BL O/0372/26

APPEAL TO THE APPOINTED PERSON

TRADE MARKS ACT 1994

IN THE MATTER OF Trade Mark Application No. UK00003860618 CRUNCH in Class 30 in the name of KBF Enterprises Ltd

and

Opposition No. OP000440132 thereto by Applied Nutrition Limited

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DECISION

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1. This is an appeal from the decision of the Hearing Officer, Ms. Rosie Le Breton, dated 18 March 2025. It is an appeal that turns primarily on a point of pleading: namely, whether the Hearing Officer's decisions under both of s. 3(1)(c) and (d) of the Trade Marks Act 1994 were wrong in principle because they were based on considerations that fell impermissibly outside the scope of the pleadings and/or the arguments canvassed before her.

Law

2. There was by the end of the hearing no dispute on the applicable principles. For present purposes it is sufficient to refer to the summary of those principles given by Falk LJ in *Phones 4 U v EE & Othrs* [2025] CA 869:

> 193. Although the focus in *Al-Medenni* and *Satyam* was on the pleadings,

> Birss LJ's comments make clear that the key determining factor is the interests of justice, and specifically the question of prejudice. So, for example, it could be that an uncanvassed theory advanced by a judge in relation to an important piece of evidence could be regarded as sufficiently unfair to warrant intervention by an appellate court, even though (being evidence rather than the facts necessary to establish a claim or defence) it did not form, or need not have formed, part of the pleadings. Conversely, I would not rule out the possibility of some departure from pleaded issues as not giving rise to unfairness on the particular facts of a case, although I would expect that to be rare unless the position was fully addressed at trial.

194. Drawing the threads together, I would summarise the position as follows:

a) The starting point is that a judge is not entitled to decide a case on a basis that has neither been pleaded nor canvassed before him. His function is limited to deciding the issues put before him.

b) Where, as in *Al-Medenni* and *Satyam,* a "theory" advanced by the judge is outside the scope of the pleaded issues (in the sense of the facts necessary to establish a claim or defence: *Shagang Shipping* at [98]), that will generally be a clear indication that reliance on that theory is impermissible.

c) However, the key point is the interests of justice and, in particular, the question of prejudice to the losing party.

d) This may mean that, even if an uncanvassed "theory" is not outside the scope of the pleaded issues, it would be unfair in all the circumstances of the case for the judge to rely on it. Conversely, in some cases it might not be unfair for the judge to depart from the scope of the pleaded issues, although generally only if this was fully addressed at trial.

The Opposition

3. The Respondent, Applied Nutrition Ltd, opposed the registration of the word mark in issue, CRUNCH, in class 30. It did so pursuant to sections 3(1)(b), (c) and (d) of the Trade Marks Act 1994. The Hearing Officer's findings on the opposition were that:

a. it succeeded in relation to all goods applied for pursuant to s 3(1)(c);

b. it succeeded in relation to some of the goods (namely "Foodstuffs, namely, snack foods; Foodstuffs made from oats") pursuant to s. 3(1)(d), and

c. no finding was made pursuant to s. 3(1)(b).

4. Ground 1 of this appeal relates to the finding on s. 3(1)(c) and ground 2 to that on s. 3(1)(d).

The Relevant Parts of the Decision and Ground 1 of the Appeal

5. At paragraph 21 of her decision, the Hearing Officer stated as follows:

> *21. At this stage, I remind myself of the opponent's pleadings under* [section 3(1)(c)]. *These are set out below:*
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> > *"The Opponent submits that the sign CRUNCH when used in relation to the Contested Goods is objectionable under Section 3(1)(c) of the Act as it is a sign which may serve in trade to designate the kind of goods, namely, confectionery and snack foods which are pleasantly hard or crisp so that the foodstuff makes a noise when consumed. The sign CRUNCH is widely used and readily understood as describing foodstuffs which are hard or crisp and make a noise when consumed and, as a result, the average consumer of such goods would perceive the sign as merely describing the texture of the goods."*

6. The Hearing Officer then addressed her mind to the dictionary definitions of CRUNCH submitted by the Opponent. Having done so she stated as follows:

> *23. At the hearing, Mr Wood submitted for the applicant that one thing I must be very careful of is the opponent's pleaded case. He submitted that the evidence needs to show that the word would be understood in the manner pleaded, and in respect of 3(1)(c), as a reference to a characteristic of the goods. He went on to submit that for a word to be descriptive, it must be a word that has a direct message, and the way the applicant's case has been pleaded is a bit vague. Mr Wood then submitted that secondly, I must consider whether anything suggests that is how consumers would see it based on the evidence.*

7. The Hearing Officer then, for the next eight paragraphs, set out her analysis in relation to evidence. For present purposes I need refer only to one paragraph of that analysis, paragraph 29. This states as follows, with the words that form the heart of the Appellant's complaint on appeal highlighted in bold:

> *29. Having considered the meaning of the word CRUNCH, in addition to and alongside the evidence of its apparent descriptive use, whilst I note that to describe something as having a CRUNCH may be less obvious than describing it as crunchy, the message conveyed by the word is just as direct in relation to foodstuff.*

> *I note in any case that to be descriptive a mark does not have to be the only, or even the most common way of describing a characteristic.* ***A description of something as having a CRUNCH, would in my view, immediately and directly convey to the average consumer of the relevant goods in this instance that they will either be, or will contain elements, that are hard or crisp when chewed. I note the use of "pleasantly" in the pleaded case, and whilst I note this is somewhat subjective, it is my view that the use of CRUNCH will clearly convey that the goods are not unpleasantly hard in a way that may damage your teeth or prove hard to swallow, as this is in conflict with its ordinary meaning.*** *Further, I consider that CRUNCH appears to already be used descriptively alongside the reference to various flavours on the products shown in the evidence, many of which are identical or very similar to those applied for under the mark. For example, the use shown of "chocolate brownie CRUNCH" on protein bars, will in my view immediately and directly convey to the consumer that they goods they are about to purchase or consume will be of a chocolate brownie flavour, with a CRUNCH to their texture.*

8. The Appellant's central submission on ground 1 of this appeal was set out succinctly in its Grounds of Appeal as follows:

> *9 As set out above, Applied Nutrition's pleaded case on descriptiveness is that the mark describes that the contested goods are "pleasantly hard or crisp so that the foodstuff makes a noise when consumed" (emphasis added). This is a specific allegation and it is against that allegation that the opposition should have been determined.*
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> *10 The need to determine the case against that specific allegation was made clearly in the Appellant's skeleton at (8]-(16], and the Appellant's warning to the Hearing Officer is recorded at (23] by the Hearing Officer. When the Hearing Officer sets out her conclusions at [29] she says:*
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> > *I note the use of "pleasantly" in the pleaded case, and whilst I note this is somewhat subjective, it is my view that the use of CRUNCH will clearly convey that the goods are not unpleasantly hard in a way that may damage your teeth or prove hard to swallow, as this is in conflict with its ordinary meaning*
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> 11. *With respect, that cannot be logically right. The meaning set out above taken from (29] is simply not the meaning set out in the form TM7, and the Hearing Officer has simply failed to consider the case properly against the allegation being ran.*

12. I reject the submissions that the Hearing Officer (a) failed to consider the s. 3(1)(c) case properly against the allegations being run by the opponent and (b) reached a conclusion in relation to descriptiveness based on an un-pleaded or un-canvassed case theory. My reasons are as follows:

a. paragraph 29 of the decision makes clear that the Hearing Officer addressed directly the question of whether the word CRUNCH carries the direct message of *"pleasantly hard or crisp"* (i.e. the wording of the pleaded case). It is also clear from that paragraph that she reached a conclusion that it does carry that message;

b. it is equally clear that her overall conclusion on descriptiveness was based on the material before her and not based on a new or uncanvassed case theory. Whilst it is possible, with the benefit of 20:20 hindsight to conclude that paragraph 29 could have been more clearly, or more fully expressed, there is no basis for concluding that the Hearing Officer found that CRUNCH was descriptive because rather than conveying a meaning that the goods were pleasantly hard or crisp, it conveyed a <u>different</u> descriptive meaning. In particular, the reference to the wording *"not unpleasantly hard"* etc. is in my view no more than a part of the Hearing Officer's reasoning for accepting the <u>pleaded</u> case. It would, of course, have been possible for the Hearing Officer to set out her reasoning in more detail. However, in my view the brevity of the Hearing Officer's expression of her reasoning was perfectly adequate given the nature of the issue she was addressing.

13. The Grounds of Appeal also assert that the Hearing Officer could not have reached the conclusion she did on section 3(1)(c) based on the evidence before her. This was not an argument that the Defendant pursued in any detail in either its skeleton or orally. It is also a submission I reject. It is plain in my view that

the conclusion reached by the Hearing Officer lay within the range of reasonable conclusions open to her and it is a conclusion that I am therefore not entitled to interfere with.

Ground 2

14. Ground 2 is directed to the Hearing Officer's finding in relation to s. 3(1)(d). The primary complaint under this ground is again whether the Hearing Officer confined herself to the pleadings and/or matters canvassed in front of her.

15. At the hearing before me, Mr. Wood who appeared for the appellant dealt with grounds 1 and 2 compendiously. I should however note that ground 2 raises a similar pleading issue to that raised in relation to ground 1, but does so in relation to differently worded paragraphs of the decision (in particular, paragraphs 37-39). Whilst I was not addressed on these paragraphs in any detail orally, I have considered them for the purposes of reaching this decision. It is sufficient to say that in my view the complaints raised in relation to these paragraphs are not made out. In particular, the appellant has not demonstrated that the Hearing Officer decided the matters in issue by reference to anything other than what was pleaded and argued before her.

16. Finally, ground 2 also asserts that there was no adequate basis for the Hearing Officer's conclusions under s. 3(1)(d). This is not an assertion that was explored in any detail in the appellant's grounds, skeleton nor in its oral argument. I shall therefore do no more here than to record that I have carefully read the Hearing Officer's decision on s. 3(1)(d) in the light of the evidence and find nothing in her reasoning that could in my view constitute an error of principle.

CONCLUSION

17. The appeal is therefore dismissed. That leaves the issue of costs. In relation to

this I will direct that the appellant pays the respondent the following sums within 21 days of this decision:

a. the £2500 ordered by the Hearing Officer, and

b. the costs of this appeal which I assess in the sum of £1500.

GEOFFREY PRITCHARD KC
THE APPOINTED PERSON
30 April 2026