

TRADE MARKS ACT 1994

IN THE MATTER OF:

TRADE MARK APPLICATION No. 3033588

IN THE NAME OF FORRESTER KETLEY LTD

DECISION

1. Forrester Ketley Ltd (“the Applicant”) appeals against the rejection of its application filed under number 3033588 to register **WILDFLOWER** as a trade mark for use in relation to ‘*perfume*’ in Class 3. Registration was refused for the reasons given by Ms. Bridget Whatmough on behalf of the Registrar of Trade Marks in a decision issued under reference BL O-345-15 on 27 July 2015. She held that the mark was excluded from registration in relation to perfume products by s.3(1)(c) of the Trade Marks Act 1994 (which prevents registration of ‘*trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the ... characteristics of goods ...*’) and additionally or alternatively by s.3(1)(b) of the Act (which prevents registration of ‘*trade marks which are devoid of any distinctive character*’).
2. The Applicant did not apply for registration under the proviso to s.3(1) of the Act on the basis of distinctiveness acquired through use. The Hearing Officer proceeded upon the premise that the designation **WILDFLOWER** would be perceived and remembered by the relevant average consumer in keeping with the meaning ascribed to it in the Oxford Dictionary of English: ‘*a flower of an uncultivated variety or a flower growing freely without human intervention*’. The Applicant accepts the correctness of that approach.

3. In paragraphs 25 to 34 of her decision the Hearing Officer made findings to the following effect:

The fact that the goods may contain wildflower extracts, essential oils from wildflowers, essence from wildflowers, or could be intended to mimic the scent of a wildflower would all be considered to be characteristics thereof: para. 28.

The fact that the goods could contain extracts or essential oils from any wildflower or indeed a combination of them is sufficient to warrant the conclusion that the sign may serve in trade to designate a characteristic thereof: para. 29. Moreover, the sign may serve in trade to designate the scent of wildflower, whether this is created artificially or not: para. 31.

Whilst wildflowers typically grow naturally in the wild, they can also be grown from seeds in domestic gardens and farms. They are currently found growing throughout the UK on urban roundabouts and grass verges. Growing wildflowers outside of their more typical natural environments is not uncommon, the aim being to recreate some of the wildflower meadows that have been lost through the years and partly to help boost the declining bee population by providing more flowers for pollination. This practice raises consumer awareness that wildflowers are no longer simply 'wild, naturally occurring flowers', but rather can be sown from seeds in different environments and for specific reasons: para. 32.

The sign is not too vague to designate a specific characteristic of the goods; it would be taken on first impression to be a normal means of designating that the goods contain, for example, essential oil from wildflowers, essence from wildflowers or wildflower extracts or could comprise a scent of 'wildflowers': paras. 28 and 33.

These findings led inexorably to the conclusion that the application for registration was unacceptable under s.3(1)(c).

4. With regard to s.3(1)(b), the Hearing Officer decided as follows:

38. Even if the mark were to fall short of conveying the requisite level of specificity to support an objection under section 3(1)(c) (which I do not believe to be the case), I would nevertheless hold that it would not be capable of performing the essential function of a trade mark without the relevant public being educated into seeing it that way. ... In my view the sign WILDFLOWER would not evoke, in the perceptions and recollections of the relevant consumer, an 'origin specific' statement as distinct from an 'origin neutral' one.

...

40. For reasons already given, I consider the sign to be descriptive of specific characteristics of the goods. It is clear from the above guidance that if a mark is entirely descriptive of characteristics of goods or services, it will also be devoid of any distinctive character under section 3(1)(b). As I have found that the mark in question is open to objection under section 3(1)(c) of the Act, it follows that it is also open to objection under section 3(1)(b) of the Act. But, in the event I am wrong that 3(1)(c) and (b) are co-extensive, my view would be that section 3(1)(b) would apply independently and that the word WILDFLOWER would be considered to be origin neutral by the relevant consumer.

The application was therefore regarded as unacceptable under s.3(1)(b) in any event.

5. During the process of examination leading up to refusal, the Registry had referred the Applicant to examples of use of the term 'wildflower(s)' to characterise the fragrance of perfumes. The following references were provided under cover of an official letter of 24 June 2014: (i) use of the term 'wildflowers' in the list of fragrance notes for the Carthusia collection of perfumes offered by Liberty of London; (ii) the following description of the fragrance of Crabtree & Evelyn's Somerset Meadow Eau De Toilette: 'The fresh scent of wildflowers mingles with dewy green notes of ivy and water lily, whilst fruity accords of blackberry and

bergamot add a hint of sweetness’; (iii) an offer on etsy.com.uk of YsabelLarouse ‘ESTIENNE Medieval Perfume - Citrus & Wildflowers Perfume’; (iv) an offer of ‘Wildflower Body Spray’ with respect to which the Kew Gardens Gift Shop narrative stated ‘The wildflower fragrance is a light, fresh scent inspired by wild meadows and flowers’; and (v) an offer by Cosmetics Now UK of Boadicea The Victorious Delicate Eau De Parfum Spray narratively described as possessing ‘Top notes of grass bellflower wildflower & clover’.

6. The Applicant maintains that it was not open to the Hearing Officer to come to the conclusions she did for the reasons she gave because: the term **WILDFLOWER** only vaguely suggests that a perfume may have a floral scent and merely being evocative of a characteristic of goods or being suggestive or allusive is not enough to justify refusal of registration under s.3(1)(c); modern perfumes are not generally ‘home made’ products and perfume manufacturers would not rely on the ‘random’ nature of wild flowers for their ingredients, but want instead to provide a consistent and reproducible scent by using flowers commercially grown from seed; UK consumers would never consider that a wild, naturally occurring flower would be used in the highly complex process of using a large number of ingredients including synthetic chemicals to produce modern perfumes; nothing raised by the Examiner or the Hearing Officer shows use of the term **WILDFLOWER** in relation to perfume; the term **WILDFLOWER** is not a dictionary term (as one word) and possesses the necessary degree of distinctiveness to satisfy the very low threshold required in order to qualify for registration under s.3(1)(b).
7. I think it is clear beyond argument that perfumes commonly possess floral fragrances and that the relevant average consumer of perfumes has at all material times been likely to regard the designation **WILDFLOWER**, when used with reference to a perfume product, as an indication that the product possesses a floral fragrance. What the designation leaves to the consumer’s imagination on first encounter and may leave to her or his recollection in the context of subsequent encounters is the particular nature and character of the floral fragrance that the user of the designation has chosen to describe as **WILDFLOWER**. That does not detract

from the central proposition that **WILDFLOWER** is a ‘*sign or indication which may serve, in trade to designate the ... characteristics of*’ perfume products. There is no saving grace in the designation being plurally descriptive in the sense that there are many and various floral fragrances which can potentially be described as **WILDFLOWER** fragrances: it is not necessary for the designation to be singularly descriptive of one particular fragrance in order for it to be excluded from registration, either for descriptiveness or for lack of distinctiveness, in relation to perfume products. It is also immaterial for the purpose of applying those exclusions from registration to delve into the question whether the relevant average consumer would or would not be likely to form a view as to whether and, if so, to what extent the **WILDFLOWER** fragrance of a perfume product may have been produced synthetically. The term **WILDFLOWER** is too plainly explanatory with regard to fragrance to stand on its own two feet as an indication of trade origin for perfume in the absence of distinctiveness acquired through use.

8. The Hearing Officer rightly regarded the application for registration of **WILDFLOWER** as a trade mark for perfume products as unacceptable under ss.3(1)(b) and (c) of the 1994 Act. The appeal is dismissed. In accordance with the usual practice on appeals to the Appointed Person from decisions of the Registrar in *ex parte* proceedings, it is dismissed with no order for costs.

Geoffrey Hobbs QC

4 April 2017

Steven Wake of Forrester Ketley Ltd appeared on behalf of the Applicant

Nathan Abraham appeared on behalf of the Registrar