O-164-16

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION, NO 3,047,947 IN THE NAME OF BELCHIM CROP PROTECTION, NAAMLOZE VENNOOTSCHAP

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF CJ BOWEN DATED 24nd JULY 2015 (O/343/15; CORRECTED BY O/368/15)

DECISION

Introduction

1. This is an appeal from the decision of Mr CJ Bowen, for the Registrar, dated 24th July 2015 (with a correction issued on 4th August 2015) in which he dismissed the opposition of Syngenta Participations AG to the registration of Belchim Crop Protection, Naamloze Vennootschap's application no 3,047,947 based on s 5(2)(b) of the Trade Marks Act 1994. Syngenta appeals.

2. Belchim's application was for the mark QUIT in class 5 in relation to:

> Pesticides; insecticides, fungicides, herbicides, nematicides, acaricides, rodenticides, molluscicides, insect repellents, algicides, germicides and disinfectants

3. Syngenta is the registered proprietor of Community Trade Mark No 10,648,467 for the mark QUILT in class 5 in relation to:

> Class 5 - Preparations for destroying vermin; Fungicides, herbicides.

Approach to appeal

4. It was accepted by Syngenta that the correct approach to appeals before the Appointed Person is based on the principles set out by Robert Walker LJ in *Reef TM [2002] EWCA Civ 763*, [2003] RPC 5 at paragraph 28 and 29:

> ….In such circumstances 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.
>
> The appellate court should not treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed. The duty to give reasons must not be turned into an intolerable burden: see the recent judgment of this court in *English v Emery Reimbold & Strick Ltd* (and two other appeals heard with it) [2002] EWCA Civ 605, 30 April 2002, para 19:
>
> > " ... the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template

> for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision."

5. Mr Chapple also referred me to the judgment of Lindsay J in *esure Insurance Limited v Direct Line Insurance plc* [2007] EWHC 1557 1557 (Ch), [2008] RPC 6 (not addressed on appeal [2008] EWCA Civ 847), paragraph 12:

> I shall not be ambitious enough to attempt a full definition of what is, for present purposes, an error of principle such as to justify or require departure from the decision below save to say that it includes the taking into account of that which should not have been, the omission from the account of that which should have been within it and the case (explicable only as one in which there must have been error of principle) where it is plain that no tribunal properly instructing itself could, in the circumstances, have reasonably arrived at the conclusion that it reached.

Syngenta's submission

6. Syngenta's criticism of the Hearing Officer's decision was that the Hearing Officer "omitted from the account" an express finding as to whether there was a likelihood of confusion between the two marks.

7. Essentially, the appeal revolved around a single paragraph in a section headed "Likelihood of confusion", namely paragraph 28 of the Hearing Officer's decision:

> 28. In my view, the completely different conceptual messages that will be conveyed by the competing trade marks will fix themselves in the average consumer's mind. In so doing, they will assist the average consumer's recall, thus making them less prone to the effects of imperfect recollection. This clear conceptual difference is, in my view, more than sufficient to neutralise the medium degree of visual and aural similarity I have identified earlier. Although I have reached this conclusion in the context of, inter alia, an average consumer who will pay at least an average degree of attention during the purchasing act, given the very clear and distinct conceptual messages that will be conveyed by the competing trade marks, I would have reached the same conclusion even if I had characterised the degree of attention paid as low and the degree of visual and aural similarity between the competing trade marks as high.

8. Mr Chapple argued that it was not clear from this paragraph what conclusion (if any) the Hearing Officer had reached on the likelihood of confusion. Mr Chapple accepted that the Hearing Officer had set out the correct law and applied the right sort of considerations up until this point. But, he submitted, there was no clear conclusion expressed on whether there was a likelihood of confusion between the two marks and so it is unclear whether any finding was made in this regard. Mr Chapple submitted that, absent such a finding, the Hearing Officer had not considered whether the requirements of s 5(2)(b) of the Trade Marks Act 1994 were satisfied.

9. If the Hearing Officer had failed to find whether or not there was a likelihood of confusion then, clearly, the appeal would have to be overturned as he would not have properly considered s 5(2). The only issue was, therefore, whether such a finding had been made. Indeed, during the hearing, Mr Chapple accepted that the decision would be unimpeachable if the phrase "considering these facts, I consider there is no likelihood of confusion", had been included in paragraph 28.

Did the Hearing Officer come to a finding on likelihood of confusion?

10. Mr Bowen dealt with the issue of Likelihood of Confusion in paragraphs 25 to 28 of his Decision. In paragraph 25 he set out a number of findings:

> • the competing goods are either identical or similar to a very high degree;
>
> • the average consumer is either a member of the general public or a specialist user such as a farmer or agricultural contractor;
>
> • whilst the selection process will be primarily visual, aural considerations must not be ignored;
>
> • the average consumer will pay at least an average degree of attention during the purchasing act;
>
> • the competing trade marks are visually and aurally similar to a medium degree and are conceptually dissonant;
>
> • the opponent's earlier trade mark is possessed of a normal/average degree of inherent distinctive character.

11. He then continued in paragraphs 26 and 27 by referring to two decisions (C-361/04 *Picasso v OHIM* [2006] ECR I-643; [2006] ETMR 29 and T-460/07 *Nokia v OHIM* [2010] ECR II-89) before presenting "his view" in paragraph 28 (set out in paragraph 7 above).

12. Mr Chapple suggested that the sentence in paragraph 28, "In so doing, they will assist the average consumer's recall, thus making them less prone to the effects of imperfect recollection", brought in an ambiguity as to what (if anything) the Hearing Officer was finding. He said no finding was made (or conclusion reached), despite the Hearing Officer expressly stating he had "reached this conclusion" and later saying he would have "reached the same conclusion" if he had made slightly different factual findings.

13. While I accept that in an ideal world a Hearing Officer should always expressly say something like "I consider there is no likelihood of confusion" where this is the case, nevertheless where that conclusion is clear from the judgment it is equally acceptable.

14. In my view, the Hearing Officer's decision clearly indicated his finding that there was no likelihood of confusion between the two marks. This is most clearly evidenced by two statements: the first statement being, "In my view, the completely different conceptual messages that will be conveyed by the competing trade marks will fix themselves in the average consumer's mind"; and, the second, after one more sentence, "This clear conceptual difference is, in my view, more than sufficient to neutralise the medium degree of visual and aural similarity I have identified earlier." Having stating that the conceptual difference was so great that it outweighed any visual and aural similarity, the only possible conclusion he could have reached was that there was no likelihood of confusion. Had he made this factual finding and then found that there *was* a likelihood of confusion, such a decision would have been perverse. Thus, his finding was totally unambiguous.

15. Even if I had found that this section of paragraph 28 left some ambiguity, the Hearing Officer continued by stating that he would have reached the same conclusion "even if I had characterised the degree of attention paid as low and the degree of visual and aural similarity between the competing trade marks as high." In other words, even if the factual findings were more in favour of Syngenta in terms of attention paid, visual and aural

similarity, the Hearing Officer nevertheless would still have found the conceptual difference sufficient to indicate no likelihood of confusion. Once more this would make sense only if he had already found there was no likelihood of confusion.

16. Furthermore, the statement identified by Mr Chapple (mentioned in paragraph 12 above) supports the lack of conceptual similarity and so the absence of any likelihood of confusion. Indeed, my reading of paragraphs 25 to 28 (and in particular the last of those paragraphs), leaves no doubt in my mind whatsoever that the Hearing Officer *did* make a finding that there was no likelihood of confusion even though he never actually included those exact words.

17. Accordingly, I dismiss the appeal and uphold the Hearing Officer's Decision. As the Applicant (Belchim) did not take part in the appeal, I make no order as to costs.

Supplementing reasons

18. This appeal was, essentially, on the grounds that the Hearing Officer did not giving adequate reasons for his judgment (although I have found that in fact he did). Even on the Appellant's case, the Hearing Officer's conclusion that the opposition be dismissed was set out clearly in paragraph 29 of the Decision (albeit there was a correction under the slip rule as to the effect of that decision).

19. In *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 the Court of Appeal set out a practice to be followed in relation to a failure to adequately give reasons:

> If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.

20. This practice has been followed ever since and it seems to me that the appropriate course of action in this case would have been for Syngenta to have applied to the Hearing Officer to elucidate his reasons. Had this been done, he could have added a sentence of additional reasoning and the appeal would have been unnecessary.

PHILLIP JOHNSON
THE APPOINTED PERSON
22nd March 2016

For Appellant (Syngenta): Malcolm Chapple (instructed by Murgitroyd & Company)
The Respondent did not take part in the proceedings.