



Hilary Term
[2026] UKSC 4
On appeal from: [2024] EWCA Civ 1453

JUDGMENT

Dairy UK Ltd (Respondent) v Oatly AB (Appellant)

before

**Lord Hodge, Deputy President
Lord Briggs
Lord Hamblen
Lord Burrows
Lord Stephens**

**JUDGMENT GIVEN ON
11 February 2026**

Heard on 10 December 2025

Appellant

Michael Edenborough KC
Niamh Herrett
(Instructed by Shakespeare Martineau LLP)

Respondent

Tom Moody-Stuart KC
(Instructed by DWF Law LLP)

LORD HAMBLÉN AND LORD BURROWS (with whom Lord Hodge, Lord Briggs and Lord Stephens agree):

1. Introduction

1. The appellant, Oatly AB (“Oatly”), is a Swedish company whose business involves the manufacture and sale of oat-based food and drink products as alternatives to dairy products. The respondent, Dairy UK Ltd (“Dairy”), is the trade association for the UK dairy industry.

2. In April 2021, the trade mark “POST MILK GENERATION” was registered by Oatly for use in relation to categories of oat-based food and drink (classes 29, 30 and 32) and for use in respect of T-shirts (class 25).

3. In November 2021, Dairy applied for a declaration that, under section 3 of the Trade Marks Act 1994 (“the 1994 Act”), that registration was invalid.

4. Dairy’s application succeeded before the hearing officer in the Intellectual Property Office (“IPO”) (other than in respect of T-shirts for which the application was refused because T-shirts were not agricultural products and therefore manifestly fell outside the scope of the relevant regulation relied on by Dairy). But her decision in respect of oat-based food and drink was appealed by Oatly (there was no cross-appeal by Dairy in respect of T-shirts) and overturned in the High Court by Richard Smith J who held that the registration was valid. His decision was, in turn, overturned by the Court of Appeal (Arnold, Snowden and Jeremy Baker LJ). Oatly now appeals to the Supreme Court.

5. The appeal concerns the proper interpretation of Parliament and Council Regulation (EU) No. 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products (the “2013 Regulation”) that, amongst many other things, regulates the use of dairy terms, such as milk, cheese, and yogurt, in relation to the marketing of agricultural products.

6. Point 5 in Part III of Annex VII referred to in Article 78 of the 2013 Regulation (“Point 5 of the 2013 Regulation”) provides that the “designations” of “milk” and “milk products” referred to in Points 1, 2 and 3 of Annex VII “may not be used for any product other than those referred to in that point”.

7. The Court of Appeal held that the trade mark, as applied to oat-based food and drink, is a “designation” of milk which is prohibited. Oatly argues that the Court of Appeal was incorrect because “designation” concerns the name of the product, that the

trade mark POST MILK GENERATION was not being used to name the product, and that, therefore, the trade mark does not fall foul of Point 5 of the 2013 Regulation.

8. Ground 1 of this appeal therefore focuses on the meaning of “designation” in the 2013 Regulation. More specifically, as formulated by the parties and refined by their submissions, the questions asked under Ground 1 are: what is the proper interpretation of the term “designation” in Article 78(2) and Part III of Annex VII of the 2013 Regulation; and does POST MILK GENERATION fall within the scope of Point 5 of the 2013 Regulation on the basis that it uses the term “milk” as a designation? Oatly further argues, and this concerns Ground 2 of this appeal, that, even if wrong on Ground 1, the Court of Appeal should have accepted that the trade mark is saved by the second limb of the proviso in Point 5 of the 2013 Regulation. Under the second limb, Point 5 does not apply to designations which “are clearly used to describe a characteristic quality of the product”. Oatly submits that POST MILK GENERATION does describe a characteristic quality of the registered goods (in classes 29, 30 and 32), namely that they are all milk-free.

9. Ground 2 therefore turns on the meaning of the second limb of the proviso in Point 5 of the 2013 Regulation. More specifically, as formulated by the parties and refined by their submissions, the questions asked under Ground 2 are: what is the proper interpretation of the second limb of the proviso in Point 5; and is POST MILK GENERATION saved by that limb of the proviso on the basis that it is clearly being used to describe a characteristic quality of the contested products for which the trade mark is registered?

10. The answers to the questions posed rest on the correct interpretation of the relevant legislation. It is common ground that, subsequent to Brexit, the 2013 Regulation is “assimilated law” (see Retained EU Law (Revocation and Reform) Act 2023 section 5). It is now well-established that the modern approach to domestic statutory interpretation requires the court to ascertain the meaning of the words used, in the light of their context and the purpose of the provision(s). See, eg, *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255, paras 28–29; *News Corp UK & Ireland Ltd v Revenue and Customs Comrs* [2023] UKSC 7; [2024] AC 89, para 27; *R (N3) v Secretary of State for the Home Department* [2025] UKSC 6; [2025] AC 1473, para 62; *Darwall v Dartmoor National Park Authority* [2025] UKSC 20; [2025] AC 1292, para 15; *X v Lord Advocate* [2025] UKSC 44; [2026] 2 WLR 43, para 22. In interpreting assimilated law comprising legislation, it is appropriate to apply that modern approach to domestic statutory interpretation albeit that the EU origin of the legislation may be relevant in considering the context and purpose of the provision(s).

2. The relevant EU legislation that has become assimilated law

11. Under section 3(4) of the 1994 Act, “A trade mark shall not be registered if or to the extent that its use is prohibited in the United Kingdom by any enactment or rule of law other than law relating to trade marks.” The relevant enactment in question (which, as has been said in para 10, is assimilated law) is the 2013 Regulation. We set out immediately below the material parts of the 2013 Regulation as amended (in minor respects, that are not directly relevant to the issues we have to decide) by the Common Organisation of the Markets in Agricultural Products Framework (Miscellaneous Amendments, etc) (EU Exit) Regulations 2019 (SI 2019/821).

(1) The 2013 Regulation

12. The crucial Point 5 of the 2013 Regulation has been emphasised below by underlining.

“Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products ...

[Recital] (76) For certain sectors and products, definitions, designations and sales descriptions are important elements for determining the conditions of competition. Therefore, it is appropriate to lay down definitions, designations and sales descriptions for those sectors and/or products, which should only be used in the Union for the marketing of products which comply with the corresponding requirements ...

Article 78

Definitions, designations and sales descriptions for certain sectors and products

1. In addition, where relevant, to the applicable marketing standards, the definitions, designations and sales descriptions provided for in Annex VII shall apply to the following sectors or products: ...

(c) milk and milk products intended for human consumption;
...

2. The definitions, designations or sales descriptions provided for in Annex VII may be used in [Great Britain] only for the marketing of a product which conforms to the corresponding requirements laid down in that Annex ...

ANNEX VII

DEFINITIONS, DESIGNATIONS AND SALES DESCRIPTION OF PRODUCTS REFERRED TO IN ARTICLE 78

For the purposes of this Annex, the ‘sale description’ means the name of the food, within the meaning of Article 17 of Regulation (EU) No 1169/2011 ...

PART III

Milk and milk products

1. ‘Milk’ means exclusively the normal mammary secretion obtained from one or more milkings without either addition thereto or extraction therefrom.

However, the term ‘milk’ may be used:

(a) for milk treated without altering its composition or for milk the fat content of which is standardised under Part IV;

(b) in association with a word or words to designate the type, grade, origin and/or intended use of such milk or to describe the physical treatment or the modification in composition to which it has been subjected, provided that the modification is restricted to an addition and/or withdrawal of natural milk constituents.

2. For the purposes of this Part, ‘milk products’ means products derived exclusively from milk, on the understanding that substances necessary for their manufacture may be added provided that those substances are not used for the purpose of replacing, in whole or in part, any milk constituent.

The following shall be reserved exclusively for milk products.

(a) the following names used at all stages of marketing:

(i) whey,

(ii) cream,

(iii) butter,

(iv) buttermilk,

(v) butteroil,

(vi) caseins,

(vii) anhydrous milk fat (AMF),

(viii) cheese,

(ix) yogurt,

(x) kephir,

(xi) koumiss,

(xii) viili/fil,

(xiii) smetana,

(xiv) fil;

(xv) rjaženka,

(xvi) rūgušpiens;

(b) names within the meaning of Article 17 of Regulation (EU) No 1169/2011 actually used for milk products.

3. The term ‘milk’ and the designations used for milk products may also be used in association with a word or words to designate composite products of which no part takes or is intended to take the place of any milk constituent and of which milk or a milk product is an essential part either in terms of quantity or for characterisation of the product.

4. As regards milk, the animal species from which the milk originates shall be stated, if it is not bovine.

5. The designations referred to in points 1, 2 and 3 may not be used for any product other than those referred to in that point.

However, this provision shall not apply to the designation of products the exact nature of which is clear from traditional usage and/or when the designations are clearly used to describe a characteristic quality of the product.

6. In respect of a product other than those described in points 1, 2 and 3 of this Part, no label, commercial document, publicity material or any form of advertising as defined in Article 2 of Council Directive 2006/114/EC or any form of presentation may be used which claims, implies or suggests that the product is a dairy product.

However, in respect of a product which contains milk or milk products, the designation ‘milk’ or the designations referred to in the second subparagraph of points 2 of this Part may be used only to describe the basic raw materials and to list the

ingredients in accordance with Regulation (EU) No 1169/2011.”

(2) Annex I to the Commission Decision 2010/791/EU

13. The importance of this Annex (Annex I to the Commission Decision 2010/791/EU of 20 December 2010 – “the 2010 Decision”) is that it lists the products referred to in what is now the proviso in Point 5 of the 2013 Regulation (which was previously in the second sub-paragraph of point III(1) of Annex XII to Council Regulation (EC) No 1234/2007). That list is directly relevant to Ground 2 in this appeal. It is not in dispute that this is assimilated law (although there is a question, not relevant to this appeal, as to how that list is being updated subsequent to Brexit). In so far as relevant, Annex I to the 2010 Decision reads as follows:

“List of the products referred to in the second subparagraph of point III(1) of Annex XII to Regulation (EC) No 1234/2007 ...

Coconut milk

‘Cream ...’ or ‘Milk ...’ used in the description of a spirituous beverage not containing milk or other milk products or milk or milk product imitations (for example, cream sherry, milk sherry) ...

Cream filled biscuits (for example, custard cream, bourbon cream, raspberry cream biscuits, strawberry cream, etc.)

Cream filled sweets or chocolates (for example, peppermint cream, raspberry cream, crème egg) ...

Creamed coconut and other similar fruit, nut and vegetable products where the term ‘creamed’ describes the characteristic texture of the product ...

Cream or creamed soups (for example, cream of tomato soup, cream of celery, cream of chicken, etc.)...”

3. The decisions below

14. On the questions with which we are concerned, it is instructive to consider the reasoning of the IPO’s hearing officer and the courts below.

(1) The IPO’s hearing officer

15. The essential reasoning of Judi Pike, the IPO’s hearing officer (O/0049/23, 17 January 2023), was that the trade mark is invalid (other than as regards T-shirts) under section 3(4) of the 1994 Act because the trade mark contains the word “milk” and the goods (in classes 29, 30 and 32) are not milk. That is prohibited by Point 5 of the 2013 Regulation. In her words, at paras 26 and 28:

“Milk is a designation in points 1, 2 and 3 of the Annex. Point 5 states that ‘milk’ cannot be used for products which are not milk ... The wording of point 5 is strict. The use of ‘milk’ is prohibited for non-milk products under point 5 of the Annex, regardless of how the mark as a whole may be viewed by consumers, which is not a consideration under point 5.”

16. She had earlier asserted, but without there being any apparent argument on this matter, that the second limb to the proviso in Point 5 did not apply because “the mark does not clearly describe a characteristic quality of the goods.” (para 21)

17. Although no longer in issue, the hearing officer decided that the trade mark would not have been invalid under section 3(3)(b) of the 1994 Act. That was because the mark did not constitute actual deceit nor a sufficiently serious risk of deception such that the behaviour of the average consumer would be materially affected. At para 33, she said:

“the average consumer will view the mark as an ironic way of saying its goods have moved on from conventional milk and are for consumers of a ‘post-milk generation’; ie those who no longer consume dairy milk. The message is not difficult to receive for a member of the purchasing public that is reasonably well-informed and reasonably observant and circumspect, paying at least an average degree of attention to the purchase. They will not be in such a hurry that they only perceive the word ‘milk’, ignore the other two words, and assume they are buying dairy milk.”

(2) Richard Smith J

18. The IPO’s decision was overturned by Richard Smith J: [2023] EWHC 3204 (Ch). His reasoning was that the hearing officer had construed the prohibition in Point 5 too widely. That was because she had adopted too wide a meaning of “designation”. It was not the use of the term “milk” in marketing products that was prohibited. Rather it was the use of the term “milk” to identify products as being milk that was prohibited. In his words at para 39:

“it is the use of the term ‘milk’ for products to identify them as *being* milk, not merely its use in their marketing, that constitutes their designation as such. In this case, the Mark was registered for a variety of goods in different classes and, although it may well have been used in their marketing, it does not purport to market them as any particular product, let alone as milk. Since the Mark does not designate those goods as ‘milk’, point 5 is not engaged and no question of the proviso to point 5 arises.”

(3) The Court of Appeal

19. Richard Smith J’s judgment was overturned by the Court of Appeal: [2024] EWCA Civ 1453. The leading judgment was given by Arnold LJ with whom Jeremy Baker LJ agreed. Snowden LJ also agreed with Arnold LJ subject to one point on the proviso in Point 5, which did not affect the decision.

20. Some of Arnold LJ’s reasoning is not relevant to this appeal because it is no longer being suggested by Oatly that a trade mark, because it is a trade mark, has some particular protection against the prohibition in Point 5. But on the questions that do arise on this appeal, Arnold LJ rejected Oatly’s submission that the 2013 Regulation should be given the same meaning as earlier versions, precisely because changes in the wording had been

made. Central to his reasoning was that, while a “designation” includes a description of a product, it is not limited to a description of a product. In essence he accepted the reasoning of the IPO’s hearing officer that “milk” is a designation in Point 1 of Annex VII so that, by virtue of Point 5, it cannot be used in relation to any product which is not “milk” as defined in Point 1 (subject to the proviso in Point 5).

21. As regards the proviso in Point 5, all three of the Court of Appeal judges agreed that that proviso did not save the trade mark because it did not clearly describe a characteristic quality of the goods in question. In Arnold LJ’s words at para 56:

“I agree with the hearing officer that it would be understood as referring to potential consumers of the goods. It may be understood as alluding to the fact that the goods are non-dairy products, but it does not clearly describe any such characteristic.”

22. On the proviso in Point 5, Snowden LJ said the following at para 77:

“... I entirely agree with the critical point made by Lord Justice Arnold at para 56 above, that if Oatly was entitled to argue that the Trade Mark fell within the second limb of the exception in Point 5, its argument would nevertheless fail on the facts. That is because the Trade Mark ‘POST MILK GENERATION’ does not describe, clearly or at all, a characteristic quality of any of the products in classes 29, 30 and 32 in relation to which Oatly wishes to use it. Rather, as obviously implied by the use of the words ‘post’ and ‘generation’, the Trade Mark describes the age-related characteristic of a particular cohort of people which Oatly intends should buy or consume its products.”

23. The disagreement between Arnold LJ and Jeremy Baker LJJ, on the one hand, and Snowden LJ on the other, was whether inclusion in the list of products set out in the 2010 Decision, which is indisputably required for the first limb of the proviso (concerning the designation of products the exact nature of which is clear from traditional usage), is also required in respect of the second limb (concerning describing a characteristic quality of the product). In obiter dicta, Arnold and Jeremy Baker LJJ thought that it was, whereas Snowden LJ thought that it was not. It is common ground between the parties to this appeal that Snowden LJ was correct on that point.

4. The essential submissions of the parties

24. On Ground 1, Michael Edenborough KC, for Oatly, essentially submits that “designation” in Point 5 of the 2013 Regulation means the name of a product (or, more fully, the name used at all stages of marketing). As the product that we are here concerned with is food or drink, “designation”, according to Mr Edenborough, means the name of a food or drink. Milk, cream, butter, cheese, yogurt are all examples of designations (as would be lamb or beef in relation to meat) because they are all names of food or drink. In contrast, POST MILK GENERATION is not the name of a product. It does not name (or even describe) a food or drink. If one were to ask in respect of oat-based milk, what is that product? The answer, “It is post milk generation” would not answer the question because it would not name the product. The name of the product would be “oat-based milk” not “post milk generation”. It follows, according to this submission, that Point 5 of the 2013 Regulation does not prohibit using POST MILK GENERATION in respect of oat-based food and drink.

25. Mr Edenborough submits that this “name of a product” meaning of “designation” is its natural meaning in the context of the 2013 Regulation and is also strongly supported by previous versions of the Regulation and by there being no indication that the 2013 Regulation was effecting a substantive change. He also relies on the fact that, in terms of purpose, it is no longer in dispute, following the factual findings of the IPO’s Hearing Officer, that consumers would not be deceived by the use of the trade mark POST MILK GENERATION.

26. In contrast, Tom Moody-Stuart KC, for Dairy, submits, on Ground 1, that “designation” in Point 5 of the 2013 Regulation means any use of the term (here the term “milk”) in referring to a relevant product (ie food or drink). This accords with the natural meaning of the word “designation” in the context in which it is being used. It does not matter that POST MILK GENERATION is not, and is not being used as, the name of a product because “designation” has a wider meaning. The term “milk”, albeit in the composite phrase POST MILK GENERATION, cannot therefore be used to refer to oat-based food or drink. It can only be “used for” milk or milk products as referred to in Points 1, 2 and 3 in Part III of Annex VII. In terms of purpose, the legislation is concerned not only to protect consumers from being deceived but also sets out what are regarded as the rules of fair competition. The correct meaning of designation is therefore not linked to whether, or not, consumers would be deceived.

27. On ground 2, Mr Edenborough argues that, even if he is wrong on Ground 1, so that POST MILK GENERATION is a prohibited designation under Point 5 of the 2013 Regulation, it is nevertheless saved by the second limb of the proviso in Point 5. That is because POST MILK GENERATION is clearly being used to describe a characteristic quality of the contested product, namely that it is milk-free. Therefore, POST MILK

GENERATION used in relation to oat-based milk or oat-based food would be making clear that there is no milk in the product.

28. In contrast, on ground 2, Mr Moody-Stuart submits that the second limb of the proviso in Point 5 of the 2013 Regulation does not save the use of POST MILK GENERATION because that is an ambiguous phrase that cannot be said to make clear that a characteristic quality of the contested product is that it is milk-free. Rather the trade mark is most obviously referring to the type of consumer (a younger generation) that is being targeted. So POST MILK GENERATION, where referring to oat-based food or drink, is not clearly being used to describe a characteristic quality of the product (ie it does not make clear that it is milk-free).

5. Ground 1: what is the proper interpretation of the term “designation” in Point 5 of the 2013 Regulation; and does POST MILK GENERATION fall within the scope of Point 5 of the 2013 Regulation on the basis that it uses the term “milk” as a designation?

29. We reject Mr Edenborough’s submission that “designation” in Point 5 of the 2013 Regulation means the name of a product so that the use of the term “milk” in the disputed trade mark is not prohibited.

30. “Designation” or “designations” in Point 5 must be read alongside Point 2(a) and (b) where the word “names” is used and it naturally follows that they do not have the same meaning. Similarly, at the beginning of Annex VII, there is a reference to “sale description” as meaning “the name of the food” and again that suggests that designation does not have the same meaning as the name of a product. A similar point can be made about recital 76 and the heading to Annex VII in both of which the terms “designations and sales description” are used, thereby indicating that they have different meanings.

31. In line with Mr Moody-Stuart’s submissions, the terms “designation” or “designations” in Point 5 on their natural meaning, viewed in the context of Annex VII, are referring to their use in respect of a food or drink rather than the naming of it. The designations referred to in Points 1, 2 and 3, including the term “milk”, may not be “used for” any product other than those so referred to. Oat-based food or drink is not referred to in Points 1, 2 and 3 and so the use of the term “milk” in respect of such food or drink is prohibited. The prohibition bites where the designation has been used for a relevant product, and it is not necessary that it has been used as the name of the product. That is a broad meaning which encompasses, but is wider than, and different from, the narrower “name of a product” meaning, argued for by Mr Edenborough.

32. Taking into account recital 76, it is also clear that that wider meaning is consistent with the purpose of Point 5 which, in respect of milk as a product, is to set out fair

conditions of competition. That purpose is distinct from protecting consumers from being deceived. It is no objection that the conditions of competition impose a strict prohibition in protecting the use of the term “milk”. This was very clearly and correctly stated by the IPO’s hearing officer at paras 26 and 28 (set out at para 15 above).

33. Mr Edenborough took us through a painstaking examination of previous versions of the 2013 Regulation (with a colour code to identify different, or the same, wording). He did so in order to show, in particular, that previous versions of what is now Point 5 had used the word “names” not “designations”. He then sought to show that the present wording was not heralded by any indication of a substantive change. We have found this exercise unhelpful. The legislation must be interpreted as it now stands and the present Point 5 uses the word “designation” which is to be contrasted with other references to the name of products. The provisions of legislation must be read in their particular context and it is therefore potentially misleading to look back at previous versions of legislation which are significantly different. While not deciding the point, which we regard as essentially irrelevant, we note that, in any event, Mr Moody-Stuart did not accept Mr Edenborough’s submission that POST MILK GENERATION would have been a valid trade mark under the pre-2013 versions of the Regulation.

34. The appeal therefore fails on Ground 1. POST MILK GENERATION does fall within the scope of Point 5 of the 2013 Regulation on the basis that it uses the term “milk” as a designation.

35. For completeness, we add three further points. First, there was some discussion at the hearing as to whether a hypothetical trade mark MILK-FREE used for oat-based food or drink would be prohibited. The Court of Appeal put this to one side saying that it did not need to be decided. In our view, in line with the broad meaning of “designation” that we consider is correct, and contrary to the submissions of Mr Edenborough, this would constitute a prohibited “designation” under Point 5. The question would then be whether that would be saved by the proviso in Point 5. Both parties accepted, and we agree, that it would be saved because it would fall within the second limb of the proviso (which we discuss further in paras 38–43 below) as clearly being used to describe a characteristic quality of the product - ie that it does not contain any milk.

36. Secondly, we were supplied by the parties with additional legislative material that we have not so far mentioned, in particular Article 5 of Directive 2000/13/EC of 20 March 2000. The appellant also relied on Amendment 171 to the 2013 Regulation which was endorsed by the European Parliament in 2020 but was later abandoned and so never came into effect. In our view, none of that additional material takes matters any further in relation to the questions that need to be decided on this appeal.

37. Thirdly, there is no domestic case that is relevant to the questions with which we are here concerned. But while it is accepted that it is not directly in point, we were referred to the decision of the Court of Justice of the European Union in Case C-422/16 *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH* (“*TofuTown*”). The CJEU, at para 20, summarised the question to be answered in that case as being whether Article 78(2) and Annex VII, Part III of the 2013 Regulation

“must be interpreted as meaning that they preclude the use of the term ‘milk’ and the designations that the regulation reserves exclusively for milk products being used to designate a purely plant-based product in marketing or advertising even if those terms are expanded upon by clarifying or descriptive terms indicating the plant-based origin of the products concerned.”

The Court’s answer to that question was “yes”. The factual background was that Tofutown was a company which produced and distributed vegetarian and vegan foods. These included products referred to as “Soyatoo tofu butter”, “plant cheese”, “veggie cheese” and “rice spray cream”. The CJEU held that those designations could not lawfully be used unless that product was listed in Annex I to the 2010 Decision (see para 13 above). But it is clear, and was not in dispute between the parties in this appeal, that the designations with which the *TofuTown* case was concerned were significantly different from POST MILK GENERATION. That is because they were using the word “milk” (or “cheese” or “cream”) as a name for the product. Mr Edenborough submitted that the CJEU was implying that “designation” was confined to its use as a name of the product but we disagree that one can draw that inference. The facts concerned a designation that named the product but the CJEU was not saying that the meaning of “designation” is so confined.

6. Ground 2: what is the proper interpretation of the second limb of the proviso in Point 5; and is POST MILK GENERATION saved by that limb of the proviso on the basis that it is clearly being used to describe a characteristic quality of the contested products for which the trade mark is registered?

38. Here the essential question is, on the assumption that the use of the trade mark POST MILK GENERATION to refer to oat-based food or drink is prohibited by Point 5 (as we have decided, on Ground 1, that it is), is it saved by the second limb of the proviso in Point 5?

39. The parties on this appeal accepted that, in respect of the disagreement between Arnold and Jeremy Baker LJ, on the one hand, and Snowden LJ on the other (see para 23 above), Snowden LJ’s view is correct. That is, the requirement of being listed (in Annex I to the 2010 Decision, set out at para 13 above) applies only to the first limb of

the proviso in Point 5 and not to the second. For the purposes of this appeal, but without deciding the issue because we have not heard full argument on it - and because, as will become clear, our decision on the proviso does not depend on it - we shall also treat Snowden LJ's view as correct.

40. Mr Edenborough contends that the designation POST MILK GENERATION in relation to oat-based food or drink is being “clearly used to describe a characteristic quality of the product”, namely that it is milk-free. To come within the proviso, it is necessary that the designation is “clearly” being used for the requisite descriptive purpose. In agreement with the Court of Appeal, we consider that it is far from clear that that trade mark is describing any characteristic of the contested products. Rather, on its face, it is focussed on describing the targeted consumers and, in particular, those younger consumers who may be said to belong to a generation for whom there are, in contrast to past generations, widespread concerns about the production and consumption of milk. In so far as it is describing a characteristic quality of the product, it is doing so in an oblique and obscure way and is certainly not doing so “clearly”.

41. Two further points support that conclusion. The first is that, even if POST MILK GENERATION were to be regarded as referring to the milk-free characteristic of the contested products, that characteristic is not being described “clearly”. In particular, does it mean that the product is entirely free of milk or only that the milk content is low? Take an analogous hypothetical trade mark, POST ALCOHOL GENERATION. If that designated a drink, it would not clearly indicate whether the drink is merely low alcohol or has no alcohol.

42. The second point is that it is accepted that POST MILK GENERATION is valid in respect of T-shirts. That may be thought to indicate that that trade mark cannot be referring to a characteristic of the contested products because it would otherwise make little sense on a T-shirt. Yet it plainly does make sense when used on a T-shirt. That is precisely because it is most obviously describing a type of young consumer who might proudly wear a T-shirt proclaiming that he or she is a member of the anti-milk POST MILK GENERATION. But that has nothing to do with a characteristic quality of the T-shirt.

43. The appeal therefore also fails on Ground 2.

7. Conclusion

44. For all the above reasons, the appeal should be dismissed.