



**DECISION
of the Cancellation Division
of 09/09/2008**

IN THE PROCEEDINGS FOR A DECLARATION OF INVALIDITY

OHIM reference number: 1210C
Community trade mark: 3 047 834 BACH FLOWER
REMEDIES
Language of the proceedings: English

APPLICANT

Healing Herb Ltd.

P.O. Box 65
Walkerstone
Hereford HR2 0UW
United Kingdom

REPRESENTATIVE

Taylor Wessing Llp

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50 Victoria Embankment
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London EC4Y 0DX
United Kingdom

**COMMUNITY TRADE MARK
PROPRIETOR**

Bach Flower Remedies Ltd.

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Wimbledon
London SW19 9UH
United Kingdom

REPRESENTATIVE

Beck Greener

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THE CANCELLATION DIVISION

composed of: Wouter Verburg, Alvaro Sesma and Alexandra Apostolakis has taken the following decision on 09/09/2008:

- 1. The registration of Community trade mark No 3 047 834 BACH FLOWER REMEDIES is declared invalid for all goods.**
- 2. The costs of the applicant shall be borne by the proprietor of the Community trade mark.**

And fixes the costs as follows:

The amount of the costs to be paid by the CTM proprietor to the applicant pursuant to Article 81(6) CTMR in conjunction with Rule 94(3) IR shall be: 1150 Euro (450 Euro - representation costs - and 700 euro - invalidity fee -).

FACTS AND ARGUMENTS

- (1) The Community trade mark No 3047834 BACH FLOWER REMEDIES (word mark) was filed on 06/02/2003 and registered on 06/05/2005 for *flower remedies and flower essences; preparations and substances for treating and alleviating emotional and/or psychological states and disorders in class 5*.
- (2) On 12/05/2005 the applicant filed a request for declaration of invalidity on the basis of absolute grounds. The applicant bases his request on Article 51(1)(a) CTMR, and claims that the mark should be declared invalid pursuant to Article 7(1) (a) (b),(c), and (d) CTMR.
- (3) The applicant further contends that the Community trade mark should be declared invalid according to Article 51(1)(b) CTMR. The CTM proprietor, had full knowledge of the fact that "BACH FLOWER REMEDIES" was a generic term for the registered goods. It has been applied for in bad faith.
- (4) On 01/09/2005 the Community trade mark proprietor was notified of the request.
- (5) The CTM owner and the applicant have had ample opportunity to present their observations during the proceedings.
- (6) The applicant claims that the term "BACH FLOWER REMEDIES" is descriptive in relation to the goods. The word Bach and the expression Bach flower remedies have been used in Europe since the 1930's to describe flower remedies made in accordance with the directions of the late Dr. Edward Bach for the treatment of emotional and/or psychological conditions regardless of the producer of said remedies. BACH FLOWER REMEDIES

refers to any of a number of preparations of the flowers of plants used in a system of complementary medicine intended to relieve ill health by influencing underlying emotional states. At the date of application for registration on 06/02/2003 the words BACH and BACH FLOWER REMEDIES were generic terms for flower remedies made in accordance with the healing methods/system of Dr. Edward Bach. The word BACH and BACH FLOWER REMEDIES were the subject of litigation in the United Kingdom. An action to invalidate the CTM proprietor's United Kingdom trade mark registrations for or incorporating these word was brought by the applicant before the English High Court (Mr. Justice Neuberger) and subsequently on appeal before the Court of Appeal. The decisions were made final by the highest British court, the House of Lords in July 2000, all decisions confirmed that BACH and BACH FLOWER REMEDIES as word marks could not be registered for the claimed goods in class 5 and should therefore be removed from the Register. In 2001, the applicant also applied to invalidate the Benelux registrations of the CTM proprietor for or incorporating the words BACH and BACH FLOWER REMEDIES in the District Court of the Hague. Here again, the Court gave judgment in favour of the applicant on the grounds that the word BACH and words BACH FLOWER REMEDIES are generic in relation to remedies made according to the methods of Dr. Bach.

(7) The CTM proprietor claims the following: The mark BACH FLOWER REMEDIES is, for the registered goods, eligible for registration. None of the invoked absolute grounds for invalidity apply. The signs derive from the man Dr. Edward Bach who in the 1930s originated medicines known as "flower remedies". Dr. Bach established the CTM proprietor's business and the CTM proprietor is Dr. Bach's successor in business, now conducting the trade in flower remedies which he established more than 70 years ago. It will be appreciated therefore, that the CTM proprietor is not a newcomer but derives its right to the sign in question from the originator of the products and the originator of the business, Dr. Bach himself. Since the outcome of the UK court litigation in 2001 the CTM proprietor has increased the prominence of the signature form of the BACH mark (though not to the exclusion of the pure word marks). The signature form was found by the UK court to be distinctive of the CTM proprietor's products and services and the applicant's request to have the UK registration for the BACH signature declared invalid by the UK court, was therefore refused subject to the CTM proprietor disclaiming the word Bach. The United Kingdom leading health magazines "here's Health" awarded Bach Flower remedies its "best brand in category" for 1997. The words BACH FLOWER REMEDIES were assumed by one of the leading Health magazines in the UK to be a brand name not a generic term. For the period 1997 to 2005 the total value of EU sales by the CTM proprietor was close to approximately 150 million euros. From the 1930s to 1988 the market share in flower remedies enjoyed by the CTM proprietor was virtually 100%. No one aside from the CTM proprietor was making flower remedies on a commercial scale. In the late 1980s, the applicant began to manufacture competitive remedies. Other business followed during the 1990s as the popularity of the CTM proprietor products continued to grow and it became apparent that there was profit to be made. However, while the CTM

proprietor's market share has diminished since 1988 it is still by far the dominant supplier of flower remedies, not just in the UK but throughout the world. Even today the CTM proprietor has approximately an 85% share of the UK market in flower remedies and has a similar proportion of the flower remedy market in other countries. The first trade mark application for the CTM proprietor's business was filed in 1979. It was a UK national application for the mark BACH FLOWER REMEDIES. This application was made almost a decade before the CTM proprietor experienced any commercially significant competition but was filed in the anticipation that, with the popularity of the CTM proprietor's products massively increasing, rival undertakings were likely to be established. During the course of the next several years the CTM proprietors business obtained additional registration in the UK, in other EU countries and in many other territories world wide. It will be noted in particular, that the CTM proprietor has maintained registrations for its BACH marks throughout virtually the whole of what is now the European Union, as well as in many other countries for decades. For instance, the earliest of the CTM proprietor's registrations for its BACH trade marks in Germany dates back to 1981, in Denmark to 1982, in Benelux to 1983, in France to 1987, in Italy and Spain to 1989, in Ireland to 1991 etc. Competitors in Europe did not emerge until 1988/1989 when the applicant began marketing its own range of remedies. In fact, until the conclusion of the UK litigation in 1999/2000 the CTM proprietor was not aware of any other manufacturer of flower remedies in the UK, Europe or elsewhere, labelling or packaging their products as BACH or BACH FLOWER REMEDIES. It must also be borne in mind that in the case of the four UK businesses (the applicant, Ainsworths, Crystal Essences (Colin Burbridge) and Sun Essences (Vivienne Williamson)) the systematic use of the word BACH FLOWER REMEDIES on publicity material and on labelling commenced only at the end of the UK litigation in 1999/2000. The use of the marks in question in titles to books and other publications says nothing about how the words are perceived and used by the relevant public. The references to dictionaries, scientific articles and the British Homoeopathic Pharmacopoeia are neutral and do not show that the sign is generic. The finding in the Court of first instance in the Dutch proceedings concerned the question of whether the marks were distinctive in Holland. It decided nothing about the corresponding position in Belgium or Luxembourg. In any event, the decision is under appeal. More significantly, the applicant has failed to inform that the recent application to have the CTM proprietor's German registration for BACH declared invalid for non-distinctiveness was rejected at first instance and that it withdrew its appeal on being told by the Appeal tribunal that it would not succeed. The decision in Germany is therefore final. The applicant has also failed to inform this tribunal of the decision of the French court of appeal of the court's finding that the mark BACH is distinctive. Also to be taken into account is the decision of the Spanish Court, again refusing to find the Bach mark invalidly registered. One national court has finally ruled that the marks are not distinctive. But two national courts, Germany and Spain have finally reached the opposite conclusion and found in favour of the CTM proprietor. One case, that in Holland, is still pending.

The signs BACH and BACH FLOWER REMEDIES are prima facie distinctive for medicinal products and almost a 100% market share in flower remedies historically is enjoyed by the CTM proprietor. The judgements in the United Kingdom were fundamentally flawed. In Germany the applicant's requests for cancellation have been rejected so far. In the case at issue, there is no evidence that ordinary consumers perceive BACH FLOWER REMEDIES as a product descriptor rather than a brand despite the applicant's assertions to the contrary. The applicant and others are not permitted to call their products Bach Flower Remedies but are entitled honestly and fairly to communicate the fact that their remedies follow Dr. Bach's methods. The CTM proprietor's trade mark registrations for marks consisting of or incorporating the word BACH over most of the European Union and many other countries of the world date back in many cases for decades. The applicant has not provided proper evidence that ordinary consumers perceive the marks as generic. The applicant has the burden of proof in these proceedings. The trade mark is distinctive (not generic) and has not been applied for in bad faith.

(8) On 19/07/2007 the parties were informed that a decision would be taken.

GROUND FOR THE DECISION

On the admissibility

(9) The request complies with the formalities prescribed in the CTMR and the Implementing Regulation and is, therefore, admissible.

On the substance

(10) From the submitted evidence and having regard to the decisions in the United Kingdom concerning the word marks BACH and BACH FLOWERS REMEDIES, it is considered that the applicant has complied with its burden of proof for showing that the registered sign is generic. It is, in the given circumstances, the burden of proof of the CTM proprietor to show that the invoked absolute grounds do not apply or whether it can rely on article 7(3) CTMR and/or Article 51(2) CTMR. In the absence of such evidence in the light of the evidence of the applicant the CTM has to be declared invalid.

(11) According to Article 7(1)(c) CTMR, a trade mark shall not be registered if it consists exclusively of signs or indications which may serve in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of the rendering of the service, or other characteristics of the goods or service.

(12) The contested CTM is registered for *flower remedies and flower essences; preparations and substances for treating and alleviating emotional and/or psychological states and disorders in class 5.*

(13) The CTM consists of the word combination BACH FLOWER REMEDIES. The relevant market is composed of producers, distributors, pharmacists (in some member states BACH FLOWER REMEDIES are sold in pharmacies), retailers (other than pharmacists), health food stores, alternative remedy shops, practitioners (which can include medical professions and veterinary surgeons) and individuals who purchase Bach flower remedies for treating themselves or for others. The word combination will immediately be understood when used in relation to the goods as referring to the characteristics or nature of the goods, i.e. remedies made in accordance with the discoveries and recipes of Dr. Bach. The submitted evidence shows that BACH FLOWER REMEDIES is used with a purely descriptive meaning in the sense of Article 7(1) (c) CTMR in trade.

(14) The abundant evidence filed by the applicant consisting of extracts from dictionaries, encyclopaedias, pharmacopoeias, books scientific articles, judgments from the United Kingdom and Holland as well as examples of use in different Member States of the European Union allow the conclusion that indeed at the date of filing the CTM, BACH FLOWER REMEDIES was a descriptive indication of the goods in question.

(15) The following dictionaries, encyclopaedias and pharmacopoeias, namely

The Shortes Oxford English Dictionary, 2002;
 Oxford Dictionary of New Words, 1991;
 Microsoft Encarta;
 Brockhaus "Die Enzyklopädie", 20th edition 1996, volume 2;
 Pschsyrembel, Wörterbuch Naturheilkunde und alternative Heilverfahren, second edition 2002;
 Roche Lexikon, Medizin (Roche medical encyclopaedia) September 2003;
 Springer Lexikon, Medizin 2004;
 Hunnius, Pharmazeutisches Wörterbuch 2004
 Geneewijzen in Nederland (Methods of Medical Treatment in the Netherlands), Compendium of Alternative Medical Treatments, by Paul van Dijk, general practitioner 1993;;
 Swedish National Encyclopaedia 2000
 and The British Homeopathic Pharmacopeia 1999;

submitted, coincide in defining BACH FLOWER REMEDIES as an alterative medicine healing method using flower extracts named after its inventor Edward Bach. In none of the dictionaries mentioned is reference made to the expression BACH FLOWER REMEDIES as a trade mark.

(16) The CTM proprietor argues that the evidence in the submitted scientific articles is at most neutral and is consistent with the marks being brands. However, seen in context, it is clear from the use of the word BACH, that the scientists (who come from a variety of countries) are using the word BACH descriptively. The articles show that the word BACH is descriptive. The scientific research is focused on the efficacy of different products and

therapies, not brands. As concerns the books submitted as evidence by the applicant it has to be noted that the books are concerned with the product in question, not the product of one manufacturer.

(17) On 04/07/2000, it was confirmed by the Courts in the United Kingdom that BACH and BACH FLOWER REMEDIES are generic terms.

On May 22, 1998, The High Court of England, made the following ruling in response to a suit brought by Healing Herbs, Ltd., against Bach Flower Remedies, Ltd, a subsidiary of the A. Nelson Company:

1. *Both the 'Bach Flower Remedies' trade marks should be removed from the register;*
2. *Both the 'BACH' registered trade marks should be removed from the register;*
3. *Both the 'BACH' trade marks in the signature form can remain on the register, but only provided the respondent is prepared to agree to a disclaimer in relation to the word 'Bach' itself;*
4. *Both the roundel device trade marks may remain on the register, provided the respondent agrees to the disclaimers extending to the word 'Bach' as well as to the words 'Flower Remedies'.*

The suit was brought by Healing Herbs after a number of educational institutions in England and around the world were threatened with law suits for offering classes on the "Bach Flower Remedies" without permission of the Bach Centre. Legal threats were also made directly to the Healing Herbs company.

The High Court agreed with the contention that "Bach Flower Remedies" is a generic term, meaning 'flower remedies prepared in accordance with the teachings of Dr Bach' and... [since they] can be prepared by anybody; they cannot, in principle, constitute a badge of origin, that is, an expression indicating a particular source of the remedies."

The ruling was appealed. On October 21, 1999, the three Justices of the Court of Appeal in the Supreme Court of Judicature upheld the original ruling.

This ruling was then appealed to the British House of Lords, the highest court of appeal in the UK. Both appeals were rejected on July 4, 2000.

(18) The fact that other European countries (Germany, Spain, France, etc) have registered said trade mark for the same goods is not decisive as the Cancellation Division must make its own assessment of the case. The reasons given by the applicant for requesting the cancellation of the trade mark as regards Article 7(1) (c) CTMR are persuasive. It has to be noted that it suffices if the absolute grounds apply in part of the Community, i.e. a Member State in order to declare the CTM invalid in accordance with Article 7(2) CTMR. The Cancellation Division considers that at the date of filing the CTM evidence existed that in the United Kingdom it was a settled issue that

BACH and BACH FLOWER REMEDIES could not be registered as they were generic. Since the decision of the United Kingdom Court dated 04/07/2000 no new facts have been added that show that said decisions are no longer valid in view of a market evolution in the UK. On the contrary more companies have emerged that use said sign in a descriptive sense and in several dictionaries said expressions BACH/BACH FLOWER REMEDIES are mentioned as descriptive terms and not as trade marks.

(19) The fact that the challenged trade mark in the present cancellation proceedings on absolute grounds has been registered for the same goods in other countries does not demonstrate that the challenged sign does not fall foul of Article 7(1) (c) CTMR. At least in the United Kingdom the word BACH or BACH FLOWER REMEDIES has been considered not apt for registration as a trade mark for *flower remedies and flower essences; preparations and substances for treating and alleviating emotional and/or psychological states and disorders in class 5*.

(20) As the relevant consumer considers “BACH FLOWER REMEDIES” a descriptive indication for the goods, and as there are no other elements in the sign, Article 7(1)(c) CTMR in conjunction with Article 7(2) of said Regulation applies because the trademark consists exclusively of a sign which may serve in trade to indicate characteristics, nature or intended purpose of the goods, namely remedies made in accordance with Dr. Bach’s instructions at least in English in the United Kingdom.

(21) It suffices for applying Article 7(1) (c) CTMR that the word combination BACH FLOWER REMEDIES is understood as regards the applied goods as purely descriptive for the relevant circles. This is the case. The goods are directed at the specialised public and the general public. The specialised public will consider said term descriptive of the challenged goods being aware who Dr. Bach was and how the flower remedies have to be prepared. The general public considers Bach flower remedies a generic expression even if it does not necessarily know who Dr. Bach was and how the flower remedies have to be prepared and how the treatment has to be applied. Should anyone become interested in said treatment with Bach flower remedies he will ask the specialised public on the matter. The situation at the date of filing the CTM, i.e. on 12/05/2003 clearly shows that in trade, as evidenced in the dictionaries BACH FLOWER REMEDIES is used as a descriptive indication of the goods. The Cancellation Division considers having regard to Article 7(2) CTMR that it does not see convincing reasons for altering the legal certainty created in the United Kingdom in view of the decisions on the non registrability of the two terms BACH and BACH FLOWER REMEDIES as pure word marks for the applied goods in said market, i.e. part of the Community.

Article 7(3) CTMR and 51(2) CTMR

(22) The CTM proprietor has not proven that the trade mark had acquired distinctive character in accordance with Article 7(3) CTMR or 51(2) CTMR.

(23) Where the CTM has been registered in breach of Article 7(1)(b), (c) or (d) but, as a result of the use made of it, has acquired distinctive character after registration, it may not be declared invalid.

(24) It is exclusively for the proprietor of the CTM to make the claim to acquired distinctiveness and to produce the evidence in support of the claim. The proprietor must demonstrate that at the time the application for invalidity was filed the mark had acquired distinctive character and that this continues to be the situation.

(25) It is important to note that:

- the evidence of use is to be assessed in order to judge whether that use has produced a situation where a mark which would otherwise have to be refused on one or several of the grounds listed in Article 7 (1) (b), (c), and (d) has become distinctive. It is not simply whether and to what extent there has been use;
- the use must be of the trade mark applied for and not a significantly different variation;
- the use must relate to the goods and services the subject of the CTM application;
- only objections under (b), (c) and (d) can be overcome in this fashion.

(26) The fact that the CTM proprietor has a substantial market share, substantial sales and advertising figures in the European Union and in some territories of the European Union, of the remedies sold under or by reference to BACH or BACH FLOWER REMEDIES does not render the word or words to be distinctive of them. The evidence submitted by the applicant showing that the sign was generic at the date of application of the CTM is not contradicted by empirical evidence such as well conducted opinion polls or the like. Even if UK consumers or EU consumers were to recognise the design of the packaging of the CTM proprietor's products, it does not follow that the word BACH has acquired distinctiveness amongst the relevant UK public. The BACH signature if stylised enough as shown in the evidence submitted by the applicant could be the distinctive feature and not the word BACH or the expression BACH FLOWER REMEDIES as such.

(27) No decisive reliance should be placed on the "Here's Health Magazine" 1996 making reference to BACH as the "best marks in categories". The distribution of said magazine has not been properly defined. A few examples where BACH or BACH FLOWER REMEDIES is referred to as a trade mark, if other evidence shows the contrary, is not significant evidence. Said evidence if weighed with the submitted evidence by the applicant does not demonstrate that the trade mark BACH or BACH FLOWER REMEDIES is eligible for registration.

Conclusions

(28) The evidence shows that at the date of filing the CTM, in at least part of the European Community, in particular the United Kingdom, said expression served as a descriptive indication of the nature or characteristics of the goods, namely flower remedies prepared in accordance with the instructions of Dr. Bach. Since the request has been found successful under Article 7(1)(c) CTMR, there is no need to examine whether other grounds for invalidation would apply.

COSTS

(29) Pursuant to Article 81(1) CTMR and Rule 94 IR, the CTM proprietor, as the party losing the cancellation proceedings shall bear the fees and costs of the applicant for cancellation.



THE CANCELLATION DIVISION

Wouter Verburg

Alvaro Sesma

Alexandra Apostolakis

Notice on the availability of an appeal:

Under Article 58 of the Community Trade Mark Regulation any party adversely affected by this decision has a right to appeal against this decision. Under Article 59 of the Regulation notice of appeal must be filed in writing at the Office within two months from the date of notification of this decision and within four months from the same date a written statement of the grounds of appeal must be filed. The notice of appeal will be deemed to be filed only when the appeal fee of 800 euro has been paid.

Notice on the review of the fixation of costs:

The amount determined in the fixation of the costs may only be reviewed by a decision of the Cancellation Division on request. Under Rule 94 (4) of the

Implementing Regulation such a request must be filed within one month from the date of notification of this fixation of costs and shall be deemed to be filed only when the review fee of 100 euro (Article 2 point 30 of the Fees Regulation) has been paid.