

O-072-14

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NUMBER 2652075  
BY LEUKAEMIA AND LYMPHOMA RESEARCH  
TO REGISTER THE FOLLOWING TRADE MARK  
IN CLASSES 9, 16, 21, 25, 26, 35, 36, 41, 42 AND 45:**

**BEATING BLOOD CANCERS**

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**BEATING BLOOD CANCERS**

**Background**

1. On 6 February 2013, Leukaemia and Lymphoma Research ('the applicant') applied to register trade mark application number 2648997 consisting of the phrase 'BEATING BLOOD CANCERS' for the following goods and services in classes 9, 16, 21, 25, 26, 35, 36, 41, 42 and 45:

Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; Apparatus for recording, transmission or reproduction of sound or images; Magnetic data carriers, recording discs; mechanisms for coin-operated apparatus; Cash registers, calculating machines, data processing equipment and computers; Fire-extinguishing apparatus; electronic, downloadable publications; computer software; podcasts; downloadable media files; data recorded electronically and in electronic form; electronic devices for displaying information; CDs, CD-ROMs, DVDs; scientific apparatus and instruments for medical research; downloadable teaching materials; downloadable publications on the subject of medical research, drug trials, medical trials and scientific trials; downloadable publications on the subject of health, diet, nutrition, cancer and cancer prevention; parts and fittings for the aforesaid goods.

Class 16: Paper, cardboard and goods made from these materials, not included in other classes; Printed matter; Book binding material; Photographs; Stationery; Adhesives for stationery or household purposes; Artists' materials; Paint brushes; Typewriters and office requisites (except furniture); Instructional and teaching material (except apparatus); Plastic materials for packaging (not included in other classes); Printers' type; Printing blocks; printed publications; magazines; brochures; journals; leaflets; posters; information and promotional material; stationery; greetings cards; invitations; gift labels and tags; diaries; calendars; address books; organisers; notebooks; notelets; binders and folders; bags made from paper; adhesives for stationery; book pads; book ends; book markers; envelopes; paper bows; paper coasters; paper coffee filters; paper containers; paper face towels; paper handkerchiefs; toilet paper; luminous paper; paper table napkins; paper tablecloths; paper articles of stationery; cardboard articles; wrapping paper; photograph albums; pictures; prints; paintings; bookmarks; stickers and decalcomanias; table mats of paper; parts and fittings for the aforesaid goods.

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Class 21: Household or kitchen utensils and containers; combs and sponges; brushes (except paint brushes); brush-making materials; articles for cleaning purposes; steelwool; unworked or semi-worked glass (except glass used in building); glassware, porcelain and earthenware not included in other classes; mugs; beer mugs; bottle openers; buckets; champagne buckets; ice buckets; coasters; cocktail stirrers; corkscrews; drinking glasses; shakers; tankards; toothbrushes; plastic water bottles; tableware; money boxes; parts and fittings for all the aforesaid goods.

Class 25: Clothing, footwear, headgear; sports clothing; sportswear; outer clothing; shirts; t-shirts; shorts; sweaters; skirts; jogging suits; trousers; jeans; pants; rainwear; blouses; jackets; coats; gloves; neckties; scarves; hats; caps; sunvisors; boots; shoes; sport shoes; sneakers; sandals; wristbands; parts and fittings for all the aforesaid goods.

Class 26: Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; badges for wear; pins; rosettes; ribbons; arm bands; woggles; lanyards; hair pins and grips; parts and fittings for all the aforesaid goods.

Class 35: Advertising; business management; business administration; office functions; public relations services; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods, from stores, websites and stalls specialising in scientific, measuring, checking (supervision), life-saving and teaching apparatus and instruments, apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, apparatus for recording, transmission or reproduction of sound or images, magnetic data carriers, recording discs, calculating machines, data processing equipment and computers, electronic downloadable publications, computer software, podcasts, downloadable media files, data recorded electronically and in electronic form, electronic devices for displaying information, CDs, CD-ROMs, DVDs, scientific apparatus and instruments for medical research, downloadable teaching materials, downloadable publications on the subject of medical research, downloadable publications on the subject of drug trials, downloadable publications on the subject of medical trials and scientific trials, downloadable publications on the subject of health, diet, nutrition, cancer and cancer prevention, paper and cardboard, printed matter, bookbinding material, photographs, stationery, adhesives for stationery or household purposes, artists' materials, paint brushes, office requisites (except furniture), instructional and teaching material (except apparatus), plastic materials for packaging (not included in other classes), printed publications, magazines, brochures, journals, leaflets, posters, information and promotional material, stationery, greetings cards, invitations, gift labels and tags, diaries, calendars, address books, organisers, notebooks, notelets, binders and folders, bags made from paper, adhesives for stationery, book pads, book ends, book markers, envelopes, paper bows, paper coasters, paper coffee filters, paper containers, paper face towels, paper handkerchiefs, toilet paper, luminous paper, paper table napkins, paper tablecloths, paper articles of stationery, wrapping paper, photograph albums, pictures, prints, paintings, bookmarks, stickers and decalcomanias, household or kitchen utensils and containers, combs and sponges, brushes, brush-making materials, articles for cleaning purposes, steelwool, unworked or semi-worked glass,

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glassware, porcelain and earthenware, table mats, mugs, beer mugs, bottle openers, buckets, champagne buckets, ice buckets, coasters, cocktail stirrers, corkscrews, drinking glasses, shakers, tankards, toothbrushes, plastic water bottles, tableware, money boxes, Clothing, footwear, headgear, sports clothing, sportswear, outer clothing, shirts, t-shirts, shorts, sweaters, skirts, jogging suits, trousers, jeans, pants, rainwear, blouses, jackets, coats, gloves, neckties, scarves, hats, caps, sunvisors, boots, shoes, sport shoes, sneakers, sandals, wristbands, Lace and embroidery, ribbons and braid, buttons, hooks and eyes, pins and needles, artificial flowers, badges for wear, pins, rosettes, ribbons, arm bands, woggles, lanyards, hair pins and grips; advertising and promotion services; business organisation services; business management services; co-ordination of organisations and individuals for the purposes of enabling scientific research; compilation of information into computer databases; systematization of information into computer databases; consultancy in the field of business organisation; data search in computer files for others; business management in the field of scientific management; marketing, conducting market research and marketing studies; market analysis; data analysis; opinion polling; converting information into a digital format; management, collection and dissemination of commercial, personal and charitable data; promoting public awareness of cancer prevention; information and advisory services relating to the aforesaid.

Class 36: Insurance; Financial affairs; Monetary affairs; Real estate affairs; charitable fund raising; financial services relating to charities and fund raising; charitable collections; organisation of collections; organisation of fund raising activities and events; financial grant services; provision of funding for medical research; provision of funding for charities; provision of funding for medical trials; provision of funding for educational and research posts; information and advisory services relating to the aforesaid.

Class 41: Education; Providing of training; Entertainment; Sporting and cultural activities; Organisation of sporting and cultural activities; organisation of sporting and cultural activities for charitable purposes; organisation, planning, arranging and conducting of discussions, study groups, workshops, lectures, conferences and seminars; education services in relation to alleviation, diagnosis, prevention and treatment of disease and medical conditions; the publication of books, records, reports, publications, newsletters, research material, journals, academic studies, briefing papers, catalogues, texts and magazines; publishing by electronic means, providing on-line electronic publications (not downloadable), publication of electronic books and journals on-line; library services; developing and conducting educational programs in the fields of health, diet, nutrition, cancer and cancer prevention; education and training in the field of medical trials and drug trials; provision of musical events; presentation of live performances; rental of music venues and stadiums; ticket agency services; information and advisory services relating to the aforesaid.

Class 42: Scientific and technological services and research and design relating thereto; Industrial analysis and research services; Design and development of computer hardware and software; Scientific and medical research services; providing

medical and scientific research information and advice relating to alleviation, diagnosis, prevention and treatment of disease and medical conditions; research in the fields of health, diet, nutrition, cancer and cancer prevention; drug trials; medical trials; medical treatment trials; scientific trials; advisory services relating to scientific and medical research; providing a platform for online discussions on communications networks, in particular on the Internet; providing an online platform for forums and discussions, providing functions for personalising online forums and online discussions; design, creation, maintenance and hosting of websites; services information and advisory services relating to the aforesaid.

Class 45: Legal services; dating services; online dating services; Security services for the protection of property and individuals political lobbying; political campaigning, advocacy and policy; political campaigning, advocacy and policy in the fields of public affairs, medical research, scientific research, medical trials and drug trials.

2. On 1 March 2013, the Intellectual Property office ('IPO') issued its examination report which raised an objection under section 3(1)(b) on the basis the sign is devoid of any distinctive character. In stating that the sign would not be seen as a trade mark, the examiner noted that it *"appears to be an informative statement indicating the subject matter (notably in relation to printed matter, education and medical trials) of some of the applicant's goods and services"*.

3. However, the examiner considered the full specification and did not feel the objection applied across the board. As a result, the examiner was prepared to allow the application to be registered in relation to certain goods and services in classes 9, 16, 21, 25, 26, 35, 36, 41, 42 and 45.

4. The matter came before me at an *ex parte* hearing on 8 July 2013, at which I indicated my preliminary position that the sign is devoid of distinctive character under section 3(1)(b) for all goods and services. Mr Julius Stobbs of Stobbs IP ('the agent') had full opportunity to address that position.

5. Mr Stobbs submitted that, in principle, such a position could not be taken for the following reasons:

- The expression 'beating blood cancers' would have no meaning or resonance as far as e.g. vending machines were concerned;
- Case law required me to consider 'use as a trade mark' in a normal and fair way;
- Case law also placed a burden on me to explain exactly how the sign would be devoid of distinctive character in relation to groups of goods or services at least, if not individual items;
- The identities and susceptibilities of the average consumer would vary considerably across the full range of goods and services. For certain services the average consumer would be specialist, and could, as a result, be more attuned to perceiving the trade mark message;

- The applicant's status as a charity potentially allowed for a lower threshold of distinctiveness - more in line, say, with magazine titles which, by definition and practice, often contain descriptive or semi-descriptive messages whilst simultaneously functioning as trade marks;

6. The agent rejected any analogy I sought to draw with the circumstances confronting the Appointed Person in e.g. *FeedbackMatters* (BL O/185/12) at paragraph 35, which reads as follows:

*"In relation to the comments at paragraph 21 about "office functions", I would not have separated these services out from the rest of the specification as giving the Mark more chance of being accepted. The power of the Mark to individualise office functions, even if restricted to something like photocopying services or phone answering services, as suggested by the hearing officer, seems to me to be no greater than for the other services. Although the Mark is less obviously potentially descriptive of what the services entail, it nevertheless remains lacking in the ability to denote origin without first being used in a way that would educate business people that this is its purpose."*

In Mr Stobbs' submission, the mark considered by the Appointed Person was entirely different to the one confronted by me. He submitted that 'FeedbackMatters' was a 'generic phrase', having wide and general application. The same could not be said for the expression 'BEATING BLOOD CANCERS'.

7. I deferred my decision at the hearing in order to fully consider the submissions made. On 10 July 2013 I issued my hearing report, which confirmed my decision to maintain objection under section 3(1)(b) against all goods and services, but to give an opportunity of two months for the applicant to consider its options (for example, by allowing the application to be formally refused and appealing that decision, or by indicating a desire to rely on acquired distinctiveness). I stated in my letter that a failure to respond at all would result in refusal of the application. The applicant did not respond within the two month period, and accordingly the application was formally refused on 16 September 2013. In response to the formal refusal, the applicant has filed Form TM5, being a request for a full statement of grounds for my decision. This, then, is the full statement of grounds in which I clearly have only the *prima facie* position to consider; the applicant not having relied upon acquired distinctiveness.

## **Decision**

8. As stated, this case has been decided on a *prima facie* basis only, under the provisions of section 3(1)(b) of the Act, which reads:

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

*(a) ...*

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

(c) ....

(d) ...

*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."*

## **Preface**

9. My starting point in this case was to clarify, both at the *ex parte* hearing and in my subsequent hearing report, that the objections under section 3(1)(b) and (c) as set out in the original examination report had, in my opinion, been conflated and confused. The wording of the objection in the examination report goes specifically to those goods and services in respect of which the examiner considered the sign to constitute mere 'subject matter'. Such an objection would be consistent with section 3(1)(c); that is to say, it is a well established principle in the UK at least that 'subject matter' can constitute a characteristic for the purposes of section 3(1)(c) (see, for example, *Flying Scotsman*, BL O/313/11, paragraphs 16-17). However, the examination report cited only section 3(1)(b) and not 3(1)(c). This conflation had perhaps led the examiner into considering that, in respect of certain goods and services, the sign would *not* be 'subject matter' and would, as a result, be free of objection.

10. In my opinion, I think the examiner's original approach in the examination report resulted in far too much leniency to the applicant. The basis of a section 3(1)(b) objection, as distinct from one raised under section 3(1)(c), is that a sign is 'unpossessed of distinctive character' from the perspective of the average consumer. Whilst a sign may be devoid of distinctive character simply and only because it designates a characteristic, (or perhaps even, just relates to a characteristic), there are also circumstances where it is 'devoid' even though a particular characteristic is *not* designated, or even vaguely referenced.

11. An explanation of the relationship between section 3(1)(b) and (c) has been fully set out by the Appointed Person in, *inter alia*, the *Flying Scotsman* case, at paragraph 19. The Appointed Person says that even though a sign may not designate a characteristic of the relevant goods and services under section 3(1)(c), it may nonetheless be devoid of distinctive character for the purposes of section 3(1)(b) only. To be absolutely clear in this case, the refusal is made under section 3(1)(b) *only*, and is directed against *all* goods and services.

## **The relevant legal principles - section 3(1)(b)**

12. The Court of Justice of the European Union ('CJEU') has emphasised the need to interpret the grounds for refusal of registration listed in Article 3(1) of Directive 2008/95/EC ('the Directive', being the codified version of the original Directive 89/104/EEC) and Article 7(1) of Council Regulation (EC) No 207/2009 ('the Regulation', being the codified version of original Council Regulation 40/94) in light of the general interest underlying each of them (Case C-37/03P, *Bio ID v OHIM*, paragraph 59 and the case law cited there, and e.g. Case C-273/05P *Celltech R&D Ltd v OHIM*).

13. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. In relation to section 3(1)(b) (and the equivalent provisions referred to above upon which section 3(1)(b) is based) the Court has held that “...*the public interest... is, manifestly, indissociable from the essential function of a trade mark*” (Case C-329/02P ‘SAT.1’ *Satelliten Fernsehen GmbH v OHIM*). The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him or her, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above mentioned judgment). Marks which are devoid of distinctive character are incapable of fulfilling that essential function. Moreover, the word ‘devoid’ has, in the UK at least, been paraphrased as meaning ‘unpossessed of’ from the perspective of the average consumer.

14. The question then arises as to how distinctiveness is assessed under section 3(1)(b). Paragraph 34 of the CJEU Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (‘Postkantoor’) reads as follows:

*“A trade mark’s distinctiveness within the meaning of Article 3(1)(b) of the Directive must be assessed, first, by reference to those goods or services and, second, by reference to the perception of the relevant public, which consists of average consumers of the goods or services in question, who are reasonably well informed and reasonably observant and circumspect (see inter alia Joined Cases C-53/01 to C-55/01 Linde and Others [2003] ECR I-3161, para 41, and Case C-104/01 Libertel [2003] ECR I-3793, paras 46 and 75).”*

15. So the question of a mark being devoid of distinctive character is answered by reference to the goods and services applied for, and the perception of the average consumer for those goods or services.

16. 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 to that effect CJEU Case C-51/10 P, *Agencja Wydawnicza Technopol sp. z.o.o. v. OHIM* [2011] ECR I-1541. Whilst that case was, technically speaking, in relation only to section 3(1)(c) or its equivalent in European law, the principle about the ‘prevention of undue monopolies’ must hold good whether section 3(1)(b) and/or (c) applies.

17. In applying these principles to this case, it is nonetheless important I am convinced that the objection applies to *all* the goods and services applied for. If there are goods or services specified which are free of objection under section 3(1)(b) then they must be allowed to proceed. In the CJEU case C-239/05 *BVBA Management, Training en Consultancy v Benelux-Merkenbureau*, the question being referred to the Court was whether the Directive, on which the Act is based of course, must be interpreted as meaning that the competent authority is required to state its conclusion separately for each of the individual goods and services specified in the application. The Court answered, and in paragraph 38 said that the competent authority was required to assess the application by reference to individual goods and services. However, where the same ground of refusal is given for a category or group of



goods or services, the Court also confirmed that the competent authority may use only general reasoning for all the goods and services concerned. It is plain from this judgment that the Court had in mind purely practical considerations which had to be balanced against a legal provision in the Trade Marks Directive which allows for refusal only in relation to goods and services where objections apply.

18. In my view, the approach taken by the Appointed Person in *'FeedbackMatters'* is correct as (or at least indicative of) a general proposition. Even if it is not, and was never intended as a general proposition *per se*, it is certainly indicative of the inherent problems in handling a sign which may be considered 'devoid' in relation to certain goods and services but not others. The fact the Appointed Person was limited in her application of the proposition to services in class 36 does nothing to undermine the practical or theoretical soundness of approach. If a view is taken that, linguistically, a phrase is likely to be 'devoid', that is to say 'unpossessed of distinctive character' or 'origin neutral' for my purposes, it is sometimes (as in this case) very hard to draw any meaningful line whereby it may be 'origin specific' in relation to certain (only) goods and services.

19. In saying this, I am of course, familiar with, and bound by, the application of 'partial refusal' based upon Art 13 of the Trade Marks Directive, namely that refusal can only be based on those goods and services in respect of which the objection is effective, and by definition, for other goods and services, the application can be accepted. I will simply observe at this stage however, this is a somewhat easier principle to apply where the objection is based only on section 3(1)(c), where objective characteristics such as *types* and *kinds* are at play, rather than signs or marks which are simply, in the registrar's view, 'devoid' under section 3(1)(b) only.

#### **Application of legal principles - section 3(1)(b)**

20. Given the huge breadth of goods and services listed in this application, it is hard to categorise who exactly the average consumer would be. I am proceeding on the basis that, in relation to the goods, it is likely to be the general public, whilst in relation to the services, these may well be accessed by other businesses as well as the general public. I should just emphasise, though, that my final conclusion in this particular case does not turn in any event on the identity of the average consumer, and by extension any supposed and especially sensitised aptitude at detecting any trade mark message.

21. I must then, consider the effect on the perceptions of the average consumer on seeing the words 'BEATING BLOOD CANCERS', in normal and fair use in relation to the goods and services of the application. This process starts with a linguistic analysis of the words in the combination presented.

22. In linguistic terms, the sign comprises three recognisable words, 'BEATING BLOOD CANCERS'. The phrase comprises an easy to understand and grammatically correct, if slightly elliptical, narrative. Simply stated, the words express a laudable medical objective and nothing more. The words 'blood cancers' are plainly and objectively descriptive of a group of cancers affecting the blood. The word 'beating' has some informality about it, but nonetheless expresses a desire to, for example, 'find a cure for', 'address the consequences of', 'fight' or otherwise 'combat'. In terms of the phrase's inherent linguistic characteristics, in

my opinion, it is hard to see exactly what about it as a whole, that could ever, conceivably perform the essential function of a trade mark in the *prima facie*. It is, to coin a well known phrase in trade mark circles in the UK, entirely 'origin neutral'.

23. Mr Stobbs' position, however, is based on the fact that there would be some 'oddness' in having what is a statement denoting a 'laudable medical objective' used in relation to, or connection with e.g. vending machines, calculators, pens, clothing, business services, insurance services or dating services. In the absence of such connection, in Mr Stobbs' submission (or the effect of his submission) the phrase would be likely to have trade mark capacity.

24. I think Mr Stobbs' position is in grave danger of undermining the critical test of consumer perception in favour of something which may be very literal and mechanistic. Even if there is no obvious connection between the phrase 'BEATING BLOOD CANCERS' and e.g. vending machines or calculators, this would not, of itself, have the effect of rendering the sign free from objection under section 3(1)(b). In other words, the average consumer would not necessarily reach the conclusion that, because a vending machine has no literal connection with 'blood cancers', the phrase must, or at least is apt to, function as a trade mark.

25. The common sense approach to this starts with the inherent linguistic analysis that I have already conducted, but also factors in, for example, recognised patterns of trade and current commercial and cultural mores, of which I can take judicial notice. The point here is that, more so than ever before, charitable and research concerns find themselves operating in a commercial sphere which involves fund raising via means such as e.g. catalogue-based retailing of goods, especially for occasions such as Christmas but also all year round. The average consumer will be very familiar with such practices which are likely to involve the linkage of a charitable message with physical goods. In the context of any such linkage, it is wholly possible that signs such as 'OXFAM' or 'DIABETES RESEARCH UK' would indicate the origin of goods sold via the mail order catalogue. In contrast, the phrase 'BEATING BLOOD CANCERS' would not, at least not in the *prima facie* case. All it does indicate is the narrative expression of a laudable medical objective. Insofar as the average consumer may see the words as possibly connected to a charitable concern, the words are not denominative of the name of such a concern, but rather the objective of any such charity which has blood cancers as its particular focus.

26. The argument in relation to use of the term in connection with services (as distinct from goods) inevitably starts with the same linguistic analysis of the words. The words are, and I repeat, inherently 'origin neutral'. The fact that they may be used in relation to a service rather than a tangible 'good' is not apt to transform them into denoting trade origin. It may be true to say that in relation to the services of class 42, the phrase is especially apt. But even for the remainder of the services, all that the words convey is the narrative expression of a laudable medical objective. That objective could comprise the objective of the undertaking itself, as in the services of class 42, or it could be that a particular undertaking has apparently attached itself, or supports in some way, that objective; in either case, the sign would be non-distinctive. It is worthwhile in this context, taking judicial notice of the fact that many commercial undertakings place great store these days in their 'corporate responsibility', whether this takes the form of e.g. allowing their employees time off to do voluntary work, or allowing their names to be linked with a particular charity. Against this

background, it would be far from unusual for an advertising firm, or any other service for that matter, to wish to be connected with a 'laudable medical objective' such as 'BEATING BLOOD CANCERS'.

27. The point I am making, in relation to both the goods and services of this application, is that the 'oddness' urged on me by Mr Stobbs, of seeing the words 'BEATING BLOOD CANCERS' used in a commercial context and in relation to goods of trade and services, would, in reality, and to the average consumer these days, not be perceived as being 'odd' at all, given the recognised patterns of trade and corporate mores to which I have referred.

28. Mr Stobbs also says that a lower threshold of distinctiveness applies in relation to charities. On this point, I accept that terms such as 'DIABETES UK' could potentially operate as trade marks in the sense that they function as the *names* of charities despite also being descriptive or semi-descriptive. But the expression 'BEATING BLOOD CANCERS' plainly does not fall into that category - it could apply to *any* charity whose chief focus happens to be blood cancers.

### **Conclusion**

29. In this decision I have considered all the papers filed and submissions made. For the reasons given above, the application is refused under section 3(1)(b) in relation to all goods and services.

Dated this 11th day of February 2013

**Edward Smith**

Acting for the Registrar  
The Comptroller General