

O/173/12

TRADE MARKS ACT 1994

**CONSOLIDATED PROCEEDINGS IN THE MATTER OF:
TRADE MARK APPLICATIONS 2555173 & 2555176
IN THE NAME OF
KERRY GROUP SERVICES INTERNATIONAL LIMITED
IN RESPECT OF THE TRADE MARKS:**

**BALANCE HEALTH
&
BALANCE**

IN CLASS 29

AND

**OPPOSITIONS THERETO UNDER NUMBERS 101674 & 101675
BY UNILEVER PLC**

TRADE MARKS ACT 1994

Consolidated proceedings in the matter of trade mark applications 2555173 & 2555176 in the name of Kerry Group Services International Limited, for the trade marks:

BALANCE HEALTH and BALANCE

and

Oppositions thereto under numbers 101674 & 101675 by Unilever Plc

THE BACKGROUND AND THE PLEADINGS

1. The applications were filed by Kerry Group Services International Limited (Kerry) on 9 August 2010. Both marks were published in the Trade Marks Journal on 10 December 2010 for the following specification in class 29:

“Vegetable fat spread containing butter-milk; butter; margarine; vegetable oil based spreads; cheese; yogurt; milk; dairy products; spreads; edible oils and fats; buttermilk.”

2. On 9 March 2011 Unilever Plc (Unilever) filed oppositions in respect of both marks which consisted of grounds based upon sections 3(1)(b) and (c) of the Trade Marks Act 1994 (“the Act”). The oppositions are directed at all of the goods in Kerry’s application.

3. Unilever frames its objections in the following terms:

BALANCE HEALTH

“5. The Application consists of the words BALANCE HEALTH, which serves in trade to designate the nature and intended purpose of the class 29 goods covered by the application, e.g. being food products which are part of a balanced, healthy diet or which assist in providing nutritional balance and health.

6. Given its descriptive nature, the term ‘BALANCE HEALTH’, should be kept free for use by third parties to designate characteristics of class 29 goods having this nature or purpose and the Applicant should not be granted a monopoly right over the descriptive words. The Application should be rejected under s.3(1)(c) Trade Marks Act 1994.

7. In addition or in the alternative, as the Application directly describes the nature or purpose of the class 29 goods covered, the Application will not be viewed by consumers as acting as an indication of origin and is devoid of distinctive character and should be refused under s.3(1)(b).”

BALANCE

“5. The Application consists of the word BALANCE, which serves in trade to designate the nature and intended purpose of the class 29 goods covered by the application, e.g. being food products which are part of a balanced, healthy diet or which assist in providing nutritional balance.

6. *Given its descriptive nature, the word 'BALANCE' should be kept free for use by third parties to designate characteristics of class 29 goods having this nature or purpose and the Applicant should not be granted a monopoly right over the descriptive word. The Application should be rejected under s.3(1)(c) Trade Marks Act 1994.*

7. *In addition or in the alternative, as the Application directly describes the nature or purpose of the class 29 goods covered, the Application will not be viewed by consumers as acting as an indication of origin and is devoid of distinctive character and should be refused under s.3(1)(b)."*

4. On 11 May 2011, Kerry filed counterstatements. In respect of both marks Kerry states, inter alia:

"2. ...it is submitted that the mark applied for is not devoid of distinctive character and that it does possess a capacity to distinguish the goods of the Applicant from those of their competitors. The mark applied [sic] is not a generic term, it does not describe the nature or intended purpose of the goods applied for nor any other characteristic of those goods. The mark applied for is not a recognised term used in the trade nor is there any reason for it to be kept free for use by third parties to designate any characteristic or quality of the goods applied for."

In relation to its BALANCE HEALTH mark, Kerry continues:

"2...The combination of the words BALANCE and HEALTH is an unusual juxtaposition and conveys no clear meaning or indication of the nature of the goods or their purpose."

In relation to its BALANCE mark, Kerry continues:

"2...The word balance conveys no clear meaning or indication of the nature of the goods or their purpose."

5. Only Unilever filed evidence in the proceedings; both parties filed written submissions in lieu of a hearing. I will refer to the written submissions as necessary below.

EVIDENCE

Unilever's Evidence

6. This consists of a witness statement dated 1 August 2011, by Nicola Fairhead, a solicitor at Baker & McKenzie LLP, Unilever's professional representative in these proceedings.

7. Ms Fairhead states that:

“6 The words ‘balance’ and ‘health’ serve in trade to designate the kind, quality and intended purpose of the class 29 goods covered by the Applicant’s marks. These goods...are all food products which are regularly marketed as products which constitute part of a balanced, healthy diet. Additionally, ‘balance’ and/or ‘health’ are widely used in connection with Class 29 goods to indicate a healthier range of similar products.”

8. Exhibit NF-2 is an extract from ‘Oxford Dictionary Online’ dated 28 July 2011, which provides a definition of the word ‘balanced’ in the following terms:

“(especially of food) having different elements in the correct proportions: a healthy balanced diet.”

9. Exhibit NF-3 is also an extract from ‘Oxford Dictionary Online’ dated 28 July 2011, which provides a definition of the word ‘healthy’ in the following terms:

“indicating or promoting good health”.

Several examples are used to illustrate the word. Ms Fairhead points to the example *“a healthy balanced diet”*.

10. Ms Fairhead describes Exhibit NF-4 of her witness statement as:

“8...extracts from websites that show the widespread use of the word BALANCE in relation to Class 29 goods.”

11. This exhibit, which consists of pages downloaded from a range of websites, shows the word ‘Balance’ being used in an entirely predictable manner in the context of a range of foodstuffs. The first extract is dated 28 July 2011 and is from www.thecattlesite.com. It refers to ‘dairy balance’ milk, available from 150 locations in Northern California. The fourth extract is a screen print which does not show a web address, is not dated and is also of US origin. The fifth extract, dated 1 August 2011, is taken from www.bodybio.com, a US site, which refers to dietary supplements. It is therefore not relevant in the context of the goods at issue. These three examples will not form part of my consideration for the reasons provided above. The two relevant extracts are as follows:

“Asda - Natural Balance Yoghurt - FEB 10”,

downloaded 28 July 2011 from www.myfitnesspal.com.

and

“Cow & Gate Baby Balance is our range of baby food specially developed to give your baby a balanced diet”,

downloaded 1 August 2011 from www.cowandgate.co.uk.

12. Ms Fairhead describes Exhibit NF-5 as:

“9...extracts from websites that show the frequent use of the phrases ‘balanced diet’ and ‘healthy balanced diet’ in relation to class 29 goods...”

13. This exhibit contains a number of extracts from UK websites, downloaded on 28 July 2011, which use the words ‘balanced diet’ and ‘healthy balanced diet’ in a manner with which the average consumer would be very familiar i.e. *“The importance of milk and dairy products as part of a healthy balanced diet”*, from www.milk.co.uk; *“Eat a healthy, balanced diet and stay active”*, from www.bbc.co.uk/health; *“A balanced diet”* and *“What is a healthy balanced diet”*, from www.nhs.uk; *“Healthy Balanced Diet”* from www.healthy-balanced-diet.com and www.homehealth-uk.com; and *“Balanced diet servings”* from www.cyh.com.

14. Ms Fairhead concludes this part of her statement in the following terms:

10. It is therefore clear that the Applicant’s Marks, consisting exclusively of the words BALANCE and HEALTH, consist exclusively of signs which may serve in trade to designate the kind, quality and intended purpose of the Applicant’s Goods, being food products which assist the user in maintaining a balanced diet...

11. Specifically in relation to the BALANCE HEALTH application, although it may be less common for these terms to be used in that particular order, the mark BALANCE HEALTH is not a sufficiently syntactically unusual juxtaposition so as to override the descriptive meaning [sic] the elements BALANCE and HEALTH, and render the mark distinctive.

15. Exhibits NF-1 and NF6-9 consist of copies of decisions from the Registry, the CFI and CJEU which Ms Fairhead considers to be relevant to this opposition. I will refer to these where appropriate. That concludes my summary of the evidence filed to the extent that I consider it necessary.

DECISION

16. The opposition is based upon sections 3(1)(b) and (c) of the Act.

Sections 3(1), (b) and (c) of the Act state:

“3. - (1) The following shall not be registered –

(a)...

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services.

(d)...

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

The average consumer of the opposed goods

17. In her witness statement Ms Fairhead states:

“...the goods at issue are fast-moving everyday food goods sold in places such as supermarkets. The average consumer, being the general public, would not pay a particularly high degree of attention when purchasing the goods.”

I agree that the average consumer of the goods in class 29 is a member of the general public. The purchaser will pay a reasonable degree of attention to their purchase, to the extent that the average consumer of foodstuffs is likely to consider, inter alia, fat content, calories, particular ingredients. However, these are low value, frequent purchases and are unlikely to demand a high level of attention to be paid over and above the fact that the average consumer will be reasonably well informed, observant and circumspect.

The Law

General principles in relation to 3(1)(b) and (c)

18. In *Koninklijke KPN Nederland NV v Benelux-Merkenbureau*, Case C-363/99, the CJEU said in relation to article 3 of the regulation, the equivalent of section 3(1)(c) of the Act:

“54. As the Court has already held (Windsurfing Chiemsee , para.[25], Linde, para.[73], and Libertel , para.[52]), Art.3(1)(c) of the Directive pursues an aim which is in the public interest, namely that such signs or indications may be freely used by all. Article 3(1)(c) therefore prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks.

55. That public interest requires that all signs or indications which may serve to designate characteristics of the goods or services in respect of which registration is sought remain freely available to all undertakings in order that they may use them when describing the same characteristics of their own goods. Therefore, marks consisting exclusively of such signs or indications are not eligible for registration unless Art.3(3) of the Directive applies.

56. In those circumstances, the competent authority must, under Art.3(1)(c) of the Directive, determine whether a trade mark for which registration is sought currently represents, in the mind of the relevant class of persons, a

description of the characteristics of the goods or services concerned or whether it is reasonable to assume that that might be the case in the future (see to that effect Windsurfing Chiemsee , para.[31]). If, at the end of that assessment, the competent authority reaches the conclusion that that is the case, it must refuse, on the basis of that provision, to register the mark.

57. It is irrelevant whether there are other, more usual, signs or indications for designating the same characteristics of the goods or services referred to in the application for registration than those of which the mark concerned consists. Although Art.3(1)(c) of the Directive provides that, if the ground for refusal set out there is to apply, the mark must consist exclusively of signs or indications which may serve to designate characteristics of the goods or services concerned, it does not require that those signs or indications should be the only way of designating such characteristics.

58. Similarly, whether the number of competitors who may have an interest in using the signs or indications of which the mark consists is large or small is not decisive. Any operator at present offering, as well as any operator who might in the future offer, goods or services which compete with those in respect of which registration is sought must be able freely to use the signs or indications which may serve to describe characteristics of its goods or services.”

19. In *BioID AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case C-37/03 P the CJEU stated that for a term to be viewed as being descriptive of a characteristic of goods and services:

“there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see Case T-19/04 Metso Paper Automation v OHIM (PAPERLAB) [2005] ECR II-2383, paragraph 25 and the case-law cited).”

20. In *Combi Steam Trade Mark* (BL O/363/09) the Appointed Person commented on section 3(1)(b) of the Act in the following terms:

“7. It has been said that lack of distinctive character is the essence of any objection under section 3(1)(b), (c) or (d) of the Act and that, despite its position in the list, section 3(1)(b) performs “a residual or sweeping-up function”, backing up the other two provisions, which contain specific and characteristic examples of types of marks that lack distinctive character: Procter & Gamble Ltd’s Trade Mark Application [1999] RPC 673 (CA) per Robert Walker LJ at 679. If a trade mark is entirely descriptive of characteristics of goods or services (and thereby prohibited from registration under section 3(1)(c)), it will also be devoid of any distinctive character under section 3(1)(b): Case C-363/99 Koninklijke KPN Nederland BV v Benelux-Merkenbureau (POSTKANTOOR) [2004] ETMR 57 (ECJ) at [86]. However, the converse is not true: a mark which is not descriptive may nevertheless be devoid of distinctive character for other reasons (ibid.).

8. When a trade marks examiner assesses the distinctiveness of a trade mark within the meaning of section 3(1)(b), s/he must do so firstly by reference to the goods or services listed in the specification, and secondly by reference to the perception of the mark in relation to such goods or services by the relevant public, which consists of average consumers of the goods or services in question, who are deemed to be reasonably well informed, observant and circumspect: *Joined Cases C-53/01 to C- 55/01 Linde AG, Winward Industries Inc and Radio Uhren AG* [2003] ETMR 78 at [41].

9. It is not necessary to show that a mark has a particular level of creativity or originality in order to establish distinctive character: *Case C-329/02P SAT.1 Satelliten Fernsehen GmbH v OHIM* [2005] ETMR 20 (ECJ) at [41]. While the Court of First Instance (“CFI”) has repeatedly referred to “a minimum degree of distinctive character” as being sufficient to avoid article 7(1)(b) of the CTMR/article 3(1)(b) of the Directive (for example, *Case T-34/00 Eurocool Logistik GmbH & Co. KG v OHIM (“EUROCOOL”)* [2003] ETMR 4 at [39]; *Case T-128/01 Daimler Chrysler Corp v OHIM* [2003] ETMR 87 at [33]; *Case T-320/03 Citicorp v OHIM (“LIVE RICHLIY”)* at [68]), the ECJ has not adopted this wording and has deemed it unnecessary to give any more precise definition to the possible dividing line between lack of distinctiveness and the minimum distinctiveness to which the CFI refers: *Deutsche Krankenversicherung AG v OHIM (“COMPANYLINE”)* [2002] ECR I-7561 at [20].

10. The ECJ approaches the issue of distinctiveness by reference to the underlying purpose of article 3(1)(b) of the Directive/7(1)(b) CTMR, which in the Court’s view is to preclude registration of trade marks that are incapable of performing the essential function of guaranteeing the identity of the origin of the marked product to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin: *SAT.1 v OHIM* at [23]; *Case C-37/03 P BioID AG v OHIM* [2005] ECR I-7975 (ECJ) at [27].”

21. The tests to be applied are summarised in *Flying Scotsman* O-313-11 when the Appointed Person said:

“19. Since there is no obligation to rule on the possible dividing line between the concept of lack of distinctiveness and that of minimum distinctiveness when assessing the registrability of a sign under Section 3(1)(b), see *Case C-104/00 P Deutsche Krankenversicherung AG v OHIM (COMPANYLINE)* [2002] ECR I-7561 at paragraph [20], it is not necessary to dwell on the question of how far Section 3(1)(b) may go in preventing registration beyond the scope of Section 3(1)(c). It is sufficient to observe that a sign may be:

(1) distinctive for the purposes of Section 3(1)(b), with the result that it cannot be regarded as descriptive for the purposes of Section 3(1)(c) and must be unobjectionable on both bases; or

(2) neither distinctive for the purposes of Section 3(1)(b), nor descriptive for the purposes of Section 3(1)(c), with the result that it must be objectionable on the former but not the latter basis; or

(3) descriptive for the purposes of Section 3(1)(c), with the result that it cannot be regarded as distinctive for the purposes of Section 3(1)(b) and must be objectionable on both bases.

22. It is clear from these cases that in order for the opposition to succeed in respect of 3(1)(c) there must be a “sufficiently direct and specific relationship” between Kerry’s trade marks and the opposed goods in class 29, “to enable the public concerned immediately to perceive, without further thought, a description of the goods in question or one of their characteristics”.

23. For the opposition to succeed in respect of 3(1)(b) I must find the marks to be non-distinctive “by reference to the goods or services listed in the specification, and secondly by reference to the perception of the mark in relation to such goods or services by the relevant public, which consists of average consumers of the goods or services in question.”

Assessment of the marks

24. Kerry have applied for two trade marks. The first consists of the well known words, ‘BALANCE’ and ‘HEALTH’, the second mark consists of the single word ‘BALANCE’. Both are presented in plain block capitals with no embellishments.

25. It is clear that I must assess these marks separately as, despite the common element, they are different marks and consequently there will be different considerations in their assessment. The parties have both filed composite submissions in which they provide general principles in relation to 3(1)(b) and (c) and application of those principles to both marks. I have noted the general comments and will refer to the specific submissions in relation to the marks where necessary.

26. In her evidence, at exhibits NF-2 and NF-3, Ms Fairhead provided several dictionary definitions which refer to the words ‘BALANCED’ and ‘HEALTHY’, which I have referred to above. Neither of these words is present in the marks applied for so these references are of little assistance. However, both parties filed additional dictionary definitions with their written submissions which do refer to the words contained within the marks. The definitions are taken from several sources but can be best expressed as follows:

balance

→ *n.* a state of equilibrium.¹

health

→ *n.* the state of being free from illness or injury

¹ Collins Dictionary and Thesaurus in one volume, Ed. William T McLeod, p.71, submitted by Kerry.

a person's mental or physical condition.²

BALANCE HEALTH

3(1)(c)

27. In its submissions Kerry states:

“...a mark must not consist exclusively of a word or words that describe ‘other characteristics’ of the goods...The word BALANCE per se has numerous meanings none of which describe any characteristic or quality of the goods concerned.”

28. Unilever states:

“Furthermore, in Case C-191/01 P, Wm Wrigley Jr v OHIM, Doublemint (2003) it was stated that where a sign has more than one meaning, as long as at least one of those meanings is descriptive of the goods concerned then that sign shall be refused for registration.”

29. The relevant paragraph of *Doublemint* is as follows:

“32. In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

30. With regard to the combination of the words BALANCE and HEALTH Kerry submits:

“...the marks applied for can lay claim to ‘linguistic imperfection and peculiarity’.”

31. Unilever states:

“In relation to the BALANCE HEALTH application, although it may be less common for these terms to be used in that particular order, the mark is not a sufficiently syntactically unusual juxtaposition so as to override the descriptive meaning of the elements BALANCE and HEALTH, and render the mark

² *Oxford Dictionaries online, 2011, Oxford University Press, submitted by Unilever.*

distinctive. This mark comprises two descriptive elements, which when viewed as a whole merely amounts to the sum of [sic] its parts."

32. In summing up its position in respect of the mark BALANCE HEALTH, Kerry submits that:

"Upon examination of the marks applied for, they do not describe any characteristics of the goods concerned...As the goods are foodstuffs, the mark BALANCE HEALTH might be considered to allude to such products as being "healthy" in nature. However, because a mark may have some allusive characteristics, it does not mean that it is objectionable under section 3(1)(c)."

33. Unilever submits:

"When faced with the sign BALANCE HEALTH, the consumer will immediately recognise that the Applicant's Goods, by virtue of their purported nutritional value, will contribute to maintaining a healthy balance, a balanced diet, and/or a bodily equilibrium. The mark is not simply evocative as suggested by the Applicant but rather has a clear meaning in relation to the goods concerned. This meaning is not opaque and does not require any reflection or any mental processing on the part of the consumer who will immediately establish a direct link between the marks and a characteristic of the goods sold under it."

34. The individual words in the mark do not require debate as to their meanings; they are everyday words, well known to the average consumer. Having reached such a conclusion I must go on to assess the overall impression the trade mark creates. In doing so I am mindful of the comments in *Campina Melkunie BV and Benelux-Merkenbureau* (C-265/00) when the CJEU said:

"39. As a general rule, the mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics within the meaning of Article 3(1)(c) of the Directive even if the combination creates a neologism. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned."

And also the comments in BioID in which the CJEU said in relation to article 7(1)(b):

"29. Thirdly, as regards a compound mark, such as that which forms the subject-matter of the present dispute, any distinctive character may be assessed, in part, in respect of each of the terms or elements, taken separately, but that assessment must, in any event, be based on the overall perception of that trade mark by the relevant public and not on the presumption that elements individually devoid of distinctive character cannot, on being combined, present such character (see SAT.1 v OHIM, cited above, paragraph 35). The mere fact that each of those elements, considered separately, is devoid of distinctive character does not mean that their

combination cannot present such character (see, by way of analogy, Case C-363/99 Koninklijke KPN Nederland [2004] ECR I-1619, paragraphs 99 and 100, Case C-265/00 Campina Melkunie [2004] ECR I-1699, paragraphs 40 and 41, as well as SAT.1 v OHIM, cited above, paragraph 28)."

35. The only evidence filed in these proceedings was that of Ms Fairhead. It does little to assist me in reaching a conclusion as it consists of, inter alia, dictionary definitions and Internet searches for words which are not present in the trade marks at issue. In addition, a number of the internet searches for the word BALANCE refer to non-UK sources. In reaching a conclusion, I will rely on the relevant dictionary definitions, the submissions of the parties and my own experience.

36. I agree with the parties that both words would be well known to the average consumer. The word BALANCE may have several meanings but, in the context of these goods in class 29, I agree with Ms Fairhead that the likely interpretation will relate to the balancing of a person's health or diet. The word HEALTH is likely to be even more familiar to the average consumer in relation to food products where, in my experience, it is commonly encountered. . In my view there is a "*sufficiently direct and specific relationship*" between Kerry's trade marks and the opposed goods, "*to enable the public concerned immediately to perceive, without further thought, a description of the [goods] in question or one of their characteristics*", namely, that the goods will help the average consumer to balance their health by maintaining their body's equilibrium.

37. I find the opposition in respect of the mark BALANCE HEALTH succeeds under section 3(1)(c) of the Act. Having found that the mark is objectionable under 3(1)(c), it follows that it also lacks distinctive character under 3(1)(b). However, as Unilever have also objected to the mark in respect of 3(1)(b) solus, I will go on to assess the mark in relation that section of the Act as a separate issue.

3(1)(b)

38. In her witness statement Ms Fairhead says, in relation to the opposition based on section 3(1)(b) of the Act:

"14...section 3(1)(b) also includes within its scope those marks which, whilst not designating a characteristic of the relevant goods and services (and therefore descriptive pursuant to s.3(1)(c) of the Trade Marks Act 1994), nonetheless fail to serve the essential function of a trade mark by being incapable of designating origin..."

...17. It is likely that a similar conclusion would be drawn in this instance, given the generic nature of the marks BALANCE and BALANCE HEALTH in relation to the Applicant's Goods. In view of this generic nature and the fact that both the words BALANCE and HEALTH are everyday English words commonly used in the context of diet, nutrition and health, the average consumer would not immediately perceive the use of these marks on food products, such as those covered by the Applicant's Marks, as an indication of the commercial origin of the goods."

39. Kerry states that:

“The fact that others may use similar words or phrases in connection with their products may suggest that the marks applied for have a relatively low level of distinctiveness, but marks with a low level of distinctiveness are still entitled to be registered. The Trade Marks Act only precludes the registration of trade marks that are devoid of distinctive character and that is not the case so far as the marks applied for are concerned.”

40. In order to be distinctive, to any degree, a trade mark must be able to carry out its essential function, namely, to guarantee the origin of the product to the consumer, taking into account the nature of those goods. I have already concluded above that the words BALANCE and HEALTH are common words with which the average consumer will be familiar, both separately and together. Given that they are, in my experience, so frequently used in respect of foodstuffs, including [Kerry's Goods] in class 29, I find that they are, in their totality, origin neutral. As a consequence, I find that the opposition in respect of BALANCE HEALTH also succeeds under 3(1)(b).

BALANCE

3(1)(c)

41. Kerry draws my attention to other 'BALANCE' marks currently on the European and UK trade mark registers. In *British Sugar* [1996] RPC 281 at 305 Jacob J stated the following:

“Both sides invited me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word "Treat". I do not think this assists the factual enquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. MADAME Trade Mark and the same must be true under the 1994 Act. I disregard the state of the register evidence.”

In view of the above, the state of the register does not assist Kerry.

42. In respect of the word 'BALANCE' Kerry submits:

“The word 'BALANCE' per se has numerous meanings...none of which describe any characteristic or quality of the goods concerned.”

43. I have already discussed, at paragraph 29 above, that in accordance with the decision in *Doublemint* it is only necessary for one of the possible meanings to describe a characteristic of the goods in order for a mark to be refused registration.

44. Unilever submits:

“...the term BALANCE immediately informs the consumer that the consumption of the product concerned will contribute to the consumer’s bodily equilibrium...”

45. I agree, the average consumer is, in my experience, familiar with such words in use in the marketplace. Marketing in the food industry is often and increasingly centred on the health benefits of particular food products and, in this context; the message provided by the mark is that the product will provide balance in the diet. As a consequence, the mark provides the “sufficiently direct and specific relationship” between Kerry’s trade marks and the opposed goods, “to enable the public concerned immediately to perceive, without further thought, a description of the [goods] in question or one of their characteristics”, namely, the fact that the goods will enable the average consumer to balance their diet

46. I find the opposition in respect of the mark BALANCE succeeds under section 3(1)(c) of the Act. Having found that the mark is objectionable under 3(1)(c), it follows that it also lacks distinctive character under 3(1)(b). However, as Unilever have also objected to the mark in respect of 3(1)(b) solus, I will go on to assess the mark in relation to that section of the Act as a separate issue.

3(1)(b)

47. As I have discussed above, the word BALANCE is well known in the context of the goods. The average consumer is used to seeing such words used in relation to foodstuffs. Consequently, the word BALANCE will not provide the average consumer of Kerry’ goods with any indication of trade origin sufficient to enable the mark to be considered distinctive. I find the opposition to the application BALANCE under section 3(1)(b) of the Act also succeeds.

Conclusion

48. Unilever’s opposition to both trade marks has succeeded under 3(1)(b) and (c) of the Act.

49. Even if I am found to be incorrect in relation to my findings under 3(1)(c), there is, in my view, no doubt that when considered in relation to the goods at issue, neither mark is capable of providing the average consumer with any trade origin message and as such both trade marks also fall foul of 3(1)(b) of the Act.

Costs

50. Unilever has been successful and is entitled to an award of costs. Awards of costs are governed by Annex A of Tribunal Practice Notice 4 of 2007. Using that TPN as a guide, I award costs to Unilever on the following basis:

Preparing a statement and considering
Kerry’s statement:

£300

Official fee	£200
Written submissions:	£100
Total	£600

51. I order Kerry Group Services International Limited to pay to Unilever Plc the sum of £600. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th day of April 2012

**Ms Al Skilton
For the Registrar**