

**TRADE MARKS ACT 1994**

**IN THE MATTER OF  
TRADE MARK APPLICATION No. 2583079  
IN THE NAME OF KENNETH GREENE**

**AND IN THE MATTER OF  
OPPOSITION No. 102846 THERETO  
BY OMAR KASSEM ALESAYI MARKETING CO LIMITED**

**AND IN THE MATTER OF  
AN APPEAL TO THE APPOINTED PERSON  
BY THE APPLICANT  
AGAINST A DECISION OF MS AL SKILTON  
DATED 4 OCTOBER 2013**

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**DECISION**

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**Introduction**

1. This is an appeal by Kenneth Greene (“the Applicant”) against a decision of Ms Al Skilton, for the Registrar, dated 4 October 2013, BL O/399/13.
2. In that decision Ms Skilton allowed an opposition brought by Omar Kassem Alesayi Marketing Co. Limited (“the Opponent”) under number 102846 against UK Trade Mark Application number 2583079 standing in the name of the Applicant.
3. The allegedly conflicting signs in question were both logo marks, the point of which, the Applicant stressed, was to be seen.
4. The crux of the appeal is that the Hearing Officer, contrary to the applicable legal authorities, compared the marks only by reference to their respective word elements.
5. As a “sub-point” the Applicant contended that the Hearing Officer wrongly attributed dominance to the word elements which, says the Applicant, were of low distinctive character in relation to the goods.
6. At the hearing of the appeal, the Applicant was represented by Ms Anna Carboni of Redd Solicitors LLP. The Opponent filed a Respondent’s Notice, dated 29 November 2013, essentially agreeing with the Hearing Officer’s decision, but chose not to appear or to be represented at the appeal hearing, nor to file any further written submissions.

**Application No. 2583079**

7. Application number 2583079 was filed by the Applicant on 31 May 2011. Registration was requested of the sign represented below for use as a trade mark in the UK:



8. The goods for which registration was requested were:

Class 29

Cooked sliced meats excluding venison; natural torn chicken; turkey; ham; roast beef; roast pork; cooked snack products made from chicken, turkey, ham, beef and pork but excluding venison; prepared snack foods

Class 30

Flavourings made from meat excluding venison; meat pies excluding venison; poultry and game meat pies

9. On 7 October 2011, the Opponent filed Notice of opposition against the Application pursuant to Section 5(2)(b) of the Trade Marks Act 1994, which provides:

“5. – (2) A trade mark shall not be registered if because –

(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.”

10. The opposition was based on the Opponent’s earlier UK Trade Mark Registration number 2571528 shown below, which was filed on 8 February 2011 and registered on 12 August 2011 (so not subject to proof of use under Section 6A of the Act):



11. The goods relied on in the earlier mark were:

Class 29

Meat, fish, poultry and game; meat extracts; tuna meat of all types; preserved, dried canned and cooked fruits and vegetables and beans; meat and chicken gravies; jams, jelly; milk and other dairy products; concentrated and sweetened milk and powder milk; creams; chips of all types; snacks; corn flakes and crisps; eggs; yoghurt (dairy products); edible oils and fats; preserves and pickles, in class 29

Class 30

Coffee and tea, cocoa, sugar, rice of all types; tapioca, sago, coffee substitutes, flour and preparations made from cereals, bread, biscuits, chocolates of all kinds stuffed with dried fruits; noodles; pasta; cakes, pastry and confectionery, pastes, ices, honey, treacle, yeast, baking powder, salt, mustard, pepper, vinegar, sauces, ketchup sauces; tomato pastes; spices and condiments, ice, nuts; fresh pastries; popcorns; snack foods; potato chips

Class 31

Agricultural-horticultural and forestry products and grains (not included in other classes), living animals, fresh fruits and vegetables and beans, seeds, live plants and flowers, foodstuffs for animals, malt; feeds; fattening feeds; coconuts fruits; fruits of pistachio; shrubs; natural fruits trees

Class 32

Non-alcoholic mineral and aerated waters and other non-alcoholic drinks, non-alcoholic beers; non-alcoholic black beers; syrups and other preparations for making non-alcoholic beverages; juices and refreshments

12. Both parties filed evidence. Since this has no relevance to the appeal, I will say no more about it.
13. Neither party requested a hearing below, but both filed written submissions in lieu. The Hearing Officer decided the opposition on the basis of the papers before her on file.

**Agreed aspects of the Hearing Officer's decision**

14. Certain aspects of the Hearing Officer's decision under Section 5(2)(b) went unchallenged on appeal. Thus, the Applicant stated that it accepted the correctness of the Hearing Officer's following findings:
- (1) The respective goods of the parties were identical, with goods in the Applicant's specifications falling within the more general categories specified in the Opponent's mark. Ms Carboni highlighted that these more general categories in the Opponent's earlier specifications included:
- (a) meat, fish, poultry and game (encompassing the Applicant's cooked sliced meats excluding venison; natural torn turkey; turkey; ham; roast beef; roast pork);

- (b) snacks (encompassing the Applicant's cooked snack products made from chicken, turkey, ham, beef and pork but excluding venison; prepared snack foods);
  - (c) meat extracts and meat gravies (encompassing the Applicant's flavourings made from meat excluding venison);
  - (d) pastry (encompassing the Applicant's meat pies excluding venison; poultry and game meat pies).
- (2) The average consumer was the general public who was reasonably well informed and reasonably circumspect and observant.
  - (3) The purchase act was likely to be primarily visual and made from a website or directly from a shelf.
  - (4) Although these would be relatively low value/fairly frequent purchases, the average consumer would pay a reasonable level of attention to them in considering amongst other things, ingredients, nutritional value and flavour.
  - (5) The English speaking consumer (who was the relevant consumer for the purposes of this opposition) was unlikely to understand the meaning of the Arabic script in the top lozenge of the earlier mark.
  - (6) Any visual/aural similarity between the Applicant's mark and the Opponent's mark resided in the word elements GREEN FARM and GREEN FARMS respectively.
  - (7) Aurally, the marks were very highly similar.
  - (8) Conceptually, the words GREEN FARM/GREEN FARMS suggested to the UK consumer a farm or a farms belonging to someone called Green, or a farm or farms that were in some way environmentally sound. Ms Carboni added that the words might also conjure up rolling countryside etc.

### **The law**

15. The Applicant also accepted that the Hearing Officer correctly stated the law governing her application of the relative ground for refusal of registration in Section 5(2)(b).
16. The Hearing Officer had instructed herself by reference to the familiar Registrar's summary of principles derived from the relevant case law of the Court of Justice of the European Union ("CJEU").
17. Ms Carboni said that this appeal revolved around the Hearing Officer's alleged misapplication of principle (d) in the Registrar's summary, viz:

“(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;”.

18. The alleged misapplication was that the Hearing Officer ignored the second half of this guidance.
19. Ms Carboni usefully ran me through a number of CJEU authorities underlying this principle: Case C-3/03 P, *Matratzen Concord GmbH, formerly Matratzen Concord AG v. OHIM* [2004] ECR I-3657, paras. 28, 29 and 32, Case C-334/05 P, *OHIM v. Shaker di L. Laudato & C. Sas* [2007] ECR I-4529, paras. 37, 38, 41 and 42, Case C-193/06, *Société des Produits Nestlé SA v. OHIM* [2007] ECR I-0114, paras. 44, 46 and 47.
20. Although I have taken into account all these authorities, I think that for present purposes and in order to make Ms. Carboni’s point, it is enough to set out the following guidance by the CJEU in *Shaker*:
  - “41. It is important to note that, according to the case-law of the Court, in the context of consideration of the likelihood of confusion, 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. On the contrary, 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 (see order in *Matratzen Concord v OHIM*, paragraph 32; *Medion*, paragraph 29).
  42. As the Advocate General pointed out in point 21 of her Opinion, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element.”
21. Ms. Carboni wished me to take from *Nestlé*<sup>1</sup> that where a figurative element of a complex mark is deemed to be less distinctive than the verbal element, it is wrong to assess the visual similarity of the marks by reference to the more distinctive element alone. However, I believe that follows from *Shaker* in any event (unless the figurative element is negligible).
22. I was additionally referred to Case T-54/12, *K2 Sports Europe GmbH v. OHIM*, 13 July 2013, paras. 30 – 32 and Case R 1462/2012-G, *Lifestyle Supplies VoF v. Ultimate Nutrition Inc.*, 18 September 2013, especially paras. 16 – 17 and 34 – 35. Since in my view these were of more relevance to the Applicant’s sub-ground of appeal, I will return to them later.

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<sup>1</sup> I was provided by the Applicant with a [Google](#) translation of the French version of the CJEU judgment which has not been published in English.

**Ground 1: the Hearing Officer wrongly compared the visual and conceptual aspects of the marks**

23. The Applicant contended that the Hearing Officer led herself into error by first deciding what in her view constituted the dominant and distinctive elements of the marks, rather than considering that question in connection with each of the visual, aural and conceptual aspects of the overall impression of the marks.
24. That, it was argued, led her to overlook other non-dominant elements in the marks in making her visual and conceptual comparisons, when she had made no finding that such non-dominant elements (or any of them) were negligible.
25. In order to assess the merits of this ground for appeal, it is necessary to look more closely at the decision itself. Ms Carboni helpfully took me through each section of the Hearing Officer's reasoning with regard to the comparison of the marks, in turn.
26. The Hearing Officer commenced her comparison as follows:
  - “40. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.
  41. The opponent's mark consists of two ovals, one above the other. The top oval contains Arabic script above an area of lines and shading which both parties refer to, throughout their submissions, as fields. The top right hand side of the oval contains a thin curved sliver in a lighter colour which gives the impression of a highlight. The lower oval consists of all of the same elements but with the Arabic script replaced by the words 'GREEN FARMS' in capital letters, the word 'GREEN' presented directly above the word 'FARMS'.
  42. The applicant's mark consists of a misshapen circle, which the applicant describes as 'an irregular convex triangular shape'. Within the shape are the words 'Green' and 'farm' which the applicant submits are 'heavily stylised', though in my view the words are fairly standard in presentation. The word 'Green' is presented above the word 'farm'. The 'm' of 'farm' takes the form of the tines of a fork, the handle of which extends from the centre of the letter and terminates at the end of the word 'Green'. At the top of the shape is a crescent shaped sliver which begins at the top left of the shape and terminates close to the top of the fork handle, resembling a highlight. The words 'FRESH FOODS' appear in upper case below the 'farm' element of the mark and are considerably smaller than the aforementioned elements.”
27. Pausing here, Ms Carboni accepted that paragraphs 41 and 42 were “fairly accurate” descriptions by the Hearing Officer of the respective marks.

28. The Hearing Officer next recorded what the parties themselves had had to say about the dominant and distinctive elements of the marks (it will be remembered that the Hearing Officer was deciding the case on the papers):

“43. With regard to the distinctive and dominant elements of the respective marks the applicant states:

“5. ... the Opponent’s Mark consists of two entirely separate and distinct uniform oval elements, one directly above the other, the top oval element containing Arabic wording above a field motif, the bottom oval element containing the words ‘GREEN FARMS’ in capital letters in an unstylised basic font above a field motif.

...

20. The Opponent either erroneously or disingenuously refers to its mark throughout its Opposition, Statement of Grounds, Submissions and Evidence as ‘GREEN FARMS’. However, this deliberately ignores the other elements of the Opponent’s Mark. Moreover the other elements are the arguably distinctive and dominant elements of its mark when perceived and addressed as a whole.”

44. The opponent states:

“The distinctive and dominant element in the respective Trade Marks is the word element GREEN FARM. When the average consumer or relevant public observes the Trade Marks they are identical with regard to the distinctive and dominant element. As such, although the average consumer normally perceives a Mark as a whole and does not proceed to analyse its various details, the fact remains that, when perceiving a verbal sign, he will break it down into elements which, for him, suggest a concrete meaning or which resemble words known to him. In the present case the English words GREEN FARM, which both of the Marks at issue contain, will attract the attention of the average consumer on account of its appearance as instantly recognisable words to which they can immediately associate a commonly recognised meaning.”

29. She then went on to say:

“45. Both oval shapes in the opponent’s mark, the ‘fields’ and the thin highlight lines, will be considered decoration and will not be afforded any trade mark significance by the average consumer. In respect of the upper oval in the mark, the average consumer in the UK is unlikely to be familiar with the meaning of the words presented in Arabic script. Consequently, the average consumer will refer to and recall the mark by reference to the plain English words ‘GREEN FARMS’. It is these words, in themselves, an independent element of the mark, which are the distinctive and dominant element of the opponent’s mark as a whole.

46. The background shape of the applicant's mark and highlight will be considered decorative and will not be given any trade mark significance by the average consumer. Similarly, the letter 'm' which is represented by a fork is not particularly distinctive for foodstuffs and will, in any event, be clearly seen as a letter 'm', the fork not detracting in any way from the word being read as 'farm'. The words 'FRESH FOODS' are descriptive of the applicant's goods in classes 29 and 30 and are considerably smaller than the remaining words in the mark. They will not be afforded any trade mark significance. The distinctive and dominant element of the applicant's mark is the words 'Green farm'."

30. The Applicant identified paragraph 45 as the focus of its appeal. Ms Carboni highlighted, and I agree, that the Hearing Officer made no finding that the Arabic script or any of the figurative elements in the Opponent's mark were negligible.
31. Similarly at paragraph 46, the Hearing Officer made no finding that the words FRESH FOODS or any of the figurative elements in the Applicant's mark were negligible. That said, Ms Carboni confirmed that no issue was taken with the Hearing Officer's finding that the words FRESH FOODS in the Applicant's mark were descriptive of the goods applied for.
32. Addressing the visual similarities in the marks, the Hearing Officer again started with the arguments of the parties:

"47. The opponent submits:

"...the attention of the average consumer will be attracted to the verbal elements within the marks. In addition, it should be considered that the average consumer only rarely has the chance to make a direct comparison between two different Marks at issue, but must rely on the imperfect picture of them that he has retained in his mind. This is particularly the case where the goods to which the Marks are being applied are essentially fast moving consumer goods, and so very little time will be spent in deliberating the purchase.

Taking the above reasoning into consideration, at a glance the average consumer will not pay close attention as to whether the identical word elements are appearing on an oval background or on an irregular convex triangular shape, neither will they have any regard as to whether a flash is appearing from the left corner or the right corner of the background shape."

48. The applicant submits:

"58. ... the Opponent's Mark and the Applicant's Mark are both heavily stylised and are dissimilar for a number of reasons:

58.1 Firstly, the Opponent's Mark has two oval/lozenge backgrounds. The Applicant's Mark by contrast has one irregular convex triangular element as its background.



58.2 Secondly. [sic] the Opponent's Mark's primary feature is an oval lozenge containing Arabic words. There are no Arabic words in the Applicant's Mark.

58.3 Thirdly, beneath the primary feature in the Opponent's Mark is a secondary lozenge containing the words GREEN FARMS in an unstylised basic font. The Applicant's Mark features the words 'Green Farm' in a highly stylised font, with an inverted pitchfork representing the letter "m". Beneath this it has the additional words 'FRESH FOODS'.

58.4 Fourthly, both lozenges in the Opponent's Mark contain a field motif at the bottom, the Applicant's Mark has no field motif.

59. The overall impression given by the Applicant's Mark and the Opponent's Mark are therefore entirely dissimilar."

49. The applicant further submits, at paragraph 60 of its submissions, that if the opponent's mark consisted "only of the subordinate GREEN FARMS oval element, the marks would still be dissimilar for the following reasons:

The opponent's mark contains the word 'farms' plural rather than farm in the applicant's mark.

The opponent's mark does not include the words FRESH or FOODS.

The opponent's mark is presented in capital letters.

A stylised font is used for the applicant's mark, it is not present in the opponent's mark.

The fork device present in the applicant's mark is not present in the opponent's mark.

The entirely distinct background shapes.

The dominant field element in the opponent's mark which is not present in the applicant's mark.

The lighter coloured flash elements being on opposite sides of the marks.

The flash element of the opponent's mark makes it look three dimensional, the applicant's does not."

33. On visual similarity, the Hearing Officer then concluded:

“50. Any similarity between the marks rests in the word elements ‘GREEN FARMS’ and ‘Green farm’, which are the dominant and distinctive elements of both marks. As discussed above, the remaining elements are unlikely to be afforded any origin significance by the average consumer. Taking these factors into account I find there to be a fairly high degree of visual similarity between the marks.”

34. The Hearing Officer followed a similar structure in her consideration of conceptual similarity:

“54. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. The assessment must be made from the point of view of the average consumer.

55. The applicant submits:

“64. Conceptually, the distinctive Arabic wording appearing in the Opponent’s mark gives the impression that the Opponent’s Mark emanates from or has an association with an Arabic speaking territory. This is completely absent from the Applicant’s Mark.

65. The field motif and oval shape of the Opponent’s Mark are also conceptually different from the irregular convex triangular shape and pitchfork motif of the Applicant’s Mark.”

56. In its submissions the opponent maintains that, “the Trade Marks in issue are conceptually similar, both containing the identical word element GREEN FARM...”

57. The conceptual impression provided by both parties’ marks is either that of a farm or farms belonging to someone called GREEN, or a farm or farms which are in some way environmentally sound. Whatever the average consumer’s interpretation of the words actually is, it will be the same in respect of both marks. I have already concluded that the additional words ‘FRESH FOODS’ in the applicant’s mark are non-distinctive for the goods applied for. Taking all of these factors into account, I find the marks to possess a very high degree of conceptual similarity.”

### **Conclusion on Ground 1**

35. I have carefully reviewed the Hearing Officer’s decision in the light of the Applicant’s full submissions. Despite the attractive way in which the Applicant’s case was argued, I am unpersuaded that the Hearing Officer fell into error as claimed in the main ground of appeal.

36. As I said earlier, I accept that the Hearing Officer made no finding of negligibility in relation to the Arabic script and, or the figurative elements (including the presence of 2 lozenges) in the Opponent’s mark on the one hand, or the words FRESH FOODS

and, or the figurative elements in the Applicant's mark on the other hand, nor do I think any such findings were open to her.

37. Nevertheless, the structure of her consideration of the visual and conceptual aspects of the overall impression of the marks shows, in my view, that the Hearing Officer had those elements in mind.
38. However, for the reasons she gave, i.e., the figurative elements were likely to be regarded as decorative, the words FRESH FOODS were descriptive of the goods and in smaller letters and the Arabic script was unlikely to be comprehended, the overall perception of the average UK consumer was likely to focus on the words GREEN FARM/GREEN FARMS, and therefore the marks were visually and conceptually highly similar. (The Applicant did not dispute the Hearing Officer's finding that the marks were aurally highly similar).
39. Ms Carboni contended that the suggestion of an Arabic connection for goods in the earlier mark created a strong conceptual point of difference between the marks. Equally it seems to me that the upper lozenge in the earlier mark might be thought by the UK consumer to contain the words GREEN FARMS in Arabic. Be that as it may, contrary to the Applicant's assertion, I think it is clear that the Hearing Officer did take the Applicant's "Arabic connection" point into account in her conceptual comparison of the marks (para. 55).
40. In my judgment, the Hearing Officer did not, as alleged, compare the marks only according to their respective word elements GREEN FARM and GREEN FARMS.
41. To the contrary, given the prominence that she decided the UK consumer would give to those words (as opposed to other elements) in their visual and conceptual appreciation of the respective marks, she was, in my view, entitled to decide that the marks were visually similar to a fairly high degree and conceptually similar to a very high degree (and, as accepted, aurally very highly similar).
42. I reject, therefore, the first ground of appeal.

### **Sub-ground of appeal**

43. As I understood it, the Applicant's so-called sub-point had 2 facets:
  - (1) The words GREEN FARM and GREEN FARMS were of low distinctiveness especially in relation the goods which the Hearing Officer found were identical (see para. 14(1)(a) – (d) above). The Hearing Officer should not therefore have afforded them dominance within the respective marks.
  - (2) The Hearing Officer wrongly determined that the words GREEN FARMS in the earlier mark were possessed of average distinctive character in her global assessment of likelihood of confusion.
44. The first facet concerns the comparison of the marks whereas the second facet pertains to the scope of protection of the earlier mark, which is a different issue (Case C-235/05 P, *L'Oréal SA v. OHIM* [2006] ECR I-0057, paras. 38 – 45).

45. In support of the first facet, Ms Carboni referred me to the decision of the General Court (“GC”) in Case T-54/12 P, *K2 Sports Europe GmbH v. OHIM*, 31 January 2013, paragraphs 30 – 32, to the effect that the public will not generally consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by the mark.
46. I have 2 observations to make in respect of facet (1) of the Applicant’s sub-ground of appeal. First, the Applicant adduced no evidence to show why the word elements GREEN FARM/GREEN FARMS in the respective marks should be regarded as being possessed of low distinctive character in relation to the goods (basically meat, fish, meat extracts, snacks and pastry).
47. I accept that GREEN is a common surname but that *per se* is insufficient to show that it is of low distinctive character especially when coupled with FARM or FARMS and used in the context of the goods in suit (Case C-404/02, *Nichols plc v Registrar of Trade Marks* [2004] I-8499). Further, whilst the marks might suggest a farm or farms which for some reason is or are environmentally friendly, or the countryside, Ms Carboni conceded that these meanings was merely allusive in relation to the goods.
48. Second, although I note the comments of the GC in *K2 Sports* (“sport” c.f. goods in Classes 18, 25 and 28), there is equally authority to the effect that:
- “the weak distinctive character of an element of a composite mark does not necessarily imply that that element cannot constitute a dominant element since – because, in particular, of its position in the sign or its size – it may make an impression on consumers and be remembered by them (see Case T- 134/06 *Xentral v OHIM – Pages jaunes (PAGESJAUNES.COM)* [2007] ECR II- 5213, paragraph 54 and the case-law cited).” Case T-383/12, *Ferienhäuser zum See GmbH v. OHIM*, 16 January 2014, paragraph 56.
49. Accordingly in my judgment, the Hearing Officer was correct to conclude that the words GREEN FARM and GREEN FARMS dominated the overall impressions of the marks in the minds of the average consumer.
50. I should mention that Ms Carboni also referred me to the decision in Case R 1462/2012-G, *Lifestyle Supplies VoF v. Ultimate Nutrition Inc. (ULTIMATE GREENS/ULTIMATE NUTRITION)*, 18 September 2013. Since, however, Ms Carboni did not suggest that the words GREEN FARMS in the earlier mark should effectively have been ignored I do not find it necessary to comment any further on that case.
51. As regards facet (2) of the sub-ground of appeal, the Hearing Officer said this about the distinctive character of the earlier mark:
- “58. I must now assess the distinctive character of the opponent’s earlier trade marks. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services for which it is registered and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive,

it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

59. In its submissions, the opponent makes no claim that its earlier trade mark has acquired any enhanced distinctive character through the use made of it. I have only the inherent characteristics of the trade marks to consider. The words 'GREEN FARMS' are not possessed of the highest level of distinctiveness when used in respect of the products in 29, 30, 31 and 32. The mark is, in my view, possessed of an average level of inherent distinctive character."

52. Ms Carboni said it was unclear whether the Hearing Officer's finding of an average level of distinctive character related to the words GREEN FARMS or the earlier trade mark. I think it was the latter although I agree that this could have been more clearly expressed.

53. The Hearing Officer's determination of likelihood of confusion was then as follows:

"60. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa.

61. I have found the marks to have a fairly high degree of visual similarity and a high degree of aural and conceptual similarity. I have found an average level of inherent distinctive character in the earlier mark and have found the applicant's goods to be identical to the opponent's goods. I have identified the average consumer, namely a member of the general public and have concluded that the purchase will be primarily visual, fairly frequent and of low value. The level of attention paid to the purchase will be reasonable to the extent that the average consumer will consider, inter alia, ingredients, nutritional value and flavour.

62. Taking all of these factors into account the similarity of the marks is such that in the context of goods which are identical there will, in my view, be direct confusion (where the average consumer believes the respective goods originate from the same or a linked undertaking). Even if I am wrong in this, the similarity between the parties' marks is such that there will be indirect confusion (where the average consumer believes the respective services originate from the same or a linked undertaking)."

54. As Ms Carboni identified there is an obvious typographical error in paragraph 62 in relation to the Hearing Officer's differentiation between direct and indirect confusion, which I do not regard (nor was asked to regard) as a material error.
55. The criticism in facet (2) of the sub-ground of appeal is that the Hearing Officer should have factored in to her global assessment of likelihood of confusion the so-said weak distinctiveness of GREEN FARMS. I have already commented on the Applicant's argument that GREEN FARMS is of low distinctiveness. In any event, first, it is the distinctiveness of the earlier mark overall which is factored into the global assessment of likelihood of confusion (which in my view is what the Hearing Officer did). Second, the distinctiveness of an earlier mark is just one of the factors to take into account in the global assessment of likelihood of confusion (see, e.g., Case T-486/12, *Sofia Golam v. OHIM*, 11 June 2014, para. 54.).
56. I do not accept that the Hearing Officer erred in either of the ways inferred in the sub-ground of appeal i.e. either facet (1) or facet (2).

### **Conclusion**

57. The appeal has failed.
58. Although a Respondent's Notice was filed by the Opponent, this was accepted to be in fairly minimalist terms. The Opponent did not attend the appeal hearing and filed no further argument. In those circumstances, I will order the Applicant to pay to the Opponent the sum of £150 as a contribution to the Opponent's costs in relation to this appeal on the same terms as the costs ordered by the Hearing Officer.

Professor Ruth Annand, 18 August 2014

Ms Anna Carboni of Redd Solicitors LLP appeared on behalf of the Applicant/Appellant

The Opponent/Respondent did not appear and was not represented