

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 2173875
BY CHEMISPHERE UK LIMITED
TO REGISTER A TRADE MARK IN CLASSES 1, 3 & 5

AND IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 50294
BY DEB LIMITED

BACKGROUND

1) On 4 August 1998, Chemisphere UK Limited of Unit 4, No 3 Richmond Road, Trafford Park, Manchester M17 1RE applied under the Trade Marks Act 1994 for registration of the mark PIPELINE in respect of the following goods:

In Class 1: “Chemical substances for use in cleaning, sterilising, disinfecting and bactericidal preparations; chemical reagents; chemical indicators and preparations including indicator dyes”.

In Class 3: “Cleaning preparations; fluids for cleaning vessels for storage, transportation and dispensing of potable liquids; cleaning compositions for apparatus for dispensing alcoholic and non-alcoholic beverages and water; additives for the aforesaid goods”.

In Class 5: “Disinfectants; sterilising preparations; sterilising and disinfecting fluids; fluids for sterilising and disinfecting vessels for storage, transportation and dispensing of potable liquids; sterilising and disinfecting compositions for apparatus for dispensing alcoholic and non-alcoholic beverages and water; fungicides; bactericides and preparations including the aforesaid goods.”

2) The mark proceeded because of distinctiveness acquired through use.

3) On the 20 October 1999 Odex Limited filed notice of opposition to the application. The entire business and assets of Odex Limited were sold on 22 December 2000 to Deb Limited, who requested that they be allowed to be substituted as the opponent. At a hearing on 28 June 2001 they were allowed into the action as a substitute opponent. The original (amended) grounds of opposition were adopted by the new opponent as was the evidence filed up to that point. The new opponent also provided security of costs. The grounds of opposition, are in summary:

a) The mark in suit when applied to goods for use in relation to pipelines is descriptive. For example, the term “pipeline” is a generic expression for a cleaner for pipelines. The term “pipeline” is used in the licensed trade and by suppliers to the trade to describe beer pipelines. The sign PIPELINE is fairly and honestly used in relation to the goods of traders other than the applicant.

b) As regards goods for use in relation to pipelines, the word PIPELINE is naturally capable of application to the goods of any trader and the use of the sign made by the applicant has not displaced its common meaning such that the sign has come to denote

the mark of the applicant.

c) Registration of the mark in suit would therefore offend against Sections 3(1)(b), 3(1)(c) and 3(1)(d) of the Trade Marks Act 1994.

d) The application was made in bad faith as the applicant knew that the mark in suit was generic. The applicant is alleged to have advertised its product as “probably the world’s most purple pipe line cleaner.” The application therefore offends against Section 3(6).

e) The application is proceeding on the basis of acquired distinctiveness. However, the applicant has used the mark in suit exclusively in relation to a product sold as a “beer line cleaner” which is a liquid disinfectant preparation for use in relation to beer lines, being pipes going from barrel to dispenser in a catering establishment (pub or hostel etc). According to the International classification, cleaning preparations fall in Class 3 with the exception of those for use in manufacturing processes and of chemical chimney cleaners (both in Class 1) and of those for medical purposes (class 5). Disinfectant soaps are stated to go in Class 3 and disinfectants for hygiene purposes in Class 5.

f) The applicant has never used the mark in suit in relation to goods falling within Class 1 and consequently could not have acquired a reputation in relation to such goods and, for this additional reason, registration should be refused under Section 3(1)(b),(c) & (d).

g) It is also submitted that the applicant’s product is a fluid for sterilising and disinfecting in Class 5, which is the appropriate class for disinfectants. The applicant could not have acquired a reputation in relation to goods in Class 3 and for this additional reason registration of the mark in Class 3 would breach Section 3(1)(b), (c) & (d).

h) In the alternative the applicant’s product is a disinfectant preparation in Class 3 and, for this additional reason, registration of the mark in Class 5 would breach Section 3(1)(b),(c) & (d).

i) The specification should be restricted to “liquid preparations used in relation to beer lines, being pipes going from barrel to dispenser in a catering establishment”. Any additional specification would offend against Section 3(1)(b), (c) & (d). In applying for a broader specification the applicant acted in bad faith offending against Section 3(6).

4) The applicant subsequently filed a counterstatement denying the opponent’s claims and claiming that they have used their mark for almost ten years prior to seeking a registration.

5) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 5 December 2001 when the applicant was represented by Mr Gregory of Messrs T M Gregory, and the opponent by Mr Couchman of Messrs Harrison Goddard Foote.

OPPONENT'S EVIDENCE

6) The opponent filed six statutory declarations and four witness statements. The first declaration, dated 17 April 2000, is by Donald Willis Heriot Arnott who was the business development manager of Odex Limited when he retired in 1997. He continued to work as a consultant for Odex until February 1999.

7) Mr Arnott states that Odex sell a wide range of cleaning and janitorial products, amongst which was a cleaner for pipes connecting beer barrels to the dispensing tap in pubs. He explains that pipe cleaners are used to kill the yeast and other micro organisms which grow in pipelines if they are not cleaned. Originally such cleaners were clear but purple cleaners were later introduced. The colour purple is produced by potassium permanganate. This chemical reacts with and oxidises organic matter. If the cleaner stays purple then the pipe is clean. Purple cleaners have been on the market, he claims, for twenty years. He states that Odex began considering introducing a purple cleaner in 1996 but did not launch the product until January 1999.

8) Mr Arnott states that all their products were sold under the ODEX mark with a descriptive title. They therefore determined upon the name "purple pipeline cleaner". He states that he did not consider the word "pipeline" registrable as a trade mark as it was a generic word for the pipes carrying beer to the dispenser. He states that "different people use different words to describe these pipes, for example: *beerline*, *pipeline*, *pipe* and *line*."

9) The second declaration, dated 30 April 2000, is by Jonathan Hugh Couchman, the opponent's Trade Mark Attorney. He states that he phoned a number of potential witnesses to ascertain whether they considered "pipeline cleaner" to be a generic phrase for beer line cleaners. He states that the results were varied with various regions using slightly different terms. These ranged from "line cleaner", "beer line cleaner" "pipeline cleaner" and "pipewash".

10) Mr Couchman also files, at exhibit JHC1, three documents from the Trade Mark Registry file for the application in suit. These show:

- An advertisement by the applicant for "PIPELINE: probably the world's most purple pipe line cleaner".
- An article from the trade publication "Scottish Licensee" referring to the launch of the applicant's product and describing it as a "non-caustic pipe cleaner that changes colour if your beer lines are dirty."
- Two items of literature from the applicant which use the word "pipe" to describe the pipes going from barrel to dispensing tap.

11) Mr Couchman also provided another two witness statements. In the first, dated 6 July 2000, he recounts a telephone conversation with Don Sykes of S&L Chemicals. Although Mr Sykes would not sign a declaration he did, according to Mr Couchman provide a leaflet relating to a product produced by S&L and also a leaflet from a company called Selden. The two leaflets are produced at exhibit JHC2. The Selden leaflet states that the product is used "to clean and sterilise beer pumps, pipelines and tanks". The S&L leaflet mentions pipelines.

12) In his next statement, dated 21 August 2000, Mr Couchman provides a number of excerpts from booklet "The International Classification of Goods and Services". He claims that this shows that the only cleaners that are proper to Class 1 are for use in cleaning chimneys, for use in industrial processes or for removing adhesive. He states that all other cleaners are listed as proper to Class 3. He accepts that disinfectants and sterilising preparations are listed as proper to Class 5. Similarly disinfectants and sterilising preparations for use in manufacturing processes belong in Class 1.

13) At exhibit JHC5 Mr Couchman provides a copy of exhibit B to a statutory declaration of David Roy Mitchum submitted in support of the application for the mark in suit. The material shows that the applicant had used the mark on one product, which is a cleaner for beer lines.

14) The opponent also filed four statutory declarations and two witness statements by various wholesale janitorial suppliers and manufacturing competitors to the two parties in this case. The witnesses were identified and contacted by Mr Couchman, it is not clear if any other potential witnesses were contacted or if there was an element of selection. Below I record the salient comments of each witness:

- Mr R W G Boaler of RB Wholesale Ltd: "A customer who wants a cleaner but does not specify the brand will telephone and say "I want a beerline cleaner" or "I want a pipeline cleaner" and we will have to ask them which one they want (we have a choice of eight pipeline cleaners)."
- Mr N H Phillips of Delmarco Ltd: "If a licensee talks about a cleaner for beerlines, he will use all sorts of expressions, such as: "beerline cleaner", "pump cleaner", "pipe cleaner" or "pipeline cleaner". "Pipeline" is therefore one of the generic descriptions used in the trade."
- Mr T J Harris of Mid Somerset Cleaning: "It varies what name people in the trade use. It is hard to be precise but I would say that our customers mainly talk about "beerline cleaner", "pipeline cleaner" or "pipe cleaner". There is no difference between any of the names."
- Mr N D Morton Northern Pottery and Linen Co Ltd: "We sell our pipeline cleaner under the name *Pureline Beerline Cleaner*. Although we use the word "beerline" in the name, we could equally well have said "pipeline". The product is a pipeline cleaner and both of the words "beerline" and "pipeline" are used in the trade. "Pipeline" is the sort of word customers use when ordering by telephone, it is a word in common use. For example people ring us up and ask for "purple pipeline cleaner" when they want our purple *Pureline Beerline Cleaner*."
- Mr D R Hollerhead of Sparkle Ltd: "When a customer wants beerline / pipeline cleaner, he does not ask for it by brand but just requests "beerline cleaner" or "pipeline cleaner". Both expressions are used. It is hard to say whether "beerline" or "pipeline" is the more popular: on balance I would say more people say "beerline" but very many also say pipeline."
- Mr K Willetts of Hi'lite Products Ltd: "I have to say that the expression "beer pipeline cleaner" has been used for a very, very long time to describe chemical products for

cleaning beer pipes. In my experience, if you asked a pub landlord what he calls such products he would say either a trade name or “beer pipe cleaner” or “beer pipeline cleaner”. These are accepted phrases because it is a matter of fact that the product is a beer pipe or beer pipeline cleaner. What else could it be called? So far as I am concerned, the product has always been called “beer pipeline cleaner” or “beer pipe cleaner”.”

APPLICANT’S EVIDENCE

15) The applicant filed ten statutory declarations and two witness statements. The first, dated 17 May 2001, is by David Roy Mitchum a Director of the applicant company a position he has held since 1986.

16) Mr Mitchum provides at exhibit DRM1 a copy of the statutory declaration (and exhibits) he made on 29 September 1999 to assist in the registration of the mark in suit. He states that the earlier declaration and the exhibits show that the mark in suit has been used continuously by his company and its predecessors throughout the UK since February 1988. In the exhibit Mr Mitchum provides turnover figures for the years 1994 - 1998 which average approximately £400,000 per annum and advertising figures for the same period showing annual expenditure of approximately £27,500. The examples of use are all in relation to “beer line cleaners”.

17) At exhibit DRM2 Mr Mitchum provides a copy of the Trade Marks Registry OPTICS case history for trade mark application No1406720. This was an application filed by the applicant on 29 November 1989 for the mark PIPELINE which was subsequently withdrawn. He states that at the time of its adoption the term “pipeline” was not a term used to describe beer lines but would only refer to large scale pipes such as used in the transportation of oil and gas.

18) The next declaration, dated 18 May 2001, is by Timothy Mark Gregory the applicant’s Trade Mark Attorney. He disputes that opponent’s claim that the term “pipeline” is commonly used by the licensed trade when discussing beer lines. At exhibit TMG1 he provides copies of a patent application and various pages from internet sites of suppliers of bar engines etc. Also supplied are pages from trade publications. All of these refer to beer lines and tubes but not pipelines. He also states that the Collins Dictionary defines pipeline as “a long pipe, esp. underground, used to transport oil, natural gas, etc., over long distances”.

19) At exhibit TMG2 Mr Gregory provides a number of the opponent’s brochures relating to products for cleaning beer lines. These do not refer to “pipeline” but “beerline/s”. Although there is a reference to “purple pipeline cleaner” in one of the product lists. Under the product it states that its product is “taking the guesswork out of beerline cleaning”. Mr Gregory states that such references only occurred in 1999 and were used on a product which has the same colour and mode of action as the applicant’s product.

20) Mr Gregory then comments on the declarations and witness statements described at paragraph 14 above. Mr Gregory makes numerous claims as to why the contents of these should be dismissed including several allegations of leading questions, partiality and hearsay. I do not find his comment helpful or persuasive.

21) At exhibits TMG4 & 5 Mr Gregory provides a variety of literature from numerous companies which refer to beer line cleaners.

22) Mr Gregory also comments on the opponent's claims regarding its specification. Broadly he states that the list which the opponent relies upon is for guidance only. He also states that the matter has been discussed with the Registry at an earlier hearing and found to be satisfactory.

23) The next declaration, dated 28 June 2001, is by Keith Robert Thomas a senior lecturer in Microbiology and brewing at the University of Sunderland. He is also a Director of Brewlab Ltd based at the University. This company performs a range of services on a commercial basis for the brewing industry in Britain. He states:

“I have been asked “what is the name of the hollow device which transmits beer from the keg or the cask to the dispense head?” I have always known this device as a beer line, and in my experience “beer line” is the term which is almost invariably used in the brewing trade.”

24) The applicant has also filed seven statutory declarations and two witness statements from chemical distributors, brewers, trade journals, manufacturers of bar equipment. The witnesses were identified and contacted by Mr Gregory, it is not clear if any other potential witnesses were contacted or if there was an element of selection. Below I record the salient comments of each witness:

Mr K Pinder of Janchem Direct Ltd (distributor) : “I have been asked what, in my experience, the normal trade term is for the products used to clean out or decontaminate the system connecting the keg or cask to the tap, pump, etc, in a pub, club or bar. In the absence of a specific trade name, the generic name for such products is “beer line cleaner”, just as the generic name “food process cleaner” is used of similar products in the food processing industry.”

Mr D J Lowe of George Gale & Co Ltd (brewer): “I have been asked what I would call the system, in a pub, club or bar, which connects the kegs or casks with the taps, pumps or engines in the bar. I have always called it a beer line or beer lines, and in my experience, it is typically referred to as that.”

Mr H F Bland of Magnaflow (Magnetic Flow Conditioning) Ltd (supplier parts): “I have been asked what I would call the system, in a pub, club or bar, which connects the keg or cask to the tap or pump in the bar. This is the beer line. To be precise, the beer line leads from the keg to the font in the bar itself, from which the beer is drawn. The beer line may or may not include pumps to drive the beer up from the cellar. I have also been asked if the “pipeline” is an alternative name for the beer line. “Pipeline” is not used in this context, and it is not at all a generic term for beer lines.”

Mr N J Curtis of Hall & Woodhouse (brewer): “I have been asked what the name is of the part of the beer dispensing system in a pub, club or other licensed premises, which connects the keg or cask to the taps in the bar, and along which beer may flow. This is the beer tubing. A concentric head or keg coupler is fitted to a keg in the cellar, and is connected to with beer tubing which allows beer to flow to the dispenser tap, mounted

on the bar counter. I have also been asked whether the terms “beer-line” or “pipeline” are correct terminology in this regard. I do not consider either to be correct, and I would only call it beer tubing.”

Mr P J Mellows of The Publican Newspaper: “I have been asked what I would call the part of the dispensing system, in a pub, club or bar which connects the kegs or casks with the taps or pumps in the bar. I would call this the beer line. I have also been asked if the “pipeline” is or is not a standard term for this system. I would say not. Sometimes I have heard the beer line referred to as just the “pipe” but never the “pipeline”.

Mr J F Duffy of Bass Ireland Limited: “I have been asked what the name is of the part of the dispensing system, in a pub or the like which leads from the keg or cask up to the taps or pumps in the bar. This is the “beer line”. The beer kegs are connected to the keg dispense unit, which is in turn connected to the dispensing equipment on the bar via either a python beer line or a single beer line. A python is a bundle of hoses (usually polythene in Britain but higher quality nylon in Ireland to reduce adhesion of yeasts and other contamination to the interior of the beer line) in a thermally insulating sleeve. In Ireland, the entire beer dispense system can be known as the “beer lines”.”

Mr R Slade of Crystal Supplies Ltd: “I have been asked what the name is of the part of the dispensing system in a pub, club or other licensed premises, which connect the keg or cask to the pumps or taps in the bar, along which beer may flow. I would call this the beer line, and beer line is the term that my customers normally use. I have also been asked whether “pipeline” is a standard term for this part of the system. I would definitely not call it that, or expect “pipeline” to be used as a name for this system.”

Mr J Fletcher trading as Drinks Trade Services: “I have been asked what I would call the part of the dispensing system, in a pub, club or bar, which connects the kegs or casks with the pumps in the bar. I would call this the feed line. I have also been asked if I have come across the term “beer line” in this context. I would use “the beer lines” to describe the whole system that supplies beer to the glass. In my experience of the trade, “the beer lines” is the normal name for the whole system. In trade terminology, the beer lines are subdivided, the feed lines being the part of the beer lines connecting the kegs in the cellar and the pumps in the bar. I have been asked if the “pipeline” is a normal term for any part of the system. I would not use this term and I have not heard it in twenty years in the trade.”

Mr M H Jones of Allyn Supplies Ltd: “I have been asked what I would call the system in a pub, club or bar which connects the kegs or casks with the taps or pumps in the bar. I have always called it the beer line, and the vast majority of my contacts refer to it as that, except when referring to specific trade names.

OPPONENT’S EVIDENCE IN REPLY

25) The opponent filed two witness statements. The first, dated 16 October 2001, is by Mark Andrew Woodhead a Director of Selden Research Ltd. He confirms that the leaflet supplied by Mr Couchman in his statement dated 6 July 2000 was a leaflet issued by Selden from 1983

onwards. He states that the leaflet and Selvo beer pump and pipeline cleaner have been used continuously since 1983, though the leaflet has been reprinted from time to time. He confirms that the pump and pipeline cleaner are still sold at the date of the statement.

26) The second statement, 17 October 2001, is yet another by Mr Couchman. He repeats his earlier claim that all the expressions “beerline”, “line” and “pipeline” (amongst others) are used generically. At exhibit JHC6 he provides copies of three UK Patent applications which use the term “pipeline” in a generic sense.

27) At exhibit JHC7 he also provides copies of pages from internet sites which show the term “pipeline” being used generically. Most refer to “Beer Pipeline Cleaner”, one refers to “lager pipelines” and also “beer pipelines”

28) That concludes my review of the evidence. I now turn to the decision.

DECISION

29) The first ground of opposition is under Section 3(6) which states:

“ A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

30) The Act does not define the term bad faith, leaving it to the Tribunal or the Court to determine whether an application was made in bad faith based upon the circumstances of a particular case. The Notes on Sections, published by the Patent office, and based upon the Notes on Clauses provided to Parliament during the passage of the Trade Marks Bill in relation to Section 3(6) provides examples of where bad faith might be found, these are:

(i) where the applicant had no bona fide intention to use the mark, or intended to use it, but not for the whole range of goods and services listed in the application;

(ii) where the applicant was aware that someone else intends to use and /or register the mark, particularly where the applicant has a relationship, for example as employee or agent, with that other person, or where the applicant has copied a mark being used abroad with the intention of pre-empting the proprietor who intends to trade in the United Kingdom;

(iii) where the mark incorporates the name or image of a well-known person without his agreement. (This should not be taken as meaning that this provision is legislating for the protection of a personal name or reputation - these remain unprotected under English law, but the nexus between unregistrability and the name of a well-known person is that of bad faith in which the application is made.)

31) I also take account of the views of Lindsay.J. in *Gromax Plasticulture Ltd v Don and Low Nonwovens Ltd* (1999 RPC 367 at page 379) where the learned judge said:

“I shall not attempt to define bad faith in this context. Plainly it includes dishonesty

and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined.”

32) It is well established that in an opposition under Section 3(6) of the Act the onus is on the opponent, reflecting the usual approach under English law that he who asserts must prove.

33) The opponent alleges that the applicant should have been aware that the mark they were seeking to register was a generic term used in the industry. However, in the course of their evidence they have clearly stated that a number of terms are used to describe the tubing between the barrel and the glass. The applicant in this case has denied that the term is generic. In order to succeed the opponent, with whom the onus rests, has to show not only that the mark applied for consists of a generic term at the date of the application. But that the applicant was aware, or beyond reasonable doubt likely to be aware that the mark was a generic term yet applied for the mark despite this knowledge. The opponent has failed to prove its case. Therefore the ground of opposition based on Section 3(6) is dismissed.

34) I next consider the grounds of opposition under Section 3(1)(b), (c) and (d) of the Act which reads:.

3 (1) The following shall not be registered -

(a)

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade.

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

35) The question is whether the word PIPELINE can perform the function of a trade mark. In considering this question I have regard to the comments of Aldous L.J. in *Philips Electronics NV v. Remington Consumer Products Ltd* [1999 RPC 809 at 818]:

“The more the trade mark describes the goods, whether it consists of a word or shape, the less likely it will be capable of distinguishing those goods from similar goods of another trader. An example of a trade mark which is capable of distinguishing is WELDMESH, whereas WELDED MESH would not be. The former, despite its

primary descriptive meaning, has sufficient capricious alteration to enable it to acquire a secondary meaning, thereby demonstrating that it is capable of distinguishing. The latter has no such alteration. Whatever the extent of use, whether or not it be monopoly use and whether or not there is evidence that the trade and public associate it with one person, it retains its primary meaning, namely mesh that is welded. It does not have any feature which renders it capable of distinguishing one trader's mesh from another trader's welded mesh."

36) I also have regard to the comments of Morritt L.J. in the *Bach and Bach Flower Remedies Trade Marks* case [2000 RPC 513 at page 526 line 10]:

"The question is whether or not the word BACH had, by 1979, acquired such a meaning so as to be incapable, without more, of affording the requisite distinction. If it had then section 1(1) is not satisfied, the word BACH cannot be a capricious addition so that registration of the sign would be in breach of paragraph (a); if it had not then the word BACH is an addition to the words FLOWER REMEDIES which is 'capricious' because it is not purely descriptive, so that both the expression BACH FLOWER REMEDIES and the word BACH are capable of affording the necessary distinction. Accordingly I accept the submission that it is both permissible and necessary in considering the application of paragraph (a) to determine the meaning of the word as used at the time of the application for registration. I do not understand Aldous L.J. in *Philips v. Remington* in the passage I have quoted, to have been considering the relevance of use to the meaning of the word."

"The usage in question must be by those engaged in the relevant trade or activity. Normally that will be the usage of the average consumer of the goods in question as described in *Lloyd Schuhfabrik* [European Court of Justice, *Lloyd Schuhfabrik Meyer v. Klijsen Handel BV* 1999 ETMR 690]. Obviously the evidence on that question is not limited to those who are consumers or end-users but may extend to others concerned in the trade such as manufacturers, wholesalers and retailers."

37) There has been recent guidance from the European Court of Justice in relation to Article 7(1)(c) of Council Regulation 40/94 on the Community Trade Mark in *BABY-DRY* Case C-383/99P. Article 7(1)(c) is equivalent to Section 3(1)(c) of the Trade Marks Act 1994. The findings of the Court are set out in paragraph 35 et seq of the judgement. Paragraphs 39 and 40 serve to illustrate the approach adopted by the Court.

39. The signs and indications referred to in Article 7(1)(c) of Regulation No 40/94 are thus only those which may serve in normal usage from a consumer's point of view to designate, either directly or by reference to one of their essential characteristics, goods or services such as those in respect of which registration is sought. Furthermore, a mark composed of signs or indications satisfying that definition should not be refused registration unless it comprises no other signs or indications and, in addition, the purely descriptive signs or indications of which it is composed are not presented or configured in a manner that distinguishes the resultant whole from the usual way of designating the goods or services concerned or their essential characteristics."

40. As regards marks composed of words, such as the mark at issue here,

descriptiveness must be determined not only in relation to each word taken separately but also in relation to the whole which they form. Any perceptible difference between the combination of words submitted for registration and the terms used in the common parlance of the relevant class of consumers is apt to confer distinctive character on the word combination enabling it to be registered as a trade mark.”

38) Both sides have filed evidence from other traders. The opponent has filed declarations mainly from wholesale janitorial suppliers, whilst the applicant has filed declarations from brewers, janitorial suppliers, a trade newspaper for publicans, bar parts suppliers and a University Professor. All witnesses give their views on the term used for the tube or pipe connecting a beer barrel with the pump mounted on the bar. The applicant’s witnesses, with one exception, all state that the term used is “beerline” and thus the cleaning fluid used is referred to as “beerline cleaner”. They also state that the term “pipeline” is not used. The exception to this unanimity was a brewer who stated that the correct term was “beer tubing” and he also stated that neither “beerline” or “pipeline” was the correct term. The opponent’s declarants were not so emphatic as to a “correct” term. They all stated that customers (publicans) used a number of terms to describe the tubing / pipe. They mentioned “beerline”, “pipeline” and “beer pipeline”. They all regarded these terms to mean the same thing and described how they sold a number of cleaners for this tubing under a variety of descriptions.

39) The applicant sought to claim that the evidence of the opponent’s witnesses could not be relied upon primarily as the applicant had been selling its product under the “pipeline” mark since 1988.

40) However, it is clear from the opponent’s evidence that the company Selden have been using the term “pipeline cleaner” since 1983. I also take into consideration the fact that Mr Gregory, at the hearing, confirmed that the applicant’s product was a cleaner not designed solely for “beerlines”. He stated:

“The product is, I believe, sold to wineries and bottled water factories. It is not only beer. “Beerline” is a term for moving beer or anything from the cellar to the bar, generally. It could be cider; it could be wine; it could be soft drinks even.”

41) I find it hard to accept that publicans would refer to tubing carrying soft drinks, cider or wine as “beerlines”. Similarly, I do not believe that wineries would use this terminology. In these matters there is no generic term which can be said to be “correct”, it is a matter of what is used by the trade. In my view the opponent’s evidence, that there are a number of generic terms for such tubing is far more convincing. The term “pipeline” is, to my mind an indication of function rather than an indication of source, and this would apply to the whole of the specification. The term is descriptive of the product and is in common use by the trade.

42) I must therefore consider the evidence of the applicant that at the relevant date, 4 August 1998, the average consumer had been educated into viewing the term “Pipeline” as providing a guarantee as to the trade origin of the goods specified. Where an applicant relies upon evidence of acquired distinctiveness then the burden of proof would appear to be on the applicant. The comments of Lloyd J. in Dualit Ltd’s Application { 1999 RPC 890 at paragraph 30]:

“ I have mentioned the burden of proof. In *Procter & Gamble* the Court of Appeal said that it was “doubtful whether it helps to discuss the judgement which the Registrar has to make in terms of burden of proof”. However, in that instance no case was put forward that distinctive character had been acquired through use. Where such a case is made, as here, the burden of proof must be at least potentially relevant. The Hearing Officer 9[1999] RPC 304 at 314, lines 26 -28) assumed no burden of proof either way. That seems to me, in principle, too favourable to the applicant, though in practice it may not have made any difference.”

43) The statutory declaration, dated 29 September 1999, originally supplied by Mr Mitchum in support of his application was filed as an exhibit to the opponent’s evidence. This shows that the company uses “PIPELINE” on its leaflets, has sales averaging £400,000 per annum and has spent an average of £27,500 per annum on advertising.

44) This is not sufficient to persuade me that a significant proportion of the relevant class of persons (ie the average consumer of such goods) would regard the term “PIPELINE” as indicating that the goods originated from the applicant.

45) The applicant has shown that it has enjoyed a reasonable turnover under the mark in the four years preceding the application. However, as Morritt L.J. stated in *Bach Flower Remedies* [2000 RPC 513 at 530 lines 19-21]:

“First, use of a mark does not prove that the mark is distinctive. Increased use does not do so either. The use and increased use must be in a distinctive sense to have any materiality.”

46) Considering all of the evidence put in by the applicant in support of the application I am not persuaded that the applicant has shown that the mark has acquired distinctiveness through use. The opposition under Section 3(1)(b) therefore succeeds.

47) As this determines the matter I do not need to consider the other grounds of opposition.

48) The opposition having succeeded the opponent is entitled to a contribution towards costs. I order the applicant to pay the opponent the sum of £1535. This sum to be paid within seven days of 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.

Dated this 12 day of March 2002

George W Salthouse
For the Registrar
The Comptroller General