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***Fage v. Chobani*: Greek Yoghurt Stirs Up the Extended Passing Off Claim**

ELISE LEGROS*

I. Introduction

In *Fage UK Ltd. v. Chobani UK Ltd.* (“*Fage v. Chobani*”), the Civil Division Court of Appeal (“the *Fage* court”) was asked to decide whether there is something special about Greek yoghurt.¹ The court held that to the yoghurt-eaters of the United Kingdom, indeed there is.²

The basis of *Fage*’s case was a common law extended passing off claim regarding use of the description “Greek yoghurt.”³ A passing off claim is based on the general proposition that “no man may pass off his goods as those of another.”⁴ Its three main elements are goodwill, misrepresentation, and damages.⁵ A company cannot mislead the public into thinking its product is actually another company’s product, and then profit from sales based on that erroneous belief.⁶ Examples of misleading practices used in the past include product descriptions and packaging that make a product easily confused with a competitor’s product.⁷

An extended passing off claim involves multiple companies (rather than a single company) that sell the same product (such as Greek yoghurt), and collectively benefit from that product’s goodwill and reputation.⁸ A single company can bring the claim—which is what *Fage* did—but that company, in addition to proving goodwill, misrepresentation, and damages, must also prove that those who deal in the product under the relevant description can be clearly identified, and that the company has been around long enough

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1. *Fage UK Ltd. v. Chobani UK Ltd.*, [2014] EWCA (Civ) 5, [70] (appeal taken from Eng.) [hereinafter *Appeal*].

2. *Appeal*, at [75].

3. *Fage UK Ltd. v. Chobani UK Ltd.*, [2013] EWHC (Ch) 630, [1] (Eng.) [hereinafter *Trial*].

4. *Reckitt & Colman Products Ltd. v. Borden Inc.* (No. 3), [1990] 1 W.L.R. 491 at 556 (Eng.).

5. *Appeal*, at [63].

6. *Reckitt & Colman*, [1990] 1 W.L.R. at 556.

7. *See J. Bollinger v. Costa Brava Wine Co. Ltd.* (No. 4), [1961] 1 W.L.R. 277 at 292 (Eng.).

8. *Erven Warnink BV v. J. Townend And Sons (Hull) Ltd.* (No. 1), [1979] A.C. 731 at 747 (Eng.).

to establish a share in the goodwill.⁹ Thus goodwill, misrepresentation, and damages are just as vital to prove an extended passing off claim as to prove a passing off claim.¹⁰

The key issue in *Fage v. Chobani* concerned an extended passing off claim: whether, in the United Kingdom, “Greek yoghurt” means yoghurt made in Greece, and if so, whether “Greek yoghurt” also denotes a distinctive type of yoghurt, so that describing yoghurt made in the United States as “Greek yoghurt” would deceive the public and damage the reputation of “Greek yoghurt” made in Greece and sold in the United Kingdom.¹¹ The *Fage* court answered these questions affirmatively, and affirmed an injunction granted by the High Court of Justice Chancery Division to prevent yoghurt made in the United States from being sold in the United Kingdom as “Greek yoghurt.”¹² The holding provides important guidance on the elements of an extended passing off claim, especially the element of goodwill. The court’s broad application of the claim will also make it easier for claimants to bring claims in the future.

II. Factual Background

For twenty-five years, Fage—a yoghurt manufacturer in Greece—had imported and sold its yoghurt in the United Kingdom under the description “Greek yoghurt.”¹³ This yoghurt was known for having particular qualities of “thickness, creaminess, taste and satisfaction.”¹⁴ In 2012, the American yoghurt manufacturer, Chobani, also began selling its yoghurt in the United Kingdom under the description “Greek yoghurt.”¹⁵ Even though Chobani’s yoghurt was not made in Greece, Chobani labeled it “Greek yoghurt” because it used the same straining method that Greek producers used to manufacture their yoghurt in Greece.¹⁶ Fage brought suit against Chobani, claiming that Chobani was passing off its U.S.-manufactured yoghurt as yoghurt manufactured in Greece.¹⁷ Fage argued that to be called “Greek yoghurt” in the United Kingdom, the yoghurt had to be manufactured in Greece.¹⁸

III. Fage’s Extended Passing Off Claim

At the heart of any passing off claim are three elements: goodwill, misrepresentation, and damage.¹⁹ This note will focus on the element of goodwill, and the court’s arguably broad application of it. To establish goodwill, a plaintiff must prove that the public has come to rely on a particular description to distinguish the plaintiff’s product from its competitor’s product.²⁰ For instance, in *J. Bollinger v. Costa Brava Wine*, the plaintiff suc-

9. *Appeal*, at [51] (citing *Erven Warnink*, [1979] A.C. at 744).

10. *Appeal*, at [67] (citing *Taittinger SA v. Allbey Ltd.*, [1993] F.S.R. 641 at 678 (Eng.)).

11. *Appeal*, at [1].

12. *Appeal*, at [148]; *Trial*, at [141].

13. *Appeal*, at [1].

14. *Appeal*, at [21].

15. *Id.* at [3].

16. *Trial*, at [33].

17. *Appeal*, at [3].

18. *Trial*, at [8].

19. *Appeal*, at 63.

20. *Reckitt & Colman*, [1990] 1 W.L.R. at 581.

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ceeded in proving that the public had come to rely on the description “champagne” to distinguish a certain type of wine with a reputation of being ideal for special occasions.²¹ In addition to goodwill, the plaintiff also must prove that the defendant has misrepresented its goods as the plaintiff’s (such as by labeling its wine “Spanish Champagne” when it did not come from the Champagne district of France), the public has been misled by the misrepresentation, and the plaintiff has suffered damage as a result.²²

In *Fage v. Chobani*, Chobani contested whether goodwill had been established, and whether the public had come to rely on the description “Greek yoghurt” to mean the yoghurt is made in Greece and distinct from other yoghurt.²³ Chobani argued that “Greek yoghurt” is a general term that can be used to describe a broad range of products, including yoghurt made in the United States using the same straining method Fage and other Greek producers used.²⁴ In finding that Fage had established the goodwill element, the court emphasized the fact that since 1983 (until the time Chobani entered the market), United Kingdom yoghurt-distributors had adopted a uniform, unwritten labeling convention which limited the description of “Greek yoghurt” to yoghurt made in Greece.²⁵ Fage trade witnesses confirmed the unwritten convention.²⁶ Other similarly textured, thick-and-creamy yoghurt sold in the United Kingdom from other countries had always been sold as “Greek style yoghurt.”²⁷ This was true whether the yoghurt got its texture from the straining method used in Greece, or by the addition of thickening additives.²⁸ The evidence showed that in 2012, about eight percent of the yoghurt bought in the United Kingdom was split between “Greek style” yoghurt (about six percent) and “Greek yoghurt” (about two percent).²⁹ Additionally, Fage’s evidence showed that “Greek yoghurt” was significantly more expensive than “Greek style yoghurt.”³⁰

Market research played an important role in the evidence and the court’s holding. When Chobani decided to expand to the United Kingdom, the company received advice from multiple sources that it should label its yoghurt “Greek Style” because in the United Kingdom, “Greek yoghurt” meant yoghurt made in Greece.³¹ Chobani’s understanding of the research was further evidenced by a title heading in Chobani’s Staff Training Manual (made for its launch in the United Kingdom) which stated “Chobani dispels the Greek yoghurt confusion. . . It’s not yoghurt from Greece . . . it’s the process that makes it Greek!”³²

Evidence also showed that Chobani initially planned to minimize the recognized legal risk of labeling its yoghurt “Greek yoghurt” instead of “Greek Style” by placement of marketing materials on supermarket shelves that emphasized it was made in New York.³³

21. *J. Bollinger and Others v. Costa Brava Wine Co. Ltd.* (No. 4), [1961] 1 W.L.R. 277 at 290, 292.

22. *J. Bollinger*, [1961] 1 W.L.R. at 292; *Reckitt & Colman*, [1990] 1 W.L.R. at R.P.C. at 575.

23. *Appeal*, at [5].

24. *Appeal*, at 5.

25. *Appeal*, at [3].

26. *Id.* at [27].

27. *Trial*, at [66].

28. *Id.*, at [7], [66].

29. *Trial*, at [58].

30. *Id.* at [61].

31. *Id.* at [66].

32. *Id.* at [78].

33. *Id.* at [76].

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But these shelf displays never came to pass, and the only mention of its U.S. origin were the words "made in the USA" in very small print on the back of the pot, which would go unnoticed by shoppers.³⁴ Fage's market research evidenced that many consumers did not know the difference between "Greek" and "Greek style" yoghurt, but the research emphasized that the fact Fage was made in Greece was a powerful selling point and would induce sellers to buy their product.³⁵

IV. Evolution of the Passing Off Claim

The principles of the law of passing off are well-settled, and precedent played a major role in the Fage court's ruling.³⁶ Commonly known as the "Spanish Champagne" case, *J. Bollinger & Ors. v. Costa Brava Wine Co. Ltd.* is a key authority the Fage court cited as relevant in a long line of cases that established the modern-day passing off claim.³⁷ The court in *Spanish Champagne* granted an injunction to prevent the defendants from selling their sparkling wine as "Spanish Champagne."³⁸ The court found that by calling their wine "Spanish Champagne," the defendants were passing off wine produced in Spain as wine produced in the Champagne district of France.³⁹ The defendants argued that their Spanish wine possessed the same characteristics as champagne from France, and by adding the word "Spanish," they had prevented any confusion about whether it was produced in France.⁴⁰ The court disagreed and held that "champagne" in the United Kingdom meant wine produced in the Champagne district of France, and a substantial portion of the public would be misled by the description "Spanish Champagne."⁴¹

The Fage court noted that the ruling in *Spanish Champagne* granted the injunction, even though many people in England would not be misled into thinking "Spanish Champagne" was champagne from France.⁴² Rather, the *Spanish Champagne* court was satisfied that a "substantial portion" of the population would be misled, and this was the segment that needed protection.⁴³ By calling their wine "champagne," the defendants were being untruthful and dishonest, and also sought to take advantage of the world-famous reputation true champagne had earned.⁴⁴

The Fage court next turned to *Vine Products Ltd. and Ors. v. Mckenzie & Co Ltd. and Ors.*, also commonly known as the "British Sherry" case.⁴⁵ The court in *British Sherry* noted that the word "sherry," like "champagne," denotes wine from a particular district—in this case, Jerez, Spain.⁴⁶ The Fage court noted that the judge in *British Sherry* expressed his agreement with *Spanish Champagne*, and the importance of protecting consumers from

34. *Id.* at [79].

35. *Trial*, at [94].

36. Christopher Morcom, *Developments in the Law of Passing Off*, E.I.P.R. 1991, 13(10), 380-85, 380.

37. *Appeal*, at [38] (citing *J. Bollinger* (No. 2), [1961] 1 W.L.R. 277 (Eng.)).

38. *J. Bollinger* (No. 4), [1961] 1 W.L.R. at 278.

39. *Id.* at 278.

40. *Id.* at 277.

41. *Id.* at 278.

42. *Appeal*, at [39].

43. *Appeal*, at [40] (citing *J. Bollinger* (No. 2), [1961] 1 W.L.R. at 291).

44. *Id.* at [39] (citing *J. Bollinger* (No. 2), [1961] 1 W.L.R. at 286).

45. *Id.* at [42] (citing *Vine Products Ltd v. Mackenzie & Co Ltd.* [1969] R.P.C. 1).

46. *Vine Products Ltd. v. Mackenzie & Co. Ltd.* (No.3), [1967] F.S.R. 402, 428 (1967).

deception—especially consumers who did not fully understand the meaning of a particular destination, as they were the ones most likely to be deceived.⁴⁷ The judge in *British Sherry* agreed with the holding in *Spanish Champagne* that allowing use of the phrase “Spanish Champagne” would dilute and gradually destroy the goodwill that true champagne producers had built up.⁴⁸ The *Fage* court took further note of *John Walker & Sons Ltd. v. Henry Ost*, where defendants were prevented from selling a Scotch whisky and local spirits blend in Ecuador under the name “Scotch whisky.”⁴⁹

The *Fage* court also cited to *Erven Warnink BV v. J. Townend and Sons (Hull) Ltd.*, known as the “Advocaat” case, as a landmark case for the passing off claim because it described in depth every element of the claim.⁵⁰ In *Advocaat*, the plaintiffs produced advocaat—an alcoholic drink made with eggs and liquor.⁵¹ Over the course of half a century, advocaat had gained a reputation and goodwill as a drink known for appearance, taste, strength, and satisfaction.⁵² Defendants produced a different alcoholic egg drink known as “egg flip,” made of eggs and wine, but marketed it as “Keeling’s Old English Advocaat.”⁵³ While the regular advocaat drinker would be able to tell the difference between the two drinks, an inexperienced customer would not.⁵⁴ The *Advocaat* court restored an injunction that prevented defendants from passing off their drink as “advocaat.”⁵⁵ In the holding, Lord Diplock explained that to establish a passing off claim, there must be:

(1) A misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a *quia timet* action) will probably do so.⁵⁶

Lord Diplock also noted in *Advocaat* that the passing off claim could be extended to cases where a number of traders (rather than a single company) shared in the goodwill and reputation of a product—an extended passing off claim.⁵⁷ As emphasized by the *Fage* court, *Advocaat* held that the traders in an extended passing off claim must be clearly identified.⁵⁸ Each trader who deals in that good under the relevant description shares in the goodwill of that product.⁵⁹ A product must have been marketed under a descriptive name, and under that name have gained “a public reputation which distinguishes it from

47. *Appeal*, at [45] (citing *Vine Products*, [1969] R.P.C. 1 at 23).

48. *Id.*

49. *Id.* at [46] (citing *John Walker & Sons Ltd. v. Henry Ost & Co. Ltd.* [1970] 1 WLR 917 (Eng.)).

50. *Appeal*, at [49] (citing *Erven Warnink* (No. 1), [1979] A.C. at 742).

51. *Erven Warnink* (No. 1), [1979] A.C. at 734.

52. *Id.* (citing *Warnink (Erven) BV v. J. Townend & Sons (Hull) Ltd.* [1978] F.S.R. 1, 11).

53. *Erven Warnink*, [1979] A.C. at 734-35.

54. *Id.* at 734.

55. *Id.* at 756.

56. *Appeal*, at [49] (citing *Ervin Warnink*, [1979] A.C. at 742).

57. *Erven Warnink*, [1979] A.C. at 744.

58. *Appeal*, at [53] (citing *Erven Warnink*, [1979] A.C. at 748).

59. *Id.* at [51].

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competing products of different composition.”⁶⁰ Whether a geographical provenance is in this descriptive name is unimportant.⁶¹

According to the *Fage* court, the 1990 case *Reckitt & Colman Products Ltd. v. Borden Inc.* (the “Jif Lemon” case) is also important for any passing off claim analysis because it simplified the essential requirements of a claim.⁶² In *Jif Lemon*, the court held that the plaintiff’s lemon juice sold in squeezzy, lemon-shaped plastic bottles had garnered a distinct reputation, and that defendants selling their own lemon juice in similarly shaped bottles would mislead the public.⁶³ The court summarized Lord Diplock’s essential requirements of a passing off claim.⁶⁴ First, the plaintiff must establish goodwill or reputation “attached to the goods . . . in the mind of the purchasing public by association with the identifying ‘get-up’ . . . [which includes] trade description, or the individual features of labelling,” and the public recognizes this get-up as distinctive of the plaintiff’s goods.⁶⁵ Second, the plaintiff must demonstrate a misrepresentation that will lead the public to believe the defendant’s goods are really the plaintiff’s goods.⁶⁶ Finally, the plaintiff will suffer damage from the public’s mistaken belief—such as loss of customers.⁶⁷

Chocosuisse Union de Chocolat v. Cadbury Ltd. (the “Chocosuisse” case) was another case cited by the *Fage* court.⁶⁸ In *Chocosuisse*, the court held the defendants could not market their chocolate as “Swiss Chalet” because a “substantial number” of people would assume the chocolate came from Switzerland, and by believing it came from Switzerland, they would assume the chocolate had distinctive features.⁶⁹ The court explained that for a passing off claim, a claimant needs more than a simple descriptive phrase, such as “French ball-bearings” or “Italian pencils,” which to most people means nothing more than goods that came from France or Italy respectively.⁷⁰ To establish goodwill, the description must also denote a distinct type of product with a particular reputation, indicating more than where the goods are made.⁷¹ If the public thought only that “Swiss chocolate” meant chocolate made in Switzerland, then there would be no passing off claim.⁷² But if a “significant part” of the public thought the description “Swish chocolate” distinguished a particular group of products, such as “chocolate made to a Swiss recipe with Swiss expertise by a Swiss manufacturer,” then there might be a cause of action.⁷³

60. *Id.* at [52].

61. *Id.*

62. *Id.* at [57] (citing *Reckitt & Colman Products Limited v. Borden Inc. & Ors*, [1990] RPC 341, 406 (1990)).

63. *Reckitt & Colman Products Limited v. Borden Inc. & Ors*, [1990] 1 W.L.R. 491 at 492.

64. *Id.* at 505.

65. *Appeal*, at [57] (citing *Reckitt & Colman Products*, [1990] 1 W.L.R. 491 at 492).

66. *Id.*

67. *Id.*

68. *Appeal*, at [58] (citing *Chocosuisse Union des Fabricants Suisse de Chocolat and Others v. Cadbury Limited*, [1999] R.P.C. 826).

69. *Chocosuisse Union des Fabricants Suisse de Chocolat and Others v. Cadbury Limited*, [1998] R.P.C. 117, 118 (1997) [hereinafter *Chocosuisse 1998*].

70. *Id.* at 129.

71. *Id.* at 129.

72. *Appeal*, at [59] (citing *Chocosuisse 1998* at 129).

73. *Id.*

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Relying on *Chocosuisse*, the *Fage* court noted that to establish goodwill in a passing off claim, a court must deduce what the words mean to the public.⁷⁴ If they are nothing more than descriptive, there is no passing off claim.⁷⁵ So, with respect to Fage's claim, two questions needed to be answered: (1) did a significant part of the public in the United Kingdom think the words "Greek yoghurt" only meant yoghurt made in Greece, and (2) if so, does this yoghurt have a reputation, distinct from other yoghurt, which deserves protection?⁷⁶

In analyzing how passing off one trader's goods for another's can result in the claimant's loss of the distinctiveness of its product's description and the public's goodwill, the *Fage* court also looked to *Taittinger SA and Ors. v. Allbev Ltd. and Anor.*⁷⁷ The court's holding in *Taittinger* prevented a non-alcoholic soft drink producer from labeling its soft drink as "Elderflower Champagne."⁷⁸ The court found that allowing the soft drink to be labeled Elderflower Champagne would "erode the singularity and exclusiveness of the description 'champagne' and so cause the first plaintiffs damage of an insidious but serious kind."⁷⁹ The reputation and goodwill of "champagne" came from not only "the quality of their wine and its glamorous associations, but also from the very singularity and exclusiveness of the description, the absence of qualifying epithets and imitative descriptions."⁸⁰

The *Fage* court held that with respect to how widespread the misrepresentation needs to be, and how much the plaintiff's business will suffer, a passing off claimant must establish that a "substantial number" of people will be misled into purchasing the defendant's product because they confuse it with the claimant's product.⁸¹ The *Fage* court noted *Neutrogena Corporation v. Golden Limited* summarized this proposition.⁸² The *Neutrogena* court found that the question of confusion or deception is whether a substantial number of people will be misled into purchasing the defendant's product when they mean to purchase the plaintiff's product, and that the confusion results in more than a *de minimis* effect on the plaintiff's trade or goodwill.⁸³

The last significant case noted by the *Fage* court was *Diageo North America v. Intercontinental Brands* (the "Vodkat" case).⁸⁴ *Vodkat* established that the distinctiveness of a claimant's description does not have to be connected to the product's quality.⁸⁵ The *Vodkat* court noted that the law of passing off was to protect the unlawful appropriation of goodwill through misrepresentation, not to guarantee quality.⁸⁶ *Vodkat* demonstrated that an

74. *Appeal*, at [59].

75. *Appeal*, at [59] (citing *Chocosuisse 1998* at 129).

76. See *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd.*, [1999] R.P.C. 826 at 832 (Eng.).

77. *Appeal*, at [67] (citing *Taittinger SA and Others v. Allbev Ltd. and Another*, [1993] F.S.R. 641 at 642 (Eng.)).

78. *Taittinger SA and Others v. Allbev Ltd. and Another*, [1993] F.S.R. 641 at 642 (Eng.).

79. *Appeal*, at [67] (citing *Taittinger*, [1993] F.S.R. at 678).

80. *Id.*

81. *Id.* at [64] (citing *Neutrogena Corporation and Anor v. Golden Ltd. and Anor*, [1996] R.P.C. 473 at 493 (Eng.)).

82. *Appeal*, at [64].

83. *Neutrogena*, [1996] R.P.C. at 481-82.

84. *Appeal*, at [69] (citing *Diageo North America Inc. v. Intercontinental Brands Ltd.*, [2010] EWCA (Civ.) 920, [21] (Eng.)).

85. *Trial*, at [123] (citing *Diageo North America*, [2010] EWCA (Civ.) 920, [21]).

86. *Diageo North America*, [2010] EWCA (Civ.) 920, [21].

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extended passing off claim did not have to be based on a reputation of prestige or luxury, but could simply be based on a generic term, such as “vodka.”⁸⁷ So, while “Greek yoghurt” must mean something more than Greece as its place of manufacture, it does not have to mean yoghurt of higher quality.⁸⁸

V. *FAGE v. CHOBANI*

Fage v. Chobani is important because the holding provides an in-depth analysis of the elements of an extended passing off claim. In principle, extended passing off claims are no different than conventional ones.⁸⁹ To define a class of manufacturers with reasonable precision in an extended passing off claim, the claimant must show that a product has come to have recognizable characteristics that distinguish it from other products, and this motivates the public to buy the product.⁹⁰ The remaining elements of goodwill, misrepresentation, and damages rely on the same case precedent as a passing off claim.⁹¹ The *Fage* court traces the evolution of passing off and extended passing off claims, but its analysis is most instructive on the element of goodwill.

Goodwill is “the benefit and advantage of the good name, reputation and connection of a business,” and what makes it attractive to consumers.⁹² Goodwill includes how the public has come to view the product by associating it with a particular description.⁹³ For instance, when a bottle of wine has the word “champagne” on it, it does not merely describe the type of wine that is inside—it distinguishes it in the eyes of the public from other types of sparkling wine.⁹⁴ To establish goodwill when a geographic location—such as Greece—forms the basis of goodwill, a claimant must prove the description has acquired a secondary meaning—such as “Swiss chocolate” meaning chocolate coming from Switzerland and that is made with more expertise than other types of chocolate.⁹⁵ In establishing goodwill in *Fage v. Chobani*, the court decided “Greek yoghurt” describes the yoghurt as coming from Greece, and that to buyers the fact it comes from Greece matters—that by coming from Greece it makes the yoghurt special and distinct from other yoghurt.⁹⁶

To establish goodwill and what makes “Greek yoghurt” distinct from other yoghurt, it was not necessary for *Fage* to establish all members of the public understand how Greek yoghurt is made, or how “Greek yoghurt” is distinct from “Greek Style” yoghurt.⁹⁷ But the *Fage* court arguably stretched the limits of what can satisfy goodwill when consumers do not fully understand what distinguishes the claimant’s products from others. The trial

87. *Appeal*, at [65].

88. *See Trial*, at [123].

89. *Appeal*, at [65].

90. *Id.* at [68].

91. *See Taittinger SA*, [1993] F.S.R. at 665 (agreeing with the *Spanish Champagne* judge’s application of passing off law when multiple traders share in goodwill of a description).

92. *Reckitt & Colman*, [1990] R.P.C. at 418 (quoting *Inland Revenue Commissioners v. Muller & Co.’s Margarine Ltd.* [1901] A.C. 217 at 223).

93. *Id.* at [57] (citing *Reckitt & Colman*, [1990] 1 W.L.R. at 507).

94. *Chocousse 1998*, at 129.

95. *Appeal*, at [59].

96. *Id.* at [71].

97. *Id.* at [66].

court acknowledged this broad application of goodwill by noting that the perception that something is special about “Greek yoghurt” is “much less prevalent” than perceptions about Champagne, Sherry, and Swiss chocolate.⁹⁸ The trial court noted also that market research suggested the public’s perception about how “Greek yoghurt” and “Greek style” yoghurt are different results more from confusion than appreciation. But what mattered to the court was that consumers recognize the phrase “Greek yoghurt” to mean the yoghurt comes from Greece and is special.⁹⁹

Neither the trial nor appellate court could articulate why exactly the population considered “Greek yoghurt” special. The trial court suggested consumers “make a romantic association between Greek yoghurt and a Greek holiday,” or consumers believe Greeks use a particular method to make their yoghurt thick and creamy.¹⁰⁰ In affirming consumers believe “Greek yoghurt” not only comes from Greece, but is also special, the Appellate Court cited the trade witnesses, unwritten labeling convention, advice Chobani received when expanding to the U.K. market, and the higher price of Greek yoghurt.¹⁰¹

The holding also reinforces that for a passing off claim, only a substantial portion of the relevant population needs to be affected. The *Fage* court found it is only necessary that a substantial part of the relevant public believes that the description indicates a distinctive type of yoghurt.¹⁰² In this case, a substantial portion (probably more than 50%) of those who buy Greek yoghurt in the United Kingdom believe it is made in Greece, and out of those Greek-yoghurt buyers, a substantial number actually care it is made in Greece.¹⁰³

VI. Conclusion

Fage v. Chobani established that in the United Kingdom, the description “Greek yoghurt” denotes a particular kind of product made only in Greece.¹⁰⁴ The *Fage* court found that allowing Chobani to market its U.S.-made yoghurt as “Greek yoghurt” would erode the distinctiveness of “Greek yoghurt” as meaning yoghurt made in Greece.¹⁰⁵ Once consumers discovered yoghurt could be called “Greek,” even if it came from the United States, consumers would no longer be able to safely assume the phrase “Greek yoghurt” on containers means it was made in Greece.¹⁰⁶ Even though *Fage* brought the claim, because it is an extended passing off claim, its two main Greek yoghurt competitors in the United Kingdom who manufacture their yoghurt in Greece also benefited from the court’s holding.¹⁰⁷

It is interesting to note that *Fage* also manufactures its yoghurt in the United States for its sales in the United States and still sells it under the description “Greek yoghurt”—even though it is manufactured in United States.¹⁰⁸ The court was careful to note that this

98. *Trial*, at [116].

99. *Appeal*, at [73].

100. *Trial*, at [115].

101. *Appeal*, at [70].

102. *Appeal*, at [73].

103. *Trial*, at [133].

104. *Appeal*, at [73].

105. *Id.* at [140].

106. *Id.*

107. *Id.* at [47].

108. *Trial*, at [62]; *The FAGE Story*, FAGE, <http://usa.fage.eu/company/fage-story> (last visited Nov. 9, 2014).

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holding applies only to the United Kingdom, because the relevant goodwill was only established among the yoghurt-eating population of the United Kingdom.

Fage v. Chobani provides important guidance on what is needed to establish an extended passing off claim, especially the element of goodwill. The case applies goodwill broadly, and reinforces that traders can protect a description even when the public does not fully understand or agree why that description makes it special. What makes “Greek yoghurt” special is less pronounced than what distinguishes Champagne from other types of sparkling wine or Swiss chocolate from other types of chocolate.¹⁰⁹ But a substantial portion of the Greek yoghurt-buying population in the United Kingdom believe “Greek yoghurt” means the yoghurt comes from Greece and it is special, and the *Fage* court found that was sufficient to establish goodwill.¹¹⁰ Trade associations will most certainly use this holding to their advantage in cases to come.


109. *Trial*, at [116].

110. *Id.* at [133].



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