

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION No. 2516238
IN THE NAME OF PREMIER FOODS GROUP LIMITED**

**AND IN THE MATTER OF OPPOSITION No. 99517 THERETO
BY THE FEEL GOOD DRINKS COMPANY LIMITED**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY THE APPLICANT
AGAINST A DECISION OF MR M. BRYANT
DATED 22 JUNE 2011**

DECISION

Introduction

1. This is an appeal from a decision of Mr. Mark Bryant (BL O/222/11) acting for the Registrar, dated 22 June 2011, in which he allowed an opposition under number 99517 brought by The Feel Good Drinks Company (“FGDC”) against the registration of Application number 2516238 in the name of Premier Foods Group Limited (“Premier”).
2. On 19 May 2009, Premier applied to register the designation AMBROSIA FEEL GOOD PUDS for use as a trade mark in the United Kingdom in respect of the following goods:

Class 29

Meat, fish, poultry and game; meat products, fish products; pates; preserved, dried, cooked, canned and frozen fruits, vegetables, pulses, meat, meat products, fish and fish products; soups; dairy products and substitutes therefore; milk products and substitutes therefore; eggs; yoghurts; cheese and substitutes therefore; milk drinks; milk drinks substitutes; milkshakes; shakes of milk substitutes; milkshake powder; powered milk or milk substitutes; jams, marmalade, preserves; conserves; peanut butter; meat, fish, fruit, vegetable, savoury, sweet and sandwich spreads; edible oils and edible fats; pickles; pickle relishes; jellies; mincemeat; fruit curds; fruit desserts; fruit salads; prepared meals, snack foods; myco-protein for food for human consumption; savouries consisting of or containing myco-protein; desserts; dairy puddings; dessert toppings; dietetic and slimming foodstuffs and substitutes

Class 30

Flavourings and seasonings; coffee; tea; cocoa, cocoa products, cocoa powder, drinking chocolate; custard; custard powder; blancmange; baking powder; flour; preparations made from flour; bran, wheatgerm, yeast; rusks; cereals and preparations

made from cereals; bread, bread products, pastry; bakery products; pastry products; farinaceous products and preparations; macaroni; vermicelli; spaghetti; pasta; sauces for pasta; noodles; pizzas; pastries and confectionery; tarts; biscuits; cookies; cakes; chocolate products; spices; sugar, rice, tapioca, sago; golden syrup and syrup for food; honey and honey substitutes; treacle; chocolate spread; salt; mustard; pepper; vinegar; sauces; desserts; puddings; dessert toppings; pudding toppings; ice cream and ice cream confections; frozen ices; frozen confections; pies; mayonnaise; salad dressings; prepared meals, snack foods and sandwiches; chutneys, sauces and salad cream; cereal bars; cereal based food bars and cake bars; frozen yoghurts

3. The Application was published in the Trade Marks Journal on 19 June 2009. On 9 September 2009, FGDC filed Notice of opposition and statement of grounds against the Application under section 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994.
4. The opposition under section 5(2)(b) was based upon 10 earlier trade marks in the ownership of FGDC. A full list is annexed to the Hearing Officer's decision.
5. The Hearing Officer decided the objection under section 5(2)(b) upon two of FGDC's earlier trade marks, which he considered were the nearest to the mark applied for¹:
 - (i) Community trade mark number 006234488 FEEL GOOD SNACKS applied for on 20 August 2007 and registered on 1 September 2009 relevantly for:

Class 29

Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes, eggs, milk and milk products; edible oils and fats; extracts of fruit and/or vegetables; meat products; sausages; prepared meals in class 29; snack foods; fruit preserves, vegetable preserves; desserts in class 29; eggs; dairy products; yoghurt; edible protein derived from soya beans; nuts and nut butters; pickles; tofu; weed extracts for foods; soups; bouillon, nut paste; all the aforesaid goods with the exception of potato-based or potato-containing products

Class 30

Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, pepper, mustard; vinegar, sauces (condiments); spices; ice; snack foods; breakfast cereals; pastry ;pizza, pasta and pasta products; biscuits; cookies; cakes; ice cream, water ices, frozen confections; syrup, treacle; molasses; ketchup; sauces and preparations for making sauces; custard powder; prepared meals in class 30; mousses; desserts in class 30; puddings; yeast baking powders; chutney; spices and seasonings; infusions (other than for medical use); meat pies; mayonnaise, meat tenderisers for household purposes; royal jelly for human consumption (other than for medical purposes); natural sweetener; salad dressings; sauces; herbs; all the aforesaid goods with the exception of potato-based or potato-containing products

¹ The proof of use requirements in section 6A of the Act were inapplicable because the marks were not registered more than five years before publication of the Application.

- (ii) United Kingdom trade mark number 2386128 FEEL GOOD CONFECTIONERY applied for on 4 March 2005 and registered on 2 June 2006 for:

Class 29

Jellies, fruit jams, fruit sauces, milk and milk products, smoothies, yoghurt drinks, milkshakes and milk drinks, flavoured milk, soft drinks made with milk or milk extracts, soft drinks made with yoghurt or yoghurt extracts

Class 30

Confectionery, confectionery for decorating Christmas trees

6. That aspect of the Hearing Officer's decision under section 5(2)(b) was not questioned on appeal.
7. For the purposes of section 5(3) FGDC relied on only one of the 10 marks listed in the Annex to Hearing Officer's decision, which FGDC claimed enjoyed the requisite reputation: United Kingdom trade mark number 2397763 FEEL GOOD DRINKS applied for on 26 July 2005 and registered on 1 September 2006 for:

Class 29

Jellies, fruit jams, fruit sauces, milk and milk products, smoothies, yoghurt drinks, flavoured milk, soft drinks made with milk or milk extract, soft drinks made with yoghurt or yoghurt extract

Class 30

Confectionery, confectionery for decorating Christmas trees

Class 32

Mineral and aerated water, other non-alcoholic drinks, fruit drinks, fruit juices, syrups and other preparations for making beverages

8. Similarly for section 5(4)(a) FGDC relied upon FGDC's unregistered rights in FEEL GOOD DRINKS.
9. The Hearing Officer having allowed the opposition under section 5(2)(b) did not decide the grounds under section 5(3) or 5(4)(a). In the absence of a Respondent's notice only the 5(2)(b) ground remained at issue on appeal.

Hearing Officer's decision under section 5(2)(b)

10. Mr. Norris, FGDC's Counsel, referred me to the decision of Mr. Daniel Alexander Q.C. sitting as the Appointed Person in *THE GLITTER BAND FEATURING JOHN ROSSALL*, BL O/426/11:

"7. Before turning to the grounds of appeal, it is convenient to outline how the Hearing Officer's Decision considered the four matters relevant to a determination under section 5(2)(b) of the Act ...: (i) the characteristics of the average consumer (ii) whether the goods/services were identical or similar (iii)

whether the respective marks were identical or similar and (iv) whether there was a likelihood of confusion.”

In the present case, the Hearing Officer started with a comparison of the goods.

Identity/similarity of goods

11. The Hearing Officer held in a comprehensive comparison table that the goods were either identical or highly similar, which matched the parties’ concessions and is uncontroversial on appeal.

Average consumer

12. It followed that the average consumer for both sets of goods, which were ordinary, generally low value, grocery products was the same (again uncontroversial). Where Premier disagrees with the decision is over the consumer’s level of attention. Premier says the purchase will be considered since it concerns food. On the other hand the Hearing Officer preferred FGDC’s contention that the purchase might be an impulse buy and would not involve a great deal of care:

“22. ... The goods involved are ordinary grocery products that are generally low cost. They are purchased on a regular basis, normally by selection from a supermarket or other shop shelf, but also sometimes (and increasingly so) online. The nature of the purchasing act is therefore, primarily visual and generally will not involve a great deal of care.”

13. I should say now that I do not think the Hearing Officer erred in relation to the level of attention paid to the purchase act. That was a finding which in his own experience of ordinary grocery purchases he was entitled to make.

Similarity of marks

14. The words FEEL GOOD were a distinctive but not dominant element in FGDC’s marks where distinctiveness lay in the marks overall. The word AMBROSIA was dominant and distinctive in the mark applied for. However, the Hearing Officer disagreed with Premier that the remaining elements in their mark were wholly descriptive. The phrase FEEL GOOD PUDS although suggestive was still distinctive albeit on the low side. Taking into account their similarities and differences the parties’ marks shared a moderately high level of similarity overall.
15. Since this part of the Hearing Officer’s decision was contentious, I set it out in full. Mr. Hinchcliffe, Premier’s Counsel, identified “inconsistencies” in the Hearing Officer’s reasoning, which he contended led the Hearing Officer wrongly to assess: (a) the similarities in the marks; (b) their distinctiveness; and (c) the likelihood of confusion.
16. The Hearing Officer’s comparison of FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY on the one hand and AMBROSIA FEEL GOOD PUDS on the other hand went as follows:

“24) When assessing the extent of similarity between the respective marks, I must do so with reference to their visual, aural and conceptual similarities bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*, para 23). At the hearing, Mr Hinchcliffe submitted that the dominant and distinctive part of Premier’s mark is the word AMBROSIA and that the remaining words perform a laudatory descriptive function and that this function is different to the function performed by the words that appear in FGDC’s marks.

25) From the guidance provided by the GC in *Formula One Licensing BV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-10/09*, paragraphs 45 – 47, it is known that it is settled case law that the public does not generally consider the descriptive element of a mark as the distinctive and dominant part, but also that registered marks may incorporate elements of weak distinctive character that are largely descriptive. Further, Section 72 of the Act states that a registration is prima facie evidence of validity and in the absence of any cancellation proceedings against the earlier mark, it is not open to me to conclude that it is wholly descriptive.

26) In the current case, the relevant consumer will perceive the words FEEL GOOD as being a distinctive element of FGDC’s marks. The words describe the state of the consumer and not to the product itself. There is some limited evidence that the use of the term has been adapted to relate to the goods themselves but, in the absence of any cancellation action, this is an insufficient counterpoint and, as I have already said, it is not open to me to reach a conclusion that FGDC’s marks are wholly descriptive. Rather, I must assume that the marks possess at least the minimum level distinctiveness for registration. As both marks consist of complete phrases where the words FEEL GOOD apply to the words that follow, i.e. SNACKS and CONFECTIONERY, it follows that the distinctiveness resides in the marks, as a whole, rather than any one element being dominantly distinctive.

27) In respect of Premier’s mark, the word AMBROSIA appears at the front of the mark. Whilst the first part of a mark may not always be of paramount importance when considering similarity (see *Spa Monopole, compagnie fermière de Spa SA/NV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-438/07*) it is clear to me that this element is the dominant and distinctive element of the mark. Mr Hinchcliffe argued that the words FEEL GOOD PUDS are laudatory and descriptive and perform a different function to the similar phrase in FGDC’s marks. Whilst I accept their suggestive nature, for the reasons explained above, I do not believe that this element of the mark is wholly descriptive, but rather it has a weakish distinctive character.

28) Having concluded what are the dominant and distinctive elements of the respective marks, I will move on to consider the level of visual, aural and conceptual similarity. From a visual perspective, FGDC’s marks contain the same words FEEL GOOD that also appear in Premier’s mark, together with an additional word being either SNACKS or CONFECTIONERY. Premier’s mark additionally includes the word AMBROSIA at the front of its mark,

which is absent in FGDC's mark, and also the word PUDS at the end. Taking these similarities and differences into account, I conclude that the respective marks share a reasonable degree of visual similarity.

29) From an aural perspective, the respective marks share the same two syllables/words FEEL GOOD, but in all other respects they are different. Premier's mark begins with the four syllable word pronounced AM-BRO-ZEE-A. The final descriptive word PUDS is also different to similarly descriptive words in FGDC's marks. Taken account of these similarities and differences, I conclude that the respective marks share a reasonable degree of aural similarity.

30) Whilst the word AMBROSIA in Premier's mark means "the food of the Gods" in Roman and Greek mythology, there is nothing before me to suggest that the average consumer will know this as, in most cases, knowledge of such mythology is superficial. It will therefore be perceived as a made-up word. The respective marks differ in their references to SNACKS, CONFECTIONERY and PUDS respectively. Nevertheless, there is some conceptual similarity between these terms as they all describe food products that are commonly consumed by the average consumer. The concept of feeling good is common to all the respective marks because of the common presence of the words FEEL GOOD. Taking all of this into account, I conclude that the respective marks share a moderately high level of conceptual similarity.

31) I must factor these findings into an overall assessment of similarity. In doing so, and also bearing in mind the weakish level of distinctive character of the common element FEEL GOOD, I conclude that, when considering the respective marks in their entirety, they share a moderately high level of similarity overall. I do not consider that this finding is appreciatively different in respect of either of FGDC's marks used for this comparison."

Distinctive character of FGDC's marks

17. FGDC's marks were possessed of inherent distinctiveness but this was on the low side. There had been some enhancement of distinctive character through use of FGDC's FEEL GOOD DRINKS mark in respect of fruit drinks but FGDC's best case under section 5(2)(b) rested with FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY in respect of which no use had been shown (and no enhancement of distinctive character could be claimed).

Likelihood of confusion

18. The weak distinctive character of the common element FEEL GOOD and of the earlier marks overall did not preclude a finding of likelihood of confusion. FEEL GOOD PUDS in the mark applied for although subsidiary to AMBROSIA functioned in the same way as in FGDC's earlier marks, i.e., qualified PUDS. There was a likelihood that the public would mistakenly believe that goods bearing the earlier marks were part of the same range of products as AMBROSIA FEEL GOOD PUDS.

19. Again, since this part of the Hearing Officer's decision was contentious, I reproduce it below. Mr. Hinchcliffe argued that the Hearing Officer wrongly found that FEEL GOOD in Premier's mark functioned in the same way as in the earlier marks. The Hearing Officer's previous inconsistent assessment of the distinctiveness of the earlier marks led him effectively to compare only the FEEL GOOD elements in the respective marks and wrongly to find that a likelihood of confusion existed.
20. The Hearing Officer said this:

“35) Mr Hinchcliffe put forward an argument that the FEEL GOOD element of the applicant's mark is descriptive and therefore serves a different function to the same words that appear in FGDC's marks. I have rejected this, but I accept that this common element has only a weakish distinctive character. The likelihood of confusion between marks where the common element is of weak distinctiveness has been discussed by the GC on a number of occasions, including in *Air Products and Chemicals, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (Air Products)* Joined Cases T – 305/06 to T 307/06, where it said:

59 With regard to the weak distinctiveness of the common components and of the earlier marks as a whole, it should be recalled that the finding of a weak distinctive character for the earlier trade mark does not preclude a finding that there is a likelihood of confusion. While the distinctive character of the earlier mark must be taken into account when assessing the likelihood of confusion (see, by analogy, *Canon*, paragraph 24), it is only one of a number of elements entering into that assessment. Even in a case involving an earlier mark of weak distinctive character, there may be a likelihood of confusion on account, in particular, of a similarity between the signs and between the goods or services covered (Case T-134/06 *Xentral v OHIM – Pages jaunes (PAGESJAUNES.COM)* [2007] ECR II5213, paragraph 70; see, to that effect, Case T-112/03 *L'Oréal v OHIM – Revlon (FLEXI AIR)* [2005] ECR II-949, paragraph 61).

60 In addition, the argument of OHIM and of the applicant in that regard would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that, where the earlier mark is only of weak distinctive character, a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question (order of the Court of 27 April 2006 in Case C-235/05 P *L'Oréal v OHIM*, not published in the ECR, paragraph 45). Such a result would not, however, be consistent with the very nature of the global assessment which the competent authorities are required to undertake by virtue of Article 8(1)(b) of Regulation No 40/94 (judgment of 15 March 2007 in Case C-171/06 P *T.I.M.E. ART v Devinlec and OHIM*, not published in the ECR, paragraph 41, and *PAGESJAUNES.COM*, paragraph 71).

36) I will keep this guidance in mind when making my decision.

37) Mr Norris relied upon *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* to support his view that confusion can occur despite Premier's mark having the word AMBROSIA at the start of its mark. This approach was criticised by Mr Hinchcliffe because the *Medion* case was not on "all fours" with the current proceedings. I note all these comments, but remain mindful that I must consider the marks as a whole and not to analyse their various details. To this effect, and as I concluded earlier, I cannot agree with Mr Norris' contention that the words FEEL GOOD are the dominant and distinctive parts of Premier's mark. Rather, I have concluded that they only have a weakish distinctive character and that AMBROSIA is the dominant and distinctive element. Nevertheless, I take account of the guidance of the GC in *Air products* and also in *CM Capital Markets Holding, SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-563/08, paragraph 39, where it concluded that weakly distinctive elements of a mark are not necessarily negligible in the overall impression conveyed by the mark.

38) Mr Hinchcliffe referred me to *Digipos* [2008] RPC 24 when contending that the words FEEL GOOD, in the respective marks, perform different functions (one descriptive, one trade origin) and therefore I should conclude that there is no likelihood of confusion. Mr Hinchcliffe also referred to the OHIM decision B1084989 DOLE MAKES YOU FEEL GOOD. This deals with the same point of law as in *Digipos*, but here he contended the facts of case are also highly relevant. The OHIM found that the words FEEL GOOD in the mark FEEL GOOD DRINKS will be identified as a name. The OHIM is therefore recognising the words FEEL GOOD as indicating trade origin, whereas in the mark DOLE MAKES YOU FEEL GOOD, the same words perform a descriptive function. Whilst I note that this OHIM decision is under appeal, I must say that I am in total agreement with its finding on this point. In the mark DOLE MAKES YOU FEEL GOOD, the concept of feeling good relates directly to the consumer because of the use of the word YOU. This is different to all the respective marks in the current case where the concept of feeling good relates to the products themselves (and as I have commented earlier, this is a somewhat unusual concept that functions to indicate trade origin). The implication of my view is that, in the current case, the FEEL GOOD element will serve the same function in both FGDC's marks and Premier's mark. In respect of Premier's mark, it is not obvious to me that the FEEL GOOD element functions in a wholly descriptive sense as contended by Mr Hinchcliffe. The words apply to the PUDS element of its mark in the same way that the same words apply to the SNACKS and CONFECTIONERY element of FGDC's marks. It clearly functions in a secondary way to the AMBROSIA element that is the first and highly distinctive element of the mark, but this does not negate the possibility that the respective marks can still lead to confusion.

39) In fact, it appears likely to me that when a consumer is confronted with the mark FEEL GOOD SNACKS, he will assume that it is merely an

extension of the range of AMBROSIA products identified by FEEL GOOD PUDS. As established in T-90/05, *Omega SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, paragraph 43, it does not matter which way round the confusion occurs in order to make a finding of confusion. Therefore, the fact that it is likely that FGDC's mark will be confused with Premier's mark rather than the other way around is not relevant for my considerations."

Outcome for section 5(2)(b)

21. Globally assessed, the Hearing Officer found that there was a likelihood of confusion. The ground of opposition under section 5(2)(b) had been made out:

"42) Taking all of the above into account together with my findings that the common element FEEL GOOD has only a weakish level of distinctive character, that the respective marks share a moderately high level of similarity overall, that the average consumer is the ordinary grocery buying general public, that the purchasing act is often not a well considered one and the fact that identical or highly similar goods are involved, I find that there is a likelihood of confusion. The average consumer is likely to believe that the goods provided under the respective marks originate from the same, or linked, undertaking.

43) The ground of opposition based upon Section 5(2)(b) of the Act is, therefore, successful in its entirety."

22. Premier was ordered to pay FGDC the sum of £1600 towards FGDC's costs of the opposition.

Appeal and standard of review

23. On 19 July 2011, Premier filed Notice of appeal to the Appointed Person under section 76 of the Act. At the appeal hearing before me, the parties were represented by the same Counsel as below: Premier by Thomas Hinchcliffe; FGDC by Andrew Norris.

24. Counsel referred me to *REEF Trade Mark* [2003] RPC 5 for the standard of review:

"28. In this case the hearing officer had to make what he himself referred to as a multi-factorial comparison, evaluating similarity of marks, similarity of goods and other factors in order to reach conclusions about likelihood of confusion ... It is not suggested that he was not experienced in this field, and there is nothing in the Civil Procedure Rules to diminish the degree of respect which has traditionally been shown to a hearing officer's specialised experience ... On the other hand the hearing officer did not hear any oral evidence. In such circumstances an appellate court should in my view 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."

25. Robert Walker L.J. went on to caution in *REEF*:

“29. The appellate court should not treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed ...”

26. As to what might constitute errors of principle, Mr. Hinchcliffe cited the non-exhaustive list provided by Lindsay J. in *esure Insurance Limited v. Direct Line Insurance Limited* [2008] RPC 6:

“12. I shall not be ambitious enough to attempt a full definition of what is, for present purposes, an error of principle such as to justify or require departure from the decision below save to say that it includes the taking into account of that which should not have been, the omission from the account of that which should have been within it and the case (explicable only as one in which there must have been error of principle) where it is plain that no tribunal properly instructing itself could, in the circumstances, have reasonably arrived at the conclusion that it reached.”

27. For his part, Mr. Norris relied on *Digipos Store Solutions Group Limited v. Digi International Inc.* [2008] Bus LR 1621 to bring home to me that:

“5. ... neither surprise at a Hearing Officer's conclusion nor a belief that he has reached the wrong decision suffice to justify interference by this court.”

Arguments on appeal

28. The crux of the appeal as I have indicated is that the Hearing Officer wrongly assessed the distinctiveness of the respective marks, which in turn led him wrongly to conclude that the marks were sufficiently similar to cause likelihood of confusion.

29. Mr. Hinchcliffe argued that even if FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY were distinctive as wholes, FEEL GOOD PUDS in AMBROSIA FEEL GOOD PUDS was purely descriptive so that the later mark was clearly distinguishable from the earlier marks by reason of the presence of the well known trade mark AMBROSIA.

30. Mr. Hinchcliffe complained that the Hearing Officer paid no regard to Premier's evidence showing how the public would understand the words “feel good” and use of “feel good” by the trade. Further he failed to take account of *Reed Executive plc v. Reed Business Information Ltd* [2004] RPC 40 to the effect that where a mark is of low distinctiveness, small differences may suffice to avoid confusion. However, as Jacob L.J. went on to make clear in *Reed* that was not a proposition of law (paras. 83 – 86 and see *PETMEDS.CO.UK*, BL O/471/12, paras. 30 – 38).

31. Premier's points were put to the Hearing Officer who instructed himself as to the law in accordance with the Registrar's accepted list of principles for section 5(2)(b)²

² The list was endorsed most recently by the Court of Appeal in *Specsavers International Healthcare Ltd v. Asda Stores Ltd* [2012] EWCA Civ 24, para. 52.

compiled from the relevant decisions of the Court of Justice of the European Union³. Mr. Norris responded that Premier's difficulty was with the outcome of the case, which was insufficient ground for interference on appeal.

Inconsistencies

32. Premier contended that the Hearing Officer's errors were due to his inconsistent appreciation of the roles played by FEEL GOOD in the respective marks.
33. The first inconsistency is said to appear at paragraph 26 of the decision (reproduced at para. 16 above) in the findings that: (a) FEEL GOOD was a distinctive element of FGDC's marks; but (b) distinctiveness resided in the marks FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY overall.
34. Any apparent inconsistency disappears when one reads the sentences in between. The Hearing Officer explained that it is the suggestive (of the mood of the consumer) combination of FEEL GOOD with SNACKS/CONFECTIONERY (unfeeling) that bestows upon the earlier marks distinctive character. I see nothing wrong with paragraph 26.
35. The second alleged inconsistency relates to the Hearing Officer's discussion at paragraph 38 of the decision (reproduced at para. 20 above) which is said to contradict with his earlier paragraph 26.
36. Here the Hearing Officer was dealing with Mr. Hinchcliffe's argument based on a decision of the OHIM Opposition Division in *DOLE MAKES YOU FEEL GOOD* (B 1 084 989) that FEEL GOOD PUDS in the mark applied for operated in a purely descriptive manner. The Hearing Officer agreed with OHIM's analysis that in the Opponent's mark (coincidentally) FEEL GOOD DRINKS, FEEL GOOD would be perceived as a name whereas in the mark applied for DOLE MAKES YOU FEEL GOOD, FEEL GOOD was performing a descriptive role because it applied directly to YOU.
37. The Hearing Officer then said:

“This [the latter] is different to all the respective marks in the current case where the concept of feeling good relates to the products themselves (and as I have commented earlier, this is a somewhat unusual concept that functions to indicate origin).”
38. Mr. Hinchcliffe sought to persuade me that this contradicts the Hearing Officer's previous finding at paragraph 26 that the concept of feeling good related to the consumer.

³ *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v. Adidas AG & Adidas Benelux BV* [2000] ETMR 723, *Medion AG v. Thomson multimedia Sales Germany & Austria GmbH* Case C-120/04 and *Shaker di L. Laudato & Co. Sas v. Office for Harmonisation in the Internal Market (OHIM) C-334/05 (LIMONCELLO)*.

39. In my judgment, Premier is splitting hairs. Any seeming divergence between paragraphs 26 and 38 was merely semantics and not error. As is clear from the rest of paragraph 38 the Hearing Officer considered that FEEL GOOD PUDS operated distinctively and not descriptively in AMBROSIA FEEL GOODS PUDS in contrast to DOLE MAKES YOU FEEL GOOD and in similar manner to FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY notwithstanding that the dominant distinctive element in Premier's mark was the word AMBROSIA. I do not accept that paragraphs 26 and 38 were materially inconsistent, if at all.

Premier's evidence

40. As regards the criticism that the Hearing Officer failed to take proper account of the evidence as to descriptiveness, Mr. Hinchcliffe directed me first to a survey conducted by John Mumford, a professional marketing and research director active in the field of conducting market surveys and employed by Tactical and Strategic Studies (Witness Statement of John Mumford, 26 August 2010). The survey was carried out online amongst around 1,000 adults who were asked: (1) if they had heard of the term "feel good"; (2) what that term brought to mind; (3) if the response to (2) was a brand or product, what particular brand or product; (4) how long they had been aware of the term "feel good". Unsurprisingly most respondents were aware of the term and associated it with health, happiness and comfort. A small proportion of respondents identified FGDC's FEEL GOOD DRINKS brand.

41. The Hearing Officer concluded that the survey evidence showed little more than that the public knew the term "feel good" as meaning feeling good, with which I concur:

"40) I do not believe that the survey conducted by Premier is persuasive in any way as it illustrates only that the term FEEL GOOD has a clear meaning in the minds of consumers. It is not illustrative of in what circumstances such a clear meaning is attributed to it. For example, taking a number of marks selected by Premier itself in its counter statement such as STONEYFIELD FARM WE MAKE YOU FEEL GOOD INSIDE and BEEBO THE FEEL GOOD FACTOR, it is clear that the words FEEL GOOD function in a descriptive way to convey that the consumer feels good. However, in the marks FEEL GOOD BACTERIA and FEEL GOOD FOOD, the words FEEL GOOD apply directly to the words BACTERIA and FOOD. It cannot be categorically said that the words function descriptively as food and bacteria cannot "feel good"."

42. Mr. Hinchcliffe secondly referred me to the evidence concerning use by the trade comprising:
- (i) Evidence relating to 12 UK and Community trade mark registrations relied on in the Notice of defence and counterstatement and the subject of Internet review by both sides (Witness Statement of Wendy Lucille Waller, dated 18 March 2010 and First Witness Statement of Emma Christina Anne Hodson dated 12 August 2010).

- (ii) Evidence of company names at UK Companies House including the words FEEL GOOD (Fourth Witness Statement of Emma Christina Anne Hodson dated, 15 September 2010).
 - (iii) Evidence concerning the results of Internet searches carried out using the Google search engine against separately: FEEL GOOD FOOD⁴, FEEL GOOD TREATS, FEEL GOOD PUDDS, FEEL GOOD SNACKS, FEEL GOOD and FEEL GOOD FOOD AND DRINK (Third Witness Statement of Emma Christina Anne Hodson, dated 15 September 2010).
43. Premier relied on (i) and (ii) for reasons considered relevant in *Digipos* (para. 65) namely that traders have evinced an intention to want to use marks/names including FEEL GOOD because those words are descriptive of their products.
44. However Mr. Daniel Alexander Q.C. sitting as the Appointed Person later remarked in *PETMEDS.CO.UK*:
- “46. In my view, in general, where a specific assertion is made that marks are not likely to be confused because the common element is descriptive, or otherwise common to the trade, the onus lies on the undertaking asserting that proposition to establish it, with evidence, unless the element in question is so obviously descriptive of the goods or services that judicial notice may properly be taken of it.”
45. And at Community level the General Court stated in Case T-135/04, *GfK AG v. OHIM* [2005] ECR II-4865 (see also Case T-400/06, *Zero Industry Srl v. OHIM* [2009] ECR II-0150, para. 73):
- “68. As regards the search of the Cedexlex database, the mere fact that a number of trade marks relating to Class 35 contain the word 'bus' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned. Firstly, the search in question does not provide any information on the trade marks actually used in relation to the services concerned. Secondly, it includes a number of trade marks in which the word 'bus' is used descriptively by public transport businesses” (see also Case T-400/06, *Zero Industry Srl v. OHIM* [2009] ECR II-0150, para. 73).
46. Similar sentiments were echoed by Floyd J. in *Nude Brands Limited v. Stella McCartney Limited* [2009] EWHC 2154 Ch:
- “29. Whilst the use by other traders of the brand name NUDE in relation to perfume may give those traders relative rights to invalidate the mark, it does not give those rights to any defendant. I am not at this stage persuaded that this evidence has a bearing on any absolute ground of invalidity. It certainly does not go as far as establishing ground 7(1)(d) – customary indication in trade. Ground 7(1)(b) is concerned with the inherent character of the mark, not with what other traders have done with it. The traders in question are

⁴ Also searched on YouTube.

plainly using the mark as a brand name: so I do not see how this use can help to establish that the mark consists exclusively of signs or indications which may serve to indicate the kind or quality or other characteristics of the goods, and thus support an attack under 7(1)(c).”

47. The Hearing Officer dealt in part with this state of the registers evidence at paragraph 40 of his decision quoted at paragraph 41 above identifying two different types of use of FEEL GOOD within the marks in question depending on their construction: on the one hand descriptive, for example, STONEYFIELD FARM WE MAKE YOU FEEL GOOD INSIDE; on the other hand not descriptive, for example, FEEL GOOD BACTERIA.
48. Otherwise the Hearing Officer said of this evidence including the more general Internet searches (iii):

“26. ... There is some limited evidence that the use of the term [FEEL GOOD] has been adapted to relate to the goods themselves but, in the absence of any cancellation action, this is an insufficient counterpoint ...”
49. Mr. Hinchcliffe relied on this passage as showing that the Hearing Officer failed to take any account of Premier’s evidence that FEEL GOOD was descriptive and common to the trade. Mr. Norris said to the contrary that it showed the Hearing Officer weighed the evidence but found it insufficient to prove Premier’s point.
50. I suspect this may again be a case of over scrutiny of the Hearing Officer’s manner of expression. Nevertheless in case of any uncertainty, I have myself considered Premier’s evidence afresh especially as highlighted by Mr. Hinchcliffe.
51. Looking first at the 12 UK and CTM registrations, these were the subject of Internet review on the part of both sides with the results sometimes disputed (Waller and Hodson 1).
52. Of the 12 registrations, five were for FEEL GOOD BACTERIA + variations owned by Müller. There was evidence that the marks were being used in relation to the company’s revamped VITALITY range of yogurt but the revamp may have been after the application date of the mark in suit.
53. Concerning the remaining seven registrations the Internet reviews revealed that: (a) the proprietor of FOR YOUR FEEL GOOD MOODS was using Feelgood in relation to a collection of candles; (b) no use of STONEYFIELD FARM WE MAKE YOU FEEL GOOD INSIDE was uncovered although there was evidence of usage of “feel good” in a normal descriptive sense such as “now that’s a kid’s snack that you can feel good about ...”; (c) COA ASIAN FEELGOODFOOD figurative was the name of Asian cuisine restaurants in Germany; (d) FEEL GOOD BIO belonged to another German undertaking who were using it in connection with soy products that may have been exported to the UK although there was no evidence of any products in the UK; (e) BENE0 THE FEEL GOOD FACTOR was apparently used in connection with ingredients for foodstuffs but no presence was shown on the UK market except in relation to spring water where it was unclear whether simply the BENE0 symbol was being used; (f) the reviews revealed no use of Family Nikola Elegant Flakes Feel

good-Look good except for Bulgaria; (g) no use of FEEL GOOD FOOD and device was uncovered for the UK.

54. Premier exhibited to the Fourth Witness Statement of Ms. Hodson a list of companies registered at UK Companies House with FEEL GOOD in their names, for example, FEEL GOOD MUSIC LIMITED and FEEL GOOD ONLINE LIMITED. The results of Ms. Hodson's research into these companies was additionally exhibited and revealed that the nature of business activities stated for these companies ranged from beauty to radio and TV. Several companies were dormant/non-trading and only a few had anything to do with the goods in question here. I do not consider that this evidence proved anything other than the fact that a number of companies were registered in the UK with FEEL GOOD in their company names.
55. As regards the more general Internet searches using the Google search engine (Hodson 3), Mr. Hinchcliffe particularly referred me to the text of the first Google snippet for the search against FEEL GOOD FOOD which states: "Feel Good Food. is a healthy eating box scheme created from an original idea by Connections Day Services." He also referred me to the Google snippets for the search against FEEL GOOD and highlighted listings for FEEL GOOD DRINKS (FGDC) and, for example, feelgood designs and Feelgood Fiction to illustrate usage in different areas. Again in my view this evidence (alone or in conjunction with Premier's other evidence including the survey) falls short of demonstrating that the earlier marks are descriptive or generic or devoid of any distinctive character for the registered goods concerned.
56. Third, Mr. Hinchcliffe directed me to the Witness Statement of Anna Blackburn, dated 24 March 2011 where she exhibits a copy of a letter from the file of FGDC's application for FEEL GOOD JUICE BARS dealing with a citation by the Registry based on an earlier CTM FEEL GOOD (device) against which FGDC argued that FEEL GOOD was low in distinctive character. Ms. Blackburn also exhibits a copy of a Registry file note relating to the same case where the examiner recorded: "... whilst it was recognised that 'feel good' for the goods of the application is not of high distinctive character, in combination with the term 'juice bars' [it] gave the totality a conceptual identity sufficient for it to function as a badge of origin."
57. I would observe regarding Ms. Blackburn's evidence that it: (i) related to another case involving different marks; and (ii) was clearly taken account of by the Hearing Officer who admitted the evidence late and discussed its contents at paragraph 11 of the decision.

Comparison of marks

58. All said and done, the Hearing Officer accepted Premier's contention that the distinctiveness of FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY was weak. What he did not accept was the further contention that FEEL GOOD was negligible in either the earlier marks or the mark applied for. In my view, he was correct.
59. It seemed to me that the case Premier was seeking to advance on appeal was that the Hearing Officer should have ignored FEEL GOOD in his comparison of the marks, or

to put it another way that the earlier marks barred only the registration of identical or near identical later marks.

60. The Court of Justice of the EU rejected just such an argument in Case C- 235/05, *L'Oréal SA v. OHIM* [2006] ECR I-0057:

“38. In the present case, having held that the earlier mark was only of weak distinctive character and that the products concerned were identical or similar, the Court of First Instance compared the signs in question in order to determine whether they were similar. At paragraph 83 of the contested judgment, it held that, notwithstanding the weak distinctive character of the earlier mark, there was a likelihood of confusion between the signs and, accordingly, between the marks covered by them.

39. In that regard, the Court of First Instance cannot be criticised for not having disregarded, in its examination of the similarity of the signs in question, the element ‘FLEX’, which is common to the marks, on the ground that the earlier mark is only of weak distinctive character.

40. In the first place, it is settled case-law that in order to assess the degree of similarity between the marks concerned, it is necessary to determine the degree of visual, aural or conceptual similarity between them and, where appropriate, to determine the importance to be attached to those different elements, taking account of the category of goods or services in question and the circumstances in which they are marketed (see *Lloyd Schuhfabrik Meyer*, paragraph 27).

41. In addition, the global assessment of the likelihood of confusion must, as regards the visual, aural or conceptual similarity of the marks in question, be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion (see *SABEL*, paragraph 23, *Lloyd Schuhfabrik Meyer*, paragraph 25, and the order in Case C-3/03 P *Matratzen Concord v OHIM*, paragraph 29).

42. It follows that the distinctive character of the earlier mark cannot have the significance which the applicant argues it should be given in the comparison of the signs in question, as it is not a factor which influences the perception which the consumer has of the similarity of the signs.

43. It must therefore be held that the applicant has misconstrued the concepts which govern the determination of whether a likelihood of confusion between two marks exists, by failing to distinguish between the notion of the distinctive character of the earlier mark, which determines the protection afforded to that mark, and the notion of the distinctive character which an element of a complex mark possesses, which is concerned with its ability to dominate the overall impression created by the mark.

44. In the second place, as was pointed out at paragraphs 35 and 36 of this judgment, the existence of a likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case.

45. The applicant's approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question ...”

61. Premier complained that the Hearing Officer did not pay sufficient regard to AMBROSIA in the later mark. However, the Hearing Officer said he was clear that AMBROSIA was the dominant and distinctive element of Premier's mark.
62. Mr. Hinchcliffe suggested that the Hearing Officer should have found that the marks were distanced conceptually because AMBROSIA was a well known trade mark. Recognition on the marketplace is a circumstance relevant to likelihood of confusion which the Hearing Officer later factored into his global assessment of that eventuality.
63. In his comparison, the Hearing Officer noted that the element FEEL GOOD PUDS followed the same pattern as in the earlier marks (i.e., was not purely laudatory/descriptive) and concluded that overall the respective marks shared a moderately high level of similarity.
64. As the Court of Justice confirmed in Case C-334/05 P, *OHIM v. Shaker di L. Laudato & C. Sas.* [2007] ECR I-4529: “ it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element” (para. 42).
65. I understood Mr. Hinchcliffe further to suggest that conceptual similarity was less relevant to primarily visual purchases as here so that the Hearing Officer should have paid less attention to any conceptual similarity with which I disagree.
66. In short, I am not persuaded that the Hearing Officer materially erred in his comparison of the respective marks.

Likelihood of confusion

67. Premier's arguments here were a continuation/repetition of the above and did not justify my interference on appeal: (a) the phrase FEEL GOOD PUDS was laudatory/descriptive in their mark (as in DOLE MAKES YOU FEEL GOOD), which I confirmed the Hearing Officer was entitled to reject; and (b) since the earlier marks were weakly distinctive small differences sufficed to distinguish them, which I noted was not a rule of law (*Reed*) and must be decided on the circumstances of each case (*PETMEDS* and see, e.g., Case T-260/08, *Indo International SA v. OHIM*, 24 January 2012).

68. Premier additionally argued that the Hearing Officer was not entitled to arrive at a finding of “reverse” confusion (i.e., the consumer would perceive FGDC’s goods as being part or extensions of the AMBROSIA FEEL GOOD PUDS range) since that had not been argued by FGDC. I agree with Mr. Norris that it was sufficient for FGDC to allege likelihood of confusion without stating any particular type. As Mr. Hinchcliffe claimed AMBROSIA was a well known brand.
69. Premier lastly argued concurrent use in the grounds of appeal but this was abandoned at the appeal hearing.

Conclusion and costs

70. In the result the appeal has failed. The Hearing Officer ordered Premier to pay FGDC the sum of £1600 towards FGDC’s costs of the opposition. I will order Premier to pay FGDC the additional sum of £600 towards FGDC’s costs of this appeal both sums to be paid as stated by the Hearing Officer.

Professor Ruth Annand, 26 March 2012

Mr. Thomas Hinchcliffe of Counsel instructed by Gill Jennings & Every LLP appeared on behalf of the Applicant/Appellant

Mr. Andrew Norris of Counsel instructed by D. Young & Co. appeared on behalf of the Opponent/Respondent