



**DECISION
of the Second Board of Appeal
of 10 December 2014**

In Case R 1993/2014-2

ResMed Limited

1 Elizabeth Macarthur Drive
Bella Vista, New South Wales 2153
Australia

Applicant / Appellant

represented by VOSSIUS & PARTNER, Siebertstr. 4, DE-81675 München, Germany

APPEAL relating to Community trade mark application No 12 503 645

THE SECOND BOARD OF APPEAL

Composed of T. de las Heras (Chairperson), C. Govers (Rapporteur) and H. Salmi (Member)

Registrar: H. Dijkema

gives the following

Decision

Summary of the facts

- 1 By an application filed on 15 January 2014, ResMed Limited ('the applicant') sought to register the figurative mark



after an amendment for the following list of goods and services:

Class 9 – Computer software for controlling a medical ventilator; Computer software for use in conjunction with patient management, inventory management and compliance and therapy management in the field of respiratory disorders;

Class 10 – Medical ventilators and parts therefor; respirators for artificial respiration and parts therefor; Humidifiers for medical use and parts therefor; Medical apparatus, namely, continuous positive airway pressure (CPAP) and automatic positive airway pressure (APAP) devices and parts therefor; Respiratory masks for medical purposes and parts therefor; Headgear for medical respiratory masks and parts therefor; Respiration monitors and parts therefor; Medical, dental and oral devices for treating bruxism, respiratory sleep disorders and snoring and parts therefor; Medical apparatus and instruments for monitoring respiratory events and system that transmits the data through the Internet and parts therefor;

Class 41 – Education services, namely, providing a learning center featuring training in relation to the management of sleep apnea and other sleep disordered breathing conditions; providing informal online training programs in relation to the management of sleep apnea and other sleep disordered breathing conditions; and providing personal instruction and coaching in relation to the management of sleep apnea and other sleep disordered breathing conditions; providing educational information in relation to the management of sleep apnea and other sleep disordered breathing conditions;

Class 42 – Providing temporary use of on-line non-downloadable software and applications for patient monitoring and compliance management in the field of sleep-disordered breathing; Providing an online web-based application and non-downloadable software for the purposes of tracking, monitoring and reporting of patient diagnostic, compliance and therapy data collected from patient monitoring devices, in the field of sleep-related breathing disorders;

Class 44 – Medical services in relation to the management of sleep apnea and other sleep disordered breathing conditions.

- 2 On 29 January 2014, the examiner issued a notice of grounds for refusal of application for a Community trade mark, stating that the trade mark applied for was not eligible for registration under Article 7(1)(b) and 7(2) CTMR as it is descriptive and devoid of any distinctive character in relation to the goods and services applied for. Its arguments are summarized as follows:

- The list of goods and services covers rather specialised goods and services that will be bought or directed to specialised trade circles. The awareness of the relevant public will be high. In part also the general public might be relevant such as in Class 41. In this case the awareness will be at least average.
 - The picture shows the image of sinus lines, which is formed of several dots. The features of the representation under examination are not distinctive for the goods and services at issue. There is nothing remarkable about this sign that would enable people to remember it the next time they are confronted with the goods or services.
- 3 On 13 March 2014, the applicant submitted its observations in reply, in which it stated that the mark applied for has at least a minimum degree of distinctiveness necessary to surmount the bar posed by Article 7(1)(b) CTMR and requested to withdraw the objection thereby allowing the application to proceed to registration. According to the examiner, the applicant based its observations on the following counter-arguments:
- The refusal lacks substantiation;
 - The sign is distinctive;
 - It is true that certain figurative elements may lack distinctive character, but a direct association with the goods has to be shown;
 - The objection is not in line with the judgment in C-273/05 ‘CELLTECH’ (19.04.2007, C-273/05 P, Celltech, EU:C:2007:224), where the Board of Appeal did not show that the mark was descriptive for the goods and services at issue;
 - It is not true that the applicant would have to submit at the date of filing all documentation available to prove that the application is apt to serve as a distinctive sign;
 - The application does not concern a product or shape, so a difference exists to the case T-129/04 Develey-Flasche (15.03.2006, T-129/04, Plastikflaschenform, EU:T:2006:84), moreover the sign is not a conventional sinus sign. It is not commonplace. The sign is endowed with a minimum degree of distinctiveness.
- 4 By decision dated 14 July 2014 (‘the contested decision’), the examiner upheld his earlier objection and rejected the CTM application in its entirety for not being eligible for registration under Article 7(1)(b) and 7(2) CTMR. In addition to the reasons put forward in his previous notice of objection, the examiner stated in essence the following:
- The goods and services are rather specialised and will be bought or directed to specialised trade circles. The awareness of the relevant public will be high. In part also the general public might be relevant such as in Class 41, in which the awareness will be at least average.

- A sign of extreme simplicity that consists of a basic geometrical figure is, in principle, incapable of transmitting a message that allows consumers to perceive it as a trade mark, unless it has acquired distinctiveness because of its use (see, by analogy, judgments of 13.04.2011, T-159/10, Parallélogramme, EU:T:2011:176, § 24 and of 12.09.2007, T-304/05, Pentagon, EU:T:2007:271, § 23). As in the present case, figurative elements which are so minimal in nature and do not possess any feature, particularly in terms of fancifulness or as regards the way in which they are combined, do not endow a sign with any distinctive character (see decision of 14 November 2012, R 2600/2011-1, ‘device of a black and white pattern’, para. 43).
- The sign is made up of various circles, which together form a line, which reminds one of a sinus line. From the perspective of the average consumer of the goods and services at issue the sign represents a simple line. In the mark applied for, neither the shape of the circles, nor the way in which they are combined are immediately noticeable features which would catch the average consumer’s attention. As such, the average consumer will give to the arrangement of the shapes any further thought and memorize details (*sic*) and will consider it as a sign that identifies the commercial origin of the goods in question.
- It also has to be considered that the goods and services are medical related (offered in the medical field or have a medical purpose). Often on an apparatus lines or diagrams are shown. Thus, also a certain link exists with the goods and services at issue.
- The examiner cannot find any eye-catching feature in the sign itself or in the combination of its constituting elements which could allow the relevant public to immediately perceive it as an indicator of the commercial origin of the designated goods.
- The sign at issue is rather decorative, it will be seen as simple shape. It is true, that the sign is always seen in connection with specific goods and services, but this does not change, what has been said above. Placed on any of the goods applied for or marketed in connection with any services above (e.g. when put on a webpage, etc.) it is unlikely that consumers will see it as a badge of origin. Simple shapes like lines, simple geometric shapes and the like lack distinctive character.
- As to the counter-argument of the applicant relating to judgment of 19.04.2007, C-273/05 P, Celltech, EU:C:2007:224, in the present case not a word mark, but a figurative sign is at issue. Thus an important difference exists in this regard.
- The examiner is of the opinion that the sign is not distinctive, so a difference exists to the case T-129/04, Develey-Flasche (15.03.2006, T-129/04, Plastikflaschenform, EU:T:2006:84). Nevertheless Article 7(1)(b) applies as the sign is very simple, rather decorative and in the opinion of the examiner non-distinctive.

- 5 On 30 July 2014, the applicant filed a notice of appeal against the contested decision. The statement of grounds was received on 2 October 2014.
- 6 In accordance with Article 61 CTMR, the appeal was submitted to the Examination Division for revision. Revision was not granted and the case was remitted to the Boards on 20 October 2014.

Grounds of appeal

- 7 The applicant requests that the contested decision be repealed in its entirety and that the Community trade mark application be accepted for registration. As to its statement of grounds, the submissions of the applicant are the following:
 - As the examiner correctly stated, ‘the list of goods and services covers rather specialized goods and services that will be bought or directed to specialized trade circles. The awareness of the relevant public will be high. In part also the general public might be relevant such as in Class 41. In this case the awareness will be at least average’ (see contested decision, page 3, paragraph 4). Most of the goods and services claimed for form part of a highly specialized and regulated market (see, by analogy, decision of 14 March 2013, R 1968/2012-1, ‘Darstellung einer Strichabfolge’, para. 22). Thus, the relevant consumer’s degree of attentiveness is, to a great extent, above average (see in this regard, decision of 29 January 2014, R 1143/2013-5, ‘Device of a. Chevron’, para. 14) will perceive the sign as an element which distinguishes the applicant’s goods and services from those of its competitors.
 - The examiner argued that ‘from the perspective of the average consumer of the goods and services at issue the sign represents a simple line’ (see contested decision, page 3, para. 7). A sign of extreme simplicity that consists of a basic geometrical figure is, in principle, incapable of transmitting a message that allows consumers to perceive it as a trade mark, unless it has acquired distinctiveness because of its use’ (see, by analogy, judgments of 13.04.2011, T-159/10, Parallélogramme, EU:T:2011:176, § 24 and of 12.09.2007, T-304/05, Pentagon, EU:T:2007:271, § 23).
 - Nonetheless, the mark at issue is not a simple geometric shape. It does not consist of a simple line, but of the arrangement of 22 black dots forming a curve with a wider shape at its ends and a narrower shape in the middle. As far as simple figures like dots are combined in different sizes forming a memorable and peculiar figure, there is no reason why the sign in question should be precluded from registration (see, by analogy, decisions of 30 April 1999, R 182/1998-1, Sedici Quadrati, §§ 11-13; and of 26 March 1999 R 199/1998-2, §§13-15).
 - The overall shape is novel, aesthetic and designed to appeal to the eye and is thus capable of creating in the minds of the relevant consumers the necessary link with the applicant’s undertaking (see, by analogy. decision of 16 May 2001, R 487/2000-3, § 6).
 - The examiner cited paragraph 43 of the decision of 14 November 2012, R 2600/2011-1, in order to conclude that ‘figurate elements which are so

minimal in nature and which do not possess any feature, particularly in terms of fancifulness or as regards the way in which they are combined which would allow that mark to fulfil its essential function in relation to the goods covered by the trade mark, do not endow a sign with any distinctive character’.

- Nevertheless, the applicant is of the opinion that this decision cannot have an influence on the outcome in the present case. Indeed, this decision concerned the representation of a geometrical figure, namely a rectangular shape showing a pattern in black and white made up of 42 identical squares (see R 2600/2011-1, cited, para. 24). In said case, the Board concluded that the mark applied for affixed on the surface of the products claimed would be perceived as forming part of their appearance itself and embodied a certain part of their characteristics, with the result that it was likely to be perceived primarily as a technical means of rendering the goods in question more absorbent or being impregnated with a cleaning substance (see R 2600/2011-1, cited, para. 32).
- This is clearly not the case here since the examiner refused the application of the mark applied for because it represented ‘a simple line’ (contested decision, page 3, para. 7) and not for representing the appearance of the goods (see R 2600/2011-1 cited, para. 34) or services· nor their inherent characteristics (see R 2600/2011-1, cited, para. 38).
- Even if the mark applied for is not particularly a complex one, it cannot be alleged that it is devoid of any distinctive character pursuant to Article 7(1)(b) CTMR. It is not difficult to imagine 22 black dots forming a curve, with a wider shape at its ends and a narrower shape in the middle, functioning as an indication of origin when affixed on the visible surface of e.g. computer software cases or medical apparatus or used in relation with education services, provision of non-downloadable software or medical services. Thus, the mark should not be precluded from registration on the basis of lack of distinctive character (see, by analogy, decision of 30 April 2001, R 15/2000-1, para. 16).
- The examiner made no attempt to establish the soundness of his findings. In order to justify its refusal, the examiner additionally pointed out that there is a ‘certain link’ between the sign and the goods and services at issue since ‘often on apparatus lines or diagrams are shown’ (see contested decision, page 3, para. 8).
- Even if it is possible for the Office to justify the applicability of absolute grounds of refusal based on a global examination of the goods and services and the sign applied for, this can only be done with regard to a homogeneous category of goods and services (see judgment of 21.03.2014, T-81/13, Bigtra, EU:T:2014:140, § 43). By merely stating that ‘the goods and services are medical related’ (see contested decision, page 3, para. 8), the examiner has clearly not assessed the distinctiveness of the trade mark at issue by reference to the goods and services applied for.
- The applicant does not see how the relevant consumers would establish a link between all of the diversified goods and services e.g. ‘computer .software for

use in conjunction with patient management inventory management and compliance and therapy management in the field of respiratory disorders' in Class 9, 'humidifiers for medical IQS and parts therefor, respiratory masks for medical purposes and parts thereof; headgear for medical respiratory masks and parts therefor; medical, dental and oral devices for treating bruxism, respiratory sleep disorders and snoring and parts therefor' in Class 10, 'education or online training' in Class 41, the 'provision of temporary use of on-line non-downloadable software and application for patient monitoring and compliance management' in Class 42 or 'medical services' in Class 44 and the sign at issue.

- The sign is not clearly recognizable as a particular image depicting anything of meaning in the context of the range of goods and services specified above. As stated in the reply of 13 March 2014 to the Notice of grounds for Refusal of Application, the sign at hand is not a sinus line since it consists of a sequence of points of different size and is not integrated into a diagram.
- The logo is attached to the goods in the form of a trade mark only to identify the origin of the goods and it does not convey any functional information to the consumer about or in connection with the use of the goods. Thus, due to the lack of informational content incorporated in the logo applied for, this logo, which is not a functional sinus line, is not used by the industry manufacturing the medical apparatus and the appertaining management software in order to describe the function or character of the respective medical apparatus and the corresponding management software. Consequently, the sign at hand is not commonly used for the highly specialized goods applied for in Classes 9 and 10 and in particular not used in the very special shape consisting of dots of different sizes.
- It has to be noted that the fact that the sign at issue may evoke certain features of the goods or services is not sufficient to justify the application of Article 7(1) (b) CTMR, unless it is shown that the relevant public would not be able to distinguish the goods or services of the applicant from those of its competitors (see judgment of 12.07.2012, T-470/09, Medi, EU:T:2012:369, § 32). Thus, even if the sign applied for may evoke some characteristics of a sinus line, this is not enough for establishing a link with the goods and services applied for.
- It is very unlikely that the relevant consumers would perceive the sign applied for as describing the goods and services at issue (see, by analogy, decision of 17 December 2004, R 429/2002-2, 'Orange Streifen', para. 21).
- The applicant does not share the finding of the contested decision that the sign would only be perceived as a trade mark if the relevant consumer were to be prompted beforehand. Rather, it is considered that the properties of the sign are such as to grant it the minimum degree of inherent distinctiveness necessary to allow registration as a CTM.
- In the case at hand, there is no reason to hold that the trade mark for which registration is sought is not capable of creating in the minds of the relevant consumer the necessary link with the goods and services of the applicant's

undertaking. It thus follows that given the specific characteristics of the sign, the relevant consumer, whose degree of attentiveness is above average for the reasons mentioned above would perceive the sign as an element which distinguishes the applicant's goods and services from those of its competitors.

Reasons

- 8 The appeal complies with Articles 58, 59 and 60 CTMR and Rule 48 CTMIR. It is, therefore, admissible.
- 9 Under Article 7(1)(b) CTMR, trade marks which are devoid of any distinctive character must not be registered. If a trade mark has a minimum degree of distinctive character it is not devoid of distinctive character, in which case this ground of refusal cannot apply, as correctly argued by the applicant.
- 10 The signs referred to in Article 7(1)(b) CTMR are signs which are regarded as incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (see judgments of 27.02.2002, T-79/00, Lite, EU:T:2002:42, § 26 and of 27.02.2002, T-219/00, Ellos, EU:T:2002:44, § 28).
- 11 Distinctive character must be assessed solely in relation to the goods for which registration of the sign has been requested and in relation to the perception which the relevant public has of it.
- 12 In the present case, bearing in mind the nature and purpose of the goods applied for in Classes 9 and 10, and the services in Classes 41, 42 and 44, which for the most part are specialized goods and services, mainly aimed at professionals, the relevant public's level of attention will be high. In part, also the general non-professional public might be relevant, such as in respect of the services of Class 41. The awareness of this part of the general public will be at least that of an average consumer, who is reasonably observant and circumspect and reasonably well informed. Consequently, the Board endorses the contested decision's undisputed findings in respect of the level of attention of the relevant public.
- 13 In principle, the relevant public in the various Member States will hold the same view with regard to the intrinsic distinctive character of the sign at issue, i.e. either the trade mark is devoid of any inherent distinctive character in all the Member States or it has the required inherent distinctive character everywhere. Linguistic differences do not play a part in this context, as opposed to situations involving word marks. Thus, in light of the foregoing, the relevant public is to be found within the entire European Union.
- 14 In the case at hand, the examiner found that the features of the representation contained in the contested sign are not distinctive for the goods and services at issue, and that there is nothing remarkable about the contested sign that would enable people to remember it the next time confronted with the contested goods and services. The sign represents a simple line. Neither the shape of the dots, nor the way in which they are combined are immediately noticeable features which would catch the average consumer's attention. The examiner further stated not to be able to find any eye-catching feature in the sign.

- 15 The Board recalls that the registration of a sign as a trade mark is not subject to a finding of a specific level of linguistic or artistic creativity or imaginativeness on the part of the proprietor of the trade mark, nor need there be any particularly eye-catching features present. It suffices that the trade mark should enable the relevant public to identify the origin of the goods or services protected thereby and to distinguish them from those of other undertakings (see judgment of 16.09.2004, C-329/02 P, SAT.2, EU:C:2004:532, § 41).
- 16 It must be borne in mind that according to the Court of First Instance, a sign of extreme simplicity that consists of a basic geometrical figure is, in principle, incapable of transmitting a message that allows consumers to perceive it as a trade mark, unless it has acquired distinctiveness because of its use (see, by analogy, judgments of 13.04.2011, T-159/10, Parallélogramme, EU:T:2011:176, § 24; of 12.09.2007, T-304/05, Pentagon, EU:T:2007:271, § 23; and of 12.11.2008, T-400/07, Farben in Quadraten, EU:T:2008:492, § 44).
- 17 As noted by the applicant, the contested sign does not merely consist of a simple line, but rather of an arrangement of 22 black dots forming a curve with a wider shape at its ends and a narrower shape in its middle part. In fact, the dots are combined in different sizes, thus forming a curve with varying width. In view of this, the Board finds that the contested sign cannot be seen to be an extremely simple variation on a basic geometric shape.
- 18 There is no indication at all that the contested sign is a mere variation on a basic shape commonly used on the goods or with the services, nor is it a well-known fact, derived from common knowledge or everyday experience, that such a sign is banal or commonplace. In the Board's opinion, the contested sign is, at least to some degree, fanciful and, hence, distinctive.
- 19 The Board agrees with the applicant that no valid reasons have been put forward indicating that the contested sign would establish a link between the sign and all of the contested goods and services. The mere statement that all goods and services are related to medicine does not at all suffice to argue that the contested sign is non-distinctive in relation to all such goods and services. The contested sign can indeed be perceived as an indication of origin, for example, when used as a logo, for instance, on the goods or on their packaging.
- 20 In the Board's view, the mark applied for is simple; however, it is not commonplace for the goods and services in question. No sound reasons have been given as to why it might not be capable of distinguishing the applicant's goods and services from those of competitors.
- 21 In conclusion, the Board believes that the mark applied for has at least the minimum degree of distinctiveness necessary for it to surmount the barrier posed by Article 7(1)(b) CTMR. Therefore, no objection under Article 7(1)(b) CTMR arises. It follows that the appeal must be upheld, the contested decision annulled and the mark may be accepted for publication for all the goods and services applied for.

Order

On those grounds,

THE BOARD

hereby:

- 1. Annuls the contested decision;**
- 2. Allows the Community trade mark application for publication for the goods and services applied for and as amended.**

Signed

T. de las Heras

Signed

C. Govers

Signed

H. Salmi

Registrar:

Signed

H.Dijkema

