

O-149-09

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2446908
BY ANTIBAC LABORATORIES PTE LTD**

TO REGISTER THE TRADE MARK:

VIROGONE

IN CLASS 5

AND

**THE OPPOSITION THERETO
UNDER NO 95394
BY ANTEC INTERNATIONAL LIMITED**

Trade Marks Act 1994

**In the matter of application no 2446908
by Antibac Laboratories Pte Ltd
to register the trade mark:
VIROGONE
in class 5
and the opposition thereto
under no 95394
by Antec International Limited**

1) On 16 February 2007 Antibac Laboratories Pte Ltd (Antibac) applied to register the trade mark **VIROGONE**. The application was published for opposition purposes on 4 May 2007 with the following specification:

Antiparasitic preparations; animal washes; antiparasitic collars for animals; bacterial and biological preparations for veterinary purposes; chemical preparations and reagents for veterinary purposes; enzyme preparations for veterinary purposes; lotions for veterinary purposes, microorganisms (preparation of-) for veterinary use; parasiticides; veterinary preparations; anti-parasitic products for animals; articles adapted for wear by animals to prevent parasitic infestation; attractants for pet animals; deodorising preparations for use on animals; insect repellents for use with animals; powders and sprays for killing fleas on animals; products for controlling infections in animals by prophylaxis; repellents for animals; skin treatment (medicated) for animals; veterinary products for the treatment of diseases of the skin of domestic animals; fungicides; insecticidal preparations for animals; chemical preparations for application to animals to reduce allergic reactions in humans; pharmaceutical preparations for animals; all included in Class 5.

2) On 3 August 2007 Antec International Limited (Antec) filed an opposition to the registration of the trade mark. Antec bases its opposition on section 5(2)(b) of the Trade Marks Act 1994 (the Act). According to section 5(2)(b) of the Act a trade mark shall not be registered if because:

“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.”

The earlier trade mark upon which Antec relies is:



VirKon

This trade mark is the subject of Community trade mark registration no 2024677. The application for the registration of the trade mark was made on 8 January 2001 and the registration procedure was completed on 26 February 2004. Consequently, the trade mark is an earlier trade mark and is not subject to proof of use requirements. The trade mark is registered for:

bleaching preparations; preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; sterilants; deodorants; detergents; non-medicated toilet preparations; pot-pourri; antiseptic swabs for cleansing; degreasing preparations;

pharmaceutical and veterinary preparations and substances; sanitary preparations and substances; disinfectants; biocides, germicides, bactericides, virucides, fungicides, insecticides, pesticides and herbicides; detergents for medical purposes.

The above goods are in classes 3 and 5 (respectively) of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

3) Antibac denies that the respective trade marks are similar and in relation to the respective goods states:

“None of these goods taken on a whole are identical with the respective specification of goods of the earlier trade mark relied on.”

I do not understand what this means. Goods are identical or they not, it is not a matter of “taken on a whole”.

4) Only Antibac filed evidence. The parties chose not to request a hearing. Antec furnished written submissions in support of its case.

5) The evidence of Antibac consists of a witness statement by Mr Terence Leslie Johnson, Mr Johnson is a trade mark attorney acting for Antibac in this case. The witness statement is a mixture of evidence of fact and submission.

6) Mr Johnson lists six registrations in class 5 for the trade marks VIRGAN, VIRUCHEM, ZIRCON, VIRZIN, Virion and VIRCO; the first four being United

Kingdom registrations and the last two Community registrations. Mr Johnson states that these trade marks are similar to Antec's trade mark. This is clearly a matter of opinion and not of fact.

7) Exhibited at TLJ 1 are two pages from a search conducted on 20 November 2008 using the Google® search engine for VIRGAN. Nothing other than the first hits and the synopses are shown. It would appear that VIRGAN was an antiviral eye gel, the use of which was discontinued in the United Kingdom in August 2006.

8) Exhibited at TJJ 2 are two pages from a search conducted on 20 November 2008 using the Google® search engine for VIRUCHEM. It would appear that VIRUCHEM V26 is a disinfectant and detergent cleaner used in relation to animals and approved by DEFRA, its use includes use in relation to the H5N1 virus; which to my understanding is one of the so-called bird flu viruses. Also included in the exhibit is a list of disinfectants approved by the Department of Agriculture and Rural Development. Included upon the list is V26 (VIRUCHEM), which is approved for foot and mouth, swine vesicular disease and poultry diseases. (Various Antec products also appear upon the list, including ANTEC VIRKON S.)

9) Exhibited at TJJ 3 are two pages from a search conducted on 20 November 2008 using the Google® search engine for basf zircon. The use appears not be trade mark use but use in relation to zircon products. The one reference to a trade mark is the reference to the trade mark registration and emanates from the website of the IPO.

10) Exhibited at TLJ 4 is a page from a search conducted on 20 November 2008 using the Google® search engine for VIRZIN. The only relevant references relate to use of VIRZIN in Germany. Also included in the exhibit are pages from *Drug and Medicine Data German V*, to which the three Google® hits relate.

11) Exhibited at TLJ 5 are pages from emc.medicines.org.uk downloaded on 20 November 2008. These relate to Inactivated Influenza Vaccine (Split Virion) BP suspension for injection in a prefilled syringe. The product is approved for use in the United Kingdom. The pages reproduce a leaflet produced by Sanofi Pasteur MSD Limited. Throughout the leaflet the product is referred to as Inactivated Influenza Vaccine (Split Virion) BP, it is not referred to as VIRION. The vaccine is for injection by medical professionals.

12) Exhibited at TLJ 6 are two pages from a search conducted on 20 November 2008 using the Google® search engine for VIRCO. There is one hit relating to Virco HIV resistant tests results. Also included in the exhibit is the page linked to the hit. It bears a date of 11 July 2001. The article relates to Virco's resistance tests conducted at Chelsea and Westminster Hospital, that is resistance testing to establish the number of drugs to which a patient's virus is susceptible. There

is a quotation from an officer of Tibotec-Virco. There is nothing in the evidence to suggest that VIRCO has been used in relation to a product in class 5.

13) So Mr Johnson's exhibits amount to the following:

- VIRGAN - an antiviral eye gel the use of which was discontinued in the United Kingdom in August 2006.
- VIRUCHEM V26 and V26 (VIRUCHEM) - used as a disinfectant in relation to animals.
- ZIRCON - used as a generic term.
- VIRZIN – listed as a medicine in Germany.
- Inactivated Influenza Vaccine (Split Virion) BP – a flu vaccine.
- VIRCO – used in reference to a study of HIV resistance.

Only one of the products, VIRUCHEM V26/V26 (VIRUCHEM), has been used in relation to animals, to which the bulk of the goods of the specification relate.

14) The evidence does not establish, in any way shape or form, that the average, relevant consumer for the goods of the application will have been educated, by use, to giving little weight to the VIR element of the respective trade marks. This is the best that evidence of use in the market place could establish; the alleged proximity of other trade marks to that of Antec not being relevant, the question before me relates to the similarity of the trade marks of Antec and Antibac, not to whether there is likelihood of confusion in relation to other trade marks.

15) Mr Johnson deduces from the evidence that he has presented that “the earlier trade mark cannot monopolise a wide range of goods. It is circumscribed by the trade marks to which I have referred which co-exist with it on the Register and in the mark place in the United Kingdom”. I do not understand what is meant by not being able to monopolise a wide range of goods. The earlier trade mark has rights in the full range of its specification, as it is not subject to proof of use. Neither can I understand what is meant by the earlier trade mark being circumscribed.

16) In my view the evidence of Mr Johnson in relation to the other trade marks has no effect upon the issues before me.

Average consumer, nature of purchasing decision and standard for likelihood of confusion

17) All of the goods of the application are for use with animals, or could be used for animals; the same must apply for the goods of the earlier registration as I have decided that they are identical. The goods are not limited in terms of by whom they could be purchased. The terms of the specifications encompass goods that could be purchased by the public at large or equally by the veterinarian. The veterinarian will bring a more practised eye and more

knowledge than the public at large. Consequently, in consideration of the likelihood of confusion Antec's best case will lay with the public at large, upon whom I will concentrate; the public at large is taken to be reasonably well informed and reasonably circumspect and observant. The nature of the goods is such that they are unlikely to be purchased on a regular basis; they are not goods that are likely to be purchased on impulse. The purchasing is likely to be the result of a deliberate and careful decision, dependent upon the health of an animal. The average consumer is likely to spend some time in examining the labelling of the products in order to ascertain their purpose, how they are to be used and any contraindications that they might give rise to. Although this perusal will involve interrogating non trade mark matter, it will also have the collateral effect of putting the trade mark before the purchaser. For the public at large the goods are likely to be bought in pet shops and pet supermarkets. In my experience, in the "traditional" pet shop goods are often requested, whilst in pet supermarkets they are purchased from self-service shelves. So in the former retail outlet verbal similarity is of more importance and in the latter retail outlet visual similarity is of more importance. The nature of the purchasing process is such that it is likely to mitigate the effects of imperfect recollection. (However, the nature of the trade marks themselves can counteract this mitigation, a matter that I deal with below.)

Comparison of goods

18) The goods of the application are clearly encompassed by the class 5 goods of the earlier registration. The respective goods are identical.

Comparison of trade marks

19) The trade marks to be compared are:

The logo for 'VirKon' is written in a bold, black, serif font. The letters are closely spaced, and the 'V' and 'K' are particularly prominent.

VIROGONE

20) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details¹. The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components². Consequently, I must not indulge in an artificial dissection of the trade marks, although I need to take into account any distinctive and dominant components. The average consumer rarely has the chance to make direct

¹ *Sabel BV v Puma AG* [1998] RPC 199.

² *Sabel BV v Puma AG* [1998] RPC 199.

comparisons between marks and must instead rely upon the imperfect picture of them he/she has kept in his/her mind and he/she is deemed to be reasonably well informed and reasonably circumspect and observant³. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public⁴.

21) Antec's trade mark has a degree of stylisation, however, this is very limited and I consider that the average, relevant consumer will effectively see it primarily as the word VIRKON.

22) I do not consider there is a readily identifiable part of either trade mark which is a distinctive and dominant element. However, the public's attention is usually, if not always, directed towards the beginnings of words⁵.

23) In his evidence Mr Johnson states that the earlier trade mark has no meaning whilst the application "provides a subtle allusion to the eradication of parasites etc by its use of its last syllable". This allusion was too subtle for me to notice. The public do not make crossword puzzle clues out of trade marks, they do not divide them up as part of a philological analysis. I do not consider that the average relevant consumer, in relation to the respective trade marks, will perceive anything other than invented words. As both trade marks will be viewed as invented words there is neither conceptual similarity or dissimilarity.

24) Both trade marks begin with the letters VIR and include the letters ON. Antibac's trade mark includes the letter OG, where Antec's has the letter K, and the letter E at the end. As I have noted above there is some stylisation of the earlier trade mark but I doubt that this will have any significant influence on the average, relevant consumer. There is a degree of visual similarity between the respective trade marks.

25) VIROGONE consists of three syllables, VIRKON two syllables. I consider that the pronunciation of the first syllables will be affected by the remainder of the trade marks. Consequently, I am of the view that Antibac's trade mark will be pronounced VEER – OH - GON and Antec's trade mark will be pronounced VUR – KON. The difference in pronunciation between the first two syllables is not particularly pronounced. Both trade marks end with the ON sound. In its

³ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* [2000] FSR 77.

⁴ *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02.

⁵ See for instance: *Les Editions Albert René v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-336/03:

⁷⁵ It should be noted in this regard that the attention of the consumer is usually directed to the beginning of the word (Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-0000, paragraph 83).

submissions Antec states that the consonants K and G are sounds which are produced almost identically in speech and could therefore be easily confused or misheard. I do not consider that K and G are similar in sound, especially as the G is likely to be pronounced in its hard form. I consider that they are phonetically very different. Mr Johnson states that the emphasis will fall on the KON element of VIRKON whilst each syllable of VIROGONE will receive equal emphasis. In my view the emphasis in pronunciation will fall on the first syllable of VIRKON. In VIROGONE, I find it likely that the middle O syllable will be most emphasised in speech, VIR will have a reasonable degree of emphasis and GONE will fall away in ordinary speech. Taking all factors into account I consider that the respective trade marks have a degree of phonetic similarity.

Conclusion

26) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa⁶. In this case the goods are identical. There is a degree of visual and phonetic similarity between the respective trade marks. Dependent upon the retail outlet phonetic or visual similarity could be of greater importance. It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark (either by nature or nurture) the greater the likelihood of confusion⁷. The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public⁸. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings⁹. The trade mark of Antec is an invented word, there is nothing to suggest that the average, relevant consumer will perceive it as being allusive to any of the goods for which it is registered. The earlier trade mark enjoys a good degree of inherent distinctiveness. The absence of meaning in both trade marks means that there is no conceptual hook which would, of itself, militate against visual or phonetic confusion. The nature of the purchasing process can mitigate imperfect recollection (see above) but the fact that both trade marks are invented words, with no conceptual hooks, means that imperfect recollection is likely to

⁶ *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

⁷ *Sabel BV v Puma AG* [1998] RPC 199.

⁸ *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

⁹ *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

have an effect that counteracts the effect of the nature of the purchasing decision.

27) Taking all of the above factors into account, I find that there is a likelihood of confusion and registration of the trade mark should be refused under section 5(2)(b) of the Act.

Costs

28) Antec has been successful and is entitled to a contribution towards its costs. I award costs on the following basis:

Opposition fee	£200
Notice of opposition	£300
Considering the counterstatement	£200
Considering evidence of Antibac	£100
Written submissions	£100

TOTAL £900

I order Antibac Laboratories Pte Ltd to pay Antec International Limited the sum of £900. 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 29th day of May 2009

**David Landau
For the Registrar
the Comptroller-General**