

O-287-09

In the Matter of THE TRADE MARKS ACT 1994

**In the Matter of Trade Mark Application No. 2332046
HERITAGE in Class 33 in the name of
INDEPENDENT FOOD SERVICES LIMITED**

**In the Matter of Opposition No. 93170 thereto by
NISA-TODAY'S (HOLDINGS) LIMITED**

**Appeal of the Applicant from the decision of
Mr. O. Morris dated 24 October 2008**

DECISION

1. This is an appeal against a decision of Mr Oliver Morris, the Hearing Officer for the Registrar, dated 24 October 2008, BL O/292/08, in which he upheld an opposition to the registration of the mark HERITAGE based on the Opponent's prior trade mark registration no 2115418, which is for the identical mark HERITAGE.

Background

2. The appeal relates to an application made on 14 May 2003 by Independent Foods Services Limited ("IFS") to register the word trade mark HERITAGE in Class 33 for cider only and to the opposition to that application lodged by Nisa-Today's (Holdings) Limited ("NISA") on 7 February 2005. However, the background to the appeal is complicated by the use of the mark by the parties on various goods, and earlier trade mark applications and proceedings between the parties.

3. So far as it appears to be relevant, and is known to me, I set out the history of this matter:
- (a) IFS started to use the mark HERITAGE as a mark on cider sold through retail outlets in about August 1994.
 - (b) On 12 November 1996, NISA applied to register the word HERITAGE as a UK trade mark for "Non-alcoholic beverages; beers" in Class 32 (as well as for other goods in Classes 29 and 30 not relevant to the current appeal). The registration was not completed until 2 January 2004. The registration number of the mark is 2115418.
 - (c) On 1 April 2003, NISA applied to register HERITAGE as a trade mark for "cider" in Class 33 as well as for other goods in Class 31. After (I assume) division of the application, the relevant part of the application bore number 2328188B.
 - (d) On 14 May 2003, IFS also applied to register HERITAGE as a trade mark for "cider" in Class 33. The application number was 2332046. This is the application that is the subject of the appeal before me. It seems that it proceeded on the basis of evidence of honest concurrent use, based upon IFS's use of the mark since 1994.
 - (e) On 7 February 2005, NISA opposed IFS's application 2332046 relying upon (a) section 5(1) of the Act on the basis of its application 2328188B, and (b) section 5(2)(a) of the Act on the basis of its earlier mark 2115418.
 - (f) On 11 August 2005, IFS lodged an opposition to NISA's application 2328188B, on the basis of section 5(4)(a) of the Act, based upon its use of the mark since 1994.

- (g) The opposition to NISA's application 2328188B was heard first. At the hearing before Mr David Landau, IFS was represented by Mr Marsh of Wilson Gunn and NISA by Mr Krause of Haseltine Lake. By a decision dated 16 January 2007, BL O/022/07, Mr Landau upheld IFS's opposition, having found on the balance of probabilities that IFS had a protectable goodwill in respect of cider by the material date, 1 April 2003.
 - (h) NISA appealed to the Appointed Person. By a judgment dated, BL O/247/07, Professor Annand refused the appeal, upholding Mr Landau's decision.
 - (i) As a result, NISA's opposition to IFS's application number 2332046 continued only upon the 5(2)(a) grounds, that is, based upon its 2115418 registration for non-alcoholic beverages and beers.
4. In the matter before me, IFS's counterstatement to NISA's opposition denied that non-alcoholic beverages and beers are similar goods to cider, but also claimed that reference must be made to the evidence of "earlier, honest, and concurrent user of the subject application, already on file."
 5. Both sides filed evidence, which was summarised by the Hearing Officer. I need not recite it here.
 6. There was a hearing before the Hearing Officer on 11 September 2008, at which the parties were represented, as before, by Mr Krause and Mr Marsh respectively.
 7. In his decision dated 24 October 2008, Mr Morris considered the evidence, noted that the proof of use regulations did not apply to NISA's mark, and

considered the usual authorities relating to s 5(2)(a). No criticism is made of his summary of the relevant legal principles. The Grounds of Appeal instead in effect challenge the application of those principles to this case and raise the following issues:

- (a) the Hearing Officer erred in finding that beer and cider are similar goods, and so erred in finding a likelihood of confusion;
- (b) similarly, the Hearing Officer erred in finding that non-alcoholic cider falls within the ambit of non-alcoholic beverages, and so should not have found cider and non-alcoholic beverages to be similar goods – again, he should have found no likelihood of confusion; and
- (c) the Hearing Officer erred in failing to take account of the history of the application and IFS's earlier goodwill arising from its use of its mark on cider, as found in Mr Landau's decision and its successful opposition mentioned above.

The Hearing Officer's decision

8. Mr Morris's findings on the issue of the similarity of beer and cider were set out in paragraphs 25 to 28 of his decision:

"25. Mr Krause's submissions focused on the fact that both goods were similar in nature, both being alcoholic "tall" drinks sold in identical measures (pints etc) or packaging (cans and bottles etc). He argued that the consumers were the same and that both goods competed for this same consumer through the same trade channels. His view was that the goods were very similar indeed.

26. Whilst Mr Marsh did not necessarily disagree with the points identified by Mr Krause, he highlighted as the key distinguishing features the fact that the core ingredients ... and ... manufacturing processes involved were different. He also stated, although he conceded that no evidence had been given on this, that it was not common for manufactures of cider to also produce beer (and vice versa). Mr Marsh concluded that the

goods were not “confusingly similar” which he further explained meant that the degree and nature of the similarity between the goods would not be capable of creating confusion.

27. The primary points of similarity and difference identified by the respective attorneys strike me as a reasonable identification of the relevant factors to consider. But, what is the net effect of these similarities and differences? Whilst Mr Marsh’s distinguishing points clearly identify that the goods are not the same, this, in itself, does not render them dissimilar. On the face of it, Mr Krause has identified a number of what appear to be quite strong similarities, I therefore find it difficult to say that there is no similarity at all between the goods or that any similarity is so minimal that confusion could not possibly arise. On this, Mr Krause referred me to the decision of Mr MacGillivray (for the registrar) in *Kriska Trade Mark* (BL O-016-05). Whilst I pointed out to Mr Krause that this decision was neither binding nor persuasive, I noted that Mr MacGillivray’s finding was based to a large extent on the decision of Mr Hobbs QC (sitting as the Appointed Person) in *Balmoral Trade Mark* [1998] RPC 297.”

Mr Morris set out a fairly lengthy passage from *Balmoral Trade Mark*, (actually reported at [1999] R.P.C. 297) in which Mr Hobbs considered the similarity of wine and whisky (and bar services), and rejected arguments based upon the differences upon the ingredients and manufacturing processes of the goods, continuing

“ ... This was said to render it unlikely that a producer of whisky would become (or be expected to become) a wine producer and unlikely that a producer of whisky who did become a wine producer would market (or be expected to market) his whisky and wines under the same trade mark. ...

...

It is common to find whisky and wines bought and sold by merchants whose customers expect them to stock and sell both

kinds of products. Many such merchants like to be known for the range and quality of the products they sell. ...Those who supply retail customers may be licensed to do so under an "off-licence" or a licence for "on and off sales" in appropriate circumstances. ...

When the overall pattern of trade is considered ... it seems clear to me that suppliers of wines should be regarded as trading in close proximity to suppliers of whisky ... In my view the degree of proximity is such that people in the market for those goods or services would readily accept a suggestion to the effect that a supplier of whisky ... was also engaged in the business of supplying wines."

Mr Morris continued

"28. Taking all of the above into account, it seems to me that the goods in question here must be regarded as having some degree of similarity. If whisky and wine are similar then beer and cider must also be given that, on the face of it, they seem closer to each other than whisky and wine. However, to inform my conclusions on the likelihood of confusion, I should also assess the degree to which they are similar. ... it would not surprise me to discover that undertakings that are responsible for the production of beer also produce cider, although, I am aware from my own experience, and in line with Mr Marsh's submission, that the end trade to the general public may be undertaken under different signs of trade origin. In terms of assessing the significance of this in the comparison of the goods, it does not strike me as a highly significant factor (although it may inform the debate in relation to the likelihood of confusion). This is particularly so when the close proximity of the respective goods at the point of sale is taken into account. In relation to this, beer and cider sold in draught form in public houses are likely to have their respective pumps close to each other (potentially even next to each other) and, if sold in bottles or cans, they are normally located close to each other in the same way as they are in retail establishments.

These factors lead me to conclude that beer and cider are not only similar goods, but they are similar to a reasonably high degree.”

9. Mr Morris dealt with the similarity of cider to non-alcoholic beverages in paragraphs 29 to 42 of his decision:

“29. ... Mr Krause argued that the term “non-alcoholic beverages” ... covered all beverages (that fall in class 32) that have no alcohol content. He accepted that this included beverages such as carbonated drinks, juices (including apple juice) and waters, but, that the term would also include the non-alcoholic versions of beverages that are traditionally alcoholic in nature such as non-alcoholic beer, wine and, crucially, non-alcoholic cider. He explained that non-alcoholic cider was a term recognised by *NICE* and that it falls within class 32 of said classification and, further, that non-alcoholic or alcohol-free cider was a product recognised by the trade, as demonstrated by his evidence.

30. Mr Marsh accepted that the term non-alcoholic beverages could, from a literal interpretation, be construed to cover non-alcoholic cider. However, ... he highlighted a number of factors which should, in his view, lead to a different finding. He questioned whether a beverage made from apple juice but without any alcohol content could properly be said to be a cider; he questioned, if it was a cider, whether such a product fell in class 32 and also whether the product existed at the time that NISA made its application; finally, he strongly argued that a non-alcoholic cider (if it existed) should not, irrespective of its literal meaning, be regarded as a non-alcoholic beverage due firstly to its link to, and categorisation with, traditional alcohol containing cider and, secondly, because non-alcoholic beverages was a term more associated with carbonated beverages and juices etc. Mr Marsh submitted that the closest product to a cider that could be categorised as a non-alcoholic beverage was apple juice, but he felt that any similarity here was not enough to cause confusion.

31. I must firstly determine whether non-alcoholic cider is a relevant good for the purposes of this opposition. ... both parties have filed evidence demonstrating the existence of *Kopparberg*, a non-alcoholic cider. ... On the face of it, the evidence shows a product designated as a pear cider and I am prepared to accept it as such.

32. ... I accept that the traditional form of cider is as an alcoholic beverage (in the same way that beer is traditionally alcoholic), but I do not agree that the instant the alcohol is removed that it ceases to become that product. Again, the evidence shows that the product is sold and marketed in the same way as its alcoholic equivalent and must be regarded as something more than a simple apple (or pear) juice.

...

34. ... Mr Krause identified that *NICE* includes a specific entry, namely: Cl. ... 32 Cider, non-alcoholic ...

35. Not only does this further support the proposition that cider can be non-alcoholic whilst still retaining a characterisation as a cider, it gives specific direction that such goods fall in class 32, the class relevant to NISA's earlier trade mark.

36. Having concluded that cider can be non-alcoholic and that such a product would fall within class 32, I must determine whether such a product can properly be said to fall with the general term "non-alcoholic beverages". To this extent I note the decision in *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267 where it was stated:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations" or any other word found in Schedule 4 to the Trade Mark Regulations 1994 anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context. In particular, I see no reason to give the words an unnaturally narrow

meaning simply because registration under the 1994 Act bestows a monopoly on the proprietor.”

37. The above case supports the argument for a literal interpretation of the term. If such an approach were adopted then it is clear (as conceded by Mr Marsh) that non-alcoholic cider must fall within the ambit of the term because: 1) it is a beverage and 2) it is non alcoholic. However, in the *Treat* case, Jacob J. stated:

“I reject this argument. Notwithstanding what is said on the label, the use of the spread with a dessert is in practice likely to be slight. Mr Lloyd Jones, Robertson's Marketing Director, thought that all potential uses of the product, otherwise than as a spread, amounted to less than 5% of volume. The product comes in a jam jar because it is like a jam. No one would describe a jam as a "dessert sauce" in ordinary parlance, yet it too can be used on a dessert and everyone knows and sometimes does that. Supermarkets regard the product as a spread. The jam jar invites use as a spread. When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all a trade mark specification is concerned with use in trade. The Robertson product is not for the purpose of trade, a dessert sauce.”

38. It is no doubt the comments of Jacob J. that Mr Marsh had in mind when he argued that cider would not be considered in trade to be a non-alcoholic beverage. Whilst I understand the argument, it seems to me, taking *Beautimatic* and *Treat* in the round, that terms in specifications and the types of goods and services that fall within their ambit, must be determined in accordance with ordinary dictionary meanings unless their context and/or accepted trade descriptions/evidence point otherwise. To this extent, IFS has filed no evidence to suggest that the term “non-alcoholic beverages” is a term recognised by the trade and that it is regarded as designating a particular range of products (a range that

differs from its literal meaning). Indeed, the term strikes me as a simple literal one with simple basic understandable words. ... accordingly, non-alcoholic cider must fall within the ambit of the term “non-alcoholic beverages”.

39. The final point to determine is whether non-alcoholic ciders existed at the time of making NISA's application. It is true that the *Kopparberg* evidence is from after the date of application and therefore that specific brand did not exist at the time of filing. However, it does not follow that non-alcoholic cider did not exist prior to *Kopparberg*. Whilst NISA have filed no evidence to show that it did, I note that *NICE* includes a reference to non-alcoholic cider not only in its most recent edition (2006, 9th Edition) but also in the previous edition (2001, 8th Edition); this at least supports the proposition that it existed well before *Kopparberg*. Further, I note the decision in *Reed Executive plc and Reed Solutions plc v Reed Business Information Ltd and Reed Elsevier (UK) Ltd, totaljobs.com Ltd* [2004] ETMR 56, where Jacob LJ accepted that a specification could be taken to cover variants of goods that came into existence after registration:

[Here the Hearing Officer set out paragraph 48 of Reed]

40. Taking all factors into account, I am prepared to accept that non-alcoholic cider is covered by NISA's application even though it was applied for in 1996; the reasons for coming to this view are that there are no strong reasons to suggest that non-alcoholic cider did not exist at that date, and furthermore, even if it didn't, it could nevertheless be considered as a new variant non-alcoholic beverage.

41. Having found that NISA's specification encompasses non-alcoholic cider, the comparison between that product and cider in class 33 is relatively straightforward. The nature of both goods is very similar (even though one has an absence of alcohol) as they are both, essentially, ciders. It is clear from the evidence of NISA that alcoholic beverages and their non-alcoholic equivalents are sold side by side. It is also likely that

the goods are sold in identical measures and/or in similar types of packaging. Both sides' submissions suggest that the goods would be marketed together. Whilst cider (alcoholic) has as one of its intended purposes an intoxicating effect which is clearly not the case for the nonalcoholic equivalent, this distinction is not sufficient, taking into account all the other factors, to lessen to any significant extent the degree of similarity. In my view, the goods are highly similar."

10. The next relevant passage of the Hearing Officers' decision is found in paragraphs 46 to 49 in which he considered the relevance of IFS's claimed honest concurrent use of the mark. Mr Morris pointed out that the findings of Mr Landau in case BL O/022/07 were not binding on him, whilst he had not had the evidence as to IFS's goodwill put before him. However, he continued:

48. Even if I could take greater cognisance of Mr Marsh's "evidence" there are, in any event, problems in giving it any real significance. The first is, as stated above, that there is no evidence of honest concurrent use of the respective marks. For "honest concurrent use" to play a meaningful role in the assessment of the likelihood of confusion I must be satisfied that the parties have traded in circumstances that suggest consumers have been exposed to both marks and have been able to differentiate between them without confusion as to trade origin. That cannot be the case where, as here, there is no evidence at all in relation to the other mark.

49. The second problem relates to Mr Marsh's submission that it would be inequitable, in view of IFS's earlier right and first use, to refuse to register IFS's application. I can see no basis for this in law. Whilst factors surrounding concurrent confusion-free trading may play a part in the assessment of a likelihood of confusion, this does not extend to simple first user. The facts do nothing to establish that there is no likelihood of confusion and therefore they cannot operate to frustrate the mandatory refusal of an application under section 5(2)(a) in the event of a finding of

a likelihood of confusion. The fact, as Mr Marsh pointed out in his skeleton argument, that confusion may occasion itself to the detriment of the applicant as opposed to the proprietor of the earlier mark is in my view not relevant, confusion is confusion regardless of which way around it occurs.”

11. Perhaps not surprisingly, given those findings, the Hearing Officer’s conclusions as to the likelihood of confusion were:

“50. In so far as the conflict with non-alcoholic cider is concerned (falling, as I have found, within the term non-alcoholic beverages) it is with little hesitation that I conclude that there is a likelihood of confusion. The marks are identical. The goods are highly similar. The evidence (Mr Krause’s evidence of co-branding between alcoholic beverage and their non-alcoholic equivalents) shows that they are marketed in the same way often using the same branding. The earlier mark also has an average degree of distinctiveness. **Taking all these factors into account I consider that confusion is not only likely but is in fact inevitable.**

51. In relation to beer, the highpoint of IFS’s case is that the goods are distinct and that the consumer is not used to seeing co-branding between these types of goods. Whilst this may be true, the marks are nevertheless identical and will be sold through the same channels of trade and the consumer is likely to encounter them in close proximity to each other. There are also strong points of similarity in the physical nature of the goods themselves. It is, therefore, a question of balancing these factors and concluding whether or not the consumer will be confused as to the economic origin of the goods, or, put another way, will the consumer believe that the goods sold come from the same trade source. In my view, the relevant, average consumer encountering the respective marks for the respective goods will clearly notice that they share an identical form of branding. It will certainly not be lost on them. This is likely to lead them to the conclusion that a particular undertaking has produced

both a cider and a beer and is using the same branding to send the same guarantee of control and quality. The word is not low in distinctiveness and it is not a word that the consumer is likely to put down to a coincidental sharing, particularly bearing in mind the close proximity to each other at the point of sale. **All things considered, I find that there is a likelihood of confusion.**"

Standard of review

12. The standard of review for this appeal is helpfully set out at paragraphs 5-6 of the decision of Daniel Alexander QC in *Digipos Store Solutions Group Limited v. Digi International Inc.* [2008] EWHC 3371, [2008] Bus. L.R. 1621:

"5... It is clear from *Reef Trade Mark* [2003] RPC 5 ("*Reef*") and *BUD Trade Mark* [2003] RPC 25 ("*BUD*") that neither surprise at a Hearing Officer's conclusion nor a belief that he has reached the wrong decision suffice to justify interference by this court. Before that is warranted, it is necessary for this court to be satisfied that there is a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong (*Reef*). As Robert Walker LJ (as he then was) said:

"...an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance to interfere in the absence of a distinct and material error of principle" (*Reef*, para. 28)

6. This was reinforced in *BUD*, where the Court of Appeal made it clear that it preferred the approach of the appellate judge but nonetheless held that there was no error of principle justifying departure from the Hearing Officer's decision. As Lord Hoffmann said in *Biogen v. Medeva* [1997] RPC 1 at 45, appellate review of nuanced assessments requires an appellate court to be very cautious in differing from a judge's evaluation. In the context of appeals from the Registrar relating to section 5(2)(b) of the Act, alleged errors that consist of wrongly assessing similarities between marks, attributing

too much or too little discernment to the average consumer or giving too much or too little weight to certain factors in the multi-factorial global assessment are not errors of principle warranting interference.”

The decision with regard to each of the issues in this case involved a multi-factorial assessment of the kind mentioned above.

Similarity of beer and cider

13. IFS submitted that the Hearing Officer had erred in apparently seeking to assess whether cider and beer are “dissimilar” rather than whether they are similar goods, referring to the Hearing Officer’s comment in paragraph 27 of his decision that “Whilst Mr Marsh’s distinguishing points clearly identify that the goods are not the same, this, in itself, does not render them dissimilar.” Those points related to the physical nature of the respective goods and their respective manufacturing processes, and to the argument (unsupported by evidence) that it is not common for manufacturers to make both beer and cider.
14. It does not seem to me that the Hearing Officer’s comment reflects any error on his part. On the contrary, it seems to me that it demonstrates that he had firmly in mind the need to assess similarity by reference to a number of different factors, the physical nature of the goods being just one of these. I think that it is clear from paragraphs 22-28 of the decision that Mr Morris took all of the appropriate legal factors into account, having been reminded of them by Mr Marsh’s skeleton argument, in addition to considering the reasons given by Mr Hobbs QC in *Balmoral*.
15. In the present case, IFS did not dispute that beer would be sold through the same retail channels as and even “alongside” cider, but instead relied upon the different composition and method of manufacture of beer and cider and upon the submission that beer is not “substitutable” for cider and vice versa.

A similar argument was put in *Balmoral*, as to the differences between wine and whisky. However, that difference did not prevent Mr Hobbs finding that the goods were similar, in the light of the other factors which he identified. Similarly, here the Hearing Officer accepted that the “physical nature” of beer and cider differs, as does the process by which those drinks are made, but he considered that those differences did not outweigh the similarities as to users, trade channels of sale etc. identified by NISA. In my judgment, that is a conclusion which it was open to the Hearing Officer to reach.

16. Mr Marsh complained that the Hearing Officer came to his conclusions as to similarity without sufficient evidence, for instance as to the trade channels through which beer and cider would be sold, but it seems to me firstly that IFS cannot complain about this, given the concessions it made before the Hearing Officer, and further that the Hearing Officer did no more than take judicial notice of well-known facts, which would equally be well-known to the relevant public in the UK. Moreover, I note that NISA’s evidence included details of various searches made on supermarket websites, which supported Mr Morris’s view that beer and ciders would be sold in the same “sections” by retailers.
17. For all these reasons, it seems to me that IFS has not identified any error of principle or other material error in the Hearing Officer’s assessment of the similarity of beer to cider.

Likelihood of confusion

18. As to the Hearing Officer’s conclusion that a likelihood of confusion would arise if the identical marks were used on cider and beer, the only further issue raised on the appeal was that the Hearing Officer erred in ignoring IFS’s ‘honest concurrent use’ of the mark on cider. It seems convenient to deal with that next.

19. IFS complained that the Hearing Officer went wrong when he said that he could take little from Mr Landau's 2007 decision other than the fact that "in a non-binding case it was found that IFS has a goodwill." I do not think that I need to decide whether or not that was a correct approach to adopt, because it seems to me that the Hearing Officer's conclusions in paragraph 48 of his decision are plainly correct: he decided that even if he had been able to take such evidence into account, it would not have shown *concurrent* use of the identical marks by the two parties. There was no suggestion or evidence that NISA had made any use at all of its mark on either beer or non-alcoholic beverages. Hence, there was no honest *concurrent* use upon which it could rely.

Proposed limitation

20. IFS sought to mitigate the likelihood of confusion in terms of sales in bars and pubs by proposing to limit the application to "cider, all contained in bottles or cans, for sale in retail premises only." That proposed limitation was raised for the first time in the Grounds of Appeal. It is designed to reflect the nature of the use made of the mark to date by IFS. I will leave aside the issue of whether that form of limitation would in principle be acceptable, because it seems to me that it would not overcome the problem that beer marked 'Heritage' by NISA and cider marked 'Heritage' by IFS could both be sold in retail outlets, where, as Mr Morris found, they would be sold in close physical proximity to each other, giving rise to a likelihood of confusion. In the circumstances, I do not think that the appeal ought to be allowed on the basis of the proposed limitation to IFS's specification.
21. I conclude that there are no grounds to disturb the Hearing Officer's finding that NISA's opposition based upon its registration for beers was well-founded. The appeal must be dismissed.

Similarity of non-alcoholic beverages and cider

22. In the circumstances, IFS's second ground of appeal ~ that the Hearing Officer was also wrong to find that cider is similar to the 'non-alcoholic beverages' within NISA's specification ~ becomes academic. However, in deference to the parties' arguments before me, I will deal briefly with the merits of that part of the appeal.

23. IFS's main argument on this aspect of the appeal was, in essence, that the Hearing Officer had erred in his view that 'non-alcoholic beverages' includes non-alcoholic cider. Mr Marsh argued that non-alcoholic cider is still a cider and so could not be included in the broader category of beverages included in NISA's specification. Alternatively, he said, non-alcoholic cider would more appropriately be described as a fruit juice or juice drink, and so would again fall outside NISA's specification. On the other hand, he accepted that a mark to be applied to a completely non-alcoholic cider could not properly be registered in Class 33 which covers only alcoholic drinks. Mr Krause, on the other hand, argued that a mark for non-alcoholic cider would fall to be registered in Class 32, and the only relevant wording within the class headings to cover such a drink would be "non-alcoholic beverages." This fits with the natural meaning of the phrase and shows that it would cover non-alcoholic cider as well as other non-alcoholic drinks.

24. The phrase "non-alcoholic beverages" was one of the Nice class headings for Class 32 in the 7th (1996) edition of the classification. I note that the explanatory notes for Class 32 in that edition say "*This Class includes, in particular:- de-alcoholised drinks.*" That to my mind supports paragraphs 34 and 35 of the decision under appeal and NISA's argument that the broader phrase, on its proper construction, is apt to include non-alcoholic cider.

25. In my view, the Hearing Officer's analysis, both factual and legal, of the question of similarity of these goods discloses neither an error of principle, nor a material error on the basis of the facts before him.
26. IFS's arguments on the question of whether non-alcoholic cider falls within the specification 'non-alcoholic beverages' were closely linked to its arguments that there is no likelihood of confusion between the alcoholic cider for which it seeks registration in Class 33, and the non-alcoholic beverages in NISA's specification. However, evidence was filed on behalf of NISA to show that non-alcoholic cider would be sold and marketed alongside alcoholic cider and beer. IFS accepted that non-alcoholic cider would be more likely to be sold alongside alcoholic cider or beer, than alongside colas or soft drinks.
27. In my judgment, IFS did not identify any error in the conclusions reached by the Hearing Officer in paragraph 50 of his decision as to the likelihood of confusion were IFS's mark registered for cider. I reject its arguments as to the impact of its prior use of the mark on cider for the reasons given by the Hearing Officer, and as a result, the appeal fails on this basis also.

Costs

28. The appeal having failed, I will order IFS to make a contribution towards NISA's costs of the appeal in the sum of £750, that sum to be paid by 17 June 2009 together with the £1700 costs awarded by the Hearing Officer.

Amanda Michaels
26 May 2009

Mr Bruce Marsh of Wilson Gunn appeared on behalf of Independent Food Services Limited.
Mr Martin Krause of Haseltine Lake appeared on behalf of Nisa-Today's (Holdings) Limited.