

TRADE MARKS ACT 1994

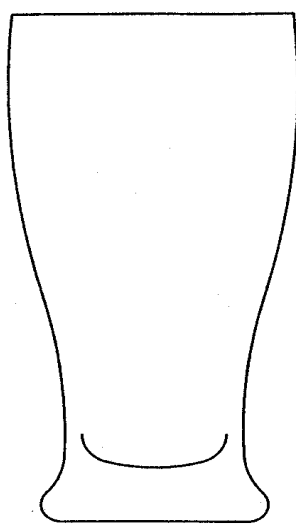
**IN THE MATTER OF
APPLICATION NO. 2043589
BY THE RAVENHEAD COMPANY LIMITED
TO REGISTER A
TRADE MARK IN CLASS 21**

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION TO REGISTER
TRADE MARK NO 2043589 IN CLASS 21 IN
THE NAME OF THE RAVENHEAD COMPANY LIMITED**

DECISION AND GROUNDS OF DECISION

On 6 November 1995, The Ravenhead Company Ltd of P.O. Box 48, Nuttall Street, St. Helens, Merseyside, WA10 3LP, applied under the Trade Marks Act 1994 to register the trade mark shown below in respect of "Glass."



Objections were taken to the application under the following sections of the Act:

Section 3(1)(b): on the grounds that the mark is devoid of any distinctive character for e.g. unworked or semi worked glass used for drinking glasses, and a sign that others may legitimately wish to use on e.g. glassware.

Section 5(2) The following mark was considered to be the same or similar and in respect of the same or similar goods:

Number

Mark

2029895

Specification

Glassware



Following a request to be heard the Hearing Officer appointed raised a further objection under Section 3(1)(a) of the Act that the mark was not graphically represented. This was later waived with the addition of the clarifying statement:

5 “The trade mark consists of a glass symmetrical about a vertical axis.”

The section 5(2) objection was also waived at this stage. Therefore, I will make no further reference to these objections in this decision.

At a hearing at which the applicants were represented by Mr Hitchcock of Lloyd Wise, Tregear & Co, their trade mark agents, the Section 3(1)(b) objection was maintained. A period of time was allowed after the hearing for the applicants to file any evidence of use in support of their application. No evidence of use was provided but supporting evidence in the form of letters from competitors were subsequently filed. Following refusal of the application under Section 37(4) of the Act, I am now asked under Rule 56 of the Trade Marks Rules 1994 to state in writing the grounds of my decision and the materials used in arriving at it.

Section 3(1)(b) of the Act reads as follows:-

10 3(1) The following shall not be registered.

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

15 The proviso to Section 3(1) is also relevant because the applicant has filed evidence to support its claim that the mark has acquired a distinctive character. I will return to this later. I first consider the *prima facie* case for registration.

20 The test of distinctiveness was laid down by Mr Justice Jacob in the *TREAT* case [1996] RPC 281 page 306 lines 2-5 when he said:

25 “What does *devoid of any distinctive character* mean: I think the phrase requires consideration of the mark on its own, assuming no use. Is it the sort of word (or other sign) which cannot do the job of distinguishing without first educating the public that it is a trade mark?”

The Registrar’s practice in relation to shape marks is set out in Chapter 6 of the Registry’s Work Manual at page 58.

30 “The appropriate test for *prima facie* acceptance will be whether because:

1. The shape in question immediately strikes the eye as different and therefore memorable;
2. And the differences between the applicant’s shape and those used by other traders are arbitrary and not dictated by function or some other non-trade mark purpose;

35 the public are likely to assume that the goods or services with reference to which the shape is to

be used recurrently are those of one and the same undertaking.

Shapes, or elements of shapes, which are likely to be taken by the public as serving;

5 a) a functional purpose (such as improving the performance of the goods);

b) as a convenience feature (such as convenient storage);

10 a purely decorative or aesthetic purpose (such as novelty shape for goods aimed at children or the attractive shape of an ornament);

15 -are unlikely to be regarded by the public as identifying the *origin* of the goods, at least until they have been educated to that perception.

20 The mark consists entirely of the shape of a drinking glass which, it seems to me, is typical of the type of glass used to serve beer or soft drinks, having no markings or embellishments to help distinguish it in the market place. From my own knowledge and experience drinking glasses are produced in a very wide range of shapes, a view confirmed by the variety of differing styles appearing on the letterheads of the supporting evidence. I do not see anything novel or memorable in the mark, at best it may be a slight variant in design.

25 In Procter and Gamble Limited's application [1999 RPC 673], Walker LJ said that:

30 "Despite the fairly strong language of s. 3(1)(b), 'devoid of any distinctive character' - and Mr Morcom emphasised the word 'any' - that provision must in my judgement be directed to a visible sign or combination of signs which can by itself readily distinguish one trader's product - in this case an ordinary, inexpensive household product - from that of a competing trader. Product A and Product B may be different in their outward appearance and packaging, but if the differences become apparent only on close examination and comparison, neither can be said to be distinctive (unless, of course, one constitutes an unlawful infringement of some existing registered trade mark).

35 I have also borne in mind the comments made by Aldous LJ in the case of Philips Electronics N.V. v Remington Consumer Products in the Court of Appeal when he said:

40 "In fact I am unable to point to any feature or features of the trade mark which could be other than descriptive of a particular design of head for an electric shaver and which would enable the trade mark to acquire a distinctive character. The trade mark contains no feature which has trade mark significance which could become a distinctive character. In my view the judge was right to conclude that the trade mark was not registrable because of section (Article) 3(1)(b) in that it was devoid of any distinctive character."

45 It is my view that the shape applied for will not be taken as a trade mark without first educating the public that it is a trade mark. It follows that this application is debarred from prima facie acceptance for registration by section 3(1)(b) of the Act.

However, that is not the end of the matter since I still have to consider the independent evidence

filed in support of this application This evidence is in the form of five signed statements from suppliers of glassware described as “competitors”.

5 The five statements are identical in nature and come from Mr RM Stephenson of HG Stephenson Ltd, Mr SW Grierson, Director of The Glass Mountain Ltd, Mr DA Huddleston of Grey-Simmonds Ltd, Mr CG Waugh of Charles Glassware and from an unidentified signatory from Jacksons (Clear Glass) Limited. The statements read:

10 “We confirm under oath that the Rio glassware range is unique to Ravenhead and the Rio has a very distinctive character shape and appeal to our customers”

15 The evidence appears to emanate from members of the glassware distribution trade, there is no information as to how these sources were selected, nor is there any indication that these were the only parties approached. Although all the statements are witnessed there is no information available regarding the status of the witnesses except in the cases of HG Stephenson Limited where it is noticeable the witness is a solicitor and the term “under oath” has been deleted.

20 Reference is made to the “Rio glassware range” having a distinctive character and shape and appealing to customers, however there is no indication as to why the shape is considered distinctive. While I must acknowledge the apparent expertise of the signatories in the field of glassware I do not consider that they can speak for how customers may perceive the mark applied for.

25 In correspondence dated 5 August 1998 the applicant’s agent refers to use made of the mark prior to the date of application, however no such evidence was filed. My comments in relation to the trade evidence therefore go to the prima facie case rather than the case for registration under the proviso to Section 3(1).

30 The mark applied for is the 3-dimensional shape of a glass which, in the prima facie case, lacks any features of trade mark significance. The independent evidence submitted in support of this application does not prove that the relevant public regard the mark as distinctive or that it is recognised as a badge of trade origin for the goods as applied for. I therefore conclude that the sign is debarred from registration by virtue of Section 3(1)(b) of the Act.

35 In reaching this decision, I have considered all the arguments and documents placed before me. The application is refused under Section 37(4) of the Act because it fails to qualify under Section 3(1)(b) of the Act.

40 Dated this 14 day of June 2000

45 JANICE SMITH
For the Registrar
The Comptroller General