

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2147651
BY NEW ZEALAND DAIRY BOARD
TO REGISTER A TRADE MARK IN CLASS 29**

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DECISION AND GROUNDS OF DECISION

1. On 10 October 1997, New Zealand Dairy Board of Pastoral House, 25 The Terrace, Wellington, New Zealand, a body constituted under the Dairy Board Act of 1961 of New Zealand, applied to register the mark FREE RANGE in Class 29 in respect of "Milk, butter, cheese, milk powder and other milk products".
2. Objection was taken under Sections 3(1)(b) and (c) of the Act on the grounds that the mark consists exclusively of the words FREE RANGE being a sign which may serve in trade to designate the kind of goods e.g. dairy products produced in natural non-intensive conditions.
3. At a hearing, at which the applicants were represented by Dr D A Sarup of Raworth, Moss & Cook, their trade mark agents, the objections under Sections 3(1)(b) and (c) were maintained. Following refusal of the application under Section 37(4) of the Act, I am now asked under Section 76 of the Act and Rule 62(2) of the Trade Marks Rules 2000 to state in writing the Grounds of Decision and the materials used in arriving at it.
4. Sections 3(1)(b) and (c) of the Act read as follows:

"Section 3(1) The following shall not be registered -

- (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,

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."

5. No evidence of use has been put before me, therefore the proviso to this Section of the Act does not apply and I have only the prima facie case to consider.
6. The mark consists of the words FREE and RANGE which, individually are so well-known that I do not believe I need to set out their individual dictionary meanings here. I am, in any case, bound to accept or reject the mark in its totality. However, the combination, itself also has a dictionary meaning. The agent argued that different dictionaries have different definitions. This is so. For example the Registrar has relied on the definitions in The Concise Oxford Dictionary, 10th Edition which says:

"free-range. adj. (of livestock or their produce) kept or produced in natural

conditions, where the animals have freedom of movement".

7. The Collins English Dictionary (2nd Edition) says:

"free-range adj. Chiefly Brit. Kept or produced in natural non-intensive conditions: free-range hens; free-range eggs"

8. Dr Sarup, on the other hand, drew my attention to alternative definitions such as The Oxford English Dictionary, Second Edition which gives the definition for FREE RANGE as:

"(a) U.S., free pasturage; (b) used esp. attrib. of chickens given freedom to range for food (opp. battery 13c); so free-range egg, etc.,"

9. Dr Sarup also stressed that other definitions do not indicate such a wide interpretation as the first two above.

10. In my view, the first two definitions above are quite clear in indicating the descriptiveness of the mark applied for in relation to the goods at issue but are not, in themselves, the only reason for maintaining the objections. I believe the UK public are very familiar with the term "free-range" in relation to eggs and poultry, and would have an expectation of eggs produced from free-range poultry being birds kept in the way defined above, a fact which I understand Dr Sarup does not dispute. I also understand from Dr Sarup that "free range" is defined in Annex II to European Commission Regulation (EC) No 1274/91 of 15 May 1991 in relation to marketing standards for eggs, although the existence of this Regulation may be less well-known to the UK purchasing public.

11. I consider, from my own knowledge and use of the language, that if the average consumer saw the term "free-range" used in connection with dairy products he or she would, by natural association with the known term for eggs and poultry assume it to refer to goods produced from livestock allowed to move freely rather than using intensive farming methods. He or she would not, necessarily, expect there to be a regulation in place to define such goods (as is the case with eggs) but would not perceive the term as a badge of trade origin unless educated to the idea through use/advertising.

12. Dr Sarup argued that the term was fanciful in relation to the goods at issue and further said that other well-known terms such as GARDEN FRESH, TENDERISED or PLIMSOLL would also be seen as fanciful for such goods. However, I consider that the goods, or at least the nature of the goods (being animal produce), are much closer to those where the term FREE RANGE is meaningful and, for the reasons given above, is likely to be seen as describing a characteristic of the goods, rather than as a badge of trade origin.

13. In submitting Form TM5 requesting the Statement of Grounds Dr Sarup asked for a "clear definition" of what I believe the term FREE RANGE means in relation to milk products. If I was to rely on a definition I would say that the one outlined above by The Concise Oxford Dictionary, 10th Edition would set it out clearly in relation to the produce of livestock, which I take to include milk and milk products. I do not believe Dr Sarup expects me to set out a detailed "legal" definition, such as relates to EC Regulations for "free-range" eggs. Such definitions do not seem relevant to this case, but only to any legislation which may be brought in under such Regulations as the EC may see fit to introduce in relation to the marketing of such goods.

14. I need only consider the words under the terms of The Trade Marks Act and for the reasons given earlier I consider that the mark consists exclusively of a sign which may serve in trade to designate the kind or quality of the goods and is, therefore, excluded from registration by Section 3(1)(c) of the Act. For the same reasons I consider the mark to be devoid of any distinctive character and therefore not acceptable for registration under Section 3(1)(b) of the Act.
15. For completeness, I should also mention that letters were written to the Registry and copied to the applicants from The National Dairy Council, Scottish Milk, The National Dairymen's Association, The Dairy Industry Federation, The NFU, Milk Marque and numerous dairy companies. All refer to the dictionary definitions and express the view that the term FREE RANGE would convey to the public the living conditions of the animals producing the products and should not be monopolised by any one business. No account has been taken of these comments in reaching this decision as the objections being maintained in this decision are those raised by the Examiner and the comments, above, were received after the Examination Report was issued.
16. In this decision I have considered all the documents filed by the applicant and all the arguments submitted to me in relation to this application and, for the reasons given, it is refused under the terms of Section 37(4) of the Act because it fails to qualify under Sections 3(1)(b) and (c) of the Act.

Dated this 14 day of May 2001.

R A Jones
For the Registrar
The Comptroller General