

O-065-08

TRADE MARKS ACT 1994

IN THE MATTER OF AN APPLICATION NO 2377795

TO REGISTER A TRADE MARK

BY POM WONDERFUL LLC

IN CLASS 32

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DECISION AND GROUNDS OF DECISION

Background

1. On 11 November 2004 Pom Wonderful LLC of 11444 W. Olympic Blvd., 10th Floor, Los Angeles, California 90064, United States of America applied under the Trade Marks Act 1994 to register the following trade mark:

ANTIOXIDANT SUPERPOWER

2. Registration is sought for the following goods:

Class 32

Fruit juices and fruit juice concentrates

3. Objection was taken against the application under Section 3(1)(b) and (c) of the Act because the mark consists exclusively of the words ANTIOXIDANT SUPERPOWER being a sign which may serve in trade to designate the kind and characteristics of the goods e.g. goods having very powerful antioxidant properties. However, the objection under Section 3(1)(c) of the Act was subsequently waived and I will make no further reference to it in this decision.

4. Following a hearing which was held on 8th October 2007 at which the applicant was represented by Mrs Trebble of Saunders & Dolleymore, their trade mark attorneys, the objection was maintained and Notice of Final Refusal was subsequently issued.

5. I am now asked under Section 76 of the Act and Rule 62(2) of the Trade Mark Rules 2000 to state in writing the grounds of my decision and the materials used in arriving at it.

6. No evidence has been put before me. I have, therefore, only the prima facie case to consider.

The Law

7. 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,

The case for registration

8. At the hearing, and in earlier correspondence, Mrs Trebble made extensive submissions in support of this application. In her letter of 8th June 2005 Mrs Trebble said:

“ANTIOXIDANT SUPERPOWER are not words used together in everyday English language. To reinforce this fact the dictionary definition of each word is:

antioxidant: 1. any substance that retards deterioration by oxidation, esp. of fats, oils, foods, petroleum products or rubber. 2. a substance such as vitamin C, vitamin E or beta carotene, that counteracts the damaging effects of oxidation in a living organism.

Superpower: 1. an extremely powerful state such as the US. 2. extremely high power, esp. electrical or mechanical.

Both dictionary definitions are taken from Collins English Dictionary 21st Century Edition. Copies of the pages used are attached.”

9. Mrs Trebble also makes reference to these dictionary meanings in order to demonstrate that the combination of the two words ANTIOXIDANT and SUPERPOWER and will not be perceived, by the relevant consumers, as a descriptive message, but as a sign which guarantees that the goods are from a single undertaking.

10. Mrs Trebble provided details relating to two corresponding applications in the US for the same mark, by the same applicant for *inter alia* “fruit juices” in class 32.

11. Finally Mrs Trebble provided copies of Google searches for the trade mark applied for.

12. Copies of the dictionary definitions, the corresponding application in the US and the results of the Google search are attached at Annex A.

13. At the hearing, Mrs Trebble reiterated the submissions made in the earlier correspondence referred to above, and provided me with further Google search results, and a further copy of the corresponding application in the US. Copies of these are at Annex B.

Decision

14. The approach to be adopted when considering the issue of distinctiveness under Section 3(1)(b) of the Act has recently been summarised by the European Court of Justice in paragraphs 37, 39 to 41 and 47 of its Judgment in *Joined Cases C-53/01 to C-55/01 Linde AG, Windward Industries Inc and Rado Uhren AG* (8th April 2003) in the following terms:

“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 the rule in 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-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 thus distinguishing it from those of other undertakings.”

15. I must determine whether the trade mark applied for is capable of enabling the relevant consumer of the services in question to identify the origin of the services and thereby to distinguish them from other undertakings. In *OHIM v SAT.1* (Case C-329/02) the European Court of Justice provided the following guidance at paragraph 41:

“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.”

16. Internet reports, which were considered to support the objection under Section 3(1)(b) of the Act, were forwarded with the examination report. Copies of these are at Annex C but I will comment on them individually.

17. The first report is from a web site in the name of Frost and Simpson. It refers to five different types of vegetable capsules, all of which are differentiated by reference to colour. Of the five, two: the Attack Pack Green and Attack Pack Red, make reference to containing “Super Power Antioxidant”. This is in contrast to the three remaining packs which make no such reference. Clearly two are promoted as being capsules which possess powerful antioxidating properties and the others are not.

18. The second report is from a web site names “hghair.com”. This report refers to an “ultra-rich, antioxidant rich body soufflé”. I am not aware of the relevance of this report as it appears to have no bearing on this decision.

19. The third report is from a web site named “drinkfuse.com”. It refers to a beverage which appears to be pomegranate white tea. It states “our latest beverage, with no carbs, no sugar and no calories, has antioxidant superpower and a “light” clean taste, unlike any other pomegranate product.” It goes on to refer to these antioxidants as being “powerful” and “supercharged” which I take to be a reference back to the word “superpower”.

20. The fourth report is from a web site named “bellybytes.com”. It appears to promote the benefits to be derived from eating cantaloupes. On page 2 it states “Vitamin C – plentiful in cantaloupe – is an antioxidant superpower”.

21. The fifth report is from a web site named “antioxidantsnow.com”. It states that human bodies may be defended against the actions oxidation “with the super power of antioxidants”.

22. The sixth report is from a web site named “wholehealthmd.com”. This provides information on newly available tea beverages and makes constant references to the antioxidants that they contain. However, on page 3 it refers to white tea and states “As a result, white tea is not readily available in the U.S., and its superpower antioxidant content is often offset by its high cost”.

23. Clearly, all of these reports provide different information, and I accept that they do not relate specifically to the goods for which the applicant seeks registration. However, they do provide information on the benefits of antioxidants and they provide a clear indication that the words ANTIOXIDANT and SUPERPOWER are perfectly capable of being used in combination to describe a product which contains or provides powerful anti-oxidation properties. This is, to a certain degree, confirmed by Mrs Trebble in the final paragraph of page 1 of her letter of 8 June 2005 where she states “Although the public may interpret the mark ANTIOXIDANT SUPERPOWER as a product with powerful antioxidating properties, it is clearly more than this due to the unusual combination of words ANTIOXIDANT and SUPERPOWER. The word superpower lending itself to the idea of world powers and super heroes”.

24. I must say that in relation to the goods in question I consider it unlikely that the word SUPERPOWER, in the context of the trade mark applied for, will be perceived by the relevant consumer as a reference to a world power such as the US. It is far more likely that consumers will see this word as a reference to the product being more powerful than other similar goods. In combination with the word ANTIOXIDANT,

the mark as a whole will be perceived as a reference to goods with very powerful antioxidant properties.

25. The goods in question are “fruit juices and fruit juice concentrates”. This specification of goods covers juices and juice concentrates made from or containing fruit. As far as I am aware, antioxidants are present, probably in varying quantities, in virtually all, if not all, fruit. The consumer of these goods would appear to be members of the general public as fruit juices and fruit juice concentrates are widely available from supermarkets, a wide range of stores and, of course, from Internet web sites. I note from the applicant’s own web site that they make specific reference to pomegranate juice which they refer to as “the antioxidant superpower”. In my view this is a simple descriptive message which informs consumers that the juice in question possesses very powerful antioxidating properties. I am also of the view that this is how the general public, who are after all the relevant consumer of the goods in question, will perceive this mark.

26. I am aware that I must consider the objection in relation to all goods applied for. The specification of goods is quite limited although it does cover all fruit juices and concentrates made from all fruit juices. It is probably a fact that all fruits have antioxidant properties and it may well be true that only some of these fruits could be described as being very powerful in this regard. Though I have not been provided with any information for individual fruits it is very likely that more than those already identified will fall into the latter category. In the circumstances I am satisfied that the objection is relevant in respect of all of the goods for which registration is sought.

27. At the hearing I was provided with the results of a Google search for the combination “ANTIOXIDANT SUPERPOWER”. The result is some 28 extracts of which those numbered 1 to 7 (by Mrs Trebble) have been expanded and are attached at Annex B. I will comment on them in numerical order.

28. Print number 1 is a print from the web site “tarporleyhealthstore.co.uk”. Unfortunately it is printed in portrait and part of the data on the right hand side of the page is missing. However, when read in conjunction with the extract it is a clear reference to the applicant’s pomegranate juice being described as “The Antioxidant Superpower”. I have now placed on file a full print of this particular part of this search result (copy on file) and it states the following:

“Pomegranate – The Antioxidant Superpower

With incredibly high levels of naturally occurring polyphenol antioxidants

That’s a real super power”

In my view this is not use of the words in a trade mark sense. This is descriptive use, indicating that the product possesses very powerful antioxidant properties.

29. Print number 2 is from the web site “ife.co.uk”. It relates to:

“two NEW products from the Bertrams range; Pomegranate-Apple Juice and Fruit & Veg Smoothie. Pomegranate is recognised to be The Antioxidant Superpower”.

Clearly this is a reference to a juice product from a third party, where it is the fruit which is again being described as the antioxidant superpower. I consider this to be descriptive use which will be perceived as an indication that the juice possesses very powerful antioxidant properties.

30. Print number 3 is from the web site “budgens.com”. It is a reference to Budgens being the first to market a beverage referred to as “POM Wonderful” and describes it as follows:

“100% Pomegranate.
The delicious, refreshing, antioxidant superpower”.

It goes on to say:

“Pomegranate juice is widely claimed to be a “super antioxidant”, containing higher levels of polyphenols (antioxidants) than red wine, blueberry juice, green tea and cranberry juice”.

Again, I consider this to be descriptive use of the words applied for which will be perceived as no more than an indication that the juice possesses very powerful antioxidating properties.

31. Print number 4 is a print from the web site “elbtreatmentspecialists.co.uk”. Unfortunately it is printed in portrait and, again, part of the data on the right hand side of the page is missing. However, when read in conjunction with the extract it is a clear reference to pomegranate juice being described as “the Antioxidant Superpower”. I have now placed on file a full print of this particular part of this search result (copy on file) and it states the following:

“Pomegranate Juice drink a glass of the Antioxidant Superpower to save the day”.

The words Antioxidant Superpower clearly refers to the pomegranate juice. I note that the letters “TM” appear to indicate that the words are intended to be perceived as a trade mark but there is no indication whose trade mark it is supposed to be. In the circumstances I assume that this a reference to the words being the trade mark of ELB and not the applicant.

32. Print number 5 does not appear to show any reference to either the applicant or the trade mark applied for. However the extract states the following:

“Pomegranates, juice and more The Antioxidant Superpower”.

Again, the words Antioxidant Superpower appear to refer to the pomegranates themselves or pomegranate juice being described as an Antioxidant Superpower

which will be perceived as an indication that they possess very powerful antioxidating properties.

33. Print number 6 could not be found so I must rely on the extract. This is from the web site “leicesterveggies.org.uk”. The extract states:

“Antioxidant Superpower to save the day. Every day. Pom is available at Waitrose and Tesco”.

The words Antioxidant Superpower do not appear to relate to anything in particular although it appears from other evidence on file, that the reference to POM is probably a reference to the juice sold by the applicant. I note that the letters “TM” appear to indicate that the words are intended to be perceived as a trade mark, and I assume that this is to indicate that it is the trade mark of the applicant. However, the extract does not clearly relate to any of the goods for which registration is sought which must detract from the weight that I may place on this evidence.

34. Print number 7 is a print from the web site “emarketingprofit.com”. It states the following:

“Discover Bazi – A New Health Drink.

Discover why Bazi is your path to health, with the unmatched antioxidant superpower of eight of the world’s most powerful “Super Fruits....”.

I do not have any information regarding the brand “Bazi” but it does not appear to be related to the applicant in any way. However, it does use the words ANTIOXIDANT SUPERPOWER” in a descriptive sense in relation to eight unnamed “super fruits”. In my view this will be perceived by the consumer as no more than an indication that the beverage marketed under the brand “Bazi” possesses very powerful antioxidating properties.

35. Mrs Trebble has provided documentation which indicates that Notices of Allowance has been issued in the USA in respect of the identical trade mark in two separate applications. One application is made in classes 31, 32 and 33 where the specification of goods in Class 32 is “fruit juices”. The other application was made in classes 1 and 5 and for “frozen fruits” in Class 29.

36. These are not decisions made in the United Kingdom. They are not even decisions made in a European State but in a totally independent authority with different laws and rules. I do not see that I can really place any weight on these acceptances when deciding issues relating to an application in the United Kingdom. I am also aware that there are often different meanings attached to the same words when they are considered in different authorities. I am not saying these words would be perceived differently in the USA, but it is an area of obvious concern. I will place little weight on the acceptance of these marks in the USA.

37. I am aware that the mark applied for is a combination of the two dictionary words ANTIOXIDANT and SUPERPOWER. In the context of the goods applied for the meaning of each word will not, in my view, be perceived as a sign indicating goods

from a single undertaking. The relevant consumer will perceive this combination, when used on the goods in question, as an indication that the goods possess very powerful antioxidating properties.

38. Consequently I have concluded that the mark applied for will not be identified as a trade mark without first educating the public that it is a trade mark. I therefore conclude that the mark applied for is devoid of any distinctive character and is thus excluded from prima facie acceptance under Section 3(1)(b) of the Act.

Conclusion

39. In this decision I have considered all the documents filed by the applicant and all the arguments submitted to me in relation to this application and, for the reasons given, it is refused under the terms of Section 37(4) of the Act because it fails to qualify under Sections 3(1)(b) of the Act.

Dated this 4th day of March 2008

**A J PIKE
For the Registrar
The Comptroller-General**

ANNEX A

ANNEX B

ANNEX C