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Unpacking *Thatchers v. Aldi*: Lessons for UK Food Businesses and Beyond

In a recent UK decision, *Thatchers Cider Company Limited v. Aldi Stores Limited* [2024] EWHC 88 (IPEC), Thatchers Cider was unsuccessful in its claim for trade mark infringement pursuant to sections 10(2)(b) and 10(3) of the Trade Marks Act 1994 (the Act) and a further claim for passing off against Aldi.

The Judgment

What was the claim Thatchers made? The dispute concerned “Thatchers Cloudy Lemon Cider” (the Thatchers Product) which was launched by Thatchers in February 2020. The design of the Thatchers Product packaging was subsequently protected by a registered trade mark (registration no

UK00003489711) (the Thatchers Trade Mark). This can be seen below. Aldi released its own brand of cloudy lemon cider in May 2022 under the name “Taurus Cloudy Cider Lemon” (the Aldi Product) which is also pictured below.

Thatchers claimed that the Aldi Product was an infringement of its Thatchers Trade Mark pursuant to sections 10(2)(b) and 10(3) of the Act. Thatchers claimed that Aldi had intentionally set out to cause a link in the minds of consumers between the two products. They claimed that this would encourage consumers to buy the Aldi Product thus taking unfair advantage of, or cause detriment to, the distinctive character of the Thatchers Trade Mark which has a reputation in the UK. Thatchers also made additional claim for passing off.

From a review of the judgment, it is clear that Thatchers struggled to particularize what exactly the “*sign*” used by Thatchers was that it was complaining of. It was noted in the judgment that it took six pages of the court transcript from day 1 for

Mr Howe KC to explain what Aldi’s offending sign in the proceedings was. Thatchers’ submissions regarding Aldi’s sign included:

1. the four-pack and the individual can;
2. a flat sign on either the can or the cardboard packaging
3. the overall appearance of the can; and
4. the front face of the can.

Her Honour Judge Melissa Clarke eventually concluded that the sign in question was the “*overall appearance of a single can of the Aldi Product, and not merely the face of it*” (the **Sign**).

Section 10(2)(b) TMA – No Likelihood of Confusion

The Court rejected Thatchers’ claim of a likelihood of confusion due to a high level of similarity between the two products. It was held that Aldi had done enough to move its packaging design sufficiently far away from the Thatchers Trade Mark.

Whilst the Court acknowledged that there were some visual similarities



between both products in relation to aspects such as the color scheme, it concluded that overall, there was a low degree of similarity. Greater weight was placed on the differences between the more dominant aspects of both products. Her Honour Judge Melissa Clarke found these more dominant aspects to be the word “THATCHERS” on the Thatchers Product and the word “TAURUS” and the image of the bull’s head on the Aldi Product, which are dissimilar.

The Court also considered the aspect of “*shelf stand-out*” of the Aldi Product. It was established that the average consumer would browse for such products for a matter of seconds before deciding to buy the product and would therefore be looking for visual cues to encourage them to purchase the product. The Court concluded that the colour scheme was “*ubiquitous to lemon flavoured drinks*” and that the “*overwhelming impression*” to the consumer would be that of the TAURUS brand. The Court did accept that the average consumer may look at the Sign and bring the Thatchers Trade Mark to mind. However, the evidence of confusion which was submitted was, in the Court’s view, lacking.

Taking into account all factors, it was held that on a global assessment there was no likelihood of confusion. The claim for infringement under section 10(2)(b) of the Act was dismissed.

Section 10(3) TMA – No Unfair Advantage and Detriment to Distinctive Character or Repute

Despite Aldi’s submission that any goodwill arising from trade in the

Thatchers Product should be attributed to the THATCHERS brand as opposed to the Thatchers Trade Mark as a whole, the Court held that the Thatchers Trade Mark did have a reputation in the UK as of May 2022. It also held that the average consumer would call to mind the Thatchers Trade Mark when presented with the Aldi Product. This conclusion was supported by consumer comments on social media referring to the Aldi Product as a ‘*rip off*’ or ‘*knock off*’ of Thatchers Product.

However, Thatchers failed to convince the Court that Aldi had sought to take unfair advantage of the Thatchers Trade Mark. The Court made note of the fact that although Aldi had added lemons to the packaging in order to communicate the lemon-nature of the product, it had not departed from its house style for TAURUS ciders. This was demonstrated by the inclusion of the TAURUS branding and the bulls head device. Further, there was also no evidence to suggest that Aldi’s use of the Sign had caused consumers to change their behaviour. The Court’s conclusion therefore was that Aldi had not sought to exploit the reputation and goodwill of the Thatchers Trade Mark nor had its use of the Sign had the effect of doing so.

Each case is decided on its own facts and rather uniquely, following a request from Thatchers, Her Honour Judge Melissa Clarke conducted a blind taste test of the two products. The argument being that customers who tried the Aldi Product and disliked the taste would consequently dislike the Thatchers Product. Her Honour Judge Melissa Clark “*found the taste of the two products to be very similar*”, but she did accept that “*they are different*”.

Ultimately, this submission was rejected by the Court and as a result, Thatchers’ claim of detriment to the

reputation of the Thatchers Trade Mark also failed.

Passing off – No Misrepresentation

The Court held that Thatchers did have goodwill in the Thatchers Trade Mark but that there had been no misrepresentation on Aldi’s part. This was due to a lack of evidence that consumers would believe that the Aldi Product is that of Thatchers, whether that being a product which is licenced, or approved by, or otherwise connected in trade with Thatchers. Consequently, Thatchers’ claim in passing off was also unsuccessful.

What Will This Judgment Mean Moving Forward?

Interestingly, in contrast to the recent *Tesco v. Lidl* judgment, the Court noted Aldi’s *lack* of paper trail relating to the creation of its packaging designs. Furthermore, Aldi was successful in this instance despite admitting to the Court that it had used the Thatchers Trade Mark as a benchmark for its ‘*Taurus Cloudy Lemon Cider*’ packaging. Her Honour Judge Melissa Clarke made clear however that her only concern was Aldi’s final product, which was sufficiently dissimilar to that of Thatchers.

This case highlights the challenge for brand owners to create distinctive packaging which is capable of acting as a trade mark. The challenge is to design packaging which can satisfy the requirements for trade mark protection, often achieved through usage of a key word or phrase as was the case here with ‘THATCHERS’ but ensuring the registration can be enforced

broadly. The judgment also gives some guidance on “copycat” products generally both in the context of food or any other consumer products, with those enforcing their intellectual property, and those avoiding third-party intellectual property, taking notes.

Ultimately however, each case is to be considered on its own merits

and facts and whilst certainly this is a positive outcome for Aldi, that does not necessarily mean the next “copycat” claim will have the same outcome.

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