TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 2110125
BY AKW MEDI-CARE LIMITED
TO REGISTER THE MARK INDEPENDENCE IN CLASS 20

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 48206 BY HUNTLEIGH TECHNOLOGY PLC

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DECISION

On 14 September 1996 AKW Medi-Care Limited applied to register the mark INDEPENDENCE in Class 20 for a specification of goods reading "Fitted kitchens; kitchen units; kitchens specially designed and adapted for the disabled and elderly; parts and fittings therefor."

The application is numbered 2110125.

On 12 February 1998 Huntleigh Technology PLC filed notice of opposition to this application on the grounds that the mark applied for offends against Section 5(4)(a) of the Act. There is also a reference to refusal in the exercise of the Registrar's discretion but as there is no power to refuse a registration which in other respects meets the requirements for registration I need make no further mention of this point.

The applicants filed a counterstatement denying the above ground; claiming to have used the mark since 1986; and asking for an award of costs in their favour.

Only the opponents have filed evidence in these proceedings.

Neither side has asked to be heard. Acting on behalf of the Registrar and after a careful study of the papers I give this decision.

Opponents' evidence

The opponent filed a statutory declaration dated 7 August 1998 by Shalini Thaker, the Group Intellectual Property Rights Manager of Huntleigh Technology PLC.

Ms Thaker says that the mark INDEPENDENCE has been used on kitchen units and furniture. Examples of such use are exhibited as follows:

3A Kitchen Installation and Specification Guide
3B Kitchens appearing in Community Care Portfolio for 1992 and 1994

3C Kitchen Brochures
3D Page relating to INDEPENDENCE kitchens in the Barbour Index

Turnover figures (at retail prices) are given as follows:

1990	150,000
1991	180,000
1992	211,000
1993	104,000
1994	218,000
1995	186,000
1996	172,000
1997	100,000

Use has been throughout the United Kingdom. I do not need to record full details here but suffice to say that the opponents provide a breakdown by region of the towns and cities covered.

The following sums have been spent in promoting the mark:

1991	4,000
1992	4,000
1993	4,905
1994	5,500
1995	11,675
1996	4,000

Publications which have been circulated in the United Kingdom in which advertisements and/or features relating to the mark have appeared are:

S Barbour Index - Main Construction Industry Reference Book, advertisements have appeared every year from 1991

S Community Care Catalogue sent to the Social Services and the Public each year

That completes my review of the evidence.

Section 5(4)(a) reads:

" (4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) .....

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark."

As no other basis for this action is apparent from the opponents' statement of grounds and evidence I assume their claim rests on the fact that use of the mark applied for is liable to be prevented by the law of passing off.

Mr Hobbs QC set out a summary of the elements of an action for passing off in WILD CHILD Trade Mark 1998 RPC 455. In brief the necessary elements are said to be as follows:

(1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff, and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

The opponents' evidence is unchallenged. Their mark or sign had been used for over six years by the material date in these proceedings. It has been applied to kitchen units and furniture and in particular to products designed for the disabled or people with special needs. As the supporting exhibits show, the goods whilst retaining the attractive appearance of ordinary kitchen units nevertheless are adjustable (e.g. in terms of height) or contain other features which are intended to make use and operation easier for disabled people. The volume of sales is not insubstantial given the specialist nature of the market. The opponent is a diversified healthcare company and I note from the exhibits that the furniture range is but one of a number of product ranges on offer. It is reasonable to infer that the collective promotion of different ranges of goods (see exhibit 3B) has also added to the overall awareness of the furniture range. I, therefore, have no hesitation in concluding that the opponents have established goodwill in their sign and thus bring themselves within the first part of the above test.

It is also clear that the applicants' mark is the same as the sign used by the opponents and that the respective goods are the same and/or very closely related (almost certainly the former). I cannot see that there are other signs which might serve to distinguish the origin of the goods. Although other marks appear in the brochures on other types of goods INDEPENDENCE is the primary or only sign used in relation to kitchen furniture.

In the circumstances described above, where effectively the marks and the goods are the same the tribunal does not need to be greatly exercised in considering whether there is or is likely to be misrepresentation and resultant damage. The consequences must, I think, be inescapable. I note that the applicants in their counterstatement claim use since 1986 but their claim has never been substantiated. The result is, therefore, that this opposition succeeds under Section 5(4)(a).

The opponents have not asked for costs in relation to these proceedings so no order is necessary.

Dated this 20 day of July 1999.

M REYNOLDS
For the Registrar
The Comptroller General