

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3333647 IN THE NAME
OF BIOCARE LIMITED**

TO REGISTER A SERIES OF TWO MARKS

BioAcidophilus

BIOACIDOPHILUS

IN CLASS 5

DECISION

Introduction

1. This is an appeal against a decision of Dafydd Collins, acting on behalf of the Registrar of Trade Marks, dated 28 April 2020 (O-262-20). The application concerned an application to register a series of two marks BioAcidophilus and BIOACIDPHILUS in respect of a variety of goods in Class 5 (“*the Application*”). The Hearing Officer refused the Application pursuant to section 3(1)(c) of the Trade Marks Act 1994 (“*the 1994 Act*”).
2. On 23 August 2018 Biocare Limited (“*the Applicant*”) filed the Application.
3. On 30 August 2018 an examination report was issued on behalf of the Registrar which contained objections under sections 3(1)(b) and 3(1)(c) of the 1994 Act. The section 3(1)(c) objection was raised on the basis that the mark consists of signs which may serve in trade to designate the kind of the goods e.g. pharmaceutical preparations containing biological acidophilus. The section 3(1)(b) objection was not independent of the objection under section 3(1)(c) and the finding of non-distinctiveness being in the present case the automatic consequence of the sign being considered to be descriptive.
4. A hearing was appointed which took place on the 5 December 2018. On 10 December 2018 a Hearing Report was issued on behalf of the Registrar in which the Hearing Officer maintained the objection to registration. The Applicant was provided 3 months in which to file evidence of acquired distinctiveness.
5. On 11 March 2019 the Applicant filed evidence in the form of the witness statement of Emma Ellis, the Managing Director of the Applicant, together with 14 exhibits. On 22 March 2019 the Hearing Officer informed the Applicant that the evidence was not sufficient but that the Applicant was entitled to request a further hearing to discuss the evidence.

6. On 9 April 2019 a hearing was requested which subsequently took place on 18 June 2019. On 1 July 2019 a Hearing Report was issued by the Hearing Officer giving reasons for why the evidence filed was not sufficient to overcome the objection to registration and providing further time for the Applicant to file additional evidence.
7. On 22 November 2019 a witness statement of Jason Oakley, the new Managing Director of the Applicant was submitted together with 22 exhibits.
8. Having reviewed all the evidence filed the Hearing Officer took the view that the evidence did not demonstrate acquired distinctiveness as a result of use and therefore refused the application under section 37(4) of the 1994 Act. On 28 January 2020 the Applicant filed a Form TM5. On 28 April 2020 the Hearing Officer issued his Decision refusing the Application.

The Hearing Officer's Decision

9. Having reviewed the chronology of the application and provided an analysis of the evidence (at paragraphs [7] to [20] of the Decision) the Hearing Officer turned to consider first the *prima facie* position under section 3(1)(c) of the 1994 Act and then the issue of acquired distinctiveness.
10. With regard to the *prima facie* case the Hearing Officer found in so far as is relevant for the purposes of the present appeal as follows (footnotes excluded):

25. The term 'BioAcidophilus' consists of the words 'Bio' and 'Acidophilus'. I consider the meaning of the words to have been firmly established during the proceedings and, in respect of the term 'Acidophilus', it has been supported by reference to highly reputable dictionaries, including hyperlinks to their online format. Nevertheless, I shall explain my opinion anew. The term 'Bio', I would argue, is categorically known as referring to 'Biological', or in the alternative, 'Biology'. For the avoidance of doubt I refer to the judgment of 5 December 2002, T-91/01, *BioID*, paragraph 28, where it was found that the prefix 'Bio' may constitute either an abbreviation of the adjective biological or biometrical, or the abbreviation of the noun biology. This was confirmed in C-37/03 P, *BioID*, at paragraph 12. The second term 'Acidophilus' is defined as a lactic-acid producing bacterium which is useful in restoring bacterial balance in the intestine (Collins Dictionary). It is frequently referred to in dictionaries as being used therapeutically to promote intestinal health. As a whole, the concept of the sign does not create an impression far removed from the simple combination of the descriptive parts. Rather, the concept of the sign BioAcidophilus is that of biological, lactic-acid producing bacterium designed to promote intestinal health.

26. The combination of words follows the rules of English grammar and syntax in so far as the adjective 'Bio' precedes the noun 'Acidophilus'. The sign will be read as Bio (adjective) Acidophilus (noun). The pause between the terms will be immediately obvious due to placement of the capital letters in the sign applied for, and/or by the natural break caused by the recognition of the prefix 'Bio'. I disagree with the attorney's submission that the term 'Bio' adds distinctive character to the sign, and will instead be understood in a purely descriptive capacity.

...

30. It is reasonable to assume that more specialist consumers of the goods in Class 5 may have a specific interest in intestinal or vaginal health, for humans or animals. This is due to the fact that the term Acidophilus is defined as a lactobacillus that is used to promote vaginal and intestinal health. Because a specialist consumer tends to have specific needs, it is a reality that such consumer will have conducted research and will display due diligence when purchasing products intended to remedy or prevent intestinal or vaginal issues. Such a consumer is therefore not only likely to be aware that acidophilus is used therapeutically to promote intestinal and vaginal health, but will also understand that 'Bio' means biological. Therefore, when searching for goods which could be used to help remedy or prevent vaginal or intestinal issues, they will understand the term Bio-Acidophilus to describe an active ingredient. This would apply to an extensive list of goods in Class 5, including those not specifically identified as relating to intestinal or vaginal health. For example, whilst a specialist consumer with a pre-existing knowledge of what Bio-acidophilus is will expect it to be contained within goods such as *vaginal suppositories*; and *veterinary preparations for the treatment of alimentary conditions in domestic animals*, they will also assume that it is contained within the majority of less specific goods applied for, such as *probiotic preparations*; *homeopathic substances*; *dietetic preparations*; *dietary supplements*; *medicated preparations for prophylactic use in animals*; *infants and invalid's food* etc. The assumption that the term is descriptive of an ingredient can even extend to goods which ordinarily fulfil other purposes. For example, whilst it is clear that *vitamins* and *tonics* can be used for more everyday conditions, such as vitamin C or iron deficiencies, the specialist consumer will assume that in instances whereby *vitamins* and *tonics* are sold under the term BioAcidophilus it is because they have been designed for promoting intestinal and vaginal health. It is also possible that such an assumption could even extend to some of the remaining goods, including *nutritional sports drinks*.

31. In relation to the general consumer of Class 5 products, who does not necessarily have a pre-existing or pre-determined specific interest in goods containing acidophilus for the purposes of remedying/improving vaginal and intestinal health in either humans or animals, they will still nevertheless assume that the goods contain Bio-Acidophilus. As previously identified, the consumer of Class 5 goods is considered to be reasonably well-informed and circumspect. Such a consumer already knows that the prefix 'Bio' refers to biological (see C-37/03 P *BioID* para 12). Such a consumer will also simply assume that the term 'Acidophilus' refers to an element contained within the goods. This is based on two main reasons. The first reason is that it is practice in the trade of goods in Class 5 to readily present information pertaining to their content, in order to allow a consumer to select the relevant product. The second reason is that, as identified by Ms Linda Smith in her examples, the term 'Acidophilus' is a frequent feature in relation to medicinal, pharmaceutical and veterinary products. Therefore, it is highly likely that a well-informed and circumspect consumer will already be aware of the existing use of the term Acidophilus in trade, and will also be aware of the trend in the trade to place information as the content of the product front-and-centre, and will ultimately therefore assume that Bio-Acidophilus is descriptive of a component/ingredient/element contained within all of the goods applied for in Class 5 to some degree.

32. It is settled law that the registrability of a sign must be assessed in context first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the relevant public's perception of the mark (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPNNederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50). The goods applied for can be summarised into two categories. The first category of goods can be identified as containing probiotics, enzymes, antioxidants for the purpose of being therapeutic, prophylactic, naturopathic, homeopathic products/preparations/substances etc. In relation to such a category of goods the specialist consumer will expect the term BioAcidophilus to refer to an ingredient contained within the goods. The second category of goods contains terms with concepts which are so broad that they could consist of a plethora of different products, for example, *vitamins, tonics, minerals, nutritional and sports drinks*. In relation to such goods the general consumer will assume that some level of BioAcidophilus is contained within them without having any need to actually know exactly what BioAcidophilus is. As such,

I find the mark to directly describe the kind, nature and intended purpose of the goods.

33. Based on all of the above, and having taken careful consideration of the submissions from the applicant and the previous Hearing Officer, I find the mark applied for will be viewed as a term which directly designates characteristics (in this case, nature, type or ingredient) of the goods applied for. In the prima facie, I find the mark to be excluded from registration for the goods applied for under section 3(1)(c) and (b) as a consequence of the finding under (c).

11. With regard to the issue of acquired distinctiveness the Hearing Officer found in so far as is relevant for the purposes of the present appeal as follows by reference to the criteria set out in Paragraph 51 of the joint judgments C-108/97 and 109/97 Windsurfing Chiemsee:

- (1) The market share held by the mark had not been provided during submissions despite such being mentioned as a deficiency in the probative value of the evidence in the Hearing Report of 1 July 2019. The lack of market share affected the perception of the value of the financial figures provided which was difficult to gauge. Against that background, the Hearing Officer concluded that in general terms £1,043,000 sales per annum and £53,000 marketing expenditure per annum was not significant in relation to the goods claimed (paragraph [40] of the Decision).
- (2) Information pertaining directly to the geographical spread of the mark within the UK had not been provided despite such being mentioned as a deficiency in the probative value of the evidence in the Hearing Report of 1 July 2019. The second tranche of evidence referred to exhibitions and trade shows in the UK attended by the Applicant but it was not possible to discern evidence of any use of the sign because the invoices for the trade shows were headed with the distinctive sign BioCare® and/or the following logo:



and not the mark applied for (paragraph [41] of the Decision).

- (3) No submissions or evidence were filed as to either the proportion of the relevant class of persons who, because of the mark identify the goods as originating from a particular undertaking or statements from the trade (paragraph [42] of the Decision).

12. Whilst noting that the criteria laid down in Windsurfing Chiemsee should not be regarded as ‘a tick box list of essential criteria’ the Hearing Officer went on to conclude that ‘so far my analysis of the evidence has not found that a significant

percentage of the relevant class of consumer has been educated to the fact that the sign applied for is an indicator of trade origin'. (paragraph [43] of the Decision).

13. The Hearing Officer then turned (paragraph [44] of the Decision) to consider a further point with regard to the evidence namely that in the majority of instances the manner in which the mark had been used was significantly different from the mark that had been applied for. That is to say in almost every instance the use of the term BioAcidophilus on packaging, catalogues, invoices and third party websites had been accompanied by the trade mark BioCare® and/or the following logo ("*the logo*"):



14. Having referred to the judgment of the CJEU in Case C-353/03 Société des produits Nestlé SA v Mars UK Ltd (HAVE A BREAK) the Hearing Officer went on to find:

46. An example of how the term applied for is used on the applicant's products is shown on the bottle of 60 BioAcidophilus Caps, sold on the applicant's website:



In my opinion I would view the term BioAcidophilus as a description of the product. That is to say I believe that the consumer would perceive the term BioCare® and the logo as being the indicators of trade origin, and the term BioAcidophilus (sic) as being a description of the kind of goods. I feel that this is compounded by the fact that the term BioCare® is a

registered trade mark, which the consumer will pick up on, and also because on the applicant's website the goods are sold as 'BioAciophilus (sic) 60 Caps'. I interpret this to reflect the fact that the applicant uses the term to describe the content of the goods they sell.

47. This example reflects a number of the other forms of use provided in the evidence submitted, whereby the term BioAcidophilus appears descriptively in a document headed by the combination of BioCare® and the logo. So frequently and dominantly is this the pattern presented in the evidence that I do not believe that the consumer would ignore the two other distinctive elements, especially in the way they are presented and placed, and focus instead on the sign BioAcidophilus as the indicator of trade origin. I am of the view that the consumer of the goods in Class 5, who is considered to be relatively well-informed and circumspect, will not perceive the sign applied for as a designator of trade origin, but will rather see it as a descriptor of the goods sold under the marks BioCare® and the logo.

48. Taking the evidence as a whole, I am unable to conclude or infer that the applicant has educated a significant proportion of the relevant consumers to believe that the marks applied for indicate trade origin.

15. The Hearing Officer therefore concluded on the basis of all the materials and arguments put forward that the application should be refused on the basis of section 3(1)(c) of the 1994 Act.

The Appeal

16. On 26 May 2020 the Applicant filed an appeal against the Hearing Officer's Decision pursuant to section 76 of the 1994 Act.
17. The Applicant relied upon four grounds of appeal that may be summarised as follows:
 - (1) That the Hearing Officer had misapplied section 3(1)(c) of the 1994 Act in making his assessment of the *prima facie* case;
 - (2) That the Hearing Officer had failed to give correct weight to the evidence filed in support of the Application;
 - (3) That the Hearing Officer had misapplied the test from Joint Cases C-108/97 and C-109/97 Windsurfing Chiemsee Produktions und Vertriebs GmbH v. Boots- und Segelzubehor Walter Huber (EU:C:1999:230); and

- (4) That the Hearing Officer had misapplied the test from the judgment in Case C-353/03 Société des produits Nestlé SA v Mars UK Ltd (HAVE A BREAK) (EU:C:2005:432).
18. In connection with the present appeal it was not suggested on behalf of the Applicant that the Hearing Officer had identified any of the applicable law incorrectly. Nor was it suggested that there was anything incorrect with regard to his approach to the average consumer or to the way that he had considered the different types of goods contained within the specification.
19. Although objections had been raised by the Registrar under both section 3(1)(b) and 3(1)(c) of the 1994 Act it was accepted for the purposes of this appeal, as it seems to have been below, that the section 3(1)(b) objection added nothing to the section 3(1)(c) objection. Therefore, neither side addressed me on the section 3(1)(b) objection and I have not considered it.
20. The hearing of the appeal took place on 8 September 2020. At the hearing of the Appeal the Applicant was represented by Mr Kieron Taylor of Swindell & Pearson Ltd and the Registrar by Mr Lee Scott.

Standard of review

21. An appeal against decisions taken by the Registrar is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. See Reef Trade Mark [2003] RPC 5; and Actavis Group PTC v. ICOS Corporation [2019] UKSC 1671 at [78] to [81].
22. Moreover, where the decision below involves the making of a value judgment the decision maker on appeal must be especially cautious about interfering with that judgment on appeal: see most recently Actavis (above) at [80]:

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge's conclusions of primary fact but with the correctness of the judge's evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible:

Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 14-17 per Clarke LJ, a statement which the House of Lords approved in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

23. In Page UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115] Lewison LJ said:

114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477 . . .

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: *see Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

24. This approach was recently reconfirmed by the Court of Appeal in Assetco plc v. Grant Thornton UK LLP (2020) [2020] EWCA Civ 1151 at [156].
25. That this is the correct approach for me to adopt on this appeal was not disputed by the parties.

Decision

26. With regard to the *prima facie* case under section 3(1)(c) of the 1994 Act no specific error of principle was identified by the Applicant by reference to the *specific* findings that the Hearing Officer made in paragraphs [25] to [33] of the Decision as set out above.
27. Instead it was submitted, as it was candidly put in the argument before me that ‘*it was argued and still argued*’, that ‘*Bio is a word extracted from the classical Greek that means “life” . . . Given that BIO means “life” then it is incorrect for the Examiner to argue that it means something more or else or is a shortening for something more or else when it means “life when translated from Greek.*’ It was further submitted that BIO has only one meaning being ‘life’.
28. Against this background it was asserted on behalf of the Applicant that either the average consumer would consider the mark BioAcidophilus as a whole and regard it as a trade mark; or that if the average consumer divided the mark into two elements then it would be into BIO meaning life and Acidophilus referring to a shortening of a type of bacteria and as that combination of elements ‘*does not mean anything*’ it would be perceived as a trade mark.
29. It seems to me that if the points raised by the Applicant were to be considered afresh by me then as stated by Geoffrey Hobbs QC sitting as the Appointed Person in NICO LONDON TRADE MARK (O- 338-20) at paragraph [36]:
- . . . the Decision would end up being re-taken by this Tribunal under the guise of reviewing it for error. However, it is necessary in order to maintain the required distance between the role of decision taker at first instance and the role of decision taker on appeal for this Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the [Applicant] relies are by force of what they reveal sufficient to establish that the Decision is vitiated by error.
30. I have reviewed the Decision in the light of the alternatives put forward by the Applicant which carried with them an implied criticism of the detailed evaluation of the mark applied for conducted by the Hearing Officer. Having done so I am satisfied that the points raised cannot be taken to have established the Decision with regard to the *prima facie* case under section 3(1)(c) of the 1994 Act is vitiated by error.
31. Moreover, adopting the approach set out in NICO LONDON TRADE MARK at paragraph [38] and the case law cited therein I dismiss the Applicant’s appeal against the Hearing Officer’s decision upholding the *prima facie* objection under section 3(1)(c) of the 1994 Act on the basis that he was right for the reasons that he gave.
32. I turn now to consider the appeal with regard to the findings on acquired distinctive character. As noted above there was no dispute that the Hearing Officer had

identified the correct principles of law that he had to apply in his Decision. Instead the basis of this appeal is that he had misapplied them adopting an ‘*overly rigid and brittle*’ analysis of the evidence; and failing to give proper weight to the evidence having regard to the case law. In particular, it was averred that the Hearing Officer erred in finding that the manner and context of use of BioAcidophilus relied upon by the Applicant was such that it would be regarded by the average consumer as a description of the product and not as use of a mark as an indication of origin.

33. Before turning to deal with the particular criticisms made on behalf of the Applicant, I note that it has not been suggested before me that the Hearing Officer did not correctly summarise the evidence that was filed in support of the claim to acquired distinctiveness. I also note that as set out in the summary of evidence in paragraphs [11] to [18] of the Decision the Hearing Officer not only summarised the evidence but provided an analysis of the evidence which included in some instances an explanation as to why such evidence was not in his view probative for the purposes of establishing acquired distinctive character. From these paragraphs it is clear that the Hearing Officer had firmly in mind the range of evidence that was before him and upon which he was required to make his Decision.
34. With regard to the approach of the Hearing Officer to the facts on the basis of the law set out in Joint Cases C-108/97 and C-109/97 Windsurfing Chiemsee (above) it is apparent that the Hearing Officer was aware that the criterion set out in that case for the assessment of distinctive character were not a ‘*tick box list of essential criteria*’ as he stated in paragraph [43] of his Decision. It is also clear that he understood that it was necessary for him to take account of the evidence as a whole as he went on to state in paragraph [48] of his Decision.
35. The particular criticisms made on the Hearing Officer’s analysis of the evidence in this connection were that the Hearing Officer had not given any or ‘*full*’ weight to:
 - (1) The length of time that the sign had been used;
 - (2) The volume of sales of and marketing spend made in relation to the product sold under the sign;
 - (3) The geographical spread of the use of the sign in particular by reference to the invoices included in the evidence; and
 - (4) The evidence in the form of results of a Google searches included in the evidence which it was averred should be interpreted as establishing that the sign was an indication of origin.
36. With regard to the time, volume of sales and marketing spend it seems to me that it was open to the Hearing Officer to take the approach that he did to the evidence. It is apparent from the Decision itself that the Hearing Officer was fully aware of the range of evidence on these matters that were before him. What is also clear is that he

regarded the *significance* of such evidence to be difficult to assess in the absence of any evidence as regards market share. It does not seem to me that his view that the sales and marketing expenditure did not strike him as significant is one that it was not open to him to make and this is all the more the case in circumstances where as stated in the skeleton of argument filed on behalf of the Applicant on this appeal that *'the evidence of advertising was not high value or high intensity'* albeit said to be made over a long period of time.

37. With regard to the lack of weight given to geographical spread of the use of the sign it is clear that the Hearing Officer was aware that there were invoices before him that showed product being supplied to addresses across the UK. However as noted in paragraph [18] of the Decision he regarded the use of the sign in such invoices as descriptive on the basis that they indicated the name of the product each invoice being headed by the trade mark BioCare® and the logo. An example of one such invoice is attached at Annex A hereto. Having reviewed the invoices submitted in evidence it seems to me that this was a conclusion that the Hearing Officer was entitled to reach.
38. Further, in this connection it is to be noted that the findings that the Hearing Officer made with regard to exhibitions and trade shows made in paragraph [41] of the Decision do not seem to be the subject of specific criticism on this appeal. In the circumstances I am of view that it was open to the Hearing Officer to make the findings he did with regard to the probative value of the evidence put forward in support of widespread geographical use of the mark applied for.
39. Turning to the Google searches relied upon. These were searches conducted on the sign BioAcidophilus. It was said before me that the results of such searches provide *'much "cleaner" and "purer" evidence . . . than a survey and this evidence clearly shows that the mark is used to identify the goods of the Applicant'* and provided evidence of the perception of the sign by the average consumer. The Hearing Officer appears to have taken the view that this was not the case in particular given the use of the trade mark BioCare® and/or the logo referred to above in the search results and on the associated web pages for such listings (see paragraphs [7], [18] and [19] of the Decision).
40. Although not expressly set out in the Decision, it seems to me that it was open to the Hearing Officer to take the view that the evidence in the form of the Google searches did not assist the Applicant¹. This seems to me to be all the more the case given (1) the other evidence that had been filed in support of the Application; (2) as quite rightly accepted on behalf of the Applicant it is not known how the Google algorithms work that have produced the search results; and/or (3) as submitted on behalf of the Registrar nothing is known about the thought processes that might or might not lead any searcher to enter the term BioAcidophilus into the Google search engine in order

¹ That that was the view of the Hearing Officer can be inferred from his conclusions. In any event the point was not taken on this appeal that the Hearing Officer had failed to consider the evidence but rather that he had not given it appropriate weight.

to generate results. That is to say whether or not they were using the term descriptively or distinctively.

41. In the circumstances, it seems to me that the criticisms of the Hearing Officer's approach to and analysis of the evidence are not well founded for the reasons set out above and below.
42. The final ground of appeal is that the Hearing Officer failed to misapplied the test from the judgment in Case C-353/03 HAVE A BREAK (above). As stated in paragraph [44] of the Decision the Hearing Officer was concerned that in '*nearly every instance of use of the term BioAcidophilus on packaging, in catalogues, or on invoices, or on 3rd party website (sic), it is accompanied by BioCare® and or [the logo]*' but also recognised that this fact did '*not automatically render the evidence submitted as irrelevant or insufficient*' (paragraph [45] of the Decision).
43. It is not suggested on this appeal that the Hearing Officer was wrong to find that the use of the sign was in nearly every instance of use accompanied by BioCare® and the logo referred to above but rather that the '*test is whether the sign BIOACIDOPHILUS is used as part of a registered trade mark, and it is maintained that is not the case, and there is no evidence that this is the case*'. However, that is not the relevant test in the context of the present appeal. The relevant test for the purposes of the present appeal as set out in HAVE A BREAK, and as considered by the Hearing Officer, was whether the use of the sign BioAcidophilus *in conjunction with* the trade mark BioCare® and the logo was such that as a consequence of such use, the average consumer actually perceived that the relevant product, designated exclusively by the mark applied for as originating from the Applicant.
44. I have reviewed the Decision in the light of the criticisms of the Hearing Officer's evaluation of the evidence filed in support of the claim to acquired distinctiveness and in particular having regard to the presentation of the sign BioAcidophilus in conjunction with the trade mark BioCare® and the logo. Having done so I am satisfied that the points raised on this appeal cannot be taken to have established that the Decision with regard to the findings of acquired distinctiveness is vitiated by error.
45. It seems to me that it was open to the Hearing Officer to assess the evidence in the way that he did and to reach the conclusion that the evidence, taken as a whole, did not demonstrate that a significant proportion of the relevant consumers had been educated to believe that the mark applied for was an indication of trade origin.

Conclusion

46. For the reasons set out above, it does not seem to me that there is any error of principle or material error in the Hearing Officer's decision. It was in my view open to the Hearing Officer to make the decision that he did to refuse the trade mark

application under section 3(1)(c) of the 1994 Act for the reasons that he gave. In the result the appeal fails.

47. Therefore, the appeal is dismissed.
48. With respect to the costs of the appeal there is no dispute that in accordance with the usual practice on *ex parte* appeals there should be no order as to costs. I therefore make no order in relation to the costs of the appeal.

Emma Himsworth QC
Appointed Person
16 October 2020

ANNEX A

www.biocare.co.uk

BioCare®



Professional Supplement Specialists

TRADE DELIVERY NOTE

11 October 2019 16:55:14

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Invoice No. 1897132



Billing Details

[Redacted]
LUTON
BEDS LU2
United Kingdom

Pick Note No.



Order No.
Account Code [Redacted]
Invoice Date 17. July 2007
Operator CCS
Shipping Agent

Bin Code	Product Code	Quantity	Description	Unit Price (Single)
	14590	10	Adult Multivitamins & Minerals 90 veg caps	30.85
	14530	3	Adult Multivitamins & Minerals 30 veg caps	12.60
	16860	15	Bio-Acidophilus 60 veg caps	24.45
	56360	1	Echinacea Complex 60 capsules	0.00

POST & PACKAGING 0.00

All Prices In GBP

Breakages and incorrect orders must be notified immediately. Unwanted stocks must be returned within 30 days of purchase

Please note we cannot take back opened product or products from our Probiotic Range

Delivery Address

[Redacted]
LONDON
SW10
United Kingdom

Customer Service Team
customerservice@biocare.co.uk
0121 433 3727

Clinical Nutrition Team
technical@biocare.co.uk
0121 433 8702

Customer A/C [Redacted]