

O-117-08

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 82829
BY VITASOY INTERNATIONAL HOLDINGS LIMITED
FOR REVOCATION OF TRADE MARK No. 1546617
STANDING IN THE NAME OF
THE SUNRIDER CORPORATION T/A SUNRIDER INTERNATIONAL**

BACKGROUND

1) The following three trade marks are registered in the name of The Sunrider Corporation t/a Sunrider International. As they were merged they now appear under a single registration number, 1546617. However, the full details have been shown for each mark.

Mark	Number	Registration completed	Class	Specification
VITALITE	1546615	10.12.99	5	Dietetic substances; herbal beverages; preparations made from herbs all being for health purposes; nutritional supplements; vitamins; dietary fibre supplements; herbal food tablets; mouth drops and lozenges; nutritional syrup; all included in Class 5; but not including oils or fats.
VITALITE	1546616	10.12.99	29	Food and food products, all containing herbs; herbal food concentrates; snack bars containing herbs; preserved, dried and cooked fruit and vegetables; preserves; all included in Class 29; but not including oils or fats or goods of the same description as oils or fats.
VITALITE	1546617	10.12.99	32	Syrups and other preparations for making herbal drinks, all being nutritional supplements in liquid form; herbal drinks, nutritional syrups for making herbal drinks, all being for sale on a one to one basis directly to consumers and not through retail outlets; all included in Class 32.

2) By an application dated 10 April 2007, subsequently amended, Vitasoy International Holdings Limited applied for the revocation of the registration under the provision of Sections 46(1)(a) & (b) claiming there has been no use of the trade mark in suit in the five years following completion of the registration process nor in the five year period prior to 10 April 2007. The applicant requests revocation with effect from 10 December 2004 or 10 April 2007.

3) On 13 August 2007 the registered proprietor filed a counterstatement stating that it has used the mark in suit on all the goods registered. The registered proprietor also points out that the revocation action was launched without prior notification and that much of the evidence of use that the registered proprietor will file has already been viewed by the applicant in a previous invalidation action (81853) before the High Court in February 2007.

4) Only the registered proprietor filed evidence. Both sides seek an award of costs. The matter came to be heard on 14 March 2008 when the registered proprietor was represented by Mr Malynicz of Counsel instructed by Messrs J A Kemp & Co. and

the applicant by Mr Onslow of Counsel instructed by Messrs Field Fisher Waterhouse LLP.

REGISTERED PROPRIETOR'S EVIDENCE

5) The registered proprietor filed a witness statement, dated 9 August 2007 by Oscar Crispino Philip D'Souza the Regional Finance Manager for Sunrider Europe Inc., the European licensee of the Sunrider Corporation. He states that the information that he provides is within his own knowledge or obtained from the records of Sunrider. He states that the mark in suit was first used in the UK in September 1991. He states that it has been used on a number of herbal supplements and herbal food products sold in the UK. These are sold under a number of brands and he lists them as *Vitalite Sunbar*, *Vitalite Bar*, *Vitalite Pack*, *Vitadophilus*, *Fibertone*, *Fortune Delight*, *Vitalite Caps*, *Vitalite Sportcaps*, *Vitalite Slim Caps* and *Vitataste*.

6) Mr D'Souza states that the registered proprietor "has made steady sales of its products branded under the VITALITE mark during the time that they have been available in the UK". He provides in the following table sales figures for each of the VITALITE branded products during the period 1995-2004. He states that he has not been able to break down the figures for 2004-2007 by reference to the trade mark, although he states that he expects the figures to have remained static. The figures shown are in UK£.

	1998	1999	2000	2001	2002	2003	2004
Vitalite Sunbar/Bar	62,831	17798	9385	8906	10570	7578	9350
Vitalite Pack	1861	1236	513	2019	757	2379	1808
Vitadophilus	2884	1926	2211	1891	2412	2064	1909
Fibertone	542	520	625	532	251	400	656
Fortune Delight	19998	10804	16602	19975	19724	24962	19360
Vitalite Caps/Action/Sportscap	22070	1743	2606	2254	2758	3136	1733
Vitataste	3383	942	1240	0	1202	1820	1022
Vitalite Slim Caps	0	0	0	1550	5846	5949	6261

7) Mr D'Souza states that the products have been sold throughout the UK and he lists towns and cities throughout the Kingdom where he states that sales have been made. He states that promotional materials have been distributed throughout the UK and he provides the following figures which relate to promoting the various VITALITE products in the UK by way of a newsletter.

Year	Amount £
2000	17,777
2001	13,291
2002	11,923
2003	11,936

2004	12,542
2005	12,379

8) Mr D'Souza states that he believes that the evidence shows that his company has used the mark on all of the goods for which it is registered. He also comments that much of this evidence was used in a recent High Court action between the parties. He provides a number of exhibits which I summarise below:

- Exhibit ODS1: examples of how the mark is applied to the goods. This consists of actual examples of boxes and jars as well as a set of photocopies of the items showing all sides of each. In a large box called "The Vitalite Pack" there were a number of smaller packages. These included "Vitalite Sunbar", various "NuPlus" boxes, "Fortune Delight" boxes, a "Vita Dolphilus" box and three "Vitalite Caps" bottles. The boxes marked "Fortune Delight" and "Vita Dolphilus" also have, on one side of the box, the marks "Sunrider" and "Vitalite". Also included as part of the exhibit were three bottles marked "Vitalite Slim Caps", "Vitataste" and "Vitalite Fibertone".
- Exhibit ODS2: copies of 22 invoices for the most part dated between August 2001 and September 2004. There were two invoices from 1992 but these are of little assistance. Six of the invoices were very badly photocopied and could not be read. Of those that could be read, they appeared to be addressed to individual clients in the UK judging by the low value and volume of each invoice. The products are referred to by their individual product name not by the VITALITE range name, but Mr D'Souza asserts in his statement that they were sold under the packaging shown in exhibit 1. Also included in this exhibit are a number of computer print outs titled "History Order" and "History Payment". These are of little assistance as for the most part they do not identify the client, their address or the products purchased.
- Exhibit ODS3: copies of promotional materials that were distributed throughout the UK to individual customers/ distributors. These feature the VITALITE marks, amongst many others, but seem primarily aimed at promoting the "SUNRIDER" mark and the unusual form of selling where each customer seeks to sell onto a number of others, who in turn become distributors. The newsletters have lists of distributors who have sold over given amounts of product. These are primarily in continental Europe, but do include a number in the UK.
- In the newsletters contained within exhibit ODS3 there are descriptions of the products which are sold under each of the marks listed in the table at paragraph 6 above, and which have the packaging provided at exhibit OSD1. These descriptions are in summary:

Vitalite Caps/slimcaps/sport caps: capsules which contain dietetic substances, herbal food concentrate, and nutritional supplements. Used for health purposes e.g. to enhance metabolic processes.

Vitalite Sunbar: a nourishing low-fat, low sodium herbal bar, containing dietary fibre.

Fortune Delight: an all natural, low calorie, concentrated herbal beverage in powder form which assists the body's natural elimination processes. Containing anti-oxidants which are shown to be effective in absorbing damaging free radicals.

Fibre-tone: each capsule contains a unique concentrated blend of herbs which provide soluble and insoluble fibre. It helps maintain efficient digestion.

Vitodophilus: a powder which when mixed with water provides a live culture bacteria into the body full of nutritional supplements.

Vitataste: a herbal concentrate capsule.

- Exhibit ODS4: examples of price lists for the period 1995 – 2004. These include a number of entries for products which have been shown in ODS1 to carry the mark in suit, albeit amongst others.
- Exhibit ODS5: Copies of invoices for the newsletters dated January 2001 – May 2007.

9) That concludes my review of the evidence. I now turn to the decision.

DECISION

10) At the hearing the registered proprietor accepted that elements of its specification were not defensible. These were:

In Class 5: Mouth drops and lozenges; nutritional syrups.

In Class 32: Syrups; nutritional syrups.

11) The revocation action is based upon Section 46 of the Trade marks Act 1994, the relevant parts of which read as follows:

“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 purposes 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.”

12) The applicant alleges that the mark has not been used in the five years following registration or in the five years prior to the date of the application which was filed on 10 April 2007. The periods in question were accepted at the hearing as being 11 December 1999 – 10 December 2004 and 10 April 2002 – 9 April 2007.

13) Where the registered proprietor claims that there has been use of the trade mark, the provisions of Section 100 of the Act make it clear that the onus of showing use rests with him. It reads:

“100. 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.”

14) I take into account the judgement in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* where the European Court of Justice, on 11 March 2003, stated at paragraphs 35-42:

“35. Next, as Ansul argued, the eighth recital in the preamble to the Directive states that trade marks ‘must actually be used, or, if not used, be subject to revocation’. ‘Genuine use’ therefore means actual use of the mark. That approach is confirmed, *inter alia*, by the Dutch version of the Directive, which uses in the eighth recital the words ‘werkelijk wordt gebruikt’, and by other language versions such as the Spanish (‘uso efectivo’), Italian (‘uso effettivo’) and English (‘genuine use’).

36. ‘Genuine use’ must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark. Such use must be consistent with the essential function of a trade mark, which is to guarantee the identity of origin of goods or services to the consumer or the end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin.

37. It follows that ‘genuine use’ of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers and the consequences of registering it in terms of enforceability *viv-a-vis* third parties cannot continue to operate if the mark loses its commercial *raison d’etre*, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings. Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations for by the undertaking to secure customers are under way, particularly in the form of advertising campaigns. Such use may be either by the trade mark proprietor or, as envisaged in Article 10(3) of the Directive, by a third party with authority to use the mark.

38. Finally, when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.

39. Assessing the circumstances of the case may thus include giving consideration, *inter alia*, to the nature of the goods or services at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark need not, therefore, always be quantitatively significant for it to be deemed genuine, as that depends on the characteristics of the goods or services concerned on the corresponding market.

40. Use of the mark may also in certain circumstances be genuine for goods in respect of which it is registered that were sold at one time but are no longer available.

41. That applies, *inter alia*, where the proprietor of the trade mark under which such goods were put on the market sells parts which are integral to the make-up or structure of the goods previously sold, and for which he makes actual use of the same mark under the conditions described in paras [35] to [39] of this judgement. Since the parts are integral to those goods and are sold under the same mark, genuine use of the mark for those parts must be considered to relate to the goods previously sold and to serve to preserve the proprietor’s rights in respect of those goods.

42. The same may be true where the trade mark proprietor makes actual use of the mark, under the same conditions, for goods and services, which, though not integral to the make-up or structure of the goods previously sold, are directly related to those goods and intended to meet the needs of customers of those goods. That may apply to after-sales services, such as the sale of accessories or related parts, or the supply of maintenance and repair services.”

15) I also take into account the comments of the Court of First Instance (CFI) in *La Mer Technology Inc v. Office for Harmonisation in the Internal Market* [2008] E.T.M.R. 9 where, at paragraphs 64-66 the CFI said:

“64. Secondly, as the applicant rightly noted and as taken into account by the Board of Appeal in [24] of the contested decision, none of the 10 invoices taken into account by the Board of Appeal contains the earlier mark.

65. However, the fact that the earlier mark is not referred to on those invoices cannot prove that the latter are irrelevant for the purposes of proving genuine use of that mark.

66. In this case, as the applicant conceded at the hearing, besides the mark applied for being a house brand, so that it is natural that it does not appear on the invoices which contain only the names of the products enabling them to be identified, it must be stated that the products referred to on those invoices are clearly identifiable, and the packaging which was supplied by the intervener, and was sold on the dates substantiated by those invoices, proves that they have either the reference “le laboratoire de la mer” or “laboratoire de la mer” (“Iodus” range). Accordingly, in respect of the “Iodus” make-up remover fluid referred to on invoice no. 22214 of 3 January 1995, it must be stated that the packaging of the product contains the term “goemar” and, below it, “laboratoire de la mer”. Likewise, in respect of the products listed in invoice nos. 24085 of 4 May 1995, 31348 of 26 March 1997, 32096 of 12 May 1997, 32257 of 21 May 1997, 32574 of 9 June 1997 and 34365 of 28 November 1997 under the name Thalasso boain or Thala. Bain, it is clear that their packaging includes “goemar” and, underneath, “le laboratoire de la mer”. Those terms also appear on the two packaging samples containing products in that range.”

16) And later at paragraph 90:

“90. The sales effected, even though they are not considerable, constitute use which objectively is such as to create or preserve an outlet for the products concerned and which entails a volume of sales which, in relation to the period and frequency of use, is not so low that it may be concluded that the use is merely token, minimal or notional for the sole purpose of preserving the rights conferred by the mark (Ansul at [35] and [36]; see, to that effect, VITAFRUIT at [49]).”

17) I now turn to consider the evidence filed in this case. The applicant sought to question the evidence filed at exhibit ODS1. The registered proprietor filed examples of the actual packaging as well as photocopies of said packaging with the Registry under the cover of a front page identifying all of the items as exhibit ODS1. The copy of the evidence sent to the applicant contained only the photocopies. At the hearing it was contended that only the photocopies should be regarded as being filed as evidence. I reject this contention as clearly the actual examples were filed as the exhibit with photocopies for ease of reference and filing. The photocopies showed all six sides of each box and both sides of the bottles. They were carefully arranged so that they could be viewed easily as such. The applicant also raised the issue of whether it was clear that the packaging had been used in the UK. The witness

statement is very clear that this packaging was used in the UK. The packaging on all products, with the exception of Nuplus, carried the Vitalite mark, as part of the main brand or as a sub-brand. As such I regard it as use of the mark in suit as a trade mark on those goods (see *BUD / BUDWEISER BUDBRAU* [2003] RPC 24).

18) From exhibit ODS3 it is clear that the registered proprietor sells via individuals who sell to others and/or recruit further distributors. Thus, a chain is formed from the registered proprietor via distributors to end users. The newsletters which formed this exhibit also showed the names of a number of UK based individuals who had recruited hundreds or thousands of others. The majority of names shown on the newsletters were from continental Europe, but whilst the business is not doing as well in the UK as elsewhere this does not detract from the sales actually made. The registered proprietor provided sales figures for the UK under the various brands it uses. It is clear from the packaging (ODS1) that most also carry the mark in suit. The witness statement filed confirmed that the sales are spread across the whole of the UK and examples of invoices were also provided. The applicant contended that the names and addresses of the distribution chain were not provided but accepted that if such sales were claimed to have been made via shops they would not have expected the names and addresses of the shops to have been provided. Similarly, the charge was made that the newsletters were only sent to the individual distributors. I do not accept this criticism and do not regard such use as “internal use”. The invoices provided are samples and whilst they are each of low value they are merely corroboration of the witness statement and its assertions. The witness statement shows significant sales in the UK during the relevant period. The evidence provided in the witness statement was not challenged by the applicant and no request was made to cross examine the witness.

19) The applicant contended that the registered proprietor had not discharged the onus that section 100 lays upon it. However, in considering what constitutes evidence of use I take into account the comments of Mr Arnold QC acting as the Appointed Person in *Pan World Brands Ltd v Tripp Ltd (Extreme)* [2008] RPC 2 where he said:

“31. Basing himself upon the first three sentences of the passage I have quoted from Moo Juice, counsel for the applicant submitted (1) that a mere assertion of use of a trade mark by a witness did not constitute evidence of use sufficient to defeat an application [for revocation] for non-use, and (2) it followed that mere testimony from a representative of the proprietor was not enough and such testimony had to be supported either by documentary records or corroborated by an external witness. I accept submission (1) but not submission (2). Kitchen J.’s statement that “bare assertion” would not suffice must be read in its context, which was, that it had been submitted to him that it was sufficient for the proprietor to give evidence stating “I have made genuine use of the trade mark”. A statement by a witness with knowledge of the facts setting out in narrative form when, where, in what manner and in relation to what goods or services the trade mark has been used would not in my view constitute bare assertion. As counsel for the applicant accepted, it might not be possible for a trade mark proprietor to produce documentary evidence: for example all the records might have been destroyed in a fire. In such circumstances I do not see anything in either the Directive, the 1994 Act or the 2000 Rules which would require the

proprietor to adduce evidence from an external witness (which is not to say that it might not be advisable for the proprietor to do so).”

20) In this decision the Appointed Person went onto consider the position regarding unchallenged evidence. He took into account *Phipson on Evidence* (16th ed), the House of Lords in *Brown v Dunn* (1894) 6 R.67, Hunt J. in *Allied Pastoral Holdings v Federal Commissioner of Taxation* [1983] 44 ALR 607 and The Court of Appeal in *Markem Corp v Zipher Ltd* [2005] RPC 31. He summed up these views:

“35. In my judgement the learned editors of *Phipson* are correct to say that the rule is not an inflexible one. There are at least two well-established exceptions to it. The first is that, as the speech of Lord Herschell L.C. in *Brown v Dunn* makes clear, it may not be necessary to cross-examine on a point if the witness has been given full notice of it before making his statement. As I pointed out in *BRUTT Trade Marks* [2007] R.P.C. 19 at [23], this may be significant in registry proceedings where evidence is given sequentially. The second is that a court is not obliged to accept a witness’s evidence in the absence of cross-examination if it is obviously incredible: see *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453.

36. Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness’s evidence despite having had the opportunity to do so, then I consider that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness’s evidence.”

21) In my opinion the registered proprietor has provided a narrative which is not “obviously incredible”. On the contrary the evidence filed as exhibits backs up the narrative. Whilst it is not the most convincing evidence that I have seen it is more than adequate. The use shown is within the relevant periods and is genuine use. The only issue is precisely what has the mark in suit been used on in terms of the specification.

22) At the start of the hearing Mr Malynicz offered certain concessions regarding parts of the specification that he was not defending (see paragraph 10). In addition he provided a list of his clients’ trade marks with a description of the nature of the item and what he felt this protected in his specification. This was very helpful and also reduced the specification that was being defended to the following:

In Class 5: Dietetic substances; herbal beverages; preparations made from herbs all being for health purposes; nutritional supplements; vitamins; dietary fibre supplements; herbal food tablets; all included in Class 5; but not including oils or fats.

In Class 29: Food and food products, all containing herbs; herbal food concentrates; snack bars containing herbs; all included in Class 29; but not including oils or fats or goods of the same description as oils or fats.

In Class 32: Preparations for making herbal drinks, herbal drinks, all being for sale on a one to one basis directly to consumers and not through retail outlets; all included in Class 32.

23) I believe that these concessions, though late in the day, were very wise as the elements that he excluded were not defensible as no evidence of use on the items excluded from the above list had been filed. I therefore have to consider whether the evidence provided is sufficient to allow the above, reduced, specifications to remain on the Register.

24) The correct approach to reducing a specification has been considered in a number of cases that have been before the High Court and Court of Appeal. Richard Arnold QC, sitting as the Appointed Person, considered and accumulated authorities in *Nirvana Trade Marks*, BL O/262/06. I gratefully adopt the following propositions that he derived from his consideration of the case law:

(1) The tribunal's first task is to find as a fact what goods or services there has been genuine use of the trade mark in relation to during the relevant period: *Decon v Fred Baker* at [24]; *Thomson v Norwegian* at [30].

(2) Next the tribunal must arrive at a fair specification having regard to the use made: *Decon v Fred Baker* at [23]; *Thomson v Norwegian* at [31].

(3) In arriving at a fair specification, the tribunal is not constrained by the existing wording of the specification of goods or services, and in particular is not constrained to adopt a blue-pencil approach to that wording: *MINERVA* at 738; *Decon v Fred Baker* at [21]; *Thomson v Norwegian* at [29].

(4) In arriving at a fair specification, the tribunal should strike a balance between the respective interests of the proprietor, other traders and the public having regard to the protection afforded by a registered trade mark: *Decon v Fred Baker* at [24]; *Thomson v Norwegian* at [29]; *ANIMAL* at [20].

(5) In order to decide what is a fair specification, the tribunal should inform itself about the relevant trade and then decide how the average consumer would fairly describe the goods or services in relation to which the trade mark has been used: *Thomson v Norwegian* at [31]; *West v Fuller* at [53].

(6) In deciding what is a fair description, the average consumer must be taken to know the purpose of the description: *ANIMAL* at [20].

(7) What is a fair description will depend on the nature of the goods, the circumstances of the trade and the breadth of use proved: *West v Fuller* at [58]; *ANIMAL* at [20].

(8) The exercise of framing a fair specification is a value judgment: *ANIMAL* at [20].

25) The registered proprietor has shown genuine use of the goods listed at paragraph 8 which is reproduced below for ease of reference:

Vitalite Caps/slimcaps/sport caps: capsules which contain dietetic substances, herbal food concentrate, and nutritional supplements. Used for health purposes e.g. to enhance metabolic processes.

Vitalite Sunbar: a nourishing low-fat, low sodium herbal bar, containing dietary fibre.

Fortune Delight: an all natural, low calorie, concentrated herbal beverage in powder form which assists the body's natural elimination processes. Containing anti-oxidants which are shown to be effective in absorbing damaging free radicals.

Fibretone: each capsule contains a unique concentrated blend of herbs which provide soluble and insoluble fibre. It helps maintain efficient digestion.

Vitadolphilus: a powder which, when mixed with water, provides a live culture bacteria into the body full of nutritional supplements.

Vitataste: a herbal concentrate capsule.

26) The applicant contended that the specification in Class 5 related to medical products and that none of the above goods were medicinal. In my experience there are herbal infusions which are sold under a medicinal label which would not be recognised as such by the medical profession. However, there is a significant proportion of the population that would claim that their health is improved by these items.

27) Having considered the issues in the light of the above guidance I am content to broadly adopt the table as set out by Mr Malynicz with minor adjustments. The result is as follows:

Product	Specification
Vitalite Caps / slimcaps / sport caps	Class 5: dietetic substances; preparations made from herbs for health purposes; nutritional supplements; herbal food tablets. Class 29: herbal food concentrates.
Fortune Delight	Class 5: preparations for herbal beverages for health purposes. Class 32: Preparations for making herbal drinks.
Vitalite Sunbar	Class 29: Snack bars containing herbs.
Vitadolphilus	Class 5: dietetic substances; nutritional supplements
Fibretone	Class 5: dietetic substances; preparations made from herbs for health purposes; dietary fibre supplements; herbal food tablets.
Vitataste	Class 5: dietetic substances; preparations made from herbs for health purposes; nutritional supplements; herbal food tablets.

28) The registered proprietor therefore retains the following specification:

In Class 5: dietetic substances; preparations made from herbs for health purposes; nutritional supplements; herbal food tablets; dietary fibre supplements; but not including oils or fats.

In Class 29: Snack bars containing herbs; herbal food concentrates; but not including oils or fats or goods of the same description as oils or fats.

In Class 32: Preparations for making herbal drinks; all being for sale on a one to one basis directly to consumers and not through retail outlets.

29) The balance of the specification is revoked with effect from 10 December 2004.

30) The registered proprietor has succeeded in defending the major parts of its specification in each class. They sought costs off the normal scale as they contended that the parties had a hearing in the High Court where the applicant had essentially the same evidence as was filed by the registered proprietor in the instant case. They also state that the revocation action was made without warning. The applicant accepted that it had seen the evidence in the previous case but felt that it did not prove genuine use. The applicant pointed out that the evidence had already been prepared and so the costs would be substantially lower for this case.

31) As the registered proprietor has been substantially successful it is entitled to a contribution towards its costs. I order the applicant to pay the registered proprietor the sum of £2,500. This sum 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 23rd day of April 2008

**George W Salthouse
For the Registrar,
the Comptroller-General**