

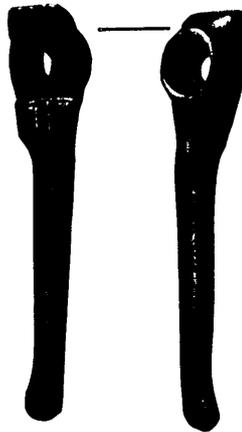
TRADE MARKS ACT 1994

**IN THE MATTER OF Application No 2000360
by Maasland NV to register a trade mark in Class 7**

DECISION

On 31 October 1994, Maasland NV applied for the registration of the trade mark shown below in Class 7 in respect of “machines and implements included in Class 7, all for use in agriculture and horticulture and parts and fittings included in Class 7 for all the aforesaid goods.”

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15 The application form indicates that the trade mark consists of the shape of the goods. The Registrar raised objections under Section 3(1)(a)-(c) of the Act on the grounds that the mark consists of the shape of an agricultural instrument which is incapable of distinguishing the goods of one undertaking from those of other undertakings. In response to these objections the applicant filed evidence in an attempt to show that the mark had acquired a distinctive character
20 through use.

This evidence consisted of a declaration by Herman Mulder, who is a Director of Maasland NV. Mr Mulder states that his company licences Lely and Lely UK to use the three dimensional trade mark in the United Kingdom. He further states that such use has taken place since 1990 in

relation to power harrows. Mr Mulder provides turnover figures for the years 1991 - 1994, which he says he has obtained from Mr Trevor Moisey who is the Financial Controller of Lely UK.

The turnover figures are as follows:-

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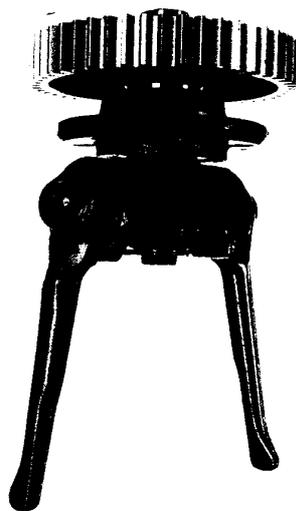
YEAR	APPROX TURNOVER £'s	APPROX NO. OF TINES SOLD
1991	89,600	12,800
1992	105,000	15,000
1993	147,000	21,000
10 1994	182,000	26,000

This appears to me to be hearsay evidence. It is arguable whether it is first hand or more remote hearsay. The Registrar has not previously objected to the admissibility of the evidence and I do not therefore intend to raise such an objection now.

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Exhibit HM1 to Mr Mulder's declaration consists of a promotional brochure showing how the trade mark is used. It appears from these brochures that the goods at issue are known as "club" tines. Reproduced below is an excerpt from one of the brochures showing how the tine is used, together with a textural description.

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Another essential component of the power harrow is the tine and tine holders. The Roterra 35 and 45 Series features the Lely "club" tine. These "club" tines are fitted by a single allen headed socket bolt and a unique captivated self locking nut to keep the tines tight in all conditions. Because the bolt is accessible from the side, the tines can quickly and easily be changed by means of a power tool or socket. "Club" tines have extra material at the wearing point to give longer working life and better value for money.

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It will be noted from the above that the “club” tine is described as having a unique fixing method and extra material at the wearing point to give longer working life and better value for money. A similar claim is made in several places in the same brochure and also in the two other brochures exhibited as evidence by the applicant. The following is another excerpt from one of the brochures:-

“ Lely “club” tines

The patented Lely “club” tine has 15% more material at the wearing point giving a substantial increase in working life and better value for money. In addition, the “club” tine material is harder at the wearing tip and softer at the fixation point, giving better wearing characteristics and strength. Lely “club” tines have a trailing action keeping moist soil and trash from being brought to the surface.”

Mr Mulder further states that he has been informed by Mr Peter Wheeler, a Sales Manager at Lely UK, that the trade mark has been extensively advertised in Great Britain and Northern Ireland. Advertisements have been placed in farmers periodical publications such as Farmer’s Weekly, Farming News, Crops and Arable Farming. My comments above regarding hearsay evidence also apply to the above statement by Mr Mulder.

Exhibit HM2 to Mr Mulder’s declaration consists of examples of advertisements for the applicant’s power harrows and associated “club” tines. An example of one of the advertisements is reproduced below.



Mr Mulder states that he believes that the goods at issue have been advertised and sold throughout the United Kingdom.

5 The applicants also filed 24 declarations from persons who were at the Cereals Show at the Neville Estate, Wellingore, Nr Lincoln on 12 June 1996. The persons concerned are all engaged in, or associated with, the farming industry. Typical of their evidence is a declaration dated 12 December 1996 by James William Ledger, who is a farm labourer. Mr Ledger states:-

10 “When I was at the Cereal Show I was shown an agricultural implement (a photocopy of which is Exhibit JR1 to this declaration) by someone I now know to have been Francine Read, a trainee solicitor employed by Taylor Joynson Garrett. I was asked by Miss Read whether I recognised the agricultural implement and I replied that it was a Lely Power Harrow Tine. I was asked why I recognised it as Lely’s tine. I said that I had
15 recognised it as a Lely’s tine from the shape of the tine, in particular the club foot at the bottom of the tine and the bit at the top where the tine fixes onto the machinery. I first saw the tine advertised between one and two years ago in the Farming Press. I believe that most farmers would recognise the tine as Lely’s because of its shape.”

20 All the declarants indicated that they recognised the shape of the “club” tine. This recognition resulted from the “club” or bulbous foot of the tine either alone or in combination with the design of the fixing end.

The Registrar responded to this evidence maintaining the objections that had already been taken and raising additional objections under Section 3(2)(a)-(c) of the Act. The applicant asked to be
25 heard. Prior to the hearing further evidence was filed in the form of a declaration dated 1 May 1998 by John Stephen Linneker, who is a partner in Taylor Joynson Garrett, a firm of UK solicitors. Mr Linneker explains that he has acted for the applicant and the Lely group of companies for over ten years. He states that he is aware from his own personal knowledge that there are many differing styles and shapes of tines available on the market in the UK. In support
30 of this proposition he provides two brochures as Exhibits JSL 1 and 2 to his declaration which illustrate the range of tines available for sale. Although these brochures confirm that there are a range of different shaped tines available, they also show that such tines all share the same common features. Firstly, they all have a top piece adapted to fix the tine to the harrow. Secondly, they all have a round or blade-like elongated shaft section for pulling through the ground. The

applicant's tine is the only one depicted which is designed to fit onto the harrow at a right angle by means of a single bolt or which has a bulbous bottom section. This evidence also indicates that the applicant, and several competitors, offer for sale weld-on tips for various tines in their range.

5 The hearing took place on 5 May 1998 at which the applicant was represented by Ms D MacFarland of Counsel instructed by Haseltine Lake Trademarks. At that hearing Ms MacFarland contended that:

1. the mark was capable of distinguishing the applicant's goods;
- 10 2. the mark was prima facie distinctive;
3. or in the alternative had acquired a distinctive character through use;
4. the evidence indicated that the mark was not perceived as primarily functional;
5. in use the shape of the applicant's goods were recognised by the bulbous end of the tine and, to a lesser extent, by the shape of the fixing end.

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On the evidence it appeared to me that the two aspects of the shape identified by the applicant as the distinctive features were functional. In particular, it appeared to me from the applicant's promotional material that the shape of the fixing end of the tine was purely to facilitate a fast and convenient means of fixing the tine to the power harrow. The shape of the bulbous end of the tine appeared to be the result of the use of additional material at the wearing point of the tine intended to extend its working life. I noted that there were several claims to this effect in the applicant's advertising material. If these observations were correct, I took the view that the mark consisted exclusively of a shape which was necessary to achieve a technical result and was therefore excluded from registration by Section 3(2)(b) of the Act. The applicant contended that I had 20 misconstrued the statements in their promotional material and that the bulbous end of the tine at issue was not functional in the way I believed it to be. I was asked to allow a period of time for the applicant to file evidence to substantiate this point. I agreed to allow a further period of three 25 months for this purpose.

30 I also maintained the objections taken under Section 3(1)(a) & (b) of the Act. If my primary conclusion was correct - there was no aspect of the shape of the applicant's tine which was

unnecessary for the achievement of the technical result - then it followed that the mark was also devoid of any distinctive character as a trade mark. Although the survey evidence provided some support for the contention that the shape of the tine had acquired a distinctive character through use, I felt unable to give much weight to the evidence in the absence of any indication as to the methodology used in the conduct of the survey. I agreed to consider additional evidence on this point also.

The applicant subsequently filed further evidence. This takes the form of an affirmation by Niranjan Shanmuganathan dated 4 August 1998, a Statutory Declaration by Cornelis Gerard Ouwerkerk dated 14 September 1998 and a Statutory Declaration by H J Wiersma dated 14 September 1998. Mr Wiersma is a Legal Advisor to the Lely Group of companies and Maasland NV, the applicant. Mr Wiersma refers to the various claims in the applicant's promotional material which I identified at the hearing. He continues:-

“It has been suggested in these proceedings that these statements indicate that the “club” shape at the lower portion of the “club” tine is solely to achieve a technical result. This would be an incorrect assumption because the statement simply refers to the fact that “club” tines have extra material at the wearing point of the tine to give a longer life. There is no mention in these statements of any functional purpose being attributable to the precise configuration of the bulbous end of the tine. As Mr Ouwerkerk states in his Statutory Declaration which I refer to, within the broad technical requirement that they should be more material at the tip of the tine to extend working life, Mr Ouwerkerk has a free rein to design the tine in any way he wanted. For the reasons Mr Ouwerkerk sets out aesthetic considerations were a dominant factor in choosing to adopt the bulbous “club” tine design.”

Mr Wiersma also indicates that Maasland NV. and/or C. Van der Lely NV and other companies within the Lely group of companies are the proprietors of several European patents and one application which relates to various different designs of tine, some of which have the “overall and broad technical aim of adding extra material to the working end of the tine.”

Mr Ouwerkerk states that he is a design engineer and that between February 1985 and October 1992 he worked at the engineering department of Lely Industries NV, during which time his job was to design new agricultural machines. Mr Ouwerkerk further states that one of his assignments at Lely, somewhere between 1989 and 1990, was the development and design of

several soil cultivation tines including the tine known as the “Club Tine”. He continues:-

5 “The general idea behind the idea of the “club” tine was to provide more material at the end of the tine which has contact with the soil (in effect making it thicker at the point) in order to delay wear and tear on the tine in vertical direction up the shaft of the tine.

10 As long as there was more material on the lower portion and tip of the tine to reduce wear, I had complete freedom in designing the appearance of the “Club Tine”. I therefore set out to design a tine which looked good and my design was governed by aesthetic considerations but within the broad parameter of the requirement for more material to be placed at the lower portion and tip of the tine. I believe this aim was achieved in the rounded “club” design I decided on. The aesthetic aim was to give a solid and well-shaped impression to a purchaser and also to create something with a distinctive appearance to set the Lely Club Tine apart from the tines of competitors and allowing purchasers to pick it out from the rest.

15 Good looking, solid design for its products has always been an important factor for Lely and is considered a good competitive advantage over the competing products of other companies. For example, I remember that at the time the club tine was being developed a number of our competitors introduced special cultivation tines. To put it mildly, these tines were poorly designed from an aesthetic point of view in my opinion and the Lely Club Tine is much more beautiful.

25 I should add that there is no technical purpose achieved by the particular rounded club shape I chose and I could have chosen many other designs to provide more material on the lower portion and tip of the tine. For example, I could have made the whole of the lower portion of the tine thicker without adding the distinctive bulbous “club” shape. However, this would not have been very advantageous from an aesthetic point of view.”

30 Despite this additional evidence, I remained of the view that the trade mark was excluded from registration by Sections 3(1)(a),(b) and 3(2)(b) and (c) of the Act and the application was refused. I have since been asked to provide my reasons for refusal which I now do.

Section 3(2)(b) and (c) are set out below:-

35 3(2) A sign shall not be registered as a trade mark if it consists exclusively of -

- 40 (b) the shape of goods which is necessary to obtain a technical result, or
(c) the shape which gives substantial value to the goods.

The current state of the law as regards Section 3(2)(b) of the Act is set out in the decision of Jacob J. in Philips Electronic NV v Remington Consumer Products [1998] RPC page 283 (the Philips case). Following the implementation of EC Directive 104/89 the trade mark law throughout the EU is the same. Jacob J. endorsed the approach taken by Judge Goran Nilsson, who expressed a minority view when the Swedish Court of Appeal considered a similar matter in a Swedish case relating to the shape of the same three headed razor. Philips was also a party to those proceedings. The relevant part of Judge Nilsson's opinion is as follows:-

“If the shape of a product is not exclusively motivated by its function and thus the existing non-functional design elements do have distinctiveness, Section 13(2) of the Trade Marks Act, according to its wording, would not be a hindrance for registration. According to one model of interpretation, this provision relates only to such technical result which is expected to be reached with the shape to the extent that there is no obstacle for registration when an equal result can be obtained with another shape. Such an interpretation will mean that an exclusively functional shape would be covered by the hindrance when the shape cannot be varied in order to obtain a certain technical result. Another conceivable way to interpret the provision would be to make a total analysis of the elements of the shape of the product and consider whether these are caused by purely technical reasons in relation to the result which is desired. Only if that is the case would there be a hindrance against registration. Where there are several possibilities to obtain a technical result of equal value, but the right to manufacture a product which is advantageous from a manufacturing point of view, is exclusively granted to one manufacturer by way of a trade mark right, the first model of interpretation would grant an exclusive right under the protection of trade mark law for technical solutions which could not be obtained by other means. Moreover, that model would lead to arbitrary and complicated assessments in the registration procedure. For these reasons the provision should be interpreted to be a hindrance to registration of trade marks, the shape of which are solely motivated by the technical result. Then a product which has a shape, which is solely motivated by function will - even if there are alternative means to reach the same technical result - be excluded from protection as a trade mark. This interpretation does not open the possibility for obtaining trade mark protection for products which have a shape which is solely dictated by function.”

Jacob J. generally agreed with this approach, but stated that:-

“I have some minor qualification of Judge Nilsson's interpretation - “Shape which is solely motivated by the technical result”. The difficulty is the word “motivated”. That suggests the question is subjective, thus involving an enquiry to the designer's purpose. That cannot be right, and I do not think Judge Nilsson meant the test to be subjective. So I would pose the enquiry thus: in substance does the shape solely achieve a technical result? I have added the qualification “in substance” because I do not believe that shapes with trivial embellishments or variants are outside exclusion for registrability.”

I think it is clear from this that the application must be refused if the shape of the tine “in

substance solely achieves a technical result.” And the applicant cannot avoid refusal of the application purely on the basis that there are other shapes available from which the same technical result could be obtained.

5 The applicant has identified two features of the tine shape which is the subject of this application which distinguishes it from the shape of other agricultural tines. The first is the design of the top of the tine which incorporates a method of fixing the tine to the power harrow. In my view this feature is not arbitrary. It is clearly dictated by the method selected by the applicant for fixing their tines to their power harrows. Their advertising material emphasises the functional nature
10 of this feature and how it provides a fast and easy method of fixing the tine to the harrow. There is nothing about it which can be said to be unnecessary for the achievement of a technical result. The applicant has argued only lightly to the contrary. The applicant’s main case is that it is the bulbous foot of their tines which is distinctive and, they claim, dictated as much by arbitrary aesthetic reasons as by function.

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Mr Ouwerkerk’s evidence suggests that aesthetic considerations were given some priority at the time of the design of the tine in question. He goes as far as to describe the tine as “much more beautiful” than some other tines. I have to say that I find it surprising that aesthetics played such an important part in the design of an object intended to be pulled through the ground behind a tractor. I am prepared to accept that the design of the tine was intended to produce a “good
20 looking, solid design”, but this could probably be said of most products of a functional nature. Mr Ouwerkerk states that the particular rounded “club” shape chosen to add extra material at the wearing point of the tine was arbitrary. He says that many other designs would have done. The only other possibility he identifies is that the whole of the lower portion of the tine could have
25 been made thicker. Mr Ouwerkerk states that this would not have been very advantageous from an aesthetic point of view. I am not an engineer, but I would have thought that such an approach would also have lead to the use of unnecessary material above the wearing point of the tine and would thus have increased manufacturing cost to no particular benefit. Further, as I have already noted from Mr Linneker’s evidence, agricultural tines appear to have two basic profiles, rounded
30 or more blade-like. These appear to relate to their intended purpose. Thus I do not think it likely that the choice of a basically rounded profile for the shaft of the tine was arbitrary.

I note from Exhibit JSL2 to Mr Linneker's declaration of 1 May 1998 that Lely and others produce a weld on replacement tip for agricultural tines. This suggests that premature wear of such tines is recognised as a problem in the industry. I note also that Mr Weirsma indicates that the applicant has several European patents covering designs intended to prolong the working life of such tines. I have not seen details of these patents and I do not therefore know whether they protect the shape which is the subject of this trade mark application.

Taking the best view I can of the matter, I have come to the conclusion that in substance the shape applied for solely achieves a technical result. Neither of the features identified by the applicant as being distinctive can be said to be unnecessary for the achievement of technical results. The degree of arbitrariness said to be involved in the design of these features amounts to no more than a "trivial embellishment or variant", which Jacob J. found in the Philips case to be insufficient so as to take the sign outside the exclusion for registrability under Section 3(2)(b)

In the same case (at page 309, lines 21-27) Jacob J. stated that:-

"Philips in their advertising over the years have strained every nerve to educate the public that their rotary shaver and its three headed shape work well. The public believe that to be so and when they see that shape they recognise a shaver of the type which they know does work. Primarily the three headed razor is recognised as having an engineering function and for that reason it adds substantial value to the product."

In this case the applicant has educated the public to believe that the fixing end of the tine makes it quick and easy to fix the tine to the harrow. The bulbous end of the "club" tine has been promoted as a means of prolonging the working life of the tine. It therefore appears to me that the relevant public will regard this shape as one of good engineering function and for that reason it is a shape which adds substantial value to the goods. I find that the shape applied for is excluded from registration by Section 3(2)(b) and (c) of the Act.

Objections of this nature cannot be overcome by the applicant showing that the mark has in fact acquired a distinctive character through use. Strictly speaking therefore, it is unnecessary for me to go on and consider the evidence of distinctiveness which the applicant has put forward. Nevertheless, in case I am found to be wrong in my primary findings and for the sake of

completeness, I will do so.

Section 1(1) of the Act is as follows:-

5 In this Act a trade mark means any sign which is capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

10 A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

Section 3(1)(a) & (b) of the Act are as follows:-

The following shall not be registered -

15 a) signs which do not satisfy the requirements of Section 1(1).

 b) trade marks which are devoid of any distinctive character

The proviso to Section 3(1) is as follows:-

20 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.

25 It is apparent from this that the matter must be judged as at the date of application - 31 October 1994. The applicant has filed evidence that they have sold tines in the shape of the mark applied for since 1990. By the date of application the sign applied for had been in use in the UK for just over four years. During this period around 75,000 agricultural tines of the shape in question were sold. I have no evidence before me as to the size of the UK market in agricultural tines and I do not therefore know whether this represents a significant proportion of the market. In the TREAT
30 case (1996 RPC page 281 at 302 lines 25-28) Jacob J. pointed out that it was illogical to assume that use equalled distinctiveness. In the same case Jacob J. pointed out that it was wrong to accept evidence of use (by itself) as evidence of distinctiveness, particularly where the mark applied for had in practice always been used together with another distinctive trade mark. In this case, the shape of the applicant's tine has always been sold under the trade marks "Lely" and

“Club” tine. The applicant’s case must therefore rely to a significant degree, on the survey evidence they have filed and the evidence which illustrates how they have used the sign.

The affirmation of Mr Shanmuganathan explains how the survey evidence was compiled. The following extract from Mr Shanmuganathan’s affirmation explains how the 24 supporting declarations were collected.

“I attended the Cereal Show at the Neville Estate, Wellingore, Nr Lincoln (The Cereals Show) on 12 June 1996 with by colleague Francine Read. Miss Read is no longer with my firm but at that time she was a trainee solicitor employed by my firm. At the Cereals Show Miss Read and I conducted a survey to gauge farmers’ responses regarding the applicants’s “club” tine (the Club Tine). In the morning Miss Read and I conducted the survey together. I conducted the survey and Miss Read observed.

I stopped interviewees at random at the Cereal Show and told them that I was conducting a survey on peoples reaction to and/or recognition of agricultural implements. I did not give the interviewees any other information on the nature and purpose of the survey. Whilst we did not take a note of the number of people who were stopped, a number of people did not wish to take part and apparently did not have the time to answer my questions. If the interviewee agreed to answer my questions I handed them the Club Tine and gave them at most approximately 30 seconds to look at it. I then asked them if they recognised this agricultural implement. A further copy of the Club Tine I handed to interviewees is exhibited to the trade declarations already filed at the Registry in support of this application. If the interviewee recognised the implement, I asked them why they recognised it.

After I had finished asking the two questions referred to above I explained to the interviewees who had recognised the Club Tine because of its shape, that I was a solicitor acting on the behalf of the applicant, and explained the nature and purpose of the survey. After I had explained this I asked the interviewees if I could take their names and addresses to take a declaration from them recording the answers they had given me. If they consented I made a note of their name and address, and a brief note of why they recognised the Club Tine. I did not have these notes typed up but used my hand-written notes to subsequently contact the interviewees.

Whilst we did not keep a record of the number of interviewees that did not recognise the agricultural implement as the Club Tine, I can recall there were only a few people (I believe less than 10) that I stopped, and were willing to answer my questions, failed to recognise the agricultural implement as the Club Tine. In contract there were at least 63 people who had taken part that positively recognised the agricultural implement as the Club Tine. In the afternoon at the Cereal Show Miss Read and I conducted surveys independently. I am informed by Miss Read and verily believe that Miss Read adopted the methodology in conducting the survey that I had used in the morning and did not

deviate from this. Also, as I did in the morning, Miss Read took a handwritten note of the names and addresses of the interviewees who recognised the Club Tine and were willing to give declarations and a brief note of why they recognised the Club Tine. I am informed by Miss Read and verily believe that she did not have these notes typed up, but used them to subsequently contact the interviewees. I am also informed by Miss Read and verily believe that, while she did not keep a written record of interviewees that did not recognise the agricultural implement as the Club Tine, she recalls that very few interviewees who were willing to answer her questions failed to recognise it as the Club Tine.”

Mr Shanmuganathan goes on to explain how Miss Read and he subsequently contacted the interviewees who had given their names and addresses and had further conversations with them which resulted in Mr Shanmuganathan and Miss Read drafting declarations which were subsequently forwarded to the interviewees. The 24 sworn declarations in evidence are as a result of these subsequent conversations.

The survey evidence is open to a number of obvious criticisms. The most obvious criticism is that the persons conducting the survey failed to take a note of the number of people who did not recognise the shape of the applicant’s tine as denoting their goods. Further, it appears clear that the answers given in the 24 declarations referred to above are as a result of telephone conversations which took place between the interviewers and the interviewees some time after the survey was conducted. In the light of these criticisms I do not think it would be right to regard the survey evidence as giving any particular indication of the degree of recognition of the shape of the applicant’s tine within the farming industry. Nevertheless, I believe this evidence does show that there is a significant degree of recognition of the shape of the applicant’s tine. In the TREAT case (1996 RPC at page 304 lines 41-43) Jacob J. stated that:

“Overall there is a further point, mainly that recognition is not the same thing as perception as a trade mark - as not only recognising the word but as regarding it in itself, as denoting the goods of one particular trader.”

In assessing the likelihood that the recognition shown in the evidence is recognition as a trade mark, I must bear in mind the evidence of how the mark has been used. The applicant’s promotional material includes pictorial representations of the mark applied for. The features of the applicant’s tine which are said to be distinctive have been promoted as features of good

engineering design. In the Philips case Jacob J. said:-

5 “Philips can never get away from the fact that the sign primarily denotes function. More use could not make any difference. The sign can never only denote shavers made by Philips and no one else because it primarily says ‘here is a three headed rotary shaver’.”

10 It appears to be that similar considerations apply here. The shape of the applicant’s tine primarily says “here is an agricultural tine with two new features which will make it easier to fit and prolong its working life”. If that is right the sign is incapable of denoting only the goods of the applicant.

15 There is some suggestion that the applicant has protected the shape of the tine applied for by way of a European patent. Even if that is so it does not, of itself, mean that the shape cannot be registered as a trade mark. However, if it is so, I believe it provides further support to my finding that the recognition shown in the evidence is not recognition as a trade mark. As Lord Davey said in Cellular Clothing Company Limited v. Maxton and Murray (1899 AC 326 at 344):-

20 “.....the evidence of persons who come forward and say that the name in question suggest to their minds and is associated by them with the plaintiff’s goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that its monopoly lasted, and therefore there was nothing to compare it with”

25 The same must apply where the sign in question is not the name of the article but the shape of the article itself.

30 I conclude that the shape of the applicant’s tine is incapable of distinguishing the goods of one undertaking and devoid of any distinctive character. I further find that, at the date of application, the shape had not acquired a distinctive character as a trade mark as a result of the use made of it. The trade mark is therefore excluded from registration by Sections 3(1)(a) and (b) of the Act.

In this decision I have considered all the evidence placed before me and all the arguments submitted on the applicant's behalf. The application is refused under Section 37(4) of the Act because the trade mark is excluded from registration by Sections 3(1)(a) and (b) and 3(2)(b) and (c) of the Act.

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Dated this 7 Day of January 1999

10 **Allan James**
For the Registrar
The Comptroller General