

IN THE MATTER OF APPLICATION NO. 2319763 IN THE NAME OF  
MATTHEWS FOODS PLC

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DECISION

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Introduction

1. On 28 December 2002 Matthews Foods plc applied to register the trade mark GO COOK! in respect of the following goods in Class 29:

Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats.

2. Objection was taken that registration would be contrary to section 3(1)(b) of the Trade Marks Act 1994 which provides:

3.(1) The following shall not registered-

...

(b) trade marks which are devoid of distinctive character.

3. Following a hearing the objection was maintained for reasons set out in a written decision of Anne Pritchard acting for the Registrar dated 23 January 2004. The applicant now appeals against that decision. Neither the applicant nor the Registrar wished to make oral representations and accordingly I am determining the case on the basis of the applicant's written representations in accordance with rule 65(3)(a) of the Trade Marks Rules 2000 as amended by the Trade Marks (Amendment) Rules 2004.

### The hearing officer's decision

4. In her decision the hearing officer began by noting that no evidence of use was relied on. She went on to reject an attempt by the applicant to rely upon the registration of other marks consisting of GO plus another word, observing that she had to consider the instant application upon its own merits and in accordance with current law. She then stated that section 3(1)(b) was a separate and distinct objection to registration to section 3(1)(c). So far as section 3(1)(b) was concerned, she directed herself that the approach to be followed was that set out in the decision of the European Court of Justice in Joined Cases C-53/01 to C-55/01 *Linde AG v Deutsches Patent- und Markenamt* [2003] RPC 45 at [37], [39]-[41] and [47]. Next she reminded herself that she was required to assess the distinctive character of the mark in relation to the goods for which registration was sought and that she should have regard to the perception of consumers of such goods, whom she considered to be the general public. She concluded that the mark was not eligible for registration for reasons which she expressed as follows:

13. Assuming notional and fair use of the mark, which includes use on the packaging of the goods as well as in advertising, it seems unlikely to me that the relevant consumer would consider this mark to denote trade origin because it will simply be seen as an invitation to buy the goods and "Go Cook!" with them. The elliptical nature of the mark does not make it any more likely to denote that the goods originate from one particular trader, because the public are used to seeing shorthand used in the promotion of goods and the exclamation mark, if anything, simply reinforces the message.
14. I am not persuaded that the mark GO COOK! in totality is distinctive in that it would serve in trade to distinguish the applicant's goods from those of other traders. In my view the mark applied for will not be identified as a trade mark without first educating the public that it is one. I therefore conclude that the mark applied for is devoid of any distinctive character and is thus excluded from prima facie acceptance under Section 3(1)(b).

### Standard of review

5. This appeal is a review of the hearing officer's decision. In my judgment the hearing officer's decision with regard to section 3(1)(b) involved a multi-factorial assessment of the kind to which the approach set out by Robert Walker LJ in *REEF TM* [2002] EWCA Civ 763, [2003] RPC 5 at [28] applies:

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.

### Applicant's submissions

6. In essence the applicant makes two submissions in support of the appeal. The first is that the mark sought to be registered consists of a combination of three elements, viz. the word GO, the word COOK and an exclamation mark. The applicant argues that, whatever might be position with regard to the word COOK alone, the combination of these three elements makes a distinctive whole. Although the applicant does not make the point explicitly, I understand it to be contending that the hearing officer fell into error in not taking proper account of all the overall effect of the combination.
7. The second submission is that the present application should be allowed because numerous previous marks have been registered which comprise GO plus a verb or noun which either directly describes or relates to the nature of the products or services for which the marks are registered.

### Assessment

8. So far as the applicant's first submission is concerned, in my judgment it is clear that the hearing officer did consider the mark as a whole and hence the combined effect of the three constituent elements. In reality the applicant is asking me to take a different view from the hearing officer in the absence of any error of law, principle or approach on the part of the hearing officer. As *REEF TM* and the cases cited therein make abundantly clear, this is not a

proper basis for an appeal. I am satisfied that the hearing officer approached the matter correctly and reached a decision which was, to put it at its lowest, a tenable decision to reach.

9. As to the second submission, the hearing officer was entirely right to reject this contention when it was advanced before her for the reasons she gave: see e.g. *British Sugar plc v James Robertson & Co Ltd* [1996] RPC 281 at 305.

### Conclusion

10. The appeal is dismissed. In accordance with the usual practice there will be no order for costs.

16 July 2004

RICHARD ARNOLD QC

Bailey Walsh & Co acted for the applicant.