

O-302-07

**IN THE MATTER OF THE TRADE MARKS (INTERNATIONAL  
REGISTRATION) ORDER 1996**

**IN THE MATTER OF INTERNATIONAL REGISTRATION No 852022  
AND THE REQUEST BY AUGUST STORCK KG TO PROTECT A TRADE  
MARK IN CLASS 30**

**AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON  
AGAINST A DECISION OF MRS L ADAMS DATED 7 MARCH 2007**

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**DECISION**

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**Introduction**

1. On 28 April 2005, August Storck KG of Berlin requested protection in the United Kingdom of the device mark set out below, under the provisions of the Madrid Protocol and on the basis of International Registration 852022:



2. The colours white, light blue and brown were claimed and protection was sought in Class 30 in respect of:  
‘Confectionery, chocolate and chocolate products, pastries.’
3. On 12 August 2005, the Registry issued notice of provisional refusal to register the mark, on the basis of an objection under section 3(1)(b) of the Trade Marks Act 1994: the mark was said to consist “essentially of the device of a mouse being a representation of the goods”, and so was “devoid of distinctive character for confectionery products in the form of a chocolate mouse”. The applicant’s trade mark attorneys responded in a letter dated 27 October 2005, arguing that the mark might *allude* to a characteristic of the goods, but was not a *representation* of the goods. The Registry responded on 2 November 2005, saying, “I acknowledge that the mark as a whole is not a mere representation of the goods” but stated that the dominant element of the mark is “clearly a chocolate mouse device, i.e. the goods.” The s 3(1)(b) objection was therefore maintained.
4. The applicant sought a hearing, which took place on 24 May 2006, when its agent endeavoured to persuade the Hearing Officer, Mrs Adams, that the mark was not a representation of the goods, a point that (according to the hearing report) she accepted. Mrs Adams instead raised concerns about the capacity of the sign to function as a trade mark, in the light of the trade in novelty animal confectionery. In that regard, she provided the applicant with a number of examples of animal-shaped confectionery products found on the Internet. She asked for examples of the mark in use, under the provisions of Rule 57, which were filed together with a letter dated 22 August 2006, containing a sample of the product being sold under the trade mark, further submissions as to why the mark was said to be distinctive and comments relating to registrations of the mark in its ‘home’ country Germany, and in Ireland, Denmark, Australia and the USA. A large number of trade mark registrations for animal device marks for goods mainly in classes 29 and 30 were also attached.

5. Mrs Adams replied on 31 August 2006. She again accepted that the mark was “not an actual representation of the product”, but maintained that it was “closely similar” so that the average consumer would see the mark on a wrapper as an indication that the package contained chocolate mice. She provided copies of the Internet print-outs mentioned at the hearing, which show a number of novelty chocolate products, some shaped like animals, others with animals moulded onto a plain square of chocolate. Mrs Adams was asked to give written reasons for maintaining the section 3(1)(b) objection, which she did in her decision dated 7 March 2007.

### **The Decision**

6. The first relevant part of the decision is at paragraph 6 where the Hearing Officer said:

“Although it is now clear that the mark applied for is not an actual representation of the holder’s goods, I nevertheless expressed reservations about the capacity of the sign to guarantee the trade origin of the goods. I informed Mr Peters that I took this view because I am aware that there is a vast trade in the manufacture of novelty [animal shaped/imprinted] confectionery. Such confectionery, in the prima facie, does not normally individualise one trader’s goods from another: it is more likely to be taken by the average consumer as either merely decorative or indicative of the shape of the product. To substantiate this view I gave Mr Peters examples of novelty confections, including mouse shapes, which I had obtained from the Internet. These show chocolates being presented in novelty shapes, chocolates with animal imprints and also chocolate animal shapes appearing on the packaging of the goods. I questioned therefore whether consumers would simply take the mark on packaging as an indication of the likely content i.e. chocolate imprinted with or shaped like a mouse, the white ‘cloud’ device, in my view, adds no trade mark character to the mark as a

whole. I accepted that the actual confection sold differs from the depiction on the packaging, but I did not consider the fact that the mark is not actually a faithful representation of the holder's goods affected the position of assessing its capacity to distinguish for the purposes of Section 3(1)(b) of the Act..."

7. She went on to refer to the information provided and submissions made in the letter of 22 August, and continued:

"9. With regard to the submissions relating to the Registry's position regarding the acceptance of animal devices for confectionery, I advised Mr Peters that the Registry had no specific practice. Each case is assessed individually and due regard is given to how faithfully the mark depicts a representation or characteristic of the product. In this particular case the mark, in my view, depicts a chocolate mouse which is not sufficiently different from the norm to be capable of prima facie acceptance.

10. With regard to his submissions relating to the protection of the mark in other countries I informed Mr Peters that while decisions from other national tribunals/courts within the EU *may* be of persuasive value they are not binding upon us [affirmed by the ECJ in *Henkel KGaA v Deutsches Patent Und Markenamt* (C-218/01)]. Further I informed him that I did not consider that a decision from outside the EU can be determined as anything other than a matter of interest. This is because the factual position surrounding such acceptances is unknown and moreover the law governing acceptance in countries outside the EU may be materially different."

8. The Hearing Officer then went on to consider the terms of s 3(1)(b), and cited the decisions of the ECJ in Case C-218/01, *Henkel KGaA v Deutsches Patent – und Markenamt*, and Joined Cases C-53/01 to C-55/01, *Linde AG, Winward Industries Inc and Rado Uhren AG*.

9. The Hearing Officer also referred to the judgment of the Court of Justice in Case C-25/05 P, *August Storck KG v OHIM*, a case which related to an application to register as a trade mark a two-dimensional representation (it appears to be a photograph) of a sweet in a gold-coloured wrapper with twisted ends. Mrs Adams cited specifically paragraphs 26-28 of that judgment, which summarised the existing case-law relating to three-dimensional marks. Mrs Adams set out paragraph 29 of the ECJ's judgment as numbered paragraph 17 of her Decision under appeal. I have set out the relevant parts of the ECJ's judgment under paragraph 19 below.
10. Mrs Adams went on to reject the application to protect this device mark saying:
- “19 ...It is my view that the mark applied for is typical of the type of image commonly found on the packaging of confectionery to indicate to the consumer the kind of product being sold. It is my view that only repeated use of this mark is capable of educating consumers to the perception that it guarantees the origin of the goods.
20. I note that the mark is more than solely a depiction of a chocolate confection. The mark consists of a number of constituent parts, a brown mouse, a blue rectangular background and a milk spill or cloud device. It is established case law that distinctiveness must be assessed on appraisal of the mark as a whole [SAT.1 SatellitenFernsehen GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-329/02 P the ECJ]. Therefore, even if individually each of the constituent parts within the mark are considered to be non-distinctive it does not necessarily follow that the mark as a whole will lack distinctive character.
21. With that in mind I therefore asked myself the question whether there is anything distinctive in the way the individual elements are brought together and arranged. The mark has been filed in colour;

white, light blue and brown are the colours claimed, I therefore have also taken this into account in reaching my decision. It is my view that there is nothing distinctive in the colours or arrangement of the constituent parts. A brown mouse represents a chocolate mouse in the context of the goods; in this trade they often have humanised faces to appeal to children. The 'milk spill', in my view, looks like a frame or background for carrying other matter such as a trade mark, or in the case of cakes a child's name etc. But even if a consumer were to see it as a 'milk spill', then in the context of these goods it would merely serve to indicate that the goods are made from milk chocolate; the blue background does not add distinctive character to the mark as a whole; it is common for packaging of novelty confection to be presented in different colours as it is often marketed to appeal to children. That takes me onto the next consideration.

**Who is the average consumer?**

22. It is established that the assessment must be determined by reference to the likely reaction of an average consumer of the goods in question, who is deemed to be reasonably well informed, reasonably observant and circumspect. In relation to these goods I consider the average consumer will primarily be children or adults who will probably be buying for children. Although some confections may be bought with some care, it is my view that the kind of confection sold under the holder's mark will not be bought with a high degree of care; it will not be a considered purchase. Therefore it is necessary for the mark to immediately impact as a trade mark. I have no doubt that a consumer would be attracted to the product because of its child appealing packaging, however I do not consider that they will be attracted to the mark as conveying a trade origin message.

23. Assessed as a whole and through the eyes of the average consumer I consider that the mark, in the prima facie, does no more than inform the relevant consumer, by visual means, that the goods sold under it are chocolate mice, chocolates decorated with the image

of a mouse or goods decorated with chocolate mice. Chocolate mice are common in this sector of the market. 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 and I do not consider that to be the case here.”

### **Standard of review**

11. An appeal to the Appointed Person against an ex parte decision of the Registrar is by way of review and not rehearing (*Dyson Limited's Trade Mark Application* [2003] RPC 821, Patten J. at paragraphs 4 - 14). Mr Chapple sought to persuade me on behalf of the applicant that in this case I ought to proceed by way of rehearing, but for the reasons given below, I do not feel it necessary to rule on that point. The approach I have adopted is as articulated by Robert Walker L.J. in *REEF Trade Mark* [2003] RPC 101 at paragraphs 28 - 29 (see also *DU PONT Trade Mark* [2004] FSR 293 at paragraph 94):

“In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed.”

### **The appeal**

12. The applicant appealed on a number of points, but primarily on the basis that there was a fundamental flaw in the decision. Paragraph 3(a) of the Grounds of Appeal claimed that the Registrar had erred in finding as a fact in paragraph 17 of the decision that "the trade mark applied for is a figurative mark consisting of the two-dimensional representation of that product," and "the mark likewise does not consist of a sign unrelated to the appearance of the products it covers," whilst the device mark is *not* a representation of the product. Further, the applicant said that such finding

was inconsistent with paragraph 6 of the decision, in which the Registrar had stated that "it is now clear that the mark applied for is not an actual representation of the holder's goods." The Applicant says that this error fatally undermined the Hearing Officer's findings that the mark lacked distinctiveness.

13. In addition, the Applicant complained that it was an error to reject the mark for lack of distinctiveness on the grounds given in paragraphs 22 and 23 of the decision.
14. Thirdly, the applicant was said that it was wrong to reject the mark where sufficient distinctive character had been found for it to have been registered in a wide number of countries across the EU, and that Mrs Adams did not give sufficient reasons for deciding not to adopt the position taken by other national Registries. I should add that since the date of her decision, the mark has been accepted in further jurisdictions, and it is now registered in Austria, Benelux, Denmark, France, Germany, Ireland, Lichtenstein, Poland, Slovenia, and Spain, as well as in Switzerland, Australia and the USA. The applicant asked for permission to adduce evidence of those additional registrations on this appeal, and the Registrar did not object.
15. The applicant's first point on the appeal was to seek to impress on me that the mark does not consist simply of a picture of a mouse; the mouse has somewhat anthropomorphic features, is shown on a background which shades from bright blue to white and there is a white cloud or "milk-spill" across the mouse's middle designed to carry the name of the product.
16. The applicant also emphasised that the mark is not a representation of the particular products upon which it has been used to date. I was provided with a sample of those goods, and I accept that the mark is not a representation of them, as they consist of small, individually wrapped, basically trapezoid, filled chocolate sweets. The sweets are moulded roughly into the shape of an

animal, which one might take to be a mouse, but which I think could just as easily be taken to be a cat. The shape certainly does not much resemble the mouse in the device mark. The Hearing Officer was similarly provided with a sample chocolate, and it seems to me that the differences between the moulded shape of the sweet and the device mark explain her comments at paragraph 6 of the decision that “the mark applied for is not an actual representation of the holder’s goods” and “the actual confection sold differs from the depiction on the packaging.” On the other hand, of course, it is plain from paragraphs 21 and 23 of the decision that Mrs Adams continued to take the view that the device “represents a chocolate mouse.”

17. The applicant’s primary point was that those findings in paragraph 6 of the Decision are not compatible with paragraph 17 of the decision. The Registrar’s representative argued, however, that the two paragraphs were consistent, since the concession in paragraph 6 referred only to the particular sweets which I have described above, but did not detract from the view (expressed at paragraph 23 of the decision) that the mark informed consumers that the goods sold under the mark were chocolate mice or chocolates etc decorated with mice. I think that there is some force in the argument that this was the Hearing Officer’s position, as paragraph 6 of the decision continued: “I accepted that the actual confection sold differs from the depiction on the packaging, but I did not consider the fact that the mark is not actually a faithful representation of the holder’s goods affected the position of assessing its capacity to distinguish.”

18. I should first say that is not clear to me whether Mrs Adams set out the terms of paragraph 29 of the ECJ’s judgment in Case C-25/05 as paragraph 17 of her decision because she was adopting it as appropriate to the facts of this case, or whether it was simply a typographical error not to show that this paragraph was part of the passage from the ECJ’s judgment set out immediately above it. I suspect the latter was the case. However, whether or not that is so, it seems to me that the Hearing Officer plainly considered the facts of this case to be

close enough to those of Case-25/05 to be of relevance to her decision (see paragraph 23 below).

19. As I have said, the mark in issue in Case C-25/05 consisted of a precise two-dimensional representation – a picture or photograph – of a specific three-dimensional product. Indeed, there had plainly been some dispute before the Board of Appeal and the Court of First Instance as to whether the mark was to be treated as a shape mark or a figurative mark (see paragraphs 21-22 of the judgment of the CFI, Case T-402/02). The examiner at OHIM, the Board of Appeal and the CFI had all concluded that the mark was devoid of distinctive character. The ECJ found no error of law in the CFI's judgment. It held:

“26 According to equally established case-law, the criteria for assessing the distinctive character of three-dimensional marks consisting of the appearance of the product itself are no different from those applicable to other categories of trade mark (see *Henkel v OHIM*, paragraph 38, Case C-136/02 P *Mag Instrument v OHIM* [2004] ECR I-9165, paragraph 30, and *Deutsche SiSi-Werke v OHIM*, paragraph 27).

27 None the less, for the purpose of applying those criteria, the relevant public's perception is not necessarily the same in the case of a three-dimensional mark, which consists of the appearance of the product itself, as it is in the case of a word or figurative mark, which consists of a sign unrelated to the appearance of the products it denotes. Average consumers are not in the habit of making assumptions about the origin of products on the basis of their shape or the shape of their packaging in the absence of any graphic or word element, and it could therefore prove more difficult to establish distinctiveness in relation to such a three-dimensional mark than in relation to a word or figurative mark (see, inter alia, *Henkel v OHIM*, paragraph 38, *Mag Instrument v OHIM*, paragraph 30, and *Deutsche SiSi-Werke v OHIM*, paragraph 28).

28 In those circumstances, 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 purposes of Article 7(1)(b) of Regulation No 40/94 (see, in particular, *Henkel v OHIM*, paragraph 39, *Mag Instrument v OHIM*, paragraph 31, and *Deutsche SiSi-Werke v OHIM*, paragraph 31).

29 That case-law, which was developed in relation to three-dimensional trade marks consisting of the appearance of the product itself, also applies where, as in the present case, the trade mark applied for is a figurative mark consisting of the two-dimensional representation of that product. In such a case, the mark likewise does not consist of a sign unrelated to the appearance of the products it covers.

30 Therefore, the Court of First Instance rightly took into consideration the shapes and colours of sweet wrappers commonly used in trade in assessing whether the mark applied for is, or is not, devoid of any distinctive character.”

20. The ECJ therefore drew a distinction between three-dimensional marks and figurative marks consisting simply of a picture of a three-dimensional product (all of which can only fulfil the essential functions of a trade mark when they depart significantly from the norm) and word or figurative marks which consist of “a sign unrelated to the appearance of the products it denotes.” The same point had been considered by the CFI in Case T-30/00, *Henkel v OHIM (Image of a detergent product)* [2001] ECR II-2663, where Henkel sought to register a figurative mark consisting of the representation, seen in perspective, of a rectangular dishwashing tablet of a specific shape and colour. The CFI held:

“48. Article 7(1)(b) of Regulation No 40/94 does not distinguish between different categories of trade marks. The criteria for assessing the distinctive character of figurative marks consisting of the representation of the product itself are therefore no different from those applicable to other categories of trade marks.

49. Nevertheless, when those criteria are applied, account must be taken of the fact that the perception of the relevant section of the public is not necessarily the same in relation to *a figurative mark consisting of a faithful representation of the product itself* as it is in relation to a word mark or a figurative or three-dimensional mark not faithfully representing the product. Whilst the public is used to recognising the latter marks instantly as signs identifying the product, this is not necessarily so *where the sign is indistinguishable from the appearance of the product itself*. It follows that an assessment of distinctive character cannot result in different outcomes for a three-dimensional mark consisting of the design of the product itself and for a figurative mark consisting of a faithful representation of the same product.” (emphasis added).

21. It seems to me that the passages which I have cited from cases C-25/05 and T-30/00 show that where a figurative mark replicates the appearance of the product itself, the mark will face the same difficulties in functioning as a trade mark as a three-dimensional representation of the product itself. Such a mark will, in particular, have to demonstrate its distinction from ‘the norm’. However, where a figurative mark does *not* represent the product, no such special rule applies. There is a third category of figurative marks, which make an allusion to the nature of the products without being a representation, faithful or not, of the products in question. In my judgment the case-law does not indicate that such marks suffer from the same intrinsic problems as ‘shape’ marks and marks which represent a particular product in terms of their impact upon the average customer.

22. At paragraph 16 of the decision, the Hearing Officer said that Case C-25/05 provided “... guidance regarding the appropriate test for assessing the [*sic*] distinctive character in relation to confection marks.” Unless by a “confection” mark, the Hearing Officer meant “a mark consisting of the shape of a

particular confectionery product” in my view that comment reflects a misapprehension on the part of the Hearing Officer. And, in any event, in my judgment, her incorporation of paragraph 29 of the ECJ’s judgment into her decision shows that that she considered that this device mark was a “two-dimensional representation of [the] product” and so did not “consist of a sign unrelated to the appearance of the products it covers.”

23. I consider that the applicant is right to say that there is an inconsistency between paragraphs 6 and 17 of the decision, given that the Hearing Officer had accepted that the mark was not a picture of the particular goods shown to her, or of any particular goods. In paragraph 19 of the decision the Hearing Officer said “the mark applied for is typical of the type of image used on confectionery packages “to indicate the kind of product being sold” and in paragraph 21 said that “A brown mouse represents a chocolate mouse in the context of the goods.” However, in my view, that finding does not suggest that Mrs Adams considered the device to be a representation of ‘the’ product; at most, it made an allusion to the kind of product (made of chocolate, or perhaps mouse-shaped or mouse-decorated) which might be sold under the mark. This becomes clearer still when considering the mark’s capacity to distinguish in relation to the whole range of goods within the specification sought, namely ‘Confectionery, chocolate and chocolate products, pastries.’

24. It is plain from paragraph 6 of the decision that the Hearing Officer considered that it made no difference to her assessment of the mark’s capacity to distinguish “that the mark is not actually a faithful representation of the holder’s goods” and she therefore went on to consider whether the mark departed significantly from the norm in the sector, applying the more stringent test set out in Case C-25/05. In paragraph 23, she concluded that the mark would do “no more than inform the relevant consumer, by visual means, that the goods sold under it are chocolate mice, ... Only a mark which departs significantly from the norm or customs of the sector ... is not devoid of any distinctive character and I do not consider that to be the case here.”

25. In my view, for the reasons I have set out above, this device does not represent the appearance of ‘the’ product. As a result, the test applied by the Hearing Officer was not appropriate to assess this mark’s capacity to distinguish for the purposes of section 3(1)(b). The Hearing Officer erred in principle.

26. In *Saint Gobain PAM SA v Fusion Provida Limited* [2005] EQCA Civ 177 at [37] Jacob L.J. pointed out that if an error of principle in a judge's reasoning with respect to obviousness was identified, then the whole question of obviousness was open for reconsideration by the Court of Appeal and not merely the aspect of the matter that was subject to the error of principle. The same principle applies in the present context: see the decision of Richard Arnold QC sitting as the Appointed Person in *Julian James' application; opposition of Smart GmbH* [2005] E.T.M.R. 93 at [18]. I have been supplied with all of the documents which were before Mrs Adams, and given the length of time that this application has been outstanding, I consider that in the interests of proportionality I should reconsider the issue of registrability now. Since I am satisfied that the Hearing Officer did make the error of principle discussed above, I will reconsider the section 3 (1)(b) objection and it is unnecessary to consider whether the Hearing Officer also made errors of principle in the other respects contended for by the applicant.

27. The public interest behind section 3(1)(b) requires that a mark must be able to fulfil its essential function “to guarantee the identity of the origin of the marked product to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin.” (*SAT.1 Satellitenfernsehen GmbH v. OHIM* (Case C-329/02 P) [2005] 1 C.M.L.R. 57; [2005] E.T.M.R. 20, at [23]). In the case, the ECJ went on to hold:

“41 Registration of a sign as a trade mark is not subject to a finding of a specific level of linguistic or artistic creativity or imaginativeness on the part of the proprietor of the trade mark. It suffices that the trade

mark should enable the relevant public to identify the origin of the goods or services protected thereby and to distinguish them from those of other undertakings.

42 Where a trade mark which does not fall foul of the ground of refusal laid down in Art.7(1)(c) of the regulation is none the less devoid of distinctive character within the meaning of Art.7(1)(b) thereof, the Office must also set out the reasons why it considers that that trade mark is devoid of distinctive character.

43 However, in this case, the Office merely stated in the contested decision that the elements "SAT" and "2" were descriptive and in current usage in the sector of media-related services, without stating in what way the term "SAT.2", taken as a whole, was not capable of distinguishing the services of the appellant from those of other undertakings.

44 The frequent use of trade marks consisting of a word and a number in the telecommunications sector indicates that that type of combination cannot be considered to be devoid, in principle, of distinctive character.”

28. The position was summarised by Professor Ruth Annand, sitting as the Appointed Person, in *O2 Holdings' applications O-127-07* (11 May 2007) at 89:

“The question is whether, when viewed overall in relation to the products concerned against the backdrop of trade practices, the average consumer is likely without further education to perceive the mark as conveying a trade mark message (it being understood that a mark can convey other messages at the same time, e.g., alluding to the nature of the product).”

29. The mark for which protection is sought consists of a number of elements: the mouse device, the blue background and the “milk spill” on which (rather like a speech bubble) one might expect to see a product or maker’s name. The mark

must be considered as a whole, although the applicant was plainly right to accept that the mouse is the dominant feature of the overall device. Where a mark consists of a combination of descriptive or common elements, it will be found, as a whole, to be devoid of distinctive character unless the combination adds up to more than the sum of its parts.

30. The relevant public in the case of the products within this specification is the general public. Such consumers are, as a general rule, accustomed to perceiving figurative marks as signs identifying commercial origin (*Libertel Groep BV v. Benelux-Merkenbureau*, C-104/01, [2003] E.C.R. I-3793; [2004] F.S.R. 4 at [65]). There is nothing special about the trade in confectionery, chocolates and pastries in this respect, as indicated by the sample device marks annexed to the applicant's agents' letter of 27 October 2005.
31. On the other hand, as the Registrar pointed out to the applicant, there are products on the relevant market which consist of chocolate-shaped butterflies, teddy bears, rabbits, etc. or chocolates embossed with animal shapes of all kinds. The issue is whether this particular mouse device would appear to members of the relevant public merely to be descriptive of the products sold under the mark, or whether the device would be perceived as indicating trade origin and carry 'a trade mark message'. On balance, it appears to me that the latter is the case, in part because the mouse device is plainly stylised and does not, to my mind, appear to be a mere representation of the product, and in part because the additional elements of the mark, and in particular the "milk spill" seem to me to distinguish the mark from a purely descriptive sign.
32. I accept that the mark may allude in some way to the nature of the products sold under it. The Registrar and the applicant both suggest that it alludes to chocolates or chocolate products, and I also consider that it may be seen as allusive to gingerbread or similar products when used in relation to 'pastries'. Possibly it also suggests that the confectionery/pastry will be animal-shaped or decorated, or intended to appeal to children. However, mere allusion to the

characteristics of a product, not amounting to descriptiveness, will not preclude a mark from registration. As the Registry's Work manual puts it "The fact that a mark strongly *alludes* to characteristics of the goods/services is NOT a proper basis for a Section 3(1)(b) objection. Applicants can therefore expect an objection that the mark will be seen as a description of the goods/services listed in the application to be raised under Section 3(1)(c) or not at all." I note that no objection was taken to this mark under section 3(1)(c), and I think that this reflects the fact that this is not a descriptive mark.

33. For these reasons, in my view, whilst this mark may have no more than a modest degree of distinctiveness, in my view it is not precluded from registration by section 3(1)(b). In the circumstances, the further arguments raised on this appeal by the applicant do not arise.

34. Finally, in accordance with normal practice, I make no order as to costs.

Amanda Michaels  
9<sup>th</sup> October 2007

MALCOLM CHAPPLE (instructed by Dr Walther Wolff & Co) appeared on behalf of the Appellant

MR. MORGAN appeared on behalf of the Registrar