

TRADE MARKS ORDINANCE (Cap. 559)

APPLICATION NO.: 300118566

APPLICANT : EARLY LEARNING CENTRE LIMITED

CLASSES: 9, 16, 35

MARK: 'EARLY LEARNING CENTRE'

STATEMENT OF REASONS FOR DECISION

Background

1. On 27 November 2003, Early Learning Centre Limited of Swindon, U.K., applied to register the mark 'EARLY LEARNING CENTRE' in respect of the following goods and services under the Trade Marks Ordinance ('the Ordinance'):

Class 9

electrical and electronic apparatus and instruments; instructional, teaching and measuring apparatus and instruments; adding machines; calculators; amusement machines; batteries; computers; computer hardware, software and firmware; lamps; scientific apparatus and instruments; apparatus and instruments all for the recordal, storage transmission and reproduction of audio, visual and audio visual data; viewers and projectors; buoyancy aids; parts and fittings for the aforesaid goods.

Class 16

papers; cardboard; articles of paper or of cardboard; portable printing sets, modelling materials; chalk; books; printed matter; greeting cards; printed publications; photographs, pictures and posters; charts; stationery; artists and writing implements and materials; instructional and teaching materials; glues and adhesives; paint brushes; albums; babies and children's napkins of paper; blackboards, drawing boards and easels; transfers; plans, maps and globes; erasers; alphabetic letters and numeral symbols; stencils; cases and holders for the aforesaid goods; parts and fittings for all the aforesaid goods.

Class 35

bringing together, for the benefit of others, a variety of goods through a retail outlet to enable customers to conveniently view and purchase those goods; the bringing

together, for the benefit of others, of a variety of goods through a home shopping channel to enable customers to conveniently view and purchase those goods by means of telecommunications or the internet; the bringing together, for the benefit of others, of a variety of goods found in a home shopping catalogue, enabling customers to conveniently view and purchase those goods by mail order by means of telecommunications or the Internet; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods from a general merchandise Internet website.

2. At the examination stage, objections were raised under section 11(1)(b) and (c) of the Ordinance.
3. The applicant called for a hearing which took place on 11 April 2005. Ms Sandy Wong of Messrs Dibb Lupton Alsop appeared on behalf of the applicant. I reserved my decision at the end of the hearing.
4. The applicant did not file any evidence of use of the mark. I therefore have only the *prima facie* case to consider.

The Trade Marks Ordinance

5. Section 11(1) of the Ordinance is as follows:
 - (1) Subject to subsection (2), the following shall not be registered –
 - (a) ...
 - (b) trade marks which are devoid of any distinctive character;
 - (c) trade marks which consist exclusively of signs which may serve, in trade or business, to designate the kind, quality, quantity, intended purpose, value, geographical origin, time of production of goods or rendering of services, or other characteristics of goods or services; and
 - (d) ...

Decision

6. The subject mark comprises the words ‘EARLY’, ‘LEARNING’ and

‘CENTRE’ in plain block capital letters. These are ordinary English words in common use.

7. According to the Concise Oxford Dictionary (8th edition, 1990), one of the meanings of the word ‘EARLY’ is ‘of childhood, esp. the preschool years (*early learning*)’, and the word ‘LEARNING’ means ‘knowledge acquired by study’. The combination ‘EARLY LEARNING’ is therefore a meaningful term referring to childhood learning.
8. The meaning of ‘CENTRE’ includes the following:
 - ‘a place at which some specified activity is concentrated: *a shopping centre*’; ‘a person or thing that is a focus of interest’ – Collins English Dictionary (Millennium Edition);
 - ‘a point of concentration or dispersion’ – Concise Oxford Dictionary (8th edition, 1990);
 - ‘a focus of interest or concern’; ‘a principal point, place or object’; ‘an office or other facility providing a service’ – Random House Webster’s College Dictionary (1991).

In this sense the word ‘CENTRE’ can refer to a place, a facility or a focus of interest.

9. There does not appear to be an entry for ‘EARLY LEARNING CENTRE’ in the above dictionaries. However, an Internet search conducted at the examination stage shows that the term ‘EARLY LEARNING CENTRE’ is commonly used to refer to a place where early learning activities take place.

Section 11(1)(c)

10. Section 11(1)(c) of the Ordinance precludes from registration marks consisting exclusively of signs which may serve, in trade or business, to designate characteristics of the goods or services in respect of which registration is sought.
11. At the hearing Ms Wong submitted that none of the goods and services applied for specify that they are ‘for young children and/or for use in early

learning centres, kindergartens and nursery centres’, and that the mark is therefore not descriptive of the applied for goods and services.

12. The applied for goods in Classes 9 and 16 cover a variety of goods including electrical and electronic apparatus, computer hardware and software, printed matter, stationery etc. Although they do not specify goods ‘for young children and/or for use in early learning centres’, the ambit of the applied for goods is sufficiently wide to cover goods related to early learning, e.g. computer products and printed matter designed for use by young children for learning purposes. Some of the applied for goods are also particularly appropriate for use in a learning environment for young children, e.g. instructional and teaching apparatus, instructional and teaching materials, blackboards, drawing boards, alphabetic letters and numeral symbols etc.
13. The applied for services in Class 35 are the bringing together of a variety of goods through different means (i.e. retail outlet, home shopping channel, mail order, and Internet website) to enable viewing and purchasing by customers. These are essentially retail services provided through the various means. The goods sold under the applied for services are not specified or limited to particular categories, and can therefore include goods related to early learning.
14. On the interpretation of section 11(1)(c) of the Ordinance, Ms Wong sought to rely on the ‘BABY-DRY’ case (Case C-383/99P) (European Court of Justice). I have considered the case but subsequent to that decision, the European Court of Justice clarified the approach to Article 7(1)(c) of the Council Regulation on the Community Trade Mark 40/94 (which is the equivalent of section 11(1)(c) of the Ordinance) in a number of cases, including *Wm. Wrigley Jr. Company v OHIM* (Case-191/01 P) (the ‘DOUBLEMINT’ case). The relevant principles are as follows:

‘In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provisions itself indicates, that such signs and indications could be used for such purposes. A sign must therefore

be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.': the 'DOUBLEMINT' case at paragraph 32.

15. In order to determine whether the mark is objectionable under section 11(1)(c) of the Ordinance, the question to be asked is whether the term 'EARLY LEARNING CENTRE' may serve to designate characteristics of the applied for goods and services.
16. While 'EARLY LEARNING CENTRE' does not appear to be defined in a dictionary, it has a readily apparent descriptive meaning and is often used as a description of a place where early learning activities take place. The mark, being a combination of three common dictionary words, conveys a message that is no more than the sum of its parts. In the context of the applied for goods, 'EARLY LEARNING CENTRE' can be used to describe the fact that the goods are suitable for use at places where early learning activities take place, i.e. early learning centres. In the context of the applied for services, 'EARLY LEARNING CENTRE' can be used as a description of the nature of the retail services, i.e. a place or facility supplying goods related to early learning. The subject mark therefore may serve to designate characteristics of the applied for goods and services, and other undertakings may legitimately also wish to use the term 'EARLY LEARNING CENTRE' to describe their similar goods and services.
17. For these reasons I find that the subject mark consists exclusively of a sign which may serve, in trade or business, to designate characteristics of the applied for goods and services, and it is excluded from registration by section 11(1)(c) of the Ordinance.

Section 11(1)(b)

18. Section 11(1)(b) of the Ordinance precludes from registration signs which are devoid of any distinctive character. For a mark to possess the relevant distinctive character within the meaning of this provision it must serve to identify the applied for goods or services as originating from a particular undertaking. Such distinctive character is to be assessed by reference to the goods or services in respect of which registration is sought, and from the

perspective of reasonably well informed and circumspect consumers of those goods or services (*Nestle SA's Trade Mark Application (Have a Break)* [2004] F.S.R. 2).

19. I must therefore assess the subject mark's distinctive character by reference to the applied for goods and services, and from the perspective of the average, relevant consumers. The application covers a variety of goods and retail services, including goods and services related to early learning. The average, relevant consumers in this context are essentially members of the general public.
20. In this regard the applicant submitted that since the subject mark is not descriptive of the applied for goods and services, no objection should be raised under section 11(1)(b) of the Ordinance.
21. As indicated above, the subject mark is a combination of three common dictionary words and it has a readily apparent meaning. The mark does not contain any graphic or semantic modification, and is likely to be seen as a combination of the term 'EARLY LEARNING' and the word 'CENTRE'. When it is used in respect of the applied for goods, the average relevant consumers are, on first impressions, likely to perceive the mark as an indication that the goods come from a place with a focus on early learning activities, i.e. an early learning centre, or alternatively, that the goods are intended for use in early learning activities. When the mark is used in respect of the applied for services, they are likely to perceive the mark as an indication that the service provider is a place or facility with a focus on early learning, i.e. where goods related to early learning activities can be obtained. Such consumer perceptions would be particularly strong where the applied for goods, or the goods sold under the applied for services, are goods designed for young children for learning purposes.
22. Without first being educated that the mark is used and intended to be used as an indication of trade origin, the average, relevant consumers' perception of the mark is likely to be origin neutral rather than origin specific. The mark does not serve to identify the applied for goods and services as originating from a particular undertaking, and thus it fails to distinguish those goods and services from similar goods and services of other undertakings. I therefore

conclude that the subject mark is devoid of any distinctive character, and it is excluded from *prima facie* acceptance under section 11(1)(b) of the Ordinance.

Other issues

23. At the hearing Ms Wong referred to the applicant's other submissions made during the examination stage, including a list of overseas registrations. I have considered these submissions but do not find them relevant or of assistance to the applicant. In particular, I note that all four UK registrations on the list were accepted on the basis of 'special circumstances', with two of them accepted under the old Trade Marks Act 1938. These registrations therefore provide little support to the applicant's case. As there are valid grounds of objection under the Ordinance, I am not prepared to accept the subject mark merely on the basis of the overseas acceptances.
24. Ms Wong also raised the issue of Internet search result at the hearing. As indicated above, at the examination stage a search was conducted on the Internet, and the applicant's attention was drawn to a number of websites which show that the term 'EARLY LEARNING CENTRE' is often used to describe a place where early learning activities take place.
25. Ms Wong contended that because the websites are all based overseas, their use of the term 'EARLY LEARNING CENTRE' is not conclusive and they should not be considered relevant to the subject application. In this regard she also contended that the Registrar should follow the Practice Amendment Circular PAC 11/00 issued by the Trade Marks Registry of the UK Patent Office.
26. I note the UK Registry's practice on the use of Internet references, but the Hong Kong Registrar's practice is set out in the chapter on 'Search' of the Trade Marks Registry Work Manual. In examining trade mark applications filed in Hong Kong, I do not believe the Registrar should exclude websites merely on the basis that they are overseas websites. Hong Kong has always been a city open to international trends and influences, and overseas websites can give a general indication of how a mark would be likely to be used by traders in Hong Kong or viewed by consumers in Hong Kong. I do not find

that the applicant has put forward any persuasive argument for the Registrar to ignore relevant overseas websites in examining trade mark applications.

Conclusion

27. In this decision I have considered all the documents filed by the applicant and all the arguments submitted in relation to this application. For the reasons given I refuse the application under section 42(4)(b) as the subject mark is excluded from registration by section 11(1)(b) and (c) of the Ordinance.

Andy Lau
for Registrar of Trade Marks

9 August 2005