BL O/1083/25

O/0637/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004160489

BY L.J. FAIRBURN AND SON LIMITED

TO REGISTER THE FOLLOWING MARKS IN CLASS 29

AND

AND

IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY L.J. FAIRBURN AND SON LIMITED

AGAINST A DECISION OF DARREN SMITH

DATED 14 JULY 2025

DECISION

Introduction

1. This is an appeal from a decision of Darren Smith acting for the Registrar, dated 14 July 2025 (**"the Decision"**, **"his Decision"** or **"the Hearing Officer's Decision"**), in relation to an application by L J Fairburn and Son Ltd ("**the Appellant**") to register the two trade marks shown above as part of a series of trade marks[1] in the United Kingdom in respect of the following services:

   Class 29

   Dairy products; dairy and egg based foodstuffs; eggs; egg products.

   ("the Appellant's Marks").

2. The marks were rejected because they were devoid of any distinctive character pursuant to section 3(1)(b) of the Trade Marks Act 1994 (**"the Act"**). That decision was set out in the examination report, and was subsequently upheld in a hearing report following a hearing before the Hearing Officer at which Mr Joel Weston appeared on behalf of the Appellant.

3. The Hearing Officer did not refuse the marks outright but allowed a period of two months in order for the Appellant to consider whether a plea of acquired distinctiveness through use may be pursued.

4. The Hearing Officer set out the following reasons for maintaining the objection in paragraph 6 of his Decision, following a request for a statement of grounds for his decision from the Appellant:

   > *"The average consumer of the goods in question would be unlikely to undertake a rigorous analysis of the marks to the degree suggested by Mr Weston*.
   >
   > - *It was unlikely that the stylistic motifs highlighted by Mr Weston would resonate with the average consumer of the goods in question to such a degree that they would perceive the signs, when considered as a whole, as distinctive trade marks. It was instead considered that the consumer would appreciate that the words are presented in a 'fancy font' but this would not be sufficient to divert the consumers attention away from or modify the descriptive meaning of the words 'Better Eggs'. Consequently, the consumer would merely perceive the stylised words as*

[1] Six marks were originally applied for as part of the series but the other four marks were not subject to the appeal and have been deleted from the application for the reasons set out in [9] of the Decision.

exclusively describing the quality of and kind of goods i.e., eggs which are better (than competing products, for example).

- *In respect of the additional verbal element 'above ordinary.' which was included within [the Appellant's Marks], it was considered that the expression 'above ordinary' was formed of everyday words, was grammatically correct and was likely to be appreciated as purely promotional in nature by the average consumer. The purely promotional nature of the expression 'above ordinary' was further enhanced by its use alongside the words 'Better Eggs'.*
- *It was not relevant that more conventional words such as 'extraordinary' existed, the test to be applied required me to establish the likely response of the average consumer to the expression 'above ordinary.' when considered in the context of the mark as a totality.*
- *The average consumer would not undertake a rigorous analysis of the mark and would likely be paying no more than an average degree of attention. Accordingly, it was unlikely that the consumer would dissect the mark and associate the words 'above ordinary.' with the letters 'BE' (from the word 'BETTER') to form the wider expression 'be above ordinary.', in the manner suggested by Mr Weston. It was considered to be more likely that the average consumer would perceive the elements 'BETTER EGGS' and 'above ordinary' as independent elements within the wider mark."*

The Appeal

5. The Appellant filed a Notice of Appeal to the Appointed Person under s.76 of the Act. The Appellant and the Registrar were content for me to decide the matter based on the papers without a hearing before me. The Registrar filed written submissions in response to the Notice of Appeal, and the Appellant filed supplementary written submissions and final rebuttal submissions, all of which I have taken into account in my Decision.

Standard of Review

6. It is well established that, in order to interfere with the decision of the Hearing Officer, I must be satisfied that there was a distinct and material error of principle in the decision or that the Hearing Officer was wrong. The relevant principles were set out in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch) at [24]. An appeal is by way of review, not a rehearing[2]. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. The decision of

[2] This is particularly relevant to this appeal, since the Appellant incorrectly stated in its supplementary written submissions *"This is effectively a **re-hearing** on the merits of distinctiveness, not just a judicial review."*.

the lower court will be *"wrong"* if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. In the absence of an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was *"outside the bounds within which reasonable disagreement is possible"* (*Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 at [80]). In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education v Pie Corbett Consultancy* [2017] RPC 17 at [52(iv)], *REEF Trade Mark* [2003] RPC 5 at [28] and *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11 at [50]-[51]).

7. In the judgment of the Court of Appeal in *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2024] EWCA Civ 262, Arnold LJ said at [110]:

> *"It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable: Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2](v) (Lewison LJ)".

8. The Supreme Court recently restated the approach to appeals of this kind in its judgment in *Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc* [2025] UKSC 25 at [94] to [95] as follows:

> *"94. It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions. While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including, in the intellectual property context, Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:*
>
> *(i) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *(ii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court.*

> *(iii) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *95. In Lifestyle Equities CV v Amazon UK Services Ltd [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those constraints in a trade mark context. After citing from the Fage case this court in a joint judgment said, at paras 49- 50:*
>
> > *"49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in In re Sprintroom Ltd [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.*
> >
> > *50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation."*

9. I have borne those principles firmly in mind.

Grounds of Appeal

10. The Appellant had a single ground of appeal in its Form TM55P, namely that the Hearing Officer failed *"to properly assess the overall impression created by the mark as a whole"*.

11. The Statement of Grounds then included five paragraphs in support of this ground. Each of these arguments had been put to the Hearing Officer at the hearing by Mr Weston, and were considered by the Hearing Officer in his Decision. I will therefore set out each of these paragraphs and deal with them in turn, and refer to the relevant paragraphs of the Decision where they were discussed.

"The mark combines distinctive graphical elements (egg shapes, yolk-yellow colour, feather-style design, and a smiling letter 'e') with a slogan that exhibits an unusual phrase structure and conceptual interplay."

12. The Hearing Officer set out the legal test that he had to apply when considering the objection under s. 3(1)(b) of the Act in paragraph 20 of his Decision, noted that the goods in question consisted of eggs, egg-based food products and dairy products, and found that the average consumer would be a member of the general public paying no more than a medium degree of attention when interacting with the sign in their purchasing act. He then continued as follows:

> *"22. …I believe that the consumer would be unlikely to undertake a rigorous mental analyse of the sign; instead, they would read the words 'BETTER EGGS' and 'ABOVE ORDINARY.' and, applying the normal rules of English grammar and language, take the words at face value, so to speak. In doing so, I believe that they would not attach any trade mark significance to the totality of the sign and instead, would appreciate the mark as simply denoting the quality of the goods (BETTER) and the kind of goods (EGGS) as well as highlighting that the goods are extraordinary (ABOVE ORDINARY.).*
>
> *23. Whilst I am mindful that I must make an assessment of the distinctive character of the sign when it is considered as a totality, it is of course accepted that where the assessment of a composite mark is concerned, it may be necessary to* [sic] *for me to examine the various elements of which the mark is comprised, as was commented on in Eurohypo v OHIM [2008] at paragraph 42 which states:*
>
> > *"…the Court of First Instance rightly held that in order to assess the distinctive character of a compound mark, not only must the various elements of which it is composed be examined but also the mark as a whole."*
>
> *24. To that end, it seems logical for me to first address what I consider to be the dominant element of the mark, the stylised words 'BETTER EGGS', especially given that at the hearing it was this element which saw much of the representatives focus. I would firstly highlight that at the hearing the representative did not dispute that the two word only marks ('BETTER EGGS' and 'Better Eggs'), which were initially included in this series application, were descriptive. As a result, I do not believe it is necessary to comment extensively on the meaning that the consumer would derive from the words 'BETTER EGGS'. Suffice it to say, that each of the words are considered to be commonplace dictionary defined words which would be easily read and understood by an average consumer of the goods in question. I would also suggest that when seen in combination the words form a grammatically correct and syntactically meaningful sentence which merely describes characteristics of the goods, namely the quality and kind of the goods i.e., better (in quality, for example) eggs.*
>
> *25. Having determined that in my view the words themselves are meaningful, I will turn to consider the stylisation applied to the words 'BETTER EGGS' and to*

address the attorney's comments made at hearing in regard to these aspects of the sign. The attorney had submitted that the font employed in the use of 'BETTER EGGS' was highly stylised in nature. He then expanded on this point by highlighting that the font selected had been designed to incorporate multiple egg shapes in the two letter 'G's', that the letter 'E' was designed to evoke the notion of a smiling emoji and that the font included a flourish on the 'leg' of the letter 'R' which would bring to mind a chicken's tail feather. The presentation was then further enhanced by the choice of colour and inclusion of highlights which together would suggest the concept of a shiny, runny yolk to the viewer of the sign.

26. Of course, I accept that each of these elements may exist within the mark. However, I disagree with the attorney's conclusion that these elements will, in combination, resonate with an average consumer to such a degree that their attention is diverted from the inherent descriptive message conveyed by the words. Instead, I believe that the average consumer would be unlikely to conduct a robust analysis of the sign to the degree suggested by the attorney. Consequently, the average consumer will simply overlook the design choices made by the applicant and whilst the average consumer may appreciate that the words are presented in a stylised font, they will nonetheless view the 'BETTER EGGS' element of the mark as serving as a mere descriptor."

13. It is clear to me that the Hearing Officer did consider the Appellant's arguments under this head, but disagreed with them. In particular, he recognised that each of the elements of stylisation described in paragraph 25 of the Decision may exist within the marks but believed that the average consumer would overlook them. The stylised elements are certainly subtle. I can see how the letter 'r' has been designed to resemble a tail feather, but only after my attention was drawn to this feature. It is not apparent to me that the letter 'e' *"evokes the notion of a smiling emoji"* or that egg shapes are apparent in the letters 'g'[3], although I accept that some people may perceive them as such. Further, I would consider that only very few people would see the highlighting on the letter 'B' as indicating *"the concept of a shiny, runny yolk"*. In its supplementary written submissions, the Appellant suggested that it was sufficient that *"some portion of the public"* or *"a fraction of consumers"* would perceive the marks in the manner argued by the Appellant. In fact, the correct test is to consider how the marks would be perceived by the average consumer, being reasonably well-informed and reasonably observant and circumspect, and representing a significant proportion of the relevant public (see *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262 at [17]).

14. The Hearing Officer's conclusion was that the average consumer would overlook the design choices and would view the BETTER EGGS element of the marks as serving as a

[3] Indeed, the Appellant itself referred to the egg motifs as *"hidden shapes"* in its supplementary written submissions.

mere descriptor This was a conclusion that a reasonable tribunal could have reached, and there is no reason for me to interfere with it.

"The phrase 'Above Ordinary' is not a common English expression and introduces an unexpected twist, giving the mark a level of originality, memorability, and distinctiveness that goes beyond a mere quality claim."

15. The Hearing Officer considered this argument in the following paragraphs of his Decision:

> *"31. At the hearing, it was submitted by the attorney that the expression 'ABOVE ORDINARY.' was a grammatically unusual turn of phrase which would strike the average consumer as awkward (and therefore distinctive), particularly as more established words such as 'extraordinary' are in common usage.*
>
> *32. For my part, when assessing the 'ABOVE ORDINARY.' portion of the mark, I must ensure that I refrain from applying a legal test which may be considered stricter than one I might apply to other types of mark; in essence, I must guard against the promotional nature of the mark prejudicing the assessment before me and ensure my decision is not based merely on a finding that the sign has a promotional aspect to it. Instead, I must make a full account of the circumstances surrounding the sign when considered as a whole.*
>
> *33. In doing this I am entitled however, as part of the process, to focus on individual elements provided that in finalising the process I focus on the mark as a whole. As far as the words 'ABOVE ORDINARY' are concerned, I of course accept the attorney's suggestion that words such as 'extraordinary' may be more commonplace, I do not believe that this fact is likely to lead to consumers perceiving the expression 'ABOVE ORDINARY.' as unusual or so striking that they attach any trade mark significance to the expression. This is because the expression 'ABOVE ORDINARY.' is formed of two dictionary defined words (and punctuation) which are in common usage and who's* [sic] *meanings would be readily understood amongst the general public in the UK. Further to this, it is considered that when the individual words are combined in the manner shown in the mark, they form a grammatically correct and meaningful expression, simply highlighting that the goods are better than 'ordinary' products.*
>
> *34. I appreciate that the expression does not specifically indicate what it is about the goods that elevates them, such that they are 'above ordinary', and in that sense the expression is somewhat imprecise. However, I do not believe that an average consumer of eggs would undertake such an analytical assessment of the sign and as a result, they are unlikely to ponder concepts such as 'what are ordinary eggs?' or 'what makes these eggs above ordinary?' I believe it is more likely that a consumer who is applying the normal rules of English language and grammar, will read the expression 'ABOVE ORDINARY.' and without further consideration of precisely what is being inferred by the expression, understand it as simply conveying that the goods are better than other 'ordinary' eggs."*

16. Having cited a passage from *Audi AG v OHIM* (Case C-398/08P) which confirmed that just because a mark may convey a promotional message does not mean it lacks any distinctiveness, he concluded as follows:

> *"36. However, in this instance I believe that the expression 'ABOVE ORDINARY.' is syntactically correct and is also apt to highlight a positive attribute of the goods. As a result, an average consumer will see the expression, especially given that it is also qualified by the 'BETTER EGGS' element of the mark, as purely promotional in nature. In essence, it is considered that there is nothing about the individual words 'ABOVE' and 'ORDINARY.' or the expression formed from their combination, which would divert the average consumer away from perceiving the expression as serving an entirely promotional function."*

17. It is clear to me that the Hearing Officer carefully considered the Appellant's arguments, but did not agree with them. He was entitled to reach his conclusion that the average consumer would perceive the words ABOVE ORDINARY as serving an entirely promotional function that would be simply understand as conveying that the relevant goods were better than other ordinary goods.

"Relevant case law including 'Baby Dry' (Procter & Gamble v OHIM), 'A Dog Is For Life, Not Just For Christmas' (O/515/16), and 'Drink Responsibly' (O/712/22) confirms that originality, cognitive engagement, and non-standard composition can endow even slogan-type marks with inherent distinctiveness."

18. With respect to the *Baby Dry* judgment, that was a judgment concerning Article 7(1)(c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark rather than 7(1)(b), which was equivalent to s.3(1)(b) of the Act. However, I do not consider the words ABOVE ORDINARY to be a *"syntactically unusual juxtaposition"* as the Court of Justice of the EU described the BABY-DRY mark in that case. The Hearing Officer was careful to consider whether there was anything unusual about the way in which the words ABOVE ORDINARY were used in combination in the marks, and concluded that they would be perceived as a grammatically correct and meaningful expression highlighting that the goods were better than 'ordinary' products.

19. I assume the reference to the *'A Dog Is For Life, Not Just For Christmas'* case was intended to be a reference to the decision of Thomas Mitcheson KC sitting as the Appointed Person in Case O/449/16 where he reviewed the CJEU's decision in *Audi.* His decision confirmed the CJEU's finding that advertising slogans could express a simple objective message and still be distinctive provided that they were also capable of indicating to the consumer the commercial origin of the goods or services in question. He concluded that the Hearing Officer had fallen into error by suggesting that a mark had to act either as an advertising slogan or a trade mark, rather than acknowledging that under the *Audi* principles it could be both. The Appointed Person therefore applied the *Audi* principles himself and concluded that the mark *"would be perceived as imaginative,*

(to some extent) surprising and unexpected and therefore easily remembered", which was likely to endow it with distinctive character. He also found that the evidence of use of the mark was striking and was consistent with the submission that the mark exhibited considerable originality and resonance, and that the mark displayed a considerable degree of originality. His conclusion was that the mark

> *"is not merely an ordinary advertising message, but possesses a certain originality or resonance, requiring at least some interpretation by members of the relevant public, and setting off a cognitive process in the minds of such people".*

I can see nothing in the Hearing Officer's Decision in this case that contravened the *Audi* principles. On the contrary, he expressly referred to them in paragraph 35 of his Decision, and made it clear that he found the Appellant's Marks to be *"purely promotional in nature"*, rather than also acting as trade marks.

20. Case O/712/22 actually concerned the mark 'DRINK SOCIALLY RESPONSIBLY' where Geoffrey Hobbs KC sitting as the Appointed Person declined to interfere with the Hearing Officer's finding that the mark lacked distinctiveness. In addition to referencing *Audi*, the decision also discussed the need for immediacy or first impression in the perception of the mark as an indication of commercial origin derived from Case T-130/01 *Sykes Enterprises Inc v OHIM (REAL PEOPLE, REAL SOLUTIONS)* and Case T253/20 *Oatly AB v EUIPO (IT'S LIKE MILK BUT MADE FOR HUMANS)*, and also referred to the non-exhaustive factors set out in the EUIPO Boards of *Appeal "Case-law Research Report — The distinctive character of slogans"* (October 2021). The Appointed Person concluded:

> *"By reason of the generality of the message it conveys and the directness of the terms in which the message is conveyed, the designation DRINK SOCIALLY RESPONSIBLY lacks the capacity to individualise alcoholic beverages (including "craft" spirits) to a single economic undertaking."*

I find nothing inconsistent in the Hearing Officer's approach in this case to the approach taken in Case O/712/22.

21. I therefore do not consider that any of the decisions cited by the Appellant above, or any of the other decisions cited in the Appellant's supplementary written submissions, show that the Hearing Officer made any error of principle or law in the way in which he reached his conclusion.

"The stylisation of the mark is not trivial – the visual arrangement contributes to the consumer's perception of it as a badge of origin rather than a promotional statement."

22. It is clear from the Decision that the Hearing Officer did not agree with the Appellant's submissions as to how the average consumer would perceive that Appellant's Marks as a result of the particular stylisation used. He dealt with this aspect in paragraphs 37 to 39 of his Decision as follows:

> *"37. Having established that the 'BETTER EGGS' portion of the mark is descriptive and that the 'ABOVE ORDINARY.' element is devoid of any distinctive character, I must now consider whether there exists anything in their combination which may lead to an average consumer perceiving the whole as a badge which has the capacity to guarantee the commercial origin of the goods.*
>
> *38. To that end, I believe it is useful at this point to address the attorney's submission that the words 'ABOVE ORDINARY.' had been specifically placed beneath the letters 'BE' of the word 'BETTER' in order to convey the expression 'BE ABOVE ORDINARY' to the viewer of the sign. Whilst the applicant may have intended to introduce this interaction between the letters 'BE' of the word 'BETTER EGGS' and the expression 'ABOVE ORDINARY.', it is my view that the suggested interplay between these elements would go unnoticed by the average consumer.*
>
> *39. It is considered that the letters 'BE' of the expression 'BETTER EGGS' are presented in a stylised font which is consistently applied to the whole expression and as such it is likely that an average consumer will view the letters 'BE' simply as being intrinsic to the word 'BETTER'. Further to this, the 'ABOVE ORDINARY.' element of the mark is presented in a distinct and somewhat conventional font. As a consequence, it is considered that an average consumer who is not particularly attentive will appreciate the two expressions as independent components within the wider mark, with the result that they are unlikely to appreciate the relationship suggested by the applicant (where a consumer discerns the presence of the expression 'BE ABOVE ORDINARY')."*

23. I agree with the Hearing Officer's comments in these paragraphs and his conclusion that the average consumer is unlikely to perceive the message BE ABOVE ORDINARY from the marks as a result of their stylisation[4]. Furthermore, the Hearing Officer's conclusion in paragraph 26 that the average consumer would overlook the various stylised elements identified by the Appellant and his ultimate conclusion in paragraph 41 that the descriptive word elements BETTER EGGS and ABOVE ORDINARY *"are not combined or presented in any way which alters their original neutral identity"* were conclusions that he was entitled to reach.

---

[4] Again, the Appellant itself stated in its supplementary written submissions: *"The mark **effectively hides** a short command "BE ABOVE ORDINARY" in the graphic arrangement"* (emphasis added).

"The Hearing Officer failed to give sufficient weight to the interplay of verbal and figurative elements in the logo. The evaluation appears to have dissected the components rather than appreciating the total commercial impression, contrary to established precedent."

24. As explained above, the Hearing Officer concluded that the word elements BETTER EGGS were *"exclusively descriptive",* the words ABOVE ORDINARY merely highlighted that the products were better than *"ordinary"*, and found that the way in which those words were presented did not alter their origin neutral identity ([41]). Throughout his Decision he was at pains to emphasise the need to consider the various elements taken in combination as a whole *("when considered as a whole"* [6], *"when considered in the context of the mark as a totality"* [6], *"it was unlikely that the consumer would dissect the mark"* [6], the quotes of paragraphs 41 and 42 from Case C-304/06 [16], *"when considered as a whole" [20], "to the totality of the sign"* [22*], "when it is considered as a totality"* [23], *"the mark as a whole"* [23], *"in combination"* [26], *"when considered as a whole"* [30] and [32*], "the mark as a whole"* [33], *"perceiving the whole"* [37], *"independent components within the wider mark"* [39], *"construing a trade mark holistically"* and *"perceiving the totality"* [40]). His conclusion was that *"the sign **as a whole** lacks the requisite minimum degree of distinctive character which would enable it to fulfil the essential function of a trade mark"* (emphasis added)[41].

25. I therefore reject the assertion that the Hearing Officer did not appreciate the total commercial impression of the Appellant's Marks.

Conclusion

26. Since the Appellant has not identified any error of principal or law made by the Hearing Officer, and as his conclusion was not irrational, the appeal fails.

27. There was some suggestion in the Appellant's supplementary written submissions that I should consider remitting the case back to the Registry to consider *"a limitation of goods"*, and it was also stated that *"The appellant is prepared, if necessary, to enter a disclaimer for the word "eggs" or any other measures the Tribunal deems appropriate to facilitate acceptance"*. However, this was not included in the Grounds of Appeal, and no specific wording was suggested. In any event, I do not consider a disclaimer or limitation to be appropriate in this case.

28. Section 13 of the Act states that a disclaimer can be used to *"disclaim any right to the exclusive use of **any specified element** of the trade mark"* (emphasis added). However, a disclaimer cannot be used where, as in this case, the entire mark is devoid of distinctive character.

29. An exclusion of objectionable terms from a specification can be acceptable in certain limited circumstances. However, any exclusion which sought to exclude *"eggs"* from the class 29 specification would be deceptive under section 3(3)(b) of the Act, and therefore unacceptable, because the Appellant's Marks are in respect of *"Dairy products; dairy and egg based foodstuffs; eggs; egg products"* and contain the descriptive words BETTER EGGS.

30. I therefore do not intend to remit the case back to the Registry for that purpose.

31. In the Hearing Officer's report dated 8 April 2025, the Appellant was given a period of two months within which to consider whether to file evidence in support of a plea of acquired distinctiveness through use. I therefore order that the period within which any plea of acquired distinctiveness through use and supporting evidence must be filed will now expire on 20 January 2026.

Costs

32. As is the usual practice on ex parte appeals, I make no order for costs in relation to the appeal.

Simon Clark
The Appointed Person
20 November 2025