

O-382-10

In the matter of UK Trade Mark Application No. 2496802 BONJORNO
CAFÉ (AND DEVICE), in Class 30, in the name of
CARAVAN MARKETING COMPANY

and

Opposition No. 98479 thereto by SOCIÉTÉ DES PRODUITS NESTLÉ SA

and

In the matter of an Appeal to the Appointed Person by CARAVAN
MARKETING COMPANY against the Decision of the
Comptroller General dated 12 February 2010

DECISION

1. Caravan Marketing Company (“Caravan”) has applied to register the trade mark "Bonjorno Café" in device form for coffee. I reproduce the mark below. In this decision I shall refer to it as “the Application”.



2. There is an opposition by Société Des Produits Nestlé SA (“Nestlé”) on the basis of their own registered Community Trade Mark for the word mark "BONJOUR" (“the CTM”). This is registered inter alia in class 30 for, amongst other things, coffee.
3. The opposition was heard by the hearing officer, Mr. Bowen, on 12th February 2010. He upheld the opposition on the ground that there was a likelihood of confusion between the marks. The decision runs to some 50

paragraphs. It is very thorough and deals with all the arguments which were made before him. It sets out the relevant principles of law to be applied in cases where likelihood of confusion is alleged. Mr Gardner, who appeared on behalf of Caravan, did not challenge those principles.

4. It is well established that in appeals on matters involving a multifactorial assessment, such as whether there is a likelihood of confusion, it is not enough for an appellant simply to seek to dispute the ultimate conclusion of the hearing officer. The appellant must establish that the hearing officer made a material error of principle.
5. At the hearing before me Mr. Gardner ultimately put his case on two aspects of the decision of the hearing officer which he alleged amounted to errors of principle.
6. Firstly he alleged that the hearing officer had attributed the wrong level of inherent distinctive character to the CTM. The hearing officer held that the mark “BONJOUR” had a reasonable level of distinctive character in the field of coffee.
7. It was common ground that the word “BONJOUR” would be understood by the average consumer as a French greeting having the meaning in English of "good morning" or "good day". Mr Gardner suggests that the CTM is therefore of a descriptive or laudatory character when applied to coffee, and

that the hearing officer should have proceeded on the basis that it had a very low level of distinctive character.

8. I do not agree. It seems to me that that the hearing officer was plainly correct in his finding. The mark does not in any way describe the product, nor is it a laudatory term, whether in the context of coffee or more generally. There may be an allusive character to the mark in that it conjures up the idea of a good day or a good start to the day, but that, as has been remarked on many occasions, is the quality of many a perfectly distinctive trade mark. This, in my view, is such a mark. I therefore reject the suggestion that the hearing officer erred in any way in determining the level of inherent distinctive character of the CTM.
9. Mr Gardner's second point (made somewhat more faintly than the first) was that there is a degree of brand loyalty when it comes to buying coffee, and the fact that consumers can be assumed to care what brand of coffee they are buying should therefore be taken into account as making confusion less likely.
10. The primary difficulty with that argument is that the hearing officer clearly did take the point into account in his decision at paragraph 19 where he said as follows:

"While I accept that the cost of the goods in issue is relatively

low and this will impact on the average consumer's level of attention, my own experience suggests that insofar as coffee is concerned, some average consumers are likely to know what type and brand of coffee they prefer and are, as a result, likely to display a degree of brand loyalty when making their selection. In those particular circumstances the average consumer's level of attention is likely to be increased somewhat".

11. The suggestion that the hearing officer erred in principle by not taking account of the point is therefore not tenable. He weighed it up as part of the multifactorial exercise which he had to undertake.

12. I should however make it clear that I do not accept the argument that “brand loyalty” is a factor which may be taken into account as reducing likelihood of confusion. Two decisions of the UK Trade Mark Registry in opposition proceedings were cited by Mr Gardner in support of his submissions on this point: *Boheme 1795* (O-257-10 – decision of Mr Oliver Morris) and *Soprano Cigarettes* (O-178-09 – decision of Mr Mark Bryant).

13. In *Boheme 1795* the following comment was made:

"The goods here are not the most expensive of products, nor are they infrequent purchases. However, they are still likely to be purchased with at least a reasonable degree of care and attention given that taste, and to some extent brand loyalty, is likely to play a part in the selection process. There is, therefore, no significant increase or decrease from the norm in respect of the degree of care and attention likely to be deployed by the average consumer when purchasing the goods".

14. In *Soprano* cigarettes the hearing officer went a little further, saying:

"It is my experience that tobacco products tend to inspire a certain degree of brand loyalty and, as a result, the purchase of such goods involves more than the average level of attention that is associated with normal consumer products".

15. I do not accept that a generalized concept of “brand loyalty” is of any real assistance in assessing likelihood of confusion. First of all it is very hard, in my view, to identify particular categories of product or service as inspiring more brand loyalty than others. Secondly, even if were established that there was a high degree of brand loyalty in a particular field, I do not see how this would advance matters. We are concerned with the likelihood of confusion, not the degree of disappointment which would be caused by an incident of confusion. Questions of likelihood of confusion are always to be approached from the point of view of the “reasonably observant and circumspect” consumer. I do not understand how brand loyalty can be said to affect the consumer’s observation skills or his circumspection. Thirdly, it is rather odd to assume that the concept of “brand loyalty” associated with a general class of products or service tends to reduce the likelihood of confusion, when we are also told by the European Court [*Sabel v Puma* [1998] RPC 199 at 22-24] to assume that a high reputation associated with a specific brand of products or services tends to increase the likelihood of confusion.

16. In all the circumstances I uphold the decision of the hearing officer. For my part I would have reached the same decision. But even that were not the case, I would still have upheld his decision because it does not contain any error of principle.

17. The appeal is dismissed. I order that the appellant shall pay £800 in costs to the respondent.

IAIN PURVIS QC

THE APPOINTED PERSON

04.10.10