

O-373-09

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2462798
BY GOOD NATURED LIMITED TO REGISTER THE TRADE MARKS**

**GOOD
NATURED**

AND

GOOD NATURED

IN CLASSES 16, 25, 30, 32 AND 33

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 97009
BY ANGUS SOFT FRUITS LIMITED**

TRADE MARKS ACT 1994

IN THE MATTER OF application No. 2462798

By Good Natured Limited to register a series of two trade marks
in Classes 16, 25, 30, 32 and 33

and

IN THE MATTER OF Opposition thereto under No. 97009

by Angus Soft Fruits Limited

BACKGROUND

1) On 31 July 2007, Good Natured Limited (“GNL”), of Rushley Green Barn, Rosemary Lane, Castle Hedingham, Halstead, Essex, CO9 3AH applied under the Trade Marks Act 1994 (“the Act”) for registration of the following trade marks:

GOOD
NATURED

and

GOOD NATURED

2) The application was in respect of goods in Classes 16, 25, 30, 32 and 33. A full list of these goods is provided as an annex to this decision.

3) On 1 May 2008, Angus Soft Fruits Limited (“Angus”) of East Seaton, Arbroath, Angus, DD1 5SY filed notice of opposition to the application. The opposition was based upon a single ground, namely that the application offended under Section 5(2) (b) of the Act because GNL’s application is in respect of similar marks and some identical or similar goods to its own earlier marks, namely:

Mark No and detail	Application and Registration Dates	All four registrations in respect of the same goods, namely:
2453820 GOOD NATURED FRUIT	26 April 2007 21 March 2008	Class 29: Processed fruits and vegetables
2460971 GOOD NATURED VEG	10 July 2007 22 February 2008	
CTM* 5859525 GOOD NATURED FRUIT	26 April 2007 24 April 2008	Class 31: Fresh fruit and vegetables
CTM* 6086227 GOOD NATURED VEG	10 July 2007 5 June 2008	

(* Community Trade Mark)

4) The opposition is directed only at the following of GNL's goods:

Class 30

Ices, sauces (condiments), ice and sweet and sugar confectionery

Class 32

Non-alcoholic beverages, fruit juices, fruit drinks, and alcoholic beverages

Class 33

Alcoholic beverages, wines, spirits and liqueurs

5) The applicant subsequently filed a counterstatement denying the opponent's claims.

6) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 5 November 2009 when Angus was represented by Mr Simon Malynicz of Counsel, instructed by Wynne-Jones, Laine & James LLP. GNL was not represented at the hearing, but it did provide written submissions in lieu of attendance.

Opponent's Evidence

7) This is in the form of a witness statement, dated 7 January 2009, by Gareth Peter Jenkins, trade mark attorney at Wynne-Jones, Laine & James LLP, the representatives for Angus in these proceedings. Mr Jenkins provides the results of an Internet search he conducted. Exhibit 1 shows copies, all dated 5 January 2009, from a selection of websites that, Mr Jenkins claims, illustrates the trend of farms in the UK to sell locally sourced products. The first of these is from www.middlefarm.com. It describes "Middle Farm" as nestling at the foot of Firle Beacon on the South Downs in Sussex. The page also contains the following text:

"We aim to promote the excellence of British farming by presenting to our customers the finest food and drink from the British countryside, maintaining the best of all that is traditional, whilst welcoming innovation wherever we find it"

8) Other pages from the same website records that Middle Farm only selects the finest meat, cheese, dressings, pickles and preserves, ice-cream, seasonal fruit

and vegetables from like-minded small-scale producers and that it has its own bakery producing cakes, scones, fruit and savoury pies and complete meals.

9) Another is from www.qgardensfarmshop.co.uk. Under the heading of “shop” the following text appears:

“We pride ourselves on stocking fresh, seasonal, high quality, local produce...”

and

“We also stock bread, dairy products, a wide range of local beers and wines, locally milled flour, cakes and biscuits, preserves and dry goods – the list goes on.”

10) Other pages record that Q Gardens farm shop is part of the largest fruit farm in Oxfordshire, famous for its cherries and plums, but that it also grows asparagus, strawberries, raspberries, currants, gooseberries, blackberries, tomatoes, damsons, greengages, apples and pears. These pages also indicate that other fresh produce is sold and that it produces its own apple juice and “pear mixtures”, a blend of pear and apple juice.

11) Further extracts are from www.burylanefarmshop.co.uk. It prides itself on sourcing the best quality freshest fruit and vegetables. It states that its produce is “[h]ome grown, or wherever possible sourced locally and from around the world...” It also offers “hand picked speciality beers, traditional ales and ciders many of which are locally brewed...” and champagne, port and armagnac.

12) Finally, there is an extract from www.abelandcole.co.uk that advertises itself as delivering organic food “to your door”. Among the products listed are fruit and vegetables, meat and poultry, bakery products, drinks, wines, beers and spirits.

13) At Exhibit 2, Mr Jenkins provides a number of extracts from websites to illustrate that “juice bars that offer for sale smoothies and juices display, at the point of sale, fresh fruit and vegetables.” The first of these is taken from www.lovesmoothies.com. This has for sale “The Smoothie Island” which is a serving counter designed for use in shopping centres, train stations, supermarkets and convenience stores. Oranges are visible in an orange juice machine. Also offered for sale is an orange juice squeezer where oranges are placed directly into the machine and are visible in a rack on the top of the machine. Its casing is transparent showing the oranges being juiced.

14) An extract from a second website www.projuice.net shows that Projuice is a company providing equipment, juice bar supplies and training in respect of the “juice industry” in the UK. Photographs on the page illustrate oranges in a juicing machine of the sort used at juice bars and seen in the previous website. There is

also another photograph that is too small to be completely clear, but appears to show a round table with a broad, transparent cylindrical central support filled with fruit and other machines or displays behind it also containing fruit. The inference here is that this is a view of a juice bar with equipment supplied by Projuice.

15) Exhibit 3 consists of further extracts from a website that Mr Jenkins has found illustrating that “Riverfords Organic”, a company based in Devon, provides recipes on its website which create some of GNL’s goods from Angus’ goods. Mr Jenkins does not identify which recipes are for goods covered by GNL’s goods, but I note that one recipe is for a banana smoothie. It is also clear from the extract that Riverfords Organic also delivers organic vegetable boxes.

Applicant’s Evidence

16) This is in the form of a witness statement, dated 13 July 2009, by Alastair John Rawlance, trade mark attorney at William A Shepherd Limited, GNL’s representatives in these proceedings. Mr Rawlance provides a single exhibit that consists of extracts from websites to show that the food and beverage sectors in the UK are “categorised into different trade journals aimed at completely different trade sectors.” These extracts are from www.eurofruitmagazine.com, www.kennedysconfection.com, www.ice-cream.org and www.bevindustry.com. The second of these provides information about the publisher, Kennedys, stating that it is an “international business-to-business publishing company, based in the UK” and it has “been actively publishing in the confectionary industry for over 40 years.” The third of these is the website for “The Ice Cream Association of Great Britain” and the extract records the fact that it publishes “Ice Cream”, an industry monthly magazine. The last is the website of a trade magazine called “Beverage Industry”.

Opponent’s Evidence in reply

17) This is in the form of two witness statements. The first, dated 28 July 2009, is by Victor Ivan Caddy, registered trade mark attorney with Wynne-Jones, Laine & James LLP. Mr Caddy explains that he visited Morrisons and Co-operative supermarkets in Evesham, Worcestershire on 6 and 14 July 2009. Here he purchased and/or photographed certain products produced in the accompanying exhibits.

18) At Exhibit VIC-1, Mr Caddy produces photographs of a bunch of bananas, shop displays showing various brands of fruit juices, tinned fruit, fruit lollipops (including a frozen pineapple fruit sticks that require defrosting before eating), frozen fruits and iced fruit smoothies, all products he found at Morrisons supermarket. All these photographs show at least some goods in each photograph bearing the mark DEL MONTE. Exhibit VIC-2 contains extracts from Del Monte’s website, dated 21 July 2009. Del Monte states that it “prepares tasty fruit and vegetables and delivers them to your favourite grocer...” It also details

its fresh and prepared salads, “whole produce” (fruit and vegetables), fruit juices, ice cream, canned fruit and fruit snacks. Examples of all of these are shown, all branded as DEL MONTE.

19) Exhibit VIC-3 contains further photographs of products that, Mr Caddy states, he found in Morrisons. This time, they relate to goods under the mark PRINCES. There are photographs of shop displays of orange juice, tomato juice, grapefruit juice and tinned fruit cocktail.

20) Exhibit VIC-4 are photographs of two tea products Mr Caddy found at Morrisons, namely Morrisons’ own branded papaya & mango flavoured infusion, TWININGS strawberry & mango tea. Exhibit VIC-5 shows copies of pages from five websites where fruit teas are offered for sale. Mr Caddy provides an explanation of the two main types of “fruit teas”. The first is the traditional fruit tea that is tea flavoured with pieces of fruit. The second is a fruit infusion which does not contain tea. He believes that these “teas” are fruit drinks and differ only in that one must add water to tea. One tea, identified by Mr Caddy, is MONIN Mango tea which is described in copies of Internet extracts shown in Exhibit VIC-6, as being “a refreshing blend of all-natural fruit juices, plant extracts, and gourmet teas”. Monin also produces fruit sauces, as shown in copies of Internet extracts found in Exhibit VIC-11, fruit syrups (Exhibit VIC-12) and alcoholic fruit liqueurs (Exhibit VIC-13).

21) At Exhibit VIC-7, Mr Caddy provides further information regarding MONIN products. These are in the form of copies of undated extracts from www.monin.com, illustrating that the mark MONIN is used in respect of fruit syrups and fruit sauces. Mr Caddy claims that MONIN is used in respect of a wider range of goods than identified in these extracts and also that they are sold through UK distributors, but this is not supported by the extracts filed.

22) Exhibits VIC-8 and VIC-9 are photographs of snack and confectionery products that Mr Caddy found on his trip to Morrisons. He draws attention to the trend suggested by these products as healthy products for children and he identifies the use of phrases such as “a great healthy lunchbox snack” and “for kids on the move”. Exhibit VIC-8 illustrates five different products in the form of packaged pieces of fruit or fruit jelly-type snacks. Exhibit VIC-9 illustrates packets of three different fruit flavoured sweets, all being promoted as being made from fruit juice.

23) At Exhibit VIC-10, Mr Caddy provides three further photographs of products he found at Morrisons. These all bear the mark OCEAN SPRAY. The first is of cartons of fruit drinks, the second of cranberry sauce, the third is of bottles of cranberry cordial. Exhibit VIC-11 consists of photographs of various sauces such as sun-dried tomato sauce, plum sauce, and red fruits sauce. All three bear different marks, with the last bearing the MONIN mark as discussed earlier.

24) Exhibit VIC-12 provides extracts from a number of websites including www.allaways.co.uk, dated 21 July 2009. At its online coffee and tea shop are exhibited various fruit syrups. The extracts from other websites also shows the same.

25) Finally, Mr Caddy provides exhibits relating to alcoholic beverages. Exhibit VIC-13 shows further copies of Internet extracts from UK websites that sell fruit liqueurs, including some bearing the mark MONIN again, and other alcoholic fruit drinks. These include strawberry liqueur. Mr Caddy identifies a reference to wine that is sold alongside fruit liqueurs.

26) The second witness statement, dated 27 July 2009, is by Lochart MacDonald Porter, Managing Director and founder of Angus. Mr MacDonald Porter provides further information in support of Mr Caddy's statement and exhibits. He states that it is commonly recognised that processed fruit and fruit juices are typically sold in branded form but that fresh fruit and vegetables are not traditionally overtly branded, but that recent trends are resulting in a change to this. In support of this he refers to Angus' own products GOOD NATURED FRUIT and GOOD NATURED SALAD. At Exhibit LMCDP-1 he provides photographs of GOOD NATURED FRUIT that he states are available in Sainsbury, Asda, Morrisons and Co-operative stores. He also states that the product GOOD NATURED SALAD is available in Asda stores and photographs of the product are provided at LMCDP-2.

27) Finally, Mr MacDonald Porter identifies a change in the industry brought about by the focus on healthy eating and the concept of "five a day" target for fruit and vegetable consumption. He states that this will lead to increased instances of brand extension and that Angus themselves are involved in discussions with another party to expand its range.

DECISION

Section 5(2)(b)

28) Section 5(2)(b) reads:

"(2) A trade mark shall not be registered if because –

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

29) An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

30) Of potential relevance to a ground of opposition under Section 5(2) are the provisions that relate to proof of use. Section 6A(1) details the circumstances where these provisions apply:

“6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.”

31) Angus relies on four earlier marks, all of which are registered and therefore qualify as earlier marks as defined by Section 6 of the Act. All four completed their registration procedures in 2008 and because this is less than five years before the publication of GNL’s mark they do not fall foul of the proof of use provisions and therefore Angus does not need to provide proof of use. The registrations may be taken into account in respect of all of their listed goods.

32) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] FSR. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] ETMR 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office*

for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P (LIMONCELLO). It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel BV v Puma AG*,
- (g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,
- (h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,
- (i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,
- (j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically

linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM (LIMONCELLO)*

The average consumer and the purchasing act

33) As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23) it is important that I assess who the average consumer is for the goods and services at issue. Both Angus' and GML's goods can be described as consumer goods and as such the primary average consumer for all the respective goods will be the general public.

34) With respect to the purchasing act, as these goods are mainly day to day food and drink provisions they will be mainly low cost items where the consumer will not pay the greatest attention, and in fact, in respect to some of the goods, such as fresh fruit and vegetables, it is often the case that little consideration is given to the trade origin of such products. Of course, I also take account that in respect of some goods such as certain alcoholic beverages and spirits, the cost may be significantly higher and the corresponding purchasing act may be more considered.

Comparison of goods

35) In assessing the similarity of goods, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.'

36) In *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] R.P.C. 281, Jacob J also gave guidance on how this should be assessed. The factors he highlighted were:

- “(a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

37) Two further cases on the way that specifications ought to be interpreted should be borne in mind. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd (“Thomson”)* [2003] RPC 32, at paragraph 31, Aldous LJ, says

“In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use.”

38) Although this was in the context of arriving at a fair specification consequent to an attack of revocation on the grounds of non-use, the principle that it is the public and circumstances of the relevant trade that should underpin consideration as to the terms used in a specification nonetheless holds good.

39) Secondly, there is the case of *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd (“Beautimatic”)* [2000] FSR 267, in which the principle of giving words their ordinary (rather than an unnaturally narrow) meaning was enshrined. In summary, the *Beautimatic* case urges an approach that is not unnaturally narrow, whilst the *Thomson* case stresses that the exercise is not one of lexical analysis in a vacuum, but by reference to how the average consumer may perceive matters in the relevant trade.

40) At the hearing, Mr Malynicz clarified that Angus' challenge to "ice and sweet and sugar confectionery" was intended to be understood as a challenge to "ice" and "sweet and sugar confectionery" and I will proceed with my considerations on this basis.

41) Taking account of Mr Malynicz's clarification and for ease of reference, I reproduce the respective goods below:

Angus' earlier marks	GNL's opposed goods
Class 29: Processed fruits and vegetables	Class 30: Ices, sauces (condiments), ice; sweet and sugar confectionery
Class 31: Fresh fruit and vegetables	Class 32: Non-alcoholic beverages, fruit juices, fruit drinks, and alcoholic beverages
	Class 33: Alcoholic beverages, wines, spirits and liqueurs

42) As a general observation, it is self evident that all the respective terms cover goods that are intended for human consumption or can include such goods. I do not consider such a general level of common purpose to be sufficient to establish similarity. Their nature can vary considerably, different food groups and drinks groups are often not in competition with each other and often they are not complementary to each other. Further they are often sold in different outlets and where they are sold at the same outlet, such as a supermarket, they can appear in different parts of the shop.

43) Before proceeding to consider the specific goods, I should also comment on GNL's evidence illustrating that various classes of goods are represented by different trade magazines and different trade associations. Mr Malynicz contended that it is not the view of traders that is important but that of the average member of the public. I concur with Mr Malynicz insofar as I have already identified the relevant consumer for the goods at issue is indeed the average consumer. But of course, I should not ignore the views of the trade as some of these may also be the relevant consumer when the goods at issue are involved in wholesale transactions.

44) Further, I also wish to comment on Mr Jenkins' evidence where he would have me believe that his evidence in respect of activities of various farm shops illustrates how brands can be extended across the full range of goods reflected in Angus' and GNL's specifications. At the hearing, Mr Malynicz conceded that some criticism of Mr Jenkins' evidence is well founded. In particular, I note that many of the exhibits only illustrate the various farm shops' retail activities where they have brought a variety of goods together in one place. The evidence falls short of demonstrating that all these goods are sold under a single mark. In fact

the evidence appears to suggest the opposite, with phrases such as “we select the finest [goods] from like-minded small scale producers” and that produce is “[h]ome grown, or wherever possible sourced locally and from around the world” alluding to a variety of goods being sold under a variety of marks.

45) With these comments in mind, I will go on to consider the issue of similarity of goods in more detail.

Ice

46) Mr Malynicz conceded at the hearing that Angus may not be able to readily demonstrate that any of its goods are similar to *ice*. This appears self-evident. *Ice* is no more than frozen water, whereas fruit and vegetables, whether processed or not are edible parts of plants. The purpose of *ice* is to cool, whereas the purpose of fruit and vegetables is to consume for sustenance. Their methods of use are different with *ice* added to drinks or used to preserve perishable items whereas fruit and vegetables are consumed as a foodstuff. Further, I see no reason why there will be any overlap of trade channels. Finally, it is settled case-law (*Sergio Rossi SpA v OHIM – Sissi Rossi*, Case T-169/03) that complementarity exists when the goods are those which are closely connected in the sense that one is indispensable or important for the use of the other, so that the consumers may think that the same undertaking is responsible for both. With this guidance in mind, I cannot see that *ice* and *fruit and vegetables* are complementary to any degree. In summary, I find that there is no similarity.

Ices

47) It is useful to begin by understanding what is meant by the terms *ices* and *processed fruit*. The word “ice” is a noun used to describe an ice cream or water ice¹. As such, I understand it to encompass a wide range of frozen confections based upon ice cream or upon other products either containing or mixed with water. The term *processed fruit* encompasses a group of foodstuffs that, following some sort of “processing”, are still described as “fruit”. Taking account of the guidance in the *Thomson* case, the term would not include products that, once processed, would be described as something other than “fruit”. To my mind, the term will be understood as including goods such as dried, frozen, tinned, puréed, sliced and diced fruit.

48) To support its contention that *ices* are similar to *fresh* and *processed fruit*, Angus have presented evidence of third party traders producing under a single trade mark both fresh fruit, processed fruit and frozen smoothies on a stick and also a frozen fruit snack on a stick. Mr Malynicz contended that this shows that

¹ “ice n.” *The Concise Oxford English Dictionary*, Twelfth edition . Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2008. *Oxford Reference Online*. Oxford University Press. Intellectual Property Office. 26 November 2009 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e27474>>

the consumer is familiar with traders of *fresh* and *processed fruit* also producing fruit based *ices* and that these respective goods are self-evidently similar because such *ices* are, or contain, processed fruits. In terms of their nature, frozen fruit smoothies share some similarities with *processed fruit*. The latter can include frozen fruit and a frozen fruit smoothie is merely liquefied fruit that is then frozen. As such, the respective goods are similar in nature. Further, there may be some overlap in intended purpose in that they can all be consumed as a snack, treat or dessert and may be in competition with each other. Further, the respective trade channels may overlap as the producers of processed (frozen) fruit could readily produce frozen fruit smoothies and, as the evidence illustrates, can be displayed on the same shelves as other frozen fruit. Therefore, taking all these points into account and the fact that the term *ices* contain goods such as frozen fruit smoothies and the term *processed fruit* includes frozen fruit, I find that there is a reasonable level of similarity between these goods.

49) The evidence put forward by Angus also illustrates a third party's (DEL MONTE) frozen pineapple on a stick appearing on the same supermarket shelf as its frozen fruit smoothie. I believe it is open to debate as to whether such a product is covered by the term *ices*, but in light of my findings in the previous paragraph, I do not consider it necessary to explore this further.

Sauces (condiments)

50) At the hearing, Mr Malynicz submitted that *sauces* are self-evidently similar to Angus' goods. The high point of this argument is that a sauce can also be essentially a processed fruit or vegetable. I acknowledge that their nature can be similar and by way of illustration, an apple sauce may be virtually indistinguishable from stewed apple in all except name. There can also be some overlap in terms of intended purpose, as both processed fruit and sauces can be used as an accompaniment to a meal or dessert. Due to these similarities, it is clear that the respective goods can be in competition with each other to the extent that the general consumer can choose between either product to accompany meals. Again, Angus have furnished evidence to demonstrate that a third party, this time under the mark OCEAN SPRAY, provides a range of goods that includes both fruit juices and fruit sauces and that the consumer is familiar with such brand extension. This point is slightly misleading as I am not required to consider the similarity between fruit juice and fruit sauces, but rather, to take Angus' best case, namely the similarity between *processed fruit* and *fruit sauces*, nevertheless, even for these goods it is clear that they can be distributed through the same trade channels and sold at shelves very close to each other. Taking all of the above into account, I find there is a reasonable level of similarity between *processed fruit* and *sauces (condiments)* as the latter includes fruit sauces which are very similar to processed fruit that, in themselves may be used as a substitute for such sauces.

Sweet and sugar confectionery

51) Mr Malynicz submitted that the evidence illustrates that there is “convergence” in the market place which is having the effect of bringing goods together in terms of similarity. In particular he referred to a trend, identified by Mr MacDonald Porter in his evidence, towards snack foods and confectionery being marketed with an emphasis upon their fruit content in order to sell themselves as healthy. I note this view, but I am not overly persuaded by an argument based on how confectionery is marketed. However, I am more influenced by the fact that processed fruit, sometimes just diced and dried, sometimes coated with chocolate or yoghurt, are sold as a confection. As such, the nature and purpose of these respective goods will be the same or at least very similar. It is not clear to me that there is identity in respect of the respective trade channels, but their end destination can be the same as they can be sold in the same area of a shop and on the same shelves as other confectionery. As such, they are clearly in competition with each other. Taking all this into account, I find that these respective goods share a reasonable level of similarity.

Non-alcoholic beverages, fruit juices, fruit drinks

52) A “beverage” is defined as “a drink other than water”². Therefore, it is clear to me that the term *non-alcoholic beverages* will include both *fruit juices* and *fruit drinks*. In respect of these latter goods, Angus has adduced evidence illustrating not just one trader but three traders providing *processed fruits* and *fruit juices* or *fruit drinks*. It contends that this supports its view that the consumer is familiar with such brand extensions. I accept this illustrates that at least part of the respective trade channels may be the same, but I note that such goods would not generally be found in the same shelves in a shop. Quite the opposite, they are usually found in different areas of a shop.

53) In respect of their nature, *processed fruit* and *fruit juice* are similar insofar as they are both produced by the act of processing fruit and are often just that, with no additional ingredients. They differ in that one is a foodstuff, the other a drink. As such the purpose is different in that one is eaten, the other is drunk by the user. They are generally not in competition to each other, however, I recognize that sometimes oranges, for example, may be purchased for the express purpose of “juicing”. In such an example, there may be some competition between the fresh fruit itself and the juice made from the same fruit. That said, they are likely to appear in different parts of a shop and on different shelves.

54) Taking all of the above into consideration, in particular the nature of the respective goods, the overlap in trade channels and the consumers’ familiarity

² “beverage n.” *The Concise Oxford English Dictionary*, Twelfth edition . Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2008. *Oxford Reference Online*. Oxford University Press. Intellectual Property Office. 11 November 2009 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e5052>>

with this, I find that *fresh and processed fruit* share a reasonable level of similarity to *non-alcoholic beverages, fruit juices and fruit drinks*.

55) Angus' argument that fruit teas are non-alcoholic beverages and are similar to processed fruit is noted, but I do not believe its case is improved to any measure by this argument. I will therefore not consider it further.

Alcoholic beverages (in Class 32) and alcoholic beverages, wines, spirits and liqueurs (in Class 33)

56) At the hearing Mr Malynicz focussed on what he saw as Angus' strongest case, namely that *fruit liqueurs* in Class 33 are similar to *fresh and processed fruit*. He argued that such *liqueurs* are promoted as being fruity and the consumer will connect the respective goods when marketed under the similar marks GOOD NATURED and GOOD NATURED FRUIT. I do not agree. The fact that *liquor* may be flavoured with a specific fruit is not sufficient to make these goods similar. An ingredient that goes into the composition of a product is not the only, nor necessarily the most important, factor to be considered. The nature of the respective goods is different as one is an alcoholic drink, the other a fresh or processed fruit. One is for drinking for intoxication, the other for eating as sustenance. The production processes involved are different. *Fruit liqueurs* are alcoholic drinks produced by distillation or fermentation whereas *fresh fruit* merely requires picking and packaging. *Processed fruit* may undergo a more elaborate process than merely picking and packaging, but whichever process this may be, it will be greatly different to distilling or fermenting.

57) Further, the specialist process required to produce *liqueur* and the resources required for such a process suggests that the respective goods will originate from different trade sources with different supply chains. They belong to different sectors. The respective goods are neither complementary nor substitutable. It is true that the *liqueur* may be flavoured by a fruit but there is no expectation by the consumer that the *fruit* and the *liqueur* will originate from the same undertaking. In an attempt to address this point, Angus provide evidence of a third party trading under the mark MONIN providing fruit liqueurs as well as fruit sauces, fruit syrups and fruit teas. However, as there is no evidence that MONIN is also used in respect of *fresh or processed fruit*, it does not advance its case to any significant extent. In any event, this is only a single example and I would be reluctant to extrapolate that this is the case more generally. Therefore, as the nature, purpose and method of use of the respective goods are clearly distinct, I find that they are not similar.

Comparison of marks

58) For ease of reference, the respective marks are:

Angus' trade mark	GNL's trade mark
GOOD NATURED VEG	GOOD NATURED
GOOD NATURED FRUIT	GOOD NATURED

59) When assessing the extent of similarity between the respective marks, I must do so with reference to their visual, aural and conceptual similarities bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*, para 23). I should state at the outset that I do not consider the differences between GNL's two marks to have any impact upon my considerations on similarity between the marks and, for the purposes of my analysis, I will treat these as a single mark.

60) Whilst GNL denies that the marks are identical, it makes no submissions in respect to the level of similarity. Angus, however, submits that the respective marks share a high level of visual similarity, that three of the four syllables of its marks are identical to GNL's mark and that there is a high degree of conceptual similarity. I concur with these submissions. Visually, GNL's mark is identical to the first two words of Angus' marks. The third word in each of Angus' marks is quite short, being only three letters in one and five letters in the other. From an aural perspective, similar observations can be made, with the respective marks sharing the aurally identical words GOOD NATURED with the only point of difference being the third word in each of Angus's marks. Finally, from a conceptual perspective, the words GOOD NATURED describe a kindly disposition. Mr Malynicz also argued that they also alluded to the relevant goods being "full of natural goodness". I accept that this, or some similar allusive value, also attaches itself to these words. The words VEG and FRUIT in Angus' marks describe the nature of the goods and provide the only point of conceptual difference between the marks.

61) To summarise, I find that the respective marks share a high level of visual, aural and conceptual similarity leading to the marks, when viewed as a whole, sharing a high level of similarity.

Distinctive character of the earlier trade mark

62) I have to consider whether Angus' marks have a particularly distinctive character either arising from the inherent characteristics of the marks or because of the use made of them. They consist of the words GOOD NATURED VEG or GOOD NATURED FRUIT. Whilst I have identified that the term GOOD NATURED may have an allusive quality in respect of the goods in which these marks are registered, nevertheless, the term, by virtue of its normal meaning, has a reasonable level of distinctive character, but not the highest level enjoyed by marks that are, for example, made up words. I must also consider the effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act. In this case, Angus has not provided any evidence as to its reputation and as

such, I conclude that the distinctive character has not been enhanced through use.

Likelihood of confusion

63) In my assessment of the relevant factors, I found that:

- the earlier marks have a reasonable level of distinctive character, but not the highest level and that this distinctive character is not enhanced further through use;
- there is no similarity between Angus' goods and GNL's *ice and alcoholic beverages* [in both Class 32 and Class 33], *wines, spirits and liqueurs*
- there is a reasonable level of similarity between Angus' goods and GNL's *ices, sauces (condiments), sweet and sugar confectionery; non-alcoholic beverages, fruit juices, fruit drinks*; and;
- the average consumer is mainly the general public in respect to both Angus' and GNL's goods and the purchasing act may not involve a great deal of consideration;
- the marks share a high level of visual, aural and conceptual similarity leading to the marks, when viewed as a whole, sharing a high level of similarity.

64) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27).

65) Firstly, in light of the guidance provided by the ECJ in *Waterford Wedgwood plc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-398/07, paragraph 34, that a finding of likelihood of confusion presupposes that the goods or services covered are identical or similar. It follows, as a natural consequence of this, that where I have found that there is no similarity between the respective goods, there is no likelihood of confusion. This is the case in respect of GNL's *ice* in Class 30, *alcoholic beverages* in Class 32 and *alcoholic beverages, wines, spirits and liqueurs* in Class 33.

66) I will therefore apply the global approach in respect of GNL's remaining goods. Here, I find that, given the reasonable level of similarity between the respective goods, the high degree of similarity between the respective marks and the nature of the purchasing act and relevant consumer, there will be a likelihood of direct confusion. Therefore, in respect of GNL's *ices, sauces (condiments) and sweet and sugar confectionery* in Class 30 and *non-alcoholic beverages, fruit juices, fruit drinks* in Class 32, I find that the consumer will, upon seeing the respective marks used in conjunction with the respective goods, confuse the marks and therefore assume that the respective goods originate from the same undertaking.

67) In summary, the opposition has been partially successful and the application should be refused in respect of *ices, sauces (condiments) and sweet and sugar confectionery* in Class 30 and *non-alcoholic beverages, fruit juices, fruit drinks* in Class 32. However, the opposition fails in respect of *ice* in Class 30, *alcoholic beverages* in Class 32 and *alcoholic beverages, wines, spirits and liqueurs* in Class 33.

COSTS

68) As both parties have enjoyed a measure of success with the opposition being only partially successful, I order that both parties bear their own costs.

Dated this 30 day of November 2009

**Mark Bryant
For the Registrar,
the Comptroller-General**

ANNEX

Full List of Goods for Application 2462798

Class 16

Paper, paper articles, cardboard and cardboard articles; printed matter; printed publications; photographs and prints; stationery; adhesives for stationery and household purposes; artist materials; paint brushes; diaries; almanacs; instructional and teaching materials; office requisites.

Class 25

Clothing; footwear; headgear; swimwear and beachwear; ties (for wear); belts (for wear).

Class 30

Sugar, rice, tapioca, sago, flour and preparations made from cereals, bread, pastry and confectionery; ices; honey, treacle; yeast, baking powder; salt, mustard; vinegar, sauces (condiments); spices; ice; prepared meals included in Class 30; sweet and sugar confectionery included in Class 30; chocolate confectionery; breakfast cereals; quiches; popcorn; mayonnaise.

Class 32

Non-alcoholic beverages; fruit juices; fruit drinks; alcoholic beverages included in Class 32.

Class 33

Alcoholic beverages; wines, spirits and liqueurs.