

O-225-06

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO. 2331405
STANDING IN THE NAME OF BRINTON PRODUCTS LTD**

AND

**IN THE MATTER OF A REQUEST FOR A DECLARATION
OF INVALIDITY THERETO UNDER NO 82260
BY WET & FORGET LIMITED**

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**IN THE MATTER OF Registration No 2331405
standing in the name of Brinton Products Ltd**

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**IN THE MATTER OF A request for a declaration
of invalidity thereto under No. 82260
by Wet & Forget Limited**

BACKGROUND

1. **wet and forget** and **wet & forget** are registered as a series of two marks. The application itself was filed on 8 May 2003 and the registration procedure was completed on 16 January 2004. As nothing turns on the series points I will for convenience simply refer to 'the mark' in what follows.
2. The mark stands registered for the following specification of goods and services:
 - Cleaning, polishing, scouring and abrasive preparations; including goods with fungicidal or moss/mould/algae and such like, killing or removing properties.
 - Disinfectants; fungicides; including fungicides or biocides or preparations suitable for the killing or removal of moss, mould, algae, lichens or other growths.
 - Paper; cardboard and goods made from these materials; printed matter; photographs; stationery; instructional material; plastic materials for packaging; books; magazines, brochures, newspapers, posters, pictures, publications, graphic prints, advertising and promotional materials and matter.
 - Advertising, marketing and promotional services in relation to cleaning preparations and products, fungicides and moss and mould removal products.
 - Treatment of materials; including anti-mould treatment, moss removal treatment, mould removal treatment, mould prevention treatment.
3. These goods and services are in Classes 3, 5, 16, 35 and 40 of the International Classification system.
4. The application was filed in the name of Southland Commodities Ltd of 24 Roseneath Road, London, SW11 6AH but was subsequently assigned to the current proprietor, Brinton Products Ltd. I note that Brinton Products Ltd has the same address as Southland Commodities Ltd. Notice of the assignment was published in the Trade Mark Journal on 27 February 2004.

5. On 30 August 2005 Wet & Forget Limited, a New Zealand company, applied for a declaration of invalidity in respect of this registration citing Section 47(1) of the Act and a claim that the application was filed by Southland Commodities Ltd in bad faith. It is clear from this wording and the nature of the claim that this must be taken to raise a claim under Section 3(6) of the Act.

6. The substance of the applicant's objection is as follows:

2. "WFL [the applicant's company] is a company incorporated under the laws of New Zealand. It is involved in the manufacture and sale of (amongst other products) a moss and mould removing product called WET & FORGET in New Zealand and elsewhere around the world. WFL has 12 trade mark registrations for WET & FORGET in New Zealand covering classes 3, 5, 16, 35, 37 and 40.
3. Simon Brinton, who is a Director of both SCL [Southland Commodities Ltd] and BPL [Brinton Products Ltd], contacted WFL in September 2002 and showed an interest in distributing WFL's 'WET & FORGET' product in the UK. A Confidentiality Agreement was entered into between the parties in January 2003 to protect information supplied by WFL to Simon Brinton in relation to the potential distribution of WFL's product in the UK.
4. Negotiations between WFL and Simon Brinton continued until 12 May 2003, when they broke down without any agreement on distribution of the 'WET & FORGET' product being reached. On 8 May 2003, whilst WFL and Simon Brinton were still in discussions, Mr Brinton, on behalf of SCL, filed an application to register the Trade Mark for goods and services in classes 3, 5, 16, 35 and 40, all of which are identical to those goods and services of interest to WFL. The Trade Mark proceeded to registration on 12 December 2003. as far as WFL is aware, BPL does not currently use the Trade Mark in the UK or elsewhere.
5. On 5 July 2004, WFL wrote to Simon Brinton at BPL requesting that he voluntarily assign the Trade Mark to WFL for no consideration. This request was repeated in further correspondence but, to date, Mr Brinton has refused to cooperate with WFL's requests."
(paragraph numbers added)

7. The registered proprietor joined issue with the applicant by means of a counterstatement filed on 17 October 2005. The counterstatement is in the nature of a response to each of the above paragraphs as follows:

"Paragraph 2 of the applicant's Statement of Reasons implies that Wet & Forget Ltd, New Zealand ('WFL') sells its 'Wet & Forget' product 'around the world'. This is entirely misleading. As far as we are aware, WFL sells their product in New Zealand and Australia only.

Paragraph 3 of the applicant's Statement of Reasons implies that WFL supplied us with confidential information. The total extent of information, confidential or otherwise, supplied by WFL consisted of a vague profit

forecast based on the ridiculous assertion that ‘everything costs three times as much in the UK as it does in New Zealand’, i.e. that we could charge the UK public £99 for a product that costs the New Zealand public (the approximate equivalent of) £33. No other information of any relevance at all was provided by WFL.

Paragraph 4 of the applicant’s Statement of Reasons implies that ‘negotiations’ continued between the two companies until 12 May 2003. In fact we came to a final conclusion in mid-March 2003 that WFL had no interest whatsoever in participating in the UK market, was only interested in gathering background market information from us, and had effectively wasted a considerable amount of our time and expenses.

We also decided at that time that the words ‘Wet & Forget’ would make an ideal supporting descriptor in advertising, though not necessarily brand name as such, for an equivalent type of product that we could potentially launch in the UK. For that reason in mid-April 2003 we initiated the Patent Office’s Search on the possibility to use the Mark in the UK, which Search advised that no confusingly similar marks were found in the UK. Subsequently we (Southland Commodities Ltd) applied to register the Mark.

Notwithstanding this, and our previous conclusion that WFL had no interest in participating in the UK market, we consider that we acted in the very best of faith by continuing to correspond with WFL and encourage WFL to participate in the market, thereby effectively giving WFL a final opportunity to do so. As expected, however, this correspondence generated nothing of any substance or consequence in response.

Paragraph 4 of the applicant’s Statement of Reason also mentions that, as far as WFL are aware, BPL does not currently use the Trade Mark in the UK or elsewhere. In reality we have intermittently used the Mark in our UK advertising – a fact well known to WFL who themselves enclosed a copy of one of our relevant advertisements in their (e-mail) letter of 05 July 2003, to which they refer in Paragraph 5 of their Statement.

Paragraph 5 of the applicant’s Statement refers to various threats of legal action made by WFL and their New Zealand lawyers. This culminated in an open offer, made in December 2004, from us to freely assign the UK Trade Mark to WFL subject to their agreement not to use the Mark in the UK for a period of 5 years. To date, no response has been received to this offer.

For the avoidance of any doubt, we should add that the technology behind (and composition of) WFL’s ‘Wet and Forget’ product is in the public domain. There are many such products available around the world (and more than six that we know of in New Zealand alone).”

8. Both parties have filed evidence in these proceedings.

9. The Registry wrote to the parties on 24 April 2006 reminding them of their right to a hearing or the opportunity to file written submissions in lieu of a hearing. In the event neither party asked to be heard. Written submissions have been received on behalf of the applicant under cover of a letter from Ashurst, its professional advisers, dated 5 June 2006. The registered proprietor also filed written submissions under cover of a letter signed by Simon Brinton dated 12 June 2006. I take these submissions into account in reaching my decision on the matter.

Applicant's evidence

10. The applicant filed evidence in the form of a witness statement by Roderick Charles Jenden, the Managing Director of Wet & Forget Limited. Mr Jenden gives evidence to the effect that Wet & Forget Ltd (W&F) is a New Zealand company that was incorporated on 22 August 1995. W&F has developed what it considers to be a revolutionary moss and mould removal product for application to a range of building surfaces. The product is non caustic, non acidic and contains no bleach and requires no scrubbing or waterblasting after application. W&F is the applicant or registrant of trade marks for WET & FORGET in New Zealand, Australia, The United States, Canada and the European Union. Details are supplied at RCJ-1.

11. The products have been sold to customers in New Zealand, Australia, the United States, Canada and the UK. In the case of the antipodean markets the trade is said to be of about a decade's duration. Website pages showing the products being advertised for sale in New Zealand and Australia are exhibited at RCJ-2.

12. The products have attracted interest from people in the UK. They fall into two groups. The first are individuals who have approached Mr Jenden with a view to becoming distributors of the products in this country. The names of five individuals are given covering the period September 2002 to September 2003. Copies of e-mail exchanges with these individuals are exhibited at RCJ-3.

13. The second group consists of individuals located in this country who have heard of the product and asked W&F to ship goods to them. Six individuals are named covering the period January 2002 to May 2003. Again, copies of e-mail exchanges are exhibited at RCJ-4.

14. This interest from the UK encouraged W&F to consider entering into a distributorship arrangement. In February 2003 W&F applied for assistance from Trade New Zealand in relation to plans to develop the business in the UK. In support of this Exhibit RCJ-5 contains:

- (a) a copy of the paper about the W&F business, including confidential sales, marketing and manufacturing information, that W&F provided to Trade New Zealand in the course of its application;
- (b) a copy of the correspondence dated 26 February 2003 from Trade New Zealand London concerning preparation for W&F's entrance into the United Kingdom market;

- (c) a copy of W&F's projected financial statements for the year ended 31 March 2004 (dated 26 June 2003);
- (d) a fax dated 19 February 2003 from New Zealand law firm Buddle Findlay to W&F in response to a request for an estimate of costs to register the WET & FORGET brand in the United Kingdom;
- (e) a letter from W&F's accountants, Gosling Chapman dated 4 March 2003 providing an estimate of costs for the preparation of a distribution agreement for the sale of the W&F Product in the United Kingdom; and
- (f) a print out of the timesheet records of W&F accountants Gosling and Chapman, indicating that on 7 February 2003 W&F met with them to discuss the development of its business in the United Kingdom.

15. Against that background Mr Jenden goes on to describe his dealings with Mr Simon Brinton, Brinton Products Ltd and Southland Commodities Ltd. He says that Mr Brinton first contacted W&F by an e-mail dated 17 September 2002, a copy of which is exhibited at RCJ-6. The e-mail is an introductory/explanatory one requesting certain information about the product and raises the possibility of a business relationship. This initial exchange was followed up on 24 and 25 September 2002 when Mr Brinton e-mailed David Waugh, Nick Hawkins and John Waugh. Mr David Waugh gives evidence in support of the registered proprietor in this case from which it appears that he is a business contact (Exhibit RCJ-9 indicates that he is married to Mr Brinton's sister). It is noted that Mr Brinton refers to Southland Commodities Ltd (the original applicant) as a possible vehicle for any resulting trade.

16. Shortly after this, on 15 October 2002, Mr Brinton registered the domain name www.wetandforget.co.uk without Mr Jenden's knowledge or consent (see details at exhibit RCJ-8).

17. On 29 October 2002 Mr Waugh forwarded to Mr Jenden a paper from Mr Brinton outlining the likely participants in any distribution arrangement for the sale of W&F products in the UK. Material in support of this is exhibited at RCJ-9.

18. In the view of the progress that was being made in discussions Mr Jenden asked Mr Brinton to sign a confidentiality agreement relating to the information that was being supplied. A copy of the signed document, dated 9 January 2003 is exhibited at RCJ-10. Mr Jenden says that he provided Mr Brinton with a significant amount of information about W&F's marketing strategy, business model, manufacturing methods and product make-up etc. On 23 January 2003, Mr Brinton confirmed his intention to travel to New Zealand in mid-February. A copy of Mr Brinton's e-mail is exhibited at RCJ-11. Prior to this Mr Jenden says he completed a questionnaire for Mr Brinton about the amount of sales, costs of sales, cost of advertising etc. A copy of the completed questionnaire is exhibited at RCJ-12 along with a ten year profit projection at RCJ-13.

19. During February 2003 Mr Brinton and his wife travelled to New Zealand and spent time with Mr Jenden discussing business opportunities. An e-mail exchange setting up a meeting is exhibited at RCJ-14.

20. Mr Jenden says that he spent three days with Mr Brinton showing him the factory where the W&F products was made, visiting completed jobs, showing him equipment used to apply the product and other related activities. On his return to the UK, Mr Brinton sent a lengthy e-mail reiterating his interest in the product and in some form of collaborative business venture. The e-mail is dated 5 March 2003 and a copy is exhibited at RCJ-15. I note that the e-mail discusses the differences between the New Zealand and UK markets and indicates that "...we will prepare our marketing plan which will determine projected unit sales prices etc, operating costs and ultimately what we think we can pay". It also enquires what progress has been made on compliance issues (chemical, biological, environmental etc). Mr Jenden suggests that the claim in the counterstatement that Mr Brinton came to a final conclusion in mid-March 2003 that W&F had no interest in the UK market is inconsistent with this state of affairs. In further support of this Mr Jenden exhibits at RCJ-16, copies of e-mails dated 3 April 2003 and 12 May 2003 from Mr Brinton asking for some time to consider some of the details of a distribution deal and chasing a response from Mr Jenden. He concludes from this that it is clear that the parties were still in discussions until at least mid-May 2003. At some point after this W&F concluded that discussions had broken down.

21. Mr Jenden goes on to deal with later developments and exhibited at RCJ-17 a magazine advertisement sent to him in March 2004 by Mr Peter Brennan, another potential UK distributor, and which emanated from Brinton Products Ltd which he says closely resembles marketing materials he showed Mr Brinton featuring the phrase Just "Wet & Forget" next to a photograph of a mould cleaning product. At this time Mr Jenden gave instructions to his solicitors for a UK trade mark application to be made. He subsequently discovered the Brinton Products' registration, details of which are exhibited at RCJ-18.

22. The final point I need to record is that Mr Jenden says he wrote to Mr Brinton on 5 July 2004 requesting that he assign the mark. On 28 September 2004 Mr Brinton e-mailed offering to assign the mark on the condition, inter alia, that W&F would not use the mark in the UK for five years. A copy of the e-mail is exhibited at RCJ-19.

Registered proprietor's evidence

23. The registered proprietor has filed two witness statements. The first is by Simon Brinton. With one exception that I will refer to briefly later, Mr Brinton's evidence does not introduce any new documentary evidence. His witness statement is mainly a commentary on Mr Jenden's evidence and sets out his own views on W&F Ltd, the nature and extent of discussions between the parties and his perception of the position generally. It follows that most of his witness statement is in the nature of submissions as to what conclusions I should draw from the documentary evidence filed by Mr Jenden. For this reason, whilst I have read the whole of this statement I do not propose to record its contents in detail. To summarise his main points he:

- suggests that W&F had limited overseas sales or experience of overseas market.
- claims Mr Jenden has overstated the position by referring to the 'revolutionary' nature of the product and the uniqueness of the marketing strategy.
- challenges the seriousness of Mr Jenden's overseas trading plans in view of his lack of familiarity with UK market conditions.
- suggests that Mr Jenden had unrealistic pricing expectations particularly bearing in mind the effects of economies of scale on pricing in a larger market such as the UK.
- suggests that Mr Jenden should have been aware of the need for regulatory approval for products of this kind. Without this import or distribution could not begin. He infers that the absence of information on and progress towards such regulatory approval is an indication of a lack of real seriousness in Mr Jenden's intentions.
- in his view the correspondence with other interested parties (potential distributors or purchasers) was limited in scope.
- claims that his registration of the wetandforget domain name was to demonstrate the seriousness of his intentions.
- suggests that the confidentiality agreement is irrelevant and that no confidential information was supplied.
- says he does not recollect visiting completed jobs in New Zealand (as Mr Jenden claims), or seeing application equipment other than a knapsack sprayer.

24. The only piece of documentary evidence that has been provided is a copy of an advertisement for a moss eradication product called Armillatox which employs the words "Just Wet It And Forget It". The source of the document and the date are not given though Mr Brinton says it has been used since 1996. He comments that, "this raises questions in terms both of the Trade Mark number 2331405 registration priority and of common use of the relevant words".

25. The second witness statement is from David Waugh. He does not say whether he is acting in a personal capacity or on behalf of a firm. I infer that it is the former (the address given is more likely to be a private address and no business name is given but I cannot be certain on the point). He says that he was involved in introducing Mr Brinton and Mr Jenden to each other, participated in their meetings in New Zealand in February 2003 and was a party to much of the relevant correspondence between the two. He confirms that he agrees with Mr Brinton's version of events. As Mr Brinton himself does not appear to dispute the documentary material filed by Mr Jenden or the chronology of events I infer that Mr Waugh means by this that he agrees with Mr

Brinton's interpretation of those events and the conclusion to be drawn but does not challenge the chronology or content of the documentary material.

26. Mr Waugh says that in mid 2002 he visited the W&F temporary office and warehouse and met with Mr Jenden. His objective was to discern whether or not Mr Jenden had any intention to expand overseas. What prompted this visit in the first place is not explained. Mr Jenden told him that he had just formed an arrangement with an Australian businessman and was focusing his immediate attention on establishing a presence in that market. He had subsequent meetings with Mr Jenden on 2 October 2002 and 17 December 2002 along with some e-mail communications with the intention of brokering a business relationship between Mr Jenden and Mr Brinton. He says that Mr Jenden was very guarded about the composition of the product and declined to disclose any sales or cost information but admitted that no patent protection existed.

27. He identifies two main problem areas in subsequent discussion; firstly the issue of a UK selling price and secondly the fact that Mr Jenden was not interested in even a nominal investment in the potential UK venture preferring an agency arrangement instead. In his view this showed a lack of any real intent or commitment.

28. The only further contact he had with Mr Jenden was a mobile phone call from him following Mr Brinton's offer to assign the UK registration. He claims to have tried to encourage Mr Jenden to make a counter-offer.

Applicants evidence in reply

29. Mr Jenden has filed a further witness statement in which he replies to Mr Brinton's evidence. As this is largely submission or a reiteration of his previous evidence I do not intend to summarise it but confirm that I have read it in full.

30. That completes my review of the evidence.

The Law And Relevant Authorities

31. Section 47(1) reads:

“47.-(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.”

32. Section 3(6) reads:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

33. The applicant's written submissions refer me to a number of cases which deal with the general principles to be applied in relation to bad faith claims or provide examples of circumstance which are said to be analogous to those pertaining here. The cases are *Coffee Time Donuts & Desserts*, 0/245/01 (a Registry decision), *Harrison v TetonValley Trading Co Ltd (Chinawhite)*, [2005] F.S.R.10, *Demon Ale Trade Mark* [2000] R.P.C. 345, *Gromax Plasticulture v Don & Low Nonwovens* [1999] R.P.C. 367 and *Be Natural*, 0/106/99 (a Registry decision). In terms of general principles, the written submissions also appear to take into account but do not mention by name the Privy Council's judgment of 10 October 2005 in *Barlow Clowes International Ltd (in liquidation) & Others v Eurotrust International Limited & Others*. As the latter has now clarified the interpretation to be placed on an earlier authority (*Twinsectra*) it is useful to set out the relevant passages from Lord Hoffmann's judgment;

“[Counsel for the defendant] relied upon a statement by Lord Hutton in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 174, with which the majority of their Lordships agreed:

“35. There is, in my opinion, a further consideration which supports the view that for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men. A finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law and not in a criminal context, I think that it would be less than just for the law to permit a finding that a defendant had been ‘dishonest’ in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest.

“36. I consider that the courts should continue to apply that test and that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he set his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.”

15. Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that *Twinsectra* had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to “what he knows would offend normally accepted standards of honest conduct” meant only that his knowledge of the transaction had to be such as to render his participation

contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.

16. Similarly in the speech of Lord Hoffmann, the statement (in paragraph 20) that a dishonest state of mind meant “consciousness that one is transgressing ordinary standards of honest behaviour” was in their Lordships’ view, intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about those standards were.”

34. On the basis of these authorities it is clear that a finding of bad faith may be made in circumstances which do not involve actual dishonesty. Furthermore, it is not necessary for me to reach a view on the registered proprietor’s state of mind regarding the transaction if I am satisfied that its action in applying for the mark in the light of all the surrounding circumstances would have been considered contrary to normally accepted standards of honest conduct.

35. In terms of the date at which the matter falls to be considered, it is well established that the relevant date for consideration of a bad faith is the application filing date or at least a date no later than that (*Hotpicks Trade Mark*, (2004) RPC 42 and *Nonogram Trade Mark*, (2001) RPC21). The relevant date here, therefore is 8 May 2003.

36. The circumstances and events which form the background to this invalidity action are not in dispute. Mr Brinton is a Director of both Southland Commodities Ltd (the original applicant) and Brinton Products Ltd, the successor in title. He appears to be the controlling mind behind these companies. Mr Brinton or one of the companies controlled by him entered into discussions with W&F Ltd with a view to a business relationship. Discussions were held with a view to an arrangement whereby Mr Brinton or any of his companies would distribute the goods in the UK. The evidence is that the Wet & Forget product was established in New Zealand at the time (the Autumn of 2002) and Mr Jenden was looking to develop other markets. For obvious geographical reasons Australian was a primary focus of attention. However a drip feed of enquiries from the UK had encouraged Mr Jenden to consider this market. Discussions with Mr Brinton continued from September 2002 to May 2003 or thereabouts when negotiations broke down. Mr Brinton is of the view that Mr Jenden’s expectations, particularly in terms of the price at which the W&F product could be sold in the UK, were unrealistic; that his knowledge of the UK market was limited; and that the necessary regulatory approvals were not in place.

37. The pricing issue appears to have been central to Mr Brinton’s view of the prospects for bringing negotiations to a successful conclusion. His evidence is to the effect that he and Mr Waugh reviewed their position in approximately the 3rd week of February 2003 and concluded that for the reasons given “Mr Jenden was completely wasting our time”. At that point negotiations had not completely broken down and Mr Brinton records that “we would nonetheless make every effort to convince Mr Jenden of the UK market realities”.

38. Subsequent to the discussions in New Zealand he says:

“..... the complete absence of any meaningful correspondence originating from W&F NZ made it abundantly clear that negotiations were, de-facto, finished. At the end of April 2003 we decided to apply to register W&F as a UK Trade Mark, with the intention of using the words (which we have done) as an appealing advertising descriptor, rather than a brand name, and the subsequent nominal email correspondence I generated (and which Mr Jenden failed to respond to) was intended to record for our files that we were correct in assuming that negotiations were finished”.

39. It is not possible to pinpoint a precise date when negotiations finished. Neither side appears to have communicated in unequivocal terms that they were terminating discussions. It is clear that discussions continued after Mr Brinton's visit to New Zealand. Exhibit RCJ-15, dated 5 March 2003 is clear evidence of continuing interest on Mr Brinton's part at that point in time. There were fitful e-mail exchanges after that date (Exhibit RCJ-16) but in all probability the end of April/ beginning of May marks the turning point. Nevertheless, my clear view from the evidence up to this point is that both side were engaged in seriously intentioned discussions. Mr Jenden had commissioned a report from Trade New Zealand on the UK market, the Deed of Confidentiality had been drawn up to protect Mr Jenden's interest during the course of negotiations, information on the New Zealand business model had been supplied, a 10 year profit forecast for the UK had been drawn up, a further questionnaire had been completed etc.

40. All of this involved Mr Jenden in significant time and effort. Even if, as is Mr Brinton's view, Mr Jenden was over-optimistic on the pricing issue, it does not detract from the seriousness with which he entered into and pursued discussions with Mr Brinton. I entirely reject Mr Brinton's submission that his actions were justified on the basis of the belief that Mr Jenden was not seriously interested in the UK market and that this cleared the way for him to take the action that he did. Mr Brinton was, of course, free to pursue his own business ventures in the UK. The issue is whether he should have registered the mark wet & forget for the goods and services in question knowing as he did that Mr Jenden was the proprietor of that mark in New Zealand; that he (Mr Jenden) was considering entering the UK market under the self same mark; and that negotiations between the parties had only just broken down. The effect of registering the mark in those circumstances would be to preempt the applicant's position and in effect for Mr Brinton to take unfair advantage of his knowledge of Mr Jenden's plans.

41. I have little hesitation in concluding that on the evidence available to me that was what happened. There are a number of other aspects of Mr Brinton's behaviour which give me cause for concern. He registered the domain name www.wetandforget.co.uk in October 2002 at which point discussions between the two parties were getting underway. He did so without Mr Jenden's knowledge or consent. His explanation that he did it to demonstrate the seriousness of his intentions is scarcely credible in the light of his failure to mention it to Mr Jenden. His explanation is that it was not mentioned because “discussions had effectively been brought to a halt by Mr Jenden's presentation of his UK pricing requirements”. But that state of affairs did not come about until much later, April 2003 or thereabouts.

42. The trade mark application itself was filed on 8 May 2003 (preliminary searches having been conducted in April). That is only two months after Mr Brinton's e-mail of 5 March 2003 (RCJ-15) setting out detailed views on the UK market and clearly evidencing a continuing serious interest on his part in reaching a business arrangement with Mr Jenden. In fact correspondence even continued after 8 May 2003. Mr Brinton's e-mail chaser of 12 May 2003 may very well have been a last attempt from his point of view to revive discussions but is still evidence that he had not entirely given up the prospect of coming to a deal. Significantly, Mr Brinton does not deny the claim that he did not inform Mr Jenden of the trade mark application. Subsequently, Mr Jenden discovered, through Mr Brennan another potential distributor, that the phrase "Just 'Wet & Forget'" was being used on a Brinton product.

43. Set against that none of the reasons given by Mr Brinton for his belief that he was free to register the mark stand up to scrutiny. Even if one was to accept that Mr Jenden's pricing projections were overly optimistic and that the regulatory approval process was not far advanced it does not undermine the seriousness of Mr Jenden's intentions.

44. It seems to me to be an inescapable conclusion that the application for registration of the series of marks at issue was in bad faith and I so hold. The belated offer to assign the mark does not redress the matter. The offer was subject to the condition that Mr Jenden would not use it for five years which may have carried with it the consequence (intentional or otherwise) of rendering the registration susceptible to revocation on non-use grounds and therefore of dubious value to Mr Jenden.

45. The application for invalidity succeeds under Section 47(1) / 3(6). Section 3(6) provides that a mark shall not be registered if or to the extent that it is made in bad faith. Section 47(5) likewise allows for a partially successful attack. The words "to the extent" indicates that bad faith may be found in relation to certain goods or services but not others. The attack here is against the whole registration and not particular Classes or particular goods and services within Classes. The registered proprietor has not suggested that the applicant is entitled to succeed in relation to some goods and services but not others. It is reasonable to infer that the specification applied for reflects the proprietor's interest in the core goods along with related goods and ancillary services. Accordingly, the finding of bad faith must apply to all the goods and services for which the trade mark is registered. In accordance with Section 47(6) the registration will be declared invalid and deemed never to have been made.

COSTS

46. The applicant for invalidity is entitled to a contribution toward its costs. I order the registered proprietor to pay the applicant the sum of £2000. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 08th day of August 2006

**M Reynolds
For The Registrar
The Comptroller General**