

O-026-08

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2398431 BY R S HYGIENE
LIMITED TO REGISTER THE TRADE MARKS AQUAHYDROX and
Aquahydrox IN CLASSES 1 & 5**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO 94333 BY
HYDRO-X INTERNATIONAL A/S**

TRADE MARKS ACT 1994

**IN THE MATTER OF application No. 2398431
by R S Hygiene Limited to register the Trade Marks
AQUAHYDROX and Aquahydrox in Classes 1 and 5**

AND

**IN THE MATTER OF Opposition No. 94333
By Hydro-X International A/S**

Background

1. On 3 August 2005 R S Hygiene Limited (hereinafter referred to as RS) applied to register a series of nine marks which, following examination, were amended to a series of two marks being **AQUAHYDROX** and **Aquahydrox**. The application was published in Trade Marks Journal No. 6619 on 3 February 2006 in respect of the following goods:

Class 1:

Chemicals for use in agriculture; additives for drinking water for livestock.

Class 5:

Additives to livestock drinking water for medical purposes; disinfectants.

2. On 3 May 2006 Hydro-X International A/S (hereinafter referred to as Hydro) filed notice of opposition to this application citing a single ground under Section 5(2)(b) of the Act. Hydro is the proprietor of Community Trade Mark No. 285890 for the following mark:



it is registered for the following goods:

Class 1:

Extracts processed from sea water, algae and from the like sea water organisms for use in preparation of, or for use as, additives designed to inhibit formation of scale or corrosion in hot water systems; chemical preparations

processed from extracts of organic or inorganic nature, for use in steam installations, district heating installations and in other industrial installations to prevent and remove coating, scale and priming.

3. This mark has a filing date of 30 June 1996 and achieved registration on 9 November 1998. It is thus both an earlier trade mark for the purposes of Section 6(1)(a) of the Act and subject to the Trade Marks (Proof of Use, etc.) Regulations 2004. In relation to the latter the notice of opposition indicated that the mark had been used on all the goods for which it is registered.

4. Hydro claims that the trade marks applied for are similar to its trade mark and the goods are said to be identical or similar.

5. RS filed a counterstatement denying the above grounds and putting Hydro to proof of use of the registered mark.

6. Both sides filed evidence and both ask for an award of costs in their favour. The parties were invited to say whether they wished to be heard or to file written submissions. Both parties indicated that they would like a decision to be issued from the papers already filed. Neither party filed any written submissions. After a careful study of the papers I give this decision.

EVIDENCE

Hydro's evidence

7. This evidence consists of two Witness Statements. The first is dated 23 January 2007 and is from Patrick Loveday, for 23 years the Managing Director of Hydro-X Water Treatments Limited, the UK distributor for Hydro-X who are the opponents in these proceedings.

8. Mr Loveday recounts that in 1996 Hydro filed an application to register a stylised version of the word HYDROX as a Community trade mark. Exhibit PL1 is a copy of the certificate relating to the registration of the mark.

9. Mr Loveday says that his company has supplied chemical products for industrial water treatment under the HYDROX trade mark since at least September 1984 and that this mark has been continuously used since then. Exhibit PL2 consists of two product brochures. The first is headed "The function principles of the Hydro-X method – And the advantages of a physical-chemical treatment of boiler water". The bottom right-hand corner of the front and back cover pages show the mark as registered, which is also shown on a photograph of a factory building and a photograph of a van. The brochure otherwise mentions the product as Hydro-X. The contact information on the reverse shows Hydro-X Water Treatment Ltd together with the GB Company No, so is clearly a UK brochure. The brochure is not dated. There is a reference to Hydro-X being Danish technology that has been "exported to more than 40 countries for over 60 years", but nothing to indicate that this includes the UK.

10. The front and back cover pages of the second brochure are headed with the mark as registered, with HYDRO-X WATER TREATMENT LTD placed beneath it in

smaller lettering. At the bottom of the back cover there are details of three offices located in the UK, so this brochure relates to use in the UK. The inside page of the brochure also shows the mark as registered with HYDRO-X WATER TREATMENT LTD placed beneath it in smaller lettering. The information states “Hydro-X produce high quality treatment systems and plant for processing and manufacturing industry. These systems can be used to treat effluent discharges or to recycle rinse waters.” It also lists the company as providing solutions to all water treatment problems, which includes boiler treatment chemicals, cooling-water treatment, chemicals, biocides, demineralization and other ion exchange plant, deaerators, degassers, water softeners and filtration plant.

11. Mr Loveday refers to Exhibit PL3, which consists of product safety information sheets and a selection of invoices. The invoices date between November 2002 and September 2005 and are headed as having originated from HYDRO-X WATER TREATMENT LTD. The product descriptions do not mention either the mark as registered or HYDRO-X, instead referring to various other products such as “Hydrocid”, “Hydrocor” and “Hydroplex”. The product information sheets are headed with the mark as registered, with HYDRO-X WATER TREATMENT LTD in very small lettering beneath, but again the products referred to are “Hydrocid”, “Hydrocor” and “Hydroplex”. Exhibit PL4 consists of a further collection of invoices dating between October 2002 and October 2005, headed HYDRO-X WATER TREATMENT LTD, but this time showing the product as Hydro-X.

12. Mr Loveday gives the approximate turnover figure for goods sold under the registered trade mark as being £170,000 per annum for the years between 2000 and 2005. He says that the figure is an estimate because sales are not broken down by product name. Mr Loveday says that the average cost of a unit is £80, from which he extrapolates that approximately 2,500 units per annum have been sold, which he equates to 1-2% of the boiler treatment market.

13. Mr Loveday says that the amount spent promoting goods under the HYDROX mark in the UK in the years between 2000 and 2005 is approximately £60,000 per annum. Mr Loveday explains that approximate figures are given because his company’s advertising and promotion expenditure is not broken down by product range, but in any event each piece of advertising/marketing material produced will include a reference to the HYDROX product. Exhibit PL5 consists of examples of Hydro’s letter headed paper, sample delivery notes, report sheets and other materials. Most of the material provided shows the mark as HYDRO-X. A customer survey card contains a photograph, included in it is part of building with signage showing the mark as registered, with the words HYDRO-X WATER TREATMENT LTD in smaller lettering underneath. In the same photograph are two vans, both bearing the mark HYDRO-X on the livery, the UK number plates indicate that they were registered no earlier than 2002 and 2003. The label is for HydroX boiler water conditioning agent, and in this case shows the mark as registered accompanied by the letters TM indicating that it is a trade mark, but this cannot be dated as originating within the relevant period.

14. The second Witness Statement is dated 24 January 2007 and is from John Max Wallace, the Trade Mark Attorney representing Hydro. He states that a trade mark search has been carried out for marks with the AQUA prefix. Exhibit JMW1 consists

of a copy of a Marquessa 2000 search report, dated 19 January 2007, which shows 239 marks in either Classes 1 or 5 with the AQUA prefix that are registered in the UK. The evidence does not deal with the extent to which (if any) all or any of these marks have been brought into use in the UK market or what the effect of such use has been on consumer perception. Jacob J, as he then was, said in *British Sugar Plc v James Robertson & Son Ltd (Treat)* [1996] RPC 281 and has been referred to many times since that:

“Both sides invited me to have regard to the state of the Register. Some traders have registered marks consisting of or incorporating the word “treat”. I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the Register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the Registrar to put the marks concerned on the Register.”

15. The state of the register material does not assist.

16. Mr Wallace also states that a search has been carried out for registered companies starting with the AQUA prefix in the UK. This he says produced a large number of hits, although he acknowledges that some of the companies have been dissolved or are in liquidation. Exhibit JMW2 consists of a list of company names and numbers. The document is not dated nor does it have any indication as to where the information has been obtained. Mr Wallace provides no explanation as to why this evidence may be relevant. I do not consider that it is.

RS’s evidence

17. This consists of a Witness Statement, dated 30 April 2007, from Martin John Lipscombe, a Registered Patent Attorney and partner of Nash Mathews, who are RS’s representatives. Mr Lipscombe states that:

“The Witness Statement of Patrick Loveday consistently refers to the opponent’s mark as HYDROX which seems to be a distortion of the true mark. The mark as registered is Hydro X with a space separating the prefix “HYDRO” from the letter X. This is apparent from the CTM register extract presented as exhibit PL1 to the Witness Statement of Mr Loveday. This is significant since the separation of “Hydro” from “X” and the capitalization of the H and X ensures that Hydro X will be viewed as, and pronounced as, two separate elements, “hydro” as in “hydroelectric” and then “X”. This is materially different to the pronunciation of the applicant’s mark AQUAHYDROX. The other exhibits to Mr Loveday’s Statement similarly make clear that the Opponents mark is Hydro spaced from an X. For example, page 1 of exhibit PL2 refers to bold print, in the title of the article, to “principles of the Hydro-X method”. References to “Hydro-X” occur repeatedly throughout exhibit PL2. The various invoices presented in exhibit PL3 all show a space between the prefix “Hydro” and the letter X and indicate the supplying company name as Hydro-X Water Treatment Limited. The

invoices in exhibit PL4, insofar as they refer to the Opponent's mark at all (which, it is noted, 3 out of 7 invoices do not), refer to the mark as Hydro-X.

Attached as exhibit MJL 1 is a print-out of the home page of the Opponent company's web-site. This shows the company name Hydro-X, and in the menu on the left hand side refers to the company's products as "Hydro-X Products".

18. Although the Statement amounts to submissions rather than evidence, given it forms the totality of RS's evidence, and in the absence of any other written submissions, I include it here and it will be taken into account in reaching my decision.

Hydro's evidence in reply

19. This consists of a second Witness Statement by Patrick Loveday, dated 16 July 2007, in which he disagrees with the submissions made in Mr Lipscombe's Witness Statement; he states that:

"Based on my experience in the industry and with customers I must disagree with paragraph 2 of the witness statement. In my experience most customers pronounce the trade mark HYDRO-X as HYDROX, rather than as two separate elements HYDRO and X, because HYDROX rolls more easily off the tongue."

Proof of use assessment

20. The Trade Marks (Proof of Use, etc) Regulations 2004 apply in this case. The provision reads as follows:

"6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark in relation to which the conditions set out in section 5(1),(2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

7) Nothing in this section affects –

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

21. The earlier trade mark relied on by Hydro had been on the register for more than five years at the date of publication of the applied for mark (3 February 2006). Hydro was, therefore, required to make a statement of use. It claimed use in relation to all of the goods for which its mark is registered. RS was not willing to accept this statement and required Hydro to prove this. The evidence must therefore demonstrate use of the mark between 4 February 2001 and 3 February 2006.

22. The two leading authorities on the principles to be applied in determining whether there has been genuine use of a trade mark are: *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer Trade Mark* [2006] F.S.R. 5. I do not intend to summarise these cases in full, but taking them in the round it is clear that the test for genuine use is a qualitative and not a quantitative one. Genuine use should be

found when the trade mark has been used in such a way so as to create or maintain a share in the market for the goods and services for which it is registered. In relation to this market share, this should not be construed as imposing a requirement that a significant market share has been achieved (*Laboratoire de la Mer*, paragraph 44). Genuine use should not be found if use is mere “token” use or if it is merely internal to the registered proprietor’s business (*Ansul*, paragraph 36 & 37 respectively).

23. Hydro say that they have supplied “chemical products for industrial water treatment” under their registered trade mark since at least September 1984. The HYDROX product is made from ‘extracts from sea, water, algae and from the like sea water organisms and is used as additives in hot water systems to prevent the formation of scaling and corrosion’. The date of first use claimed has not been challenged, and given that Mr Loveday is well placed to know this fact, on the guidance provided by Mr Richard Arnold QC, sitting as the Appointed Person in the *Extreme case [BL 0/161/07]*, must be taken as being the case. That said, whilst the date of first use can be accepted as being 1984, this does not necessarily assist as the use must be within the relevant period. That this use has been in the form as registered is a matter of dispute.

24. The earliest evidence before me dates from 1996 when Hydro filed an application to register a stylised version of the word HYDROX as a Community trade mark. However, as registration of a trade mark is not use this does not assist them.

25. Two product brochures are exhibited as PL2. From the contact information they clearly originate from the UK. The mark is shown in two forms, the first and most commonly used in relation to the products is HYDRO-X. There are also examples of the mark as registered being used. Whilst the brochures are not dated it is possible to determine from the dialling codes that one pre-dates 16 April 1995, “PhONEday” when the extra numeral 1 was added; for example, on the brochure the dialling code for Wakefield is shown as 0924, whereas from “PhONEday” the code changed to 01924. The information states “Hydro-X produce high quality treatment systems and plant for processing and manufacturing industry. These systems can be used to treat effluent discharges or to recycle rinse waters.” Although available pre-April 1995, given this is some years prior to the relevant period it is not safe to say that this brochure demonstrates use within the relevant period. Mr Loveday does not say that it was.

26. The product label and survey card (Exhibit PL5) also contain information that places them as being used in the UK. The label has a contact telephone number for Raines, which by reference to the use of the “01” number prefix can be dated as being later than PhONEday, but that does not necessarily place the use as being within the relevant period. The card depicts two vehicles with UK registration plates indicating that they were issued in 2002 and 2003, but only establishes that the vehicles were registered no earlier than those years, not that they were being used by Hydro. As neither item is able to be dated as being in use during the relevant period, and Mr Loveday does not say that they were, they do not establish use as required.

27. Exhibit PL3 consists of product safety information sheets and a selection of invoices dating from November 2002. The invoices are headed as having originated from HYDRO-X WATER TREATMENTS LTD. One of them, dated 25 April 2003,

shows that 25 litres of HYDRO-X was sold to an agriculture company, but the remaining invoices do not mention product sales of HYDROX/HYDRO-X, instead referring to various other products such as “Hydrocid”, “Hydrocor” and “Hydroplex”. It was established in *Celine Sarl v Celine SA (C-17/06) [2007] E.T.M.R. 80* that unless affixed to the goods or used in such a way “that a link is established between the sign which constitutes the company, trade or shop name”, the use of a company name is not use in relation to the goods. I do not consider that the placing of the company name in plain lettering at the top of the invoice shows the required link.

28. The product information sheets are headed with the registered mark, with the company name HYDRO-X WATER TREATMENT LTD in very small lettering beneath. They can be dated as within the relevant periods. The products referred to are “Hydrocid”, “Hydrocor” and “Hydroplex”. Although the sheets have been provided in evidence affixed to the invoices, there is nothing that shows they were provided to customers in this way and Mr Loveday does not say that they were. It is not therefore possible to take them as showing use from within the relevant period.

29. Exhibit PL4 consists of a further collection of invoices dated between October 2002 and October 2005, again headed HYDRO-X WATER TREATMENT LTD, but this time showing the product as Hydro-X. Hydro-X appears to be being used as a main brand with “Hydrocid”, “Hydrocor” and “Hydroplex” being sub-brands.

30. On my assessment there is limited evidence that can be placed within the relevant period. The brochures forming part of Exhibit PL2 show use of the mark as registered and HYDRO-X. Taking into account the comments made by Lord Walker in *Bud and Budweiser Budbraii Trade Marks [2003] RPC 25*, I do not consider that use of HYDRO-X constitutes use of the registered mark. In my view HYDRO-X is visually, orally and conceptually different to the registered mark and therefore differs from the registered mark in its distinctive character. There is no conclusive use of the mark as registered that can be dated within the relevant period and I arrive at the position that **the proof of use requirement has not been satisfied in respect of the goods of the earlier mark.**

31. That effectively determines the outcome of the opposition. However, in case I am found to be wrong on that point, I will go on to consider the ground of opposition as if the evidence had proven use across the full range of goods covered by Hydro’s Registration.

Section 5(2)(b)

32. Section 5(2)(b) reads:

“(2) A trade mark shall not be registered if because –

(a)

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

33. An objection under Section 5(2)(b) requires me to consider whether there are similarities in the marks and similarities in the goods that cumulatively lead to a likelihood of confusion. The leading guidance from the European Court of Justice is contained in *Sabel BV v Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG and Adidas Benelux BV* [2000] E.T.M.R. 723.

The Relevant Consumer and the nature of the purchasing decision

34. The issues are to be considered from the perspective of the average consumer who is deemed to be reasonably well informed and reasonably circumspect and observant.

35. The goods covered by RS’s application are ‘chemicals for use in agriculture; additives for drinking water for livestock; additives to livestock drinking water for medical purposes’ and ‘disinfectants’. With the exception of disinfectants, these goods appear to be for a specialist market. RS did not provide any evidence or submissions relating to the user of the goods sold under the AQUAHYDROX mark. Therefore, in the absence of any assistance in this matter, I consider that the relevant consumer is notionally those involved in the agricultural industries such as farmers, vets, gardeners etc., who are specialist purchasers. The term ‘disinfectant’ is without qualification so would include both disinfectants for specialist use and also disinfectants for general household use. I therefore consider that the average consumer of ‘disinfectant’ could include both specialists and the general public.

36. In his witness Statement, Mr Loveday states that Hydro’s goods are provided to industrial as well as domestic customers, including farms.

37. With the exception of ‘disinfectants’, given the specialist nature of both Hydro’s and RS’s goods, it is my view that the goods are liable to be carefully considered purchases. I note that in Hydro’s product brochure it states ‘it is important that any decision maker knows about the general physical-chemical conditions behind the advantages of the Hydro-X method. The purpose of the present publication is to give the necessary insight into the Hydro X boiler water conditioning process.’

38. It may be that ‘disinfectants’ will also be carefully considered purchases, but given that this term covers general household disinfectant, a less careful selection process cannot be discounted.

39. I have not been given any evidence as to whether the average consumer would make regular or occasional purchases of the respective goods, so I bear in mind both possibilities in reaching a decision.

Comparison of goods

40. The respective sets of goods are as follows:

Hydro's goods	RS's goods
<p>Class 1:</p> <p>Extracts processed from sea water, algae and from the like sea water organisms for use in preparation of, or for use as, additives designed to inhibit formation of scale or corrosion in hot water systems; chemical preparations processed from extracts of organic or inorganic nature, for use in steam installations, district heating installations and in other industrial installations to prevent and remove coating, scale and priming.</p>	<p>Class 1:</p> <p>Chemicals for use in agriculture; additives for drinking water for livestock.</p> <p>Class 5:</p> <p>Additives to livestock drinking water for medical purposes; disinfectants.</p>

41. In order to assess the similarity of the goods I note the test set out by Mr. Justice Jacob in *British Sugar Plc v James Robertson & Sons Ltd* (supra) one must consider:

- (a) the uses of the respective goods or services;
- (b) the users of the respective goods or services;
- (c) the physical nature of the goods or services;
- (d) the trade channels through which the goods or services reach the market;
- (e) in the case of self-serve consumer items, where in practice they are respectively found or likely to be found on the same or different shelves; and
- (f) the extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods or services, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

42. The above factors were referred to in the opinion of the Advocate General in *Canon*; page 127, paragraphs 45-48. In its judgment, the ECJ stated at paragraph 23:

‘In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken

into account. Those factors include, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.’

43. These criteria are, of course, intended to be of general applicability but not all are equally relevant in all circumstances (e) above being an example of an inapplicable criterion in this case.

44. Adapting the above tests to the circumstances of the goods here, I find as follows:

The uses of the respective goods

45. Hydro’s goods have a specific use which is to prevent and remove coating, scale and priming in industrial installations. In their brochure it states ‘Hydro-X is a method and product for conditioning boiler and district heating water. Hydro-X is simple to use and gives complete protection against corrosion and scale along with an assurance of efficient and harmless dissolving of existing scale’. RS’s goods, in so far as the ‘additives’ are concerned, also have a precise use. I do not think that an ‘additive’ for drinking water for livestock, whether for medicinal purposes or not, could naturally be considered to have the same purpose as Hydro’s goods. In my view the respective uses are quite different.

46. The term ‘chemicals for use in agriculture’ in RS’s application is less precise. The Oxford English dictionary defines the word ‘agriculture’ as ‘the science or practice of farming, including the growing of crops and the rearing of animals.’ With that in mind it seems to me that ‘chemicals for use in agriculture’ would not naturally cover ‘chemicals for the protection against corrosion and scale or dissolving of existing scale in boilers and the like’. It follows that, in my view, the respective uses are different. In coming to this conclusion I have borne in mind the need to have regard to the practical application of terms in specifications, as referred to in the *Treat* case:

"When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all, a trade mark specification is concerned with use in trade."

47. The last remaining item for consideration in RS’s application is ‘disinfectants’. The Oxford English dictionary defines the word ‘disinfectant’ as a ‘chemical liquid which destroys bacteria’. It therefore seems to me that the goods covered by Hydro’s registration and ‘disinfectants’ included in RS’s application are compositions intended for different purposes; their uses are not in my view the same. **I consider that the uses of the respective goods are different.**

The users of the respective goods

48. I have considered the users of the respective goods in my assessment of the average consumer above. However, I think it is worth mentioning that although the statement by Mr Loveday indicates that Hydro’s goods are sold to ‘farms’, he does not provide evidence as to the extent to which goods sold under the registered mark

are sold to farms/used by farmers. Nor does he say whether this use is for purposes connected with farming/agriculture itself or merely for domestic hot water systems which happen to be on farms. Taking all of Hydro's evidence into account I consider that the goods sold under the registered mark are most frequently used by those connected with the boiler treatment market, and that this may include farmers or a farm connected company. **There is a potential overlap in the respective users of the goods.**

Physical Nature of the goods

49. Chemicals, additives and disinfectants are available in a number of different forms such as spray, powder, granule, liquid etc. The product sold under the registered mark is delivered as a ready-to-use liquid in cans, drums or plastic containers [Exhibit PL2]. RS have provided no evidence as to the physical nature of its goods and I concede that they may be provided in liquid form. However, of greater relevance I think is the composition of the chemicals. It seems to me very unlikely that a chemical product which inhibits the formation of scale or corrosion in hot water systems, or chemical products which prevent and remove coating, scale and priming in industrial installations, is going to comprise of the same chemical composition as that used as additives to livestock's water or for use in agriculture. The uses appear to be too different for the compositions to be the same or similar. Similarly, given the definition of the word 'disinfectant' I think it is unlikely that this would be made up of the same chemical compositions as those covered by Hydro's registration. **Overall I consider that the physical nature of the goods may be identical, but the compositions of the goods are liable to be very different.**

Trade channels through which the goods reach the market

50. In their counterstatement RS claim that the respective goods 'have entirely separate trade channels', however this statement is not expanded upon. Hydro has not sought to rebut RS's statement. It may be that RS's goods are sold directly to end users, farmers, vets etc or they may be sold to intermediaries, such as farm/vet suppliers; I simply do not know. I therefore consider it appropriate to bear in mind both possibilities. Hydro's evidence indicates that they sell direct to the end user.

51. I have no evidence that tells me whether the goods for which Hydro have shown use and those covered by RS's application can be sourced from a single manufacturer or whether they are discrete areas of trade. These products are intended for specific uses, e.g. scale removal in boilers, or a particular market, in this case agriculture. I see no reason why a large chemical company such as ICI could not have divisions that manufacture scale inhibitors, agricultural chemicals and disinfectants. However, in the distribution chain it seems likely to me that the differences in the uses of the respective products will lead them down separate paths to specialist wholesalers and distributors.

52. I consider it unlikely that the respective goods will be sold through the same trade channels, although I concede that the possibility they may occasionally do so cannot be ruled out entirely.

The extent to which the respective goods are in competition or complementary.

53. There is no doubt in my mind that the respective goods are not in competition with each other. As to complementarity there have been a number of judgements of the Court of First Instance dealing with the issue. In *Mülhens GmbH & Co KG v OHIM*, Case T-150/04 the Court recognised that goods may be aesthetically complementary but that “this aesthetically complementary nature must involve a genuine aesthetic necessity, in that one product is indispensable or important for the use of the other and consumers consider it ordinary and natural to use these products together.” In *Alecansan, SL v OHIM*, Case T-202/03 the CFI noted (without disapproving) the position adopted in the OHIM Opposition guidelines:


“46) As regards the complementary nature of the goods, it must be pointed out that, according to the definition given by OHIM in point 2.6.1 of Part 2, Chapter 2, of the Opposition Guidelines of 10 May 2004, goods [or services] are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods [or for the provision of those services] lies with the same undertaking (see also to the effect Case T-85/02 *Diaz v OHIM* [2003] ECR II-4835, paragraph 36).

54. It seems clear from these cases that complementarity should be viewed narrowly. There must be some natural, functional, technical, aesthetic link between, or other feature of the goods, that leads the consumer to think the goods will be marketed, sold or used together. No evidence on this point has been filed by either party. Taking the natural meanings of the goods, and absent any evidence which demonstrates the contrary, **I do not consider that the respective goods are in competition nor are they complementary.**

55. I consider that whilst there are some minute similarities overall the respective goods are not similar.

Comparison of marks

56. I am required to make a comparison of the respective marks from a conceptual, visual and aural standpoint and by reference to the overall impressions created bearing in mind their distinctive and dominant components. The marks for comparison are:

Hydro's Mark	RS's Marks
	AQUAHYDROX AquaHydrox

57. For the purposes of the comparison I do not intend to distinguish between AQUAHYDROX and AquaHydrox because the marks are materially the same and therefore the same considerations will apply.

Conceptual consideration

58. As far as I am aware, and there is no evidence to the contrary, the respective trade marks (as a whole) are not ordinary words found in the English language, and have no meaning in relation to the character of the respective goods. HYDRO is a known combining form that is used to indicate or denote water, liquid or fluid. Being not too far from this it is possible (although I do not go so far as to say likely) that the opponent's earlier mark HYDROX could be seen in the same way, and particularly so given that it is frequently used as HYDRO-X, and in relation to a product derived from and used in connection with water. HYDROX is a specialised product where the consumer will be better informed and knowledgeable, and to whom the reference to water will be more apparent than would otherwise be the case.

59. RS's marks have the prefix "AQUA". Through everyday use such as in "Aqua-Aerobics", "Aqua-Park" and "Sub-Aqua" the consumer will recognise AQUA as being a combining form or prefix that indicates a connection with water. Although consumers do not analyse and dissect marks, because they are used to seeing AQUA used in this way, it will alert them to the fact the mark is composed of two elements; "AQUA" and "HYDROX", and may well lead them to the view that goods sold under the AQUAHYDROX marks are for use or connected with water. So if Hydro's mark sends out a message linked to water, RS's marks will potentially send the same message as Hydro's mark. However, if HYDROX is taken as a meaningless invention, adding AQUA to it will not give it a meaning; it will say the same thing with or without AQUA. **I take the view that if HYDROX has any conceptual meaning – AQUAHYDROX will have a similar meaning.**

Visual consideration

60. Looking at the respective marks based purely on their appearance they are of differing lengths, which although not so significant in longer marks, still contributes to their initial impact on the eye. Hydro's mark has the letters in a stylised form, although nothing too out of the ordinary and still clearly HYDROX. RS's marks are in an ordinary typeface which notionally would allow for use in different styles of font, including one the same as that used by Hydro, and in the same upper-lower case style.

61. Beyond the aesthetics, insofar as the respective marks are, or incorporate the word HYDROX, there must be some visual similarity. I do not consider that having the first and terminal letters in upper case and the intervening letters in lower case will materially affect the perception; it will be seen as HYDROX. It is undeniably the case that the whole of Hydro's mark is contained within RS's marks, but this is as a suffix. RS's marks have the prefix "AQUA" which is a commonplace word or prefix with which the public will be familiar. The eye naturally picks out the familiar and to my mind AQUA is a strong visual element in the impression created, particularly so given its use at the beginning of the word. However, being familiar adds to the likelihood that the visual perception of RS's marks will be as a combination of two elements. As far as I am aware, and there is no evidence to the contrary, HYDROX is an invented word with no clear relevance in relation to the goods for which it is used. However, AQUA may well be seen as a descriptive reference to "water" which is more likely given the specialised nature of the goods for which AQUAHYDROX is

used. This imbues the HYDROX element with more significance. **Overall I consider it likely that Hydro's mark will be seen as HYDROX and that AQUAHYDROX will be seen as AQUA HYDROX, on that comparison there is a degree of visual similarity between the respective marks.**

Aural consideration

62. Insofar as RS's marks contain the entirety of Hydro's mark, there must be some phonetic similarity. The AQUA element at the beginning of RS's marks is a strong element that will have an impact on how the marks sound when spoken. Whilst it is not usual for each and every syllable to be enunciated with clarity, it seems to me that there is a natural distinction in sound created by the softness of the ending of AQUA, and the impact of the hard first syllables in HYDROX. **In my view there is enough similarity in sound that I consider the respective marks to be aurally similar.**

Likelihood of confusion

63. This is the matter of global appreciation taking all relevant facts into account. Central to the determination is the interdependency principle whereby a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C 117). The distinctive character of the mark must also be taken into account, as must the nature of the average consumer and the circumstances in which the goods are supplied/purchased.

64. Hydro has made no claim to having enhanced the distinctiveness of their mark through its use. From the evidence filed I do not consider that the use is sufficient to elevate the distinctive character of the registered mark. The assessment of distinctiveness therefore rests with its inherent qualities. As I have indicated above, I consider that when assessed as a whole the mark is liable to be seen as comprising a made-up word in stylised form. In my view, the mark is inherently highly distinctive.

65. Perhaps with the exception of the disinfectants found in RS's specification, the consumers in both cases are almost certainly specialist. Qualified and knowledgeable users of complex products exercise greater care and attention when making their purchase and also when subsequently using the goods.

66. Whilst I consider that the respective marks should be regarded as similar, taking into account the respective goods are for different and specific uses, in the main by knowledgeable and informed consumers, I do not consider that there is a likelihood for confusion. This is the case even when the possibility of imperfect recollection is factored in. Similarly, due to the overall differences, I do not consider that the consumer would wrongly believe that the respective goods come from the same or economically linked undertakings.

Conclusion

67. The likelihood of confusion must be appreciated globally, and taking into account all factors relevant to the circumstances of the case, I find that there is no likelihood of confusion and the opposition fails.

Costs

68. RS have been successful and are entitled to a contribution towards their costs. I award costs on the following basis:

Considering the Notice of opposition	£200
Filing the counterstatement	£300
Considering and responding to Hydro's evidence	£200

TOTAL £700

69. I order Hydro to pay R S the sum of £700. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 4th of February 2008

**Lynda Adams
For the Registrar
the Comptroller-General**