

O-258-17

TRADE MARKS ACT 1994

IN THE MATTER OF OPPOSITION No. 406094

IN THE NAME OF KNORR-NAHRMITTEL AKTIENGESELLSCHAFT

TO TRADE MARK APPLICATION No. 3134998 NOODLE EXPRESS

IN THE NAME OF SYMINGTON'S LIMITED

DECISION

1. This is an appeal against decision O-561-16 dated 28 November 2016 of Mr CJ Bowen acting as the Registrar's Hearing Officer ("the Decision") which rejected an opposition based upon sections 3(1)(b) and (c) of the Trade Marks Act 1994 ("the Act") against the mark NOODLE EXPRESS in the following categories:

Class 29 Instant meals; prepared meals; instant food which requires heating; soups; noodle based soups; snack foods, in particular dried instant hot snacks.

Class 30 Instant meals; prepared meals; preparations for making instant meals; instant food which requires heating; noodles; preparations consisting principally of noodles.

2. The Opponent, Knorr-Nahrungsmittel Aktiengesellschaft, appeals the decision.

PRELIMINARY MATTERS – HEARINGS AND SKELETONS

3. As the Hearing Officer recorded at §4 of the Decision, before the Registrar neither party filed evidence, requested a hearing nor filed written submissions in lieu of attendance (albeit that the Opponent had filed some written submissions during the evidence rounds).
4. The Applicant, Symington's Limited, has not taken part in the appeal and indicated at an early stage that it would not be attending any hearing. Although a hearing had been fixed for the Opponent's appeal, less than two working days before the hearing was due to take place the Opponent's solicitors, Baker McKenzie, contacted the Intellectual Property Office to ask for the hearing to be vacated and the appeal to be determined on the papers. The request was made in unequivocal terms in a telephone call and then a letter dated 25 May 2017, which stated:

“Further to our telephone conversation on 24th May 2017 during which we notified the IPO that our client does not wish to attend the hearing, we confirm in writing that we will not be attending the hearing on 30th May 2017. We hereby request a decision on paper. Therefore, our understanding is that skeleton arguments are not necessary.”

5. In response to this letter I directed the Opponent to my observations at §§4-6 of my decision in O-007-17 MEDI-MATT, which I repeat below:

Preliminary Point - Hearings before the Appointed Person

...

4. It has been emphasised in the past that the Appointed Persons receive considerable assistance from the attendance of the parties at a hearing and the parties are strongly encouraged to attend. This remains the case. The particular benefit of a hearing is that it allows the parties to focus on the alleged errors of the Hearing Officer, and this focus is often sharpened by questions from the tribunal. Moreover, oral discussion enables the parties to emphasise which they consider are their best points.
 5. The nature and standard of review in appeals from the Registry is well-known but is not always taken into sufficient account in the grounds of appeal and written submissions. To be successful on appeal the appellant must identify a distinct and material error of principle or otherwise demonstrate that the decision is wrong. This standard is much more difficult to meet if the parties merely repeat the submissions made at first instance, because in the absence of an error of principle an appellate tribunal will show a real reluctance to interfere (*REEF Trade Mark* [2003] R.P.C. 5 at §28). An oral hearing provides a good opportunity for the appellant to emphasise the alleged error(s) and explain precisely why rectification of any error(s) would lead to a different overall result, and for the respondent to explain why there are no error(s) and/or why any such error(s) are not material. There is considerable value in this exercise for those determining the appeal.
 6. Having said this, attendance at a hearing before the Appointed Person is not compulsory and a decision can be rendered based on written submissions alone (notwithstanding that this may be a less effective way of putting across the parties' respective cases). A hearing will only be vacated at the request of both parties. That is what has happened in the present case, and so my decision is based upon a careful review of the evidence, the Decision and the written submissions of the parties. However the written submissions from both sides have tended to reargue the case that was before the Hearing Officer in the way that I have deprecated above.
6. Nevertheless, in the absence of a timely response to this from the Opponent, I vacated the hearing in accordance with the Opponent's request.

7. As can be seen from the contents of Baker McKenzie's letter, at the same time as requesting that the hearing be vacated, the Opponent suggested that as a result of this no skeleton argument was necessary. That suggestion is incorrect.

8. The issue of skeleton arguments is dealt with at paragraph 6.8.2 of the current edition of the Trade Marks Manual:

"6.8.2 Skeleton arguments

Parties with legally qualified representatives are required to submit skeleton arguments in advance of a Substantive Hearing. Where parties intend to rely on authorities (other precedent cases) then details of these should be included within the skeleton arguments.

Parties who do not have a legally qualified representative are not required to provide skeleton arguments, although they may do so if they wish."

9. For the avoidance of doubt, I consider that an Appeal still amounts to a Substantive Hearing within the meaning of the guidance in the Manual when it is to be determined on the papers. If anything, it is even more important to receive a skeleton argument where the appeal is to be determined in this way because of the assistance it may give in identifying the alleged errors made below.

10. Likewise I consider that as both parties were professionally represented they should both have submitted skeletons or written submissions (see §4.2 of the Trade Marks Manual) to the Hearing Officer in lieu of attendance to assist in his decision on the papers. The present process for determining the allowability of trade marks is an adversarial not an inquisitorial system. It functions best when the parties take the trouble to engage fully with the process and provide assistance to the tribunal by summarising their respective positions. Moreover, given the standard of review on appeal (set out more fully below) it is just as important (if not more so) that they do so before the Registrar as well as before the Appointed Person.

11. I am grateful to the solicitors for the Opponent for producing a helpful skeleton in short order which was provided the working day before the hearing had been due to take place. I should also add that the Grounds of Appeal in this case were much fuller than is sometimes the case, but I do not consider that that can negate the requirement for a skeleton from a represented party (albeit that fuller grounds may justify a shorter skeleton, and vice versa).

12. That is not the end of the matter, however. Approximately one hour before the vacated hearing had been due to take place, I received a telephone request from

the solicitors of the Opponent to reinstate the hearing that morning, alternatively to refix it at some future date. I refused both requests and will briefly set out my reasons why below.

13. Litigants before the Appointed Person, particularly sophisticated litigants instructing experienced trade mark solicitors, as here, should be aware that co-ordinating a hearing involves a number of moving parts concerning the IPO, the Government Legal Department and the Appointed Person. A time needs be found when a hearing room at the IPO is free and a hearing fixed which is convenient for the parties and the Appointed Person designated to hear the particular case (including providing time after the hearing to prepare a written judgment). Further, transcribers need to be booked to attend the hearing. All this needs to take place bearing in mind the pressures on public funding and the interests of other litigants using the facilities of the IPO. Working within these constraints the IPO, the Government Legal Department and the Appointed Persons strive to allow appeals to be determined as quickly and efficiently as possible.
14. Given the Opponent's unequivocal request for the matter to be determined on paper, the hearing in the present case was vacated and the transcribers stood down. The very late request to reinstate the hearing one hour before it was due to take place was unreasonable and could not be accommodated in the time available or in the absence of transcribers, nor could it take place later that day as the hearing room had been booked for another hearing. Moreover, given the way in which the matter had unfolded and the absence of any reason (let alone a good reason) for the Opponent's change of heart, I refused to allow the hearing to be reinstated at a later date. The requirement to refix (bearing in mind the constraints referred to above) would have introduced considerable delay into the outcome of the proceedings and could have prejudiced other litigants waiting for their cases to be heard.
15. In short, although the system of appeals before the Appointed Person is intended to be less formal and cheaper and quicker than appeals to the High Court, participants must still comply with the usual customs in relation to the conduct of the litigation and the notification of, fixing and vacation of hearings. Litigation decisions made in proceedings before the Registrar and the Appointed Person in respect of the filing of evidence, written submissions and representation and attendance at hearings are as binding and should be treated as seriously as decisions in any other type of litigation.
16. Accordingly I refused to reinstate the hearing and have dealt with it on the papers, as the Opponent originally requested. In coming to the decision below I have

carefully reviewed the written materials before me, namely the Decision, the Opponent's Notice of Appeal and its Skeleton Argument.

THE DECISION

17. The Decision of the Hearing Officer concerned only the inherent characteristics of the mark applied for, and the objections brought under ss.3(1)(b) and (c) of the Act:
- “3. - (1) The following shall not be registered -
- ...
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
18. The Opponent takes no issue with the Hearing Officer's approach to the law, only with its application. Accordingly I shall not quote from the Hearing Officer at length.
19. At §8 of the Decision the Hearing Officer identified the average consumer as a member of the general public who is to be regarded as “*reasonably well-informed and reasonably observant and circumspect*”. This is not challenged on appeal.
20. At the Opponent's behest the Hearing Officer dealt with s.3(1)(c) first. He summarised the relevant case law by reference to the summary of Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) at §§91-92. The Opponent submitted that based upon this case law the mark was objectionable because “*the expression NOODLE EXPRESS immediately informs the average consumer of the nature and purpose of the goods without any further need for reflection that the goods applied for are meals which can be prepared quickly and which may contain noodles*”.
21. The Opponent also relied on the observations of the CJEU in *Campina Melkunie BV and Benelux-Merkenbureau* Case C-265/00 at §§39-43 in relation to a combination of descriptive elements. The Hearing Officer summarized these passages as follows:
15. As the CJEU makes clear, a combination of elements which is descriptive of characteristics of the goods remains descriptive of those characteristics “unless there is a perceptible difference between the sum of its parts” with the combination creating “an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed...”

22. At §16 the Hearing Officer determined that the word NOODLE was descriptive and that *“in relation to the vast majority of the goods in the application many of which are characterised as “instant” i.e. foodstuffs which can be prepared at speed”* the word EXPRESS *“has very limited distinctive character”*.
23. After reminding himself in §17 that it is irrelevant that there may be more usual ways of designating the characteristics to which the opponent refers, he went on to hold that in spite of the descriptiveness of “NOODLE” and the very limited distinctive character of “EXPRESS” *“the combination created is, in my view, somewhat unusual; this unusualness stems from a combination of factors.”*
24. He relied on two factors to support his conclusion. He referred to the syntax of the mark and considered that the more natural use in a descriptive sense would be EXPRESS NOODLE(S). He also relied on the fact that the word EXPRESS is more likely to be encountered as descriptive of services (e.g. a noodle based restaurant service) than goods (§§17-18).
25. He therefore concluded under s.3(1)(c) at §19:
 19. There is no escaping the fact that when considered in the context of the goods most likely to be of interest to the applicant, the words “NOODLE EXPRESS” are highly allusive. However, the combination of the factors mentioned above are, in my view, just, sufficient for the application not to fall foul of section 3(1)(c) of the Act and the opposition based upon this ground fails accordingly.
26. He then turned to s.3(1)(b) and noted that in its written submission the Opponent had stated *“if the objection under section 3(1)(c) falls away following our submissions above, so must the objection under section 3(1)(b).”*
27. Nevertheless he went on to deal with it separately.
28. He summarized the law by reference to the CJEU’s decision in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) at §§29-33 and *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 at §41.
29. Based on the latter case in particular he referred to the Opponent’s submission that “NOODLE EXPRESS” does not maintain a sufficient level of creativity and imagination to enable consumers to identify the origin of the goods in question from those of other competitors (§23).
30. Nevertheless he concluded at §24 that:

“... the factors I have identified above as contributing to the unusualness of the applicant's trade mark are also, once again in my view, just, sufficient to enable the average consumer to identify the origin of the goods at issue and to distinguish them from those of other undertakings. As a consequence, the opposition based upon 3(1)(b) also fails and is dismissed.”

THE APPEAL

Standard of Review

31. The Opponent submits that the Hearing Officer erred in principle in dismissing the opposition. In particular it suggests, following *Esure Insurance Ltd v Direct Line Insurance Plc* [2008] RPC 6 at §12 that such an error “*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 (explainable only as one in which there must have been an 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.*”
32. The standard to be applied to appeals of this nature was recently summarised by Daniel Alexander QC sitting as the Appointed Person in *TT Education Ltd v Pie Corbett Consultancy (O/17/17)* with minor revisions as supplied by Phillip Johnson sitting as the Appointed Person in O-173-17:

“52. Drawing these threads together, so far as relevant for the present case, the principles can therefore be summarized as follows.

- (i) Appeals to the Appointed Person are limited to a review of the decision of Registrar (CPR 52.21). The Appointed Person will overturn a decision of the Registrar if, but)only if, it is wrong (CPR 52.21
- (ii) The approach required depends on the nature of decision in question (*REEF*). There is spectrum of depending on the nature of the decision. At one end of the spectrum are decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum are multi-factorial decisions often dependent on inferences and an analysis of documentary material (*REEF, DuPont*).
- (iii) In the case of conclusions on primary facts it is only in a rare case, such as where that conclusion was one for which there was no evidence in support, which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that the Appointed Person should interfere with it (*Re: B and others*).

- (iv) In the case of a multifactorial assessment or evaluation, the Appointed Person should 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. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (*REEF, BUD, Fine & Country and others*).
- (v) Situations where the Registrar's decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong (c) where the view expressed by the Registrar is one about which the Appointed Person is doubtful but, on balance, concludes was wrong. It is not necessary for the degree of error to be "clearly" or "plainly" wrong to warrant appellate interference but mere doubt about the decision will not suffice. However, in the case of a doubtful decision, if and only if, after anxious consideration, the Appointed Person adheres to his or her view that the Registrar's decision was wrong, should the appeal be allowed (*Re: B*).
- (vi) The Appointed Person should not treat a decision as containing an error of principle simply because of a belief that the decision could have been better expressed. Appellate courts should not rush to find misdirections warranting reversal simply because they might have reached a different conclusion on the facts or expressed themselves differently. Moreover, in evaluating the evidence the Appointed Person is entitled to assume, absent good reason to the contrary, that the Registrar has taken all of the evidence into account. (*REEF, Henderson and others*).

Bearing in mind the repeated reminders that different points are likely to be particularly relevant in other cases, this is not intended to be a summary of universal application for other cases where particular aspects of the approach may require different emphasis."

s.3(1)(c)

- 33. Under s.3(1)(c) the Opponent relies on the findings that "NOODLE" is descriptive and that EXPRESS only has "very limited distinctive character" to suggest that no reasonable tribunal could have concluded that the combination was sufficiently distinctive to be registrable.
- 34. The Opponent submits that the reasoning of the Hearing Officer was too scarce, was contrary to well-established case-law and omitted to take into account relevant facts.

Syntax

35. Taking the two factors relied on by the Hearing Officer in turn, the Opponent first submits that the syntax of the mark is not unusual. Further or alternatively the Opponent argues that even if the position of the words is arguably grammatically incorrect, the combination of words is not unusual for the average consumer.

36. In support of this the Opponent pointed out that the exact, grammatically correct use of nouns and adjectives is not decisive in determining whether a sign is descriptive. It referred to the Board of Appeal Decision R0033/2000-3 *Vacations direct* (cited in the most recent version of EUIPO Guidelines for Examination, Part B, Examination, Section 4, Absolute Grounds for Refusal, Article 7(1)(c) EUTMR p.9) at §§17 & 19 of that decision:
 17. The combination of the word "direct" with "vacations" for the goods and services applied for are not allusive, but exclusively and directly descriptive. The trade mark 'VACATIONS DIRECT' as a whole is immediately understood for goods and services in relation to vacations, which are provided directly, i.e. without intermediary. In relation to accommodation whether short term, long term or time share accommodation, the trade mark 'VACATIONS DIRECT' therefore describes the selling channel via direct marketing. The consumer immediately understands that he can directly book with the proprietor of the house or apartment. The proprietor of the holiday house or apartment knows that by introducing his name into the publications; brochures; catalogues, magazines, newsletters or posters, the consumer will contact him directly and not via a travel agency. Accommodation which is reserved or booked via the applicant does not need any further intermediary. For the consumer as well as for the provider of accommodation or travel agency services, the absence or reduction of intermediaries not only means having the service cheaper, as the examiner had indicated, but also means that the flow of information on the accommodation and the actual locations and surroundings is better.

 - ...
 19. The word combination is grammatically correct, generally comprehensible, and formed in accordance with customary usage. It does not constitute a neologism. It is true that in dictionaries the term 'vacations direct' is maybe not defined as a standing expression. However, the Board would like to point out that the mere fact that an expression is not mentioned in dictionaries does not render a sign eligible for registration (see judgment of the Court of First Instance of 12 January 2000 in Case T-19/99 DKV Deutsche Krankenversicherung AG v OHIM 'COMPANYLINE', paragraph 26, [2000] ECR II-1; OJ OHIM 5/2000, p. 698; judgment of 26 October 2000 in Case T-345/99 Harbinger Corporation v OHIM 'TRUSTEDLINK', paragraph 37). This is evident in the case in issue, because the sign is an ordinary combination of two common English words, which is immediately intelligible. It is impossible to

mention every possible word combination including 'direct' in a dictionary (decision of 20 December 2000 – R 544/1999-3 – DIRECT LINE).

37. The Opponent suggests that the same reasoning can be applied to the case at hand and that NOODLE EXPRESS is no different to EXPRESS NOODLE. It follows that there is no perceptible difference between the sum of the parts and no impression is created which is sufficiently far removed from the merely descriptive combination to render the mark registrable.
38. I do not agree with this submission for a number of reasons.
39. First, it is not correct to suggest that NOODLE EXPRESS represents the usual syntactic way of referring to noodles which can be cooked quickly. As the Hearing Officer pointed out, the more usual way of referring to this concept would be "EXPRESS NOODLE(S)". It is grammatically incorrect to reverse the order of the words¹ and the term NOODLE EXPRESS instead alludes to forms of transport ("climb aboard the "Noodle Express") or at least to the provision of food services. As a result I do not consider that the average consumer would immediately consider the mark applied for to be descriptive.
40. Second, I cannot accept that the combination of words is not unusual for the average consumer. The Opponent submitted no evidence to suggest that goods in classes 29 and 30 are customarily referred to as "[GOODS] EXPRESS" and I do not think that this is something in relation to which I am entitled to take judicial notice. It is certainly not a turn of phrase which springs immediately to mind in relation to these categories of goods. Accordingly I cannot accept the Opponent's submission that the average consumer is accustomed to the use of the word EXPRESS after the goods to refer to their cooking time.
41. Of course if the average consumer stops to think about the mark and goods he or she may surmise that they can be prepared quickly. The Hearing Officer recognised this when he accepted the very limited distinctive character of "EXPRESS". However he was entitled to conclude on the material before him that this was not inevitable and that the combination of words was somewhat unusual.
42. Finally I do not get much assistance from the VACATIONS DIRECT case referred to by the Opponent. Comparing different facts between cases is rarely of assistance. In the present case the VACATIONS DIRECT decision can be

¹ and therefore the facts of this case can be contrasted with those of O-358-13 PORRIDGEBREAK referred to in the Grounds of Appeal.

distinguished because that word combination was “*grammatically correct, generally comprehensible, and formed in accordance with customary usage*” (§19). For the reasons given above, NOODLE EXPRESS is neither grammatically correct nor formed in accordance with customary usage. Even if it may be generally comprehensible, it has some allusive properties for the reasons given and is not immediately comprehensible as referring to quickly prepared noodles.

Goods/Services

43. The Opponent also criticises the Hearing Officer’s finding that the use of the word EXPRESS is more likely to be encountered by the average consumer in the context of the provision of a service rather than in relation to a trade in goods (e.g. a noodle based restaurant service).
44. The Opponent suggests that the Hearing Officer was wrong to conclude that “EXPRESS only applies to restaurant services”. I do not think that this was the Hearing Officer’s finding – he merely concluded that the term was more likely to be encountered in relation to the provision of services. I think he was right to do so, and the criticism made by the Opponent is therefore overstated and incorrect.
45. There is more force in the Opponent’s submission that there may be blurred lines between restaurant services and the sale of goods in classes 29 and 30. In this respect the Opponent referred me to the tendency for traders to claim that products are restaurant quality, takeaway-style products (e.g. PIZZA EXPRESS branded goods in supermarkets) and to the home delivery of restaurant services (e.g. by DELIVEROO).
46. The Opponent suggested that the lines between services and goods have therefore been removed, but again, I think that the Opponent is overstating its case. The difference between goods and services still exists in the mind of the consumer even though there are some examples of cross-over between them. As I mentioned above, I think the term NOODLE EXPRESS is more likely to be seen as referring to the delivery of restaurant services (whether with or without a transport element) than to the supply of goods alone. I therefore agree with the Hearing Officer’s conclusions on this point.

Conclusion

47. As the Opponent correctly observed, the Hearing Officer considered that the application was borderline descriptive but that it just fell on the right side of the line

to be registrable. I am urged to hold that it fell on the other side of the line and that the opposition should succeed.

48. I readily acknowledge that this is a borderline case and that if the Hearing Officer is right, the term NOODLE EXPRESS is barely registrable. In cases such as this which are close to the line the smallest nuance in reasoning can lead to a difference in outcome and reasonable tribunals can come to different conclusions based on the same facts and arguments. However the mere fact that I might have come to a different conclusion if I was deciding this from scratch does not mean that I should necessarily reverse the Hearing Officer. Instead, as the Opponent acknowledges, I must identify an error of principle or come to the conclusion that the Hearing Officer was wrong to reject the opposition.
49. In assessing the Decision I place particular weight on the factors (iv)-(vi) identified by Daniel Alexander QC and quoted above. In particular, in the absence of a distinct and material error of principle I should show a real reluctance to interfere and I should only interfere where I consider the Hearing Officer was wrong.
50. For the reasons I have given I am unable to identify an error in the analysis carried out by the Hearing Officer. Nor, standing back, can I conclude that he was wrong to hold that the mark does not describe exclusively the kind, quality and purpose of the goods for which registration is sought. Accordingly I dismiss the appeal under s.3(1)(c) and reject the opposition for the reasons given by the Hearing Officer.

Section 3(1)(b)

51. Although the Opponent emphasised that ss.3(1)(b) and 3(1)(c) of the Act are independent and must be considered separately, it also acknowledged that they are overlapping. Indeed it relied on the same alleged errors made by the Hearing Officer as I have discussed above to support its appeal under s.3(1)(b). Accordingly I can deal with s.3(1)(b) briefly.
52. For the reasons given above I am of the view that the syntax of NOODLE EXPRESS does support a finding that there is some inherent distinctiveness in the mark.
53. I acknowledge that one of the purposes of the protection afforded by a trade mark is to guarantee the trade mark as an indication of origin. In relation to this the Opponent relied on the decision of the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) at §§29-32, and in particular §32:

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67).
54. In the present case the Opponent acknowledges that the Hearing Officer correctly described the qualities of the relevant consumer of the goods. However it submits by reference to decision BL O-481-16 NERO EXPRESS which cites an earlier decision of Iain Purvis QC sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc.* BL O-375-10 at §17(b) that the Hearing Officer fell into error because:
- "the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).
55. It should be noted that both those earlier decisions concerned relative grounds objections and so are not directly applicable here. Further, for the reasons given above and by the Hearing Officer I do not accept that the use of the word EXPRESS following the word NOODLE in relation to goods in classes 29 and 30 is purely non-distinctive.
56. The Opponent also pointed to other goods marketed using the EXPRESS wording such as CIF EXPRESS and NUROFEN EXPRESS, where it said that consumers will understand that those products deliver results quickly.
57. Accordingly the Opponent submits that the average consumer would perceive that "NOODLE EXPRESS" is not a badge of origin and indicates that these are noodles which can be prepared quickly.
58. Again, whilst I can see the force of the argument given the borderline nature of the mark, I cannot identify any error of principle in the Hearing Officer's approach. There is a difference in character between the use of EXPRESS to indicate that an effect will be achieved rapidly by the use of goods or services (e.g. cleaning, reduction of headache, service in a restaurant) and the preparation time for the goods being purchased, which alludes to a different characteristic and follows less naturally.
59. Whilst the mark NOODLE EXPRESS is only just inherently distinctive for the goods applied for, I cannot find fault in the Hearing Officer's conclusion that it possesses the minimum level of distinctiveness to be registrable under s3(1)(b).

Conclusion

60. For all these reasons the appeal will be dismissed and the opposition rejected.
61. As the Applicant played no part in this appeal there is no need to make any additional award of costs in its favour. The original payment of £200 ordered to be paid by the Opponent to the Applicant within 14 days of the determination of this appeal should now be made.

Thomas Mitcheson QC
The Appointed Person
31 May 2017

The Applicant took no part in the Appeal
The Opponent was represented by Baker McKenzie
The Registrar took no part in the Appeal.