

O-333-03

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

**IN THE MATTER OF APPLICATION NO 713167
IN THE NAME OF RECKITT BENKISER N.V.**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 70486 BY
ROBERT MCBRIDE LIMITED**

**TRADE MARKS ACT 1994 and
The Trade Marks (International Registration) Order 1996**

**IN THE MATTER OF application No 713167
in the name of Reckitt Benkiser N.V.**

And

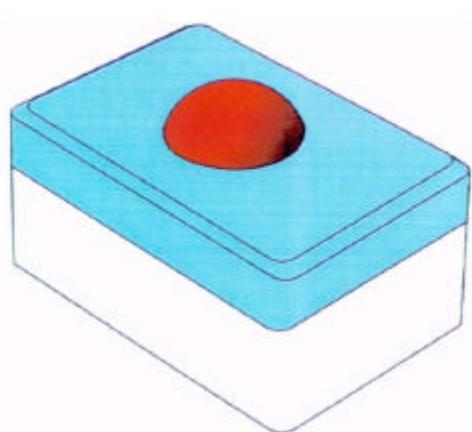
**IN THE MATTER OF opposition thereto under No 70486
By Robert McBride Limited**

Background

1. On 27 April 1999, Benkiser N.V. registered a trade mark under the Madrid Protocol, designating the United Kingdom as a country to which protection was sought to be extended.
2. The trade mark is protected in Classes 1 and 3 in respect of the following goods:

- | | |
|----------------|---|
| Class 1 | Chemical products for industrial purpose; water softening preparations; all aforementioned goods with or without a disinfective component. |
| Class 3 | Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; carpet cleaners; detergents (other than for use in manufacturing operations and medical purposes); decalcifying and descaling preparations for household purposes; fabric softeners and other similar laundry additives; all aforementioned goods with or without a disinfective component. |

3. The mark applied for is as follows:



4. On 18 December 2000, Robert McBride Limited filed notice of opposition to this application. The grounds of opposition are in summary:

1. **Under Section 3(1)(b)** because the mark is devoid of distinctive character.
2. **Under Section 3(1)(c)** because the mark consists exclusively of shapes and colours which may serve in trade to designate the kind, quality, intended purpose or other characteristic of the goods for which protection is sought.
3. **Under Section 3(1)(d)** because the mark consists exclusively of signs or indications which have become customary in the bona fide established practices of the trade.

5. Section 3(6) had been included in the grounds of opposition but this was subsequently withdrawn.

6. The applicants filed a Counterstatement in which they deny all of the grounds on which the opposition is based.

7. Both sides request that costs be awarded in their favour.

8. Both sides filed evidence in these proceedings. The matter came to be heard on 25 March 2003, when the applicants were represented by Mr Roger Wyand of Her Majesty's Counsel, instructed by Grant Spencer Caisley & Porteous, their trade mark attorneys, and the opponents by Mr James Mellor of Counsel, instructed by Marks & Clerk, their trade mark attorneys.

Opponents' evidence

9. This consists of two Witness Statements, both dated 31 July 2001, from Julia Bradley, the head of marketing of Robert McBride Ltd, a position she has held since 1999. Ms Bradley states that she has been actively engaged in the textile and dishwashing business since 1988, and that she makes her statement on the basis of her personal knowledge and the exhibits produced and shown to her.

10. Ms Bradley begins her first statement by referring to the shape and colours of the mark applied for, and the range of goods for which protection is sought, asserting that the shape of the tablet is commonplace and ensures the correct dosage of detergent. She says that these compressed tablets of powder are round or rectangular in shape, were initially white although later containing speckles (that may or may not denote an active ingredient) in much the same way as loose washing powders have contained more than one colour element. Ms Bradley says that this developed into the use of tablets with colours in separate layers, the colours denoting their multi-functional nature, which operates as a substitute for separate dosing of machines with pre-wash chemicals, cleaning preparations, softening agents, bleaches and rinsing agents. Ms Bradley says that the coloured layers came about to promote these functions to the consumer.

11. Ms Bradley continues by asserting that the colours of the application are commonly used in industry. She refers to exhibit JBA which consists of photocopies of packaging that depicts detergent tablets in either circular or rectangular shape. These are either in single (white) colour, or two colour combinations, the second colour being either green, or more usually a blue/grey, in a separate layer, speckled in the white, or in one case as a tablet within a tablet. All are sold under a brand name and in some instances a representation of the tablet is shown on the exterior packaging. As stated by Ms Bradley, the evidence shows detergent tablets of this type have been introduced to the market by a number of traders.

12. Ms Bradley says that the colours green, white, red, yellow, pink and blue have commonly been used in industry to denote particular functions, for example, blue for high performance, white to indicate cleanliness, red to indicate a strong anti-grease agent, yellow to indicate lemon fragrance, etc. She says that the colour coding is used in all domestic cleaning products of this type and that the colours say something to the consumer about the manner in which the product performs its job. Ms Bradley says that such two-colour tablets are commonly referred to as “two phase”, “dual action” or “double action” tablets.

13. Ms Bradley asserts that through the promotional activities of traders, including the applicants, the functionality of colours has become known to the public, who have also been educated to the dual or double-action nature of such tablets, in support referring to exhibit JBB. The exhibit consists of further photocopies of packaging, containing clear references to the functions of the coloured elements, making statements such as “2 in 1”, “double action” and “dual action” and in the case of the Finish Powerball, the following descriptions related to the coloured elements:

“The white layer cleans all traces of dirt away, for a spotless and brilliant finish.”

“The blue layer breaks down and lifts off the dried-on food residue.”

“New Finish tablets have the revolutionary POWERBALL which contains unique StainSoakers. The POWERBALL starts to dissolve instantly to release the StainSoakers which get to work straight away, soaking and softening really dried-on food residue such as baked-on egg and cheese sauces.”

14. Ms Bradley refers to the development from single colour tablets, to two-layer and three-layer tablets, and to the “marketing advantage” gained by promoting this technical functionality to consumers. She refers to exhibits JBC and JBD which consist of details of trade mark applications for two-layered tablets made in the UK and Community Trade Mark Offices. Ms Bradley asserts that three layer or three colour tablets such as the designs of the applications in suit are no more distinctive than the two layer tablets detailed in the exhibits, the addition of the third colour or of a “Powerball” pre-wash element merely reflects the marketing of a third functional element. She refers to exhibit JBB saying that this shows examples of the type of marketing used by traders, including the Finish Powerball. Ms Bradley concludes her statement saying that the public has been educated to the fact that the colours denote functionality, not origin.

15. Ms Bradley begins her second Witness Statement saying that the “current generation” of dishwashing detergents in tablet form have been around since 1994, and since 1998 in the case of laundry tablets. She says that these were initially regarded simply as a compressed form of powders, and as they became more sophisticated traders began to market the tablets by highlighting the functions performed, Ms Bradley making particular reference to a campaign relating to a Finish two-colour tablet undertaken by the applicants in 1998. She goes on to give a chronology of when different traders entered the market, the colours of their tablets, and volumes of sales, which apart from the applicant’s FINISH dual-layer tablet and the proctor & Gamble Ariel tablet were all introduced after the relevant date in these proceedings. Ms Bradley refers to exhibits JBB1 and JBB2, which consist of packaging and a promotional video relating to the Finish Powerball, Ms Bradley highlighting that both explain the functionality of the different coloured elements, which are as described above.

Applicants’ evidence

16. This consists of two Statutory Declarations. The first is dated 7 May 2002 and comes from Claire Christina Hutchinson, a trade mark attorney with Grant Spencer Caisley & Porteous, the applicants’ representatives in these proceedings.

17. Ms Hutchinson refers to a visit to a Sainsbury’s superstore in order to review and purchase laundry and dishwasher products, exhibit CCH1 being a list of the products purchased. Ms Hutchinson says that she did not purchase the applicants’ products as she already had examples in her possession, copies of the packaging being shown as exhibit CCH. Exhibit CCH3 consists of copies of the packaging for the brands listed in exhibit CCH1. Ms Hutchinson says that none of the products contains “any code which would enable a purchaser to draw any conclusions about the function of the product from the colours of the tablet.” which I take to mean there is no consistency in the colours used for a particular function by the different traders.

18. In most instances the tablets that consist of layers of colour state, or at least have some indication that there is a particular function performed by one or both layers, for example Surf state that the white layer gives a concentrated deep clean and the top coloured layer releases freshness, in one case using the colour yellow to indicate “lemon fresh”. The Bold “Active Fresh” tablet appears to be in white alone, but describes itself as “2 in 1” stating that it softens, freshens, makes ironing easier, and no doubt cleans. The Sainsbury’s brand lemon fresh dishwasher powder is in a yellow bottle, and their “3 in 1 lemon fresh dishwasher tablet” uses yellow on the packaging with the description “now with salt action - with built in rinse aid”. ASDA also describe their three layer dishwasher tablets as “3 in 1” and “triple action cleaning”. A three layer tablet sold by Safeway under the name Cyclon is also described as triple action and depicts the tablet with the three coloured layers separated, with the description:

“Yellow layer

rapidly dissolves first to release the enzymes which soak and soften dried in food residues.

White layer

Dissolves next to remove loosened food residues and release active oxygen which tackles stubborn stains like tea and coffee.

Green layer

Finally dissolves to remove any remaining stains completely. It also contains special ingredients which effectively counteract lime scale, leaving your dishes looking bright and shiny.”

19. The Sun Optimal tablet is depicted as a two colour - three layer tablet, with the statement “3 in 1” above the image of the tablet, and the description “detergent + rinse aid + salt” placed below. The side of the packaging contains a pictorial representation of this statement. The Tesco dishwasher detergent tablet is depicted and described in the same terms and in a very similar way.

20. Exhibit CCH2 consists of photocopies of the packaging for the applicants’ Finish Powerball products, including the mark under opposition. The lemon varieties are indicated by the use of yellow on the packaging. Each shows the tablet separated into its three component parts, each element linked to a statement relating to its function, for example, in relation to the mark in suit it states:

“The white layer cleans all traces of dirt away for a brilliant finish.”

“The blue layer breaks down and lifts off the dried-on food residue.”

“The POWERBALL contains unique StainSoakers which soak and soften really dried-on food residue such as baked-on egg and cheese sauces.”

21. Ms Hutchinson refers to a second visit to the store during which she reviewed all of the laundry products shown in the list given as exhibit 4, reiterating that she did not find any reference to a code that would enable a purchaser to draw any conclusions about the nature of the product from the colours of the tablet, although does accept that yellow is frequently used to denote the presence of lemon. She says that she found most of the tablets viewed to be either round or rectangular, unlike the applicants’ product which is different and distinctive, both in shape and colour configuration.

22. The second Statutory Declaration is dated 13 May 2002 and comes from Keith Edwards, Marketing Director of Reckitt Benkiser (UK) Limited, a position he has held since 1989. Mr Edwards states that his experience in the marketing of domestic cleaning products spans a period of more than twenty years.

23. Mr Edwards refers to exhibit KE1, which consists of details of the marks applied for by his company, including the mark in suit, that have been opposed by Robert McBride Limited. He refutes the assertion that the shape as a whole is non-distinctive. Mr Edwards refers to exhibit KE2, which consists of details of two applications to register layered detergent tablets, made by

the opponents and opposed by his company. He gives his opinion on Ms Bradley's evidence relating to the common nature of certain shapes and colours, and drawing a distinction with his company's mark. Mr Edwards goes on to give a critique of the examples of the use of colours in detergent tablets exhibited by Ms Bradley, distinguishing his company's tablet as being aesthetically interesting and unusual, designed to catch the consumer's eye as something special and unique associated exclusively with his company. He also states that many products are multi-functional without being multi-coloured.

24. He goes on to explain why he considers the colouring of ingredients in a different manner does not detract from the registrability of the shape and colour configuration of the tablet as a whole. He refutes the assertion by Ms Bradley that there are standard colours or a colour code used in detergent tablets. He comments on the results of his review of multi-function tablets on the market, mentioning in particular the Safeway Cyclon, Sun and Sainsbury's tablets, noting that particular traders vary their use of colour.

25. Mr Edwards comments on the decisions mentioned by Ms Bradley, and to the registration of a mark by Cadbury's, details of which are shown as exhibit KE3. He asserts that the packaging of his company's product (an example of which is shown as exhibit KE4) and the related advertising encourages the consumer to see the shape as a trade mark. Mr Edwards sets out his recollections of the history and development of the detergent tablet and his company's involvement, highlighting what he sees as inaccuracies in Ms Bradley's statement.

26. That concludes my review of the evidence insofar as it is relevant to these proceedings.

Decision

27. The opposition is based on Sections 3(1)(b), 3(1)(c) and 3(1)(d). Those sections read as follows:

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

- (a) ...
- (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,
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade:

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.”

28. In relation to Section 3(1)(b), Mr Justice Jacob in *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281 said:

“Next is “TREAT” within Section 3(1)(b). What does devoid of 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?”

29. In *Procter and Gamble v OHIM, Case C-383/99* (the BABY-DRY case), the ECJ indicated that Section 3(1)(c) should be regarded as follows:

“The signs and indication 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.”

30. In relation to Section 3(1)(d), the ECJ has said in *Merz v Krell GmbH, Case C-517/99*, that:

“It must first of all be observed that, although there is a clear overlap between the scope of Article 3(1)(c) and 3(1)(d) of the Directive, marks covered by Article 3(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the trade mark is registered.”

31. In *Benckiser NV’s* appeal in respect of International Registration No. 700785, Geoffrey Hobbs QC looked at the question of the registrability of the two-layered tablet in the following way:

“My approach to the question of registrability under section 3(1) of the 1994 Act is as indicated in Reetsma’s application 7 September 2000; see pages 6 to 10 of the 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 or shape and colours 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.”

32. To this I would add the decision of Mr Justice Laddie in *Kabushiki Kaisha Yakult*

Honsha's application [2001] RPC 756, an appeal against the Registrar's refusal to register the shape of a bottle as a trade mark. In his decision Mr Laddie put the position as follows:

“Where inherent distinctiveness is concerned, the Registry has to find that the mark performs the function of identifying origin even before the public is educated that it is to be so used for that purpose. Where invented, non-descriptive word marks are concerned, it may be easy to come to such a finding. But where a container is in issue it may well be much more difficult. As Mr Thorley rightly conceded, the fact that a container is unusual or attractive does not, per se, mean that it will be taken by the public as an indication of origin. The relevant question is not whether the container would be recognised on being seen a second time, that is to say, whether it is of memorable appearance, but whether by itself its appearance would convey trade mark significance to the average customer. For the purpose of this appeal, I am prepared to accept that the bottle shape which is the subject of these applications is both new and visually distinctive, meaning that it would be recognised as different to other bottles on the market. That does not mean that it is inherently distinctive in a trade mark sense.”

33. Referring to the *EUROCOOL* case [2003 ETMR 4], Mr Wyand submitted that “a minimum degree of distinctive character” would be sufficient to defeat an attack under Section 3(1)(b), and that in determining whether a mark was possessed of this “minimum” the test was that set out by the Court of First Instance in *Henkel v OHIM* Case T-30/00, citing the following:

“In order to ascertain whether the representation claimed, given the combination of the shape and the arrangement of the colours of the tablet represented, may be perceived by members of the public as an indication of the origin, the overall impression produced by that representation must be analysed.. That is not incompatible with an examination of each of the individual features making up the representation in turn. As regard a mark consisting of a faithful representation of the product, it is necessary to ascertain first, whether the design of the product represented may, in itself, make an impact on the public mind and, second, whether the way in which the product is represented has some distinctive feature capable of denoting the origin of the product's origin.”

34. Mr Wyand argued that the evidence did not establish that different traders consistently used the same colours in relation to the same active ingredient, but even if the colours were taken to indicate the presence of an active ingredient, the shape and/or the colour combination of the mark in suit was so different from any other shape/colour combination on the market that the relevant public would recognise it and make repeat purchases knowing it to be the same product they previously obtained.

35. Mr Mellor countered that the shape and/or colour combination of the mark is not so different from others, but even if it were, this would not make it distinctive, and whether or not there is an industry standard in the use of colours, the real point is that the average consumer is accustomed to seeing colours being used in detergent tablets to indicate function.

36. I consider that based on the decision of Justice Laddie in the *Yakult* case, Mr Mellor is

correct when he says that being different does not make a mark distinctive. I also concur with his assessment in relation to the use of colours; the question is not whether traders consistently use the same colours to denote the same function, but how the public has come to regard this use of colours, but the ultimate question is whether any combination of the shape and/or colours and/or the way in which the colours have been used, creates a sign that is origin specific.

37. The main body of the tablet is rectangular in shape, each edge of which is slightly bevelled. The evidence shows this to be one of a number of shapes used by traders of detergent and disinfectant tablets. However, this tablet also has another feature to its shape, protruding from the upper surface. Mr Wyand refers to this as a ball, a description challenged by Mr Mellor. It may well be that this protuberance started life in the shape of a ball; it is shown as such on the applicants' packaging, but in the mark applied for most of it is submerged into the body of the tablet such that it can only accurately be described as a dome shape. Whilst the dome may well be something different to the usual, adopting the words of Geoffrey Hobbs QC, it in my view *"represents only a minor variation of a basic geometric shape."*

38. The applicants claim the colours; red, blue and white as a feature of the mark. The opponents assert that the fact that there are three distinguishable colours would be taken as no more than an indication that the tablet contains three different active ingredients, and that as far as the colours themselves are concerned, they are commonly used to indicate the presence of certain qualities in the tablet, citing blue for high performance, white to indicate cleanliness, red to indicate a strong anti-grease agent, yellow to indicate lemon fragrance, etc.

39. On my reading the evidence establishes that the industry uses colours to convey that a particular tablet contains a number of active ingredients that perform distinct actions, there being a correlation between the number of colours and the number of active ingredients. Apart from obvious uses such as yellow to denote lemon fragrance, there does not appear to be an industry standard in the use of colours. Exhibit JL4 consists of photographs of cleaning tablets and their packaging. A number of the tablets have different coloured layers, albeit only consisting of two colours, and primarily white and blue. The packaging shows consistent use of the colour yellow being used as described above.

40. Exhibit SB4 contains an example of the packaging for various block detergents, including the applicants' 'FINISH POWERBALL TABS', the product which the mark in suit depicts. This is represented as a two-layer rectangular tablet of blue and white, with a red ball impressed into the upper surface and is accompanied by the following description:

"The white layer cleans all traces of dirt away, for a spotless and brilliant finish."

"The blue layer breaks down and lifts off the dried-on food residue."

"New Finish tablets have the revolutionary POWERBALL which contains unique StainSoakers. The POWERBALL starts to dissolve instantly to release the StainSoakers which get to work straight away, soaking and softening really dried-on food residue such as baked-on egg and cheese sauces."

41. Other examples of layered detergent or disinfectant tablets shown in the exhibit make references such as “New Domestos Triple Action Rim Blocks are the only rim blocks that 1. Freshen 2. Prevent limescale and 3. Kills germs.”. The Tesco dishwasher tablets refer to the “New improved Dual Layer Action - The enzymes in the blue layer combine with a gentle but effective bleaching system to deliver best ever cleaning.”.

42. Although the evidence does not establish that coloured layered tablets were in use at the date that the application in suit was made, the *Benckiser* case referred to above pre-dates the relevant date in these proceedings. Based on the evidence and information available to me, I believe that it is clear that the concept of detergents, disinfectants and the like, being available in the form of a tablet composed of different layers of colour had been around for some time prior to the relevant date, and that a number of traders had placed, or proposed to place, such goods on the market. The evidence also clearly establishes that each of the colours, whether in layers, speckled one into another or as in the applicants’ case, in the form of a ball impressed into the block, denotes the presence of a separate and different active ingredient and/or fragrance.

43. In the decision of the Court of First Instance of the European Communities in Henkel KGaA’s appeal against the refusal of OHIM to grant protection in respect of a similar three-dimensional mark, the CFI said:

“Indeed distinctiveness must be denied if, as in the present case, the sectors of the market addressed are induced to understand the presence of coloured elements as an indication of given properties of goods and not as an indication of their origin. The mere possibility that consumers become accustomed to recognising goods by their colours is not sufficient to remove the obstacle to registration provided by Article 7, paragraph 1, letter b of Regulation 40/94 [GMVO].”

44. In the *Benckiser* case, Mr Hobbs put the position as follows:

“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.”

45. Mr Hobbs went on to hold that the appearance of the tablets put forward for registration was not sufficiently arresting so as to perform the essential function of a trade mark, and to be devoid or unpossessed of a distinctive character, and excluded from registration by Section 3(1)(b) of the Act at the relevant date. Although that case involved tablets comprised of two coloured layers, given the reasoning behind Mr Hobbs’ findings and the arguments and evidence before me, I see no logical reason why the position should be found to be any different where there are three coloured layers.

46. In *Procter & Gamble Company’s* appeal against the decision of OHIM to grant protection in respect of a similar three-dimensional mark, the Court of First Instance (case 62000A0117) said:

“As regards the use of the colour green, it must be observed that the use of basic colours, such as blue or green, is commonplace and is even typical of detergents. The use of other basic colours, such as red or yellow, is one of the most obvious variations on the typical design of these products. The same is true of the various shades of those colours. For that reason, the applicant’s argument that the mark applied for is distinctive because one of the layers of the tablet is “pale green” must be dismissed.”

47. Even without this guidance, the evidence shows that the colours specified in the application, namely, white blue and red are used, to differing degrees and varying shades by other traders, both on the goods themselves and on the packaging.

48. In an appeal to the Appointed Person against the registrar’s refusal to register a tablet mark, the applicants described the mark in the following terms: “two layers of different thicknesses, each being of mottled or coarse grained effect with the upper layer being thinner, with, in addition, a white dome in the centre of the top of the cylinder, which in contrast to the coarse grained effect, was smooth”. The lower layer and the dome were white, the upper layer was blue. The applicants argued that although only two colours were specified, there was a three colour effect, and that this three coloured effect was rendered more striking by virtue of the mottled or coarse grained effect of the colours of the two cylinders in contrast to the smooth effect of the dome. In his decision, Mr Simon Thorley QC took the following view:

“I see the substance in Mr McCall’s submissions but I am no more satisfied than the hearing officer was that the combination of colours and shapes in a tablet of this nature would be seen by the average consumer as being indicative of anything more than the different ingredients present in the tablet in contrast, no doubt, to other tablets which did not have the benefit of three separate ingredients. I am unpersuaded that there is anything in the combination of shape, colour and texture which inherently will suggest to the average consumer that the combination constitutes an indication of origin rather than an indication of contents.”

49. In my view there is nothing sufficiently arresting about the combination of the three colours claimed in this mark, nor anything in the individual and collective features of the mark applied for that persuades me that the mark in this case should be regarded as being capable of distinguishing or denoting trade origin. Consequently, the opposition in respect of Section 3(1)(b) succeeds.

50. My decision under Section 3(1)(b) effectively decides the matter. Although I do not need to go on to consider the grounds under Sections 3(1)(c) and 3(1)(d) in detail. In a decision of the Court of First Instance of the European Communities in Henkel KGaA’s appeal against the refusal of OHIM to grant protection in respect of a similar three-dimensional mark, the Court upheld the findings of OHIM, saying:

“The coloured particles therefore indicate the given properties of the goods but cannot therefore be regarded as descriptive particulars in the sense of Article 7, paragraph 1, letter c of Regulation 40/94 [GMVO].”

51. So the objection is not that the mark may serve, or has become customary in the trade as an indication or designation of the kind, quality, intended purpose or other characteristic of the goods covered, and contrary to Section 3(1)(c) and 3(1)(d), but that it cannot serve to distinguish such goods and is not distinctive in terms of trade origin as required by Section 3(1)(b).

52. The opposition having been successful, the opponents are entitled to an award of costs. I order the applicants to pay the opponents the sum of £1,500 as a contribution towards their costs. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 5th day of November 2003

**Mike Foley
for the Registrar**