

TRADE MARKS ACT 1994

**IN THE MATTER OF Trade Mark Registration
No: 2111756 in the name of Contour Showers Ltd**

5

and

**An Application under No: 10042 for a declaration
of invalidity by Autumn Mobility Limited.**

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BACKGROUND

The mark at issue, SHOWERCARE, (No: 2111756) was registered with effect from 2 October 1996, for the following goods:

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‘Cubicles, enclosures, doors, screens and panels, all for showers designed for the disabled’

in Class 11. It stands on the register in the name of Contour Showers Ltd of Siddorn Street, Winsford, Cheshire, CW7 2BA.

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On 4 March 1998, Autumn Mobility Limited of Autumn House, 10-16 Shepherd Street, Royton, Oldham, OL2 5PB filed their application for a declaration of invalidity. Although the grounds of the application are expressed in very general terms, it became clear, in the course of the filing of evidence, that the grounds on which the invalidation action was brought related to s 5(4)(a) of the Act.

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The registered proprietors (RPs) of registration No: 2111756 deny the grounds. They note that the application for invalidity was not particularised, and add that no prior notice was provided. Consequently, they ask for a full award of costs in their favour.

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Both sides filed evidence in these proceedings and the matter came to be heard on 1 March 2000, when the RPs were represented by Mr Bruce Marsh of their trade mark Attorney’s Wilson Gunn McCaw. The applicants for the Declaration of Invalidity were represented by Mr Roger Hinchliffe of Pearson Hinchliffe, the applicants’ Solicitors.

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APPLICANT’S EVIDENCE

This consists of a Statutory Declaration by Anthony Blakeley, dated 26th February 1998. Mr Blakeley states that he is the Chairman and Managing Director of Autumn Mobility Limited, a position he has held since its incorporation. The facts in his declaration are based on his own personal knowledge, and from the records of his company to which he has full access. Mr Blakeley explains that his company manufactures and sells shower bases, shower cubicles and shower screens, in aluminium, acrylic and fibre glass as well as curtains, curtain rails, assistant rails, shower seats and chairs. The company specialises in items for the elderly and disabled.

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He goes on to say that in his view, the basis of the application for invalidity was sufficient, but to avoid any doubt, he clarifies that the basis of the objection is under s 5(2)(b) of the Act. I

note that later in the applicants' evidence the ground is further corrected, and refers now to objection under s 5(4)(a) of the Act.

Mr Blakeley explains that the words SHOWER CARE (presented as two separate words) were first used by his company in their literature in 1985. In 1986 his company produced its first brochure using the words SHOWER CARE (presented as one word). A copy of a brochure is provided as Exhibit AB 1. Although the document is said to originate in 1986, I note that the brochure provided carries the handwritten legend 1988/1989. Exhibit AB2 is said to be a copy of the applicants brochure originating in 1988, which was then reprinted in 1992. However, the brochure provided is undated. Exhibit AB3 is a copy of the applicants' current brochure which was first produced in 1995. This is also undated. All of the brochures, however, bear the sign SHOWER CARE.

Mr Blakeley states that the mark has been used since 1985 throughout the whole of the United Kingdom in relation to the manufacture and sale of the goods mentioned above. Turnover in the period 1990-1996 under the mark is given as:

Year	Turnover
1990	£180,116.00
1991	£196,860.00
1992	£256,024.00
1993	£311,330.00
1994	£410,311.00
1995	£411,354. 00
1996	£401,596.00
1997	£460,125.00
1998	£534,000.00

I can, of course, only consider turnover up to the material date in these proceedings i.e., 2 October 1996.

Mr Blakeley then refers to the RPs' use of the mark, and Exhibits AB4 and AB5 are copies of their brochures. The first of these brochures is dated September 1996, while the second appears to be undated. Both show use of the mark SHOWER CARE in relation to the goods for which the mark is registered. Mr Blakeley then provides some general observations of his own on the development of the RPs' business. He concludes that the expansion of the RPs' business (away from the general shower screen market and as a manufacturer of doors and screens for third parties) into the retailing and disabled and elderly markets, means that they now sell their goods through the same distributors as his company. He adds that his company's products are sold through occupational therapists, house surveys, housing associations, mail shots, by personal visits made by agents working for his company, distributors, national builders merchants, independent installers, and at the NAIDEX, Independent Living and various other one day exhibitions. However, no promotional figures are supplied, nor any examples of the mark used in the manner indicated provided. Mr Blakeley does refer to one specific instance of confusion; apparently his company was phoned in error when a potential customer was attempting to contact the RPs.

RPs' EVIDENCE

This consists of two Statutory Declarations. The first is by Bruce Marsh of Wilson Gunn McCaw, dated 6th January 1999. Mr Marsh explains that he is a registered trade mark Attorney, and a partner in the firm acting for Contour Showers Limited (the RPs). He adds that he is authorised to make this declaration on behalf of the RPs. Mr Marsh states that, having read the declaration of Mr Blakeley, he notes that the declaration of invalidity has been made under s 5(2)(b), pursuant to s 47(1) of the Act. He points out that the latter is an absolute ground, the former, relative and, as such, proper to s 47(2) of the Act. Mr Marsh adds that the RPs have used the mark since 1988, and refers to the declaration of Mr Peter Hickson which follows.

This declaration, by Peter Hickson, is dated 30th June 1998. Mr Hickson is a Director of Contour Showers Limited who, prior to 1994, traded under the name Contour Doors Limited. He has held his position for nineteen years, and is fully authorised by his company to make this declaration on its behalf. The facts in his declaration are taken from records within his personal knowledge.

Mr Hickson states that his company has used the trade mark SHOWER CARE continuously since 1988 and to support this, refers to Exhibit PHI. This consists of three documents:

! The first is a sales leaflet dated Spring 1989. This entitled 'Contour Doors Ltd' and states 'Shower Enclosures for the Disabled'. One example is given. There is no reference to the SHOWERCARE mark.

! The second document is a sales brochure which bears the title: 'The Contour SHOWERCARE Range'. It is undated, but displays the pre 01- phone number format. This would place the document at least before April 16th 1995. However, the RPs are still called Contour Doors Ltd. which, according to Mr Hickson's statement above, would place use of this document before 1994. The brochure states:

'CONTOUR DOORS LTD have, for many years, produced a selection of high quality Shower Screens and Bath Enclosures for use in both the domestic and commercial market sectors. In recent years the company has worked closely with leading shower tray manufacturers to develop the unique SHOWERCARE range of products. The SHOWERCARE range has been manufactured in direct response to the demands of less able-people within our society. SHOWERCARE products can be used by the whole family, being both practical and adaptable for able-bodied as well as disabled people.'

! The third document is also a sales brochure, also undated, but obviously produced much later than the first two brochures. It bears the name Contour Showers Ltd. and contains information on shower enclosures for, what I may call the 'general' that is, non-disabled, market. I can find no reference to the mark SHOWERCARE. This document has, in my view, no relevance to the case at hand.

From this material I can draw the following conclusions:

- ! there is no evidence to support Mr Hickson's assertion of continuous of the mark since 1988;
- ! the RPs' business is, historically at least, in the sale of shower 'enclosures';
- ! they were selling such products for the disabled in 1989, not under the mark SHOWERCARE, but as Contour Doors Ltd., their previous trading name;
- ! It appears that the RPs were trading under the mark at least from about 1994 onwards. The quote from the second brochure is ambiguous; it describes the development of the 'Showercare range', not their sale.

Between the years 1988 and 1997, Mr Hickson says that sales of goods under the mark have risen from £15,000 per year to £500,000 per year, with the unit cost in the order of £550. Mr Hickson concludes his declaration by saying that both his company and Autumn Mobility have been using the trade mark SHOWERCARE for at least ten years, and to his knowledge, there have been no instances of confusion.

APPLICANTS' EVIDENCE IN REPLY

This consists of a further Statutory Declaration by Mr Blakeley mentioned dated 7th April 1999. Mr Blakeley states that he wishes to clarify that the basis of the application for invalidity is s 47(2) of the Act, and in particular, s 5(4)(b). He adds that a further declaration has been filed under Rule 13(8) to correct the position, and this is indeed the case. Having read that declaration, I do not propose to summarise its contents.

Mr Blakeley says that he has read the Declaration of Mr Hickson and makes a number of observations, mainly intended to highlight the risk of confusion between the marks, which is increased, in his view, because both parties now sell under the same name in exactly the same market:

'When Contour Showers Limited obtained its Trade Mark registration in respect of the Trade Mark SHOWERCARE it was a general manufacturer/wholesaler in the market selling doors and shower screens but not shower trays. Contour Showers Limited now sells shower trays as well, which means that it is able to offer a total package.'

This is one of a number of assertions made about the RPs' business history and strategy, which I will only consider if relevant to the ground stated. One, at least, appears to contradict the evidence of the first brochure in Exhibit PH1:

'The original market in which Contour Doors Limited ("the former name of Contour Showers Limited") is a general market and is for able bodies persons but this is not clear from the exhibits referred to in the statutory Declaration of Peter Hickson.'

More relevant to the issue of confusion is Exhibit AB1 of this declaration which contains a photograph'; Mr Blakeley's comments on its significance:

5 'I now produce a photograph marked "AB1" which I took on the 9th March 1999 at the premises of IPM Limited. The aforementioned photograph shows an exhibition of two shower units for elderly/disabled persons. The unit on the left is manufactured by Autumn Mobility Limited and that on the right by Contour Showers Limited and the photograph clearly shows that the products produced by each company are similar. The showroom of IPM Limited is open to both public and trade purchasers and the only reference to either of the two products is in the brochure of each company which are set out with other brochures on a stand some little distance away from the exhibits. It is clear to me that an occupational therapist or housing surveyor or, in fact, a member of the public who would not have a direct knowledge of either of the products could easily be confused by the product labelling.'

15 Mr Blakeley comments on the similarity between the marks as used by the RPs and he repeats his assertion that actual confusion has occurred (paragraph 11).

Finally, he states:

20 'It is my opinion that Contour Showers Limited has adopted the word "Showercare" and has taken the trouble to register it as a Trade Mark in order to take advantage of the prior use of that name by Autumn Mobility Limited in a market in which Contour Showers Limited did not become involved until some nine years after Autumn Mobility Limited commenced selling shower screens and trays for the elderly/disabled.

25 It is apparent to me that there is a very real possibility that the continued use of the word "Showercare" by Contour Showers Limited could amount to the basis of passing-off action in that it is clearly the intention of Contour Showers Limited to develop its share of the shower screens and trays market addressed specifically to elderly/disabled persons.'

30 THE DECISION

There was a preliminary point concerning the Statement of Grounds, which I think needs to be first set against the history of the exchanges between the parties and the Registry.

35 Following receipt of the Statement of Grounds, the RPs submitted their Counter Statement on 8th July 1998, stating:

40 'The TM26 and accompanying declaration of Anthony Blakeley filed on 19th February 1998 does not contain reference to the Trade Marks Act 1994, nor grounds on which the application for a declaration of Invalidity is based.

In view of the above is requested that the application is dismissed in its entirety.

45 Since the application contains no grounds and no prior notice was provided of this action, a full award of costs in favour of the registered proprietor is requested.'

Subsequent to this, the applicants wrote to the Registry on 7th October 1998, submitting their first Statutory Declaration by Mr Blakeley,. The letter stated:

5 ‘We note that in the counter statement submitted by Wilson Gunn M’Caw agents for the Registered Proprietor that it is stated that the application contains no grounds and that no prior notice was provided of the action. We submit that there were adequate grounds in the statement in support of the application and secondly that we were in correspondence with Wilson Gunn M’Caw between the 28th April, 1997 and the 2nd June 1997 and that correspondence made our client’s position very clear.’

The enclosed Declaration (dated 7th October 1998) contained the following statement:

10 ‘Agents for the registered proprietor stated in a counter-statement to the TM 26 and accompanying statement filed on the 19th February 1998 that it does not contain reference to the Trade Marks Act 1994 ... nor grounds on which the application for declaration of invalidity is based and whilst I believe that there was sufficient information in the statement to show the basis of the application I wish to make it clear that the application was under
15 Section 47 (1) of the Act on the ground that its registration is contrary to the provisions of Section 5 (2)(b) of the Act in that it is similar to an earlier trade mark, “Showercare” owned by my Company and has been registered for goods identical with or similar to those for which the earlier trade mark is protected and there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.’

20 There was a further, and obvious error, in this statement, which the RPs noted in an additional Statutory Declaration by Mr Marsh, dated 6th January 1999:

25 ‘In Anthony Blakeley’s statutory declaration I note the application for a Declaration of Invalidity is made under Section 47 (1) of the Trade Marks Act 1994 (the Act). However the grounds state that the registration is contrary to Section 5 (2) (b) of the Act. Section 47 (1) of the Act relates to trade marks which may be declared invalid if registered in breach of Section 3 of the Act.’

30 (At this time, the RPs enclosed a the Declaration from Mr Hickson, dated 30th June 1998, and this represented the sum of their evidence).

35 On 12th January 1999 the applicants wrote to the Registry noting the error spotted by Mr Marsh, which they described as ‘typographical’. However, they corrected this *and* further amended the basis for their application in another Statutory Declaration by Mr Blakeley dated 7th April 1999, where he states:

40 ‘I now wish to correct, the aforementioned wording contained in my ... earlier declaration, by substituting the following words:

45 “I wish to make it clear that the application is under section 47(2)(b) of the Act on the ground that its registration is contrary to the provisions of section 5(4)(a) of the Act in that it is similar to an earlier unregistered Trade Mark .. ‘Showercare’ owned by my company and used for goods similar to or identical with those for which the Trade Mark number 2111756 has been protected and there exists a likelihood of confusion on the part of the public which includes the likelihood of association with the other Trade Mark...and a very real possibility that the use of the Trade Mark ... number 2111756 by Contour Showers Limited could be the subject of a passing off action.” ’

The corrections were allowed. It seems clear to me that the applicants had erred in advancing s 5(2)(b) as their cause of action under s 47(2)(b), as they had no prior registration to cite against the RPs' registration.

5 Finally, the Registry wrote to the RPs on 19 April 1999 asking them whether they had any objection to this Declaration being admitted to the proceedings. They responded on 23 April 1999 and stated that they did not. Subsequently, with the agreement of both parties, a main Hearing was arranged.

10 At the Hearing, Mr Marsh referred to the opponents's form TM26 which was originally filed with the accompanying Statement of Grounds, and said:

15 'The Trade Marks Rules 31(1) does state quite categorically that the TM26 must be accompanied by a full statement of grounds setting out the grounds of the action. We did raise the point in our counter statement that in fact no grounds were set out in the statement of grounds, in fact, was not even headed as statement of grounds. That issue has not been addressed or picked up on by the registry as of yet. The applicant's grounds are only really set out in evidence. There is some confusion over exactly what the grounds are. It is really a procedural point as to whether the actual application for invalidity should have been admitted to begin with when in fact no statement of grounds has actually been set out at the outset.'

I was also referred to *Wild Child Trade Mark* [1998] 14 RPC 455, which says:

25 'In the interests of justice and fairness it is plainly necessary for an objection to registration under section 5(4) to be framed in terms which: (i) specify whether the objection is raised under subsection (4)(a) or subsection (4)(b); (ii) identify the matters which are said to justify the conclusion that use of the relevant trade mark in the United Kingdom is liable to be prevented by virtue of an "earlier right" entitled to recognition and protection under the relevant subsection; and (iii) state whether the objection is raised in relation to all or only some (and, if so, which) of the goods or services specified in the registration or application for registration of the relevant trade mark. If an objector fails to provide sufficient information as to the nature or extent of his objection the registrar "may direct that such ... information ... as he may reasonably require shall be filed within such period as he may specify" under rule 51 of the Trade Marks Rules 1994. The direction may doubtless be given by the registrar of his own motion or upon the application of a party to the proceedings before him.'

40 The first point I would make is that I see nothing in rule 31(1) (of the now revoked Trade Mark Rules 1994) categorically stating that the statement of grounds should be headed as such. More fundamentally, as *Wild Child* makes clear, the Registrar does have discretion to 'direct that such ... information ... as he may reasonably require' may be submitted.

45 Further, I note that the RPs did not raise a question at the time. Far from it - by their letter of 23rd April 1999 they were content that the Declaration - which appertained only to the amendment to the Statement of Grounds - be admitted into the proceedings. This suggest that their response at this stage goes beyond simple acceptance of the declaration *per se*. It conveys to me - and I think to the Registry and applicants at the time - an implied consent to

the clarification of the grounds as well. The Registry letter of 19th April 1999 is clearly suggestive, in my view, that the applicants' 'corrective statutory declaration' be admitted on that basis, i.e. as a finalisation of the grounds of the application, on which the RPs were asked to comment. The fact no protest was made does not indicate a passionate commitment to their earlier stance that the application be dismissed. I would have expected them to have least have objected to the contents of that Declaration and, in the limit, asked for an Interlocutory Hearing where the issues could have been confronted.

The fact that the parties were both willing to agree to a main hearing also indicates to me that they were willing to proceed to deal with the substance of the action. And I think I would hesitate to dismiss a case on the basis of a step taken for the purpose of assisting a party in the prosecution of his case; or of protecting or otherwise dealing with the subject matter of the action, which is the proper purpose of interlocutory proceedings.

None of this, of course, should be taken as condoning inadequate statements of case. I think criticism of the Statement of Grounds are valid; they are very poor, and the comments by the Appointed Person in *Wild Child* are only one endorsement from a number in the recent case law relating to the importance of proper pleadings. In my view they read more like a Statutory Declaration than a clear delineation of the legal basis of the applicants' suit.

That said, however, the Statement of Grounds do assert that the applicants were trading in 'the market for the elderly and disabled as opposed to simply producing showers for general use..' under the name SHOWERCARE since 1986. This does seem to establish a basis in law under s 47(2) as an 'earlier right', and this fact was recognised by the examining officer at the time.

In view of the above, I now wish to consider the applicants' case. The request for the declaration of invalidity is made under Section 47(2)(b) of the Act. This states:

'47.-(1) .. ,

(2) The registration of a trade mark may be declared invalid on the ground-

(a) .. ,

(b) that there is an earlier right in relation to which the condition set out in Section 5(4) is satisfied.'

The applicants grounds are, in this case, based upon s 5(4)(a) of the Act which states:

5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented

a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade..'

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an 'earlier right' in relation to the trade mark.

In citing ‘passing off’ as the basis for the applicants’ invalidity action, Mr Hinchcliffe referred me to *HFC Bank plc v Midland Bank plc* (HC 1999 No. 01316, unpublished), while both parties referred to *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341. The latter was also cited in a decision of Geoffrey Hobbs QC sitting as the Appointed Person in the *Wild Child* case [1998] 14 RPC 455 in which he gave a summary of the law of passing off, which I think is helpful. Mr Hobbs QC said:

‘A helpful summary of the elements of an action for passing off can be found in Halsbury’s Laws of England 4th Edition Vol. 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 and *Erven Warnik BV v J Townend & Sons (Hull) Ltd* [1979] AC 731 is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiffs goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff, and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of ‘passing off’, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.”

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that;

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant’s use of a name, mark or other feature which is the same or sufficiently similar that the defendant’s goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

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In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

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(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

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(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff,

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

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(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.” ’.

This seems to me, perhaps, the clearest of the law, and will be basis of my decision here.

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To achieve their objective, the applicants need to show that at the relevant date (2 October 1996): (i) they had acquired goodwill under their mark, (ii) that use of the mark would amount to a misrepresentation likely to lead to confusion as to the origin of their goods; and (iii) that such confusion is likely to cause real damage to their goodwill.

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In defining good will, Mr Hinchcliffe referred me to *The Commissioners of Inland Revenue v Muller & Cola Margarine Limited* [1901] AC 217 at 223 to 4, where Mr Justice Lloyd stated:

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‘It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which is emanates.’

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The onus is on the applicants to prove their case. And to do so they must establish that the mark SHOWERCARE was an indicium of their business such that customs were attracted to it because of the mark. I have, however, considerable difficulty in reaching such a conclusion, largely because of the use the applicants appear to have made of the sign.

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The only examples I have been provided are in the three brochures comprising Exhibits AB1 to 3. In Exhibit AB1, the mark appears only once, on the cover of the brochure, where its use is more or less descriptive: ‘SHOWERCARE FOR THE ELDERLY AND DISABLED’. I note in their Statement of Grounds they say:

5 'Autumn Mobility's first literature was produced in 1985... the words "Shower Care" were used .. to indicate the type of showers that Autumn Mobility produced and initially the brochure was designed on the basis that its front sheet would have the following phrase "shower care for the elderly and disabled". Thus, the words "Shower Care" have been used generically rather than as a trade mark.'

10 They then state that later use of the mark was as one word '..so that it did not form a phrase as stated in the first brochure...the phrase was still there but not in the same format. The effect was to isolate and emphasise the word "Showercare".'

15 This may have been the intention, but I do not believe they managed to achieve it. True, SHOWERCARE is banded in blue in this first brochure, but then so are other clearly non-distinctive words on the penultimate page. In my view the use of SHOWERCARE here on the front cover can be contrasted with the appearance of the applicants' name, also on the front cover, which *is* an example of clear trade mark usage.

20 In Exhibit AB2 the use is perhaps closer to that of a trade mark because the S is capitalised and the rest of the mark is in lower case. Nevertheless, it continues to suffer from qualitatively the same objections as in the first exhibit, i.e. is used only once and appears to designate the function of the products within the brochure or the purpose of the brochure itself.

25 The final document, in Exhibit AB3, continues the trend towards what one can, to a degree, more comfortably designate, trade mark use. Though the same phrase as previously employed is used, the name itself is in an italic script with a distinctive 'S'.

30 The difficulty I thus have with this evidence is the paucity of the use of the mark and its manner. In particular, the sign does not appear to be used in respect of any single product of the applicants, that is, it does not appear on their goods, merely on the brochure. This is not fatal to the applicants' case, but does make it more difficult to establish that their goodwill is identified with the sign. Rather, what goodwill the applicants have, it seems to me, rests in their business name 'Autumn Mobility Limited'. This is the substantive *trademark* they possess and there is simply not enough material for me to conclude that SHOWERCARE also discharges an equivalent function.

35 I can, however, set against this the comments of Mr Blakeley in his first Declaration at paragraphs 20 and 21:

40 'It is commonplace for purchasers to refer to our brochure as the "Showercare" brochure rather than the "Autumn Mobility Ltd." brochure and frequently local authorities and the general public telephone ask for a copy of the "Showercare" brochure.

45 My Company recently received a telephone enquiry for a "Showercare" brochure and on making further enquiries it was established that the caller was seeking the "Showercare" brochure issued by Contour and not by my Company and I directed the enquirer to Contour.'

(The second claim is repeated in the later Declaration by Mr Blakeley dated 7th April 1999).

There is nothing here to confirm that the cited callers were attracted to the applicants by the name SHOWERCARE, that is, the mark is an indicator of the applicants' goodwill. The name might simply be the appellation used to distinguish a brochure and little else. It would have helped me if a declaration from one or more of the callers referred to had placed in context the purpose of their request and their understanding of the mark. I have not been given the dates and names relating to these enquiries and, against the background of s 72 in the Act, the onus is on the applicants to make out their case.

As it is, I think I can conclude little from Mr Blakeley's comments without further information. Though some significant turnover under the mark before the relevant date has been recorded (see page two), if the examples above are indicative of the use under the mark claimed, I cannot come to the conclusion that the applicants have demonstrated a goodwill under the name.

The *Wild Child* case has been cited several times in this decision, and I think it is apposite to do so again:

'My difficulty with regard to the use of the words WILD CHILD as part of the overall get-up of such sweatshirts is that I would not expect people to interpret the use of those words in that manner as an indication of trade origin. I therefore cannot see any basis for the suggestion that people in the world at large will have been educated by means of such use to infer that "complete articles of outer clothing; footwear and headgear" supplied under or by reference to the trade mark WILD CHILD are connected in the course of trade or business with the undertaking responsible for supplying sweatshirts embellished in the way I have described. On that view of it the evidence tendered on behalf of the opponent does not actually demonstrate that the words WILD CHILD have been used by the opponent in a manner sufficient to cause them to be misleading when used as a trade mark for the goods of interest to the applicant c.f. *Unidoor Ltd. v. Marks & Spencer Plc* [1988] RPC 275; *Divisional Trading Officer v. Kingsley Clothing Ltd* [1989] RPC 695; *KODIAK Trade Mark* [1990] ESR 49. I appreciate that the registrar is often required to act upon evidence that might be regarded as less than perfect when judged by the standards applied in High Court proceedings. However, I am not willing to regard assertions without any real substantiation as sufficient to sustain an objection to registration under section 5(4). On my assessment of the evidence the asserted "earlier right" remains unsubstantiated and the question of conflict does not arise.'

I think similar conclusions can be drawn here. I simply do not have the evidence before me to conclude that the applicants had sufficient goodwill under the mark at the relevant date. The application fails at the first hurdle under s 5(4)(a) and is refused.

Though not affecting this finding, the point made in *Wild Child* about substantiation also applies to the evidence relating to date of use of the mark. I have made comments about the RPs' evidence in this respect on page 4. Use of the applicants' mark is claimed from 1986, with Exhibit AB1 being cited as proof. However, as I pointed out in the evidence summary, this document is undated, but carries the handwritten legend 1988/1989. At the Hearing, Mr Hinchcliffe stated that the document was first issued in 1986, but additional copies were reprinted in 1988, and later. In Exhibit AB2 the brochure is said to date from 1988 but, again,

is undated, while the brochure in AB3 is said to date from 1995, but on the inside cover it carries the phrase 'April 1998 Brochure'.

5 In his Declaration dated 7th April 1999, Mr Blakeley says that there is no evidence as to when the brochures exhibited to Mr Hickson's Declaration on behalf of the RPs were first introduced or when they were actually used. This criticism, of course, can be levelled at his own brochures. All in all, I found that this material, from both sides, afforded little support to the assertions made about dates in the respective declarations.

10 On the matter of costs, the Mr Marsh stated:

15 'We would like to request a full order for costs and would like the registry to take into account the inconvenience the registered proprietor has been put to by having to defend this action and, in particular, the confusion that has arisen over the grounds for the action which in some ways has put them to further inconvenience in having to defend the proceedings.'

For the applicants, Mr Hinchcliffe responded:

20 '..this was an entirely justifiable case. The initial confusion with regard to the cause of action was quickly clarified. It made no difference whatsoever to the respondent. If it had done at all, it was only a minor one in relation to submitting a further affidavit. I would put it that there was no real cause for them to claim costs on that question alone.'

25 I agree with Mr Hinchcliffe and I see no reason to award costs beyond the usual scale. I therefore order the applicants to pay to the RPs the sum of £635.00. This sum is to be paid within one month the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

30 **Dated this Day 5th of July 2000.**

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Dr W J Trott
Principal Hearing Officer
For the Registrar, the Comptroller General