

**TRADE MARKS ACT 1994  
AND  
THE TRADE MARKS (INTERNATIONAL REGISTRATION) ORDER 1996**

**IN THE MATTER OF  
INTERNATIONAL REGISTRATION NO. 728481  
TO PROTECT A TRADE MARK IN CLASSES 1 and 3**

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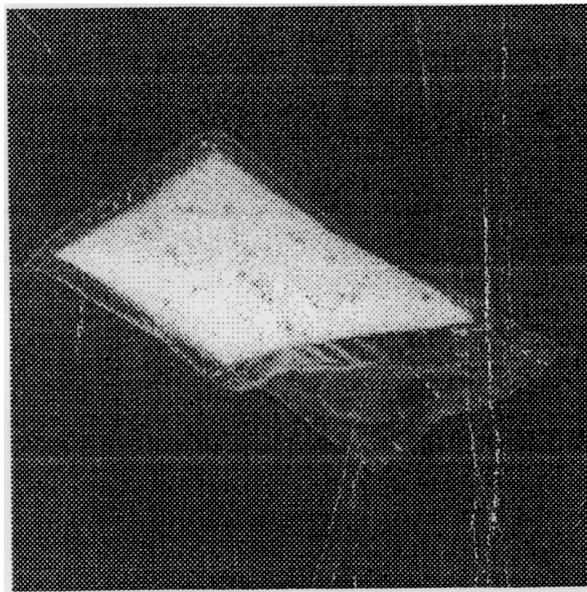
5 **IN THE MATTER OF  
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TO PROTECT A TRADE MARK IN CLASSES 1 and 3**

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**DECISION AND GROUNDS FOR DECISION**

15 On 20 January 2000, SA Henkel Belgium N.V. of 66, Havenlaan, B-1210, Bruxelles, Belgium,  
on the basis of an International Registration, requested protection in the United Kingdom  
under the provisions of the Madrid Protocol of the mark:

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The following words appear beneath the mark on the form of notification:

45 *Colors claimed: red, white and blue.*

The International Registration is numbered 728481 and protection is sought in respect of:

CLASS 1: Chemical products for industrial purposes; descaling preparations, other than for household purposes.

5 CLASS 3: Soaps, washing and bleaching preparations for washing-up and laundry use; stain removers; cleaning preparations and polishing preparations; chemical preparations for cleaning wood, metal, glass, plastic, stone, ceramics, china and textiles.

10 On 8 May 2000, the notification of a total refusal of protection by the United Kingdom Patent Office was issued. Objection was taken to the mark under paragraphs (a), (b) and (c) of Section 3(1) of the 1994 Trade Marks Act on the grounds that the mark is incapable of distinguishing the goods of one undertaking from those of other undertakings and also because  
15 it consists exclusively of a representation of the goods which is devoid of any distinctive character and may be required in trade by others.

Through Mr J D McCall of W P Thompson & Co, their UK trade mark agents, the holder requested a hearing. At the hearing the objection under Section 3(1)(a) was waived and no  
20 further mention need be made of this. The objections under Sections 3(1)(b) and (c) were maintained and notice of final refusal under Article 9(3) of the Trade Marks (International Registration) Order 1996 was issued on 18 October 2000. I am now asked by the holder's agents, W P Thompson & Co, under Section 76 of the 1994 Trade Marks Act and Rule 62(2) of the Trade Marks Rules 2000 to state in writing the grounds of the decision and the  
25 materials used in arriving at it.

Article 3 of the 1996 Order states that protection shall depend upon whether an equivalent national application would succeed. The relevant part of the 1994 Act under which objection was taken is as follows:

30 "3 - (1) The following shall not be registered -

- (b) trade marks which are devoid of any distinctive character.
- (c) trade marks which consist exclusively of signs or indications which may  
35 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,

40 Provided that, a trade mark shall not be refused registration by virtue of paragraphs (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."

No evidence of use has been put before me, therefore the proviso to this Section of the Act does not apply and I have only the prima facie case to consider.

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5 The mark consists of a two-dimensional representation of the goods, which appear to be contained in a transparent sachet or pack divided into two segments. The first segment appears to contain a white powder with pale red specks, the second contains a round, or possibly oval, blue tablet. As such I consider it conveys to the purchasing public a representation of a ready-portioned sachet or pack containing two separate active ingredients for use in e.g. a dishwasher or washing machine. From my own knowledge of such everyday household products the packaging does not appear to be unusual and merely serves as an alternative to the large containers or packs of compressed powder tablets which are also available. Indeed "sachet" is described in the Concise Oxford Dictionary, 10<sup>th</sup> Edition as "a small sealed bag or packet containing a small quantity of something", and in Collins English Dictionary, 2<sup>nd</sup> Edition as "1. A small sealed envelope, usually made of plastic or waxed paper, for containing cream, shampoo etc." I consider this demonstrates the packaging concept shown has been around for some time and I do not see anything novel or original in the way the sachet is presented or that the goods can be seen through it.

15 At the hearing the agent argued that this application is on a par with the "coloured capsules" cases considered under the 1938 Act, i.e. images of pharmaceutical tablets which had one half being transparent so that the multi-coloured granules within it could be seen against the transparent surface - rather like the present case whereby the two-dimensional mark shows the coloured powder/tablet against the clear surface of the packaging.

20 I cannot accept that this case is on "all fours". The earlier cases proceeded on substantial evidence of use and on the particular facts demonstrated in support of those cases. In the present case no evidence has been filed and therefore I can only consider the prima facie case for the mark as filed. In my view this is the sort of mark that requires the public to be educated to the idea it is a trade mark at all, let alone a distinctive one.

25 Therefore, I consider the mark is devoid of any distinctive character and is not acceptable, prima facie, for registration under Section 3(1)(b) of the Act. In this regard I am guided by the comments of Mr Justice Jacob in the British Sugar Plc and James Robertson and Sons Ltd case (the TREAT case), 1996 RPC 281, comments which also go to Section 3(1)(c) of the Act when he said:

35 "Next, is "Treat" within Section 3(1)(b)? What does devoid of any distinctive character mean? I think the phrase requires consideration of the mark on its own, assuming no use. Is it the sort of word (or other sign) which cannot do the job of distinguishing without first educating the public that it is a trade mark? A meaningless word or a word inappropriate for the goods concerned ("North Pole" for bananas) can clearly do. But a common laudatory word such as "Treat" is, absent use and recognition as a trade mark, in itself (I hesitate to borrow the word from the old Act "inherently" but the idea is much the same) devoid of distinctive character. I also think "Treat" falls within Section 3(1)(c) because it is a trade mark which consists exclusively of a sign or indication which may serve in trade to perform a number of the purposes there specified, particularly to designate the kind, quality and intended purpose of the product".

I believe the purchasing public are used to seeing such packaging for household goods or for goods used in industrial cleaning and are unlikely to consider the mark, the subject of this application, as denoting trade origin. The powder shown is, predominantly, white which is a very common base colour for the goods. Indeed, from my own experience of such everyday products I believe it could be said that white powder, with or without specks of another colour, is common to the trade. Furthermore, the specks of red are almost de minimis in the mark and would create little impact on the consumer in its overall impression of the mark. The blue tablet simply indicates another element of the pack which contains an item with a complementary purpose. Therefore, the representation of the pack, taken as a whole, will simply indicate to the prospective customer that it contains goods with different functions to achieve an overall purpose e.g. cleaning clothes or dishes. I am further guided in this respect by the comments in the Procter & Gamble Ltd case, 1999 RPC 673 at page 680 lines 42-49 where Walker L J says:

"Despite the fairly strong language of Section 3(1)(b), "devoid of any distinctive character" - and Mr Morcom emphasised the word "any" - that provision must in my judgement be directed to a visible sign or combination of signs which can by itself readily distinguish one trader's product - in this case an ordinary, inexpensive household product - from that of another competing trader. Product A and Product B may be different in their outward appearance and packaging, but if the differences become apparent only on close examination and comparison, neither can be said to be distinctive ....."

I therefore conclude that the mark applied for is devoid of any distinctive character and consists exclusively of a sign that may serve, in trade, to designate the kind and intended purpose of the goods and is thus excluded from protection in the United Kingdom under Sections 3(1)(b) and (c) of the 1994 Act.

In this decision, I have considered all the documents filed by the applicant and all the arguments submitted to me in relation to this designation and, for the reasons given, it is refused under the terms of Articles 3 and 9(3) of the Trade Marks (International Registrations) Order 1996 (as amended) because it would fail to qualify under Sections 3(1)(b) and (c) of the Act.

Dated this 7<sup>th</sup> day of February 2001

R A Jones  
For the Registrar  
The Comptroller General