

TRADE MARKS ACT 1994

IN THE MATTER OF

APPLICATION NO. 2,000,169

TO REGISTER A TRADE MARK

IN CLASS 20

IN THE NAME OF JOHN LEWIS OF HUNGERFORD PLC

DECISION

Application No. 2,000,169

On 31st October 1994 John Lewis of Hungerford Plc (“the Applicant”) applied to register “**the smell, aroma or essence of cinnamon**” as a trade mark for use in relation to articles of furniture and parts and fittings therefor in Class 20.

Examination

The Trade Marks Registry objected to registration in an official letter dated 14th March 1995 on the grounds: (1) that the sign put forward for registration was not capable of being represented graphically; and (2) that it was a sign that other traders may legitimately wish to use.

The Applicant responded in February 1996 maintaining that the sign it wished to register could not properly be said to be incapable of being represented graphically

because it was, in fact, represented graphically in the application for registration by the words **“the smell, aroma or essence of cinnamon”**. It also denied that the sign was one which other traders might legitimately wish to use in connection with the sale of articles of furniture: “Even though cinnamon is a smell which might be associated with kitchen environments when in use, it would not normally be associated with furniture products when sold from the factory” and “in order to dispel any doubt, we would mention that one would not make furniture from a cinnamon bush”. The prima facie acceptance of Application No. 2000234 for **“the strong smell of bitter beer applied to flights for darts”** as a trade mark for use in relation to flights for darts in Class 28 was cited as a precedent for the acceptance of a verbal graphic representation such as that put forward for registration in the present case.

In an official letter dated 13th March 1996 the Registry redefined its objections to registration in the following terms:

“The mark as you say is represented graphically and in a manner [from] which others inspecting the register would be able to obtain an accurate understanding of the mark, by the written description. However, it is considered that the mark is still open to objection (prima facie) under Section 3(1)(a) and (b) as well as Section 1.

The late Section 1 objection is in respect of the mark’s capacity to distinguish the goods of one undertaking from those of another.

The application No. 2000234 for ‘darts smelling of beer’ is quite unusual, whereas it is quite common for furniture to smell of polish which contains the perfume of various fragrances including cinnamon. There have been other applications for the smell of cinnamon in other classes.”

With a view to overcoming the objections raised in this letter, the Applicant proceeded to file evidence of distinctiveness acquired through use of the relevant sign in relation to furniture. In a statutory declaration dated 22nd October 1996 its Managing Director, John Llewellyn Lewis, stated that in 1989 the Applicant had launched a range of kitchen furniture identified by “the unusual and distinctive aroma of cinnamon”. He explained that promotion of the furniture in that range:

“involves including a sachet or sachets of cinnamon essence within the packaging or, if the goods contain internal recesses (e.g. drawers or cupboards), within those recesses. Thus does the aroma permeate the goods and the customer immediately recognise something unusual when the goods are being selected or are received. However, we have investigated and fully intend to expand our promotion through the use of ‘scent strips’ for use with adverts to be enclosed in, for example, magazines. This will begin as soon as it becomes economically efficient to advertise in this way”.

Subsequently, on 19th May 1997, at a hearing before one of the Registrar’s senior hearing officers (Miss Virginia Douglas) it was agreed that the objections under Section 3(1)(b) and (c) of the Act would be waived subject to limitation of the specification of the application to ‘kitchen furniture’. However, the Registry remained concerned about the ability of the words “**the smell, aroma or essence of cinnamon**” to satisfy the statutory requirement for graphic representation. The official record of the hearing confirms that this aspect of the application remained under review:

“I agreed that there was no doubt that the mark was being used as a trade mark as provided for under the 1994 Act. The difficulty for the Registry was in recording precisely what had been registered (or indeed how far it should be required to do so), though I conceded that cinnamon was probably as unambiguous a smell as it was possible to get. [The

Applicant's representative] agreed that it might be possible to produce a written formula showing the broad parameters within which the scent fell by means of gas chromatography. However this would be an expensive option for his client and in his view unnecessary, the description 'the smell of cinnamon' being readily identifiable by the vast majority of people and easily checked by anyone not familiar with it simply by going into the nearest supermarket."

After further consideration the hearing officer wrote to the Applicant on 19th June 1997 in the following terms:

"As promised I am writing to you further to the hearing on 19 May following consideration of the application with colleagues here.

The conclusion is that we should not accept 'the smell of cinnamon' as an adequate description of the mark, even though we did earlier accept 'the smell of roses' and the 'smell of bitter beer'. It seems we are the only state in the EU to accept such descriptions and the feeling is that we should fall into line with other member states.

As regards your offer to represent the mark by means of a gas chromatograph, we feel this would not be acceptable on its own because it would not be intelligible to the ordinary reader of the Trade Marks Journal. However we would be prepared to accept for publication "the mark consists of the smell of cinnamon as described in the accompanying gas chromatograph". In my view this would be a 'clarification' rather than an 'amendment' of the mark as applied for. However it is just possible that the application might be open to challenge as contrary to Section 39 of the Act and you may wish to draw this to the attention of your client.

If your client wishes to proceed on this basis the mark would be advertised as having acquired distinctiveness by use for a specification limited, as discussed at the hearing, to kitchen furniture".

The reference to the "**smell of bitter beer**" was a reference to Application No. 2000234 in Class 28 (see above). The reference to "**the smell of roses**" was a reference to Application No. 2001416 for "**a floral fragrance/smell reminiscent of roses as**

applied to tyres” as a trade mark for use in relation to tyres for vehicle wheels in Class 12.

The Applicant took steps to obtain an electronic sensory analysis and graphic profile of the relevant **“smell, aroma or essence of cinnamon”** from Neotronics Scientific Ltd, a company specialising in ‘electronic nose’ technology. The results of the tests were communicated to the Registry in a letter from the Applicant’s trade mark attorneys dated 5th December 1997:

“Analyses have been carried out on the smell of cinnamon supplied by John Lewis of Hungerford Plc. The analyses were performed on an eNOSE 5000 Electronic Nose System using, as sampler a CTC Analytics PAL 80 (NeoGB) Headspace autosampler at an incubation temperature of 50°C.

The Sensor Module used was the Metal Oxide (MO) module containing eight Capteur High Power sensors, identified by the numbers 20350, 20400, 20450, 20370, 20410, 20390, 20430 and 20360.

The system was configured so that the Sample loop was 2.5 ml, the Transfer time was 6 seconds and the Analysis time was 2 minutes. The Carrier Gas was zero grade Air supplied by British Oxygen Company. Using the apparatus set up in the manner identified, eight repetitions of the procedure were carried out and the responses at each sensor shown in Fig.1. An average is shown in Fig.2.

By this means, the Average plot represents a graphical “profile” or fingerprint of the cinnamon smell.”

John Lewis of Hungerford Cinnamon Samples

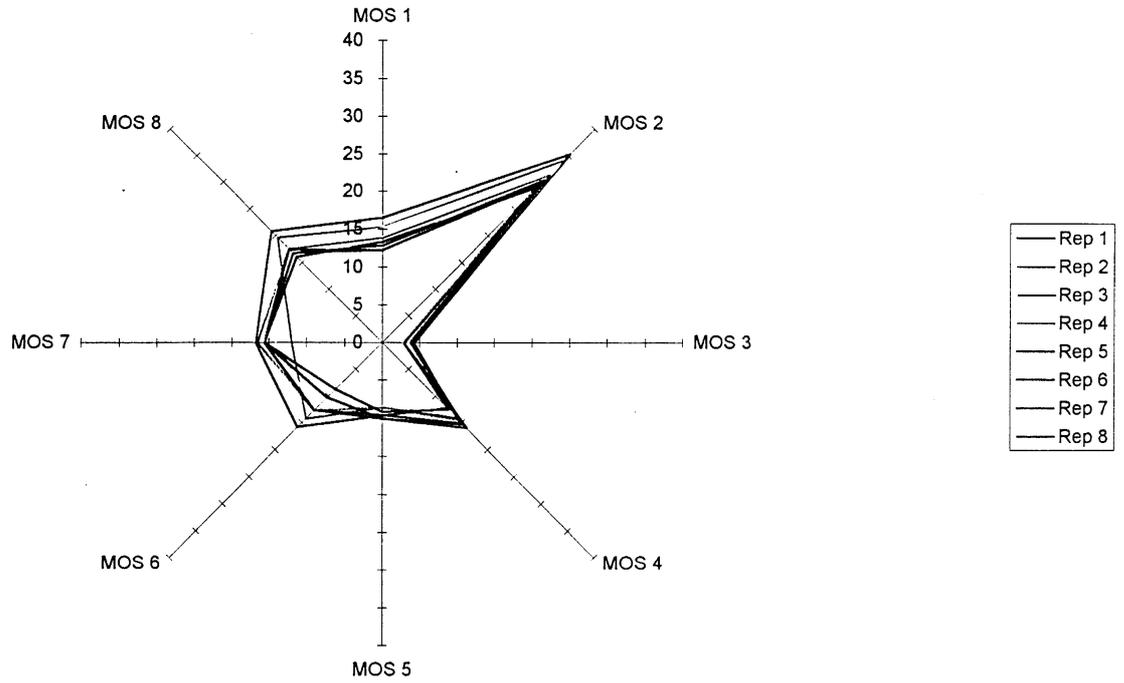


Figure 1 (only available as hard copy)

John Lewis of Hungerford Cinnamon Samples (Average)

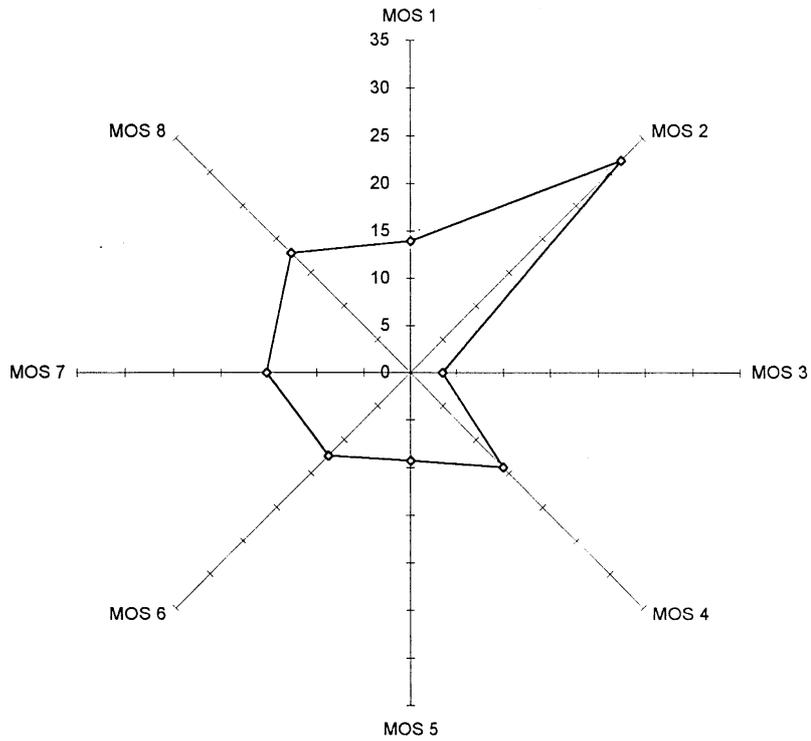


Figure 2 (only available as hard copy)

The Registry questioned the ability of “electronic nose” analysis to provide a graphic representation which could properly be regarded as unique to a particular smell. The Applicant responded with evidence in the form of a statutory declaration of John Warburton, Director of Sales and Marketing for Neotronics Scientific Ltd. This stated:

- “3. Neotronics is one of two British manufacturers of scientific equipment known as an “electronic nose”. The electronic nose is designed to mimic the human sense of smell. Conducting polymers are used as sensors and a number of different sensors are employed. The electrical resistance of these polymers changes temporarily when they absorb the various vapours in a particular smell. This produces a digital record of the odour which can be displayed graphically. Neotronics is entirely independent of the Applicant.
4. I have been shown the Official Letter from the Trade Marks Registry dated 16 December 1997 in which the Examiner asks for independent corroboration of the electronic nose technology used to produce the smell profiles for Application No. 2000169, which were filed with Frank B Dehn & Co’s response of 5 December 1997 which I have also seen. The Examiner has raised various points in the Official Letter and I give my answers to each of the points in turn below.
5. Accuracy of the electronic nose technology: I have assumed here that the Examiner is asking whether the results are correct. As is the case with numerous types of scientific measurement, the technology used is comparative – an unknown sample must be compared with a library of data which must first be programmed into the system. Assuming the data is correctly programmed, the unknown smell samples will be identified correctly.
6. Reproducibility: The same/similar smells will always produce the same “profile” under the same measurement conditions.

7. Temperature and “carrier”: Knowledge of the temperature of the system is essential in ensuring the reproducibility of the profile. The nature of the carrier gas is also important – the system works with most inert gases but different gases will give different results. Tests performed on the same smell but at different temperatures and with different carriers could produce different profiles. Similarly, the same profiles could be produced from different smells under different measurement conditions. That is why the measurement conditions, such as the sensors, the carrier, and the temperatures are identified.
8. Electronic nose technology has been commercially available since 1994 and is available in all the major European countries, the USA and the Asian countries. The Neotronics system is available throughout Europe, the USA, Australia, New Zealand, Korea and China. This technology is used in many industries, such as food/drink, chemicals, pharmaceuticals, tobacco, flavour and fragrance. The price of electronic nose technology systems ranges from £20,000 to £50,000.
9. The slight variations in the eight test profiles which have been submitted to the Patent Office are entirely normal and to be expected. No analytical instrument, including the electronic nose, will always produce exactly the same result from one analysis of the same sample to the next. Inherent variability is compensated for by the training process in setting up the library of data in the systems.”

The Registry concluded in the light of this evidence that the proposed graphical representation of the electronic sensory analysis would be unintelligible to people inspecting the Register of Trade Marks or the Trade Marks Journal and that they would in any event be unable to identify the smell represented in the graphical representation without additional information as to the test conditions and apparatus used to produce it, even if they had access to the necessary equipment. The objection to registration under Sections 3(1)(a) and 1(1) of the Act was therefore maintained on the ground that the

application for registration related to a sign which was identified with insufficient precision to satisfy the statutory requirement for graphic representation. This was communicated to the Applicant in an official letter of the 20th May 1998.

The Applicant reverted to its original position and pressed for acceptance of its application on the basis that the words “**the smell, aroma or essence of cinnamon**” were precise as to the identity of the sign put forward for registration and needed no further elaboration in order to satisfy the statutory requirement. It asked for a hearing at which to make further representations in support of the application.

In an official letter dated 5th August 1998 the Registry indicated that it was amenable to the request for a further hearing in view of the Applicant’s concern that the previous hearing might not have covered the objection under Sections 3(1)(a) and 1(1) in sufficient depth and on the basis that the application came within a new area of law in which the Registrar’s practice was evolving. However, the letter made it clear that the previously waived objection to the application under Section 3(1)(b) of the Act was being revived and would also be considered at the proposed hearing because the principal hearing officer to whom the case had been passed was “doubtful that Ms. Douglas was justified, on the evidence before her, in reaching the decision that the smell of cinnamon has acquired a distinctive character as the applicant’s trade mark.”

The Applicant endeavoured to allay the Registrar’s concerns under Section 3(1)(b) by filing further evidence of distinctiveness in the form of statutory declarations from four independent trade witnesses. The additional evidence was filed in February 1999.

The Registry was not satisfied that the evidence demonstrated distinctiveness of the relevant sign among members of the public at the date of the application for registration. It replied to the Applicant on 19th April 1999 maintaining all outstanding objections to registration and offering the Applicant the opportunity of a hearing at which to make representations in support of its application. The official letter indicated that the hearing would not be arranged until after the publication of a decision in a related case which was expected to offer guidance on the question of graphical representation. That was a reference to my decision in the Ty Nant case [2000] RPC 55 issued on 12th July 1999.

In accordance with the practice adopted in the aftermath of the Ty Nant decision the Registry wrote to the Applicant on 3rd September 1999 in the following terms:

“This application has been reviewed in order to ensure that it complies with the requirements of Section 32(2)(d) of the Act. The reasons for this review are given in the attached Journal notice, which was published on 25 August 1999 in Journal No. 6291.

In order to meet the requirements of Section 32(2)(d), the representation of the mark must, from the outset, disclose the identity of the sign which is said to be registrable and which in due course may be accepted for registration. It must be clearly and unambiguously recorded and be sufficiently precise to be susceptible of examination with a view to registration.

The representation currently on file fails to satisfy the requirements of Section 32(2)(d), the identity of the sign it purports to represent has not been clearly and unambiguously recorded. The degree of precision with which the sign is represented is not sufficient to permit full and effective examination. The application will therefore not proceed to re-examination until this deficiency in application has been remedied.

The mark in question is not considered to be sufficiently graphically represented.

Under the provisions of Rule 11, you are allowed two months within which to remedy the deficiency. If you fail to remedy the deficiency within this time period, the application shall be deemed never to have been made. Rule 62(3) prescribes that this two month period is not extendible. Accordingly, you are allowed **two months** from the date of this letter, by which time I must receive your response.

If you furnish a representation that satisfies the requirements of Section 32(2)(d) within the time period given above, the date of filing of the application will become the date upon which the Registrar receives an acceptable representation. (Section 33(1) refers).

Should you disagree with the above view, you are of course entitled to be heard on this matter. If you wish to request a Hearing, I will arrange the same as quickly as possible, given the time critical nature of this objection.”

The Applicant decided not to file a more precise representation of the relevant sign within the period of two months prescribed by this letter. It requested a hearing at which to argue that the notice of deficiency given under Rule 11 of the Trade Mark Rules 1994 was irregular on the basis that the graphic representation filed on 31st October 1994 was sufficient as it stood to satisfy the requirements of the 1994 Act. The hearing took place before Mr. Allan James, Principal Hearing Officer, on 9th March 2000.

The Principal Hearing Officer’s Decision

The notice of deficiency given under Rule 11 was upheld by the Principal Hearing Officer in a written decision issued on 16th June 2000. Having considered the adequacy of the graphic representation in the light of the Ty Nant decision and the cases referred to in that decision, he concluded that the representation was unacceptable under Section 32(1)(d) because it lacked definition and could not stand alone as a means of identifying a sign susceptible of examination and registration under the Act. He observed that:

“... the description put forward in this case presupposes that the reader already knows what cinnamon smells like. The description does not stand on its own but relies upon the reader’s previous experience of the sign. In the case of an unknown smell the only way to really find out what it smells like from the name of the compound is to obtain a sample from which the smell can be appreciated. But in that event it is the sample which reveals the identity of the sign, not the representation of it that will appear on the register.”

He went on to observe that:

“..... even though many people would probably say that they know what cinnamon smells like, that does not mean that those people would necessarily have the same smell in mind. The smell of cinnamon is probably open to a wider degree of interpretation than fresh cut grass because a person’s perception of the smell is likely to be influenced by the circumstances in which they have appreciated it. So, for example, a cook’s perception of what cinnamon smells like may be different to that of a consumer whose perception is based upon the smell of confections or drinks containing cinnamon. There is also the question of whether the “essence” of cinnamon is any different to the smell or aroma of cinnamon. In my view this adds to the ambiguity present in the description of the mark.”

His comments with regard to the smell of fresh cut grass were intended to distinguish the present case from the controversial decision of the Second Board of Appeal of the Community Trade Marks Office allowing registration of “**the smell of fresh cut grass**” as a trade mark for use in relation to tennis balls: see Case R156/1998-2 Venootschap onder Firma Senta Aromatic Marketing’s Application [1999] ETMR 429. He further considered that the ambiguity of the description in the present case was an obstacle to the full and effective implementation of the scheme of rights and liabilities established by the Act:

“I do not believe that the representation tendered for registration is sufficiently precise to allow the Registrar’s Examiners to compare the sign with other potentially

confusingly similar signs for the purposes of Section 5 of the Act, without the use of samples. For example, how else would someone who does not know what cinnamon smells like, compare the sign with other applications to register (say) the smell of cloves or cassia? The purpose of a graphical representation is to avoid the need for samples of goods, smells, music etc having to be stored on or in relation to Trade Marks Registers, which are inevitably paper or electronic based records. In this case the problem may be a practical one as well as one of principle. The applicant's own promotional material describes the sign as "smelling (of) the delicious spices reminiscent of a wonderful country kitchen." It is therefore quite easy to imagine why other traders in kitchen furniture may adopt similar smells in the marketing of such goods."

The inevitable result of his assessment was that the application for registration was deemed, in accordance with the provisions of Rule 11(a), never to have been made.

The Appeal

In July 2000 the Applicant gave notice of appeal to an Appointed Person under Section 76 of the Act. In its Grounds of Appeal and at the hearing of the appeal the Applicant accepted that the adequacy of the graphic representation contained in its application for registration fell to be tested by reference to the criteria identified in the Ty Nant decision. It referred in that connection to the paragraph at p.56 of the report of the decision in which I said:

"The degree of precision with which the sign is represented must be sufficient to permit full and effective implementation of the provisions of the Act relating to absolute unregistrability (section 3), relative unregistrability (section 5), infringement (section 10) and public inspection of the Register (section 63). These provisions call for a fixed point of reference: a graphic representation in which the identity of the relevant sign is clearly and unambiguously recorded. There may be more than one way of representing a sign graphically with that degree of precision. It also seems clear that a sign (such as a sound or aroma) can be taken to have been represented graphically with the required degree

of precision when figuratively represented, even though interpretation or analysis may then be required in order to detect or demonstrate use of it.”

Basing itself upon the passages I have italicised, the Applicant contended that there can be no objection in principle to the filing of a verbal representation of a sign such as that in question in the present case (c.f. Case R 156/1998-2 Venootschap onder Firma Senta Aromatic Marketing’s Application) and no objection in principle to the filing of a verbal representation which requires interpretation or analysis in order to detect or demonstrate use of the sign thus represented. It further contended that in the light of those considerations the “**smell, aroma or essence or cinnamon**” should be regarded as a sufficiently unambiguous description of a readily identifiable fragrance to be acceptable for examination with a view to registration under the Act.

On behalf of the Registrar it was accepted that smell marks are not excluded from registration by the provisions of the 1994 Act, Council Directive 89/104/EEC of 21st December 1988 to approximate the laws of the Member States relating to trade marks or Council Regulation (EC) No. 40/94 of 20th December 1993 on the Community trade mark. The Registrar nevertheless maintained:

- (1) that the difficulty of representing smell marks graphically was a problem which could not legitimately be cured by relieving applicants applying for registration of such marks of their obligation to satisfy the statutory requirement for graphic representation;

- (2) that the identity of a smell mark (no less than the identity of any other sign put forward for registration) had to be clearly and unambiguously recorded in the graphic representation filed under Section 32(1)(d) of the Act; and
- (3) that the graphic representation had to be a self-contained and self-sufficient expression of the smell it purported to represent.

Assessed on that basis the words “**the smell, aroma or essence of cinnamon**” were, in the Registrar’s view, too vague and incomplete to identify a smell susceptible of examination with a view to registration.

Decision

It is anticipated that guidance as to the implementation of the requirement for graphic representation in relation to smell marks will, in due course, be provided by the European Court of Justice in answer to the questions referred to it in Case C-273/00 Sieckmann v. German Patent and Trade Mark Office (registered at the Court of Justice under number 618.264 on 10th July 2000). That guidance would have a bearing on the issues which arise for consideration in the present case. The Applicant and the Registrar nevertheless asked me to determine the appeal without waiting for the pending reference to the European Court of Justice in the Sieckmann case to come to a conclusion. For the reasons I gave at greater length in Maasland’s Application [2000] RPC 893 at 900, 901 I consider that it is open to me to proceed as requested. Having regard to the length of time that the relevant application has been pending and the protracted examination to which it has been subjected, I think it is desirable that I should do so.

I take as my starting point the generally accepted proposition that signs do not have to be visually perceptible in order to be capable of registration under the Trade Marks Act 1994, Council Directive 89/104/EEC or Council Regulation (EC) No. 40/94 c.f. the last sentence of Article 15(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (15 April 1994).

Moving forward on that basis I can only conclude that the requirement for graphic representation does not require applicants to perform the impossible task of filing a visible representation from which an invisible sign can be directly perceived. A graphic representation of an invisible sign cannot do more than define the relevant sign in terms of the presentational criteria it must fulfil. That is why I expressed the view in Ty Nant's Application at page 56 that such signs can be taken to have been represented with the required degree of precision when figuratively represented, even though interpretation or analysis might then be required in order to detect or demonstrate use of them.

In my view, the need to have regard to something outside the graphic representation in order to obtain a direct perception of the sign it represents does not always or necessarily indicate that the graphic representation is inadequate for the purposes of examination and registration under the Act. The established practice of accepting graphic representations in which colours are named and identified either "*as shown in the representation on the form of application for registration*" or by reference to Pantone chart numbers suggests otherwise. So does the established practice of accepting graphic representations in which sounds are represented by musical notation. So does the general principle that the use of a trade mark or sign "*otherwise than by means of a*

graphic representation” can sustain rights and give rise to liabilities under the 1994 Act: see Section 103(2).

I agree with the submissions made on behalf of the Registrar to the effect that the identity of a smell mark (no less than the identity of any other sign put forward for registration) has to be clearly and unambiguously recorded in the graphic representation filed under Section 32(1)(d). The focus of attention under Section 32(1)(d) is the particular sign which the applicant is using or proposing to use for the purpose of distinguishing his goods or services from those of other suppliers. That, in the case of a smell, appears to be difficult (and may be impossible) to define independently of the particular olfactant(s) he is using or proposing to use for the purpose of presenting the relevant smell to the noses of people in the market place for his goods or services. The difficulty of attaining precision in the graphic representation of smells was considered by Debrett Lyons in “Sounds, Smells and Signs” [1994] EIPR 540. He noted that sensory evaluation is ultimately subjective and presents obvious problems for a trade mark system which must delimit exclusive rights. This comment is amply borne out by the inability of the Neotronics sensory analysis and graphic profile to provide a graphic representation which could properly be regarded as unique to the Applicant’s **“smell, aroma or essence of cinnamon”** in the present case.

Many factors have a bearing on the perception of a smell. Perceptions are liable to vary accordingly to the nature, purity, concentration, quantity, age and temperature of the relevant olfactant(s). They are also liable to vary under the contemporaneous influence of other olfactants and from one person to the next according to their ability to discern the smell in question. A verbal description of a smell will ordinarily leave readers of the

description free to a greater or lesser extent to decide for themselves what aromas can be regarded as examples of that smell. They may well be unable to make such a decision without sampling the smell from different available sources in natural or synthetic form. Words which merely describe a smell by reference to the olfactory perceptions of people exposed to it are thus liable to cover a range of perceptions linked to a range of precipitating sources.

The Applicant is not seeking to register a series of trade marks (c.f. Section 41 of the Act). So the question at issue is whether the identity of a single sign susceptible of examination with a view to registration is clearly and unambiguously recorded in the words **“the smell, aroma or essence of cinnamon”**. If so, the notice of deficiency given under Rule 11 will have been irregular and the application for registration should be regarded as still pending for the purposes of substantive examination. If not, the application must be deemed under Rule 11 never to have been made.

Cinnamon is the name given to the spice obtained from the bark of certain trees of the laurel family. I understand that true cinnamon comes from the inner bark of the *Laurus Cinnamomum*, a native of Sri Lanka, and base cinnamon comes from *Laurus Cassia*, a native of tropical Asia. I also understand that cinnamon from the bark of these trees comes in different forms and concentrations with differing degrees of aromatic strength. I do not know whether it is possible to produce synthetic olfactants which emit fragrances describable as **“the smell, aroma or essence of cinnamon”**, but I would expect that to be the case. So far as I am aware, the composition of the “cinnamon essence” referred to in Mr. Lewis’s evidence on behalf of the Applicant has not been

identified and the source of the aroma to be emitted by the “scent strips” the Applicant intends to use for promotional purposes has not been specified.

A person’s perception of the smell of cinnamon is liable to be influenced by the context in which he or she has experienced it. I do not know how many different ways there are in which people can experience the smell of cinnamon. I believe that they go beyond those related to cookery and the preparation of alcoholic drinks and into the realms of toiletries and air fresheners. I am unsure whether or how far they may go beyond that. When the hearing officer indicated at the hearing on 19th May 1997 that *“cinnamon was probably as unambiguous a smell as it was possible to get”* she was inevitably drawing upon her own experience of particular sources of the smell she was referring to. She could not assume that other people would generally interpret the expression **“the smell, aroma or essence of cinnamon”** in the same way and to the same effect as she did. That is why she declined to accept that the words in question were sufficient, in and of themselves, to provide a clear and unambiguous record of the mark the Applicant was seeking to register.

I would have been prepared to accept that an application to register the smell of cinnamon as emitted by x (with the nature and condition of x clearly and unambiguously defined) was capable of satisfying the requirement for graphic representation if x, in the condition thus defined, was and was likely to remain generally accessible for use as a benchmark of the specified smell. However, as matters stand I am not persuaded that the identity of a single sign susceptible of examination with a view to registration can be said to have been clearly and unambiguously recorded in the words **“the smell, aroma or essence of cinnamon”**. In my view, the wording lacks precision as a result of the degree

of subjectivity it allows in the determination of the question whether a fragrance exemplifies “**the smell, aroma or essence of cinnamon**” and the extent to which the differing perceptions of different individuals can equally well be regarded as benchmarks for the interpretation of the wording in question. I do not think that it provides people with as much information as they would realistically need to know in order to determine how closely a given smell matches the one which the graphic representation is intended to identify. I therefore consider that the notice of deficiency was correctly issued by the Registrar under Rule 11 of the Trade Marks Rules 1994 in the present case.

Conclusion

The Applicant’s appeal from the decision issued by the Registrar on 16th June 2000 will be dismissed for the reasons I have given above. In the absence of any reason to depart from the usual practice in relation to appeals of the present kind, the appeal will be dismissed with no order as to costs.

Geoffrey Hobbs Q.C.

19th December 2000

Christopher Morcom Q.C. instructed by Messrs Frank B. Dehn & Co appeared on behalf of the Applicant.

Allan James, Principal Hearing Officer, appeared on behalf of the Registrar.