

O-162-03

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2229137
BY MATSUSHITA ELECTRIC WORKS LTD
TO REGISTER A TRADE MARK IN CLASS 10**

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BACKGROUND

1. On 12 April 2000, Matsushita Electric Works Ltd of 1048, Oaza-Kadoma, Kadoma-shi, Osaka 572, Japan, applied under The Trade Marks Act 1994 for registration of the trade mark **Blood Pressure Watch and device** in respect of "Blood pressure meters". A representation of the mark is shown below:



2. Objection was taken under Sections 3(1)(b) and (c) of the Act because the mark consists of the words "Blood Pressure Watch" and a device of a heart, the whole being a sign which may serve in trade to designate the purpose of the goods i.e. blood pressure monitoring devices.

3. A hearing took place before me, where the applicant was represented by Mr S G Knott of Mathisen, Macara & Co, their trade mark attorneys. I should add that this case was discussed at the same time as a co-pending application, 2220267, for the words alone. The agent acknowledged that the device present in this mark did not affect the issue one way or the other as the device of a heart does not add distinctive character to the mark and is commonly used given the purpose of the goods. The outcome, therefore, resides in the acceptability or otherwise of the words present in this mark. I maintained the objections under Sections 3(1)(b) and (c). A period of time was allowed for the applicant to file independent expert evidence regarding the proper term for the product, although I indicated it may not persuade me as to how the relevant public would perceive the mark. The agent subsequently submitted evidence which I did not consider to be persuasive and the application was therefore refused.

4. Following refusal of the application under Section 37(4) of the Act, I am now asked under Section 76 of the Act and Rule 62(2) of the Trade Marks Rules 2000 to state in writing the grounds of my decision and the materials used in arriving at it.

The Law

5. Section 3(1)(b) and (c) of the Act reads as follows:

"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 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,

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."

6. 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.

The Applicant's Arguments

7. The agent referred to the criteria set out in the Baby-Dry case [2002] ETMR 3 and argued that the product is not a "watch" but a "blood pressure monitor". Therefore, the mark applied for used the word "watch" fancifully and was not the usual way of designating the relevant goods.

8. Exhibits were provided to show how the applicant used the mark. Copies are provided at Annex A to this decision. Further exhibits were also provided to show the use by others of different terms to describe blood pressure monitors that can be worn on the wrist. The terms used include "digital wrist monitor", "wrist blood pressure monitor", "wrist type digital blood pressure monitor". None of the examples provided showed use of the words present in the mark applied for.

DECISION

9. The mark consists of the words "Blood pressure" and "watch". The Concise Oxford Dictionary, Tenth Edition, gives the following definitions.

"blood pressure. n. the pressure of the blood in the circulatory system, which is closely related to the force and rate of the heartbeat and the diameter and elasticity of the arterial walls."

"watch

.....

n.l. a small timepiece worn typically on a strap on one's wrist."

10. From the above it is clear that the term "watch" has a specific meaning as a timepiece. However, when qualified by the words "blood-pressure" I consider the meaning is self-evident i.e. a method of measuring blood pressure which is worn, like a watch, on the wrist. Indeed the examiner for co-pending application 2220267 (words only) identified the nature of the product, when examining the application, without the benefit of the exhibits provided later. This indicates to me that the combination forms a natural description of the product.

11. In response to the agent's submissions that terms other than the applicant's mark are used to describe the product, I provided examples of use of the term "blood pressure watch". The first example shows reference to the applicant's product where "ISIS Products" use the term descriptively - "The blood pressure watch couldn't be simpler to use, you only have to wrap the watch around your wrist and switch it on." A copy is provided at Annex B.

12. I also provided use by others of the term applied for - "HG140 MOBIL The blood pressure watch for active people" which also refers to "Fully automatic, oscillometric blood pressure watch." Also, "NUMED" refers to "klok - Blood Pressure Watch", "Goode" refers to "Our major products are blood-pressure meter and blood-pressure watch" and an article refers to "Heartbeat Monitoring" where "In June 1998, BBC News Online reported that Europe's first telemedicine monitoring centre opened in Wales. Although such a system is new to the UK, similar ones have been running in the United States for around six years and so is well proven. Early systems required a personal computer to be installed in the patient's home which collated and stored the data. It collected information sent from a blood-pressure watch and several electrocardiogram electrodes" All the above references, taken from the Internet and passed to the agent, are provided at Annex C.

13. In my view, the above use confirms that the term "blood pressure watch" is natural language and is one of the apt terms used to describe such a product.

14. I do not dispute that alternatives exist, such as those referred to by the applicant. However, I bear in mind the comments of Mr Hugh Laddie QC, as he then was, in the PROFITMAKER decision, 1994 RPC 613 at page 616, lines 38-44:

"The fact that honest traders have a number of alternative ways of describing a product is no answer to the criticism of the mark. If it were, then all those other ways could, on the same argument, also be the subject of registered trade marks. The honest trader should not need to consult the register to ensure that common descriptive or laudatory words, or not unusual combinations of them, have been monopolised by others."

15. Although this decision was taken under the 1938 Trade Marks Act I consider the comments are still equally valid.

16. The agent referred to the BABY-DRY case, a judgement of the European Court of Justice, Case C-383/99P, on the scope and purpose of Article 7(1)(c) of the Community Trade Mark Regulations. (Equivalent to Section 3(1)(c) of the UK Trade Marks Act.) Paragraphs 37, 39 and 40 of the judgement are reproduced below:

"37.- It is clear from those two provisions taken together that the purpose of the prohibition of registration of purely descriptive signs or indications as trade marks is, as both Procter & Gamble and the OHIM acknowledge, to prevent registration as trade marks signs or indications which, because they are no different from the usual way of designating the relevant goods or services or their characteristics, could not fulfil the function of identifying the undertaking that markets them and are thus devoid of the distinctive character needed for that function."

"39.- The signs and indications referred to in Article 7(1)(c) of Regulation 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 trade 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 to designate the goods or services or their essential characteristics is apt to confer distinctive character on the word combination enabling it to be registered as a trade mark."

17. These paragraphs indicate that only marks which are no different from the usual way of designating the relevant goods or services or their characteristics are now debarred from registration by Section 3(1)(c).

18. As I have found that the words applied for are no different from one of the usual ways of designating the relevant goods and services and that the heart device adds no distinctive character given the heart-related purpose of the goods, it follows that I consider the mark applied for consists exclusively of a sign which may serve in trade to designate the kind or quality of the goods and is therefore, excluded from registration by Section 3(1)(c) of the Act. For the same reasons, I consider the mark to be devoid of any distinctive character and therefore not acceptable for registration under Section 3(1)(b) of the Act.

19. In this decision I have considered all the documents filed by the applicant 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) and (c) of the Act.

Dated this 17TH day of June 2003

R A JONES
For the Registrar
The Comptroller General