

TRADE MARKS ACT 1994

**IN THE MATTER OF
APPLICATION No 2335213
BY OLD KENTUCKY RESTAURANTS LIMITED
TO REGISTER A TRADE MARK
IN CLASS 43**

DECISION AND GROUNDS OF DECISION

Background

1. On 18 June 2003 Old Kentucky Restaurants Limited of 27 Fleet Street, Birmingham, B3 1JP applied to register the trade mark **WHERE PEOPLE MEET PEOPLE MEET PEOPLE** for the following services:

Class 43 Public house services, bar services, café services, hotel services, restaurant and snack bar services; catering, catering services for the provision of food and drink.

2. Objection was taken to the mark under Section 3(1)(b) of the Act because the mark consists of a non-distinctive slogan that would not be seen to function as a trade mark.

3. At a hearing, at which the applicants were represented by Mr Baker of Hallmark IP Limited, their trade mark attorneys, the objection was maintained.

4. Following refusal of the application I am now asked under Section 76 of the Act and Rule 62(2) of the Trade Mark Rules 2000 to state in writing the grounds of my decision and the materials used in arriving at it.

5. No evidence of use has been put before me. I have, therefore, only the prima facie case to consider.

The Law

6. Section 3(1)(b) of the Act reads as follows:

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

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

The Case for Registration

7. In correspondence prior to the hearing Mr Baker suggested that the trade mark applied for “*does not have an immediately obvious semantic meaning*” and “*is clearly a lexical invention*”. He made particular reference to the fact that the word PEOPLE appears three times and the word MEET appears twice. Mr Baker went on to state that “*The average consumer would perceive the mark in question as an unusual combination of words, and as such, the mark would be regarded as memorable and*

therefore distinctive”.

8. At the hearing Mr Baker stressed the repetition of the combination **MEET PEOPLE** which the applicants see as the key feature of the mark. I explained to Mr Baker that in my view a significant proportion of the relevant consumers would perceive the mark in the following way:

**WHERE PEOPLE MEET
PEOPLE MEET PEOPLE**

9. When viewed in this way any distinctive character brought to the mark by the repetition of the combination **MEET PEOPLE** is lost.

10. In correspondence following the hearing Mr Baker confirmed that the preferred manner of using this mark is on one continuous line i.e.

WHERE PEOPLE MEET PEOPLE MEET PEOPLE

11. Mr Baker also provided some examples of the mark in use. These are attached as Annex A.

Decision

12. The test to be applied in respect of this application is not whether the mark, in its totality, is a combination which is used in common parlance to describe the services applied for but whether the mark, again in its totality, is devoid of any distinctive character. The whole purpose of Section 3(1)(b) of the Act is to prohibit registration of signs which, although not caught by the clear parameters set out by Sections 3(1)(c) and (d) of the Act are, nevertheless, incapable of distinguishing the goods and services of one undertaking from those of other undertakings.

13. The approach to be adopted when considering the issue of distinctiveness under Section 3(1)(b) of the Act has recently been summarised by the European Court of Justice in paragraphs 37, 39 to 41 and 47 of its Judgment in *Joined Cases C-53/01 to C-55/01 Linde AG, Windward Industries Inc and Rado Uhren AG* (8th April 2003) in the following terms:

“37. It must first of all be observed that Article 2 of the Directive provides that any sign may constitute a trade mark provided that it is, first, capable of being represented graphically and, second, capable of distinguishing the goods and services of one undertaking from those of other undertakings.

.....

39. Next, pursuant to the rule 1 Article 3(1)(b) of the Directive, trade marks which are devoid of distinctive character are not to be registered or if registered are liable to be declared invalid.

40. For a mark to possess distinctive character within the meaning of that provision it must serve to identify the product in respect of which

registration is applied for as originating from a particular undertaking, and thus to distinguish that product from products of other undertakings (see Philips, paragraph 35).

41. In addition, a trade mark's distinctiveness must be assessed by reference to, first, the goods or services in respect of which registration is sought and, second, the perception of the relevant persons, namely the consumers of the goods or services. According to the Court's case-law, that means the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect (see Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 31, and Philips, paragraph 63).

.....

47. As paragraph 40 of this judgment makes clear, distinctive character means, for all trade marks, that the mark must be capable of identifying the product as originating from a particular undertaking, and thus distinguishing it from those of other undertakings."

14. The Registrar's **Practice Amendment Notice (PAN) 7/02** on slogans says, at paragraph 13, that:

"a mark that is free from objection under Section 3(1)(c) may still be devoid of any distinctive character because it sends a message that could apply to any undertaking and is not therefore capable of individualising the goods or services of one undertaking".

15. This notice goes on to suggest areas where an objection under Section 3(1)(b) may be relevant but does not purport to give an exhaustive list.

16. It is essential that the distinctive character of a trade mark is assessed in relation to the services for which the applicant seeks registration. The specification for which registration is sought covers a range of services in Class 43 which are generally concerned with the provision of food and drink. This is confirmed by the examples provided at Annex A which show the mark in use in relation to such services.

17. I must, of course, assume fair and notional use of the mark in relation to the provision of the services applied for. Such use includes use in advertising wherein it is customary for advertisements to use abbreviated language, a notion endorsed by Mr Simon Thorley QC sitting as the Appointed Person in "Where all your favourites come together" – see BL 0/573/01.

18. I accept that the test for registering slogans is no different than for any other type of marks but as slogans are often used for advertising purposes they may not be so readily accepted by the general public as an indication of trade source as would more traditional signs such as words, brands, logos and figurative marks (see the Judgement of the Court of First Instance in "REAL PEOPLE REAL SOLUTIONS" – Case T-130/01 5 December 2002). I also accept that lack of originality per se is not fatal to the outcome of the application for registration.

19. The trade mark applied for must be assessed by reference to how the mark is perceived by the relevant consumer who, in respect of the services contained within the specification applied for are, in my view, the general public. I should make it clear that although the applicants have filed several documents in support of this application (See Annex A) I am not considering a case of acquired distinctiveness through use of the trade mark applied for.

20. It is clear from the examples provided at Annex A that the mark is used in two ways. In five of the examples the mark is used in the following format:

WHERE PEOPLE MEET PEOPLE MEET PEOPLE

21. By way of contrast there are seven examples of the mark being used in the following format:

**WHERE PEOPLE MEET
PEOPLE MEET PEOPLE**

This is, of course, the same words presented in a different format but it is, in my view, fair and normal use of the trade mark applied for.

22. In my view the relevant public, bearing in mind that services relating to the provision of food and drink are services that are in common supply from a large number of sources, would not consider this mark to denote trade origin. Restaurants, bars and other establishments which traditionally provide food and drink have for many years been used by members of the public for the purposes of meeting other people. These may be people meeting at an agreed place or it may be people meeting each other on an informal basis once they are on the premises of such establishments. Members of the public may encounter this mark when entering the premises, once they are inside the premises or in some form of advertising in which the services provided are set out, perhaps as shown at Annex A. A significant proportion of these members of the public are likely to perceive this mark as a slogan indicating that the premises where it is displayed are suitable for meeting other people. In my view they will not place any trade mark significance on it.

23. I find support for this in a decision by The Court of First Instance – Case T-281/02, *Norma Lebensmittelfilialbetrieb GmbH & Co KG v. OHIM (Mehr für Ihr Geld)* at paragraphs 31 and 32:

“31. In that regard, the applicant’s argument that the consumer is told nothing about the content or nature of the goods offered under the mark is irrelevant, because he does not know to what the word “more” relates. For a finding that there is no distinctive character, it is sufficient to note that the semantic content of the word mark in question indicates to the consumer a characteristic of the product relating to its market value which, whilst not specific, comes from promotional or advertising information which the relevant public will perceive first and foremost as such, rather than as an indication of the commercial origin of the goods (see, to that effect, *REAL PEOPLE, REAL SOLUTIONS*, paragraphs 29 and 30). In addition, the mere fact that the word mark “Mehr für Ihr Geld” does not convey any information about the nature of

the goods concerned is not sufficient to make that sign distinctive (see, to that effect, BEST BUY, paragraph 30).

32. Furthermore, there is nothing about the mark applied for “Mehr fur Ihr Geld”, that might, beyond its obvious promotional meaning, enable the relevant public to memorise it easily and instantly as a distinctive trade mark for the goods designated. Even if the mark applied for were used alone, without any other sign or trade mark, the relevant public could not, in the absence of prior knowledge, perceive it otherwise than in its promotional sense (REAL PEOPLE, REAL SOLUTIONS, paragraph 28).”

24. I am not persuaded that the words **WHERE PEOPLE MEET PEOPLE MEET PEOPLE** in combination are distinctive in that they would serve in trade to distinguish the goods and services of the applicant 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 a trade mark. 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) of the Act.

Conclusion

25. In this decision I have considered all the documents filed by the applicants 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 Section 3(1)(b) of the Act.

Dated this 20th day of September 2004

A J PIKE
For the Registrar
The Comptroller-General

ANNEX IS NOT ATTACHED