

**O-656-18**

**TRADE MARKS ACT 1994**

**TRADE MARK APPLICATION NO. 3228461  
BY TWG TEA COMPANY PTE LTD  
TO REGISTER AS A TRADE MARK**

**CARAVAN**

**IN CLASS 30**

**AND**

**OPPOSITION THERETO UNDER NO. 411039  
BY UNILEVER PLC**

## Background and pleadings

1. On 3 May 2017, TWG Tea Company Pte Ltd (“the applicant”) applied to register **CARAVAN** as a trade mark under number 3228461. The mark was accepted and published in the Trade Marks Journal on 15 September 2017 in respect of the following goods:

Class 30      Tea; black tea [English tea]; flavourings of tea; tea-based beverages; fruit flavoured tea; fruit tea; beverages with tea base; rooibos tea; herbal tea; chai tea; green tea; Japanese green tea; oolong tea (Chinese tea); aromatic teas; beverages made of tea; iced tea; tea bags; tea extracts; tea essence; tea for infusions; spices; sugar; chocolates; chocolate bars; pralines; edible ices; ice cream; sorbets (ices); ice desserts, confectionery; cakes, pastry; macaroons (pastry); pastries; biscuits; cookies, aromatic preparations for pastries.

2. Unilever Plc (“the opponent”) opposes the trade mark on the basis of sections 3(1)(b), 3(1)(c) and 3(1)(d) of the Trade Marks Act 1994 (“the Act”). The opposition under each of these grounds is directed against all of the goods of the application. The opponent’s claims are as follows:

- i) Under s. 3(1)(b), that “CARAVAN” cannot fulfil its essential function because, when viewed in connection with the applied-for goods, “CARAVAN” will be perceived as a referring to a common type of tea (“Caravan tea”). This is a sign used by other traders in the everyday course of their business to describe a type of tea and/or tea-related products which have a particular style or flavour;
- ii) Under s. 3(1)(c), that “CARAVAN” is a direct reference to the caravans that transported tea from China to Europe via Russia and refers to the flavour/style of the tea that was transported. “CARAVAN” is a common name used to describe a type of tea and/or tea-related products that have a particular style or flavour, one example of which is Russian Caravan tea. The mark thus consists exclusively of

a sign which may serve in trade to designate “among other things” the kind of goods;

- iii) Under s. 3(1)(d), that “CARAVAN” consists exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade. The sign is used in trade in the UK by many third parties as a common name for the applied-for goods, in particular a type of tea and/or tea-related products that have a particular style or flavour.

3. The applicant filed a counterstatement denying each of the claims made. It admits that “Russian Caravan” is used by third parties but denies the relevance of this fact to the present opposition.

4. Only the opponent filed evidence, which I will summarise to the extent that I consider necessary. A hearing took place before me on 19 September 2018, by video conference, at which the applicant was represented by Ian Bartlett of Beck Greener and the opponent by Rachel Wilkinson-Duffy of Baker & McKenzie LLP.

## **Evidence**

5. This consists of the witness statement of Michel Rorai, with accompanying exhibits MR-1 to MR-5. Mr Rorai is the opponent’s Global Trade Mark Counsel, a position which he has held for over ten years.

6. Definitions of the word “caravan” are provided at MR-1. The most relevant from the oxforddictionaries.com site is:

“Any large group of people, typically with vehicles or animals, travelling together in single file”.

7. The definition above is, however, marked as “historical” and is secondary to the meaning of “caravan” as a vehicle equipped for living in. A similar definition to that quoted above is provided from [dictionary.cambridge.org](http://dictionary.cambridge.org).

8. The following are provided:

- A *Wikipedia* article entitled “Tea Horse Road”, dated June 2016 (taken from the WayBack Machine).<sup>1</sup> It makes reference to the caravan paths through the mountains of Southwest China and to mule caravans, which carried both tea and salt;
- A *Wikipedia* page entitled “Siberian Route”, dated May 2014, also taken from the WayBack Machine.<sup>2</sup> It refers to the camel caravans which crossed Mongolia to the Great Wall. It states that the route “is the namesake of the Russian Caravan blend of tea [...] imported primarily in the form of hefty hard-packed tea bricks”;<sup>3</sup>
- The title page of a book called *Tea: A Global History*, along with the publication details, contents and glossary pages.<sup>4</sup> It shows a UK publisher and a first publication date of 2010, with reprints in 2013 and 2016. One chapter is entitled “Caravans and Mediterranean Shores”. The glossary states “Caravan teas: sometimes called China Caravan or Russian Caravan because they originally came overland to Russia by the camel caravan routes from China”;
- Three pages from a book entitled *In Secret Mongolia*.<sup>5</sup> The title page indicates that the book was first published, under another name, in London in 1934. The edition in evidence was first printed in 1995 but it is not clear whether this was published in the UK: only the publisher’s name (different from the first) and not its address is given. An extract refers to caravan routes and includes a statement that “[it] is brick-tea (caravan tea) that the nomads insist on having, for this is the most suitable for long transport”;

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<sup>1</sup> MR-2, p. 5.

<sup>2</sup> *Idem*, p. 6.

<sup>3</sup> Mr Rorai also makes the point that tea was often transported in hard-packed bricks: §9 of his witness statement.

<sup>4</sup> MR-2, pp. 7-9.

<sup>5</sup> *Idem*, pp. 10-12

- A page from [www.tea.sg/history\\_of\\_tea.html](http://www.tea.sg/history_of_tea.html), from the WayBack Machine and dated October 2007.<sup>6</sup> It mentions the tea caravans which travelled between Russia and China;
- A page from *Wikipedia*, with a revision date of September 2016, entitled “Russian Caravan”.<sup>7</sup> It describes Russian Caravan as a blend of oolong, keemun and lapsang souchong teas which has a “sweet, malty taste, and smoky taste”. The article states that the name derives from the 18<sup>th</sup>-century camel caravans which facilitated the tea trade. It states “[anecdotal] evidence had it that during the camel caravan journeys, the teas took on the smoky taste of the campfires”. It appears from the article that the blend of teas is not fixed, that lapsang souchong may not be present and that yunnan black tea may be included;
- A *Wikipedia* page entitled “Russian tea culture” and dated December 2010 (again taken from the WayBack Machine).<sup>8</sup> It states that “[traditional] tea in Russia includes the traditional type known as Russian Caravan as it was originally imported from China via camel caravan [...] the tea acquired its distinctive smoky flavour from the caravan’s campfires”. The article indicates that “[today], this tea is often given its smoky flavour after fermentation or is a keemun or a “black or oolong from China or Formosa (Taiwan) with a hint of smoky Lapsang Souchong or Tarry Souchong””.
- Extracts from a book entitled *Where to Take Tea: A Guide to Britain’s Best Tearooms*, first published in London in 2008.<sup>9</sup> It states that Russian Caravan tea was “named after the camel caravan that brought china tea to Europe along the silk and spice route- a blend of China tea”;
- A page from [ratetea.com](http://ratetea.com), dated May 2012, which states “Russian caravan tea, sometimes just called caravan tea, or other names involving “Russian” is a blend of black teas [...]”.<sup>10</sup>

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<sup>6</sup> Idem, p. 13

<sup>7</sup> MR-3, pp. 15-16.

<sup>8</sup> Idem, p. 17.

<sup>9</sup> Idem, pp. 18- 20.

<sup>10</sup> Idem, p. 21.

9. Mr Rorai also provides pages showing various teas for sale.<sup>11</sup> These are:

- A page from uk.teabox.com for Russian Caravan tea, described as a “straight tea blend”. It repeats the story that the tea took on a smoky flavour from campfires on the caravan journey. No date is visible;
- A page from www.stashtea.com dated August 2016, taken from the WayBack Machine. It shows “Caravan Black Tea” for sale. Prices are in dollars;
- A page from perennialtearoom.com dated June 2016 and showing Georgian Caravan tea for sale. Quantities are in ounces and prices in dollars.

10. The final exhibit is a report, commissioned by the opponent and dated 24 April 2018, on the use of “CARAVAN” in the UK.<sup>12</sup> Much of it is plainly irrelevant. For example, lists of companies or domain names which include the word “caravan” in their name offer no particular assistance, nor do social media pages which have no apparent UK link or relevance to the instant proceedings. The report includes evidence of numerous retailers who offer Russian Caravan tea, the details of which it is not necessary to repeat here. I note that the report identifies a number of teas on sale including or with variations on the name “caravan”, namely “Karavan”, “Cardigan Caravan”, “Grande Caravane”, “La Caravane”, “China Caravan”, “Smoky/Smokey Caravan”, “Georgian Caravan” and “Kenyan Caravan”.<sup>13</sup> “Smokey Caravan” and “Georgian Caravan” are said to have been available since 2014; no dates are provided for the remainder. Some, such as the website pages for “Karavan” and “Cardigan Caravan” refer to the camel caravans, whilst “Smoky Caravan” is said to be “a blend not dissimilar to our Russian Caravan”; others (“Grande Caravane”, “La Caravane”) make no reference either to the caravans or to a particular flavour. One extract quoted in the report states that tea imported into Europe via Russia was called “Caravan tea”. However, it further states that, after the opening of the Suez Canal in 1869:

“Caravan tea from a product with certain characteristics began to turn into a marketing myth. By the middle of the 20<sup>th</sup> century this tea myth-making had

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<sup>11</sup> MR-4.

<sup>12</sup> MR-5.

<sup>13</sup> *Idem*, pp. 29, 35-39.

been completed—the name ‘Russian Caravan’ was given to a blend whose permanent ingredient is Chinese Keemun tea (sometimes, very seldom—Lapsang Souchong, smoked tea)”.<sup>14</sup>

11. As the applicant chose not to file evidence, that concludes my summary.

## Decision

12. The relevant parts of s. 3 of the Act read:

“3(1) The following shall not be registered –

(a) [...]

(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,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade:

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”.

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<sup>14</sup> p. 43.

13. Although the applicant initially claimed in the alternative that the mark had acquired distinctiveness, it filed no evidence and it is therefore not necessary for me to consider the proviso. The relevant date for determining whether the mark is objectionable under the above grounds is the date of application, i.e. 3 May 2017.

14. I bear in mind that the above grounds are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c), but still be objectionable under section 3(1)(d) and/or 3(1)(b) of the Act. In *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P, the Court of Justice of the European Union (“CJEU”) stated that:

“25. Thirdly, it is important to observe that each of the grounds for refusal to register listed in Article 7(1) of the regulation is independent of the others and requires separate examination. Moreover, it is appropriate to interpret those grounds for refusal in the light of the general interest which underlies each of them. The general interest to be taken into consideration when examining each of those grounds for refusal may or even must reflect different considerations according to the ground for refusal in question (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-0000, paragraphs 45 and 46)”.

15. The position under the above grounds must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect. However, the average consumer’s level of attention may vary, depending on the goods at issue. The goods at issue are all everyday foods and beverages, which are likely to be bought by members of the public or by businesses, such as retailers and wholesalers. Given that the purchase of the goods at issue is likely to be reasonably frequent, and that the goods themselves are not especially costly, I see no reason why the average consumer in either group would pay a level of attention which is significantly higher or lower than medium.

### Section 3(1)(d)

16. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM*, Case T-322/03, the General Court (“GC”) summarised the case law of the Court of Justice under the equivalent of s.3(1)(d) of the Act, as follows:

“49. Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 31, and Case T-237/01 *Alcon v OHIM – Dr. Robert Winzer Pharma* (BSS) [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public’s perception of the mark (BSS, paragraph 37).

50. With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (BSS, paragraph 38).

51. Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade

in the goods or services for which the marks are sought to be registered (see, by analogy, *Merz & Krell*, paragraph 35, and *BSS*, paragraph 39).

52. Finally, signs or indications constituting a trade mark which have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, *Merz & Krell*, paragraph 37, and *BSS*, paragraph 40)".

17. In *Stash Trade Mark* BL O/281/04, Ruth Annand (sitting as the Appointed Person) provided further guidance, stating:

"33. In the event, I do not believe this issue of the interpretation of section 3(1)(d) is central to the outcome of the appeal. "Customary" is defined in the Oxford English Reference Dictionary, 1995 as: "usual; in accordance with custom". In my judgment, the Opponent has failed on the evidence to prove that at the relevant date STASH contravened section 3(1)(d) as consisting exclusively of signs or indications which have become customary either in the current language or in trade practices for the goods concerned".

18. The opponent's claim is that "CARAVAN" is used in the UK as a common name for the goods applied for, in particular a type of tea and/or tea-related products that have a particular style or flavour. At the hearing, Ms Wilkinson-Duffy clarified that the opponent's claim is that "CARAVAN" describes a blend of tea which is fairly strong and smoky but whose characteristics are not firmly fixed.

19. It is accepted by the applicant that "Russian Caravan" is used to identify a blend of tea, known for its smoky flavour.<sup>15</sup> That is plainly the case and the opponent has filed a

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<sup>15</sup> Applicant's skeleton, §18.

good deal of evidence relating to “Russian Caravan” tea. However, the present application is for the word “CARAVAN” alone. The evidence regarding Russian Caravan tea is, therefore, not relevant in determining whether the use of “CARAVAN” solus is objectionable under any of the pleaded grounds.

20. There is some evidence of “caravan tea” in use but there are a number of difficulties with this evidence. First, it is scant. There are only a handful of examples in any event. Secondly, some of the instances shown are not clearly directed at UK customers: for example, the uses at MR-4 are priced in dollars rather than sterling. Such evidence does not establish that the UK consumer would have been exposed to “caravan” being used for tea in this way. Other potential uses which are dated before the application date are two book extracts and the print from ratetea.com.<sup>16</sup> The first book extract appears to indicate that there is a category of teas called “caravan teas” which is synonymous with both China Caravan and Russian Caravan teas. It is, however, only one example. As for the second relevant extract, it is not clear either where the book was published or what its distribution was. The article from ratetea.com is not positively identifiable as emanating from or being directed at the UK, the .com suffix shedding no light on the territorial focus of the site. Finally, the report at MR-5 contains examples of the use of variations of “Caravan” and of the use of “Caravan” itself, with an adjective, to sell tea. Only two of these examples are said to have been available before the application date, and neither shows use of “Caravan” alone. Whilst later evidence may cast light backwards, I do not consider that the evidence in this case provides any reliable indications, not least because it is very limited and includes varying forms of use. The evidence as a whole is insufficient to establish that “CARAVAN” had become customary in the trade for any of the goods at the relevant date. The ground under s. 3(1)(d) fails.

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<sup>16</sup> MR-2, pp. 7-12 and MR3, p. 21.

### Section 3(1)(c)

21. The case law under section 3(1)(c) (corresponding to article 7(1)(c) of the EUTM Regulation, formerly article 7(1)(c) of the CTM Regulation) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks ( OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699 , paragraph 19; as regards Article 7 of Regulation No 40/94 , see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18 , paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461 , paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia , *Henkel KGaA v*

*Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44 , paragraph 45, and Lego Juris v OHIM (C-48/09 P) , paragraph 43).*

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley* , paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie* , paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM (C-80/09 P)*, paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are

other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56)."

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic

of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].”

22. The claim under s. 3(1)(c) closely resembles that under s. 3(1)(d), namely that “CARAVAN” is a direct reference to the tea caravans and that it refers to goods which have a particular flavour or style. There is no claim that it indicates geographical origin.

23. To many individuals in both groups of average consumer, if not the majority, the word “CARAVAN” will not evoke images of groups of people, vehicles and animals travelling across harsh terrain, still less of the Sino-Russian tea caravans, irrespective of the particular goods at issue; rather, they will understand it to mean a type of vehicle. Nevertheless, I accept that the secondary or historical meaning of “CARAVAN”, outlined above and not disputed by the applicant, may be understood by consumers in both groups who are more knowledgeable.

24. There is some evidence which recounts anecdotes of Russian Caravan tea acquiring its flavour from the campfires en route to Europe. In my view, the evidence is too slight to demonstrate that the average consumer would know this account in relation to Russian Caravan tea. That the consumer would then take a mental leap and immediately understand “CARAVAN” solus, when used in relation to tea, as descriptive of a particular strong, smoky blend is not established on the evidence provided. Although the uses by the traders shown at MR-5 might point towards the term having the capacity to designate a characteristic, none of them shows “Caravan” being used on its own and the evidence is not clear that the uses shown do, in fact, designate the characteristics claimed by the opponent. Indeed, the evidence at MR-5 is that there are teas called “Smokey/Smoky Caravan”, which rather suggests that “CARAVAN” does not have the meaning claimed by the opponent, as there would be no reason to use “Smokey/Smoky” were that the case. It appears that there may be use of the term in the US but there is nothing in the evidence which leads me to suppose that the UK consumer would be familiar with such uses.

25. Based on the above, I am doubtful that, even for those consumers who are aware of the tea caravans, the term “CARAVAN” would be perceived as anything more than alluding to the transport means and routes of bygone days. I am left with the view that the mark is not descriptive of a characteristic of tea. There is no evidence in relation to goods other than tea, nor, given my comments, above, can I see any reason why “CARAVAN” would describe a characteristic of any goods which are not tea, even if they may contain tea or tea flavouring. Nor do I think that, in May 2017, there was any particular need to keep the mark free for other traders. The ground under s. 3(1)(c) is dismissed.

### Section 3(1)(b)

26. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

“29. [...] the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes 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 those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P

*Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)".

27. Whilst this ground of objection is independent of the grounds already considered, there is no material difference in the way that it is pleaded and Ms Wilkinson-Duffy accepted at the hearing that the success of the ground would depend on the outcomes under ss. 3(1)(c) and 3(1)(d). The claim is that the mark is devoid of distinctiveness because it is descriptive/generic. Given my findings, above, the ground fails.

## Conclusion

28. The opposition has failed. Subject to appeal, the application will proceed to registration.

## Costs

29. As the applicant has been successful, it is entitled to a contribution towards its costs, which are sought on the standard scale. The applicant filed no evidence, which is reflected in the award, below. Basing my award on the relevant scale (Tribunal Practice Notice 2/2016 refers), I award costs to the applicant on the following basis:

Considering the Notice of Opposition and filing a counterstatement:	£200
Considering the other party's evidence:	£400
Preparing for and attending the hearing:	£600
<b>Total:</b>	<b>£1,200</b>

30. I order Unilever Plc to pay TWG Tea Company Pty Ltd the sum of **£1,200**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 17<sup>th</sup> day of October 2018**

**Heather Harrison  
For the Registrar  
The Comptroller-General**