

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3828698

IN THE NAME OF STONEGATE FARMERS LIMITED

AND OPPOSITION No. 437671

IN THE NAME OF THE JOLLY HOG GROUP LIMITED

DECISION

1. This is an appeal against a decision of Hearing Officer Sarah Wallace dated 25 July 2024 in which she upheld an opposition in its entirety under s.5(2)(b) of the Trade Marks Act 1994.
2. The Applicant/Appellant, Stonegate Farmers Limited, seeks registration of the mark JOLLY PECKISH in classes 29 and 30, covering foodstuffs.
3. The Opponent/Respondent, The Jolly Hog Group Limited, is the proprietor of UK trade mark number 918282195 for JOLLY, also in classes 29 and 30, as well as in class 43.
4. The Hearing Officer upheld the opposition based on the likelihood of indirect confusion.
5. The Applicant/Appellant seeks to appeal under four grounds identified in the skeleton argument supplied to me.
6. At the hearing before me on 26 November 2024 the Applicant/Appellant was represented by Aaron Wood of Novagraaf. The Opponent/Respondent did not appear and did not provide a skeleton argument for the hearing. However, it had previously filed a Respondent's Notice.
7. As I return to below, before the Hearing Officer the Applicant did not appear, but did provide written submissions. Before the Hearing Officer the Opponent appeared represented by Mr Victor Caddy of IAM The Victor.

Standard of Appeal

8. There was no dispute as to this. The appeal is a review not a rehearing. See for example the principles set out by Joanna Smith J. in *Axogen Corp v Aviv Scientific Ltd* [2022] EWHC 95, which include the observations of Iain Purvis QC on appeals against likelihood of confusion in *Rochester Trade Mark* BL 0/049/17. The Hearing Officer must have made a material error or have reached a conclusion that is wrong. It is not enough that the Appointed Person might have arrived at a different evaluation.
9. See also Lewison LJ's characterisation in *FAGE v Chobani* [2014] EWCA Civ 5 at §114 of the difference between the standard of assessment at trial and any appeal, which "*applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them*". As he added, "*The trial is not a dress rehearsal. It is the first and last night of the show.*" This may be of particular relevance in circumstances where the original decision was made at the election of one or other of the parties based on written submissions alone.

Grounds 1 – error of logic in conceptual meaning

10. Ground 1 as characterised in the Appellant's skeleton before me reflects the Reasons for appeal contained in the Appellant's TM55. In short, it is submitted that the Hearing Officer should not have found a likelihood of indirect confusion because "JOLLY" does not retain its independent and distinctive role in the mark applied for. The caselaw on indirect confusion exemplified by *LA Sugar* therefore does not apply. The conceptual dissimilarity between the marks should have overridden any similarities, properly applying the interdependence principle.
11. It is convenient first to review the way in which the Hearing Officer approached the issue of indirect confusion. Having referred to the evidence filed by the Opponent, she summarised the case-law. No criticism is made of that summary.
12. She then moved on to a comparison of the goods and services. Again, no criticism of her decision is made in this regard.
13. The average consumer was identified in her next section, which includes the general public as well as business users such as food retailers and café owners.
14. The Hearing Officer then moved on to consider the marks themselves. She ascribed a medium level of distinctiveness to the JOLLY mark, based on its meaning of "happy or jovial".

15. The Hearing Officer then turned to a comparison of the respective marks. She found the marks to be similar to a medium degree, visually and aurally. Neither of these findings is challenged on appeal.
16. The appeal is founded on an alleged error in her findings as to conceptual similarity. In [60] she analysed the mark applied for as follows:
 60. The contested mark is also a word-only mark, which is comprised of the words “JOLLY PECKISH”. There will be a significant proportion of consumers that might view these words as joining together to form a unit, in the same way that ‘jolly good’, ‘jolly tired’ or ‘jolly useful’ might. However, there will also be a significant proportion of consumers that will not recognise the formation of a unit in these words. For these consumers the overall impression rests predominantly within the word “JOLLY” with the word “PECKISH” having a lesser role given that it is allusive of the goods and services.
17. The Appellant criticised her finding that a significant proportion of consumers would not see the mark as a unit such as “jolly tired”.
18. This was compounded, it was said, by her conceptual comparison in [63]. Although she held that consumers seeing JOLLY PECKISH as a unit would find the marks conceptually dissimilar, she held that for those people still perceiving JOLLY to mean “happy or jovial” there would be a medium level of conceptual similarity.
19. It was this group of people who were critical to her finding of likelihood of confusion. Whilst she held that the differences between JOLLY and JOLLY PECKISH were such that there would be no direct likelihood of confusion, she proceeded to go on and consider the likelihood of indirect confusion and found that it was present.
20. In dealing with this, she cited the well known decision of Iain Purvis KC sitting as the Appointed Person in *L.A. Sugar v Back Beat* Case BL O/375/10, which explains the concept of indirect confusion at [16]-[17]. The Hearing Officer went on to note in relation to the three examples he gives:
 70. These examples are not exhaustive but provide helpful focus.
 71. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion. Furthermore, in [*Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian*

Ltd v Sutaria (Case BL O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

21. She then sought to apply the principles to the facts of the case in her [72].
22. As the Appellant noted in submissions to me, this is a very long paragraph, but it can be broken down as follows. After rejecting some of the arguments of the Opponent, the Hearing Officer accepted that for the significant proportion of consumers she had previously identified who are not familiar with the phrase “JOLLY PECKISH” and would not see it as a unit, the word “JOLLY” does retain its independent and distinctive role. For these consumers she considered that the mark would be perceived “*as a brand extension on the basis that “JOLLY” would be seen as a house mark and “PECKISH” as a sub brand for snack food*”.
23. She therefore concluded:

Taking all of the above into account, it is my view that this significant proportion of average consumers would assume a commercial association between the parties, or sponsorship on the part of the opponent, due to the use of the shared word “JOLLY”, even where the goods and services are similar to only a low degree. Consequently, I consider there to be a likelihood of indirect confusion.
24. In doing so she also noted that the requirement for a significant proportion of consumers to be confused did not require that proportion to form the majority, citing Lord Justice Kitchin in *Interflora Inc & Anor v Marks and Spencer Plc* [2014] EWCA Civ 1403 at [129].
25. On this appeal the Appellant’s case amounted to an attack on the finding of the Hearing Officer that a significant proportion of consumers would not regard JOLLY PECKISH is a unit and/or would find the two marks conceptually similar. This is her [60] & [63].
26. However, I do not detect any error in the analysis of the Hearing Officer in these paragraphs that would justify interference. The s.5(2) test requires consideration of notional use i.e. notional use of JOLLY for the goods for which it is registered where JOLLY would be understood conceptually as meaning “happy or jovial”. In such circumstances it is perfectly possible that a consumer familiar with such notional use of JOLLY and subsequently seeing JOLLY PECKISH would not consider that JOLLY had a different meaning in this context – or at the very least would consider that

there was a dual meaning or play on words indicating an extension or sub-brand of the JOLLY line of goods together with the more descriptive allusion to being hungry. For this reason I think the Hearing Officer was entitled to find that a significant proportion of consumers would find the overall impression rests predominantly within the word “JOLLY” and that the two marks therefore have a medium degree of conceptual similarity.

27. Moving on to the likelihood of confusion, even if PECKISH could be said in context to have some distinctive components (for some consumers), contrary to the Appellant’s submissions those components alone do not disqualify the application of the *LA Sugar* test. I therefore think there was basis for the Hearing Officer to decide that a significant proportion of average consumers would assume a commercial association between the parties.
28. The Appellant also submitted that the Hearing Officer had wrongly interpreted the interdependency principle and/or been misled into finding indirect confusion by virtue only of the similarity of the JOLLY parts of the marks. It was also submitted that the Hearing Officer had started with the answer (likelihood of confusion) and worked backwards. It was suggested that the finding of sub- or co- branding was not in accordance with *LA Sugar* and/or irrational on the facts of the present case.
29. I reject these criticisms too. As noted above, the Hearing Officer correctly directed herself in relation to the categories in *LA Sugar* and the fact they are not exhaustive. Moreover, she reminded herself that a finding of indirect confusion should not follow merely because two marks share a common element or because one mark causes another to be called to mind. As was pointed out to me, there must be a proper basis for a finding of indirect confusion. I am satisfied that there was such a basis before the Hearing Officer and that her conclusion was not irrational. I also note that *Liverpool Gin* was a case about co-branding, even though this was not a category expressly referred to in *LA Sugar*.
30. For all these reasons I reject the grounds of appeal contained in the TM55.

Grounds 2-4 – breach of principles of adversarial system/natural justice/error of fact

31. I can take these grounds together for the reasons which follow. None of them appeared in the TM55, but I shall deal with them anyway because of their more general significance.

32. Under them the Appellant submitted that the Hearing Officer was not entitled to make a finding of likelihood of indirect confusion because this had not been pleaded and the Appellant had not had an opportunity to address it, amongst other things because it chose not to attend the hearing which took place (which it was entitled not to do). Moreover, it was said that not only was the point not pleaded, but there was no evidence submitted to support such a finding. It was said that the Hearing Officer had raised the objection *ex officio* and so it was procedurally unfair.
33. These are potentially serious allegations. But I have no hesitation in dismissing them all on the facts of the present case.
34. The Appellant helpfully referred me to the recent decision of the Appointed Person Phillip Johnson in BL/O/0974/24 CHOPLIFE in which he had addressed similar arguments put forward by the same representative, Mr Wood, on behalf of another party. This was another case in which there was a finding of co-branding which it was said the Hearing Officer was not entitled to reach because it had not been pleaded.
35. I have reviewed the decision of Mr Johnson and I agree with and endorse the principles he relied on in rejecting the arguments in that case. Given the similarity between the issues arising in both cases it seems pointless for me to repeat his citation of authorities, particularly as the point did not appear in the Appellant's TM55 in the present case and is anyway defeated on the facts. Instead, I direct the reader to §§6-19 of the CHOPLIFE decision. In short, I do not consider that the potential for co-branding needs to be pleaded specifically in the Registry within a general allegation of likelihood of confusion, nor do I consider that evidence needs to be filed in support.
36. Turning to the facts of the present case, the most important point is that indirect confusion was expressly put in issue by the Appellant itself in its skeleton argument before the Hearing Officer.
37. The Opponent's Amended TM7 had stated in answer to Q5 "*Owing to the similarities between the marks and the identity and similarities between the goods, consumers are likely to believe that Applicant's goods are provided by the Opponent or an economically linked undertaking*".
38. Although this is a general allegation, it covers indirect as well as direct confusion. In response to this the Appellant had expressly cited *LA Sugar* in its submissions dated 27.6.23 and argued that JOLLY PECKISH cannot "be seen as a brand extension"

or “brand variation” of JOLLY (see [21]). [31] of the Conclusion section stated (emphasis added):

No common element is so strikingly distinctive and the sharing of the word JOLLY does not automatically render the Opposed Mark a likely brand variation of the Earlier Mark originating from the same or economically-related undertakings. **Neither a likelihood of confusion, likelihood of indirect confusion, or a likelihood of association, can exist.**

39. References to “brand extension” and “brand link” were also repeated in the skeleton provided in lieu of attending the hearing before the Hearing Officer.
40. So the Appellant can neither say that it was not properly before the Hearing Officer, nor that it was taken by surprise by the Hearing Officer dealing with it, even if it did not attend the hearing. Moreover, if it had remained in any doubt about whether the Hearing Officer had understood its submissions, it could have attended the hearing – *“the first and last night of the show.”*
41. In my judgment the suggestion that there has been some sort of unfairness or breach of any principle of natural justice is without foundation. I therefore reject these remaining grounds of appeal. Given the factual background of the Appellant’s own submissions before the Hearing Officer, these points should not have been taken by the Appellant on the appeal before me. It should have been apparent to the Appellant’s representatives that these arguments were unsustainable.
42. In the premises there is no need to deal with the Respondent’s Notice.

Costs and Conclusion

43. I reject the appeal and the decision of the Hearing Officer to allow the opposition must stand.
44. The Hearing Officer ordered the Applicant/Appellant to pay £1050 to the Opponent/Respondent within 21 days of the date of this decision if the appeal failed. That order stands.
45. I make no order as to costs on the appeal given the Respondent’s non-participation in the hearing before me.

Thomas Mitcheson QC
The Appointed Person
27 November 2024