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THE PATENT OFFICE

Tribunal Room 2
Harmsworth House,
13-15 Bouverie Street,
London, EC4Y 8DP.

Friday, 30th April 2004

Before:

MR. G. HOBBS Q.C.
(Sitting as the Appointed Person)

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In the Matter of the Trade Marks Act 1994

and

In the Matter of Trade Mark Application No. 2317497 by
THE PROCTER & GAMBLE COMPANY

- - - - -

Appeal of Appellants from the decision of Mr. Rose'Meyer
acting on behalf of the Registrar dated 28th January 2004.

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(Computer Aided Transcript of the Stenograph Notes of Marten
Walsh Cherer Ltd., Midway House, 27/29 Cursitor Street,
London, EC4A 1LT. Telephone No: 0207 405 5010.
Fax No: 0207 405 5026.)

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MISS D. McFARLAND (D. Young & Co) appeared on behalf of the
Appellant.

MR. JAMES (representing the Registrar) appeared for the
Comptroller-General of Patents etc.

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D E C I S I O N

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THE APPOINTED PERSON: On 4th December 2002 the Procter & Gamble
Company applied to register the following device:



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as a trade mark for use in relation to the following goods in
class 1 and class 3:

"Class 1. Chemical ingredients such as ingredients
for the care, treatment and beautification of fabrics.

Class 3. Bleaching preparations and other substances
for laundry use; detergents; fabric softeners;
laundry additives; preparations for the care,
treatment and beautification of fabrics; soaps."

It was not contended that the device had acquired a distinctive
character through use prior to the date of the application for
registration.

The Registrar considered that the device was excluded from
registration by section 3(1)(b) of the 1994 Act, for the

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reasons given in a written decision issued by Mr. G.J. Rose'Meyer on 28th January 2004. The hearing officer correctly directed himself as to the legal test to be applied by reference to paragraphs 37, 39, 41 and 47 of Joined Cases C-53/01 to C-55/01 Linde A.G. Winward Industries Inc and Rado Uhren AG. His assessment of the mark presented for registration was expressed in the following terms:

"11. Ms Thornton-Jackson's arguments in correspondence and at the hearing did nothing to persuade me the mark had the requisite distinctive character. In my view, the mark consists of a number of constituent parts, which in totality, fail to bestow upon the mark the minimum degree of distinctive character required to allow prima facie acceptance.

12. Ms Thornton-Jackson was very careful to point out and offer her views on how and why the integers constituting the mark were individually and collectively distinctive. Whilst I accept there are a number of individual constituent parts making up the mark, it is well settled that the test for distinctiveness of a trade mark must be judged against the mark as a whole. I observed at the hearing that I

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saw nothing strikingly novel or distinctive in a depiction of the goods on the packaging of the goods, and contrary to Ms Thornton-Jackson's view, neither did I in this particular depiction. Whilst I am willing to concede there is stylisation in the letter 'Q' into an allusion to the face of a clock, taken in context of the mark in totality, I think that feature is somewhat lost. It would take a particularly observant and analytical consumer of these common everyday goods to pick out this feature and attach origin or trade mark significance to the whole mark because of it.

13. Of course Ms Thornton-Jackson does not argue it is the 'Q' feature alone which offers the application sufficient distinctiveness. She submits that this, along with the upwardly curving words 'QuickWash action' trailing in the bubbly wake of the goods themselves when combined, make a distinctive whole. I disagree. I see nothing in the totality to overcome the statutory hurdle imposed by section 3(1)(b). The words 'QuickWash action' are purely descriptive of goods which offer a quick wash, and a minor stylistic curvature of the font does not detract from that fact

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at all in my view.

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16. When considering this matter through the eyes of the relevant consumer of the goods in question I am of the view that they will not place any trade mark significance on this mark but will perceive it as a sign which does no more than depict and describe a characteristic of the goods applied for."

He considered that he was free to reach that conclusion notwithstanding the prior acceptance of UK registered trade mark 2312150. The latter trade mark consists of the following device:

This is the image of UK reg. t.m. 2312150



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registered in the name of the Procter & Gamble Company for the following specification of goods:

"Chemical ingredients such as but not limited to ingredients for the care, treatment and beautification

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and

"Bleaching preparations and other substances for laundry use; detergents; fabric softeners; laundry additives; preparations for the care, treatment and beautification of fabrics; soaps" in class 3.

The registration was subject to a colour claim. The colours blue, yellow and white were claimed as elements of the mark.

The hearing officer distinguished the earlier registration from the present application for registration on the basis stated in paragraph 15 of his decision:

"... In my view the two cases can be distinguished by the overall visual impact they create. The registration has a visual identity quite different to the application in suit, it claims various colours as an element of the mark and has no representations of the goods to which the mark is intended to be applied. Whilst on the face of it the marks share some features, they are certainly not on all fours. In particular, the clock face 'Q', which the applicants consider to be a distinctive feature, is prominent in the earlier mark, whereas it is lost in the later application."

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The applicant appeals to an Appointed Person under section 76 of the Act, contending in substance that the hearing officer could not have reached the conclusion that he did consistently with the guidance provided by the case law to which he referred, or with the prior acceptance of what was said by the applicant to be the immaterially different trade Mark No.2312150. Reversal of his decision was therefore requested on the ground of manifest error of assessment.

These contentions were developed in argument at the hearing before me. The artistic idiosyncracies of the device were emphasised, as was the need to have regard to the singularity of the mark as a whole, in contra distinction to what was said to be the hearing officer's compartmentalised approach to the different features observable within it. I was also reminded that, in the seamless transition from descriptiveness to distinctiveness, it does not require much by way of distinctive power to render the mark registerable under current law.

In that connection I was referred to the recent decision of the First Board of Appeal of the Community Trade Marks Office in Case R-341/2003-1, **Black & Decker Corporation's Application** for registration of the word mark **EASI-DIY**. This decision was issued on 7th January 2004. I am bound to say that I regard it as a lenient application of the low threshold approach to registration

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and I do not derive any assistance from it. By contrast the recent Postkantoor and Biomild judgments of the ECJ emphasise that possession of a distinctive character is a real requirement for registration and that marks must be carefully examined for compliance with that requirement.

It is, of course, correct that marks must be assessed without excision or dismemberment. The average consumer does not normally pause to construe the signs which he or she encounters during the course of a normal day. It is nonetheless necessary to bear in mind that the constituents of a sign may or may not contribute unequally to the message conveyed by the sign as a whole.

I do not think that the hearing officer was guilty of excision or dismemberment in his assessment of the present mark. Devices can be distinctive or non-distinctive, just like any other kind of sign. What matters are the perceptions and recollections that the sign in question is likely to trigger in the mind of the average consumer of the goods concerned and whether they would be origin specific or origin neutral.

I think that the verbal elements of the mark I am considering speak loud and clear. It seems to me that the message they convey is origin neutral. The artistic presentation neatly and skilfully builds upon and reinforces the origin neutral message in a way that makes it even more effective than the words alone might have been for that purpose. I think that net result is a well-executed, artistically pleasing, origin neutral device.

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I recognise that there is a degree of incongruity between the acceptance of the earlier registration and the refusal of the present application. However, I do not think that I can allow that to deflect me from the conclusion that I have reached with regard to the registrability of the sign which is presently before me.

For these reasons shortly stated, I consider that the hearing officer was right to come to the conclusion that he did and that registration should be refused under section 3(1)(b) of the Act for lack of sufficient distinctive character.

THE APPOINTED PERSON: No order for costs in accordance with the usual practice?

MR. JAMES: We are content with that.

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