

TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION NO. 3445442

BY OATLY AB

TO REGISTER THE TRADE MARK:

WOW NO COW

IN CLASSES 25, 29, 30 AND 32

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 421017 BY D'S NATURALS, LLC

Background and pleadings

1. On 11 November 2019, Oatly AB (“the applicant”) applied to register the trade mark shown on the cover page of this decision.
2. The application was published for opposition purposes on 31 January 2020 for the following goods:

Class 25 T-Shirts.

Class 29 Oat-based drinks as milk substitutes; oat-based yoghurt substitute; oat-based crème fraiche; oat-based cooking cream and creamer.

Class 30 Oat-based vanilla sauce and oat-based vanilla custard; oat-based ice cream; oat-based food spread.

Class 32 Oat-based natural energy drinks; oat-based breakfast drinks; oat-based fruit drink beverages; oat-based smoothie beverages.

3. D's Naturals, LLC (“the opponent”) filed a notice of opposition on 30 July 2020. The opposition, which is based upon sections 3(1)(b) and (c) of the Trade Marks Act 1994 (“the Act”), is directed against all the goods in Classes 29, 30 and 32. In respect of its 3(1)(b) ground, the opponent states:

“The relevant public will perceive the sign as an advertising slogan and a mere informative message, formulated in a clear and straightforward manner, indicating essential features of the goods (regarding their nature, composition and methods of production, amongst others). It is a simple juxtaposition of descriptive words, does not constitute a ‘play on words’, does not introduce an element of conceptual intrigue or surprise and, as will be shown in the following, does not require a particular interpretative or cognitive effort on behalf of the relevant public in order to perceive it as such.”

In respect of its 3(1)(c) ground, the opponent states:

“...the challenged mark consists solely of the word elements ‘WOW NO COW’ which describe the characteristics of the goods at issue. Notably, the term ‘NO COW’ immediately informs consumers that the goods branded under such a mark are free from/do not contain ingredients or products which originate from cows (e.g. cow milk/dairy). Further, the first element ‘WOW’ – in addition to being entirely non-distinctive and laudatory – will be perceived as informing consumers of and highlighting the kind and quality of the goods to which the respective subsequent elements ‘NO COW’ explicitly refer.”

4. The applicant filed a counterstatement denying the grounds of opposition.
5. The opponent is represented by Noerr Alicante IP, S.L. and the applicant is represented by Boulton Wade Tennant LLP. Both parties filed evidence which I will summarise to the extent I consider necessary. A hearing was held on 9 September 2021. Mr Guy Tritton, of Counsel, appeared on behalf of the opponent and Mr Michael Hicks, of Counsel, appeared for the applicant.
6. Although the UK has left the European Union (“EU”), section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

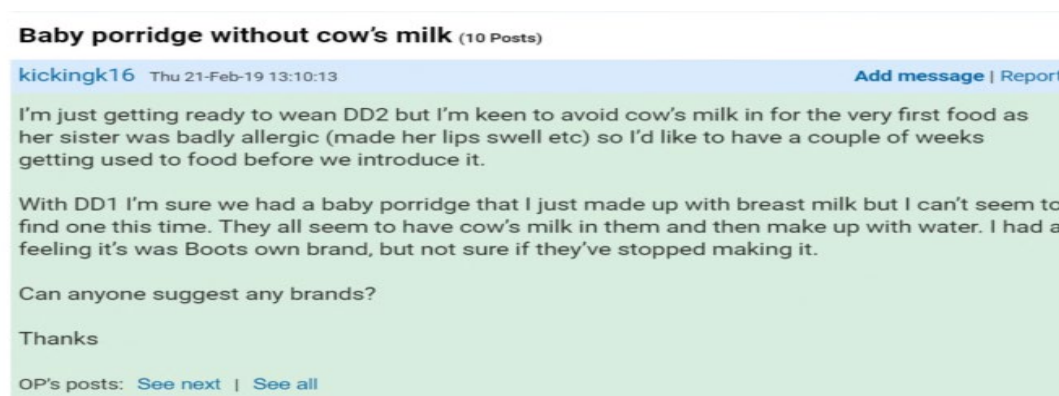
Evidence

7. The opponent’s evidence consists of a witness statement dated 23 February 2021, by Mr Michael Hawkins, Solicitor and partner at the opponent company, together with 25 exhibits.
8. Excerpts from Collins English Dictionary on the definitions of the terms “WOW”, “NO”, and “COW” are provided as Exhibit MH1.

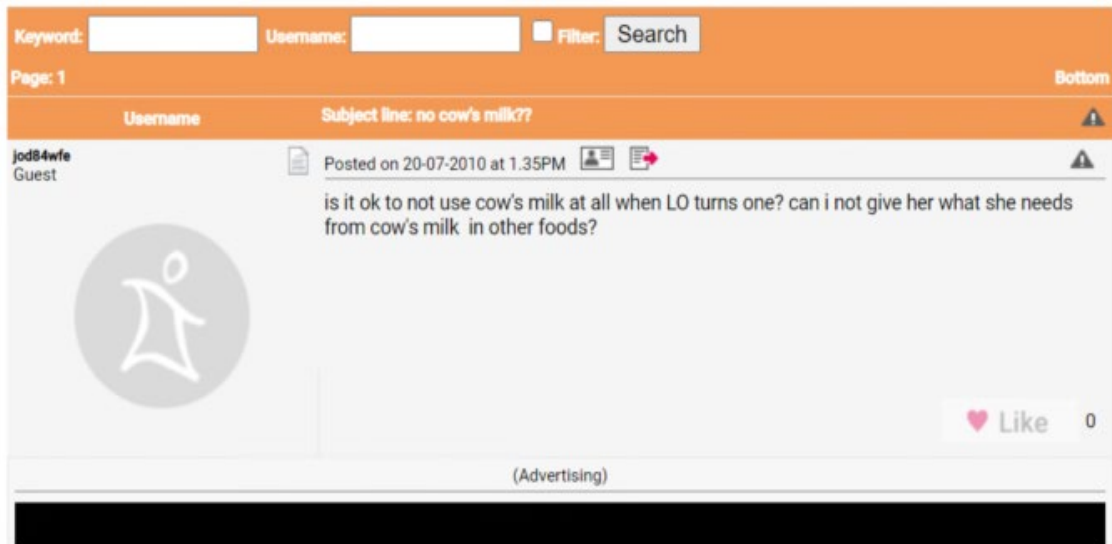
9. Exhibit MH2 consists of an excerpt from the book titled “*History of Soymilk and Other Non-Diary Milks (1226-2013)*”. The book has a copyright date of 2013. The opponent highlights the following sentence from page 118:

“One day after testing a satisfactory batch, Ford got out the little notebook he carried with him and wrote, ‘First good milk. No cow’. [...] Most of it was served in the form of ice cream.’

10. An extract of the table of contents page from the book titled “*Non-Bovine Milk and Milk products*” dated 2016 is in evidence as Exhibit MH3. There are a number of references to “Non-Cow Milk” in the chapters’ titles. The book is also described as a valuable resource for those involved in the non-cow milk sector, e.g. academia, research institutes, milk producers, dairy industry, trade associations, government, and policy makers.
11. Exhibit MH4 which consists of an article entitled “No Cow Know-How”, is dated 24 January 2020 and published on medium.com. The article talks about three beef and dairy substitutes that top the class for flavour and sustainability. This document is dated after the application filing date.
12. The following blog entry dated 21 February 2019 from www.mumsnet.com is provided as Exhibit MH5:



13. Exhibit MH6 consists of the following extract from www.netmums.com:



14. Web archive screen capture of a website titled “*No Cow’s Milk For Me Thanks!*” dated 10 August 2018 obtained via the Wayback Machine is in evidence as Exhibit MH7. The website is claimed to be the UK’s first and original site for dairy allergic or lactose intolerant people.
15. An extract of an article titled “*Shopping guide for cow’s milk-free foods and drinks*” from the NHS Milton Keynes University Hospital website is provided as Exhibit MH8. The webpage is undated.
16. Exhibit MH9 contains the following information obtained from the web archive pages of www.mcdonalds.com dated 12 November 2018:

Can you provide a list of menu items that do not contain cow's milk?

Our Fish Finger Happy Meal® with Fish Fingers and Fries does not contain any cow's milk as ingredients. Other food on the menu that does not contain cow's milk include: Grilled Chicken Salad with Balsamic Dressing, Grilled Chicken and Bacon Salad with Fajita or Balsamic Dressing, Shaker Side Salad® with Balsamic Dressing, Carrot Sticks, Fruit Bag, Hash Brown and Tomato Ketchup, Sweet & Sour Dip, Sweet Curry Dip, Smoky BBQ Dip, Sweet Chilli Dip.

Tag: [menu](#) [items](#) [do](#) [not](#) [contain](#) [cows](#)

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17. Exhibits MH10 consists of extracts of the web archive pages of www.tinynutrition.com dated 2 September 2018. The opponent highlights the following sentences from the webpage:

“There has been an explosion of plant-based “milks” available in the UK in the last few years and there is now a huge variety of these plant-based “milks” available in supermarkets and health food shops around the country. There are many reasons why families may wish to use plant-based drinks instead of cow’s milk...your child may have a cow’s milk allergy, your family may be vegan or your family may simply want to include more plant-derived foods in their diets from a sustainability and ‘better for the planet’ point of view.”

18. The printout of an article titled “*What are the Alternatives to Industrially Produced Cows Milk?*” dated 17 December 2012 published on Permaculture magazine is in evidence as Exhibit MH11. The opponent highlights the following sentence from the article:

“Ahimsa Milk is only commercially-produced milk that guarantees no cow, calf or bull is ever slaughtered as part of its production; [..]”

19. Exhibit MH12 consists of a printout of an article titled “*Coconut Milk: What’s The Difference Between The Can And The Carton?*”. The article is from the website www.myrecipes.com and is dated 21 March 2017. It contains the following references: “So whenever you see “coconut milk,” you’re talking about the solution made by combining coconut with water. There’s no cow dairy involved whatsoever.”

20. Another article titled “*Real Cheese From A Lab, No Cow Necessary*” from www.techcrunch.com dated 15 July 2014 is in evidence as Exhibit MH13.

21. Exhibit MH14 is an article published in The Guardian and is dated 29 January 2019. The article is titled “*White Gold: The Unstoppable Rise Of Alternatives Milks*”. The opponent highlights the following paragraph from the article:

Meanwhile, reduced demand for cow's milk and falling prices led to the closure of 1,000 dairy farms in the UK between 2013 and 2016. Milk's reputation as a healthy food is under threat from anxieties about bovine antibiotics, animal cruelty and the industry's environmental impact, as well as increased diagnosis of lactose intolerance. Teenagers now consider cow's milk less healthy than plant milk alternatives, a development the former chairman of Dairy UK, David Dobbin, called "a demographic time bomb".

22. An article from the website thefestivals.uk dated 28 February 2019 is in evidence as Exhibit MH15. Among other things, the article states: "Shambala has banned traders from selling hot drinks made with cow's milk at this summer festival."
23. Exhibits MH16 and MH17 are articles from The independent and the website npr.org dated 7 June 2019 and 2 August 2019, respectively. MH16 concerns plant-based milk options, while MH17 discusses animal-free alternatives to ice cream, beverages and food. The opponent has highlighted the following references from MH17: "diary protein produced in a lab, no cows needed."
24. An article titled "*How environmentally friendly is vegan milk?*" dated 25 September 2019 from the website www.thegrocer.co.uk is in evidence as Exhibit MH18. The article discusses the impact of cows' milk on the environment. Exhibit MH19 is an article from The Daily Mail dated 4 November 2019. According to the article, there has been a huge shift towards plant-based milk drinks in recent years.
25. Mr Hicks refers to an article titled "*Is it better to drink cow's milk or a dairy-free alternative?*" dated 25 November 2019 published on BBC website under the food fictions section. He claims that in the article, the terms cow's milk and milk are used interchangeably. This document is dated after the application filing date of the contested mark.¹
26. Exhibits MH21 – MH24 consists of a number of other articles. All these documents post-date the application date of the contested mark. Exhibit MH23 consists of the following screengrab of a video titled "ALL MILK-NO COW" published on theflexitarianimes.com on 23 July 2020:

¹ Exhibit MH20



Applicant's evidence

27. The applicant's evidence consists of a witness statement dated 23 April 2021 by Ms Catherine Ann Wolfe, a Chartered Trade Mark Attorney of Boulton Wade Tennant LLP, together with 7 exhibits. Exhibits CW1-CW3 consist of registration details for the marks WOW NO COW! (or its variations) and "WOW NO COW" in various jurisdictions, including the EUIPO and the USPTO.
28. An article titled "*Replacing actual political activism with ethical shopping: The case of Oatly*" published in September 2019 on sciencedirect.com, is in evidence.² Ms Wolfe highlights the following paragraphs from the article:

If we look at fonts and slogans, we can note that the brand is written with broad and uneven block letters, again as something handmade, and ends with an exclamation mark, which Oatly often uses: OATLY! This contrasts with the kinds of thin fonts which formerly tended to be used for health products including Oatly's earlier design. On the side of the package we find the recurring slogan "WOW! NO COW!" Here we have a rounded font. The exact provenance would be hard to pin down, but it resembles what was used in comic books. The slogan itself is a kind of language game. It is childishly simple and rhymes ("wow-cow") – language itself becomes the center of attention in an amusing way. It uses it for the Oatly typical negation ("no"), which suggests a controversy against the milk industry. The traditional assumption that milk products come from cows does not apply, but here we have the alternative, which is emphatically underlined by the two exclamation marks. All this is part of how Oatly's activism in response to a grave and serious problem in the world has its appeal, in its simplicity, its ease and its chic-ness.

² Exhibit CW4

On the back of the package we find the funny heading 'The boring side' introducing the list of ingredients. The font is large and in a style which resembles being written on a wall in dripping paint or the horror movie cliché of writing in dripping blood; again, a sense of a simpler past. As well as artlessness these designs therefore allow Oatly to signal that they are clever and fun and always challenging conventions. In one sense this is an artless and fun kind of activism.

29. That concludes my summary of the evidence to the extent I consider it necessary.

Cancellation action at the EUIPO

30. In his skeleton argument, Mr Hicks referred to an application for a declaration of invalidity of the mark "WOW NO COW!" at the EUIPO, which the Cancellation Division rejected on 13 August 2021.³ He then made submissions to the effect that I should take into account the reasoning of the Cancellation Division because facts in the case before the EUIPO and the current proceedings are materially the same. In response, Mr Tritton argued that the matter before the EUIPO was decided on different evidence and a slightly different mark. Citing the decision in *Hollington v Hewthorn*, Mr Tritton further argued that the findings of fact in one case between different parties are irrelevant to the findings of fact in another case.⁴ He also submitted that I must give no regard to any other Division's decision. Although, I may pay attention to the reasoning in regard to a specific case, which the EUIPO considered, I am mindful that the EUIPO decision is not final yet. As I am not bound by the EUIPO decision, I must exercise my decision-making independently based on the arguments and evidence presented before me in the current proceedings.

Section 3(1)

31. Section 3(1) of the Act provides as follows:

“3(1) The following shall not be registered –

³ C39 494

⁴ [1943] KB 587

(a) [...]

(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,

(d) [...].

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

32. I bear in mind that the above grounds are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c) but still be objectionable under section 3(1)(b): *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P at [25].

33. The relevant date for determining whether the applicant’s mark is objectionable under sections (3)(1)(b) and (c) is the date of the application of the contested mark, i.e. 19 November 2019.

Section 3(1)(c)

34. I will first consider the opposition based on the 3(1)(c) ground. Section 3(1)(c) prevents the registration of marks which are descriptive of the goods, or a characteristic of them. The case law under section 3(1)(c) (corresponding to article 7(1)(c) of the European Union Trade Mark (“EUTM”) Regulation, formerly article 7(1)(c) of the Community Trade Mark (“CTM”) Regulation) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the Court of Justice of the European Union (“CJEU”) in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699 , paragraph 19; as regards Article 7 of Regulation No 40/94, see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18 , paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I1461, paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7 (1)(c) of Regulation No 40/94. Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia , *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44 , paragraph 45, and *Lego Juris v OHIM* (C-48/09 P) , paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of

which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley* , paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie* , paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to

the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland* , paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56)."

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97]."

35. The opponent claims that the applicant's mark describes a characteristic of the contested goods in that they are free from/do not contain ingredients from a cow, particularly cow's milk. At the hearing, Mr Tritton also argued that the opponent's evidence shows that the traders have or would wish to describe their products as no cow products. He also argued that adding the word "WOW" only merely highlights to the consumer that the milk substitute they are about to buy has no cow's milk in it.

36. The applicant denies the claim and submits that the contested mark is not simply a collocation of descriptive words because neither WOW nor NO COW are in themselves descriptive of any of the goods.

37. Although any assessment of descriptiveness must consider the mark's totality, it is also helpful to first analyse the mark by reference to its constituent parts.⁵ Therefore, I will first consider the position in relation to the words "no cow". However, I make it clear that my conclusion is not a finding on the registrability of the individual elements of the trade mark. Before I proceed any further, I must assess who is the average consumer of the applicant's goods. The goods consist of everyday products, and the average consumer is a member of the general public. It is, therefore, the perspective of this consumer which is the key consideration in these proceedings.

38. Mr Tritton argued that no cow is a natural way to describe dairy and milk products that do not come from a cow. Although in the opponent's evidence, the common descriptors used are non-cow milk or no cow's milk, I acknowledge that other terms can serve as descriptors. However, the evidence shows only limited use of the words "no cow", some post-date the relevant period. In every instance, the words "no cow" are accompanied by additional words or used as part of a magazine article title. For example, the article titled "*Coconut milk: What's the difference between the can and the carton?*" contains the following sentence: "there's no cow dairy involved whatsoever."⁶ Similarly, "no cow necessary or no cow needed" are some other descriptors used in the evidence.⁷ I was also referred to a note from Henry Ford on soy milk appearing in a book published in 1939. His note reads: "First good milk. No cow". I am not convinced that the words "no cow", solus, was used in any of the evidence as one of the descriptors of milk substitutes nor that the relevant public recognised the words "no cow" as designating a particular characteristic of the goods that are either milk substitutes or do not contain cow's milk. I conclude that "No cow" is not a natural way to describe a product devoid of cow's milk, nor is the evidence compelling enough to conclude that it is one of the possible ways to designate a product that does not contain cow's milk. Any use shown of "no cow" is limited to a particular context and does not specifically relate to designating the characteristics. I pause here to note that the examples provided in the evidence

⁵ See *BABY-DRY* decision (Case C-383/99 P) para 40

⁶ Exhibit MH12

⁷ Exhibits MH13, MH23, MH24

also differ from the contested mark which contains an additional word “WOW” at the beginning.

39. I have also considered the question of public interest behind section 3(1)(c) ground which reflects the need to keep certain words free for other manufacturers and traders. The registration of a mark gives rise to a right to the mark as a whole and not in respect of the individual words of which it is comprised. I have already concluded that the mark as a whole does not designate the characteristics of the goods at issue. In those circumstances, I do not consider that my findings on section 3(1)(c) is likely to be unduly restrictive.

40. Following my conclusions noted earlier in the decision, it seems that the trade mark WOW NO COW cannot be said to consist of exclusively of signs or indications that may serve in trade to designate the characteristics of the goods. Accordingly, I find that the mark should not be refused under the provisions of section 3(1)(c).

Section 3(1)(b)

41. The question now is whether the mark “WOW NO COW” may still be devoid of any distinctive character under section 3(1)(b) in relation to the goods at issue, even though it does not precisely designate a characteristic of the goods as per section 3(1)(c). The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific

product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

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). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36;

Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37).”

42. The applicant argues that the mark is not devoid of distinctive character because the mark includes an internal rhyme, the phrase is grammatically striking, and it is close to being a palindrome. The applicant then proceeds to submit:

“Overall, therefore, the Mark creates an innovative and distinctive impression. When first seen, the reader will need to give consideration to its intonation and to unpick and understand its semantic content. It has a significant element of conceptual intrigue and surprise. It is much more than a mere promotional and laudatory message. Overall, the result is a mark which is much more than just the sum of its parts. It has an unusual and memorable syntactic structure and involves a number of linguistic devices.”

43. The opponent’s objection is essentially the same as that under the section 3(1)(c), i.e. the consumers will not perceive the challenged mark as an identifier of origin but merely as a descriptive term describing the characteristics of the goods at issue, namely that such food and beverage goods are devoid of cow’s milk or any ingredients derived from cows. The opponent also submits:

“The combination of the words “WOW NO COW” is comprised of the purely promotional/non-distinctive element WOW, followed by the equally non-distinctive elements NO COW. The expression WOW NO COW will be understood as referring to- and appraising- goods not produced from or not containing cow milk (or other ingredients originating from cows), thus describing essential characteristics of the goods at issue.

In addition, there is no other element beyond the words “WOW NO COW” that could confer upon the mark the necessary distinctive

character beyond its obviously descriptive character in the perception of the relevant public.”

44. Referring to the decision in *View, Inc. v EUIPO*, Mr Tritton argued that there must be a cognitive process or a degree of mental gymnastics to be done before a mark becomes distinctive.⁸ He further referred to paragraph 26 in the decision:

"The relevant public will perceive the slogan solely as an informative message about those goods and services and will immediately establish a link between the slogan and the qualities, nature or purpose of the goods and services in question, without any particular interpretation or treatment. The sign applied for will not therefore be perceived as an indication of origin."

45. With regard to the argument that the contested mark will be seen as a purely promotional or non-distinctive elements, I remind myself of the guidelines provided in *Audi*, where the Court held:⁹

"...while it is true... that a mark possesses distinctive character only in so far as it serves to identify the goods or services in respect of which registration is applied for as originating from a particular undertaking, it must be held that the mere fact that a mark is perceived by the relevant public as a promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that the mark is devoid of distinctive character."

46. I am of the view that there is a degree of originality in the mark "WOW NO COW" with its repeated use of the letters W and O and the rhyming words wow and cow. This character of the mark makes it memorable to the average

⁸ T-49/19

⁹ [2010] ECR I-0000

consumer and renders it with a certain degree of distinctive character, just enough to pass the relatively low hurdle set for the distinctiveness of the mark.¹⁰ The consumer is unlikely to see the mark as a mere banal expression. In the absence of a descriptive meaning, the imaginative combination and the resonance the words create is sufficient for the average consumer to perceive the mark as an indication of commercial origin.

47. The case law in *Audi* also confirms (at paragraph 47 of that particular decision) that semantic characteristics such as '*having a number of meanings*', '*being a play on words*', or being perceived of as '*imaginative, surprising and unexpected*', such that the sign in which they reside can be easily remembered, are, as a rule, likely to endow it with a distinctive character. Although the Court nonetheless notes that such characteristics are not essential pre-requisites for a finding of distinctive character, I can take account of those features that are likely to endow the mark with a distinctive character. In those circumstances, it cannot be found that the mark WOW NO COW is devoid of any distinctive character. Here a distinction must be drawn between Mr Tritton's example of "We Bake Great Cakes", which he argues would be unregistrable presumably for cakes even though the slogan may be memorable and rhymes. Unlike Mr Tritton's example of the slogan, which is clearly descriptive, that is not the case with the contested mark. Any link between the contested mark and the goods at issue is certainly not immediate and obvious, and, therefore, an analogy cannot be drawn in the opponent's favour.

48. The opposition based on section 3(1)(b) also fails.

COSTS

49. The applicant has been successful and is entitled to an award of costs. Awards of costs are governed by Tribunal Practice Notice ("TPN") 2/2016. In awarding the costs, I bear in mind that the applicant's evidence was of no assistance to the issues before me, although the purpose behind its filing is understandable.

¹⁰ *Oatly AB v EUIPO T-253/20*

Therefore, I decline to award the applicant any costs in relation to filing its evidence. Accordingly, I award costs to the applicant on the following basis:

Preparing the counterstatement and Considering the statement of case:	£200
Considering the opponent's evidence:	£400
Preparing for and attending the hearing:	£600
Total:	£1,200

50. I order D's Naturals, LLC to pay Oatly AB the sum of £1,200. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th November 2021

**Karol Thomas
For the Registrar
The Comptroller-General**