

O-036-04

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 80136
BY TRIP TRAP DENMARK A/S
FOR REVOCATION OF TRADE MARK No 1109950



STANDING IN THE NAME OF
STOKKE GRUPPEN AS

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 80136
BY TRIP TRAP DENMARK A/S
FOR REVOCATION OF TRADE MARK No 1109950
TRIPP TRAPP & DEVICE
STANDING IN THE NAME OF
STOKKE GRUPPEN AS

BACKGROUND

1) The following trade mark is registered under number 1109950 in Class 20 of the register in respect of “Furniture and parts thereof; all included in Class 20”.



Registration of this mark shall give no right to the exclusive use of the word “Tripp”.

- 2) The application for registration was made on 22 February 1979. The registration stands in the name of Stokke Gruppen AS of Hahjem, 6260 Skodje, Norway.
- 3) By an application dated 7 November 2001, Trip Trap Denmark A/S of Havnevej 17, Hadsund, Denmark applied for the revocation of the registration under the provisions of Section 46(1)(a) & (b). The grounds stated that there has been no use of the trade mark in suit since registration was granted, or in the alternative in the five years prior to the filing of the application in relation to the goods covered by the registration and there are no proper reasons for non-use.
- 4) On 15 February 2002 the registered proprietor filed a counterstatement stating that the word mark TRIPP TRAPP and various logo forms of marks incorporating the words TRIPP TRAPP have been used continuously in the UK in relation to the goods registered since 1974. It is claimed that there has been significant use in the UK of marks differing in elements which do not alter the distinctive character of the mark in the form in which it was registered.
- 5) Both sides seek an award of costs. Both sides filed evidence.
- 6) At the hearing, on 28 October 2003, the proprietor was represented by Mr Moody-Stuart of Counsel instructed by Messrs J A Kemp & Co. The applicant for revocation was represented by Ms Hutchinson of Messrs Grant Spencer Caisley & Porteous.

REGISTERED PROPRIETOR'S EVIDENCE

7) The registered proprietor filed a witness statement, dated 12 February 2002, by Jon Alstad the UK Director of Stokke UK Ltd a wholly owned subsidiary of Stokke Gruppen AS. He states that the registered mark consists of the words "tripp trapp" in a lower case script together with a device or logo. He describes the device as "a representation of a chair". He also states that the name "tripp trapp" is applied only to this particular design of chair and to accessories for use therewith. The chair is specifically designed for children, although it can be used by adults.

8) Mr Alstad states that sales of the chair in the UK began in 1974 via an importer, Westnofa (London) Ltd. In 1987 the importer was changed to Scan-Sit Ltd. Mr Alstad states that sales were disappointing averaging only approximately 3,000 chairs per annum. In 1997 the company Stokke UK Ltd was formed. He states that in 1999 this company started distributing Tripp Trapp chairs in the UK. The company sold 7,100 chairs in 1999, 9,500 chairs in 2000 and 13,000 chairs in 2001.

9) Mr Alstad states that his company also sells various accessories for use with the chair under the mark in suit. These include baby restraints, cushions and additions which render the chair suitable for use by disabled children. At exhibit C he provides a number of brochures. Mr Alstad explains that the numbers printed on these brochures show the year it was printed, the brochures are dated between 1992- 1999. None show use of the mark registered. All show use of the words "Tripp Trapp".

10) At exhibit D Mr Alstad provides copies of magazines which carry advertisements for the "Tripp Trapp" chair but do not use the mark registered. The publications are dated Feb 2000 - Oct 2001. Mr Alstad states that his company spends approximately £100,000 per annum on advertising in the UK and a similar amount on brochures each year.

11) Mr Alstad states that his company has the domain name "tripptrapp.co.uk" registered and that a search using the internet will reveal many postings of his company's product for sale in the UK. At exhibit F he provides press cuttings which show the product and refer to it as the "tripp trapp chair" and usually identify the manufacturer as Stokke. At exhibit G he provides invoices for the product and at exhibit H a list of stockists. Both use the word only form (tripp trapp) not the mark as registered.

12) Mr Alstad accepts that the mark registered "is not used in the precise same form nowadays". However, he claims that the word mark "Tripp Trapp" is, and has been used in the UK for many years in relation to chairs, cushions and fittings. He states that the word mark is very similar to the registered mark and should be taken to equate to use of the registered mark.

APPLICANT'S EVIDENCE IN REPLY

13) The applicant filed a statutory declaration, dated 22 July 2002, by Claire Christina Hutchinson the applicant's Trade Mark Attorney. She states that the proprietor states that the mark used has been used on a specific chair and accessories for that chair only and not in relation to all the goods for which it is registered. She notes that no use of

the mark registered has been provided. The only use shown has been the use of the words "TRIPP TRAPP". Ms Hutchinson states:

"The mark as used is not "very similar" to the registered mark. The mark as registered includes a strong logo which dominates the mark and encloses the words "tripp trapp" which are conjoined by a link between the letter "i" of the first word and the letter "t" of the second word. The words "tripp trapp" are represented in lower case and staggered within the mark as registered. The mark in use differs in elements which alter the distinctive character of the mark substantially."

14) That concludes my review of the evidence. I now turn to the decision.

DECISION

15) At the hearing the applicant for revocation withdrew the ground of revocation under Section 46(1)(a) stating that the matter would be decided under Section 46(1)(b) of the Act. The relevant part of Section 46 reads as follows:

"46.(1) The registration of a trade mark may be revoked on any of the following grounds-

- (a)....
- (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non - use:
- (c)....
- (d)....

(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes."

16) The applicant alleges that the mark has not been used in the five years prior to the date of the application for revocation. Under Section 46(b) the period in question is, therefore, 7 November 1996 - 6 November 2001

17) Where the registered proprietor claims that there has been use of the trade mark, the provisions of Section 100 of the Act makes it clear that the onus of showing use rests with him. It reads:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

18) The proprietor has admitted that it has not used the mark in the exact form registered. It is contended that the mark has been used "in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered".

19) Both sides referred me to the judgement of the Court of Appeal in *BUD / BUDWEISER BUDBRAU* [2003] RPC 24. In particular, reference was made to the comments of Lord Walker at paragraphs 43-45 where he stated:

“43. The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?”

44. The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer, but is nevertheless capable of analysis. The same is true of any striking and memorable line of poetry:

‘Bare ruin’d choirs, where late the sweet birds sang’

is effective whether or not the reader is familiar with Empson’s commentary pointing out its rich associations (including early music, vault-like trees in winter, and the dissolution of the monasteries).

45. Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of ‘whose eyes? - registrar or ordinary consumer?’ is a direct conflict. It is for the registrar, through the hearing officer’s specialised experience and judgement, to analyse the ‘visual, aural and conceptual’ qualities of a mark and make a ‘global appreciation’ of its likely impact on the average consumer, who:

‘Normally perceives a mark as a whole and does not proceed to analyse its various details.’

The quotations are from para [26] of the judgement of the Court of Justice in Case C-342/97 *Lloyd Schuhfabrik Meyer GmbH v Klijsen Handel BV* [1999] E.C.R. I-3819; the passage is dealing with the likelihood of confusion (rather than use of a variant mark) but both sides accepted its relevance.”

20) I was also referred to the comments of Sir Martin Nourse, in the same *Bud* case where, at paragraph 12, he said:

“Mr Bloch accepted that, in relation to a particular mark, it is possible, as Mr Salthouse put it, for the words to speak louder than the device. However, he said that it does not necessarily follow that the entire distinctive character of the mark lies in the words alone. That too is correct. But there is yet another possibility. A mark may have recognisable elements other than the words themselves which are nevertheless not significant enough to be part of its distinctive character; or to put it the other way round, the words have dominance which reduces to insignificance the other recognisable elements.”

21) Mr Moody-Stuart also sought to rely upon the principles applied by OHIM in considering non-use under the equivalent provisions of the Community Trade Mark


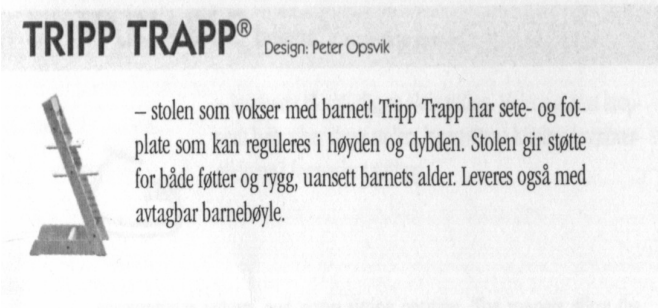
Regulation, although he accepted that this approach is not binding he hoped that it would be persuasive. To my mind these principles do not add to those provided by the Court of Appeal and so it is to the *Bud* case quoted above that I shall look for guidance.

22) At the hearing Mr Moody-Stuart stated that the high water mark of his case was leaflet 965017-11-90 provided at exhibit C of Mr Alstad's evidence. He described the use he was relying on as follows:

“A typical use of the mark in such brochures can be found on the back page of the brochure printed in 1996, serial number 965017-11-90. This consists of the words TRIPP TRAPP in block capitals above a side on, right facing, depiction of the chair. This differs from the mark in the font on the writing, the position of the writing and the precise form of the depiction of the chair. However, the distinctive character consists of the words and the side on depiction, and it is submitted that the elements which differ from the mark as registered do not alter such character.”

23) I do not fully agree with this description. The words TRIPP TRAPP are printed in bold on a yellow/cream band. They have the letter R in a small circle after them which usually denotes that whatever precedes it is registered. Below is a depiction of the chair. Whilst it is side on it is a three dimensional image in that one can see both uprights and cross members. This allows it, along with the other depictions on the page to see clearly that the item is a chair. The fact that the other, preceding, pages in the brochure also show chairs and their names in the same manner would also be a factor in the impact on the average consumer.

24) For ease of reference I reproduce the mark in suit below and the relevant part of leaflet 965017-11-90:

Trade Mark	Leaflet
	

25) Mr Moody-Stuart described the above trade mark as consisting of a “distinctive word combined with a highly ‘descriptive’ device, in the sense that it is an image of the product sold under the mark. On a global consideration, the distinctive character of the mark resides primarily in the words used, TRIPP TRAPP. The device part of

the mark, a 'side on' depiction of a TRIPP TRAPP chair adds only to the distinctive character of the mark on that level of generality. In the mark the words speak louder than the device, and although they do not drown out the contribution of the device in its entirety, they reduce its importance to a general impression of a side on depiction of the striking TRIPP TRAPP design of chair.”

26) To my mind the device element of the registered mark is striking in design, scale and its starkness. It is not a trivial embellishment or piece of fancy artwork, it clearly is meant to convey something but unless one is familiar with the product it is not clear what the device is depicting. The device has two horizontal bars reminiscent of a pound or euro sign. At the very top of the device are two blocks, one horizontal, one at an angle which do not appear on depictions of the actual chair. The “angled L” shape of the main body of the device is very striking. The words “tripp trapp” nestle within its angle. The words do not have any meaning but are unusual in that they have a rhythm and an almost onomatopoeic quality. They are written one above the other with letters from the top word “melting” or “running” into the lower word.

27) When compared to the use shown on the leaflet there are obvious differences. The juxtaposition of the device and words differ considerably. The device as used in the registered mark is significantly different to the depiction of the product in the leaflet. Whilst aurally the word aspect remains the same the visual aspect is very different.

28) I do not accept the contention that the entire distinctive character of the mark in suit is the word element alone. In my view it is the juxtaposition of the device to the words, the initial uncertainty over what the device actually represents and its relationship to the words which is the most striking aspect of the mark. The words are clearly recognisable, but they are not so dominant in the mark registered to register the device element to an insignificant aspect. In my opinion, on a global appreciation, the mark used by the proprietor possesses a different distinctive character from the mark registered.

29) Consequent to my decision that the mark shown to be used is in a form differing in elements which alter the distinctive character of the mark in the form in which it is registered, the application for revocation under Section 46(1) of the Act must succeed. In accordance with Section 46(6)(a) of the Act the rights of the proprietor shall be deemed to have ceased as from the date of the application for revocation.

30) The application for revocation succeeds. I order the proprietor to pay the applicant the sum of £2000. 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 30th day of January 2004

George W Salthouse
For the Registrar
The Comptroller-General