

O/0504/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003964312

IN THE NAME OF RECKITT BENCKISER FINISH B.V.

TO REGISTER THE TRADE MARK



IN CLASS 3

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000448565

BY HENKEL AG & CO. KGAA

BACKGROUND AND PLEADINGS

1. On 5 October 2023 Reckitt Benckiser Finish B.V. (***“the Applicant”***) applied to register in the UK the trade mark shown on the cover page of this decision, under number UK00003964312 (***“the Contested Mark”***).
2. On 9 April 2024 the mark was accepted and published in the Trade Marks Journal in respect of the following goods:

Class 3: Dishwashing preparations; dishwashing detergents; bleaching preparations and other substances for dishwashing; dishwasher cleaner, freshener and deodorizer; rinse agents for machine dishwashers; drying agents for machine dishwashers; detergents for dishwashing in solid, fluid or gel form; polishing preparations for kitchen and glassware; cleaning, polishing, scouring and abrasive preparations for dishwashing; decalcifying and descaling preparations for domestic use; stain removing preparations, all aforementioned goods with or without a disinfective component.

3. On 12 July 2024 Henkel AG & Co. KGaA (***“the Opponent”***) opposed the application in its totality under section 3(1)(b), section 3(1)(c) and section 3(1)(d) of the Trade Marks Act 1994 (***“the Act”***).
4. Under section 3(1)(b), the Opponent contends that the Contested Mark is a simple geometric shape (a 2D red circle/dot or a 3D red ball) that is devoid of any distinctive character and that it is widely used in the market for the goods at hand in a purely decorative sense.
5. Under section 3(1)(c), the Opponent claims that the application should be refused registration in that the mark (being a red dot/ball) consists exclusively of a sign used in trade to designate that the goods contain certain ingredients, have specific characteristics, provide certain functions (i.e., rinse aid in dishwasher tablets) and that the mark essentially consists of a representation of the products or part of them.
6. Under section 3(1)(d), the Opponent submits that the Contested Mark consists exclusively of a sign or indication which has become customary in trade (i.e., the

dishwasher/washing tablet sector) and it is used by various economic operators in the field of dishwashing, washing agents and detergents in a decorative sense.

7. The Applicant filed a counterstatement denying each of the claims made by the Opponent under sections 3(1)(b), 3(1)(c) and 3(1)(d) and it puts the Opponent to strict proof of each of its allegations.
8. The Applicant is represented by Stobbs. The Opponent is represented by HGF Limited.

RELEVANCE OF EU LAW

9. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE AND SUBMISSIONS

10. The Opponent filed evidence in chief in the form of the witness statement of Tamsin Knight and exhibits TAK1 – TAK26. Ms Knight is a Trainee Trade Mark Attorney at HGF Limited (the Opponent's representative) and she has held this position since 7 October 2024. The Applicant filed evidence in reply in the form of the witness statement of Natasha O'Shea, Chartered Trade Mark Attorney at Stobbs (IP) Limited (the Applicant's representative), and exhibits NO1 – NO4. All the witnesses are duly authorised to provide evidence.
11. A hearing took place before me, by videoconference, on 18 May 2026. Prior to the hearing, the parties filed skeleton arguments. The Opponent was represented by Lee Curtis of HGF Limited. The Applicant was represented by Julius Stobbs of Stobbs.
12. The parties' evidence and submissions will not be summarised here but will be referred to as and where appropriate during this decision. This decision is taken following a careful consideration of all the papers as well as of the submissions presented in writing and at the hearing.

PRELIMINARY MATTER

13. Ms Knight's evidence at exhibit TAK20 consists of a list of hyperlinks. Ms Knight, in her witness statement, indicates that this exhibit shows advertisements by the Applicant from the YouTube platform showing uses by the Applicant of a red round element as part of the product and as an active ingredient.¹
14. The Applicant, in its skeleton argument, contends that the evidence consists exclusively of a list of hyperlinks and, thus, it should be ignored.²
15. Before the hearing took place, Mr Curtis made available the active links contained in the evidence and pointed out that at the time of filing of such evidence the Registrar did not object to it. At the hearing I heard both parties' positions on this matter. Notably, Mr Curtis submitted that exhibit TAK20 provided additional examples of the Applicant's use of the Contested Mark and that even if exhibit TAK20 were deemed inadmissible, from the remaining evidence, such uses of the Contested Mark would be nonetheless apparent. I clarified that although Mr Curtis had later made available the active links, I could not take them into account insofar as I am not allowed to conduct my own research. Nonetheless, I agreed with Mr Curtis that exhibit TAK20 consisted of additional examples of uses of the Contested Mark by the Applicant as already shown in other parts of the evidence and as indicated by Ms Knight in her witness statement. Therefore, although I will not take into account the hyperlinks provided in the evidence, I will consider Ms Knight's statement on this part of the evidence for my assessment.

DECISION

Section 3(1)

16. Section 3(1) of the Act provides as follows:

“3(1) The following shall not be registered –

(a) [...]

¹ Ms Knight's witness statement at [23].

² Applicant's skeleton argument at [52].

(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.”

17. Section 1(1) states:

“1(1) In this Act “trade mark” means any sign which is capable—

(a) [...]

(b) of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals, colours, sounds or the shape of goods or their packaging.”

18. I bear in mind that the above grounds are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c), but still be objectionable under section 3(1)(d) and/or 3(1)(b) of the Act.³

19. Before I move on with my assessment, I note that the Applicant points out that the contested application does not solely concern dishwashing preparations. From the applied-for specification in class 3 I see that most of the goods can be categorised

³ *SAT.1 SatellitenFernsehen GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“OHIM”)*, Case C-329/02 P at [25].

under the wider category of “dishwashing preparations”. Even if I appreciate that terms such as “*polishing preparations for kitchen and glassware*”, “*decalcifying and descaling preparations for domestic use*” and “*stain removing preparations*” do not directly refer to dishwashing, they can nonetheless be used for dishwashing purposes (e.g., to descale the dishwasher and remove limescale stains from dishes/glassware). Furthermore, both parties’ evidence and submissions, as it will be clarified further below in this decision, refer to cleaning preparations (in solid, fluid or gel form) with multi-purpose actions (clean, freshen, deodorise, rinse aid, dry, polish/stain removal, and descale). Therefore, as the goods at hand are sufficiently directly and specifically connected (i.e., they form a homogenous group), I will carry out my assessment and apply my reasoning for all the goods in the specification, unless otherwise specified.⁴

The relevant public

20. The above grounds must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect.⁵ I agree with the parties that the relevant consumers are members of the general public who will purchase the goods fairly regularly. The goods are relatively inexpensive, nonetheless the relevant consumer will take into account various factors when purchasing the goods such as the type of goods (e.g. biological/non-biological), nature (powder/liquid), effectiveness in removing stains and making the glassware shine. Overall, consumers will pay a medium degree of attention when purchasing these goods. I note that the Applicant also submits that some business consumers will purchase the goods,⁶ however, no higher degree of attention is contended. Nonetheless, I maintain the view that the relevant consumer for the goods at hand will be the general public as outlined above.

⁴ *BVBA Management, Training en Consultancy v Benelux-Merkenbureau*, Case C-239/05.

⁵ *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04.

⁶ *Ibid.*

Relevant Date

21. The relevant date for the assessment is the filing date of the Contested Mark which in this case is **5 October 2023**.⁷ I shall bear this date in mind whilst considering the claims.

Section 3(1)(b)

22. Section 3(1)(b) of the Act prevents registration of marks which are devoid of distinctive character. The principles to be applied under article 7(1)(b) of the Community Trade Mark (“CTM”) Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and section 3(1)(b) of the Act) were conveniently summarised by the Court of Justice of the European Union (“CJEU”) in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

“29 [...] the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes 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 those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

⁷ *Imagination Technologies v OHIM*, Case C-542/07.

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)."

23. At the hearing the parties agreed that the Applicant did not claim any acquired distinctiveness for the Contested Mark. Hence, I only have the mark's inherent distinctiveness to consider.

24. As a preliminary point, both parties directed me to the previous considerations made by the Registrar on the mark's distinctiveness at examination stage. Although I note the parties' submissions on this point, I am not bound by previous decisions of the Registrar, and I have to carry out my assessment independently on the basis of the evidence and submissions presented by the parties before me in these proceedings.

25. In its statement of grounds, the Opponent contends that the Contested Mark lacks distinctive character in that:

- 1) *“the sign forming the subject of the application is likely to be interpreted by consumers as a simple geometric shape, notably a red circle or dot.”*
- 2) *“Even if consumers interpreted the sign forming the subject of the Application as a ‘red ball’, consumers [...] would not view the said sign as a badge of trade origin. Red dot or red ball devices are widely used in relation to the goods covered by the Application by other traders in a purely decorative sense.”*

26. I will address these arguments in turn.

The mark is a simple geometric shape

27. The Opponent directs me to a previous decision by the EUIPO concerning the invalidity action of a sign identical to the Contested Mark, where it was found that *“the sign at issue represents a basic geometrical shape without the minimum distinctive character”*⁸ and, thus, it was invalidated by the EU office. As correctly recognised by the Opponent, this decision does not bind me because it derives from a different jurisdiction and it was issued after the Brexit transitional period on 31 December 2020.⁹

28. I find the mark is not a simple 2D red circle. The curved lines and shading in the mark give the impression of something resembling a 3D red ball or sphere. I agree with the Applicant that the mark consists of a *“glassy or shiny red ball”*.¹⁰ I therefore find that there is more to the Contested Mark than a simple geometric 2D red circle to the extent that the mark has a sufficiently complex stylisation placing it above the minimum threshold of inherent distinctiveness.

Red ball devices are widely used in relation to the goods at hand by other traders in a purely decorative sense

29. Also on this point the Opponent refers me to the abovementioned EUIPO decision where it was found that *“the relevant public will perceive the contested mark in respect of each of the individual registered goods purely, as a decorative element. Everyday experience shows simple geometric shapes, whether or not they are*

⁸ Cancellation No C 64 098 (Invalidity) at [11].

⁹ Opponent’s skeleton arguments at [14].

¹⁰ Applicant’s skeleton arguments at [16].

associated with ordinary colours, are ornamental designs frequently used in trade".¹¹

30. Leaving aside the fact that I am not bound by this decision and that I found the Contested Mark not to be a simple geometric shape, I do not find that I am in a position to take judicial notice of the fact that red balls are commonly used in relation to dishwasher tablets as purely decorative elements or designs. As stated by Ms Anna Carboni in *Chorkee Ltd v Cherokee Inc.*, (case BL O/048/08): "*judicial notice may be taken of facts that are too notorious to be the subject of serious dispute*". Therefore, to reach such a conclusion I need to be persuaded by the Opponent's evidence that red balls are, in fact, commonly used decoratively in the market for dishwasher tablets or other cleaning preparations.
31. Turning to the evidence provided by Ms Knight, the exhibits from TAK2 to TAK9 all refer to uses of the Contested Mark by the Applicant.
32. Exhibits TAK9 and TAK10 refer to a 2D red circle placed on the packaging of cleaning powder. This mark is a simpler 2D red circle and I do not find it comparable to the Applicant's more stylised 3D-like shiny red ball.
33. Exhibit TAK11 features the packaging of a colour and dirt collector. The packaging depicts an illustration of what seems a white sheet (presumably representing the collector sheet). Flowing into the sheet are streams of coloured swirls converging towards a red circular area positioned on or near the sheet, emphasising the point at which the dye is being captured. Also in this case, the evidence does not feature a red shiny ball/sphere device, but a 2D red circle with specific illustration purposes.
34. Ms Knight also provides extracts showing other businesses (i.e., Somat, Ariel, and Fairy) using the depiction of a red element on their packaging in relation to their dishwasher tablets. The use by Somat in Figure 1 is the closest to the Contested Mark as it shows use of a 3D-like shiny red circle. Also the evidence concerning the anti-limescale tabs by "bloo" (Figure 4) shows a red circle on the goods' packaging, although this is flatter and is more disc shaped. The uses by Ariel and Fairy on their packaging (respectively Figure 2 and Figure 3) relate to a crescent-shaped shiny red section of the goods.

¹¹ Cancellation No C 64 098 (Invalidity) at [11].



Figure 1 – Exhibit TAK12, page 69



Figure 2 – Exhibit TAK16, page 77



Figure 3 – Exhibit TAK18, page 82



Figure 4 – Exhibit TAK21, page 88

35. Ms Knight also provides extracts showing businesses using a red dot or circle on their packaging for stain removing or cleaning preparations for dishwashing (see images below).



Figure 5 – Exhibit TAK14



Figure 6 – Exhibit TAK24



Figure 7 – Exhibit TAK23

36. The evidence also contains two instances showing the use of a red circle giving a 3D impression (resembling the Contested Mark) by ASDA on its products for some of its goods' packaging (rinse aid and dishwasher cleaner). See Figure 8 and Figure 9.



Figure 8 – Exhibit TAK25, page 96



Figure 9 – Exhibit TAK26, page 98

37. From my account of the evidence, it appears that there are essentially three competitors of the Applicant (Somat, bloo and ASDA) that use on their packaging a red circle or sphere that resembles the Contested Mark. The remaining evidence shows either uses by the Applicant of the Contested Mark or uses of red circles that differ from the Contested Mark. Overall, the evidence is insufficient to show that red balls are commonly used on the packaging of dishwasher tablets (or other cleaning products) in a decorative manner.

38. It follows from my findings above that the Contested Mark is not a simple geometric shape, and it possesses at least the minimum degree of inherent distinctive character to function as a trade mark. Furthermore, the Opponent's evidence is insufficient to show that red balls are commonly used in the relevant market purely with a decorative function.

39. As a final point, in the Opponent's skeleton arguments it is asserted that the Contested Mark lacks distinctiveness on the basis that the relevant public would perceive the mark as representing the products, or part of them. In this regard, the Opponent refers me to an invalidity action before the EUIPO in which a sign almost identical to the Contested Mark was found to lack distinctive character for that reason. Ms Knight, in her evidence, also refers me to decision number BL O/587/20 (*Tefal*) concerning the refusal of a mark consisting of a red dot as placed on the

goods.¹² Neither Ms Knight nor Mr Curtis at the hearing elaborated further on this part of evidence. However, it appears that the decision was provided to show a precedent where the Registrar refused for registration a red circle (or dot) under section 3(1)(b) as relating to part of the applied-for goods. Leaving aside the fact that previous decisions both from the Registrar and the EUIPO are not binding on me, Mr Stobbs noted at the hearing that the Opponent did not plead the alleged representation of the goods (or part of them) by the Contested Mark under section 3(1)(b), but solely under section 3(1)(c) as a basis for finding descriptiveness. As the cited case law concerns only an assessment of the mark's distinctiveness (or lack thereof), I will not take it into account in my assessment. In any event, I will consider the Opponent's argument that the Contested Mark allegedly represents part of the goods, as pleaded under section 3(1)(c), later in this decision.

40. From the above it follows that the opposition based upon section 3(1)(b) fails.

Section 3(1)(c)

41. Section 3(1)(c) prevents the registration of marks which designate the kind, quality, quantity, intended purpose, or other characteristics of the goods and services. I bear in mind when undertaking the assessment that the purpose of this section is to ensure signs designating a characteristic of the goods/services remain free for use by traders.

42. The case law relating to this section, which corresponds with Article 7(1)(c) of the EU Trade Mark Regulation (formerly the CTM Regulation), was set out by Arnold J. (as he then was) in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art. 7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

‘33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the

¹² Exhibit TAK1.

purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L40, p. 1), see, by analogy, [2004] ECR 1-1669, paragraph 19; as regards Article 7 of Regulation No 40/94, see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr & Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. 1-12447; [2004] E.T.M.R. 9' [2004] R.P.C. 18, paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461, paragraph 24).

36. [...] due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94. Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia, *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44, paragraph 45; and *Lego Juris v OHIM* (C-48/09 P, paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley*, paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie*, paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/89 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] E.C.R. I-2779, paragraph 35; and Case C-363/99 *Koninklijke KPN Nederland* [2004] E.C.R. I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104; *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No 40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods of services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94, the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time or production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that this list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word "characteristic" highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56).'

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux Merkenbureau* (C-363/99) [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97]."

43. Whether the Contested Mark is descriptive must be assessed through the eyes of the relevant parties, as the CJEU held in *Matratzen Concord AG v Hukla Germany*

SA, Case C-421/04. In paragraph 24 of that decision, it described the relevant parties as in trade or the average consumers of the goods in question, “*reasonably well-informed and reasonably observant and circumspect*”. The case law quoted above in *Starbucks* makes it clear that a mark will be caught by this section if the relevant parties can easily recognise that it designates a characteristic of the goods, such as their nature (e.g., chemical composition/ingredients) or intended purpose.

44. Regarding the Contested Mark’s descriptiveness, the Opponent’s argument is twofold: 1) the red ball is descriptive of the goods’ ingredients or chemical composition and intended purpose (rinse aid function); 2) the red ball represents part of the goods.

45. With regard to the first argument, it is stated that “[...] *a red dot or red ball is an indication that the products covered by the Application contain certain ingredients and has specific characteristics and provide certain functions, notably a rinse aid in dishwasher tablets.*”¹³ The Opponent also clarified that a sign is not confined to “matters in language” (i.e., words), but extends to all features of goods or their packaging.¹⁴ In other words, as clarified by Mr Curtis at the hearing, it is contended that the Contested Mark is a descriptive sign of a characteristic of the goods, namely, an active ingredient.

46. Mr Curtis, at the hearing, referred me to exhibits TAK8 and TAK18 contending that such evidence shows that the Contested Mark is used in a descriptive manner.

47. Looking at the evidence, exhibit TAK8 reproduces an extract from a third-party online article by Retail Times UK, dated 14 March 2023, reproducing an image of the packaging of the Applicant’s dishwasher tablets including the representation resembling a 3D red ball/sphere (Figure 10). Exhibit TAK18 shows the packaging of one of the Applicant’s competitors (i.e., Fairy) with the depiction of a 3D-resembling red element on their packaging in relation to their dishwasher tablets (Figure 11).

¹³ Statement of grounds dated 12 July 2024 at [3].

¹⁴ Opponent’s skeleton arguments at [25].



Figure 10 – Exhibit TAK8, page 60



Figure 11 - Exhibit TAK18, page 82

48. The Applicant contends that exhibit TAK8 shows one of the uses by the Applicant of its own trade mark which differs from other uses of other red elements on third-party product packaging. Accordingly, the Applicant contends that in the Fairy's packaging reproduced in exhibit TAK18 there is no representation of a red ball or sphere.¹⁵

49. The Opponent contends that *"this evidence shows that the active ingredient or surfactants in the dishwasher products at issue is shown by a red dot/ball"*.¹⁶

50. In exhibit TAK8 the article describes the tablets' Cycle-Sync technology that delivers an effective clean. Ms Knight indicates that the technology being presented seems to relate to the three ingredients shown in different colours in the product representation, including the red ball.¹⁷ Although I appreciate that the product packaging reproduces a red ball/sphere as part of the dishwasher tablet, this part of the evidence does not show any direct correlation or provide any description of a red ball/sphere as serving as an active agent within the Cycle-Sync technology. Turning to exhibit TAK18, the evidence does not indicate that the red section of the dishwasher tablet shown on the packaging has any specific function. Therefore, I find that this evidence does not indicate that consumers will perceive

¹⁵ Applicant's skeleton arguments at [33] and [35].

¹⁶ Opponent's skeleton arguments at [24].

¹⁷ Ms Knight's witness statement at [11].

the use of red shapes on the goods' packaging as indicating a specific characteristic of the goods.

51. Ms Knight also refers me to a study from the Royal Society of Chemistry, dated 2013, reporting that surfactants (the active element in dishwasher tablets) are depicted with a red sphere (Figure 12).

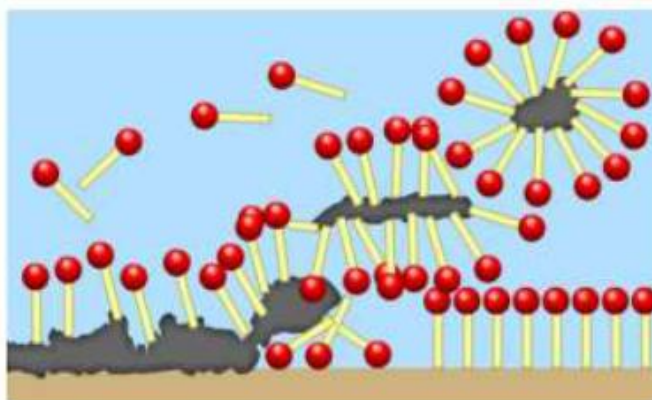


Figure 8: The non-polar tails (in yellow) of 'tadpole shaped' detergent molecules mix with grease, while the polar heads (in red) mix with water, thus forcing the grease and water to mix

Figure 12 – Exhibit TAK19, page 84

52. The Applicant provided printouts from third-party websites providing information on surfactants. The evidence represents the polar heads of surfactants in various colours (blue, grey, yellow and green).¹⁸

53. At the hearing, Mr Curtis contended that it is immaterial that surfactants can be depicted in different colours in that a mark should be refused registration if at least one of its possible meanings (i.e., red colour or red ball/circle) designates a characteristic of the goods (tablets with surfactants).

54. From the parties' evidence it appears that the colour red is not exclusively indicative of a specific component contained in the dishwasher tablets (i.e., surfactants) and that in the Opponent's evidence the use of the colour red is arbitrary for demonstration purposes. Nonetheless, even if I were to accept that the colour red is exclusively characteristic of an ingredient (or chemical composition) in dishwasher tablets, I do not find this fact would support a finding of descriptiveness for the Contested Mark. This is because the relevant consumer of the goods at

¹⁸ Exhibit NO3.

hand is the general public who is not an expert in the chemical composition of dishwasher tablets (let alone the colour of such chemicals). Therefore, even admitting that red is the colour of surfactants, the relevant consumer will not perceive it as indicating a characteristic of the goods. This view is also reinforced by the fact that in all the extracts of the Applicant's uses of the red ball on its product packaging, they all contain the word "powerball". From the evidence I note that "powerball" is the term used to describe the goods' rinse aid function¹⁹ whereas the depiction of the red ball/sphere in combination with the tablets is not present on all the packaging of the goods (Figure 13). Conversely, the word "powerball" is always present to describe one of the goods' characteristics.



Figure 13 - Exhibit TAK5, page 52

55. Regarding the second limb of the section 3(1)(c) argument, the Opponent contends that "[...] a red dot or red ball device essentially consists of a representation of the products or at least part of the products covering by the Application and thus is wholly descriptive".²⁰

¹⁹ See exhibit TAK3, page 48 and exhibit TAK5, page 52.

²⁰ Opponent's statement of grounds at [3].

56. Ms Knight provided evidence to support the argument that the Contested Mark is descriptive insofar as the red ball/sphere represents part of the Applicant's products.²¹ The evidence features images of the Applicant's product packaging for dishwasher tablets showing a red sphere as part of the goods (e.g., Figure 14 and Figure 15). Ms Knight also states that the evidence refers to the red ball in the product description as being one of the three fast dissolving chambers.²² Accordingly, the product description in the evidence indicates "[...] 3 fast-dissolving chambers to deliver results even in eco-cycle. Our new formula degreases, targets stuck on food with the power action of scrubbing and the Finish liquid powerball delivers our ultimate shine."²³



Figure 14 – Exhibit TAK2, page 45

²¹ Ms Knight's witness statement at [5].

²² Ms Knight's witness statement at [6].

²³ Exhibit TAK3, page 48.



Figure 15 – Exhibit TAK4, page 50

57. Ms Knight provided evidence aimed at showing that third-party retailers of the Applicant's products also use the red ball/sphere on their product packaging to represent part of the product (Figure 16 and Figure 17).



Figure 16 – Exhibit TAK6, page 55

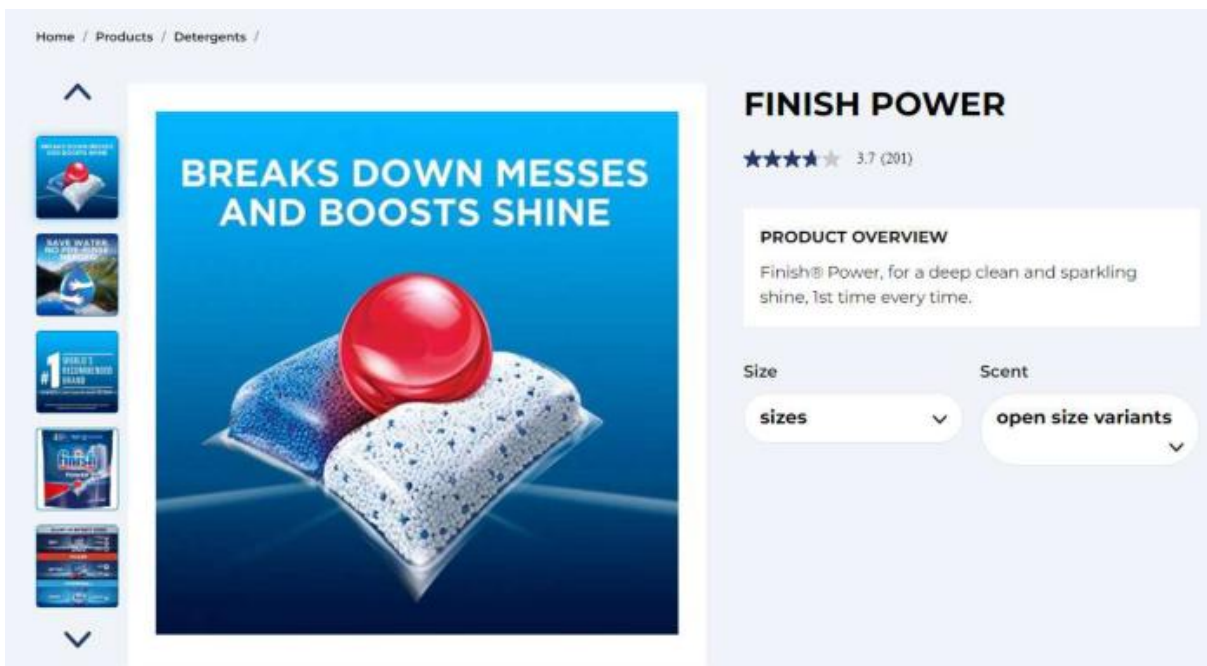


Figure 17 – Exhibit TAK6, page 54

58. At the hearing, Mr Stobbs argued that whilst in *Henkel* the mark consisted of a real-life 3D representation of a washing tablet, in the case at hand the Contested Mark is a stylised representation of a glossy/shiny red marble that does not have an innate connection with the goods. Additionally, it is contended that the uses shown in the Opponent’s evidence are all uses by the Applicant of its own mark and in

most of these uses the red ball is represented enlarged, separated, emphasised, or emerging from the washing tablets. From the Opponent's evidence, showing instances of the Contested Mark as used by the Applicant, I agree with the Applicant that the red ball is always represented in an exaggerated or unusual fashion that departs from any real-life representation of a dishwasher tablet.

59. In any case, even if I were to find that the red ball/sphere will be perceived as merely representing part of the Applicant's goods, I agree with the Applicant that from the evidence provided by the Opponent, all the uses of the red ball/sphere are uses by the Applicant in relation to its own products. I also agree with the Applicant that the Opponent's evidence does not show that other competitors in the relevant market use a red ball/sphere to identify their products (or part of them). Ms Knight's evidence shows only a few instances where some of the Applicant's competitors use either a red circle (although flatter)²⁴ or a red-coloured section placed on their products.²⁵ I find the Opponent's evidence shows uses that differ from those of the Applicant's red ball/sphere and I agree with the Applicant that all the uses of a red ball/sphere for dishwashing tablets are exclusively made by the Applicant to identify its own goods and that the Opponent's evidence is insufficient to establish that a common practice exists in the relevant market to use a red ball/sphere to exclusively describe a characteristic of dishwashing tablets or pods. I note Ms Knight's evidence showing the use by ASDA of red circles or spheres on its packaging for dishwasher products.²⁶ The representation of the red circles/spheres is closer to the Contested Mark. However, the evidence does not show that such figurative elements are descriptive of any of the goods' characteristics and the Opponent did not provide further clarification on this point. Thus, I do not find that this part of the evidence supports a finding of the Contested Mark's descriptiveness.

60. Finally, the Opponent directed me to the finding in *Starbucks* where it was stated that for a sign to be descriptive it is "*not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes*".²⁷ Mr Curtis, at the

²⁴ Exhibits TAK12, TAK13 and TAK21.

²⁵ Exhibits TAK16, TAK17 and TAK18.

²⁶ Exhibits TAK25 and TAK26.

²⁷ *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) at [91].

hearing, repeated this point, but he did not elaborate further. From the evidence before me I do not see how it would be reasonable to believe that, in the future, a red ball/sphere would be used to exclusively describe a characteristic of the goods at hand to the extent that it should be left free to use for the Applicant's competitors.

61. From the above considerations it follows that the opposition based upon section 3(1)(c) also fails.

Section 3(1)(d)

62. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM*, Case T-322/03, the General Court summarised the case law of the Court of Justice under the equivalent of s.3(1)(d) of the Act, as follows:

“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)."

63. The Opponent contends that "*red dots or red ball devices form part of a long standing labelling convention in particular in the dishwasher/washing tablet sector. Red dots or red ball devices are frequently used by various economic operators in the field of dishwashing, washing agents and detergents in a decorative sense.*"²⁸

64. Regarding the Opponent's argument that red ball devices are commonly used in the relevant market in a decorative sense, as already discussed at paragraphs [30] – [38], the evidence provided by the Opponent is insufficient to substantiate this claim. I will not consider this point any further.

65. Regarding the claim that red dots or red ball devices form part of a long standing labelling convention in the dishwasher/washing tablet sector, from my assessment of the Opponent's evidence above in this decision, I deem it insufficient to support a finding that the use of red balls was customary in the current language or in the *bona fide* and established practices of the trade on the relevant date, in the context of the goods applied for.

66. Therefore, the opposition based upon section 3(1)(d) fails for all the goods applied for.

OUTCOME

67. The opposition fails in its entirety under sections 3(1)(b), 3(1)(c) and 3(1)(d) of the Act.

²⁸ Opponent's statement of grounds at [4].

68. The Applicant has been successful. Subject to any successful appeal, the application by Reckitt Benckiser Finish B.V. may proceed to registration.

COSTS

69. The Applicant is entitled to an award of costs. The relevant scale is contained in Tribunal Practice Notice (“TPN”) 1/2023. Bearing that scale in mind, I award costs to the Applicant as follows:

Considering the notice of opposition and preparing the counterstatement	£250
Preparing evidence and considering and commenting on the other side’s evidence	£600
Preparing for and attending a hearing	£800
Total:	£1,650

70. I order Henkel AG & Co. KGaA to pay Reckitt Benckiser Finish B.V. the sum of **£1,650**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 15th day of June 2026

Andrea Rossi
For the Registrar