

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2385083
BY FLOREAL LIMITED TO REGISTER
THE TRADE MARK ARION IN CLASS 3**

**AND IN THE MATTER OF OPPOSITION THERETO UNDER No. 93781
BY THE PROCTER & GAMBLE COMPANY**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY THE OPPONENT AGAINST A DECISION OF MR. M. REYNOLDS
DATED 2 AUGUST 2007**

DECISION

Introduction

1. This is an appeal from a decision of Mr. M. Reynolds, the Hearing Officer acting on behalf of the Registrar, dated 2 August 2007 (BL O/219/07), in which he dismissed an opposition brought by The Procter & Gamble Company against UK Trade Mark Application number 2385083 standing in the name of Floreal Limited.
2. Application number 2385083 is dated 22 February 2005 and requests registration of the designation ARION for use as a trade mark in respect of the following goods in Class 3:

Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; washing powder, clothes washing liquid, laundry detergents, stain-removing preparations; fabric conditioner; scented preparations for use in ironing; laundry starch; household cleaning preparations.
3. Following publication, on 29 September 2005 The Procter & Gamble Company filed notice of opposition to the application. Objection was made under section 5(2)(b) of the Trade Marks Act 1994 that because ARION was similar to an earlier trade mark belonging to the opponent and was to be registered for identical and, or similar goods there existed a likelihood of confusion on the part of the public, which included a likelihood of association with the earlier trade mark.
4. The earlier trade mark relied on was the opponent's Community Trade Mark number 199976, ARIEL, registered in Class 3 for:

Bleaching preparations and other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps.

Since the earlier trade mark was more than five years old when the application was published, the opposition needed to include a statement of use (section 6A, rule 13(1), Trade Marks Rules 2000). The opponent claimed use of ARIEL in relation to:

Preparations and other substances for laundry use, washing powder, clothes washing liquid, laundry detergents, stain-removing preparations.

The applicant did not challenge that statement of use.

5. Only the opponent filed evidence. Both parties made written submissions but neither party requested an oral hearing. Accordingly, the Hearing Officer decided the case on the papers before him.

The Hearing Officer's decision

6. The Hearing Officer decided in summary:
 - (a) The low threshold test of similarity referred to by Lindsay J. in *esure Insurance Limited v. Direct Line Insurance plc* [2007] EWHC 1557 (Ch) at paragraph 46 was satisfied as regards the respective marks and goods (paras. 19 – 20).
 - (b) The statement of use was within the original specification of the opponent's earlier mark. That statement would form the basis for the comparison of goods (para. 22).
 - (c) "Bleaching preparations and other substances for laundry use; ... washing powder, clothes washing liquid, laundry detergents, stain removing preparations; fabric conditioners; scented preparations for use in ironing; laundry starch" in the applicant's mark fell within and were identical to "preparations for and other substances for laundry use" in the earlier mark (para. 23).
 - (d) "Cleaning preparations" and "household cleaning products" in the applicant's mark would include laundry products so again there was identity in the respective goods (para. 24)
 - (e) "Polishing, scouring and abrasive preparations" (e.g., dishwasher products) in the applicant's mark share marked similarities with "laundry preparations and substances" in the earlier mark and were similar goods (para. 25).
 - (f) Both marks were relatively short words with the first three letters in common. Even allowing for the importance traditionally attached to the beginnings of words, the average consumer would not fail to notice the differences in the endings of the marks (para. 27).
 - (g) Phonetically, both marks had three syllables and might be pronounced in the same way, i.e., with a stressed first syllable and a long vowel sound (para. 28).
 - (h) Neither word conveyed a clear and specific meaning that would be grasped immediately by a consumer such that conceptual dissimilarity on its own could tip the balance in favour of the applicant¹ (para. 30).
 - (i) The goods were largely self-serve items, which the consumer would select visually. Overall, there was a moderate degree of similarity between the marks (para. 31).

¹ The applicant had argued that due to the suffix ION, its mark was likely to be viewed as something scientific whereas ARIEL had the meaning of lion of god. The Hearing Officer noted that ARIEL might also be recognised as a character from the *Tempest* or as a type of font.

- (j) ARIEL is a brand leader and enjoys a high reputation in the UK for laundry products. It has a very high degree of distinctive character (para. 32).
- (k) Laundry and household cleaning products are normally purchased as part of the regular shopping process and are likely to be brought by the person who is normally responsible for this part of the domestic routine. A reasonable degree of care is likely to be taken in selecting and purchasing such goods (para. 33).
- (l) There was no evidence to support the opponent's contention that ARION was likely to be viewed as a brand extension of ARIEL. The FLASH and FAIRY examples referred to in the opponent's submissions supported the applicant's argument that the trend with household cleaning products is for the core brand to stay the same. The opponent's evidence showed that ARIEL had remained unchanged since 1968, the core brand being used with various descriptive additions, e.g., Ariel Biological (para. 34).
- (m) Taking into account the interdependency of the degree of similarity between the marks and the goods, the reputation of the earlier mark and the effect of imperfect recollection bearing in mind that the goods are unlikely to attract a high level of purchasing attention, there are insufficient similarities between the marks to lead to a likelihood of direct confusion (paras. 35 – 37).
- (n) Use of ARION might cause some consumers to bring the brand leader ARIEL to mind. However the evidence pointed away from ARION being perceived as a variant form or brand extension of ARIEL. There was also no likelihood of indirect confusion (paras. 38 – 40).

The appeal

7. On 30 August 2007, the opponent filed notice of appeal to an Appointed Person under section 76 of the Act. At the hearing of the appeal, the opponent was represented by Mr. Thomas Mitcheson of counsel. The applicant was not represented and did not appear but filed written submissions through its Attorney, Ms. Wakerley of Reddie & Grose.
8. Mr. Mitcheson referred to the standard of appeal, i.e., review and not rehearing. Since the Hearing Officer did not receive oral evidence, I need not exercise the highest degree of reluctance to interfere with the decision below (*REEF Trade Mark* [2003] RPC 101).
9. Generally speaking, the opponent accepts the findings of the Hearing Officer. It accepts that the Hearing Officer accurately summarised the evidence and correctly stated the law. What the opponent appeals is the overall decision of the Hearing Officer. It says that although the Hearing Officer got the principles right, he failed to apply them properly. In particular, he should have concluded that: (a) the marks were highly similar; and (b) given the identity or similarity of the goods and the high distinctiveness of ARIEL, there was a likelihood of confusion on the part of the public.
10. The first error of principle is said to have occurred when the Hearing Officer was comparing the marks. Mr. Mitcheson contends that although the Hearing Officer rightly identified that overall impressions were paramount, his conclusion was based on the dissected marks. First, his finding that visually consumers would not fail to notice the differences in the endings of the marks might be true when the marks are viewed side by side but ignores the fact that the products might not be stocked together. Second, his determinations that phonetically the marks might be pronounced in the same way and conceptually there was nothing to differentiate the marks should

have led him to decide that there was a substantial degree and not a moderate degree of similarity between the marks.

11. It is clear that when the Hearing Officer was speaking of permissible dissection of the marks, he was dealing with the parties' written submissions in that regard (para. 26). It is equally clear that in conducting his analysis of the visual, aural and conceptual similarity between the marks he had firmly in view the need to take into account the overall impressions of the marks in the perceptions of the relevant consumer of the goods in question. He refers to that need in his opening observations (para. 26), when discussing possible meanings conveyed by the marks (para. 29) and in his conclusion on the degree of similarity between the competing marks (para. 31). In accordance with paragraph 27 of the Court of Justice of the European Communities' judgment in Case C-342/97 *Lloyd Schuhfabrik Meyer & Co GmbH v. Klijsen Handel BV* [1999] ECR I-3819, his assessment of the degree of similarity between the marks was made in the context of the category of the goods in question and the circumstances in which they are marketed (i.e., "largely self-serve consumer items which the consumer will select by eye", para. 31). The Hearing Officer does not expressly state that the respective products might not be sold together (i.e., that the consumer might not encounter products bearing the respective marks side by side) but that is inherent in their nature. A Hearing Officer is not obliged to state every factor that weighs in his evaluation (*REEF*, paras. 29 – 30)². I am not persuaded that the Hearing Officer fell into error in finding that overall there was a moderate degree of similarity between ARION and ARIEL.
12. Mr. Mitcheson argued that even accepting the Hearing Officer's finding of a moderate degree of similarity between the marks, when one factors into the equation the identity/similarity of the goods and the high distinctive character of ARIEL, it is impossible to arrive at a conclusion other than that there exists a likelihood of confusion in the minds of the public, which includes a likelihood of association with the opponent's earlier mark. He says that even though the Hearing Officer recognised the principle that the more distinctive a trade mark, the greater the likelihood of confusion (Case C-251/95 *Sabel BV v. Puma AG* [1997] ECR I-6191, para. 24), he failed to give proper weight to his finding that ARIEL enjoyed high distinctive character. Moreover, when assessing the effect of imperfect recollection, the Hearing Officer ignored the first time shopper.
13. The latter criticism arises from the Hearing Officer's observation that the products in question were likely to be brought as part of the regular shopping process (para. 33). The opponent seems to have misinterpreted that observation to mean that the Hearing Officer took into account seasoned shoppers only. I find no basis for the criticism that first time shoppers were excluded. The Hearing Officer held that an average consumer would exercise a reasonable degree of care in purchasing the goods. The opponent has not shown that the Hearing Officer was wrong or that a new shopper would exercise a different level of care.
13. I also find no justification for the objection that the Hearing Officer afforded insufficient weight to the high distinctive character of the ARIEL mark. Mr. Mitcheson argued that the overall result of no likelihood confusion was even more surprising in the light of the Hearing Officer's finding that use of ARION for the goods applied for was likely to cause some consumers to bring the brand leader ARIEL to mind.
14. However, in my judgment, the opponent is merely asking this tribunal to substitute a different view for that of the Hearing Officer. The opponent has not established that

² Indeed, later in his decision when considering the effect of imperfect recollection on the likelihood of confusion, the Hearing Officer mentions the need to take into account the fact that the respective marks might be encountered sequentially rather than concurrently (para. 36).

the Hearing Officer's approach was in error or that his determination was not one that he was entitled to reach.

Conclusion

15. In the result the appeal has not succeeded. The Hearing Officer ordered the opponent to pay the applicant the sum of £800 as a contribution to its costs of the opposition. I shall order the opponent to pay the applicant the additional sum of £150 in respect of the costs of this appeal.

Professor Ruth Annand, 2 January 2008