

O-427-10

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION 2506380
IN THE NAME OF LESS MESS LTD
IN RESPECT OF THE SERIES OF TWO TRADE MARKS:**

**FAT TRAP
&
Fat Trap**

AND

**AN APPLICATION (NO 83621) FOR INVALIDATION BY
ORGANIC ABSORBENTS LIMITED**

TRADE MARKS ACT 1994

In the matter of registration 2506380 standing in the name of Less Mess Ltd in respect of the series of two trade marks: FAT TRAP & Fat Trap

and

An application (no 83621) for invalidation by Organic Absorbents Limited

The background and the pleadings

1) The registered trade marks the subject of these proceedings stand in the name of Less Mess Ltd ("LM"). LM applied for them as a series application on 14 January 2009, the application then completing its registration procedure on 12 June that year. The trade marks, together with the goods for which they are registered, are shown below:

FAT TRAP

Fat Trap

Class 21: Containers for kitchen and household use; containers for the collection and disposal of fats, greases and oils.

2) On 3 November 2009 Organic Absorbents Limited ("OA") applied for a declaration of invalidity in respect of LM's registration. Invalidity is sought in respect of all the goods covered by the registration. The grounds for invalidation are under sections 3(1)(b) & (c) of the Trade Marks Act 1994 ("the Act"). The claim under section 3(1)(b) is that the marks are devoid of any distinctive character because they describe characteristics of the goods of the registration. In relation to section 3(1)(c), the claim is put in the following terms:

"the mark "FAT TRAP" consists exclusively of words that serve to designate the kind and intended purpose of the goods for which it is registered and is a term that is used in the trade to describe such goods i.e. a product which traps fat".

3) LM filed a counterstatement denying the grounds of invalidation. The counterstatement refers to the acceptance of its mark at examination stage and it also contains detailed submissions on the relevant case-law etc.

4) Both sides filed evidence. The matter then came to be heard before me on 15 October 2010. At the hearing LM were represented by Mr Michael Brown of Alpha & Omega. OA were represented by Mr Michael Harrison of Harrison IP.

The evidence

OA's evidence – witness statement of Geoffrey Nutland dated 18 March 2010

5) Mr Nutland is OA's managing director. He says that he has been using the name FAT TRAP since at least 2006 in relation to a disposable pouch for absorbing liquids such as fats, oils and grease (in the trade, fats, oils and greases are collectively referred to as "FOG" - I will adopt this term where necessary). He explains that the product is designed to stop FOG being put down kitchen sinks. He states that he applied to register the name as a trade mark in class 1 but it was refused registration on the grounds that it was descriptive; pages 1-3 of Exhibit GN1 contain copies of the relevant examination report issued by the Intellectual Property Office. Mr Nutland explains that he became aware of LM's registration in July 2009 and that he would have objected to it earlier if he had known about it.

6) Mr Nutland states that although his application was in class 1 and LM's registration is in class 21, the products do the same thing i.e. they trap or collect fat for safe disposal. Mr Nutland says that his product has been on sale since October 2006, initially by FT (UK) Limited (a company now dissolved) but since June 2008 by OA. Sales details since 2007 are provided, namely:

<u>Period</u>	<u>Customer</u>	<u>Amount</u>	<u>Number of packs sold</u>
2007-2008	Anglian Water	£17,000	30,000
1/7/2008	Lakeland	£6,000	8,000
1/12/2008	Yorkshire Water	£1,000	1,000
2/5/2008- 9/02/2010	Web sales & Caravan	£3,000	£4,000
26/2/09	Suma	£228.48	
1/10/2008- 7/5/2009	Anglian Water	£1,675.75	3,000
		£44,014.53	71,000

7) Mr Nutland states that around £64,000 has been spent on marketing and promoting the product. A breakdown is provided on page 4 of Exhibit GN1 showing that such expenditure relates to: attendance at various shows and events, advertisements in water related journals and in trade catalogues, sales/marketing consultants and public relations including endorsement by a celebrity chef.

8) Various pages are provided in Exhibit GN1 relating to the use of the words FAT TRAP in the trade, a summary is provided below:

i) Pages 5-7 contain a WRC Portfolio Research document relating to a FOG project. It contains a questionnaire about the trial of "FT (UK) Ltd Fat-Trap". The questionnaire asks "where did you obtain your free sample of the Fat-Trap?". The project took place in October 2005.

ii) Pages 5-10 contain another WRC Portfolio Research document which includes references to: "The Nortje Fat Trap" which is termed a "a domestic fat trap", "The Less Mess Fat Trap" which is a "domestic kitchen fat collection pot", and the "FT (UK) Ltd Organic (Coconut) Fat Trap" which is a "domestic kitchen, organic, fat absorption pouch". The document contains a copyright date of 2008.

iii) Pages 11-19 contain literature produced by OA including advertising material and marketing photographs showing the "The Fattrap" product which "traps fat fast". The literature is dated between February 2009 and July 2009.

iv) Pages 20-23 contain prints from the website www.grease-removal.co.uk. A welcome page includes the text "...your essential site for grease treatment and grease management solutions – Grease Guzzlers, Biological Grease Treatment and Fat Traps" and "whether you need a fat trap or an all singing and dancing grease digestion system". There are links on the website to pages containing "Grease and Fat Traps". Another page contains three products "Fat Trap GT2", "Fat Trap GT4 – Pedestrian" and "Fat-Trap GT4 – Vehicular". A page for the "Fat Trap – GT2" is provided which includes the text "Fat Traps provide a low cost and effective method for separating fat and grease from water flow". The device appears to be of the sort fitted into the water drainage system of a kitchen. No dates are contained on these prints, but I note that Mr Nutland states that the majority of all the uses in the exhibit have taken place since before LM applied to register the mark in question.

v) Pages 24-26 contain prints from www.sirance.co.uk. Under a heading "Microwave & Oven Pads – Fat Trap & Absorbent Rotisserie Liners" there is a description of The Fat-Trap™ which appears to be a pad that is placed under cooking meat whereby the "fat dripping from the food[s] is absorbed and trapped inside the pad". Another page is provided for Fat-Trap™ Microwave liners which work in a similar manner. No dates are contained on the prints, but I note, again, Mr Nutland's general statement (summarized at point iv above) regarding the use of such terms and since when. In any event, further pages (35-37) consist of archive prints as of 7 May 2008 showing the same material. Also provided is a letter to Geoff (presumably Nutland) from Susan Evans of Sirane which states that "Sirane manufacture and produce a product called a Fat-Trap used for cooking purposes and have done since March 2003."

vi) Pages 27-29 contain prints from www.edincare.com (this appears to be a UK based website as the products are priced in pound sterling). Various “pro-trap” and “eco-trap” products are shown under a heading “Pro-Trap/Eco-Trap Fat Traps”. They are described as grease separator systems which appear to fit into kitchen (commercial) systems and which separate fat from grey water. No dates are contained on the prints, but I note, again, what Mr Nutland states as summarised at point iv. Further archive prints (dated 17 April 2008) are provided which are similar (but not the same) and which include the words “EcoFat Trap 120” etc.

vii) Pages 30-33 contain prints from www.grease-eater.co.uk, a website operated by a company called Hydera International Ltd which sells a product for treating a “fat trap”. These appear to be treatments for the grease separator systems referred to above.

viii) Page 34 contains a print from www.lakeland.co.uk, a website which sells a product called “Fat Trappers” which, when used in a grill rack or roasting dish, “.soak up all the excess fat from foods such as sausages, chops, burgers and bacon and trap it within.”

ix) An extract is provided from the BBC News website containing an article headed ““Fat traps” to unclog town sewers” which relates to the installation of fat traps under the sinks of restaurants, pubs and hotels.

9) Mr Nutland also refers to the examination of LM’s trade mark which was initially objected to as being descriptive. He notes that the objection was overcome on the basis of argument that LM’s product did not “catch” or “trap” fat and, thus, was not in line with the dictionary definitions of the word TRAP. Mr Nutland argues that the word TRAP should not be given a narrow definition and he exhibits an extract from the Compact Oxford English Dictionary which defines TRAP as:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a bath, basin, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person’s mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

10) Also exhibited is an extract from the Cambridge Dictionary Online (Learners Edition) in which Mr Nutland highlights that when used as a verb, “trap” can also mean “to keep something in one place”. The actual reference reads:

“To keep something such as heat or water in one place, especially because it is useful

A greenhouse stays warm because the glass traps the heat of the sun”

11) Mr Nutland completes his evidence by stating that the average user of the products in question would not distinguish between something that “traps” or “catches” and something that “collects” or “keeps” and he believes that the average user would recognize the name “FAT TRAP” as being descriptive of LM’s product.

LM’s evidence – witness statement of Tina Pearce dated 14 May 2010

12) Ms Pearce is the managing director of LM. Exhibit TP1 to her witness statement contains a number of documents which she refers to, the first such document being a Companies House print showing that LM was incorporated on 18 September 2003. She says that since then, the trade mark FAT TRAP has been used continuously, the first product being a cylindrical plastic container having a removable lid and an internal funnel to facilitate the tipping of FOG into it. She says that a collapsible cardboard version has also been introduced.

13) Ms Pearce provides sales figures and advertising figures as follows:

Year ending	Sales	Advertising/promotion
30.9.2004	£30, 456	£4, 636
30.0.2005	£15, 547	£3, 043
30.09.2006	£40, 867	£2, 847
30.09.2007	£68,502	£2, 552
30.09.2008	£77,540	£1, 050
30.09.2009	£83,723	£439

14) Ms Pearce notes that in the 2004 accounts there was also a charge of £11,689 which was spent on research and development. She also says that as each product carries LM’s contact details, the product itself serves as an advertisement. In relation to the above sales, Ms Pearce explains that LM’s principal customers are water companies. She says that at the end of April 2010 567,890 FAT TRAP products had been supplied, broken down as follows: Severn Trent Water 270,000, Anglian Water Group 85,000, Yorkshire Water 53,000, South West Water 30,000, Wessex Water 5,000, Northumbrian Water 10,000, and United Utilities 27,000.

15) Ms Pearce refers to a non-disclosure and confidentiality agreement between what she claims to be the proprietor of the registration and a company called Dainton Limited. The agreement is provided in Exhibit TP1. Whilst Dainton Limited is a party, the other party is a person called Tina Offield. There is no mention of LM. The point Ms Pearce makes is that the person signing on behalf of Dainton Limited is Mr Nutland, who later went on to make an application for FAT-TRAP in his own name, and who now has a role in OA and, therefore, he had access to detailed information concerning the FAT TRAP product since at least as early as January 2006 (when the non-disclosure agreement was reached). I note all this, but the absence of any explanation of who Ms Offield is and her relationship, if any, with LM means that this evidence has little significance. In any event, it is not clear from the agreement itself what information was disclosed between the parties nor is it clear what relevance this has in deciding whether the mark in question is a descriptive term or not.

16) The FAT TRAP product has, Ms Pearce says, attracted considerable interest due to its environmentally friendliness. She highlights extracts from:

The “EasyLiving” publication of April 2006. A picture of the product is shown, as are the words “Fat Trap tub. £2.25 for two”.

“Prima” magazine dated May 2007. The article writer answers a reader’s question regarding fat disposal by suggesting that they try “a handy gadget called the Fat Trap”. The article explains that it is a small container that sits on your worktop or under your sink to store FOG.

“Limited Edition – North London” publication dated February 2007. The article features a picture of the product and includes the text: “Don’t risk clogging your kitchen sink with waste fat and oil, instead pour it straight into The Fat Trap.”

17) Exhibit TP1 also contains a to whom it may concern letter dated 4 May 2010 from Unex Designs Limited who worked on the design of the product. It confirms that it has worked with Ms Pearce since 2003 on the “trade marked fat trap product”. A further to whom it may concern letter (dated 22 April 2010) is exhibited from the Marketing-PR Company in Tavistock who, Ms Pearce explains, carry out promotional work for LM. The letter confirms that this has been done since November 2006. Two press releases about the FAT TRAP product are attached to this letter from December 2006. The letter also refers to the product having received coverage in: Cumbrian Newspaper (January 2007), The Bath Chronicle (December 2006), PRIMA (May 2007), Limited Editions (February 2007), Radio 2 Chris Evans Show, SHE, Daily Express (no dates for these last three are provided), News & Star (February 2007), Recycling and Waste World (January 2007) and Link Magazine (Spring 2007). No content for any of this coverage is, though, provided.

18) Ms Pearce also refers to a marketing review for LM's FAT TRAP product that was carried out by Clarity Business Solutions in May 2004. The report is provided in Exhibit TP1. Other facts that emerge from the evidence are that:

- ❖ FAT TRAP has won a number of awards including the Green Champion Award. An extract from the North Devon Gazette (November 2006) refers to this.
- ❖ Water companies promote the product. Details of such promotion by SouthWest Water are provided in the form of a customer newsletter dated 19 July 2005 which states that "Domestic customers can help the environment by using "Fat Traps", which are directly available from Less Mess Ltd....". Similar promotion is shown in SouthWest Water's publication called WaterLevel (Autumn 2004) in the form of an article headed "Get the fat trap habit" and which includes the text "One bright solution comes in the form of the "Fat Trap" (pictured). It's a 500ml capacity plastic screw-top container that sits neatly at the side of the sink or cooker until it is needed".
- ❖ The product featured on the Gordon Ramsey television programme "The F Word" in the summer of 2006. Ms Pearce states that its use was demonstrated and an explanation given of the importance of its use to avoid blocking drains.

19) Ms Pearce completes her evidence by highlighting what her registration covers (containers) and that the FAT TRAP product is just a container which serves for the effective collection and disposal of FOG. She also refers to the reputation that has been established as a result of sales and publicity so that when members of the general public, when seeing the trade mark FAT TRAP in relation to a domestic or household container, will associate it with LM.

OA's reply evidence – second witness statement of Geoffrey Nutland dated 23 June 2010

20) Mr Nutland's second witness statement is, in the main, a critique of Ms Pearce's evidence particularly focusing on what he consider to be the limited form of promotion of LM's product and that very few sales have taken place to the general public. Factual evidence in this witness statement includes:

An example of Severn Trent Water referring to LM's product in what Mr Nutland says is a descriptive manner. This is dated 15 June 2010 and the text includes:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

An extract from CONNECT RIGHT with highlighted text reading:

“DO cool and dispose of domestic fats and oils in the bin or install a fat trap.”

Further information regarding the Non-Disclosure Agreement, with Mr Nutland stating that he told Ms Pearce that he was planning to market “Organic Fat Trap” and trade mark it and that he was not aware of LM’s product or name prior to this. There was a possibility that the two companies would work together but this clearly did not come to fruition.

DECISION

21) LM has filed evidence to show that its mark has a reputation and, therefore, that it has a distinctive character through use. However, this only needs to be assessed if the invalidation is successful, *prima facie*, in respect of the grounds of invalidation. I will therefore consider the grounds under section 3(1)(c) and (b) *prima facie* and will only return to the question of distinctive character through use if it is necessary to do so. I will begin with section 3(1)(c).

The section 3(1)(c) ground of invalidation

22) Section 3(1)(c) states that the following shall not be registered:

“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 services, or other characteristics of goods or services”

23) The European Court of Justice (“ECJ”) has issued judgments germane to this issue. A helpful summary of the position was given in *Wm. Wrigley Jr. Company v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-191/01 P (“*Doublemint*”), where it was stated:

“32. In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

24) I also note that in *Matratzen Concord AG v Hukla Germany SA*, (Case C-421/04) ("*Matratzan*") the ECJ stated:

"In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50)."

25) I also note the decision of the General Court in *Ford Motor Co v OHIM*, Case T- 67/07 ("*Ford*") where it was stated:

"there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics"

26) Given that the mark at issue is a two word combination, I also bear in mind the decision of the ECJ in *Postkantoor* (Case C-363/99) which considered the registrability of combinations of descriptive words. Paragraphs 98–100 of the judgment are reproduced below:

98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive. Merely bringing those elements together without introducing any unusual variations as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

99. However, such a combination may not be descriptive within the meaning of Article 3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition must be satisfied as regards both the aural and the visual impression produced by the mark.

100. Thus, a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of

which registration is sought, is itself descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the second case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purpose of the same provision.

27) In relation to the underlying interest, section 3(1)(c) pursues an aim which reflects the public interest in ensuring that descriptive signs or indications may be freely used by all (see, for example, *Doublemint*).

28) OA's argument is that that the words FAT TRAP are descriptive based on the dictionary meanings of those words, that those words combine to form a descriptive whole, and that all of this is supported by the fact that such a word combination has been used by other traders. At the hearing, Mr Brown conceded that the words FAT TRAP may constitute a descriptive combination for some goods but that this was not the case for simple containers such as LM's product. This is a sensible concession. It is clear from the evidence that the words FAT TRAP are used descriptively at least in relation to the category of goods that I will describe as grease separator systems. Such goods appear to be devices which are built into water drainage systems, particularly in commercial kitchens, which separate FOG from the water itself and then retains (or traps) the FOG inside the device whilst allowing the water to flow on. To this extent, I can clearly see that the words FAT TRAP may constitute an apt description for such a product.

29) However, the issue must be assessed by reference to the goods in respect of which the mark is registered. To that extent, it is quite possible that a mark may be descriptive of one product but not descriptive of another even they produce a similar end result (the end result being, in this case, the prevention of FOG from blocking drains). In assessing the aptness of the word combination FAT TRAP to describe the goods of the registration it is necessary to consider the meanings of such words. The word FAT, in the context of the goods at issue, requires no real analysis. It is clearly a meaningful word. In terms of the word TRAP, OA's evidence contains the following definition:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a

bath, basis, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person's mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

30) Mr Harrison relied particularly on definition 4, namely: "a container or device used to collect a specified thing". LM's product is a container, its specification clearly says so. Furthermore, the purpose of the product can be said to enable a person to collect their used cooking fat in it for future disposal. I can, therefore, fully understand why Mr Harrison relies on the definition he does as, on the face of it, the product could be said to be a trap as so defined. However, the container based definition does not appear to be a common one. It does not appear in my copy of the Collins English Dictionary. It may be that the definition must be read in context with the other meanings of the word. For example, if the container traps something inside so as to prevent its escape then such a container may properly be defined as a trap. There is no evidence that shows any form of container being referred to as a trap. I do not consider it likely that a container would ordinarily be described as a trap unless its purpose is to prevent its contents from escaping. Whilst LM's product is a container for fat, it is, in my view, far-fetched to say that the container is trapping the fat inside – the fat is hardly attempting to get out. Fat is poured into it and the lid put on to prevent it from being spilled if accidentally knocked - this would never be categorized as trapping. Absent evidence to show that containers are ordinarily referred to as traps then the definition relied upon is not persuasive, on its own, for me to find that LM's product would be described as such. In this context, and considering definition 4, FAT TRAP does not describe the product.

31) That is not the end of it because the more general definitions of TRAP relate to devices used to catch something, or in which something is retained to prevent escape. The second type of meaning is already dealt with in the preceding paragraph – unless the container's purpose can be said to be trapping something inside to prevent its escape then the word TRAP would not be apt. In my view, it is not. In relation to being a device for catching something, again, I come to the view that something which is merely a container is hardly likely to function as a trap. There are many and varied types of trap - mouse traps, sand traps (a golfing term) a trap under a sink, a greyhound trap. All these uses are, though, more apt uses given that they trap something: a mouse trap traps or catches mice, a sand trap creates an unpleasant/difficult situation for a golfer by trapping him or her into a bunker, a trap under the sink is a specific term of art but which, in any event, traps gases underneath a water filled curve, a greyhound trap (again a clearly defined term) prevents the greyhound from escaping until it is

time to race. All of these uses are clear and understandable but, for LM's product, I do not consider it apt for it to be considered as a trap or that it is something which traps.

32) In terms of OA's evidence, I have already explained that some goods may be more aptly described as fat traps, particularly the fat separator systems referred to earlier. It is not clear what the Nortje Fat Trap consists of but the accompanying text suggests that it is a domestic version of these separator systems. Other than these types of products the only other form of use relates to pouches or mats which are used during or after cooking in order to soak up fat. The use made of the words FAT TRAP for these products appears more akin to trade mark use rather than descriptive use. In any event, such products may more aptly be described as trapping fat and I note in particular that OA's product "traps fat fast" – I do not think the same can be said of a simple container as one simply pours the fat into it when ready.

33) Other aspects of the evidence I have considered relates to the claimed descriptive uses made in relation to LM's product. Severn Trent Water stated in a publication:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

34) I do not find the above particularly telling, the publication could as much be referring to the product name as to using a description. Indeed, I have struggled to find any of the promotional materials or articles relating to LM's product as suggesting that the container traps fat or acts as a trap. The extract from CONNECT RIGHT is even less significant. It reads:

"DO cool and dispose of domestic fats and oils in the bin or install a fat trap."

35) In relation to the above, you would clearly not "install" a container. The above text simply refers to two ways of dealing with FOG: disposal in a bin once cooled (LM's product achieves this result) or by installing a fat trap (I presume this to mean a separator system). Also considered are the circumstances surrounding Mr Nutland's application for a trade mark which was refused. This has little significance either way. I must come to my own decision having regard to all the evidence and arguments before me.

36) There is, of course, the argument as to perception. The matter must be considered against the perception of the relevant parties (the trade and the public). OA argue that as water companies, for example, use and will know of the words fat trap as a description (presumably they will be aware of grease separator systems) then, when seeing such words on a container for fat, such use will simply send a descriptive message. I note the argument, but in my view

the relevant parties will be able to distinguish between what may be known descriptively as a fat trap and what will be seen as a different product. It is my view that the words FAT TRAP will be perceived as allusive, but not a directly descriptive combination of words for the goods of the registration.

37) I must also have regard to the fact that whilst the exact product (or a characteristic of it) sold by LM may not be described as a fat trap, other types of container in class 21 may have a more trapping quality. I have considered this aspect, but a container is a container. There is nothing in the specification that would indicate a more active trapping quality. The fat separator systems, for example, are quite distinct products and would never be described as containers. They would, in any event, fall in a different class. The other types of product shown in the evidence would not, similarly, be considered as a container. I see no reason to find that a container in class 21 will have any more a fat trapping characteristic than LMs container and, therefore, for the reasons given, consider that the words FAT TRAP are not descriptive of the goods in question.

38) My decision is to reject the application for invalidation under section 3(1)(c) of the Act.

The section 3(1)(b) ground of invalidation

39) Section 3(1)(b) states that the following shall not be registered:

“trade marks which are devoid of any distinctive character”

40) The test to be applied under this ground has been dealt with by the ECJ in a number of its judgments, notably in Joined Cases C-53/01 to C- 55/01 *Linde AG, Winward Industries Inc and Rado Uhren AG* (8 April 2003). The test equates to assessing the impact that the sign will have on the average consumer when used in relation to the goods at issue and then deciding whether they will see it as something that is identifying to them goods originating from a particular undertaking. Although this ground has full and independent scope from the other ground of objection, I note that in *Postkantoor* the ECJ stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

41) The pleaded case is that the marks are devoid of distinctive character because they describe characteristics of the goods for which they are registered. Taking this pleading into account, together with the comments made in

Postkantoor, there is little to say on this ground given that I have already determined that the mark is not descriptive. No claim, other than it being descriptive of the goods, has been put forward as to why the mark is devoid of distinctive character. This claim must, therefore, also fail. In view of this, and in view of the claim also failing under section 3(1)(c), there is no need to consider the issue of acquired distinctiveness.

Costs

42) LM has been successful and is entitled to a contribution towards its costs¹. I hereby order Organic Absorbents Ltd to pay Less Mess Ltd the sum of £1300. This sum is calculated as follows:

Preparing a statement and considering the other side's statement
£300

Filing evidence and considering the other side's evidence
£500

Attending the hearing
£500

43) The above sum should 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 13 day of December 2010

**Oliver Morris
For the Registrar,
The Comptroller-General**

¹ Costs are normally awarded on the basis of the registrar's published scale in Tribunal Practice Notice 4/2007.

O-427-10

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION 2506380
IN THE NAME OF LESS MESS LTD
IN RESPECT OF THE SERIES OF TWO TRADE MARKS:**

**FAT TRAP
&
Fat Trap**

AND

**AN APPLICATION (NO 83621) FOR INVALIDATION BY
ORGANIC ABSORBENTS LIMITED**

TRADE MARKS ACT 1994

In the matter of registration 2506380 standing in the name of Less Mess Ltd in respect of the series of two trade marks: FAT TRAP & Fat Trap

and

An application (no 83621) for invalidation by Organic Absorbents Limited

The background and the pleadings

1) The registered trade marks the subject of these proceedings stand in the name of Less Mess Ltd ("LM"). LM applied for them as a series application on 14 January 2009, the application then completing its registration procedure on 12 June that year. The trade marks, together with the goods for which they are registered, are shown below:

FAT TRAP

Fat Trap

Class 21: Containers for kitchen and household use; containers for the collection and disposal of fats, greases and oils.

2) On 3 November 2009 Organic Absorbents Limited ("OA") applied for a declaration of invalidity in respect of LM's registration. Invalidity is sought in respect of all the goods covered by the registration. The grounds for invalidation are under sections 3(1)(b) & (c) of the Trade Marks Act 1994 ("the Act"). The claim under section 3(1)(b) is that the marks are devoid of any distinctive character because they describe characteristics of the goods of the registration. In relation to section 3(1)(c), the claim is put in the following terms:

"the mark "FAT TRAP" consists exclusively of words that serve to designate the kind and intended purpose of the goods for which it is registered and is a term that is used in the trade to describe such goods i.e. a product which traps fat".

3) LM filed a counterstatement denying the grounds of invalidation. The counterstatement refers to the acceptance of its mark at examination stage and it also contains detailed submissions on the relevant case-law etc.

4) Both sides filed evidence. The matter then came to be heard before me on 15 October 2010. At the hearing LM were represented by Mr Michael Brown of Alpha & Omega. OA were represented by Mr Michael Harrison of Harrison IP.

The evidence

OA's evidence – witness statement of Geoffrey Nutland dated 18 March 2010

5) Mr Nutland is OA's managing director. He says that he has been using the name FAT TRAP since at least 2006 in relation to a disposable pouch for absorbing liquids such as fats, oils and grease (in the trade, fats, oils and greases are collectively referred to as "FOG" - I will adopt this term where necessary). He explains that the product is designed to stop FOG being put down kitchen sinks. He states that he applied to register the name as a trade mark in class 1 but it was refused registration on the grounds that it was descriptive; pages 1-3 of Exhibit GN1 contain copies of the relevant examination report issued by the Intellectual Property Office. Mr Nutland explains that he became aware of LM's registration in July 2009 and that he would have objected to it earlier if he had known about it.

6) Mr Nutland states that although his application was in class 1 and LM's registration is in class 21, the products do the same thing i.e. they trap or collect fat for safe disposal. Mr Nutland says that his product has been on sale since October 2006, initially by FT (UK) Limited (a company now dissolved) but since June 2008 by OA. Sales details since 2007 are provided, namely:

<u>Period</u>	<u>Customer</u>	<u>Amount</u>	<u>Number of packs sold</u>
2007-2008	Anglian Water	£17,000	30,000
1/7/2008	Lakeland	£6,000	8,000
1/12/2008	Yorkshire Water	£1,000	1,000
2/5/2008- 9/02/2010	Web sales & Caravan	£3,000	£4,000
26/2/09	Suma	£228.48	
1/10/2008- 7/5/2009	Anglian Water	£1,675.75	3,000
		£44,014.53	71,000

7) Mr Nutland states that around £64,000 has been spent on marketing and promoting the product. A breakdown is provided on page 4 of Exhibit GN1 showing that such expenditure relates to: attendance at various shows and events, advertisements in water related journals and in trade catalogues, sales/marketing consultants and public relations including endorsement by a celebrity chef.

8) Various pages are provided in Exhibit GN1 relating to the use of the words FAT TRAP in the trade, a summary is provided below:

i) Pages 5-7 contain a WRC Portfolio Research document relating to a FOG project. It contains a questionnaire about the trial of "FT (UK) Ltd Fat-Trap". The questionnaire asks "where did you obtain your free sample of the Fat-Trap?". The project took place in October 2005.

ii) Pages 5-10 contain another WRC Portfolio Research document which includes references to: "The Nortje Fat Trap" which is termed a "a domestic fat trap", "The Less Mess Fat Trap" which is a "domestic kitchen fat collection pot", and the "FT (UK) Ltd Organic (Coconut) Fat Trap" which is a "domestic kitchen, organic, fat absorption pouch". The document contains a copyright date of 2008.

iii) Pages 11-19 contain literature produced by OA including advertising material and marketing photographs showing the "The Fattrap" product which "traps fat fast". The literature is dated between February 2009 and July 2009.

iv) Pages 20-23 contain prints from the website www.grease-removal.co.uk. A welcome page includes the text "...your essential site for grease treatment and grease management solutions – Grease Guzzlers, Biological Grease Treatment and Fat Traps" and "whether you need a fat trap or an all singing and dancing grease digestion system". There are links on the website to pages containing "Grease and Fat Traps". Another page contains three products "Fat Trap GT2", "Fat Trap GT4 – Pedestrian" and "Fat-Trap GT4 – Vehicular". A page for the "Fat Trap – GT2" is provided which includes the text "Fat Traps provide a low cost and effective method for separating fat and grease from water flow". The device appears to be of the sort fitted into the water drainage system of a kitchen. No dates are contained on these prints, but I note that Mr Nutland states that the majority of all the uses in the exhibit have taken place since before LM applied to register the mark in question.

v) Pages 24-26 contain prints from www.sirance.co.uk. Under a heading "Microwave & Oven Pads – Fat Trap & Absorbent Rotisserie Liners" there is a description of The Fat-Trap™ which appears to be a pad that is placed under cooking meat whereby the "fat dripping from the food[s] is absorbed and trapped inside the pad". Another page is provided for Fat-Trap™ Microwave liners which work in a similar manner. No dates are contained on the prints, but I note, again, Mr Nutland's general statement (summarized at point iv above) regarding the use of such terms and since when. In any event, further pages (35-37) consist of archive prints as of 7 May 2008 showing the same material. Also provided is a letter to Geoff (presumably Nutland) from Susan Evans of Sirane which states that "Sirane manufacture and produce a product called a Fat-Trap used for cooking purposes and have done since March 2003."

vi) Pages 27-29 contain prints from www.edincare.com (this appears to be a UK based website as the products are priced in pound sterling). Various “pro-trap” and “eco-trap” products are shown under a heading “Pro-Trap/Eco-Trap Fat Traps”. They are described as grease separator systems which appear to fit into kitchen (commercial) systems and which separate fat from grey water. No dates are contained on the prints, but I note, again, what Mr Nutland states as summarised at point iv. Further archive prints (dated 17 April 2008) are provided which are similar (but not the same) and which include the words “EcoFat Trap 120” etc.

vii) Pages 30-33 contain prints from www.grease-eater.co.uk, a website operated by a company called Hydera International Ltd which sells a product for treating a “fat trap”. These appear to be treatments for the grease separator systems referred to above.

viii) Page 34 contains a print from www.lakeland.co.uk, a website which sells a product called “Fat Trappers” which, when used in a grill rack or roasting dish, “.soak up all the excess fat from foods such as sausages, chops, burgers and bacon and trap it within.”

ix) An extract is provided from the BBC News website containing an article headed ““Fat traps” to unclog town sewers” which relates to the installation of fat traps under the sinks of restaurants, pubs and hotels.

9) Mr Nutland also refers to the examination of LM’s trade mark which was initially objected to as being descriptive. He notes that the objection was overcome on the basis of argument that LM’s product did not “catch” or “trap” fat and, thus, was not in line with the dictionary definitions of the word TRAP. Mr Nutland argues that the word TRAP should not be given a narrow definition and he exhibits an extract from the Compact Oxford English Dictionary which defines TRAP as:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a bath, basin, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person’s mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

10) Also exhibited is an extract from the Cambridge Dictionary Online (Learners Edition) in which Mr Nutland highlights that when used as a verb, “trap” can also mean “to keep something in one place”. The actual reference reads:

“To keep something such as heat or water in one place, especially because it is useful

A greenhouse stays warm because the glass traps the heat of the sun”

11) Mr Nutland completes his evidence by stating that the average user of the products in question would not distinguish between something that “traps” or “catches” and something that “collects” or “keeps” and he believes that the average user would recognize the name “FAT TRAP” as being descriptive of LM’s product.

LM’s evidence – witness statement of Tina Pearce dated 14 May 2010

12) Ms Pearce is the managing director of LM. Exhibit TP1 to her witness statement contains a number of documents which she refers to, the first such document being a Companies House print showing that LM was incorporated on 18 September 2003. She says that since then, the trade mark FAT TRAP has been used continuously, the first product being a cylindrical plastic container having a removable lid and an internal funnel to facilitate the tipping of FOG into it. She says that a collapsible cardboard version has also been introduced.

13) Ms Pearce provides sales figures and advertising figures as follows:

Year ending	Sales	Advertising/promotion
30.9.2004	£30, 456	£4, 636
30.0.2005	£15, 547	£3, 043
30.09.2006	£40, 867	£2, 847
30.09.2007	£68,502	£2, 552
30.09.2008	£77,540	£1, 050
30.09.2009	£83,723	£439

14) Ms Pearce notes that in the 2004 accounts there was also a charge of £11,689 which was spent on research and development. She also says that as each product carries LM’s contact details, the product itself serves as an advertisement. In relation to the above sales, Ms Pearce explains that LM’s principal customers are water companies. She says that at the end of April 2010 567,890 FAT TRAP products had been supplied, broken down as follows: Severn Trent Water 270,000, Anglian Water Group 85,000, Yorkshire Water 53,000, South West Water 30,000, Wessex Water 5,000, Northumbrian Water 10,000, and United Utilities 27,000.

15) Ms Pearce refers to a non-disclosure and confidentiality agreement between what she claims to be the proprietor of the registration and a company called Dainton Limited. The agreement is provided in Exhibit TP1. Whilst Dainton Limited is a party, the other party is a person called Tina Offield. There is no mention of LM. The point Ms Pearce makes is that the person signing on behalf of Dainton Limited is Mr Nutland, who later went on to make an application for FAT-TRAP in his own name, and who now has a role in OA and, therefore, he had access to detailed information concerning the FAT TRAP product since at least as early as January 2006 (when the non-disclosure agreement was reached). I note all this, but the absence of any explanation of who Ms Offield is and her relationship, if any, with LM means that this evidence has little significance. In any event, it is not clear from the agreement itself what information was disclosed between the parties nor is it clear what relevance this has in deciding whether the mark in question is a descriptive term or not.

16) The FAT TRAP product has, Ms Pearce says, attracted considerable interest due to its environmentally friendliness. She highlights extracts from:

The “EasyLiving” publication of April 2006. A picture of the product is shown, as are the words “Fat Trap tub. £2.25 for two”.

“Prima” magazine dated May 2007. The article writer answers a reader’s question regarding fat disposal by suggesting that they try “a handy gadget called the Fat Trap”. The article explains that it is a small container that sits on your worktop or under your sink to store FOG.

“Limited Edition – North London” publication dated February 2007. The article features a picture of the product and includes the text: “Don’t risk clogging your kitchen sink with waste fat and oil, instead pour it straight into The Fat Trap.”

17) Exhibit TP1 also contains a to whom it may concern letter dated 4 May 2010 from Unex Designs Limited who worked on the design of the product. It confirms that it has worked with Ms Pearce since 2003 on the “trade marked fat trap product”. A further to whom it may concern letter (dated 22 April 2010) is exhibited from the Marketing-PR Company in Tavistock who, Ms Pearce explains, carry out promotional work for LM. The letter confirms that this has been done since November 2006. Two press releases about the FAT TRAP product are attached to this letter from December 2006. The letter also refers to the product having received coverage in: Cumbrian Newspaper (January 2007), The Bath Chronicle (December 2006), PRIMA (May 2007), Limited Editions (February 2007), Radio 2 Chris Evans Show, SHE, Daily Express (no dates for these last three are provided), News & Star (February 2007), Recycling and Waste World (January 2007) and Link Magazine (Spring 2007). No content for any of this coverage is, though, provided.

18) Ms Pearce also refers to a marketing review for LM's FAT TRAP product that was carried out by Clarity Business Solutions in May 2004. The report is provided in Exhibit TP1. Other facts that emerge from the evidence are that:

- ❖ FAT TRAP has won a number of awards including the Green Champion Award. An extract from the North Devon Gazette (November 2006) refers to this.
- ❖ Water companies promote the product. Details of such promotion by SouthWest Water are provided in the form of a customer newsletter dated 19 July 2005 which states that "Domestic customers can help the environment by using "Fat Traps", which are directly available from Less Mess Ltd....". Similar promotion is shown in SouthWest Water's publication called WaterLevel (Autumn 2004) in the form of an article headed "Get the fat trap habit" and which includes the text "One bright solution comes in the form of the "Fat Trap" (pictured). It's a 500ml capacity plastic screw-top container that sits neatly at the side of the sink or cooker until it is needed".
- ❖ The product featured on the Gordon Ramsey television programme "The F Word" in the summer of 2006. Ms Pearce states that its use was demonstrated and an explanation given of the importance of its use to avoid blocking drains.

19) Ms Pearce completes her evidence by highlighting what her registration covers (containers) and that the FAT TRAP product is just a container which serves for the effective collection and disposal of FOG. She also refers to the reputation that has been established as a result of sales and publicity so that when members of the general public, when seeing the trade mark FAT TRAP in relation to a domestic or household container, will associate it with LM.

OA's reply evidence – second witness statement of Geoffrey Nutland dated 23 June 2010

20) Mr Nutland's second witness statement is, in the main, a critique of Ms Pearce's evidence particularly focusing on what he consider to be the limited form of promotion of LM's product and that very few sales have taken place to the general public. Factual evidence in this witness statement includes:

An example of Severn Trent Water referring to LM's product in what Mr Nutland says is a descriptive manner. This is dated 15 June 2010 and the text includes:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

An extract from CONNECT RIGHT with highlighted text reading:

“DO cool and dispose of domestic fats and oils in the bin or install a fat trap.”

Further information regarding the Non-Disclosure Agreement, with Mr Nutland stating that he told Ms Pearce that he was planning to market “Organic Fat Trap” and trade mark it and that he was not aware of LM’s product or name prior to this. There was a possibility that the two companies would work together but this clearly did not come to fruition.

DECISION

21) LM has filed evidence to show that its mark has a reputation and, therefore, that it has a distinctive character through use. However, this only needs to be assessed if the invalidation is successful, *prima facie*, in respect of the grounds of invalidation. I will therefore consider the grounds under section 3(1)(c) and (b) *prima facie* and will only return to the question of distinctive character through use if it is necessary to do so. I will begin with section 3(1)(c).

The section 3(1)(c) ground of invalidation

22) Section 3(1)(c) states that the following shall not be registered:

“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 services, or other characteristics of goods or services”

23) The European Court of Justice (“ECJ”) has issued judgments germane to this issue. A helpful summary of the position was given in *Wm. Wrigley Jr. Company v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-191/01 P (“*Doublemint*”), where it was stated:

“32. In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

24) I also note that in *Matratzen Concord AG v Hukla Germany SA*, (Case C-421/04) ("*Matratzan*") the ECJ stated:

"In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPNNederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50)."

25) I also note the decision of the General Court in *Ford Motor Co v OHIM*, Case T- 67/07 ("*Ford*") where it was stated:

"there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics"

26) Given that the mark at issue is a two word combination, I also bear in mind the decision of the ECJ in *Postkantoor* (Case C-363/99) which considered the registrability of combinations of descriptive words. Paragraphs 98–100 of the judgment are reproduced below:

98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive. Merely bringing those elements together without introducing any unusual variations as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

99. However, such a combination may not be descriptive within the meaning of Article 3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition must be satisfied as regards both the aural and the visual impression produced by the mark.

100. Thus, a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of

which registration is sought, is itself descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the second case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purpose of the same provision.

27) In relation to the underlying interest, section 3(1)(c) pursues an aim which reflects the public interest in ensuring that descriptive signs or indications may be freely used by all (see, for example, *Doublemint*).

28) OA's argument is that that the words FAT TRAP are descriptive based on the dictionary meanings of those words, that those words combine to form a descriptive whole, and that all of this is supported by the fact that such a word combination has been used by other traders. At the hearing, Mr Brown conceded that the words FAT TRAP may constitute a descriptive combination for some goods but that this was not the case for simple containers such as LM's product. This is a sensible concession. It is clear from the evidence that the words FAT TRAP are used descriptively at least in relation to the category of goods that I will describe as grease separator systems. Such goods appear to be devices which are built into water drainage systems, particularly in commercial kitchens, which separate FOG from the water itself and then retains (or traps) the FOG inside the device whilst allowing the water to flow on. To this extent, I can clearly see that the words FAT TRAP may constitute an apt description for such a product.

29) However, the issue must be assessed by reference to the goods in respect of which the mark is registered. To that extent, it is quite possible that a mark may be descriptive of one product but not descriptive of another even they produce a similar end result (the end result being, in this case, the prevention of FOG from blocking drains). In assessing the aptness of the word combination FAT TRAP to describe the goods of the registration it is necessary to consider the meanings of such words. The word FAT, in the context of the goods at issue, requires no real analysis. It is clearly a meaningful word. In terms of the word TRAP, OA's evidence contains the following definition:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a

bath, basis, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person's mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

30) Mr Harrison relied particularly on definition 4, namely: "a container or device used to collect a specified thing". LM's product is a container, its specification clearly says so. Furthermore, the purpose of the product can be said to enable a person to collect their used cooking fat in it for future disposal. I can, therefore, fully understand why Mr Harrison relies on the definition he does as, on the face of it, the product could be said to be a trap as so defined. However, the container based definition does not appear to be a common one. It does not appear in my copy of the Collins English Dictionary. It may be that the definition must be read in context with the other meanings of the word. For example, if the container traps something inside so as to prevent its escape then such a container may properly be defined as a trap. There is no evidence that shows any form of container being referred to as a trap. I do not consider it likely that a container would ordinarily be described as a trap unless its purpose is to prevent its contents from escaping. Whilst LM's product is a container for fat, it is, in my view, far-fetched to say that the container is trapping the fat inside – the fat is hardly attempting to get out. Fat is poured into it and the lid put on to prevent it from being spilled if accidentally knocked - this would never be categorized as trapping. Absent evidence to show that containers are ordinarily referred to as traps then the definition relied upon is not persuasive, on its own, for me to find that LM's product would be described as such. In this context, and considering definition 4, FAT TRAP does not describe the product.

31) That is not the end of it because the more general definitions of TRAP relate to devices used to catch something, or in which something is retained to prevent escape. The second type of meaning is already dealt with in the preceding paragraph – unless the container's purpose can be said to be trapping something inside to prevent its escape then the word TRAP would not be apt. In my view, it is not. In relation to being a device for catching something, again, I come to the view that something which is merely a container is hardly likely to function as a trap. There are many and varied types of trap - mouse traps, sand traps (a golfing term) a trap under a sink, a greyhound trap. All these uses are, though, more apt uses given that they trap something: a mouse trap traps or catches mice, a sand trap creates an unpleasant/difficult situation for a golfer by trapping him or her into a bunker, a trap under the sink is a specific term of art but which, in any event, traps gases underneath a water filled curve, a greyhound trap (again a clearly defined term) prevents the greyhound from escaping until it is

time to race. All of these uses are clear and understandable but, for LM's product, I do not consider it apt for it to be considered as a trap or that it is something which traps.

32) In terms of OA's evidence, I have already explained that some goods may be more aptly described as fat traps, particularly the fat separator systems referred to earlier. It is not clear what the Nortje Fat Trap consists of but the accompanying text suggests that it is a domestic version of these separator systems. Other than these types of products the only other form of use relates to pouches or mats which are used during or after cooking in order to soak up fat. The use made of the words FAT TRAP for these products appears more akin to trade mark use rather than descriptive use. In any event, such products may more aptly be described as trapping fat and I note in particular that OA's product "traps fat fast" – I do not think the same can be said of a simple container as one simply pours the fat into it when ready.

33) Other aspects of the evidence I have considered relates to the claimed descriptive uses made in relation to LM's product. Severn Trent Water stated in a publication:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

34) I do not find the above particularly telling, the publication could as much be referring to the product name as to using a description. Indeed, I have struggled to find any of the promotional materials or articles relating to LM's product as suggesting that the container traps fat or acts as a trap. The extract from CONNECT RIGHT is even less significant. It reads:

"DO cool and dispose of domestic fats and oils in the bin or install a fat trap."

35) In relation to the above, you would clearly not "install" a container. The above text simply refers to two ways of dealing with FOG: disposal in a bin once cooled (LM's product achieves this result) or by installing a fat trap (I presume this to mean a separator system). Also considered are the circumstances surrounding Mr Nutland's application for a trade mark which was refused. This has little significance either way. I must come to my own decision having regard to all the evidence and arguments before me.

36) There is, of course, the argument as to perception. The matter must be considered against the perception of the relevant parties (the trade and the public). OA argue that as water companies, for example, use and will know of the words fat trap as a description (presumably they will be aware of grease separator systems) then, when seeing such words on a container for fat, such use will simply send a descriptive message. I note the argument, but in my view

the relevant parties will be able to distinguish between what may be known descriptively as a fat trap and what will be seen as a different product. It is my view that the words FAT TRAP will be perceived as allusive, but not a directly descriptive combination of words for the goods of the registration.

37) I must also have regard to the fact that whilst the exact product (or a characteristic of it) sold by LM may not be described as a fat trap, other types of container in class 21 may have a more trapping quality. I have considered this aspect, but a container is a container. There is nothing in the specification that would indicate a more active trapping quality. The fat separator systems, for example, are quite distinct products and would never be described as containers. They would, in any event, fall in a different class. The other types of product shown in the evidence would not, similarly, be considered as a container. I see no reason to find that a container in class 21 will have any more a fat trapping characteristic than LMs container and, therefore, for the reasons given, consider that the words FAT TRAP are not descriptive of the goods in question.

38) My decision is to reject the application for invalidation under section 3(1)(c) of the Act.

The section 3(1)(b) ground of invalidation

39) Section 3(1)(b) states that the following shall not be registered:

“trade marks which are devoid of any distinctive character”

40) The test to be applied under this ground has been dealt with by the ECJ in a number of its judgments, notably in Joined Cases C-53/01 to C- 55/01 *Linde AG, Winward Industries Inc and Rado Uhren AG* (8 April 2003). The test equates to assessing the impact that the sign will have on the average consumer when used in relation to the goods at issue and then deciding whether they will see it as something that is identifying to them goods originating from a particular undertaking. Although this ground has full and independent scope from the other ground of objection, I note that in *Postkantoor* the ECJ stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

41) The pleaded case is that the marks are devoid of distinctive character because they describe characteristics of the goods for which they are registered. Taking this pleading into account, together with the comments made in

Postkantoor, there is little to say on this ground given that I have already determined that the mark is not descriptive. No claim, other than it being descriptive of the goods, has been put forward as to why the mark is devoid of distinctive character. This claim must, therefore, also fail. In view of this, and in view of the claim also failing under section 3(1)(c), there is no need to consider the issue of acquired distinctiveness.

Costs

42) LM has been successful and is entitled to a contribution towards its costs¹. I hereby order Organic Absorbents Ltd to pay Less Mess Ltd the sum of £1300. This sum is calculated as follows:

Preparing a statement and considering the other side's statement
£300

Filing evidence and considering the other side's evidence
£500

Attending the hearing
£500

43) The above sum should 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 13 day of December 2010

**Oliver Morris
For the Registrar,
The Comptroller-General**

¹ Costs are normally awarded on the basis of the registrar's published scale in Tribunal Practice Notice 4/2007.

O-427-10

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION 2506380
IN THE NAME OF LESS MESS LTD
IN RESPECT OF THE SERIES OF TWO TRADE MARKS:**

**FAT TRAP
&
Fat Trap**

AND

**AN APPLICATION (NO 83621) FOR INVALIDATION BY
ORGANIC ABSORBENTS LIMITED**

TRADE MARKS ACT 1994

In the matter of registration 2506380 standing in the name of Less Mess Ltd in respect of the series of two trade marks: FAT TRAP & Fat Trap

and

An application (no 83621) for invalidation by Organic Absorbents Limited

The background and the pleadings

1) The registered trade marks the subject of these proceedings stand in the name of Less Mess Ltd ("LM"). LM applied for them as a series application on 14 January 2009, the application then completing its registration procedure on 12 June that year. The trade marks, together with the goods for which they are registered, are shown below:

FAT TRAP

Fat Trap

Class 21: Containers for kitchen and household use; containers for the collection and disposal of fats, greases and oils.

2) On 3 November 2009 Organic Absorbents Limited ("OA") applied for a declaration of invalidity in respect of LM's registration. Invalidity is sought in respect of all the goods covered by the registration. The grounds for invalidation are under sections 3(1)(b) & (c) of the Trade Marks Act 1994 ("the Act"). The claim under section 3(1)(b) is that the marks are devoid of any distinctive character because they describe characteristics of the goods of the registration. In relation to section 3(1)(c), the claim is put in the following terms:

"the mark "FAT TRAP" consists exclusively of words that serve to designate the kind and intended purpose of the goods for which it is registered and is a term that is used in the trade to describe such goods i.e. a product which traps fat".

3) LM filed a counterstatement denying the grounds of invalidation. The counterstatement refers to the acceptance of its mark at examination stage and it also contains detailed submissions on the relevant case-law etc.

4) Both sides filed evidence. The matter then came to be heard before me on 15 October 2010. At the hearing LM were represented by Mr Michael Brown of Alpha & Omega. OA were represented by Mr Michael Harrison of Harrison IP.

The evidence

OA's evidence – witness statement of Geoffrey Nutland dated 18 March 2010

5) Mr Nutland is OA's managing director. He says that he has been using the name FAT TRAP since at least 2006 in relation to a disposable pouch for absorbing liquids such as fats, oils and grease (in the trade, fats, oils and greases are collectively referred to as "FOG" - I will adopt this term where necessary). He explains that the product is designed to stop FOG being put down kitchen sinks. He states that he applied to register the name as a trade mark in class 1 but it was refused registration on the grounds that it was descriptive; pages 1-3 of Exhibit GN1 contain copies of the relevant examination report issued by the Intellectual Property Office. Mr Nutland explains that he became aware of LM's registration in July 2009 and that he would have objected to it earlier if he had known about it.

6) Mr Nutland states that although his application was in class 1 and LM's registration is in class 21, the products do the same thing i.e. they trap or collect fat for safe disposal. Mr Nutland says that his product has been on sale since October 2006, initially by FT (UK) Limited (a company now dissolved) but since June 2008 by OA. Sales details since 2007 are provided, namely:

<u>Period</u>	<u>Customer</u>	<u>Amount</u>	<u>Number of packs sold</u>
2007-2008	Anglian Water	£17,000	30,000
1/7/2008	Lakeland	£6,000	8,000
1/12/2008	Yorkshire Water	£1,000	1,000
2/5/2008- 9/02/2010	Web sales & Caravan	£3,000	£4,000
26/2/09	Suma	£228.48	
1/10/2008- 7/5/2009	Anglian Water	£1,675.75	3,000
		£44,014.53	71,000

7) Mr Nutland states that around £64,000 has been spent on marketing and promoting the product. A breakdown is provided on page 4 of Exhibit GN1 showing that such expenditure relates to: attendance at various shows and events, advertisements in water related journals and in trade catalogues, sales/marketing consultants and public relations including endorsement by a celebrity chef.

8) Various pages are provided in Exhibit GN1 relating to the use of the words FAT TRAP in the trade, a summary is provided below:

i) Pages 5-7 contain a WRC Portfolio Research document relating to a FOG project. It contains a questionnaire about the trial of "FT (UK) Ltd Fat-Trap". The questionnaire asks "where did you obtain your free sample of the Fat-Trap?". The project took place in October 2005.

ii) Pages 5-10 contain another WRC Portfolio Research document which includes references to: "The Nortje Fat Trap" which is termed a "a domestic fat trap", "The Less Mess Fat Trap" which is a "domestic kitchen fat collection pot", and the "FT (UK) Ltd Organic (Coconut) Fat Trap" which is a "domestic kitchen, organic, fat absorption pouch". The document contains a copyright date of 2008.

iii) Pages 11-19 contain literature produced by OA including advertising material and marketing photographs showing the "The Fattrap" product which "traps fat fast". The literature is dated between February 2009 and July 2009.

iv) Pages 20-23 contain prints from the website www.grease-removal.co.uk. A welcome page includes the text "...your essential site for grease treatment and grease management solutions – Grease Guzzlers, Biological Grease Treatment and Fat Traps" and "whether you need a fat trap or an all singing and dancing grease digestion system". There are links on the website to pages containing "Grease and Fat Traps". Another page contains three products "Fat Trap GT2", "Fat Trap GT4 – Pedestrian" and "Fat-Trap GT4 – Vehicular". A page for the "Fat Trap – GT2" is provided which includes the text "Fat Traps provide a low cost and effective method for separating fat and grease from water flow". The device appears to be of the sort fitted into the water drainage system of a kitchen. No dates are contained on these prints, but I note that Mr Nutland states that the majority of all the uses in the exhibit have taken place since before LM applied to register the mark in question.

v) Pages 24-26 contain prints from www.sirance.co.uk. Under a heading "Microwave & Oven Pads – Fat Trap & Absorbent Rotisserie Liners" there is a description of The Fat-Trap™ which appears to be a pad that is placed under cooking meat whereby the "fat dripping from the food[s] is absorbed and trapped inside the pad". Another page is provided for Fat-Trap™ Microwave liners which work in a similar manner. No dates are contained on the prints, but I note, again, Mr Nutland's general statement (summarized at point iv above) regarding the use of such terms and since when. In any event, further pages (35-37) consist of archive prints as of 7 May 2008 showing the same material. Also provided is a letter to Geoff (presumably Nutland) from Susan Evans of Sirane which states that "Sirane manufacture and produce a product called a Fat-Trap used for cooking purposes and have done since March 2003."

vi) Pages 27-29 contain prints from www.edincare.com (this appears to be a UK based website as the products are priced in pound sterling). Various “pro-trap” and “eco-trap” products are shown under a heading “Pro-Trap/Eco-Trap Fat Traps”. They are described as grease separator systems which appear to fit into kitchen (commercial) systems and which separate fat from grey water. No dates are contained on the prints, but I note, again, what Mr Nutland states as summarised at point iv. Further archive prints (dated 17 April 2008) are provided which are similar (but not the same) and which include the words “EcoFat Trap 120” etc.

vii) Pages 30-33 contain prints from www.grease-eater.co.uk, a website operated by a company called Hydera International Ltd which sells a product for treating a “fat trap”. These appear to be treatments for the grease separator systems referred to above.

viii) Page 34 contains a print from www.lakeland.co.uk, a website which sells a product called “Fat Trappers” which, when used in a grill rack or roasting dish, “.soak up all the excess fat from foods such as sausages, chops, burgers and bacon and trap it within.”

ix) An extract is provided from the BBC News website containing an article headed ““Fat traps” to unclog town sewers” which relates to the installation of fat traps under the sinks of restaurants, pubs and hotels.

9) Mr Nutland also refers to the examination of LM’s trade mark which was initially objected to as being descriptive. He notes that the objection was overcome on the basis of argument that LM’s product did not “catch” or “trap” fat and, thus, was not in line with the dictionary definitions of the word TRAP. Mr Nutland argues that the word TRAP should not be given a narrow definition and he exhibits an extract from the Compact Oxford English Dictionary which defines TRAP as:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a bath, basin, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person’s mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

10) Also exhibited is an extract from the Cambridge Dictionary Online (Learners Edition) in which Mr Nutland highlights that when used as a verb, “trap” can also mean “to keep something in one place”. The actual reference reads:

“To keep something such as heat or water in one place, especially because it is useful

A greenhouse stays warm because the glass traps the heat of the sun”

11) Mr Nutland completes his evidence by stating that the average user of the products in question would not distinguish between something that “traps” or “catches” and something that “collects” or “keeps” and he believes that the average user would recognize the name “FAT TRAP” as being descriptive of LM’s product.

LM’s evidence – witness statement of Tina Pearce dated 14 May 2010

12) Ms Pearce is the managing director of LM. Exhibit TP1 to her witness statement contains a number of documents which she refers to, the first such document being a Companies House print showing that LM was incorporated on 18 September 2003. She says that since then, the trade mark FAT TRAP has been used continuously, the first product being a cylindrical plastic container having a removable lid and an internal funnel to facilitate the tipping of FOG into it. She says that a collapsible cardboard version has also been introduced.

13) Ms Pearce provides sales figures and advertising figures as follows:

Year ending	Sales	Advertising/promotion
30.9.2004	£30, 456	£4, 636
30.0.2005	£15, 547	£3, 043
30.09.2006	£40, 867	£2, 847
30.09.2007	£68,502	£2, 552
30.09.2008	£77,540	£1, 050
30.09.2009	£83,723	£439

14) Ms Pearce notes that in the 2004 accounts there was also a charge of £11,689 which was spent on research and development. She also says that as each product carries LM’s contact details, the product itself serves as an advertisement. In relation to the above sales, Ms Pearce explains that LM’s principal customers are water companies. She says that at the end of April 2010 567,890 FAT TRAP products had been supplied, broken down as follows: Severn Trent Water 270,000, Anglian Water Group 85,000, Yorkshire Water 53,000, South West Water 30,000, Wessex Water 5,000, Northumbrian Water 10,000, and United Utilities 27,000.

15) Ms Pearce refers to a non-disclosure and confidentiality agreement between what she claims to be the proprietor of the registration and a company called Dainton Limited. The agreement is provided in Exhibit TP1. Whilst Dainton Limited is a party, the other party is a person called Tina Offield. There is no mention of LM. The point Ms Pearce makes is that the person signing on behalf of Dainton Limited is Mr Nutland, who later went on to make an application for FAT-TRAP in his own name, and who now has a role in OA and, therefore, he had access to detailed information concerning the FAT TRAP product since at least as early as January 2006 (when the non-disclosure agreement was reached). I note all this, but the absence of any explanation of who Ms Offield is and her relationship, if any, with LM means that this evidence has little significance. In any event, it is not clear from the agreement itself what information was disclosed between the parties nor is it clear what relevance this has in deciding whether the mark in question is a descriptive term or not.

16) The FAT TRAP product has, Ms Pearce says, attracted considerable interest due to its environmentally friendliness. She highlights extracts from:

The “EasyLiving” publication of April 2006. A picture of the product is shown, as are the words “Fat Trap tub. £2.25 for two”.

“Prima” magazine dated May 2007. The article writer answers a reader’s question regarding fat disposal by suggesting that they try “a handy gadget called the Fat Trap”. The article explains that it is a small container that sits on your worktop or under your sink to store FOG.

“Limited Edition – North London” publication dated February 2007. The article features a picture of the product and includes the text: “Don’t risk clogging your kitchen sink with waste fat and oil, instead pour it straight into The Fat Trap.”

17) Exhibit TP1 also contains a to whom it may concern letter dated 4 May 2010 from Unex Designs Limited who worked on the design of the product. It confirms that it has worked with Ms Pearce since 2003 on the “trade marked fat trap product”. A further to whom it may concern letter (dated 22 April 2010) is exhibited from the Marketing-PR Company in Tavistock who, Ms Pearce explains, carry out promotional work for LM. The letter confirms that this has been done since November 2006. Two press releases about the FAT TRAP product are attached to this letter from December 2006. The letter also refers to the product having received coverage in: Cumbrian Newspaper (January 2007), The Bath Chronicle (December 2006), PRIMA (May 2007), Limited Editions (February 2007), Radio 2 Chris Evans Show, SHE, Daily Express (no dates for these last three are provided), News & Star (February 2007), Recycling and Waste World (January 2007) and Link Magazine (Spring 2007). No content for any of this coverage is, though, provided.

18) Ms Pearce also refers to a marketing review for LM's FAT TRAP product that was carried out by Clarity Business Solutions in May 2004. The report is provided in Exhibit TP1. Other facts that emerge from the evidence are that:

- ❖ FAT TRAP has won a number of awards including the Green Champion Award. An extract from the North Devon Gazette (November 2006) refers to this.
- ❖ Water companies promote the product. Details of such promotion by SouthWest Water are provided in the form of a customer newsletter dated 19 July 2005 which states that "Domestic customers can help the environment by using "Fat Traps", which are directly available from Less Mess Ltd....". Similar promotion is shown in SouthWest Water's publication called WaterLevel (Autumn 2004) in the form of an article headed "Get the fat trap habit" and which includes the text "One bright solution comes in the form of the "Fat Trap" (pictured). It's a 500ml capacity plastic screw-top container that sits neatly at the side of the sink or cooker until it is needed".
- ❖ The product featured on the Gordon Ramsey television programme "The F Word" in the summer of 2006. Ms Pearce states that its use was demonstrated and an explanation given of the importance of its use to avoid blocking drains.

19) Ms Pearce completes her evidence by highlighting what her registration covers (containers) and that the FAT TRAP product is just a container which serves for the effective collection and disposal of FOG. She also refers to the reputation that has been established as a result of sales and publicity so that when members of the general public, when seeing the trade mark FAT TRAP in relation to a domestic or household container, will associate it with LM.

OA's reply evidence – second witness statement of Geoffrey Nutland dated 23 June 2010

20) Mr Nutland's second witness statement is, in the main, a critique of Ms Pearce's evidence particularly focusing on what he consider to be the limited form of promotion of LM's product and that very few sales have taken place to the general public. Factual evidence in this witness statement includes:

An example of Severn Trent Water referring to LM's product in what Mr Nutland says is a descriptive manner. This is dated 15 June 2010 and the text includes:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

An extract from CONNECT RIGHT with highlighted text reading:

“DO cool and dispose of domestic fats and oils in the bin or install a fat trap.”

Further information regarding the Non-Disclosure Agreement, with Mr Nutland stating that he told Ms Pearce that he was planning to market “Organic Fat Trap” and trade mark it and that he was not aware of LM’s product or name prior to this. There was a possibility that the two companies would work together but this clearly did not come to fruition.

DECISION

21) LM has filed evidence to show that its mark has a reputation and, therefore, that it has a distinctive character through use. However, this only needs to be assessed if the invalidation is successful, prima facie, in respect of the grounds of invalidation. I will therefore consider the grounds under section 3(1)(c) and (b) prima facie and will only return to the question of distinctive character through use if it is necessary to do so. I will begin with section 3(1)(c).

The section 3(1)(c) ground of invalidation

22) Section 3(1)(c) states that the following shall not be registered:

“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 services, or other characteristics of goods or services”

23) The European Court of Justice (“ECJ”) has issued judgments germane to this issue. A helpful summary of the position was given in *Wm. Wrigley Jr. Company v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-191/01 P (“*Doublemint*”), where it was stated:

“32. In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

24) I also note that in *Matratzen Concord AG v Hukla Germany SA*, (Case C-421/04) ("*Matratzan*") the ECJ stated:

"In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50)."

25) I also note the decision of the General Court in *Ford Motor Co v OHIM*, Case T- 67/07 ("*Ford*") where it was stated:

"there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics"

26) Given that the mark at issue is a two word combination, I also bear in mind the decision of the ECJ in *Postkantoor* (Case C-363/99) which considered the registrability of combinations of descriptive words. Paragraphs 98–100 of the judgment are reproduced below:

98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive. Merely bringing those elements together without introducing any unusual variations as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

99. However, such a combination may not be descriptive within the meaning of Article 3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition must be satisfied as regards both the aural and the visual impression produced by the mark.

100. Thus, a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of

which registration is sought, is itself descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the second case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purpose of the same provision.

27) In relation to the underlying interest, section 3(1)(c) pursues an aim which reflects the public interest in ensuring that descriptive signs or indications may be freely used by all (see, for example, *Doublemint*).

28) OA's argument is that that the words FAT TRAP are descriptive based on the dictionary meanings of those words, that those words combine to form a descriptive whole, and that all of this is supported by the fact that such a word combination has been used by other traders. At the hearing, Mr Brown conceded that the words FAT TRAP may constitute a descriptive combination for some goods but that this was not the case for simple containers such as LM's product. This is a sensible concession. It is clear from the evidence that the words FAT TRAP are used descriptively at least in relation to the category of goods that I will describe as grease separator systems. Such goods appear to be devices which are built into water drainage systems, particularly in commercial kitchens, which separate FOG from the water itself and then retains (or traps) the FOG inside the device whilst allowing the water to flow on. To this extent, I can clearly see that the words FAT TRAP may constitute an apt description for such a product.

29) However, the issue must be assessed by reference to the goods in respect of which the mark is registered. To that extent, it is quite possible that a mark may be descriptive of one product but not descriptive of another even they produce a similar end result (the end result being, in this case, the prevention of FOG from blocking drains). In assessing the aptness of the word combination FAT TRAP to describe the goods of the registration it is necessary to consider the meanings of such words. The word FAT, in the context of the goods at issue, requires no real analysis. It is clearly a meaningful word. In terms of the word TRAP, OA's evidence contains the following definition:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a

bath, basis, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person's mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

30) Mr Harrison relied particularly on definition 4, namely: "a container or device used to collect a specified thing". LM's product is a container, its specification clearly says so. Furthermore, the purpose of the product can be said to enable a person to collect their used cooking fat in it for future disposal. I can, therefore, fully understand why Mr Harrison relies on the definition he does as, on the face of it, the product could be said to be a trap as so defined. However, the container based definition does not appear to be a common one. It does not appear in my copy of the Collins English Dictionary. It may be that the definition must be read in context with the other meanings of the word. For example, if the container traps something inside so as to prevent its escape then such a container may properly be defined as a trap. There is no evidence that shows any form of container being referred to as a trap. I do not consider it likely that a container would ordinarily be described as a trap unless its purpose is to prevent its contents from escaping. Whilst LM's product is a container for fat, it is, in my view, far-fetched to say that the container is trapping the fat inside – the fat is hardly attempting to get out. Fat is poured into it and the lid put on to prevent it from being spilled if accidentally knocked - this would never be categorized as trapping. Absent evidence to show that containers are ordinarily referred to as traps then the definition relied upon is not persuasive, on its own, for me to find that LM's product would be described as such. In this context, and considering definition 4, FAT TRAP does not describe the product.

31) That is not the end of it because the more general definitions of TRAP relate to devices used to catch something, or in which something is retained to prevent escape. The second type of meaning is already dealt with in the preceding paragraph – unless the container's purpose can be said to be trapping something inside to prevent its escape then the word TRAP would not be apt. In my view, it is not. In relation to being a device for catching something, again, I come to the view that something which is merely a container is hardly likely to function as a trap. There are many and varied types of trap - mouse traps, sand traps (a golfing term) a trap under a sink, a greyhound trap. All these uses are, though, more apt uses given that they trap something: a mouse trap traps or catches mice, a sand trap creates an unpleasant/difficult situation for a golfer by trapping him or her into a bunker, a trap under the sink is a specific term of art but which, in any event, traps gases underneath a water filled curve, a greyhound trap (again a clearly defined term) prevents the greyhound from escaping until it is

time to race. All of these uses are clear and understandable but, for LM's product, I do not consider it apt for it to be considered as a trap or that it is something which traps.

32) In terms of OA's evidence, I have already explained that some goods may be more aptly described as fat traps, particularly the fat separator systems referred to earlier. It is not clear what the Nortje Fat Trap consists of but the accompanying text suggests that it is a domestic version of these separator systems. Other than these types of products the only other form of use relates to pouches or mats which are used during or after cooking in order to soak up fat. The use made of the words FAT TRAP for these products appears more akin to trade mark use rather than descriptive use. In any event, such products may more aptly be described as trapping fat and I note in particular that OA's product "traps fat fast" – I do not think the same can be said of a simple container as one simply pours the fat into it when ready.

33) Other aspects of the evidence I have considered relates to the claimed descriptive uses made in relation to LM's product. Severn Trent Water stated in a publication:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

34) I do not find the above particularly telling, the publication could as much be referring to the product name as to using a description. Indeed, I have struggled to find any of the promotional materials or articles relating to LM's product as suggesting that the container traps fat or acts as a trap. The extract from CONNECT RIGHT is even less significant. It reads:

"DO cool and dispose of domestic fats and oils in the bin or install a fat trap."

35) In relation to the above, you would clearly not "install" a container. The above text simply refers to two ways of dealing with FOG: disposal in a bin once cooled (LM's product achieves this result) or by installing a fat trap (I presume this to mean a separator system). Also considered are the circumstances surrounding Mr Nutland's application for a trade mark which was refused. This has little significance either way. I must come to my own decision having regard to all the evidence and arguments before me.

36) There is, of course, the argument as to perception. The matter must be considered against the perception of the relevant parties (the trade and the public). OA argue that as water companies, for example, use and will know of the words fat trap as a description (presumably they will be aware of grease separator systems) then, when seeing such words on a container for fat, such use will simply send a descriptive message. I note the argument, but in my view

the relevant parties will be able to distinguish between what may be known descriptively as a fat trap and what will be seen as a different product. It is my view that the words FAT TRAP will be perceived as allusive, but not a directly descriptive combination of words for the goods of the registration.

37) I must also have regard to the fact that whilst the exact product (or a characteristic of it) sold by LM may not be described as a fat trap, other types of container in class 21 may have a more trapping quality. I have considered this aspect, but a container is a container. There is nothing in the specification that would indicate a more active trapping quality. The fat separator systems, for example, are quite distinct products and would never be described as containers. They would, in any event, fall in a different class. The other types of product shown in the evidence would not, similarly, be considered as a container. I see no reason to find that a container in class 21 will have any more a fat trapping characteristic than LMs container and, therefore, for the reasons given, consider that the words FAT TRAP are not descriptive of the goods in question.

38) My decision is to reject the application for invalidation under section 3(1)(c) of the Act.

The section 3(1)(b) ground of invalidation

39) Section 3(1)(b) states that the following shall not be registered:

“trade marks which are devoid of any distinctive character”

40) The test to be applied under this ground has been dealt with by the ECJ in a number of its judgments, notably in Joined Cases C-53/01 to C- 55/01 *Linde AG, Winward Industries Inc and Rado Uhren AG* (8 April 2003). The test equates to assessing the impact that the sign will have on the average consumer when used in relation to the goods at issue and then deciding whether they will see it as something that is identifying to them goods originating from a particular undertaking. Although this ground has full and independent scope from the other ground of objection, I note that in *Postkantoor* the ECJ stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

41) The pleaded case is that the marks are devoid of distinctive character because they describe characteristics of the goods for which they are registered. Taking this pleading into account, together with the comments made in

Postkantoor, there is little to say on this ground given that I have already determined that the mark is not descriptive. No claim, other than it being descriptive of the goods, has been put forward as to why the mark is devoid of distinctive character. This claim must, therefore, also fail. In view of this, and in view of the claim also failing under section 3(1)(c), there is no need to consider the issue of acquired distinctiveness.

Costs

42) LM has been successful and is entitled to a contribution towards its costs¹. I hereby order Organic Absorbents Ltd to pay Less Mess Ltd the sum of £1300. This sum is calculated as follows:

Preparing a statement and considering the other side's statement
£300

Filing evidence and considering the other side's evidence
£500

Attending the hearing
£500

43) The above sum should 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 13 day of December 2010

**Oliver Morris
For the Registrar,
The Comptroller-General**

¹ Costs are normally awarded on the basis of the registrar's published scale in Tribunal Practice Notice 4/2007.

O-427-10

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION 2506380
IN THE NAME OF LESS MESS LTD
IN RESPECT OF THE SERIES OF TWO TRADE MARKS:**

**FAT TRAP
&
Fat Trap**

AND

**AN APPLICATION (NO 83621) FOR INVALIDATION BY
ORGANIC ABSORBENTS LIMITED**

TRADE MARKS ACT 1994

In the matter of registration 2506380 standing in the name of Less Mess Ltd in respect of the series of two trade marks: FAT TRAP & Fat Trap

and

An application (no 83621) for invalidation by Organic Absorbents Limited

The background and the pleadings

1) The registered trade marks the subject of these proceedings stand in the name of Less Mess Ltd ("LM"). LM applied for them as a series application on 14 January 2009, the application then completing its registration procedure on 12 June that year. The trade marks, together with the goods for which they are registered, are shown below:

FAT TRAP

Fat Trap

Class 21: Containers for kitchen and household use; containers for the collection and disposal of fats, greases and oils.

2) On 3 November 2009 Organic Absorbents Limited ("OA") applied for a declaration of invalidity in respect of LM's registration. Invalidity is sought in respect of all the goods covered by the registration. The grounds for invalidation are under sections 3(1)(b) & (c) of the Trade Marks Act 1994 ("the Act"). The claim under section 3(1)(b) is that the marks are devoid of any distinctive character because they describe characteristics of the goods of the registration. In relation to section 3(1)(c), the claim is put in the following terms:

"the mark "FAT TRAP" consists exclusively of words that serve to designate the kind and intended purpose of the goods for which it is registered and is a term that is used in the trade to describe such goods i.e. a product which traps fat".

3) LM filed a counterstatement denying the grounds of invalidation. The counterstatement refers to the acceptance of its mark at examination stage and it also contains detailed submissions on the relevant case-law etc.

4) Both sides filed evidence. The matter then came to be heard before me on 15 October 2010. At the hearing LM were represented by Mr Michael Brown of Alpha & Omega. OA were represented by Mr Michael Harrison of Harrison IP.

The evidence

OA's evidence – witness statement of Geoffrey Nutland dated 18 March 2010

5) Mr Nutland is OA's managing director. He says that he has been using the name FAT TRAP since at least 2006 in relation to a disposable pouch for absorbing liquids such as fats, oils and grease (in the trade, fats, oils and greases are collectively referred to as "FOG" - I will adopt this term where necessary). He explains that the product is designed to stop FOG being put down kitchen sinks. He states that he applied to register the name as a trade mark in class 1 but it was refused registration on the grounds that it was descriptive; pages 1-3 of Exhibit GN1 contain copies of the relevant examination report issued by the Intellectual Property Office. Mr Nutland explains that he became aware of LM's registration in July 2009 and that he would have objected to it earlier if he had known about it.

6) Mr Nutland states that although his application was in class 1 and LM's registration is in class 21, the products do the same thing i.e. they trap or collect fat for safe disposal. Mr Nutland says that his product has been on sale since October 2006, initially by FT (UK) Limited (a company now dissolved) but since June 2008 by OA. Sales details since 2007 are provided, namely:

<u>Period</u>	<u>Customer</u>	<u>Amount</u>	<u>Number of packs sold</u>
2007-2008	Anglian Water	£17,000	30,000
1/7/2008	Lakeland	£6,000	8,000
1/12/2008	Yorkshire Water	£1,000	1,000
2/5/2008- 9/02/2010	Web sales & Caravan	£3,000	£4,000
26/2/09	Suma	£228.48	
1/10/2008- 7/5/2009	Anglian Water	£1,675.75	3,000
		£44,014.53	71,000

7) Mr Nutland states that around £64,000 has been spent on marketing and promoting the product. A breakdown is provided on page 4 of Exhibit GN1 showing that such expenditure relates to: attendance at various shows and events, advertisements in water related journals and in trade catalogues, sales/marketing consultants and public relations including endorsement by a celebrity chef.

8) Various pages are provided in Exhibit GN1 relating to the use of the words FAT TRAP in the trade, a summary is provided below:

i) Pages 5-7 contain a WRC Portfolio Research document relating to a FOG project. It contains a questionnaire about the trial of "FT (UK) Ltd Fat-Trap". The questionnaire asks "where did you obtain your free sample of the Fat-Trap?". The project took place in October 2005.

ii) Pages 5-10 contain another WRC Portfolio Research document which includes references to: "The Nortje Fat Trap" which is termed a "a domestic fat trap", "The Less Mess Fat Trap" which is a "domestic kitchen fat collection pot", and the "FT (UK) Ltd Organic (Coconut) Fat Trap" which is a "domestic kitchen, organic, fat absorption pouch". The document contains a copyright date of 2008.

iii) Pages 11-19 contain literature produced by OA including advertising material and marketing photographs showing the "The Fattrap" product which "traps fat fast". The literature is dated between February 2009 and July 2009.

iv) Pages 20-23 contain prints from the website www.grease-removal.co.uk. A welcome page includes the text "...your essential site for grease treatment and grease management solutions – Grease Guzzlers, Biological Grease Treatment and Fat Traps" and "whether you need a fat trap or an all singing and dancing grease digestion system". There are links on the website to pages containing "Grease and Fat Traps". Another page contains three products "Fat Trap GT2", "Fat Trap GT4 – Pedestrian" and "Fat-Trap GT4 – Vehicular". A page for the "Fat Trap – GT2" is provided which includes the text "Fat Traps provide a low cost and effective method for separating fat and grease from water flow". The device appears to be of the sort fitted into the water drainage system of a kitchen. No dates are contained on these prints, but I note that Mr Nutland states that the majority of all the uses in the exhibit have taken place since before LM applied to register the mark in question.

v) Pages 24-26 contain prints from www.sirance.co.uk. Under a heading "Microwave & Oven Pads – Fat Trap & Absorbent Rotisserie Liners" there is a description of The Fat-Trap™ which appears to be a pad that is placed under cooking meat whereby the "fat dripping from the food[s] is absorbed and trapped inside the pad". Another page is provided for Fat-Trap™ Microwave liners which work in a similar manner. No dates are contained on the prints, but I note, again, Mr Nutland's general statement (summarized at point iv above) regarding the use of such terms and since when. In any event, further pages (35-37) consist of archive prints as of 7 May 2008 showing the same material. Also provided is a letter to Geoff (presumably Nutland) from Susan Evans of Sirane which states that "Sirane manufacture and produce a product called a Fat-Trap used for cooking purposes and have done since March 2003."

vi) Pages 27-29 contain prints from www.edincare.com (this appears to be a UK based website as the products are priced in pound sterling). Various “pro-trap” and “eco-trap” products are shown under a heading “Pro-Trap/Eco-Trap Fat Traps”. They are described as grease separator systems which appear to fit into kitchen (commercial) systems and which separate fat from grey water. No dates are contained on the prints, but I note, again, what Mr Nutland states as summarised at point iv. Further archive prints (dated 17 April 2008) are provided which are similar (but not the same) and which include the words “EcoFat Trap 120” etc.

vii) Pages 30-33 contain prints from www.grease-eater.co.uk, a website operated by a company called Hydrara International Ltd which sells a product for treating a “fat trap”. These appear to be treatments for the grease separator systems referred to above.

viii) Page 34 contains a print from www.lakeland.co.uk, a website which sells a product called “Fat Trappers” which, when used in a grill rack or roasting dish, “.soak up all the excess fat from foods such as sausages, chops, burgers and bacon and trap it within.”

ix) An extract is provided from the BBC News website containing an article headed ““Fat traps” to unclog town sewers” which relates to the installation of fat traps under the sinks of restaurants, pubs and hotels.

9) Mr Nutland also refers to the examination of LM’s trade mark which was initially objected to as being descriptive. He notes that the objection was overcome on the basis of argument that LM’s product did not “catch” or “trap” fat and, thus, was not in line with the dictionary definitions of the word TRAP. Mr Nutland argues that the word TRAP should not be given a narrow definition and he exhibits an extract from the Compact Oxford English Dictionary which defines TRAP as:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a bath, basin, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person’s mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

10) Also exhibited is an extract from the Cambridge Dictionary Online (Learners Edition) in which Mr Nutland highlights that when used as a verb, “trap” can also mean “to keep something in one place”. The actual reference reads:

“To keep something such as heat or water in one place, especially because it is useful

A greenhouse stays warm because the glass traps the heat of the sun”

11) Mr Nutland completes his evidence by stating that the average user of the products in question would not distinguish between something that “traps” or “catches” and something that “collects” or “keeps” and he believes that the average user would recognize the name “FAT TRAP” as being descriptive of LM’s product.

LM’s evidence – witness statement of Tina Pearce dated 14 May 2010

12) Ms Pearce is the managing director of LM. Exhibit TP1 to her witness statement contains a number of documents which she refers to, the first such document being a Companies House print showing that LM was incorporated on 18 September 2003. She says that since then, the trade mark FAT TRAP has been used continuously, the first product being a cylindrical plastic container having a removable lid and an internal funnel to facilitate the tipping of FOG into it. She says that a collapsible cardboard version has also been introduced.

13) Ms Pearce provides sales figures and advertising figures as follows:

Year ending	Sales	Advertising/promotion
30.9.2004	£30, 456	£4, 636
30.0.2005	£15, 547	£3, 043
30.09.2006	£40, 867	£2, 847
30.09.2007	£68,502	£2, 552
30.09.2008	£77,540	£1, 050
30.09.2009	£83,723	£439

14) Ms Pearce notes that in the 2004 accounts there was also a charge of £11,689 which was spent on research and development. She also says that as each product carries LM’s contact details, the product itself serves as an advertisement. In relation to the above sales, Ms Pearce explains that LM’s principal customers are water companies. She says that at the end of April 2010 567,890 FAT TRAP products had been supplied, broken down as follows: Severn Trent Water 270,000, Anglian Water Group 85,000, Yorkshire Water 53,000, South West Water 30,000, Wessex Water 5,000, Northumbrian Water 10,000, and United Utilities 27,000.

15) Ms Pearce refers to a non-disclosure and confidentiality agreement between what she claims to be the proprietor of the registration and a company called Dainton Limited. The agreement is provided in Exhibit TP1. Whilst Dainton Limited is a party, the other party is a person called Tina Offield. There is no mention of LM. The point Ms Pearce makes is that the person signing on behalf of Dainton Limited is Mr Nutland, who later went on to make an application for FAT-TRAP in his own name, and who now has a role in OA and, therefore, he had access to detailed information concerning the FAT TRAP product since at least as early as January 2006 (when the non-disclosure agreement was reached). I note all this, but the absence of any explanation of who Ms Offield is and her relationship, if any, with LM means that this evidence has little significance. In any event, it is not clear from the agreement itself what information was disclosed between the parties nor is it clear what relevance this has in deciding whether the mark in question is a descriptive term or not.

16) The FAT TRAP product has, Ms Pearce says, attracted considerable interest due to its environmentally friendliness. She highlights extracts from:

The “EasyLiving” publication of April 2006. A picture of the product is shown, as are the words “Fat Trap tub. £2.25 for two”.

“Prima” magazine dated May 2007. The article writer answers a reader’s question regarding fat disposal by suggesting that they try “a handy gadget called the Fat Trap”. The article explains that it is a small container that sits on your worktop or under your sink to store FOG.

“Limited Edition – North London” publication dated February 2007. The article features a picture of the product and includes the text: “Don’t risk clogging your kitchen sink with waste fat and oil, instead pour it straight into The Fat Trap.”

17) Exhibit TP1 also contains a to whom it may concern letter dated 4 May 2010 from Unex Designs Limited who worked on the design of the product. It confirms that it has worked with Ms Pearce since 2003 on the “trade marked fat trap product”. A further to whom it may concern letter (dated 22 April 2010) is exhibited from the Marketing-PR Company in Tavistock who, Ms Pearce explains, carry out promotional work for LM. The letter confirms that this has been done since November 2006. Two press releases about the FAT TRAP product are attached to this letter from December 2006. The letter also refers to the product having received coverage in: Cumbrian Newspaper (January 2007), The Bath Chronicle (December 2006), PRIMA (May 2007), Limited Editions (February 2007), Radio 2 Chris Evans Show, SHE, Daily Express (no dates for these last three are provided), News & Star (February 2007), Recycling and Waste World (January 2007) and Link Magazine (Spring 2007). No content for any of this coverage is, though, provided.

18) Ms Pearce also refers to a marketing review for LM's FAT TRAP product that was carried out by Clarity Business Solutions in May 2004. The report is provided in Exhibit TP1. Other facts that emerge from the evidence are that:

- ❖ FAT TRAP has won a number of awards including the Green Champion Award. An extract from the North Devon Gazette (November 2006) refers to this.
- ❖ Water companies promote the product. Details of such promotion by SouthWest Water are provided in the form of a customer newsletter dated 19 July 2005 which states that "Domestic customers can help the environment by using "Fat Traps", which are directly available from Less Mess Ltd....". Similar promotion is shown in SouthWest Water's publication called WaterLevel (Autumn 2004) in the form of an article headed "Get the fat trap habit" and which includes the text "One bright solution comes in the form of the "Fat Trap" (pictured). It's a 500ml capacity plastic screw-top container that sits neatly at the side of the sink or cooker until it is needed".
- ❖ The product featured on the Gordon Ramsey television programme "The F Word" in the summer of 2006. Ms Pearce states that its use was demonstrated and an explanation given of the importance of its use to avoid blocking drains.

19) Ms Pearce completes her evidence by highlighting what her registration covers (containers) and that the FAT TRAP product is just a container which serves for the effective collection and disposal of FOG. She also refers to the reputation that has been established as a result of sales and publicity so that when members of the general public, when seeing the trade mark FAT TRAP in relation to a domestic or household container, will associate it with LM.

OA's reply evidence – second witness statement of Geoffrey Nutland dated 23 June 2010

20) Mr Nutland's second witness statement is, in the main, a critique of Ms Pearce's evidence particularly focusing on what he consider to be the limited form of promotion of LM's product and that very few sales have taken place to the general public. Factual evidence in this witness statement includes:

An example of Severn Trent Water referring to LM's product in what Mr Nutland says is a descriptive manner. This is dated 15 June 2010 and the text includes:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

An extract from CONNECT RIGHT with highlighted text reading:

“DO cool and dispose of domestic fats and oils in the bin or install a fat trap.”

Further information regarding the Non-Disclosure Agreement, with Mr Nutland stating that he told Ms Pearce that he was planning to market “Organic Fat Trap” and trade mark it and that he was not aware of LM’s product or name prior to this. There was a possibility that the two companies would work together but this clearly did not come to fruition.

DECISION

21) LM has filed evidence to show that its mark has a reputation and, therefore, that it has a distinctive character through use. However, this only needs to be assessed if the invalidation is successful, *prima facie*, in respect of the grounds of invalidation. I will therefore consider the grounds under section 3(1)(c) and (b) *prima facie* and will only return to the question of distinctive character through use if it is necessary to do so. I will begin with section 3(1)(c).

The section 3(1)(c) ground of invalidation

22) Section 3(1)(c) states that the following shall not be registered:

“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 services, or other characteristics of goods or services”

23) The European Court of Justice (“ECJ”) has issued judgments germane to this issue. A helpful summary of the position was given in *Wm. Wrigley Jr. Company v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-191/01 P (“*Doublemint*”), where it was stated:

“32. In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

24) I also note that in *Matratzen Concord AG v Hukla Germany SA*, (Case C-421/04) ("*Matratzan*") the ECJ stated:

"In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50)."

25) I also note the decision of the General Court in *Ford Motor Co v OHIM*, Case T-67/07 ("*Ford*") where it was stated:

"there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics"

26) Given that the mark at issue is a two word combination, I also bear in mind the decision of the ECJ in *Postkantoor* (Case C-363/99) which considered the registrability of combinations of descriptive words. Paragraphs 98–100 of the judgment are reproduced below:

98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive. Merely bringing those elements together without introducing any unusual variations as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

99. However, such a combination may not be descriptive within the meaning of Article 3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition must be satisfied as regards both the aural and the visual impression produced by the mark.

100. Thus, a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of

which registration is sought, is itself descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the second case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purpose of the same provision.

27) In relation to the underlying interest, section 3(1)(c) pursues an aim which reflects the public interest in ensuring that descriptive signs or indications may be freely used by all (see, for example, *Doublemint*).

28) OA's argument is that that the words FAT TRAP are descriptive based on the dictionary meanings of those words, that those words combine to form a descriptive whole, and that all of this is supported by the fact that such a word combination has been used by other traders. At the hearing, Mr Brown conceded that the words FAT TRAP may constitute a descriptive combination for some goods but that this was not the case for simple containers such as LM's product. This is a sensible concession. It is clear from the evidence that the words FAT TRAP are used descriptively at least in relation to the category of goods that I will describe as grease separator systems. Such goods appear to be devices which are built into water drainage systems, particularly in commercial kitchens, which separate FOG from the water itself and then retains (or traps) the FOG inside the device whilst allowing the water to flow on. To this extent, I can clearly see that the words FAT TRAP may constitute an apt description for such a product.

29) However, the issue must be assessed by reference to the goods in respect of which the mark is registered. To that extent, it is quite possible that a mark may be descriptive of one product but not descriptive of another even they produce a similar end result (the end result being, in this case, the prevention of FOG from blocking drains). In assessing the aptness of the word combination FAT TRAP to describe the goods of the registration it is necessary to consider the meanings of such words. The word FAT, in the context of the goods at issue, requires no real analysis. It is clearly a meaningful word. In terms of the word TRAP, OA's evidence contains the following definition:

noun 1 a device or enclosure designed to catch and retain animals. 2 an unpleasant situation from which it is hard to escape. 3. A trick causing someone to act contrary to their interests or intentions. 4 a container or device used to collect a specified thing. 5 a curve in the waste pipe from a

bath, basis, or toilet that is always full of liquid to prevent the upward passage of gases. 6 a bunker or other hollow on a golf course. 7 the compartment from which a greyhound is released at the start of a race. 8 a device for hurling an object such as a clay pigeon into the air. 9 *chiefly historical* a light, two-wheeled carriage pulled by a horse or pony. *Informal* a person's mouth.

Verb (trapped, trapping) 1 catch or hold in or as in a trap. 2 trick into doing something.

30) Mr Harrison relied particularly on definition 4, namely: "a container or device used to collect a specified thing". LM's product is a container, its specification clearly says so. Furthermore, the purpose of the product can be said to enable a person to collect their used cooking fat in it for future disposal. I can, therefore, fully understand why Mr Harrison relies on the definition he does as, on the face of it, the product could be said to be a trap as so defined. However, the container based definition does not appear to be a common one. It does not appear in my copy of the Collins English Dictionary. It may be that the definition must be read in context with the other meanings of the word. For example, if the container traps something inside so as to prevent its escape then such a container may properly be defined as a trap. There is no evidence that shows any form of container being referred to as a trap. I do not consider it likely that a container would ordinarily be described as a trap unless its purpose is to prevent its contents from escaping. Whilst LM's product is a container for fat, it is, in my view, far-fetched to say that the container is trapping the fat inside – the fat is hardly attempting to get out. Fat is poured into it and the lid put on to prevent it from being spilled if accidentally knocked - this would never be categorized as trapping. Absent evidence to show that containers are ordinarily referred to as traps then the definition relied upon is not persuasive, on its own, for me to find that LM's product would be described as such. In this context, and considering definition 4, FAT TRAP does not describe the product.

31) That is not the end of it because the more general definitions of TRAP relate to devices used to catch something, or in which something is retained to prevent escape. The second type of meaning is already dealt with in the preceding paragraph – unless the container's purpose can be said to be trapping something inside to prevent its escape then the word TRAP would not be apt. In my view, it is not. In relation to being a device for catching something, again, I come to the view that something which is merely a container is hardly likely to function as a trap. There are many and varied types of trap - mouse traps, sand traps (a golfing term) a trap under a sink, a greyhound trap. All these uses are, though, more apt uses given that they trap something: a mouse trap traps or catches mice, a sand trap creates an unpleasant/difficult situation for a golfer by trapping him or her into a bunker, a trap under the sink is a specific term of art but which, in any event, traps gases underneath a water filled curve, a greyhound trap (again a clearly defined term) prevents the greyhound from escaping until it is

time to race. All of these uses are clear and understandable but, for LM's product, I do not consider it apt for it to be considered as a trap or that it is something which traps.

32) In terms of OA's evidence, I have already explained that some goods may be more aptly described as fat traps, particularly the fat separator systems referred to earlier. It is not clear what the Nortje Fat Trap consists of but the accompanying text suggests that it is a domestic version of these separator systems. Other than these types of products the only other form of use relates to pouches or mats which are used during or after cooking in order to soak up fat. The use made of the words FAT TRAP for these products appears more akin to trade mark use rather than descriptive use. In any event, such products may more aptly be described as trapping fat and I note in particular that OA's product "traps fat fast" – I do not think the same can be said of a simple container as one simply pours the fat into it when ready.

33) Other aspects of the evidence I have considered relates to the claimed descriptive uses made in relation to LM's product. Severn Trent Water stated in a publication:

"Order a Fat Trap for your home by completing the form below. Fat Traps are suitable to collect any cooled kitchen fat you produce in the home"

34) I do not find the above particularly telling, the publication could as much be referring to the product name as to using a description. Indeed, I have struggled to find any of the promotional materials or articles relating to LM's product as suggesting that the container traps fat or acts as a trap. The extract from CONNECT RIGHT is even less significant. It reads:

"DO cool and dispose of domestic fats and oils in the bin or install a fat trap."

35) In relation to the above, you would clearly not "install" a container. The above text simply refers to two ways of dealing with FOG: disposal in a bin once cooled (LM's product achieves this result) or by installing a fat trap (I presume this to mean a separator system). Also considered are the circumstances surrounding Mr Nutland's application for a trade mark which was refused. This has little significance either way. I must come to my own decision having regard to all the evidence and arguments before me.

36) There is, of course, the argument as to perception. The matter must be considered against the perception of the relevant parties (the trade and the public). OA argue that as water companies, for example, use and will know of the words fat trap as a description (presumably they will be aware of grease separator systems) then, when seeing such words on a container for fat, such use will simply send a descriptive message. I note the argument, but in my view

the relevant parties will be able to distinguish between what may be known descriptively as a fat trap and what will be seen as a different product. It is my view that the words FAT TRAP will be perceived as allusive, but not a directly descriptive combination of words for the goods of the registration.

37) I must also have regard to the fact that whilst the exact product (or a characteristic of it) sold by LM may not be described as a fat trap, other types of container in class 21 may have a more trapping quality. I have considered this aspect, but a container is a container. There is nothing in the specification that would indicate a more active trapping quality. The fat separator systems, for example, are quite distinct products and would never be described as containers. They would, in any event, fall in a different class. The other types of product shown in the evidence would not, similarly, be considered as a container. I see no reason to find that a container in class 21 will have any more a fat trapping characteristic than LMs container and, therefore, for the reasons given, consider that the words FAT TRAP are not descriptive of the goods in question.

38) My decision is to reject the application for invalidation under section 3(1)(c) of the Act.

The section 3(1)(b) ground of invalidation

39) Section 3(1)(b) states that the following shall not be registered:

“trade marks which are devoid of any distinctive character”

40) The test to be applied under this ground has been dealt with by the ECJ in a number of its judgments, notably in Joined Cases C-53/01 to C- 55/01 *Linde AG, Winward Industries Inc and Rado Uhren AG* (8 April 2003). The test equates to assessing the impact that the sign will have on the average consumer when used in relation to the goods at issue and then deciding whether they will see it as something that is identifying to them goods originating from a particular undertaking. Although this ground has full and independent scope from the other ground of objection, I note that in *Postkantoor* the ECJ stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

41) The pleaded case is that the marks are devoid of distinctive character because they describe characteristics of the goods for which they are registered. Taking this pleading into account, together with the comments made in

Postkantoor, there is little to say on this ground given that I have already determined that the mark is not descriptive. No claim, other than it being descriptive of the goods, has been put forward as to why the mark is devoid of distinctive character. This claim must, therefore, also fail. In view of this, and in view of the claim also failing under section 3(1)(c), there is no need to consider the issue of acquired distinctiveness.

Costs

42) LM has been successful and is entitled to a contribution towards its costs¹. I hereby order Organic Absorbents Ltd to pay Less Mess Ltd the sum of £1300. This sum is calculated as follows:

Preparing a statement and considering the other side's statement
£300

Filing evidence and considering the other side's evidence
£500

Attending the hearing
£500

43) The above sum should 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 13 day of December 2010

**Oliver Morris
For the Registrar,
The Comptroller-General**

¹ Costs are normally awarded on the basis of the registrar's published scale in Tribunal Practice Notice 4/2007.