

TRADE MARKS ACT 1994

IN THE MATTER OF:

APPLICATION No. 84071

IN THE NAME OF INTERSNACK KNABBER-GEBACK GMBH & CO. KG

TO INVALIDATE TRADE MARK REGISTRATION No. 2563779

IN THE NAME OF CHIQUO LTD.

DECISION

1. Trade mark number 2563779 was registered on 4 February 2011 with effect from 9 November 2010 in the name of Chiquo Ltd ('the Proprietor'). This is the registered mark:



and these are the goods for which it was registered:

Class 29: Peas, beans, dals, rice, nuts and seeds; snacks prepared from peas, beans, seeds and nuts; dried fruits.

Class 30: Flour; spices.

Class 31: Unprocessed edible seeds.

2. On 26 May 2011 Intersnack Knabber–Gebäck GmbH & Co. KG ('the Applicant') applied to the Registrar of Trade Marks for a declaration to the effect that the registration of the trade mark number 2563799 was wholly invalid. It is sufficient for present purposes to note that the Applicant objected to the registration in suit under Section 5(2)(b) of the Trade Marks Act 1994 upon the basis of the rights to which it was entitled as proprietor of the earlier Community trade mark **CHIO** registered under number 134684 on 2 February 1999 pursuant to an application for registration filed on 1 April 1996.

3. It stands accepted that the goods with respect to which the rights conferred by that registration could legitimately be invoked under Section 5(2)(b) were:

Class 29: Potato crisps; prepared potato products for snacks; roasted, dried, salted or savoury nuts.

Class 30: Salted or lye-biscuits; pretzels and savoury biscuits, being cereal products in extruded or pellet form for snacks or being prepared cereal products for snacks.

4. The question for determination by the Registrar was whether there were similarities between the marks in issue and similarities between the goods in issue that would have combined to give rise to the existence of a likelihood of confusion if the Applicant's trade mark and the Proprietor's trade mark had been used concurrently in the United Kingdom in relation to goods of the kind for which they were respectively protected and sought to be protected by registration in November 2010.

5. That question was answered adversely to the Applicant for the reasons given by Mr. Oliver Morris on behalf of the Registrar in a written decision issued under reference BL O-263-12 on 6 July 2012. He ordered the Applicant to pay £1,800 to the Proprietor as a contribution towards its costs of the proceedings in the Registry.

6. With regard to the goods in issue, the Hearing Officer decided:

(1) that there was identity in relation to *'nuts [considered as snack foods]'* and *'snacks prepared from nuts'* (paragraphs 22, 23)

(2) that there was *'a good deal of similarity'* in relation to *'peas, beans, dals and seeds [considered as snack foods]'*, *'snacks prepared from peas, beans and seeds'* and *'dried fruits'* (paragraphs 22, 23);

(3) that there was *'a good deal of similarity'* in relation to *'unprocessed edible seeds'* (paragraph 25);

(4) that there was a *'reasonable degree of similarity'* in relation to *'spices'* (paragraph 26).

7. With regard to the marks in issue, the Hearing Officer proceeded upon the basis that they were neither conceptually similar nor conceptually dissimilar (paragraph 30). He considered that they were visually similar to a low degree for the following reasons:

31) In terms of the visual comparison the words CHIQUO and CHIO share the same first three letters CHI and both end in O. However, one mark has only four letters and the other six so the CHIO mark is appreciably shorter.

The word CHIQUO also contains the letters QU, one of the more unusual letter groupings in the English language. There is, of course, a further difference created by the device element in the CHIQUO mark which contributes further dissimilarity, but I do not consider that this is overly significant when one bears in mind the dominance of the CHIQUO element. Weighing these similarities and differences, I come to the view that there is only a low degree of visual similarity.

He considered that they were aurally similar to a greater degree than they were visually similar for the following reasons:

32) In terms of the aural comparison, the CHIO mark is likely to be pronounced as CHEE-O (ch as in church, ee as in tea, and o as in the letter itself). The CHIQUO mark is a more difficult mark to articulate and will be pronounced either as CHEE-CO (co as in the abbreviation for company) or CHEE-KWO (kwo as in status quo). Either way, I consider there to be more aural similarity than there is visual similarity - I assess it at a reasonable, but not high level. In both cases, QU (whether it forms part of CO or KWO) stands out to a degree.

8. In paragraph 33 of his decision he found that the earlier trade mark **CHIO** was inherently distinctive to a high degree in relation to goods of the kind he was considering. Having directed himself correctly by reference to the case law of the CJEU relating to the scope and nature of the assessment required for the purpose of determining the objection to validity under Section 5(2)(b), he concluded that the objection should be rejected upon the following basis:

36) In terms of whether there exists a likelihood of confusion, I will consider the position firstly in relation to nuts. This is because if Intersnack cannot succeed here (in respect of goods which I have found to be identical) then it

will be in no better position with the other goods it opposes. That the goods are identical is an important point because this could off-set the lower degree of similarity between the marks (a point Mr. Grimshaw highlighted). I must bear in mind the more casual purchase of the goods and the concept of imperfect recollection. I also bear in mind that neither mark has a concept for the average consumer to base his recollections upon. Nevertheless, and despite all these factors, I still come to the view that the marks, due to the level of similarity between them, will not be confused. The shortness of CHIO compared to CHIQUO and the differences created by the QU provide acute enough differences for the average consumer to distinguish between them even when identical goods are in play. That there may be more aural similarity than visual similarity does not persuade me, when the degrees of similarity are considered, together with the predominantly visual selection of the goods, that there is a likelihood of confusion. **The ground of opposition under section 5(2)(b) fails.**

9. The Applicant appealed to an Appointed Person under Section 76 of the 1994 Act contending that the Hearing Officer's rejection of the application for invalidity was wrong and should be reversed because:

- (a) he had erred in law in reaching the conclusion that he did regarding the likelihood of confusion, based on the factual determinations that he made; or
- (b) he had failed to take into account and accord the appropriate weight, as required by law, to all the relevant factors when assessing the similarity of the marks in question.

These contentions were developed in argument at the hearing before me. The Proprietor elected not to participate in the hearing of the appeal. It maintained that the Hearing Officer's decision was correct for the reasons he had given.

10. The Hearing Officer's assessment of the degree of similarity between the goods in issue was not substantively challenged and neither was his assessment of the degree of distinctiveness possessed by the earlier trade mark. The focus of attention was his assessment of the degree of similarity between the marks in issue. This was criticised in detail. It was submitted that relevant considerations had either not been taken into account or not been given sufficient weight as a result of the adoption of a formulaic and overly simplistic comparison of the marks in issue.

11. In that connection it was emphasised on behalf of the Applicant that: (i) although **CHIO** is shorter, it is entirely included with the word **CHIQUO** as they share the same letters in the same sequence; (ii) the additional letters 'QU' are situated in the centre of the word **CHIQUO** and would for that reason be accorded less significance than the beginnings of the two words, which are identical; (iii) the additional letters 'QU' are apt to be robbed of impact by slurred speech, mispronunciation, mishearing and imperfect recollection; (iv) both words are comprised of two syllables.

12. Both as between marks and as between goods and services, the evaluation of 'similarity' is a means to an end. It serves as a way of enabling the decision taker to gauge whether there is 'similarity' of a kind and to a degree which is liable to give rise to perceptions of relatedness in the mind of the average consumer of the goods or services concerned. This calls for a realistic appraisal of the net effect of the similarities and differences between the marks and the goods or services in issue, giving the similarities and differences as much or as little significance as the average consumer (who is taken to

be reasonably well-informed and reasonably observant and circumspect) would have attached to them at the relevant point in time.

13. It is axiomatic that the marks in issue should be considered without dismemberment or excision. That is not fully recognised in the Applicant's contention that **CHIO** is entirely included within the word **CHIQUO**. In my view, **CHIQUO** is a word out of which **CHIO** can be extracted only by a process of dismemberment that the relevant average consumer would not be prone to engage in. The pivotal issue for determination by the Registrar was whether there was enough visual, aural and conceptual individuality in the mark **CHIQUO** to enable it to co-exist peacefully with the mark **CHIO** in use in the United Kingdom in relation to goods of the kind in issue. There was undoubtedly room for more than one view as to what the answer to that question should be on approaching it from the perspective I have indicated in paragraph 12 above.

14. It is particularly important in such circumstances to observe the distinction between on the one hand making a decision in the first instance and on the other hand determining on appeal whether it was open to the decision taker at first instance to arrive at the decision he did on a correct application of the law to the matter in dispute. The Hearing Officer addressed himself to the matter in dispute in the present case from the correct legal perspective. He did not, when making the required assessment, take immaterial factors into account or omit to take material factors into account. He concentrated on the impact of the differences and similarities in spelling of the words **CHIO** and **CHIQUO**. I cannot say that on balancing the factors he had identified in the way that he did, he came to a conclusion which was not open to him. That being so, it

would not be legitimate for me to set his decision aside on the basis of the Applicant's contention that he should have attached less weight than he did to the letters **QU** as a characterising feature of the distinctive word **CHIQUO**.

15. The Appeal will be dismissed for the reasons I have given. I have no reason to believe that the Proprietor has incurred any or any significant costs in connection with the Appeal, which is therefore dismissed with no order for costs. The Hearing Officer's order for costs remains in place.

Geoffrey Hobbs QC

27 February 2014

Mr. Stephen Hodsdon of Mewburn Ellis LLP appeared on behalf of the Applicant.

The Proprietor was not represented at the hearing.

The Registrar was not represented at the hearing.