

O-024-04

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2317497
BY THE PROCTOR & GAMBLE COMPANY
TO REGISTER A TRADE MARK IN CLASSES 01 AND 03**

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Background

1. On the 4th December 2002, The Procter & Gamble Company (“the applicants”) of One Procter & Gamble Plaza, Cincinnati, Ohio, 45201, United States of America, applied to register the following sign as a trade mark in Classes 1 and 3:



2. The application was made in respect of the following goods:

Class 1

Chemical ingredients such as but not limited to ingredients for care, treatment and beautification of fabrics.

Class 3

Bleaching preparations and other substances for laundry use; detergents; fabric softeners; laundry additives; preparations for the care, treatment and beautification of fabrics; soaps.

3. During the course of the examination of the application, objection under Section 3(1)(b) of the Act was raised in the following terms:

“...because the mark consists of the descriptive words “quick wash action” incorporating a clock, together with the device of washing tablets. As such, the whole mark is considered devoid of distinctive character for eg washing tablets which have a quick wash action”.

4. After a couple of rounds of correspondence arguing against the objection with the examiner, the applicants' representatives D.Young & Co, requested a hearing which was held on the 2nd September 2003. The applicants were represented by Ms Angela C Thornton-Jackson of D.Young & Co. After hearing her submissions, I reserved my judgement, but on further consideration of them, I subsequently communicated my decision to maintain the objection to her in writing in the report of the hearing.
5. Following refusal of the application, I am now asked under Section 76 of the Act and under Rule 62(2) of the Trade Mark Rules 2000 to state in writing the grounds of my decision and the materials used in arriving at it.
6. No evidence of use has been put before me. I have, therefore, only the prima facie case to consider.

The Law

7. Section 3(1)(b) of the Act reads as follows:

"3.-(1) The following shall not be registered –

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

The case for registration

- 8 . In correspondence and at the hearing Ms Thornton-Jackson argued that the Section 3(1) objection was unjustified. At the hearing she submitted that she had been astounded to receive this objection in the first place. She highlighted to me the letter "Q" of the word "QuickWash", which is stylised to represent the face of a clock. In addition to this Ms Thornton-Jackson pointed to the way the words "QuickWash action" curved upwards and appeared to have been swept along in the wake of the washing tablets. She further described the depiction of the movement of the tablets through water and the suggestion of a speed trail of bubbles they had left. She maintained that when the mark is considered as a whole it is an unusual and distinctive mark which the public would perceive as a distinctive logo. She said that this particular unique form of presentation need not be legitimately used by third parties.
9. To further back up her submissions she pointed me to a previous acceptance in the name of these same applicants. Registration No. 2312150 (represented below):



The Decision

10. The approach to be adopted when considering the issue of distinctiveness under Section 3(1)(b) of the Act has recently been summarised by the European Court of Justice in paragraphs 37, 39 to 41 and 46 to 47 of its Judgment in *Joined Cases C-53/01 to C-55/01 Linde AG, Windward Industries Inc and Rado Uhren AG* (8th April 2003) in the following terms:

“37. It must first of all be observed that Article 2 of the Directive provides that any sign may constitute a trade mark provided that it is, first, capable of being represented graphically and, second, capable of distinguishing the goods and services of one undertaking from those of other undertakings.

.....

39. Next, pursuant to the rule 1 Article 3(1)(b) of the Directive, trade marks which are devoid of distinctive character are not to be registered or if registered are liable to be declared invalid.

40. For a mark to possess distinctive character within the meaning of that provision it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from products of other undertakings (see *Philips*, paragraph 35).

41. In addition, a trade mark’s distinctiveness must be assessed by reference to, first, the goods or services in respect of which registration is sought and, second, the perception of the relevant persons, namely the consumers of the goods or services. According to the Court’s case-law, that means the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and *circumspect* (see Case C-210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31, and *Philips*, paragraph 63).

.....

47. As paragraph 40 of this judgment makes clear, distinctive character means, for all trade marks, that the mark must be capable of identifying the product as originating from a particular undertaking, and thus distinguishing it from those of other undertakings.”

11. Ms Thornton-Jackson’s arguments in correspondence and at the hearing did nothing to persuade me the mark had the requisite distinctive character. In my view, the mark consists of a number of constituent parts, which in totality, fail to bestow upon the mark the minimum degree of distinctive character required to allow prima facie acceptance.
12. Ms Thornton-Jackson was very careful to point out and offer her views on how and why the integers constituting the mark were individually and collectively distinctive. Whilst I accept there are a number of individual constituent parts making up the mark, it is well settled that the test for distinctiveness of a trade mark must be judged against the mark as a whole. I observed at the hearing that I saw nothing strikingly novel or distinctive in a depiction of the goods on the packaging of the goods, and contrary to Ms Thornton-Jackson’s view, neither did I in this *particular* depiction. Whilst I am willing to concede there is stylisation in the letter “Q” into an allusion to the face of a clock, taken in context of the mark in totality, I think that feature is somewhat lost . It would take a particularly observant and analytical consumer of these common everyday goods to pick out this feature and attach origin or trade mark significance to the whole mark because of it.
13. Of course Ms Thornton-Jackson does not argue it is the “Q” feature alone which offers the application sufficient distinctiveness. She submits that this, along with the upwardly curving words “QuickWash action” trailing in the bubbly wake of the goods themselves when combined, make a distinctive whole. I disagree. I see nothing in the totality to overcome the statutory hurdle imposed by Section 3(1)(b). The words “QuickWash action” are purely descriptive of goods which offer a quick wash, and a minor stylistic curvature of the font does not detract from that fact at all in my view.
14. At the hearing, when I suggested the depiction of washing tablets on packaging for washing tablets (even when suggestive of movement through water because of the bubbles etc) was not in my experience unique or novel, Ms Thornton-Jackson suggested that I should prove this assertion. I declined to do so. In *EUROLAMB* [1997] R.P.C. 279, Geoffrey Hobbs QC, acting as the Appointed Person held that Section 37 is neutral and there is no presumption in favour or against registration. The combined effect of Sections 37(4) and (5) is to eliminate the discretion that the Registrar had under the 1938 Act and to put him in a position of having to make a judgement, yes or no, upon the materials before him as to the registrability of a mark. There is nothing in the nature of a burden for the Registrar to discharge in order to provide evidence to show that this sort of depiction is not unusual. It has been held on numerous occasions that the

registrar's hearing officers are entitled to rely upon their own experience of the market. See for example, *Yakult Honsha KK's Trade Mark Application* [2001] R.P.C. 756. In my opinion this mark would only ever be viewed as an indication of what one might expect from the goods and a depiction of what they look like. It is in my view, common "get-up" for the packaging of goods of this kind. There is no origin or trade mark message.

15. I should also deal with the prior registration Ms Thornton-Jackson brought before me at the hearing. In essence of course it is well established – see *British Sugar v. James Robertson & Son Ltd* [1996] R.P.C. 281 and *Madame* [1966] R.P.C. 541 that precedents or the state of the Register are in principle irrelevant. However, this is a very recent acceptance of an application made by the same registered proprietors. I commented at the hearing that while I was not aware of the circumstances which led the registrar to put this mark on the register, in my view the two cases can be distinguished by the overall visual impact they create. The registration has a visual identity quite different to the application in suit, it claims various colours as an element of the mark and has no representations of the goods to which the mark is intended to be applied. Whilst on the face of it the marks share some features, they are certainly not on all fours. In particular, the clock face "Q", which the applicants consider to be a distinctive feature, is prominent in the earlier mark, whereas it is lost in the later application.
16. When considering this matter through the eyes of the relevant consumer of the goods in question I am of the view that they will not place any trade mark significance on this mark but will perceive it as a sign which does no more than depict and describe a characteristic of the goods applied for.
17. In the circumstances I have concluded that the trade mark at issue comprises a word which, prima facie, cannot distinguish the applicants' goods from those of other undertakings and is therefore debarred from registration by Section 3(1)(b) of the Act.

Conclusion

18. In this decision I have considered all the documents filed by the applicants and all the arguments submitted to me in relation to this application and, for the reasons given, it is refused under the terms of Section 37(4) of the Act because it fails to qualify under Sections 3(1)(b) of the Act.

Dated this 28th day of January 2004.

**GJ ROSE'MEYER
For the Registrar
The Comptroller-General**