

O-222-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2516238
BY PREMIER FOODS GROUP LIMITED TO REGISTER THE TRADE MARK**

AMBROSIA FEEL GOOD PUDS

IN CLASSES 29 AND 30

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 99517
BY THE FEEL GOOD DRINKS COMPANY LIMITED**

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by The Feel Good Drinks Company Limited**

BACKGROUND

1) On 19 May 2009, Premier Foods Group Limited (“Premier”) applied under the Trade Marks Act 1994 (“the Act”) for registration of the above mark 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.

2) On 9 September 2009, The Feel Good Drinks Company Limited (“FGDC”) filed notice of opposition to the application. The grounds of opposition are based upon Section 5(2)(b), Section 5(3) and Section 5(4)(a) of the Act. FGDC bases its Section 5(2)(b) grounds upon ten of its earlier marks. It claims that Premier’s mark is similar to all these marks and is in respect of identical or similar goods. Relevant details of FGDC’s earlier marks are provided in an annex to this decision.

3) The grounds based upon Section 5(3) of the Act are based upon one earlier mark, namely 2397763, FEEL GOOD DRINKS. This is one of the earlier marks relied upon in respect of the Section 5(2)(b) grounds and relevant details are in the annex. FGDC claim that this earlier mark enjoys a reputation and that Premier’s mark is similar to it.

4) FGDC also pleads a ground of opposition based upon Section 5(4)(a) of the Act because it’s mark FEEL GOOD DRINKS is entitled to protection under the law of passing off.

5) Premier subsequently filed a counterstatement denying FGDC’s claims, contending that the FEEL GOOD element of the respective marks is generic and citing numerous third party registrations to support its contention.

6) Both sides filed evidence in these proceedings and FGDC also filed written submissions in reply to Premier’s evidence. Both sides ask for an award of costs. The matter came to be heard on 14 April 2011 when FGDC was represented by Andrew Norris of Counsel, instructed by D Young & Co and Premier was represented by Tom Hinchcliffe of Counsel, instructed by Gill Jennings & Every LLP.

Opponent’s Evidence

7) I intend to consider FGDC’s case under Section 5(2)(b) of the Act based upon its FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY marks. The evidence does not show any use of either of these marks and as such, is not relevant for my deliberations in respect of the grounds based upon Section 5(2)(b). If necessary, I will consider later the evidence insofar as it supports the grounds based upon Section 5(3) and Section 5(4)(a).

Applicant's Evidence

8) This includes a witness statement, dated 12 August 2010, by JoAnna Emery, Trade Mark Manager of Premier. Ms Emery states that the mark AMBROSIA has been used in the UK since 1919 in relation to custard, rice pudding and products based upon custard and rice. Marketing spend for the AMBROSIA brand is provided giving figures of between £1.2 million and £3.5 million for the years 2005 to 2009. Ms Emery states that AMBROSIA is a household name in the UK and is the market leader in respect of custard and rice pudding.

9) Premier first used the "strap line" FEEL GOOD PUDS in relation to crumble and jelly puddings on 8 August 2009 in an advertisement in The Grocer magazine. The product itself first appeared on in the marketplace in October 2009. 21,509,210 units bearing the subject mark were sold between its launch in October 2009 and April 2010, with sales to date amounting to £9,859,102.

10) A second witness statement, dated 26 August 2010, by John Mumford, a professional marketing and research director. He states that that he conducted an online survey between 16 – 30 July 2010 amongst approximately 1000 respondents to determine the response to the term FEEL GOOD in the UK. The responses illustrated that the main associations with FEEL GOOD were "happiness/joy" to "cosy/warm/safe" and to "being optimistic/confident".

Applicant's Additional Evidence

11) At the hearing I admitted into the proceedings further evidence submitted by FGDC two weeks earlier. This consisted of a further witness statement, dated 24 March 2011, by Ms Hodson who exhibited a letter, dated 11 July 2005, sent to the Registry by D Young & Co, in respect to examination proceedings relating to FGDC's mark FEEL GOOD JUICE BARS. In that letter, it is argued on behalf of FGDC that the mark at issue in those proceedings could be distinguished from a cited earlier mark and as part of this argument, it is stated that the words FEEL GOOD "are low in distinctive character". A second exhibit consists of a copy of the minute sheet relating to the same case. The examiner has recorded that "Feel Good'...is not of high distinctive character [but that] in combination with the term 'juice bars' [it] gave the totality a conceptual identity sufficient for it to function as a badge of trade origin".

DECISION

Section 5(2)(b)

12) Section 5(2)(b) reads:

"(2) A trade mark shall not be registered if because –

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

13) An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

14) Of potential relevance to a ground of opposition under Section 5(2) are the provisions that relate to proof of use. Section 6A(1) details the circumstances where these provisions apply:

“6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.”

15) FGDC relies upon numerous earlier rights, all of which are registered and therefore qualify as earlier marks as defined by Section 6 of the Act. None of these were registered more than five years before the publication of Premier’s application and as such, do not fall foul of the proof of use provisions. FGDC can, therefore, rely on all of its earlier marks and in respect of all or any of their listed goods and services.

16) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the Court of Justice of the European Union (CJEU) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] FSR. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] ETMR 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P (LIMONCELLO)*. It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel BV v Puma AG*,
- (g) in determining whether similarity between the goods or services covered by two marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *LIMONCELLO*

Comparison of goods

17) It is common ground between the parties that many goods are identical, however, FGDC does not identify which goods it considers are identical and which are only similar. Therefore, for clarity I set out below what goods are identical and what goods are similar and to what degree. In doing so, I am mindful of the guidance of the CJEU in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* where it stated (at paragraph 23):

‘In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.’

18) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281).

19) I also take account of the following guidance of the General Court's (GC) judgment in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) ("Meric")* Case T-133/05, para 29:

"In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)."

20) The table below sets out where the respective goods are identical and where they are similar:

FGDC's goods	Premier's goods (as exemplified by its registration CTM) 6234488 FEEL GOOD SNACKS	Level of similarity
Class 29		
<i>Meat, fish, poultry and game; meat extracts; ...; meat products; sausages;</i>	<i>Meat, fish, poultry and game; meat products,...; pates; meat, meat products; meat ... spreads;</i>	Identical
<i>preserved, dried and cooked fruits and vegetables;</i>	<i>preserved, dried, cooked, canned and frozen fruits, vegetables, pulses</i>	Identical
<i>jellies, jams, compotes, fruit preserves, vegetable preserves; extracts of fruit and/or vegetables</i>	<i>jams, marmalade, preserves; conserves; peanut butter; fruit, vegetable ... spreads; pickles; pickle relishes; jellies; mincemeat; fruit curds</i>	Identical
<i>Eggs</i>	<i>eggs;</i>	Identical.

<i>milk and milk products; edible oils and fats; eggs; dairy products; yoghurt</i>	<i>dairy products and substitutes therefore; milk products and substitutes therefore; yoghurts; cheese and substitutes therefore; milk drinks; milk drinks substitutes; milkshakes; shakes of milk substitutes; milkshake powder; powered milk or milk substitutes</i>	Identical
<i>soups; bouillon</i>	<i>soups</i>	Identical
<i>prepared meals in class 29; snack foods</i>	<i>prepared meals, snack foods</i>	Identical
<i>desserts in class 29</i>	<i>fruit desserts; fruit salads; desserts; dairy puddings; dessert toppings</i>	Identical
<i>edible protein derived from soya</i>	<i>myco-protein for food for human consumption; savouries consisting of or containing myco-protein</i>	Identical
<i>Fish; snack foods</i>	<i>fish products; fish and fish products; fish spreads</i>	Identical or in the case of <i>fish products</i> and <i>fish spreads</i> , these are similar to <i>fish</i> . It is common for providers of fish to also provide products made from fish too, and that many of these may be described as <i>snack foods</i>
<i>Jams, ...meat products, nut butters,...nut paste</i>	<i>savoury, sweet and sandwich spreads;</i>	Identical

<i>edible oils and fats</i>	<i>edible oils and edible fats</i>	Identical
<i>All of Premier's Class 29 goods</i>	<i>dietetic and slimming foodstuffs and substitutes</i>	Identical. All of Premier's goods may be produced to assist in slimming regimes
Class 30		
<i>salt, pepper, spices; spices and seasonings</i>	<i>Flavourings and seasonings;</i>	Identical
<i>Coffee, tea, cocoa</i>	<i>coffee; tea; cocoa, cocoa products, cocoa powder</i>	Identical
<i>cocoa</i>	<i>drinking chocolate</i>	<i>Cocoa</i> is a hot drink made from cacao powder, as is <i>drinking chocolate</i> . If not identical, they are highly similar
<i>custard powder</i>	<i>custard; custard powder</i>	Identical
<i>baking-powder; yeast baking powders</i>	<i>baking powder</i>	Identical
<i>flour and preparations made from cereals, bread, pastry</i>	<i>flour; preparations made from flour; bran, wheatgerm, cereals and preparations made from cereals; bread, bread products, pastry; bakery products; pastry products; farinaceous products and preparations; pastries</i>	Identical
<i>yeast</i>	<i>yeast</i>	Identical
<i>pasta and pasta products</i>	<i>macaroni; vermicelli; spaghetti; pasta</i>	Identical
<i>sauces and preparations for making sauces</i>	<i>sauces for pasta; noodles</i>	Identical
<i>pizza</i>	<i>pizzas</i>	Identical
<i>confectionery</i>	<i>confectionery</i>	Identical
<i>biscuits; cookies;</i>	<i>blancmange; rusks;</i>	Identical

<i>cakes; desserts in class 30; puddings</i>	<i>tarts; biscuits; cookies; cakes; chocolate products</i>	
<i>sugar, rice, tapioca, sago, ...; honey, treacle; salt, pepper, mustard; vinegar, sauces (condiments); spices</i>	<i>spices; sugar, rice, tapioca, sago; honey and honey substitutes; treacle; salt; mustard; pepper; vinegar; sauces</i>	Identical, except <i>honey substitutes</i> that are highly similar to <i>honey</i>
<i>syrup, treacle; molasses</i>	<i>golden syrup and syrup for food</i>	Identical
<i>Honey, ...syrup, treacle</i>	<i>chocolate spread</i>	These goods may share the same intended purpose, method of use, appear on adjacent shelves in shops and are in competition with each other. They share a high level of similarity
<i>mousses; desserts in class 30; puddings</i>	<i>desserts; puddings</i>	Identical
<i>sauces and preparations for making sauces</i>	<i>dessert toppings; pudding toppings</i>	Identical
<i>ice; ice cream, water ices, frozen confections</i>	<i>ice cream and ice cream confections; frozen ices; frozen confections; frozen yoghurts</i>	Identical
<i>snack foods; meat pies</i>	<i>pies</i>	Identical
<i>mayonnaise; salad dressings; sauces</i>	<i>mayonnaise; salad dressings; sauces and salad cream</i>	Identical
<i>snack foods; prepared meals in class 30</i>	<i>prepared meals, snack foods</i>	Identical
<i>snack foods</i>	<i>sandwiches</i>	<i>Sandwiches</i> are a light meal and as such may be described as a

		<i>snack food.</i> Therefore, they are identical or at least highly similar
<i>chutney</i>	<i>chutneys</i>	Identical
<i>breakfast cereals</i>	<i>cereal bars; cereal based food bars and cake bars</i>	Identical

The average consumer and nature of purchasing act

21) As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23) it is important that I assess who the average consumer is for the goods at issue. I have found that the respective goods are largely identical and where not identical, they share high levels of similarity. It follows that the respective average consumers will be the same.

22) At the hearing, Mr Norris submitted that the respective goods are low value items and that the purchasing act for such items is not considered and on occasions such purchases could be described as “impulse purchases”. Mr Hinchcliffe submitted that the purchasing act involved an ordinary level of care, however, I concur with the views of Mr Norris. 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.

Comparison of marks

23) For the purposes of this comparison, I find it convenient to use only two of the ten earlier marks as relied upon by FGDC. For ease of reference, these are detailed in the table below, together with Premier’s mark:

FGDC’s marks	Premier’s mark
FEEL GOOD SNACKS	AMBROSIA FEEL GOOD PUDS
FEEL GOOD CONFECTIONERY	

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 mythology¹, 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 the earlier trade mark

32) I have to consider whether FGDC's marks have a particularly distinctive character either arising from the inherent characteristics of the marks or because of the use made of them. At the hearing, Mr Hinchcliffe submitted that FGDC's marks possess a weak distinctive character. In support of this he referred to a number of other registrations (listed in the counterstatement) where he contended the words FEEL GOOD are used descriptively and all contain an additional element that distinguishes each mark. I have commented earlier, in the absence of an attack on FGDC's earlier marks, it is not open for me to find that they do not possess at least the minimum level of distinctiveness required for registration. Nevertheless, whilst I can conclude that FGDC's marks possess distinctive character, this is only on the low side.

33) I must also consider the effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act. Mr Hinchcliffe conceded that there has been some enhancement to distinctive character, but that this is only in respect of the mark FEEL GOOD DRINKS and only in respect of fruit

¹ "ambrosia". Oxford Dictionaries. April 2010. Oxford Dictionaries. April 2010. Oxford University Press. 8 June 2011 <<http://oxforddictionaries.com/definition/ambrosia>>.

drinks. My reading of the evidence leads me to the same conclusion. In my consideration of the Section 5(2)(b) grounds of opposition, I have compared what I consider to be FGDC's best case, namely its reliance upon the marks FEEL GOOD SNACKS and FEEL GOOD CONFECTIONERY. There is no use shown in respect of either of these marks, however, I should say here that this does not alter the findings that follow.

Likelihood of confusion

34) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27).

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 II-5213, 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.

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 STONYFIELD FARM WE MAKE YOU FEEL GOOD INSIDE and BEBEO 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".

41) I note Mr Norris' submission that FGDL has considered a business link-up with *Nestle* to produce a range of FEEL GOOD PUDS. This is of little value as it does not illustrate use on the market, but rather that only discussions took place.

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.

Concurrent use

44) In light of the use claimed, by Premier, of its mark, I believe that I must comment briefly on the issue of concurrent use.

45) Having found that a *prima facie* likelihood of confusion exists, the only factor that can save the application is the existence and effect of concurrent use. Ms Emery, in her witness statement, discloses that 21 million puddings have been sold amounting to a turnover of £9.9 million. I note that the products bearing its mark were first advertised in August 2009 and not put on the market until October 2009. Both these dates are after the relevant date in these proceedings (being the filing date of 19 May 2009). As such, this use fails to support the necessary requirement for the parties to have traded in circumstances that suggest consumers have been exposed to both marks and have been able to differentiate between them without confusion as to trade origin.

46) My *prima facie* finding that there is a likelihood of confusion remains undisturbed.

Section 5(3) and Section 5(4)(a)

47) In light of my findings in respect to the grounds based upon Section 5(2)(b) of the Act, it is not necessary for me to consider the grounds based upon Section 5(3) and Section 5(4)(a). However, I will say briefly that, as FGDL claims a reputation only in respect of the mark FEEL GOOD DRINKS and only in respect of drinks products, its success under these grounds would be less extensive than the level of success based upon its Section 5(2)(b) grounds.

COSTS

48) The opposition having been successful, FGDC is entitled to a contribution towards its costs. I take account of the fact that a hearing has taken place and that evidence has been filed, but that it did not assist me in reaching my decision. I award costs on the following basis:

Preparing Notice of Opposition and considering statement of case in reply	£500
Preparing and filing evidence and considering other sides' evidence	£500
Preparation and attendance at hearing	£600
TOTAL	£1600

49) I order Premier Foods Group Limited to pay The Feel Good Drinks Company Limited the sum of £1600. 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 22nd day of June 2011

**Mark Bryant
For the Registrar,
the Comptroller-General**

ANNEX

FGDC's Earlier Marks

Mark number and text and relevant dates	Relevant Goods and Services
<p>Community Trade Mark (CTM) 6234488</p> <p>FEEL GOOD SNACKS</p> <p>Filing date: 20 August 2007</p> <p>Registration date: 1 September 2009</p>	<p>Class 29: <i>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.</i></p> <p>Class 30: <i>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.</i></p> <p>Class 31: <i>Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt; all the aforesaid goods with the exception of potato-based or potato-containing products.</i></p>

	Class 43: <i>Services for providing food and drink; temporary accommodation.</i>
2386128 FEEL GOOD CONFECTIONERY Filing date: 4 March 2005 Registration date: 2 June 2006	Class 29: <i>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.</i> Class 30: <i>Confectionery, confectionery for decorating Christmas trees.</i>
CTM5591251 THE FEEL GOOD FOOD COMPANY Filing date: 19 December 2006 Registration date: 01 October 2008	Class 29: <i>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.</i> Class 30: <i>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.</i>

	<p>Class 31: <i>Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt; all the aforesaid goods with the exception of potato-based or potato-containing products.</i></p> <p>Class 43: <i>Services for providing food and drink; temporary accommodation.</i></p>
<p>2379321</p> <p>FEEL GOOD FRUITS</p> <p>Filing date: 30 November 2004</p> <p>Registration date: 15 December 2006</p>	<p>Class 29: <i>Jellies, fruit jams, fruit sauces, milk and milk products, smoothies, yoghurt drinks, milkshakes/drinks, flavoured milk, soft drinks made with milk or milk extracts, soft drinks made with yoghurt or yoghurt extracts.</i></p> <p>Class 32: <i>Mineral and aerated waters, other non-alcoholic drinks, fruit drinks, fruit juices, syrups and other preparations for making beverages.</i></p>
<p>2397763</p> <p>FEEL GOOD DRINKS</p> <p>Filing date: 26 July 2005</p> <p>Registration date: 01 September 2006</p>	<p>Class 29: <i>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.</i></p> <p>Class 30: <i>Confectionery, confectionery for decorating Christmas trees.</i></p> <p>Class 32: <i>Mineral and aerated water, other non-alcoholic drinks, fruit drinks, fruit juices, syrups and other preparations for making beverages.</i></p>
<p>CTM5250113</p> <p>FEEL GOOD DRINKS</p> <p>Filing date: 26 July 2006</p> <p>Registration date: 21 April 2009</p>	<p>Class 29: <i>Jellies, fruit jams, milk and milk products, yoghurt drinks, flavoured milk, soft drinks made with milk or milk extract, soft drinks made with yoghurt or yoghurt extract.</i></p> <p>Class 30: <i>Confectionery, confectionery for decorating Christmas trees, fruit sauces.</i></p> <p>Class 32: <i>Smoothies.</i></p> <p>Class 43: <i>Services for providing food and drink; temporary accommodation, restaurant, bar and catering services.</i></p>
<p>2386121</p> <p>FEEL GOOD JUICES</p>	<p>Class 29: <i>Jellies, fruit jams, fruit sauces, milk and milk products, smoothies, yoghurt drinks, flavoured milk, soft drinks made with milk or milk extracts, soft drinks made with yoghurt or yoghurt extracts.</i></p>

<p>Filing date: 04 March 2005</p> <p>Registration date: 02 June 2006</p>	<p>Class 32: <i>Mineral and aerated water, other non-alcoholic drinks, fruit drinks, fruit juices, syrups and other preparations for making beverages.</i></p>
<p>2386125</p> <p>FEEL GOOD JUICE BARS</p> <p>Filing date: 04 March 2005</p> <p>Registration date: 22 September 2006</p>	<p>Class 29: <i>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 extract.</i></p>
<p>CTM6224174</p>  <p>Filing date: 23 August 2007</p> <p>Registration date: 14 September 2009</p>	<p>Class 29: <i>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.</i></p> <p>Class 30: <i>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.</i></p> <p>Class 31: <i>Agricultural, horticultural and forestry products and grains not included in other classes; live</i></p>

	<p><i>animals; fresh fruits and vegetables; seeds, natural plants and flowers; foodstuffs for animals, malt.</i></p> <p>Class 43: <i>Services for providing food and drink; temporary accommodation.</i></p>
<p>2386123</p> <p>THE FEEL GOOD DRINKS COMPANY</p> <p>Filing date: 04 March 2005</p> <p>Registration date: 9 December 2005</p>	<p>Class 29: <i>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.</i></p> <p>Class 30: <i>Confectionery, confectionery for decorating Christmas trees.</i></p> <p>Class 43: <i>Services for providing food and drink; temporary accommodation, restaurant, bar and catering services.</i></p>