

O-520-13

TRADE MARKS ACT 1994

IN THE MATTER OF
TRADE MARK REGISTRATION No 2514068 IN THE NAME OF PAUL KAYE AND
EDWARD ANDERSON FOR: REBOUND THERAPY IN CLASSES 41 AND 44

AND

AN APPLICATION FOR INVALIDITY UNDER NO 84306
BY THE CHARETERED SOCIETY OF PHYSIOTHERAPY

Background and pleadings

1. Trade mark registration No 2514068 stands in the name of Paul Kaye and Edward Anderson. The application for registration was made on 20th April 2009, with the registration procedure being complete on 11th September 2009. The mark is Rebound Therapy and is registered in respect of the following services:

Class 41:

Education, teaching and training; education teaching and training relating to physical therapy, therapeutic exercise and recreation for people with disabilities and/or special needs; arranging and conducting courses, classes, sessions, conferences, seminars and/or workshops in relation to the aforementioned services; provision of online electronic publications (not downloadable); recreational services; provision of facilities and/or equipment for recreational purposes; publishing services; publication of books, texts, leaflets, reports, educational and training materials and manuals; advisory, consultancy and information services relating to the above.

Class 44:

Physical therapy; therapeutic treatment of the body; personal therapeutic services relating to muscle education and/or re-education; provision of physical and/or exercise therapy for people with disabilities and/or special needs; advisory, consultancy and information services relating to the above.

2. The applicant for invalidation is The Chartered Society of Physiotherapy (CSP). Its pleaded grounds are under sections 3(1)(a), 3(1)(b), 3(1)(c) and 3(1)(d) of the Trade Marks Act 1994 ("the Act"). The thrust of the case of CSP is that rebound therapy is a common therapy within the physiotherapy field, practiced by many physiotherapists. As such the registered trade mark cannot distinguish those services offered under the mark from those of others.
3. Paul Kaye and Edward Anderson filed a counterstatement denying the claims made. Both parties filed evidence and written submissions. The latter will not be summarised except where considered necessary, but have been taken into account in reaching this decision. Neither party requested a hearing and so this decision is given following a careful perusal of the papers.

Preliminary remarks

4. A large amount of evidence and information has been filed in these proceedings, some of which is not directly relevant to the proceedings here. The summary that follows is therefore focussed upon that which is pertinent to the key issue in these proceedings, namely whether or not Rebound Therapy is capable of acting as a badge of origin.

Applicant's evidence

5. This is comprised of a large number of witness statements and accompanying evidence, some of which is broadly repetitive in nature. Where there is repetition, therefore, and where it is deemed appropriate to do so, the statements will not be summarised individually in detail. Rather, this will be done collectively, describing key points contained and any relevant exhibits. Further, as there is a large amount of evidence, the summary below will focus upon the information which best supports the applicant's case and will not include information which does not materially improve its position.
6. The first witness statement is from Ms Sally Smith, a physiotherapist working in adult learning disabilities in Nottinghamshire Healthcare NHS Trust. She explains that she has over 26 years experience working in Rebound Therapy and initiated the development of the Rebound Working Party in 1996, of which she is still the current chair. Further, she was one of those responsible for bringing this matter to the attention of the applicant (CSP).
7. By way of background, Ms Smith explains that she was initially inspired by one of the proprietors (Eddie Anderson) in 1984, co-tutored with him in 1986 and has been one of the forerunners in developing rebound therapy in physiotherapy for adults with learning disabilities both locally and nationally throughout the last 26 years. Exhibit 3 is a list detailing all of Ms Smith's activities in respect of rebound therapy, including teaching on training courses, television appearances and development of guidelines of good practice. Ms Smith has published in a professional physiotherapy journal (exhibit 4 dates this as being in 1990) and written a chapter in "Learning Disability; Physical Therapy, Treatment and Management. A Collaborative Approach Second Edition", published in 2006, also shown in exhibit 4. She was one of the lead physiotherapists involved in co-writing (jointly with the CSP) a professional paper in Safe Practice in Rebound Therapy in 2006/7 (shown in exhibit 6). She was the lead person in developing the working party under the Association of Chartered Physiotherapists in Learning Disabilities for physiotherapists experienced in Rebound Therapy, the aim of which was to raise awareness of the therapy, train others in practicing the therapy and to enable national networking. This is the same working party that continues today with some original members and some newer. (Exhibit 7 is a list of current members). Ms Smith has run many courses over many years to train physiotherapists and non physiotherapists in Rebound Therapy. Exhibit 8 shows the topics covered on a training course held in 1992, a covering letter from a course held in 1994, an attendance sheet from a course in 2007 and also a list of Rebound Therapy Trainers from 2012. It is noted from this list that there are trainers' details from various locations throughout the UK; according to Ms Smith, these deliver Rebound Therapy to a set standard and syllabus to other physiotherapists and non physiotherapists. Ms Smith explains that rebound therapy has grown and developed since the 1980's. Though Eddie Anderson has a background in children and education, she has grown and developed the techniques for adults.
8. Ms Smith ends her statement by declaring her support for the applicant. She states that although Mr Anderson has always been credited as the original inspiration for rebound therapy, it has been developed throughout the years and has changed considerably. There are, according to Ms Smith, a number of physiotherapy colleagues around the country which use it in other disciplines; such as neurology, development coordination disorder and cystic fibrosis. In Wales an advanced course in rebound therapy has been developed. Exhibit 17 contains articles, letters and advertisements in support of these statements. Ms Smith states that rebound therapy has been recognised by the CSP as a mode of treatment for many years, has been

taught at physiotherapy colleges and is referred to in the Association of Chartered Physiotherapists for People with Learning Disabilities (ACPPLD) leaflet (Exhibits 19 and 20).

9. The second witness statement is from Ms Deborah Cook, a Clinical Community Physiotherapist. Ms Cook states that she has been practicing and teaching rebound therapy since 1984. She was originally trained by Eddie Anderson. She states that the term has been used by her since then to describe the therapeutic use of the trampoline and is used to describe this method of treatment. Ms Cook corroborates Ms Smith's statement regarding the journal article and book chapters written by them. According to Ms Cook, rebound therapy has been used on several occasions by physiotherapy students so the term is in common usage by students too. Ms Cook explains that she has taught rebound therapy to Nottingham University students from 1992-1996 and from 2001 to the present day. The term is therefore recognised by qualified physiotherapists as a method of treatment and has been used since the early 1980s and is a recognised term for the therapeutic use of the trampoline.
10. The third witness statement is from Ms Bethan Evans, a Chartered Physiotherapist who has been practising for over 32 years; she has been using rebound therapy for the past 15 years. She has been a rebound therapy trainer since 2001. She explains that the term has been used for many years in physiotherapy to refer to as therapeutic use of a trampoline and may form part of a wider therapy programme. It is a term used in literature, documentation and correspondence which is sent to GPs, consultants, clients, families and carers, as well as others working in the wider community and leisure centres. Ms Evans is of the view that there should be no ownership of a term which has become generic and is widely used by the community at large as well as the physiotherapy profession.
11. The fourth witness statement is from Ms Susan Soutar, a Chartered Physiotherapist, who is also a rebound therapy trainer. She too confirms that rebound therapy is a term in common use to describe treatment using a trampoline.
12. The fifth witness statement is from Ms Nichola Ann Wright, a paediatric physiotherapist who has been using rebound therapy for over 20 years. She also explains that she trains others in the use of the therapy, who go on to work with children requiring the treatment. She has also, as part of her Community team, developed guidelines on rebound therapy, which have been in use for over 10 years;. a copy of which is shown at exhibit NAW 5 and 6. Ms Wright is also a member of the working party previously described by Sally Smith and has also worked on many of the applicant's activities, as already described by Ms Smith, such as the "Safe Practice in Rebound Therapy" paper and an accompanying information paper; which is now used as a guidance document by physiotherapists across the country. A copy is contained within Exhibit NAW21. Ms Wright confirms that she has used rebound therapy to describe trampoline therapy for over 20 years.
13. The sixth witness statement is a second statement from Ms Deborah Cook. There are a number of exhibits attached to this statement which include the following:
 - reports on rebound therapy (1982),
 - a number of letters/application forms/advertisements/other promotional material regarding training courses (as early as 1986),
 - draft journal articles from 1990,
 - minutes of a hospital meeting in 1988 which mentions a rebound therapy study day,
 - CSP leaflets regarding rebound therapy (1995),

- details of rebound therapy packages from physiotherapy services (1995),
- ACPPLD newsletters containing information about rebound therapy,
- job advertisement for physiotherapist with an opportunity to practice “rebound” (1995),
- list of dates of meetings of the working party (1996),
- press article from Nottingham Evening Post regarding rebound therapy (1997),
- articles in ACPPLD newsletters and magazines regarding rebound therapy (various dates in the 1990s and 2000s).

14. There are seven witness statements which are broadly repetitive and so will be described collectively. These are all from physiotherapists who all state they have been practising rebound therapy for varying lengths of time (some for a significant number of years). Many are also trainers in the practice. All state that the term is generic or is otherwise known to describe trampoline therapy. The witness statements also include exhibits which support the points made.

15. Many of the witnesses who have provided statements describe their apprehension in using the term at the current time, due to fear of litigation.

Registered Proprietor’s evidence

16. This takes the form of two witness statements, the first from Mr Eddie Anderson. Mr Anderson explains that he first started using rebound therapy in the period 1972-1974. He went on to develop it as part of a Physical Education curriculum between 1974 and 1979 and then used it as part of a movement programme during the period 1979-1986. Mr Anderson also explains that he was also responsible for training others in the therapy (which indeed has been confirmed by the applicant).

17. The second witness statement is from Mr Paul Kaye. Some of the information therein relates to countries other than the United Kingdom and so is not relevant. Mr Kaye repeats much of the same background information regarding the origin of rebound therapy and Mr Anderson’s involvement in this. As such, it will not be repeated here. Mr Kaye claims that the first professional papers on rebound therapy were presented by Mr Anderson between the mid 1970s and the mid 1980s, a copy of one of the papers is included in Exhibit 6. It is noted that this describes trampoline therapy but does not refer to it as rebound therapy. Also exhibited at exhibit 7 and 8 is correspondence between Mr Anderson and CSP where it is acknowledged that Mr Anderson is the source of rebound therapy and as a recognised trainer of the practice. This is of course already accepted by the Applicant .

18. Mr Kaye claims that rebound therapy is not a generic term for special needs trampolining and refers only to the Eddy Anderson model of exercise therapy. In order to ensure that the quality and integrity of rebound therapy is maintained, only those who are appropriately qualified and validated may use the term to describe their work. In respect of the witness statements contained in applicant’s evidence, Mr Kaye claims that many will have been trained by Eddy Anderson and so are “entitled” to use the term rebound therapy. Mr Kaye claims that some of the courses mentioned by the applicant (such as that in Wales) were of inferior quality, which can affect the integrity of the rebound therapy name. There is in evidence a letter from an attendee of the course in Wales, expressing concern about the course. According to Mr Kaye, CSP only wish to utilise the name rebound therapy in order to benefit from the credibility and reputation of Eddy Anderson’s work. He denies anyone has been threatened with litigation in respect of the use of the name.

Applicant's evidence in reply

19. This is a witness statement from Ms Deborah Cook. In terms of relevant information, Ms Cook explains that in physiotherapy circles rebound therapy remains descriptive and exhibits an article, dated November 2012 at DC-12 to that effect. It is noted that a definition of rebound therapy is provided, namely that it relates to the therapeutic use of a trampoline. Ms Cook disagrees that that all of the working party members were trained by Mr Anderson. Instead she claims that only she and Sally Smith were trained by Mr Anderson and that his work has now diffused throughout the profession.

DECISION

The relevant law – Section 3(1)

20. “3._ (1) The following shall not be registered –
..... (a) signs which do not satisfy the requirements of section 1(1)¹,
(b) trade marks which are devoid of any distinctive character,
(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:
Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

21. It is well established in law that the absolute grounds for refusing registration must be examined separately, although there is a degree of overlap between sections 3(1)(b), (c) and (d) of the Act. In *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* [2004] E.T.M.R. 57, the Court of Justice of the European Union (“CJEU”) stated:

“67. As regards the first part of the question, it is clear from Article 3(1) of the Directive that each of the grounds for refusal listed in that provision is independent of the others and calls for a separate examination (see, *inter alia*, *Linde*, paragraph 67). That is true in particular of the grounds for refusal listed in paragraphs (b), (c) and (d) of Article 3(1), although there is a clear overlap between the scope of the respective provisions (see to that effect Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraphs 35 and 36).

¹ Section 1(1) of the Act states: “In this Act a “trade mark” means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings”.

68. Furthermore, according to the Court's case-law, the various grounds for refusing registration set out in Article 3 of the Directive must be interpreted in the light of the public interest underlying each of them (see in particular Case C-299/99 *Philips* [2002] ECR I-5475, paragraph 77, *Linde*, paragraph 71, and *Libertel*, paragraph 51).

69. It follows that the fact that a mark does not fall within one of those grounds does not mean that it cannot fall within another (see to that effect *Linde*, paragraph 68).

70. In particular, it is thus not open to the competent authority to conclude that a mark is not devoid of any distinctive character in relation to certain goods or services purely on the ground that it is not descriptive of them.

71. Second, as has been observed in paragraph 34 of this judgment, whether a mark has distinctive character for the purposes of Article 3(1)(b) of the Directive must be assessed by reference to the goods or services described in the application for registration.

.....

75. As regards the second part of the question, whether a mark has distinctive character must be assessed, as has been observed in paragraph 34 of this judgment, first, by reference to the goods or services in respect of which registration of the mark has been sought, and, second, by reference to the way in which it is perceived by the relevant public, which consists of average consumers of those goods or services, reasonably well informed and reasonably observant and circumspect.”

22. The ground of invalidation based upon Section 3(1)(d) will be considered first. These are trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade.

23. In *Telefon & Buch Verlagsgesellschaft mbH v OHIM*, Case T-322/03, the GC stated:

“49 Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 31, and Case T-237/01 *Alcon v OHIM – Dr. Robert Winzer Pharma (BSS)* [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public's perception of the mark (*BSS*, paragraph 37).

50 With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (*BSS*, paragraph 38).

51 Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, *Merz & Krell*, paragraph 35, and *BSS*, paragraph 39).

52 Finally, signs or indications constituting a trade mark which have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, *Merz & Krell*, paragraph 37, and *BSS*, paragraph 40)."

24. The enquiry is not whether the mark is descriptive of a characteristic of the services, although that could also apply to a mark which falls foul of section 3(1)(d). It is whether the mark (as opposed to the individual words) was customary in the current language of the UK or was customary in the bona fide and established practice of the trade (i.e. in the trade the subject of the opposed services) at the date of application. Proving this requires the filing of evidence of fact supporting the claim. It cannot be proved by supposition.
25. The following guidance is also borne in mind: In *Stash Limited v Samurai Sportswear Ltd* BL O/281/04 Professor Annand, sitting as the appointed person, stated:
- "33. In the event, I do not believe this issue of the interpretation of section 3(1)(d) is central to the outcome of the appeal. "Customary" is defined in the Oxford English Reference Dictionary, 1995 as: "usual; in accordance with custom". In my judgment, the Opponent has failed on the evidence to prove that at the relevant date STASH contravened section 3(1)(d) as consisting exclusively of signs or indications which have become customary either in the current language or in trade practices for the goods concerned."
26. It is therefore important to establish whether rebound therapy is customary in the trade, not just used in the trade.
27. It is accepted that Mr Anderson coined the phrase rebound therapy back in the 1970s. Further that he practiced rebound therapy and trained others to do so. It is also accepted that Mr Anderson continues to this day to practice in rebound therapy and train others.
28. However, it is considered that the evidence filed by the applicant unequivocally demonstrates that during the time period between the 1970s and the date of application in 2009, a number of activities using the term rebound therapy had occurred, these include the following:
- that a number of physiotherapists around the country have been and still are practicing rebound therapy;
 - that there have been a number of different sources of literature produced on rebound therapy, be they guidance leaflets, journal articles, newsletter articles produced by different people/organisations regarding rebound therapy;

- that there is an ongoing working group on rebound therapy facilitated by the applicant;
 - that student physiotherapists study rebound therapy as a method of physiotherapy.
29. Bearing in mind all of the foregoing, it is considered that, based on the evidence provided, rebound therapy is a method which has become widespread throughout the physiotherapy trade to the extent that it appears to be an indication used to refer to therapeutic use of a trampoline. It is concluded therefore that it has become customary in the trade. This conclusion also applies to the class 41 services for which rebound therapy is currently registered as these services can also be provided (and indeed the evidence shows they are) by those working in the physiotherapy trade. The application for invalidity based upon Section 3(1)(d) therefore succeeds in its entirety.
30. As the application has been successful, there is, strictly speaking no need to consider the remaining grounds. However, for the sake of completeness, the grounds under Section 3(1)(c) and 3(1)(b) will also be considered. In respect of Section 3(1)(c), the average consumer will be both medical professionals and the public at large and will access these services via referral or recommendation in respect of the services in class 44 or as a method of training/continuation of education in respect of services in class 41. The evidence clearly shows that rebound therapy has, as a result of its development in physiotherapy over a number of years, become an indication which describes the therapeutic use of a trampoline. This will be understood as such by the average consumer accessing the services in the manner already described. In respect of class 44, it therefore describes the type of therapy being provided or otherwise points to the subject matter of, for example, a consultancy service. In respect of class 41, rebound therapy clearly describes the subject matter. The application therefore also succeeds in respect of Section 3(1)(c). As it is successful in this regard, it is a given that the application also succeeds under Section 3(1)(b) as a descriptive indication is also, by definition, devoid of distinctive character. Section 3(1)(a) relates to signs which cannot constitute a trade mark. As Arnold J held in *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418(Ch), this part of the Act relates to signs incapable of distinguishing any goods or services. On the basis of the pleadings and the evidence there is no basis for such a claim.

Final remarks

31. It is noted that the applicant presented survey evidence as part of its evidence in chief. However it is not without its flaws and, indeed, a respondent to the survey itself accuses it of being leading. In any case, it is considered that this evidence does not place the applicant in any better position than in respect of the rest of the evidence filed which clearly shows that rebound therapy is a term that is customary in the trade and is also a descriptive term. As such, no further comment shall be made in respect of this survey.
32. Finally, it is noted that the Registered Proprietor's make mention of acquired distinctiveness of rebound therapy and that this was provided to the Trade Marks Registry during the prosecution of its application for registration. This evidence has not been provided in these proceedings. It is true that there is a letter from an attendee of a course in Wales expressing concern about the quality of the content. That this letter was written to the Registered Proprietor's suggests that on this

particular occasion and by this customer, rebound therapy was linked to them. However, this is only one instance and cannot reasonably negate the cogency of the evidence provided by the applicant.

COSTS

33. CSP have been successful and so are entitled to a contribution to its costs. It is therefore awarded the sum of £650 which is comprised as follows:

Preparing a statement and considering the other side's statement

£150

Considering and filing evidence

£300

Official fee for filing invalidation

£200

34. I therefore order Paul Kaye and Edward Anderson to pay The Chartered Society of Physiotherapists the amount of £650. The sum should 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 20th of December 2013.

Louise White
For the Registrar,
The Comptroller-General