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## What does PureOaty mean?

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The scope of protection of a trade mark registration is a key question faced by trade mark practitioners when advising on rebrands. The recent Oatly case [Oatly AB v Glebe Farm Foods Limited [2021] EWHC 2189 (IPEC)] raises some interesting questions in the context of a likelihood of confusion and unfair advantage.

Oatly owned a number of earlier trade marks, including for OATLY [word] for oat-based beverages and milk substitutes. Oatly brought infringement proceedings against Glebe Farm's use of PUREOATY on oat milk drinks – a rebrand from "OAT DRINK".

The Court in the UK found that there was no infringement. There would be no confusion on the marketplace, and whilst Oatly had a reputation, no unfair advantage had been taken.

Whilst acknowledging that adding the letters "LY" to "OAT" or "L" to "OATY" gave the OATLY marks their distinctiveness, the court did not consider the visual similarity of the elements OATY -v- OATLY, including the common inclusion of the letter "y" – despite finding that the absence of the letter "L" detracted from the similarity. The court focused on PUREOATY being two descriptive words forming a single word and "OAT" also being descriptive for oat drinks. Much of the commentary has focussed on criticising Oatly for bringing the case and confirming that the Court were being sensible. However, this approach arguably overlooks Glebe Farm's desire to change from OAT DRINK to be more 'brand' (they also changed the colour and tone of the packaging to make it more appealing to customers – like Oatly) and the notional scope of protection enjoyed by the OATLY registrations.

OATLY was held to have a strong reputation, with a link by consumers being made. However, no unfair advantage was found because the marks were deemed to have a low level of similarity and "OAT" was descriptive. The Court said that if the link arises only from a descriptive or non-distinctive element then this will not be unfair. This is difficult to understand: why would a consumer make a link if the mark was descriptive? If PUREOATY brings OATLY to mind, does this not create an unfair advantage?  It is a fine line between a mere link and a link creating an unfair advantage.

In most cases involving directly competitive product (identical goods), if a competitor

creates a link in the mind of the public with the well-known brand, I would have thought that this was likely to be considered “riding on the coat-tails” or “freeriding”, at least if there is any image transfer.

Oatly has been criticised in the press for bringing this action. However, they have led the oatmilk sector in the UK to such an extent that it is not surprising that they are sensitive to possible copyists. Overall, Oatly’s action was not without merit. The case provides useful discussion around businesses learning from their competitors, including adopting similarities in presentation. For now, the scrutiny of legal argument and PR issues around lookalike cases shows no signs of abating.

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