

O-051-15

TRADE MARKS ACT 1994

IN THE MATTER OF

**TRADE MARK REGISTRATION 1465275
IN THE NAME OF VITASOY INTERNATIONAL HOLDINGS LIMITED
OF THE FOLLOWING TRADE MARK IN CLASS 32:**

VITA

AND

**AN APPLICATION (NO. 500333) BY SUNRIDER CORPORATION
TO REVOKE THE REGISTRATION ON GROUNDS OF NON-USE**

The background and the pleadings

1. The trade mark (**VITA**) the subject of this dispute was filed by Vitasoy International Holdings Limited (“the proprietor”) on 24 May 1991. The mark was entered on the register on 17 November 2000. The mark is registered for the following goods in class 32:

Carbonated and non-alcoholic beverages; all made from or including sugar cane, guava and mango; all included in Class 32; but not including any drinks made from or including lime flavouring.

2. Sunrider Corporation (“the applicant”) seeks revocation of the registration on grounds of non-use under:

Section 46(1)(a) of the Trade Marks Act 1994 (“the Act”) on grounds of non-use in the five year period following the date of registration. The relevant five year period being: 18 November 2000 to 17 November 2005 (“the first relevant period”), and,

Section 46(1)(b) of the Act on grounds of non-use in the five year period: 14 March 2009 to 13 March 2014 (“the second relevant period”).

3. The proprietor filed a counterstatement denying the grounds of revocation. Its defence is based on the mark having been (and continues to be) genuinely used. There is no claim to any proper reasons for non-use.

4. The proprietor filed evidence (and written submissions), the applicant filed written submissions in response. Neither party requested a hearing, both opting to file written submissions in lieu of a hearing.

The legislation and the leading case-law

5. The provisions relating to revocation are contained in section 46 of the Act, the relevant parts of which read:

“46.-(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c)

(d)

(2) For the purpose of subsection (1) 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 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made: Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

6. Section 100 is also relevant:

“If in any civil proceedings under this Act a question arises as to the use to

which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

7. In *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418 (Ch) Arnold J commented on the case-law of the Court of Justice of the European Union (“CJEU”) in relation to genuine use of a trade mark:

“In *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I have added references to Case C-416/04 P *Sunrider v OHIM* [2006] ECR I-4237):

"(1) Genuine use means actual use of the mark by the proprietor or a third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely 'token', which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider*, [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22]-[23]; *Sunrider*, [70]-[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no *de minimis* rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]”

The proprietor’s evidence

8. This comes in the form of a witness statement by Ms Tong Ah Hing, the proprietor’s company secretary. By way of background, it is explained that the proprietor was established in Hong Kong in 1940 with the launch of VITASOY, a soy drink. In 1975, diversification led to the introduction of VITA, a range of fruit juice drinks and, subsequently, tea. By the late 70s and 80s, the proprietor entered various overseas markets. VITA is “currently” sold in 30 markets including the EU.

9. Ms Ah Hing states that VITA products entered the UK (and other) markets in 1979. Exhibit TAH1 contains a copy of a publication produced by the proprietor called *The Vision of VITASOY*, which she states was sent to distributors (including those in the UK) in 1979. There are references in the publication to VITA products, which consist of fruit juice drinks (in a range of flavours) and tea based drinks. The publication contains a map of where the goods are exported to, including the UK. Ms Ah Hing states that the juice drinks come in apple, orange, mango, guava, pineapple, sugar cane and blackcurrant flavour and the tea drinks include chrysanthemum tea, honey chrysanthemum tea, honey green tea and apple green tea. Exhibit TAH2 contains packaging samples of drinks which contain sugar cane, guava and mango. Some of the packaging is for the other flavours. The packaging shows UK distributor details. It is stated that the samples come from 1985 and “clearly evidences how the VITA mark is used and has been used in relation to [the proprietor’s] beverages sold in the [UK]”. I depict one of the labels below. The most prominent use of VITA is not very clear due to

the way in which the label is to wrap around the product. However, the smaller version of the word VITA at the top of the label appears to represent the manner in which the larger version is used:



10. Exhibit TA3 contains a series of archived web-prints from the proprietor's website, headed "export products". The prints were obtained using the Internet archive tool Wayback machine. The products identified as being exported are VITASOY soy drinks, VITA tea drinks, VITA fruit drinks, VITA distilled water and VITA coffee. The only reference to the UK is that the VITASOY product has been certified by the UK Soil Association. It is, though, highlighted by Ms Ah Hing that the web address is "vitasoy.com/en/..." which, she states, shows that the goods were sold in England. Three sets of archive prints are provided which are very similar to each other. They are dated 3 August 2003, 30 April 2006 and 11 October 2003. Ms Ah Hing notes that the prints from 2006 fall outside of the relevant period(s), but that the archive tool is limited in terms of the dates on which snapshots of the website are available. She confirms that the content of the website was the same in the relevant periods.

11. It is stated that VITA and VITASOY are established brands in the UK and the EU. A table showing the dates of first sale in the UK and other EU countries is provided in Exhibit TAH4. The UK is identified as "before 1985" for both brands. It

is added that the subject registration claimed use from 1978. Ms Ah Hing states that the proprietor has continued to sell VITA products in the UK including during the relevant periods. Exhibit TAH5 consists of a table showing the value of VITA shipments (in Hong Kong dollars) to various countries including the UK. The most recent date is 2003/2004, a period in which the value of shipments to the UK was HK\$ 3.78 million. There is no breakdown between product type. Ms Ah Hing states that the table goes up to 2006, but it clearly does not, indeed, the table shows a date on which it was last updated (January 2005). I accept, though, Ms Ah Hing's point that the UK shipments represent the vast majority of those made in the EU. Exhibit TAH6 contains a table showing advertising and promotional spend. The earliest year is 1996/1997, the latest 2006/2007. Up until 2004/2005, the spend was always above HK \$179K, but this declined in subsequent years. The last four years of figures are: 2003/2004 (HK\$ 504k), 2004/2005 (HK\$ 213k), 2005/2006 (HK\$ 43k) and 2006/2007 (HK\$ 4k). The figures cover the advertising and promotional spend for both VITASOY and VITA in the EU.

12. Exhibit TAH7 contains sample invoices dated between 2000 and 2013. I will detail those in the relevant periods:

13. The first relevant period (18 November 2000 to 17 November 2005) - all invoices are for the attention of HP Foods Limited in Enfield.

- An invoice dated 27 December 2000 which includes VITA drinks containing mango, guava and sugar cane.
- An invoice dated 16 May 2001 which includes VITA drinks containing mango and guava.
- An invoice dated 6 June 2002 which includes VITA drinks containing guava and sugar cane.
- An invoice dated 14 June 2002 which includes drinks containing mango, guava and sugar cane.
- An invoice dated 19 August 2003, none of the drinks contain mango, guava or sugar cane.
- An invoice dated 26 August 2003, none of the drinks contain mango, guava or sugar cane.
- An invoice dated 5 July 2004 which includes VITA drinks containing mango, guava and sugar cane.
- An invoice dated 18 July 2005, none of the drinks contain mango, guava or sugar cane.

- An invoice dated 19 July 2005 which includes drinks containing mango, guava and sugar cane.
- Bills of lading dated 28 December 2000, the consignment includes VITA drinks containing mango, guava and sugar cane. A similar bill of lading is provided with no date.

14. The second relevant period (14 March 2009 to 13 March 2014).

- An invoice dated 26 October 2009 to Westmill Foods which includes VITA drinks containing mango and sugar cane.
- An invoice dated 30 July 2010 to Westmill Foods which includes VITA drinks containing mango, guava and sugar cane.

15. Exhibit TAH8 is said to contain samples of UK advertisements featuring VITA products. They are accompanied by a declaration from Sze Mui Ng (the proprietor's export manager) who states that the advertisements were used between 1999 and 2002. The declaration is dated 9 December 2004 so, clearly, has not been produced for the purpose of these proceedings. The products include VITA fruit drinks (mango, guava, orange and, pineapple & orange) and distilled water. Exhibit TAH9 contains "various examples from websites of retailers and wholesalers offering for sale VITA branded products in the UK", as follows:

- A print from the website of Westmill Foods. It has a copyright date of 2006, but the print appears to have been taken on 19 February 2009. It refers to both the VITASOY and VITA products (the latter being fruit juice drinks and tea drinks). It states "the popularity of Vitasoy/Vita products in Hong Kong makes it a Chinese household brand in the UK today". A subsequent list of goods identifies VITA mango, guava and sugar cane drinks, amongst others. The packaging depicted on the web-print shows VITA in the form depicted earlier.
- Further prints from Westmill Foods containing similar information. Ms Ah Hing states that they were taken from the website in 2009 and 2010 respectively. I additionally note that the VITA mango, guava and sugar cane drinks are designated under the headings juice/fruit juice, respectively.
- Prints described as "goods on order" from Hankook Foods Ltd. The prints are dated 27 March 2012 and 29 June 2012 respectively. None are for drinks containing mango, guava or sugar cane.
- A 14 page print from fareastliving.co.uk which appears to have been obtained on 16 March 2009. It shows various goods (including other

brands) under the Asian drinks category, including: VITA tea drinks, VITA guava juice, VITA mango juice and VITASOY. The products are described with these words, but the pictures of the packaging have no apparent use of VITA, they do not match the packaging shown earlier.

- Prints from SeeWoo, Oriental Food Specialist. The prints appear to have been obtained on 19 February 2009. Results for a search for VITA show various products including VITA guava, mango and sugar cane drinks. The stylised mark is depicted on the packaging.
- Prints from Wing Yip Online Store dated 2 March 2009. VITA mango drink is depicted (including on the packaging). There is also a guava drink but this is identified as a Vitasoy product.

16. Ms Ah Hing states that even though some of the above prints are not from the relevant periods, she confirms that VITA drinks were sold in the UK throughout 2009 and beyond. At exhibit TAH10 she provides UK sales figures for the range of VITA drinks. The figures range from HK\$ 3.92 million in 2008/2009 to HK\$ 3.9 million in 2012/2013.

17. Exhibit TAH11 contains a promotional poster aimed at “VITA [stylised] FANS” Ms Ah Hing explains that this was produced for a competition run in August 2013 by its distributor HP Foods limited.

18. Exhibit TAH12 contains various photographs/images, mainly at points of sale, where VITA and VITASOY products have been sold. The locations include Cricklewood, Warwick University, Liverpool and Croydon. There are photographs/images from 2014, 2013, 2011 and 2008/09. It is difficult to see the exact products being sold, however, a number depict the word VITA in stylised text. The stylisation differs from that depicted earlier. There is also one use of the plain word VITA in the context of “VITA free tasting”. This is dated 5 June 2013 in Cricklewood. The new stylisation can be seen in the following image:



19. Exhibit TAH13 consists of a promotional survey poster from 2013 used in King's College London. The poster depicts a number of products including VITA (the newer stylised version) juice drink. An apple flavour is depicted. There is one other fruit flavour, but it is not possible to see what it is, but later evidence (in Exhibit TAH17) shows that it is mango.

20. Exhibit TAH14 contains advertisements published in UK magazines, including Eastweek, a publication Ms Ah Hing states is aimed at the Asian community. They are from 2010, 2011 and 2013. The advertisement includes pictures of VITA juice drinks. They appear to include mango (and also an apple version) as above.

21. Ms Ah Hing states that since November 2012 S.O.P International Limited (SOP) in Hertford has been the proprietor's sole UK distributor. It is also the distributor in Ireland and the Benelux. An article from Chinese Weekly (TAH15) is provided where this is detailed. Exhibit TAH16 contains an extract from SOP's website with the details of a "current" competition (closing date 14 July 2014) it is running. VITA (the newer stylised version) juice drink packaging is depicted but the flavours are difficult to see. It appears to be pineapple, and orange & pineapple. Exhibit TAH17 contains prints from SOP's website showing the products it currently offers. It includes VITA sugar cane juice, VITA mango juice and VITA guava juice. The old stylisation is used for the sugar cane version, the newer stylisation for the others. Ms Ah Hing states that the distributor has sold these goods since 2012.

The specification as registered

22. In its written submissions the applicant raises an issue with regard to the scope of the proprietor's specification and the impact this has upon the question of genuine use. The specification reads:

Carbonated and non-alcoholic beverages; all made from or including sugar cane, guava and mango; all included in Class 32; but not including any drinks made from or including lime flavouring.

23. The submission is that the qualification "all made from or including sugar cane, guava **and** mango" (my emphasis) means that the beverage in question must be made from or include all three of these ingredients. The proprietor disagrees, arguing that the construction means that the specification will be read so as to indicate that they can contain sugar cane, guava or mango. Whilst there is an argument that the words could be read either way, the nature of trade mark specifications is often to list items and in this circumstance the word "and", in the context of the specification before me, is most likely to be seen simply as a list of potential ingredients rather than indicating that a single product contains all three ingredients. This is, in my view, consistent with how the relevant public is likely to see things. The same applies to the term "carbonated **and** non-alcoholic

beverages". It does not mean that the specification is for a product which is both carbonated and non-alcoholic but, instead, it simply lists that the goods are carbonated beverages and non-alcoholic beverages. I must therefore reject the applicant's accompanying submission that the proprietor has failed the genuine use test on account of an absence of a beverage that contains all three of guava, mango and sugar cane. This is not a requirement.

Genuine use

24. Both sides' submissions make reference to the individual exhibits filed by the opponent, highlighting what they do and do not show in the relevant periods. This is all noted. The applicant submits that any use of the VITA mark for tea products is not relevant as such goods, on account of the specification qualification, do not fall within the registered goods. A similar observation is made in relation to soy drinks, although, such goods are, in any event, sold under a different mark (VITASOY). I agree that the use on such goods does not establish use on the registered goods, although it does assist to provide some context as to the proprietor's business.

25. The applicant's other criticisms include that: the evidence lacks "continuity [and] corroboration", that the sales figures are not broken down, and that for the invoiced goods (including mango/sugar cane or guava juice drinks) no evidence that the packaging depicts the VITA mark is provided. It considers that the evidence does not establish that the use has been more than token. The proprietor, on the other hand, submits that the combination of invoices, packaging, sales figures and advertisements provides a clear picture that the VITA mark has been put to genuine use in the UK and that such use is not merely token.

26. The applicant accepts that the whole picture of the evidence must be considered. It makes reference to the decision of the General Court in Case T-415/09, *New Yorker SHK Jeans GmbH & Co KG v OHIM* :

"53. In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (*COLORIS*, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07 *P Ferrero Deutschland v OHIM*, not published in the ECR, paragraph 36)."

27. I also note that in the decision of Mr Daniel Alexander QC (sitting as the Appointed Person) in *PLYMOUTH LIFE CENTRE* (BL O-236-13), he stated:

“.....it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more, so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

28. And I also note the decision in *Catwalk* BL O/404/13 where Mr Hobbs QC (also sitting as the Appointed Person) stated in his paragraph 22:

“When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use. As to which see paragraphs [17] to [19] and [24] to [30] of the Decision of Mr. [Daniel] Alexander QC sitting as the Appointed Person in *PLYMOUTH LIFE CENTRE* Trade Mark (BL O-236-13; 28 May 2013).”

29. I accept that it would have been better for the proprietor to have broken down its VITA turnover figures between not only the various goods (e.g. the fruit juice drinks as opposed to tea), but also between the different varieties of the fruit juice drink (on account of the fact that the specification as registered covers only three varieties). One would assume that such figures would have been available. The evidence could also have been more detailed in certain other respects. However, that the evidence could have been better does not mean that it should be rejected out of hand as failing to establish genuine use. The evidence could still be sufficiently solid.

30. I consider that the evidence taken as a whole establishes that the VITA mark has been genuinely used in relation to both fruit juice drinks and tea based drinks (and probably also distilled water). The turnover is not broken down but the evidence shows, in my view, that both these products are important parts of the VITA drinks range. It is counterintuitive to believe, based on the evidence as a

whole, that the tea drinks dominate the business to such an extent that the use in relation to the fruit juice drinks is token. There are examples of the mark being used in relation to fruit juice drinks on websites and at points of sale. The invoices themselves are not overwhelming, but these are just, as the witness states, a “selection of sample invoices”. There seems, as the proprietor submits, to be a reasonable level of continuity. Whilst not all of the exhibits can be placed in the relevant periods, the commentary of the witness is that the type of use occurred during the relevant periods. As I have already stated, the use in relation to tea drinks does not really assist because of the qualification to the specification. The use in relation to fruit juice drinks does, however, count. I bear in mind that the specification only covers three varieties of fruit juice drink. However, there are examples of these varieties in the invoices and on websites etc. I have borne in mind the two separate relevant periods, but my findings as to genuine use apply to both relevant periods given the reasonably consistent use over the years.

31. The use of the word VITA on the packaging is in a particular form. However, nowhere in its submissions does the applicant raise any issue that such use alters the distinctive character of the mark in the form in which it was registered. Even if such an argument had been raised, I would have accepted¹ that the stylisation was fairly limited and would not have altered the distinctive character of the mark and, in any event, there is some use of the mark in plain word form on invoices and on websites.

32. Another dispute between the parties is what a fair specification should be to reflect the use that has been made. A fair specification cannot, of course, be wider than the registered goods. The fair specification must not be pernickety². It is necessary to consider how the relevant public are likely to describe the goods³. The General Court (“GC”) in *Reckitt Benckiser (España), SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-126/03 held:

“45 It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or subcategories relating to which the goods or services for which the trade mark has actually been used actually belong. However, if a trade mark has

¹ After applying the test laid down by Mr Arnold QC (sitting as the Appointed Person) in *NIRVANA Trade Mark* (O/262/06) and in *REMUS trade mark* (O/061/08), and having borne in mind the guidance given by Mr Hobbs QC (sitting as the Appointed Person), in *Catwalk*.

² See *Animal Trade Mark* [2004] FSR 19.

³ See *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32.

been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

53 First, although the last sentence of Article 43(2) of Regulation No 40/94 is indeed intended to prevent artificial conflicts between an earlier trade mark and a mark for which registration is sought, it must also be observed that the pursuit of that legitimate objective must not result in an unjustified limitation on the scope of the protection conferred by the earlier trade mark where the goods or services to which the registration relates represent, as in this instance, a sufficiently restricted category."

33. I also note the comments of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited* BL O/345/10, where he stated:

"However, that does not appear to me to alter the basic nature of the required approach. As to that, I adhere to the view that I have expressed in a number of previous decisions. In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods concerned"

34. Given my comments on the specification as registered, and given my comments about the use made, the net effect is that the only relevant genuine use that falls within the specification as registered is the use made in relation to

the fruit juice drinks, the sugar cane, mango and guava varieties. The proprietor argues that the term non-alcoholic beverages can be retained. I do not agree. Fruit juice and fruit juice drinks constitute a specific subcategory within the broad term non-alcoholic beverages. Having gone through the various exhibits in detail, it is clear that the fruit juice drink is not pure (100%) fruit juice. Water appears to be its main ingredient, although, it is clear that the fruit juice component is a key selling point. I consider that the relevant public is likely to describe this as a fruit juice drink (as opposed to fruit juice per se). The specification must reflect its non-alcoholic nature (as per the original specification) and the qualification. The exclusion (goods made from lime flavouring) is not strictly necessary in view of the qualification, however, it should be retained for sale of clarity. I consider a fair specification to read:

Non-alcoholic fruit juice drinks; all made from or including sugar cane, guava and mango; all included in Class 32; but not including any drinks made from or including lime flavouring.

35. The registration shall be revoked, with effect from 18 November 2005, save for the above goods. The mark shall remain registered for the above goods.

Costs

36. The applicant has succeeded only partially. The proprietor has retained the goods for which it has been using the mark. Neither side will be favoured with an award of costs.

Dated this 3rd day of February 2015

**Oliver Morris
For the Registrar,
The Comptroller-General**