

MR HOBBS: On 13th August 1998 Benckiser NV applied under section 54 of the Trade Marks Act 1994 and the provisions of the Trade Marks (International Registration) Order 1996 for protection of international registration number 700785 in the United Kingdom.

Henkel KGaA is now the holder of the international registration following the change of proprietorship recorded on 4th October 1999.

In the request for protection, the relevant mark was described as: "the shape of a tablet consisting of the combination of two layers in the colours green and white." The colours green and white were claimed as elements of the mark. The mark was graphically represented in the form shown in the annex to this decision.

Protection was requested in respect of the following goods in Class 1:

"Chemical products for industrial purposes; descaling agents; water softeners."

and the following goods in Class 3:

"Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; detergents, decalcifying and descaling preparations; laundry additives."

The Registrar gave notice of refusal of protection under Articles 3 and 9 of the 1996 Order on the basis that the mark was excluded from registration by section 3(1)(b) of the Trade

Marks Act 1994. The notice of final refusal was issued on 30th March 2000.

Written reasons for the refusal of protection were issued by Mr Ian Peggie on behalf of the Registrar of Trade Marks on 27th June 2000. His assessment of the relevant mark, which was not said to have acquired a distinctive character through use in the United Kingdom, was as follows:

"The mark consists entirely of the shape of a round tablet with a bevelled edge consisting of the combination of two layers in the colours green and white. From my own knowledge and experience of such everyday products I do not see anything novel in these elements of the mark. It is a basic geometrical shape and there is nothing fanciful about selecting a round tablet shape for the manufacture of solid detergents. White is a natural colour for cleaning agents and I see nothing unusual in the presence of a single contrasting colour which may, in addition to being decorative, indicate the presence of different ingredients or scents. These features do not make the shape of the tablet recognisable as a trade mark in the sense that a typical consumer of the product would deduce that the tablets emanate from a particular source. Whilst it is clear that a combination of non-distinctive elements can create a distinctive whole I do not accept that this is the position with this mark. I do not see that there is anything in the shape of this tablet in the

colours green and white that would serve to distinguish the goods of the applicant from those of other traders."

His conclusion was:

"The public are well used to seeing coloured tablets of this sort of shape. At best it may be a slight variant on other such tablets but to my mind there is nothing memorable or distinctive about it. I do not see that there is anything in the shape and colour combination of this tablet that would serve to distinguish the goods of the holder from those of other traders. It is my view that the shape applied for will not be taken as a trade mark without first educating the public that it is a trade mark. It follows that this application is debarred from prima facie acceptance by section 3(1)(b) of the Act."

I would observe at this juncture that Mr Peggie's reasons for refusing protection generally accorded with those given by the Boards of Appeal of the Community Trade Marks Office in numerous decisions refusing applications to register detergent tablets in round or rectangular form as three-dimensional trade marks.

The case law of the Community Trade Marks Office in this area is noted in paragraph 14 of the decision of the First Board of Appeal in case **R436/1999-1 (Unilever NV's Application)** of 14th September 2000. A full list of the many pertinent appeal decisions can be found by accessing the on-

line index of decisions maintained by the Community Trade Marks Office.

I should also observe at this juncture that the Registrar's practice in the United Kingdom is a little more lenient than that prevailing in the Community Trade Marks Office in that tablets with three-colour combinations may be accepted prima facie for registration if the colour combination can be regarded as arbitrary and striking and acceptance is all the more likely if there is some special feature of shape in the tablet presented for registration.

On 20th July 2000 Henkel gave notice of appeal to an Appointed Person under section 76 of the Trade Marks Act 1994 against the Registrar's refusal to extend the protection of its international trade mark registration to the United Kingdom.

In its grounds of appeal Henkel maintained that the mark put forward for protection was intrinsically distinctive. It submitted that the mark would, by its very nature, communicate the fact that the goods with reference to which it was used recurrently were those of one and the same undertaking.

My approach to the question of registrability under section 3(1) of the 1994 Act is as indicated in **Reemtsma's Application** 7th September 2000; see pages 6 to 10 of that decision under the heading "Section 3(1)(b) of the 1994 Act".

The get-up (in terms of the shape and colours) of the tablets I am now considering must be sufficient in and of

itself to denote origin in order to be separately registrable as a trade mark under the Act. The higher the degree of individuality it possesses, the greater the likelihood of it possessing trade mark significance in the perceptions and recollections of the average consumer.

It is, therefore, appropriate to consider the extent to which the relevant features of shape and colour may have broken new ground in the presentation of Class 1 and Class 3 goods in the United Kingdom at the relevant date and what effect that might have upon the perceptions and recollections of the average consumer of such goods.

Henkel has relied on submissions without evidence in support of its challenge to the Registrar's position in that connection. I am thus left to rely on my own general knowledge and experience of the manner and circumstances in which consumer goods are normally bought and sold in order to determine this appeal.

It seems to me that the tablet shape in question represents only a minor variation of a basic geometric shape. The colours have a degree of visual impact, but not to an extent that I would regard as particularly striking. There is every likelihood, in my view, that they would be taken to indicate the presence of two active ingredients in the relevant tablets and, as a corollary to that, every likelihood that they would not be perceived as possessing significance in terms of the trade origin of the goods.

The question is whether the degree of individuality imparted to the tablets by the features of shape and colour in combination is sufficient to render them not merely distinguishable from other such goods, but distinctive in terms of trade origin.

Giving the matter the best consideration I can, I think that the appearance of the tablets put forward for registration is not sufficiently arresting to perform the essential function of a trade mark. In the absence of distinctiveness acquired through use, the mark put forward for registration was, in my view, devoid, by which I mean unpossessed, of a distinctive character, and therefore excluded from registration by section 3(1)(b) of the Act at the relevant date.

I think the Hearing Officer's assessment of the tablet was in substance correct and I am not persuaded by the applicant's submissions to the contrary effect. The appeal will therefore be dismissed.

Does anybody want to say anything about costs?

MR JAMES: I was not going to ask for any costs.

MR HOBBS: In that case, we will follow the usual practice in ex parte appeals. There will be no order for costs.

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