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TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER 3037368
BY ROBINSONS SOFT DRINKS LIMITED
TO REGISTER THE FOLLOWING 3D TRADE MARK IN CLASS 32:



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Background

1. On 10 January 2014, Robinsons Soft Drinks Limited ('the applicant') applied to register the above sign for the goods as follows:

Class 32: Non-alcoholic beverages; cordials (non-alcoholic beverages); squashes (non-alcoholic beverages); concentrates and dilutes; carbonated non-alcoholic drinks; mineral and aerated waters; fruit drinks and fruit juices; slush drinks; tablets or preparations for making effervescent non-alcoholic drinks; syrups, concentrates, powders, tablets, essences and/or other preparations for making beverages.

2. On 28 January 2014, the Intellectual Property Office ("IPO") issued an examination report in response to the application. In that report an objection was raised under section 3(1)(b) of the Act on the basis that the mark is devoid of any distinctive character. The examiner stated that the sign consists of a 3D representation of a non-distinctive receptacle, or container for the goods listed. As such, the examiner considered that the average consumer is unlikely to pay any trade mark significance to the mark, when encountered in the context of the goods in question.

3. On 26 March 2014, an extension of time was requested by the applicant's representative in order to collate information and file a response. This was granted until 28 May 2014.

4. On 28 May 2014 the agent responded to the examination report contesting the objection. The examiner was not persuaded by the agent's arguments, and on 16 June 2014 wrote to the agent confirming this. In response, on 18 August 2014 a hearing was requested where the applicant would be represented by Mrs Tracy Arch of Barker Brettell LLP.

5. A hearing was scheduled for 22 October 2014, but Ms Arch was unable to attend and as such, the hearing was rescheduled for 5 November 2014. At the hearing on 5 November 2014, I deferred my decision in order to allow myself further time to consider Ms Arch's submissions and the exhibits presented at the hearing. On 25 November 2014, I issued my decision maintaining the objection and in view of the fact that Ms Arch had confirmed the applicant was unable to submit evidence of acquired distinctiveness, the application was refused.

6. On 22 December 2014, the agent submitted a form TM5 requesting a statement for the reasons for the decision. I am now asked under section 76 of the Trade Marks Act 1994 and rule 69 of the Trade Marks Rules 2008 to state in writing the grounds of my decision and the materials used in arriving at it. No formal evidence has been put before me for the purposes of demonstrating acquired distinctiveness. Therefore, I have only the *prima facie* case to consider.

The applicant's case for registration

7. Prior to setting out the law in relation to sections 3(1)(b) of the Act, I will set out the applicant's case for *prima facie* acceptance of the mark. In correspondence dated 28 May 2014 it was submitted that:

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- Consumers have become accustomed to brand identity and consequently trade mark and origin indications arising from a number of different sources; whilst a 3D trade mark representing packaging might not be the most prominent means of product and source identification, it is capable of serving the function of product and source identification.
- The 3D mark is quite different from packaging in market and, whilst not highly imaginative, it does possess sufficient capacity to distinguish the applicant's goods from those of other traders.
- The mark may have been too readily dismissed by the examiner, merely due to its nature and form. In view of the fact that the goods are intended to establish a new category or new product, there will be a significant amount of information and promotion of the products and of the trade marks; therefore the consumer's level of attention will be higher during the initial introduction of product to market.
- The mark must be considered as whole, rather than seeking to analyse the various elements of the mark separately; the sign need not be a work of invention and is not founded on any element of originality; In *Eurocool v OHIM*, Case T-34/00, it was held that a minimal degree of distinctive character is sufficient to render that ground for refusal inapplicable.
- Whilst individually the features comprising the three-dimensional mark in question may not be highly distinctive, it is disputed that the overall sign presents a non-distinctive receptacle or container in relation to the goods applied for.

8. Exhibits were also provided in order to demonstrate that the mark is quite different from anything else in the soft drinks sector at the time of filing the application. It was submitted that this can be seen through the examination of a cross section of products available in the soft drinks market. Annex A shows the exhibits provided as a means of comparison with the applicant's mark. In this respect, it was submitted that there are features in the mark which contribute to the distinctiveness of the sign and which include:

- Pronounced roundness in the overall impression of the shape, emphasised in the bottom half of the container and which appear to act in juxtaposition to the packaging's ability to rest squarely on a flat surface without falling over.
- Unusual, tactile size and shape that is palm-sized and not dictated solely by form and function.
- Eye-catching stylisation of the upper section, including the lid, being not only stylistic but also memorable and presenting a distinguishing feature in its own right.
- The overall resemblance to a drop of liquid which alludes to the underlying nature of the product.

9. Further written submissions made stated that:

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- The sign may not be a clever work of invention and may only be presented to the market in conjunction with other indicators of trade origin, but nevertheless, it is capable in its own right of distinguishing the goods of the applicant.
- The mark departs significantly from the norm in packaging in the soft drinks industry and consequently it will immediately be seen as highly innovative, eye-catching and distinctive.
- Single-serve and multi-serve ready to drink products are typically presented in plastic bottle forms or cans, with a certain overriding commonality of form. Dilutables, cordials and squashes are usually packaged in glass or PET (polyethylene terephthalate) bottles, with screw caps and whilst there can be wider variance in the presentation of such packaging, none bear features or overall forms of presentation, which are similar to the applicant's mark.
- The shape mark is clearly bulbous in its front and rear aspects, quite opposite to most common forms of packaging for soft drinks, being a feature which enables the shape to stand out from the crowd. Furthermore, packaging closures for the goods are relatively common and typically without significant form of presentation or distinguishing features, for example screw caps and ring-pulls. In contrast, the closure in the subject mark is novel, stylistic, asymmetrical, unusual and eye-catching, particularly when viewed as part of the stylistic indentation on the packaging.
- The mark applied for is in black and this is an important distinguishing feature of the mark. It is considered that black is not a common colour for packaging of the goods in relation to PET packaging, which is traditionally clear or opaque. Whilst use of coloured PET packaging has started to become more common in relation to children's ready to drink products, these are usually vibrant colours. The applicant is not aware of any other soft drink company who uses this colour, which is striking and prominent.
- The criteria for assessing the distinctive character of the three dimensional trade marks consisting of the appearance of the packaging of a product are no different from those to be applied to other categories of marks. Whilst some aspects of trade dress are more traditional than others, such as word and logo trade marks, other non-traditional aspects have grown in significance. They serve an increasing function in product/source identification and are more readily relied upon in today's consumer environment than may previously have been the case.
- The use of visual aids has become highly effective in the marketing of everyday, mass consumption products and such aids readily and quickly convey information to the consumer which assists in the identification and sourcing relevant goods. The prevalence of look-alike packaging is a clear indicator of just how effective such visual aids can be. Research of bodies such as the British Brands Group and the UK IPO (see for example

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<http://www.britishbrandsgroup.org.uk/upload/File/Similar%20pkg%20examples%202012.pdf> and <http://www.ipo.gov.uk/ipresearch-looklikes-310513.pdf>) confirms that consumer purchasing habits are being influenced in the market place due to the use of similar packaging, regardless and unusually to the exclusion of the use of primary, traditional trade marks. Supermarkets and other own brand suppliers are capitalising on the ability to influence consumer purchasing habits through the use of packaging bearing striking resemblance to market leading brands like never before. It is contrary to commercial reality to suggest that packaging plays no part in a consumers purchasing habits and decisions in relation to fast moving consumer goods, and in particular, in relation to the goods in question, namely soft drinks and preparations.

- The subject mark may not be highly distinctive in nature when compared and contrasted to invented word marks or indeed fanciful shape marks, however the hurdle for registrability is not "highly distinctive", rather it is that the subject mark possesses sufficient distinctiveness to provide it with the capacity to distinguish the goods of the applicant from those of other undertakings. It is an unusual shape and colour for soft drinks, contrary and almost juxtaposed in shape, colour and size from packaging familiar to the relevant consumer. The subject mark is not at all what a consumer would expect of packaging for soft drinks; it stands out from the crowd, even without use of other markings. It also has features which help in maintaining that impression of something different, such as in the novel and asymmetrical closure and its difference from usual caps, bottle tops and/or pulls and finally, it is also highly tactile in shape and form.
- Annex B is an extract taken from the applicant's written submissions and is intended to highlight the distinguishing features of the container.

10. At the hearing Ms Arch reiterated her comments previously made in writing and also submitted that:

- The category of goods covered by the application is new and the shape of the packaging of the goods is very different to anything else on the market, in the soft drinks sector.
- The applicant has invested a significant amount of time in developing the packaging; it has won awards and accolades and it serves to give a message relating to the origin of the goods.
- The design of the container is highly unusual and whilst the flip lid is common, the asymmetrical appearance in the lid is highly unusual and there is nothing else like it on the market.
- With regard to the colour of the mark, black is a highly distinguishing feature of the mark and not common in relation to the goods, typically soft drinks packaging is clear.

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Ms Arch also presented a video showing advertisements of the mark and other visual exhibits showing competitors containers, including those used for packaging concentrated water enhancers and concentrated water flavourings. These are shown at Annex C.

The Law

11. Section 3(1)(b) of the Act reads as follows:

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

(b) trade marks which are devoid of any distinctive character,

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

The above provision mirror Article 3(1)(b) of First Council Directive 89/104 of 21 December 1988 (as subsequently codified). The proviso to section 3 is based on the equivalent provision of Article 3(3).

Decision - Section 3(1)(b) – legal principles

12. In assessing whether the mark applied for falls foul of section 3(1)(b), I refer to a judgment issued by the Court of Justice in the European Union (CJEU) in Joined Cases C-53/01 to C-55/01 *Linde AG, Windward Industries Inc and Rado Uhren AG* (8 April 2003) where, in paragraphs 37, 39 to 41, and 47, the following is stated:

"37. It is to be noted at the outset that Article 2 of the Directive provides that any sign may constitute a trade mark provided that it is, first, capable of being represented graphically and, second, capable of distinguishing the goods and services of one undertaking from those of other undertakings.

39. Next, pursuant to rule 1 Article 3(1)(b) of the Directive, trade marks which are devoid of distinctive character are not to be registered or if registered are liable to be declared invalid.

40. For a mark to possess distinctive character within the meaning of that provision it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product from products of other undertakings (see *Philips*, paragraph 35).

41. In addition, a trade mark's distinctiveness must be assessed by reference to, first, the goods or services in respect of which registration is sought and, second, the perception of the relevant persons, namely the consumers of the goods or services. According to the Court's case law, that means the presumed expectations of an average consumer of the category of goods or services in question, who is reasonably well informed and reasonably observant and circumspect (see Case C-

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210/96 *Gut Springenheide and Tusky* [1998] ECR I-4657, paragraph 31, and *Philips*, paragraph 63).

47. As paragraph 40 of this judgment makes clear, distinctive character means, for all trade marks, that the mark must be capable of identifying the product as originating from a particular undertaking, and those distinguishing it from those of other undertakings."

13. The sign applied for is a three dimensional representation of the shape of a container. As regards the registrability of the shape of packaging, in *Henkel KGaA v Deutsches Patent-und Markenamt* (C-218/01) and *Henkel KGaA v Office for Harmonisation in the Internal Market* (C-456/01) the CJEU provided guidance on section 3(1)(b) via its second question, wherein the national court asked whether, for three dimensional marks consisting of the packaging of goods which are generally packaged in trade, their distinctive character within the meaning of Article 3(1)(b) of the Directive depends on whether an average consumer who is reasonably well informed and reasonably observant and circumspect is able, even without conducting an analytical or comparative examination and without paying particular attention, to recognise the characteristic features of the three-dimensional trade mark applied for as differing from the norm or custom in the sector, so that they are capable of distinguishing the goods concerned from those of other undertakings. The Court's response, at paragraphs 49-53, stated that:

"48. According to the case-law of the Court, for a mark to possess distinctive character within the meaning of Article 3(1)(b), it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from products of other undertakings (*Linde and Others*, paragraph 40).

49. It follows that a simple departure from the norm or customs of the sector is not sufficient to render inapplicable the ground for refusal given in Article 3(1)(b) of the Directive. In contrast, a trade mark which significantly departs from the norm or customs of the sector and thereby fulfils its essential origin function is not devoid of distinctive character.

50. That distinctive character of a trade mark within the meaning of Article 3(1)(b) must be assessed by reference, first, to the goods or services in respect of which registration is sought and, second, to the perception of the relevant persons, namely the consumers of the goods or services. That means the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect (see, to that effect, Case C-210/96 *Gut Springenheide and Tusky*, paragraph 31, *Philips*, paragraph 63, and *Linde and Others*, paragraph 41).

51. The competent authority must therefore undertake a specific assessment of the distinctive character of the trade mark at issue, referring to the perception of the average consumer as defined in paragraph 50 of this judgement, in order to verify that it fulfils its essential function, namely that of guaranteeing the origin of the product.

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52. In any event, the perception of the average consumer is not necessarily the same in the case of a three-dimensional trade mark, consisting of the packaging of a product, as it is in the case of a word or a figurative mark which consists of a sign that is independent from the appearance of the goods it denotes. Average consumers are not in the habit of making assumptions about the origin of goods based on the shape of their packaging, in the absence of any graphic or word element, and it could therefore prove more difficult to establish distinctive character in the case of such a three dimensional trade mark than in the case of a word or figurative mark (see, to that effect, *Linde and Others*, cited above, paragraph 48, and, as regards a mark consisting of a colour, Case C-104/01 *Libertel* [2003] ECR I-3793, paragraph 65).

53. In view of the foregoing considerations, the answer to the second question must be that, for three-dimensional trade marks consisting of the packaging of goods which are packaged in trade for reasons linked to the very nature of the product, their distinctive character within the meaning of Article 3(1)(b) of the Directive must be assessed by reference to the perception of the average consumer of such goods, who is reasonably well informed and reasonably observant and circumspect. Such a trade mark must enable such a consumer to distinguish the product concerned from those of other undertakings without conducting an analytical or comparative examination and without paying particular attention."

14. Further and more specific legal principles regarding the sign being unusual, novel or a common variant will be explored in more detail under the heading below, 'Application of the legal principles'.

15. On the basis of the guidance above, it is clear that any assessment of a mark's distinctiveness pursuant to section 3(1)(b) must take into account both the nature of the goods claimed, and the likely perception of the relevant consumer using those goods. Only by considering such factors will I be able to determine the likelihood of any potential consumer perceiving the sign applied for as either a distinctive indicator of origin, or simply as an "origin-neutral" sign.

16. In addition to assessing consumer perception, I must also be aware that the test is one of immediacy or first impression as confirmed by the General Court ('EGC') which, in its decision on *Sykes Enterprises v OHIM (REAL PEOPLE REAL SOLUTIONS)* [2002] ECR II-5179, stated the following:

"However, a sign which fulfils functions other than that of a trade mark is only distinctive for the purposes of Article 7(1)(b) of Regulation No 40/94 if it may be perceived immediately as an indication of the commercial origin of the goods or services in question, so as to enable the relevant public to distinguish, without any possibility of confusion, the goods or services of the owner of the mark from those of a different commercial origin."

17. It is not appropriate to apply more stringent criteria or to impose stricter requirements when assessing the distinctiveness of three dimensional marks consisting of the shape of the goods (such as the one sought in the present case) than those which are applied in the case of other categories of marks (see judgments of the GC of 19 September 2001 in Case

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T-30/00 *Henkel KGaA v OHIM* („Tablet for washing machines“) [2001] ECR II-2663, at paragraph 48 and of 7 February 2002 in Case T-88/00 *Mag Instrument Inc. v OHIM*, [2002] ECR II-0467, at paragraph 32). A three-dimensional mark which consists of the shape of the container of the product itself is not necessarily perceived by the relevant consumers in the same way as a word or figurative mark which consists of a sign which is not dependent on the appearance of the goods designated by the mark (see CJEU judgments of 29 April 2004 in Joined Cases C-456/01 and C-457/01 *Henkel KGaA v OHIM* („Tabs“), at paragraph 38; and of 12 February 2004 in Case C-218/01, referral for a preliminary ruling from the Bundespatentgericht: *Henkel KGaA, („Perwoll“)*, at paragraph 52). This is because the average consumer is not in the habit of making assumptions about the origin of products based on their shape in the absence of any graphic or word element.

18. The assessment of a sign for registrability must be made with reference to each discrete category of goods or services covered by an application for registration, see Case C-239/05 *BVBA Management, Training en Consultancy v Benelux-Merkenbureau* [2007] ECR I-1455 at paragraphs 30 to 38; and Case C-282/09 P *CFCMCEE v OHIM* 2010 ECR I-00000 at paragraphs 37 to 44;

19. It is also a well-established principle these days that the Registrar's role is to engage in a full and stringent examination of the facts, underling the Registrar's frontline role in preventing the granting of undue monopolies, see, e.g. CJEU Case C-51/10 P, *Agencja Wydawnicza Technopol sp. z.o.o. v. OHIM* [2011] ECR I-1541.

Application of the legal principles

20. In the present case, the mark in question consists of a 3D container, whilst the specification covers: “Non-alcoholic beverages; cordials (non-alcoholic beverages); squashes (non-alcoholic beverages); concentrates and dilutes; carbonated non-alcoholic drinks; mineral and aerated waters; fruit drinks and fruit juices; slush drinks; tablets or preparations for making effervescent non-alcoholic drinks; syrups, concentrates, powders, tablets, essences and/or other preparations for making beverages.” all in Class 32.

21. Given the goods claimed, it is reasonable to assume that the average consumer consists of the general public. The level of consumer attention may vary a little depending on the customer; however, I consider it reasonable to assume that a prospective purchaser of the applicant's goods would apply at least a moderate level of attention and circumspection when considering whether or not to buy. The goods at issue are everyday goods purchased in a retail environment where the consumer is used to seeing an array of products. In the case of drinks specifically, the consumer is, for example, used to seeing the traditional bottle or can as well as, more recently, drinks contained in pouches.

22. I agree with Ms Arch's submission that consumers are brand aware; however, Ms Arch's position is that the shape, by which I include colour and configuration, differs so significantly from the norm and customs of the trade that it will be capable of functioning as a trade mark, without first educating consumers that it is performing that function.

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23. At the hearing Ms Arch advised me that the goods of particular interest to the applicant are 'super concentrated squash', I understand that these goods are also sometimes referred to as 'water flavourings' or 'water enhancers'. Due to the fact that the goods are highly concentrated and are marketed as being pocket-sized, it seems practical to me that such goods will be packaged in a container which is much smaller than a conventional type squash bottle. Furthermore, taking into consideration Ms Arch's submissions that there is nothing like this shape available in the marketplace, I can only reiterate what the examiner had previously stated in correspondence, that because a shape is unusual, this does not automatically confer distinctive character in a trade mark sense upon the mark.

24. Much of the applicant's argument centres, even if these words are not expressly used, on the bottle's 'newness', its 'unusualness', its 'visual distinctiveness' or its 'memorable appearance'. Of particular relevance, to me, is the decision relating to Yakult Honsha KK's Trade Mark Application [2001] RPC 39. Here Mr Justice Laddie gives his view of the test for inherent distinctiveness in the case of a three dimensional trade mark. Paragraphs 7 -11 state:

7. The suggestion that Mr James was making a finding under s 3(2) is misconceived. Before him, counsel then appearing for Yakult had argued that the bottle contained a distinctive feature, namely the presence and positioning of the indentation running around the circumference of the bottle. It was said that this feature, and the resulting 'shoulders' of the bottle, provided an unusual distinctive shape somewhat resembling a decapitated dumpy human figure. It was in response to that argument that Mr James said that his impression was that the indentation in the bottle was there to provide users with a convenient means of gripping the bottle between their thumb and index finger. Furthermore he went on to say that such considerations were irrelevant to the prima facie case for registration. I have little doubt that Mr James had clearly in mind that he was considering a s 3(1)(b) objection only. However, in the end it seemed to me that there was a risk of more time being spent arguing the issue of admissibility than was warranted. For that reason alone, I allowed the evidence. In the end, little reliance was placed on it by Mr Thorley.

8. There was little dispute between the parties as to the correct approach to the application of s 3(1)(b). The onus is on the applicant to show that the proposed mark is inherently distinctive. Mr Thorley agreed that Mr James was entitled to rely upon first impressions, as long as in doing so he directed his attention to the correct issue. According to Mr Thorley, that issue, in a case where a container is the subject of the application, is whether the design is eye catching in a relevant trade mark sense. The fact that a particular design is eye-catching because it is unusual or decorative is not enough by itself. At all times the Registry has to ask whether the design is distinctive as a badge of origin. The exercise to be undertaken was described by the *European Court of Justice in Lloyd Schuhfabrik Meyer & Co. GmbH v Kliysen Handel BV [2000] FSR 77* ; Case No: C-342/97, [1999] ECR I-3819 :

"In determining the distinctive character of a mark ... the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as

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coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings” (para. 22)

9. In my view the same point was made even more succinctly by Lloyd J in *Dualit Ltd's (Toaster Shapes) Trade Mark Applications [1999] RPC 890*, a case concerning an application to register the shape of an electric toaster as a trade mark:

“... does [the mark] have a meaning denoting the origin of the goods?” (p 897)

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

11. Mr James came to the conclusion that the average consumer was likely to conclude that the design in the applications was nothing more than a bottle of pretty ordinary shape. I agree. Like Mr James, I can see nothing which would convey to someone who was not a trade mark specialist that this bottle was intended to be an indication of origin or that it performed that function. Even were it to be recognised as of different shape to other bottles on the market, there is nothing inherent in it which proclaims it as having trade mark significance.

The above decision confirms that the mere fact that that shape is ‘visually distinctive’, ‘eye-catching’ ‘unusual’ or even ‘novel’ is not sufficient to establish that the mark will function and be seen as a trade mark by the relevant consumer.

25. More recently, in Case C-445/13 P, *Voss of Norway ASA v OHIM*, the CJEU also confirmed that a mere ‘variant’ of the shape of the goods for which registration is sought, is not sufficient to establish that the mark is not devoid of any distinctive character. The CJEU stated at paragraphs 91-95 that:

91. In those circumstances, the more closely the shape for which registration is sought resembles the shape most likely to be taken by the product in question, the greater the likelihood of the shape being devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 207/2009. Only a mark which departs significantly from the norm or customs of the sector and thereby fulfils its essential function of indicating origin is not devoid of any distinctive character for the

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purposes of that provision (judgments in *Mag Instrument v OHIM*, C-136/02 P, EU:C:2004:592, paragraph 31, and *Chocoladefabriken Lindt & Sprüngli v OHIM*, C-98/11 P, EU:C:2012:307, paragraph 42).

92. It follows that, where a three-dimensional mark is constituted by the shape of the product for which registration is sought, the mere fact that shape is a 'variant' of a common shape of that type of product is not sufficient to establish that the mark is not devoid of any distinctive character for the purposes of Article 7(1)(b) of Regulation No 207/2009. It must always be determined whether such a mark permits the average consumer of that product, who is reasonably well informed and reasonably observant and circumspect, to distinguish the product concerned from those of other undertakings without conducting an analytical examination and without paying particular attention (judgment in *Mag Instrument v OHIM*, C-136/02 P, EU:C:2004:592, paragraph 32).

93. In the present case, after referring, in paragraphs 37 to 44 of the judgment under appeal, to the applicable case-law, the General Court, in paragraphs 51 to 58 of that judgment, determined whether the contested trade mark departs significantly from the norm or customs of the relevant sector.

94. It concluded, in paragraph 59 of the judgment under appeal, that the Board of Appeal had not erred in finding that the average consumer in the European Union would perceive the contested trade mark, as a whole, merely as a variant of the shape of the goods for which registration of that trade mark was sought. It then held, in paragraph 62 of the judgment under appeal, that the contested trade mark, as perceived by the relevant public, is not capable of individualising the goods covered by that trade mark and distinguishing them from those which have a different commercial origin.

95. It is apparent from the foregoing considerations that the General Court correctly identified and followed the criteria established by the relevant case-law in that regard.

The above decision further confirms that the mere fact that that shape is a 'variant' of a common shape of that type of product, or is 'unusual' or even 'novel' is not sufficient to establish that the mark is not devoid of any distinctive character for these purposes.

26 Furthermore when comparing the applicant's mark, to the shape of packaging of competitors' products, as shown in Annex C, pages 1-3, it appears that the goods are typically sold in small, pocket sized containers and this is a factor I have considered in assessing the distinctiveness of the mark and its ability to distinguish. The examples provided by Ms Arch at Annex C, particularly the 'Go Splash', 'Oasis' 'Vimto' and 'Enhance' containers, appear to re-inforce the fact that competitors' goods are sold in containers which are similar in shape to the applicant's sign.

27. Regarding the fact that the container has won awards and accolades, I do not think that those factors can, in any way, be determinative upon, or reflective of, consumer perception. In my view the shape of the container seems fairly simplistic and whilst Ms Arch likened the lid of the container to a 'swoosh', on first impressions, I consider that consumers would

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merely perceive this 'indentation' on the lid as a feature which facilitates ease of opening and would probably be perceived by consumers as having a technical function. It is also worth noting that the consumer of the goods will not be an expert in respect of 'packaging' or attentive to fine detail.

28. I note that the shape of the container is 'oval', which is perhaps not as typical as other containers in the market place, but there is nothing about this shape which could be said to be significantly outside the norms and customs of the trade.

29. With regard to the colour within the sign it was submitted that this is highly unusual and adds further distinctiveness to the mark. However, it appears to me that it is highly unlikely consumers would automatically attach trade mark significance to the colour within the sign, in the absence of any evidence of acquired distinctiveness. Neither the combination of the colour, nor the shape of the container makes the overall impression distinctive in a trade mark sense in my opinion.

30. Having considered the constituent parts of the sign it appears to me that the overall impression created by the sign is not one capable of indicating the origin of the goods in the prima facie. Bearing in mind the legal test which is one, in this case, of differing significantly from the norms and customs of the trade, the 'trade' being represented by the containers exhibited at Annex C, in my opinion, the sign as filed would not perform the function of a trade mark.

Conclusion

31. In this decision, I have considered all documents filed by the applicant, and all arguments submitted to me in relation to this application. Having done so, and for the reasons given above, the application is refused because it fails to qualify under sections 3(1)(b) of the Act.

Dated this 3rd day of August 2015

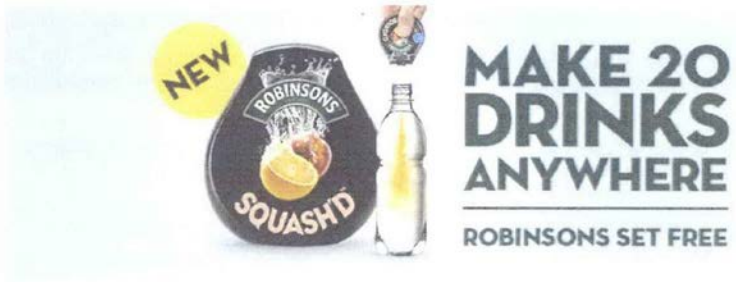
**Bridget Whatmough
For the Registrar
The Comptroller-General**

Annex A





Annex B



Annex C



Annex C



Annex C

Cordial Bottles



Annex C



Image from thedrum.co.uk (advertising focused publication)



Annex C



Annex C



Cans of carbonates



Annex C



Other examples of typical packaging



Annex C



Annex C



Annex C

