

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No 2150507
BY KELLOGG COMPANY TO REGISTER THE
MARK ALL-BRAN BUDS IN CLASS 30**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER
No 48416 BY ALLIED BAKERIES LIMITED**

TRADE MARKS ACT 1994

5 **IN THE MATTER OF Application No 2150507**
by Kellogg Company to register the mark
All-Bran Buds in Class 30

and

10 **IN THE MATTER OF Opposition thereto under**
No 48416 by Allied Bakeries Limited

15 **DECISION**

On 10 November 1997 Kellogg Company applied to register the mark ALL-BRAN BUDS in
Class 30 for a specification of goods which reads "Farinaceous products, cereals and
20 preparations made from cereals; flour, bread, biscuits, cakes, pastry, non-medicated
confectionery; honey, treacle, baking powder, prepared meals; snack foods for human
consumption".

The application is numbered 2150507.

25 On 21 April 1998 Allied Bakeries Limited filed notice of opposition to this application. In
summary the grounds are:

- 30 (i) under Section 5(2)(b) having regard to UK and Community trade marks in the
ownership of the opponents (see below for details);
- (ii) under Section 5(3) by reason also of the opponents trade marks referred to
below and the existence of dissimilar goods;
- 35 (iii) under Section 5(4)(a) in that use of the mark applied for would be liable to be
prevented by the law of passing off;
- (iv) under Section 3(3)(b) in that the application in suit is of such a nature as to
deceive the public as to the nature and origin of the goods;
- 40 (v) under Section 3(4) in that use of the mark is liable to be prevented by virtue of
the provisions of Community law.

Details of the opponents' marks are as follows:

45

	No	Mark	Class	Specification
5	1068456	HIBRAN	30	Bread, flour, cakes, pastries, biscuits (other than biscuits for animals); and non medicated confectionery; preparations made from cereals for food for human consumption; all the aforesaid goods containing bran
10	29827	HIBRAN	30	Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour, bread, bread products, bakery products, pastry and confectionery; biscuits (other than biscuits for animals), cookies, cakes, gateaux; pitta bread, naan bread, bread rolls, croissants, baps, cobs, buns, crumpets, muffins, scones, pancakes, doughnuts, fruit bread, malt loaf, swiss rolls, pastries, brownies; crispbread, shortcake, flan cases wafers, crisprolls; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ices; ice
15				
20				
25				The applicants filed a counterstatement making no admissions in respect of any of the above grounds and referring to two registrations of their own.

Both sides ask for an award of costs in their favour.

30 Both sides filed evidence. Neither side has asked to be heard but written submissions have been received under cover of a letter of 20 August 1999 from A A Thornton & Co on behalf of the opponents and a letter of 27 August 1999 from Haseltine Lake on behalf of the applicants. Acting on behalf of the Registrar and after a careful study of the papers (including the written submissions) I give this decision.

35

Opponents' Evidence

40 The opponents filed a statutory declaration dated 15 September 1998 by Louise White, the Marketing Controller of Allied Bakeries Ltd. She says that the trade mark HIBRAN was first used in 1976 and has been used continuously throughout the UK since that date in respect of bread. Retail sales in recent years have been as follows:-

45

YEAR	ESTIMATED VALUE OF SALES - RETAIL £ Sterling
1992	£ 30,618,000.00
1993	£ 24,386,000.00
1994	£ 19,013,000.00
1995	£ 16,992,000.00
1996	£ 13,392,000.00
1997	£ 11,227,000.00
1998 (annualised)	£ 9,973,000.00

5

10

The goods are sold throughout the United Kingdom primarily through supermarkets such as ASDA, Co-Op, Kwik Save, Safeway/Presto, Sainsbury, Somerfield, Tesco and Waitrose amongst others. Examples of the trade mark as applied to the goods are exhibited at LWI.

15

Ms White says that the Trade Mark is promoted both to retailers and directly to the end consumers. Promotion to retailers is typically by way of sale presenters. An example of a sale presenter is exhibited at LWII. Promotion to end consumers is by way of leaflets and posters as well as promotional offers in store, on or off packaging for the goods and through editorials in national magazines such as Good Housekeeping magazine. Examples of these types of promotions and promotional material are exhibited at LWIII.

20

A significant amount of promotion of the trade mark is also by way of advertisements in magazines such as "Cosmopolitan", "Good Housekeeping", "Options", "She", "Ideal Home", "Elle", "Prima", "New Woman", "Marie Claire", "BBC Good Food" and "Sainsburys Magazine" as well as newspapers, such as "The Independent Magazine" and "The Weekend Guardian".

25

In the period 8 February 1997 - 1 June 1997 £386,061.00 was spent on advertising. Examples of an advertisement that appeared in "The Grocer" published 8 February 1997 and "BBC Good Food" published June 1997 are exhibited at LWIV.

30

Finally Ms White makes a number of observations in relation to the respective marks.

Applicants' Evidence

35

This comes in the form of a declaration from David A Herdman, Kellogg's Corporate Counsel - Trade marks.

40

He notes that the mark applied for is an amalgamation of two very long standing names of his company that is to say ALL-BRAN and BRAN BUDS registered respectively for "bran products for food for human consumption" and "cereal preparations consisting predominantly

of bran". He exhibits certified copies of the registrations concerned (DAH1) along with a copy of a statutory declaration detailing evidence of use in support of the ALL-BRAN mark (DAH2). In the circumstances of this case I do not need to refer in detail to that evidence but I confirm that I have noted its contents. Mr Herdman too comments on the parties' respective marks.

Opponents' evidence in reply

Ms White has filed a further statutory declaration. Briefly she:

S notes that the applicants' use has been in relation to breakfast cereal preparations and expresses the view that, had this application been similarly limited it would not have concerned her company whose use has been in relation to bread

S comments on the applicants' specification and the fact that it could result in their using the mark ALL-BRAN BUDS on bread

S suggests that Mr Herdman's view on the similarity of marks has been made on the basis of existing uses of the respective marks and takes no account of the apparent intentions of his clients to move into uses of the mark for bread and similar goods.

That concludes my review of the evidence.

It is clear from the nature of the evidence and the written submissions that the opponents rely principally on the Section 5(2)(b) and 5(4)(a) grounds. I will deal with Section 5(2)(b) first. It reads as follows:

"5.-(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.

The term "earlier trade mark" is itself defined in Section 6 which so far as is relevant reads:

"6.-(1) In this Act an "earlier trade mark" means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark 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,

(b)

(c)

5

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

10

The opponents' UK registration (No 1068456) constitutes an earlier trade mark. Their CTM application (No 29827) has an earlier filing date and has matured to registration. It too is therefore, an earlier trade mark.

15

The correct approach to the interpretation of the expression "a likelihood of confusion on the part of the public" as used in Article 4(1)(b) and Section 5(2) was considered by the European Court of Justice in Case C-251/95 Sabel BV v Puma AG, Rudolf Dassler Sport [1998] RPC 199. The way in which the presence or absence of a "likelihood of confusion" should be assessed was identified in paragraphs 23 and 24 of the judgment of the court at 223:

20

"Article 4(1)(b) of the Directive does not apply where there is no likelihood of confusion on the part of the public. In that respect, it is clear from the tenth recital in the preamble to the Directive that the appreciation of the likelihood of confusion depends on numerous elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign, and between the goods or services identified'. The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case.

25

30

That global appreciation of the visual, aural or conceptual similarity of the mark in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The wording of Article 4(1)(b) of the Directive - 'there exists a likelihood of confusion on the part of the public' - shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.

35

40

In that perspective, the more distinctive the earlier mark the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact that the two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either per se or because of the reputation it enjoys with the public."

45

The opponents say in their written submissions that "in view of the conceptual, phonetic and visual similarities between the marks ALL-BRAN and HIBRAN, we believe that the public

would be confused by use of ALL-BRAN BUDS on goods which are the same as or similar to those in respect of which the opponent uses its marks HIBRAN". I note that there is a considerable degree of overlap between the specification of the opponents' registrations and that of the mark applied for though it seems that this notional overlap has not been replicated in trading terms up until now. Both parties, it seems to me, have adopted marks which, if not directly descriptive of certain of the goods within their specifications, are strongly allusive to the nature or content of those goods, that is to say goods with a high or wholly bran content. The above extract from Sabel v Puma indicates that the risk of confusion may be increased where the earlier mark has a particularly distinctive character per se. It seems to me that the opposite is also true. Marks whose claim to an inherently distinctive character is not particularly strong and which rely, or rely in part, on semi-descriptive matter must accept the consequence that smaller differences will serve to remove or reduce any risk of confusion.

In terms of the above test I see no visual or aural similarity between ALL-BRAN BUDS and HIBRAN. There is some conceptual similarity to the extent that both marks are intended to convey a characteristic of the goods (in terms of their bran content). But I do not consider that this factor in itself is a sufficient reason for me to come to the view that confusion will result particularly bearing in mind that the applied for mark is not ALL-BRAN but ALL-BRAN BUDS. I should also add that for reasons which I will touch on in relation to the Section 5(4)(a) ground I do not consider that the opponents' use of HIBRAN is of assistance to them. The opposition under Section 5(2)(b) fails.

Although Section 5(3) was referred to in the statement of grounds neither the opponents' evidence or written submissions deal with the ground. The provisions of Section 5(3) only come into play when the mark applied for is identical with or similar to an earlier trade mark. In dealing with Section 5(2)(b) I have already found that the marks are not similar such that there exists a likelihood of confusion on the part of the public and I can see no reason to come to a different finding in relation to the marks so far as dissimilar goods are concerned. Consequently, the opposition fails under Section 5(3).

I turn next to the objection based in Section 5(4)(a) which reads as follows:-

"(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark."

A summary of the elements of an action for passing off were set out in WILD CHILD trade mark (1998 RPC 455). Briefly, the opponents are required to establish that they have goodwill in an indicium; that there will be an operative misrepresentation and that there will be consequential damage.

I have already given my views on the respective marks as registered and applied for. There is a further factor in play when considering the opponents' use. So far as I can see all the opponents' exhibits (with one possible exception which appears to be part only of a piece of packaging) show use of HIBRAN in close association with other identifiers, these being
5 principally the words VITBE or ALLINSON. I acknowledge that HIBRAN is generally given rather greater visual prominence but the link with other marks is plain to see. Even accepting, therefore, that the opponents can make good a claim to goodwill based on their trading activities in bread they must in my view fail on the second leg of the test as there can be no misrepresentation in the light of my views on the respective marks and the manner in which
10 the opponents' mark is used. It follows also that there will be no damage arising from the applicants' use of their mark. The opposition fails under Section 5(4)(a).

In relation to the Section 3(3)(b) and 3(4) grounds the applicants have commented in written submissions that they have not been substantiated in evidence. I would also add that they have
15 not been explained or justified in the statement of grounds or the opponents' written submissions. I dismiss those grounds.

As the opposition has failed the applicants are entitled to a contribution towards their costs. I order the opponents to pay the applicants the sum of £485.
20

Dated this 20th day of September 1999

25

M REYNOLDS
For the Registrar
30 the Comptroller General