

TRADE MARKS ACT 1994

**IN THE MATTER OF UK trade mark application 2517770
by Vitabiotics Ltd to register the mark
SWEETELA in Classes 1 and 5**

**AND IN THE MATTER OF Opposition No. 99611
by Reckitt Benckiser Healthcare (UK) Ltd**

**Appeal of the Applicant from the decision of
Mr. Oliver Morris dated 30 September 2010**

DECISION

1. This is an appeal against a decision of Mr Oliver Morris, the Hearing Officer for the Registrar, dated 30 September 2010, in which he rejected an opposition to the registration of the mark SWEETELA for goods in Classes 1 and 5. The applicant was Vitabiotics Ltd ("Vita") and the opponent Reckitt Benckiser Healthcare (UK) Ltd ("Reckitt").

Background

2. On 3 June 2009, Vita applied under No. 2517770 for registration of the word trade mark SWEETELA for "Sweetening preparations, low-calorie sweeteners for use in food and beverages" in Class 1 and "Pharmaceutical preparations; sweetening preparations for dieters, slimmers or medical purposes in tablet or powder form" in Class 5.
3. Notice of Opposition to all of the goods was filed on behalf of Reckitt based on section 5(2)(b) of the Act. Reckitt relied upon three earlier registered trade marks, of which only two UK marks are relevant to this appeal; both of those marks are for the word SWEETEX. The first of them, number 1120617, is registered in Class 1 for "Artificial sweetening preparations" and the second, number 771934 in Class 5 for "Dietetic sweetening agents in tablet form for diabetics, all being goods for export."
4. Reckitt filed evidence and Vita filed written submissions (effectively in lieu of evidence), but no hearing was sought before the hearing officer nor did either side file further submissions.

5. The Hearing Officer rejected the opposition and Reckitt appealed.

Grounds of Appeal

6. The essence of the appeal was Reckitt's argument that the Hearing Officer had failed to carry out a proper analysis of the relevant factors to be weighed in the global appreciation of the likelihood of confusion for section 5(2)(b), in particular in finding only a moderate level of visual similarity, a low level of aural similarity, and no relevant conceptual similarity between the earlier marks and the sign.

Relevant parts of the Hearing Officer's decision

7. Reckitt's evidence concentrated upon the long-standing use of the Sweetex marks on artificial sweeteners and Vita accepted that the mark is highly established on the UK market. After summarising the evidence, the Hearing Officer set out section 5(2)(b) and the usual guidance of the CJEU. At paragraph 20 of his decision he explained:

"20) I intend to consider the opposition in relation, first of all, to the goods in class 1. I do so because there may be some subtle differences in relation to the class 5 assessment given that they include goods (even if they are sweeteners) for medical and dietetic purposes which may, when they are purchased, be a more considered process than artificial sweeteners per se. That is not to say that the opposition will fail in class 5, but it is more a case that if Reckitt cannot succeed in class 1 then it is unlikely to be in any better position in class 5."

He went on:

"21) There are some aspects of the case which are not really in dispute. There is no dispute that the goods are identical. ...There is also no real dispute as to the average consumer of the goods which both parties say will be non-specialist members of the general public. Reckitt say that the average consumer will undertake the selection of the goods in a casual manner paying little attention. Vita make no real submission on this point, although, I do note that it says that the average consumer will pay a high level of attention to differences between marks which are based on descriptive words (SWEET prefixed marks for example).

22) The case-law informs me that the average consumer is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). The degree of care and attention the average consumer uses when

selecting the goods can, however, vary depending on the particular goods in question ... In the case before me the goods are relatively low cost, and for those who buy artificial sweeteners such a purchase will be relatively frequent. This points towards a casual purchase in line with Reckitt's submission. That does not mean that no care and attention will be displayed at all because the goods, after all, are purchased to be ingested and, furthermore, brand loyalty may play a part in the selection process. However, the degree of care and attention is certainly at the lower end of the scale.

23) Another aspect on which there is little difference between the parties is the degree of distinctive character of the earlier mark. This is a factor because the more distinctive the earlier mark(s) (based either on inherent qualities or because of the use made of them), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). From an inherent starting point the earlier mark is reasonably distinctive. It gives a strong allusion to the nature of the goods (due to the SWEET element) but the mark as a whole is SWEETEX which is reasonably distinctive in totality. However, the evidence of use of SWEETEX, together with Vita's concession that it is "highly established", informs me that the earlier mark(s) should be regarded as highly distinctive."

8. None of those findings are contentious. Reckitt's appeal turned on the Hearing Officer's findings as to the similarity between the marks and his conclusion that there was no likelihood of confusion between them. He said:

"25) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account any distinctive and dominant components.

26) The above comments are particularly apposite in the case before me because I believe it clear, particularly bearing in mind the nature of the goods, that both marks will be perceived by the average consumer as being based on the word SWEET

(which both sides accept is a descriptive word for the goods at issue) together with the suffixes EX/ELA. Whilst the average consumer will notice that both marks are based on the word SWEET, this does not mean that this word SWEET should be discounted from the respective marks' overall impressions. Similar observations were made by the GC when considering the trade marks RESPICORT and RESPICUR in Case T-256/04 (*Mundipharma v OHIM, Altana Pharma*) where it stated:

“The above conclusions on the perception of the opposing marks are not affected by OHIM’s argument that the component ‘respi’ cannot contribute to any similarity between the signs because of its descriptive character. In fact, in spite of that character, that component, which is placed at the beginning of the two marks, takes up two of their three syllables and is longer than the respective second components, makes a significant contribution to the overall impression produced by the two signs in question.”

27) That deals, to some extent, with Vita’s reference to the fact that no one party can claim a monopoly in the word or prefix SWEET. Whilst I understand the concern, the question that remains is to look at the totalities created by the overall impression of the respective marks.

28) I also note Reckitt’s submission that beginnings of marks are, generally, more focused upon. However, a number of cases [FN] have stressed that this is not always the case and this must, therefore, be only a rule of thumb. In the case before me, the fact that the beginnings of the marks are descriptive will be something the average consumer is alive to and, thus, they will not focus on the beginnings. Whilst this does not mean that the average consumer will instead focus upon the endings, it is certainly, in line with the case-law, the whole mark and its full construction and overall impression that will be appreciated and focused upon. [The footnote to this paragraph reads: “See, by way of example, the decisions of the GC in *Spa Monopole, compagnie fermière de Spa SA/NV v OHIM* (Case T-438/07) and *Castellani SpA v OHIM* (T-149/06). These, of course, are not relied upon on their facts but only the point of principle”.]

29) In terms of visual similarity, the marks are of a similar length (7 and 8 letters respectively), the first 6 of which are shared. The last letter (in the case of Reckitt’s mark) and the last two letters (of Vita’s mark) differ. These letters show no real similarity and, furthermore, the letter X is one of the more unusual letters in the

English language such that the difference at the end is more likely to stand out. Having said that, the differences do not outweigh all similarity, but I regard such similarity to be of only a moderate level.

30) In terms of aural similarity, there is a degree of aural similarity as both marks share the first syllable SWEET but there is a difference in the endings of the marks in that the second (and final) syllable of Reckitt's mark is EX and the final two syllables of Vita's mark is EL-A or E-LA. This results in the respective pronunciations being: (a) the two syllable SWEET-EX against (b) the three syllable SWEET-E-LA or SWEET-EL-A. These pronunciations also provide a further difference in that Vita's mark has a certain flow about it whereas Reckitt's mark has a more truncated feel. There are some clear differences but not that they outweigh all similarity. I regard there to be a low degree of aural similarity.

31) In terms of concept, neither party have made any submissions on this. Neither mark, in totality, has any real concept. Both, though, are based on the word SWEET, but given this words descriptive context, I do not regard this as particularly significant. There is no relevant conceptual similarity or dissonance.

32) The key question is whether these factors combine to create a likelihood of confusion. It is clear that all these factors have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17) and that a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

33) I am considering here identical goods – this is important in view of the interdependency principle and the offsetting approach whereby a lesser degree of similarity between the marks may be offset by a greater degree of similarity (in this case identity) between the goods. I am also dealing with a highly distinctive earlier trade mark. The average consumer is a member of the general public who will select the products in a casual manner. The significance of this is that the concept of imperfect recollection is all the more important as the average consumer will not be particularly careful or attentive and will tend to rely more on imperfect recollection than he or she would have done had the goods been highly considered purchases. Imperfect recollection is also emphasised here as there is no real conceptual hook

for either mark which can be stored away and which may have assisted in distinguishing the marks. All the factors mentioned so far in this paragraph point towards confusion rather than away from it. That being said, there are still differences between the marks residing in their endings such that the similarity between them is of only a low (aural) to moderate (visual) degree and that such similarity resides in a descriptive element.

34) Reckitt's concern is that the SWEETELA product may be selected in the mistaken belief that it is SWEETEX or that the average consumer will believe that SWEETELA is a variant product from the undertaking responsible for SWEETEX. Dealing with the first proposition of mistaken identity, I come to the view that there is no likelihood of confusion. Whilst the average consumer rarely has the opportunity to make direct comparisons (if a direct comparison were possible here then I have no doubt that mistaken identity will not occur), the differences in the endings of the marks, even bearing in mind imperfect recollection and the other relevant factors, are sufficient for the average consumer to be able to differentiate even when he or she is purchasing these identical goods. The endings are sufficiently and markedly different so that, when the marks are taken as a whole, their overall impressions are capable of differentiation. Whilst the purchase is a casual one, the average consumer is still reasonably observant and circumspect and they will not overlook the differences between the marks. There is no likelihood of direct confusion.

35) The other argument is that the average consumer will believe that the goods are the responsibility of the same or an economically linked undertaken. This is a relevant form of confusion often referred to as indirect confusion. I do not, though, accept this argument. Whilst the word SWEET is at the beginning of both marks and that it is used to create an invented word, the average consumer is likely to put this down to mere co-incidence rather than any form of economic connection. In my view SWEETELA will be seen for what it is, simply a competing brand in the field of artificial sweeteners. There is no likelihood of indirect confusion. The fact that there may be no other brands of a similar construction in use in the relevant field does not detract from this finding.

36) Given my finding that there is no likelihood of confusion in relation to the goods sought to be registered in class 1, I do not consider it necessary to consider the goods in class 5. ...The opposition fails in its entirety."

The standard of review

9. The standard of review for this appeal is helpfully set out at paragraphs 5-6 of the decision of Daniel Alexander QC in *Digipos Store Solutions Group Limited v. Digi International Inc* [2008] RPC 24:

"5... It is clear from *Reef Trade Mark* [2003] RPC 5 ("*Reef*") and *BUD Trade Mark* [2003] RPC 25 ("*BUD*") that neither surprise at a Hearing Officer's conclusion nor a belief that he has reached the wrong decision suffice to justify interference by this court. Before that is warranted, it is necessary for this court to be satisfied that there is a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong (*Reef*). As Robert Walker LJ (as he then was) said:

"...an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance to interfere in the absence of a distinct and material error of principle" (*Reef*, para. 28)

6. This was reinforced in *BUD*, where the Court of Appeal made it clear that it preferred the approach of the appellate judge but nonetheless held that there was no error of principle justifying departure from the Hearing Officer's decision. As Lord Hoffmann said in *Biogen v. Medeva* [1997] RPC 1 at 45, appellate review of nuanced assessments requires an appellate court to be very cautious in differing from a judge's evaluation. In the context of appeals from the Registrar relating to section 5(2)(b) of the Act, alleged errors that consist of wrongly assessing similarities between marks, attributing too much or too little discernment to the average consumer or giving too much or too little weight to certain factors in the multi-factorial global assessment are not errors of principle warranting interference."

The decision with regard to the issues in this case involved a multi-factorial assessment of the kind mentioned above.

Merits of the appeal:

Class 1 goods

10. In paragraph 33 of the decision, the Hearing Officer listed a number of his findings which he accepted pointed to a likelihood of confusion, yet he found that there was no such likelihood. In Reckitt's Grounds of Appeal it complained that his analysis had been flawed, and that he should have found that

- a. as the marks share the same first 6 letters, they are highly visually similar and such similarity is important to goods of this nature, which are liable to be purchased through self-selection;
 - b. again, because the marks share the same first 6 letters, there is at least a moderate level of aural similarity;
 - c. there is conceptual similarity, as the marks are both based on the descriptive word "sweet," and
 - d. all of these similarities are significant because the identical element of the marks is the first and most significant part of the word.
11. Reckitt referred me to paragraph 21 of the decision in *Lloyd*, a seminal CJEU case to which the Hearing Officer had also referred at a number of points in his decision, suggesting that it showed that the combination of factors mentioned in paragraph 33 of the decision under appeal led inevitably to a likelihood of confusion. That does not seem to me to be correct as a matter of principle; the CJEU in that case held only that "there *may* be a likelihood of confusion, notwithstanding a lesser degree of similarity between the trade marks, where the goods or services covered by them are very similar and the earlier mark is highly distinctive" (emphasis added). The question of whether there is a likelihood of confusion in any particular case must depend on the facts of that case, and the question for me is whether the Hearing Officer erred as a matter of principle or was clearly wrong in his conclusions. Reckitt also referred me to the General Court's decision in *Matratzen v OHIM*, Case T-6/01, in which it was held that two marks are similar when they are at least partly identical in terms of their visual, aural or conceptual aspects. That proposition does not seem to me to take this appeal anywhere, because the Hearing Officer accepted that these marks are similar, at least visually and aurally (I deal with the point about conceptual similarity below); this is not a case in which the Hearing Officer erred in finding no similarity at all.
12. In relation to the visual and aural similarities between these marks, it does not seem to me that the approach taken by the Hearing Officer was incorrect. First, he was plainly right to seek to compare the marks as a whole, assessing the overall impression created by each mark, and he specifically said in paragraph 26 of the decision that he was not discounting the descriptive element of the marks, namely that each of them begins with the descriptive word "sweet". It also seems to me that he gave due consideration to the importance generally attributed to the first part of word marks, as well as to the differences between

them. Insofar as he was looking at visual similarity, he concluded in paragraph 29 that the differences between the endings of the marks are significant, that the differences do not mean that the marks are not similar at all, but reduce the level of similarity to "moderate".

13. In my judgment, there is nothing in this part of the decision which suggests that there was any error of principle or material error made by the Hearing Officer. Reckitt referred me to a number of decisions of the General Court which, it submitted, showed that the presence of a number of the same letters in the same order in two word marks means that they are visually similar. That may well be the case. However, those decisions can be contrasted to the *Castellani* decision mentioned below, in which different word endings were held to rule out any visual similarity. Nothing in this decision shows, in my judgment, that this Hearing Officer erred in principle in the manner in which he assessed visual similarity: he accepted that these marks are visually similar but, in his view, the differences in the endings of the words reduce the level of such similarity. In my judgment, that is a conclusion which he was entitled to reach and even if another hearing officer might have come to a different conclusion, there is no error of principle such that I should revisit the question of the level of visual similarity between the marks in this appeal.
14. Reckitt's submissions as to the Hearing Officer's findings on aural similarity were based on essentially the same points as those on visual similarity, and it relied upon the importance of the similarity of the beginning of the word. I was referred to a number of decisions of the OHIM Boards of Appeal where word marks which had identical beginnings were found to be aurally similar. Again, those decisions may be contrasted with the *Castellani* case, demonstrating how each case must be approached on its own facts. The Hearing Officer here found that there was a degree of aural similarity here, as well as aural differences. In my judgment, his approach accorded with principle, and I do not consider it appropriate to revisit the point on appeal.
15. Reckitt also challenged the Hearing Officer's findings on conceptual similarity. I note that Reckitt had not alleged in its TM7 or its evidence that the marks were conceptually similar, nor were any submissions made by either party as to conceptual similarity. Nevertheless, Mr Morris rightly considered whether the marks were conceptually similar. He accepted that both were based on the word 'sweet' but thought that neither 'in totality, has any real

concept.’ Hence he found no relevant conceptual similarity, nor did he think that one mark had a meaning which the other did not (the conceptual ‘dissonance’ to which he referred).

16. In my judgment, paragraph 31 of his decision, in which the Hearing Officer reaches those conclusions, must be read in the light of paragraphs 25-28 of the decision, where he had considered how much the descriptive beginning of each mark affected the overall impression given by each of the marks. In paragraph 28, Mr Morris referred to two General Court decisions in which word elements in the marks to be compared had identical descriptive beginnings. These decisions can usefully be contrasted to Case T-256/04, *Mundipharma*, which the Hearing Officer cited at paragraph 26 and upon which Reckitt relied on the appeal (together with a number of the Board of Appeal decisions). In *Mundipharma*, a decision dated 13 February 2007, the marks were RESPICORT and RESPICUR for therapeutic preparations for respiratory illnesses/pharmaceuticals. At paragraphs 57-60, the General Court found that the marks would seem conceptually similar to members of the general public, who would recognise the “respi” prefix as relating to respiratory disease, whilst professionals would also understand the suffixes as indicating some conceptual difference. As the Hearing Officer said, that comparison took into account the need to compare the overall impression of each mark, including their identical beginnings. By contrast, the *Castellani* case to which the Hearing Officer referred, Case T-149/06 dated 20 November 2007, related to an application to register ‘Castellani’ plus a shield device as a mark for wines; the earlier marks were Castellum and Castelluca, also registered for wines. The General Court held:

“57 As regards the conceptual comparison, the Court considers to be incorrect the Board of Appeal’s finding, set out at point 21 of the contested decision, that the average German consumer is likely to associate the two marks in the same way with the word ‘Kastell’, which means castle in German, so that the competing signs are conceptually similar.

58 In that regard, it should be noted, first, that the use of a word meaning ‘castle’ is common in the wine sector. ... the German consumer is accustomed to seeing a large number of trade marks for wine whose name begins with ‘Schloss’, ‘castello’, ‘château’, ‘castel’ or ‘castle’ when purchasing wine in a specialist shop, a supermarket or a hypermarket or when choosing a wine from a wine list in a restaurant. He will therefore attach less significance to the prefix and closely examine the suffix of the mark on the bottle label.

...

60 Thus, contrary to the finding in the contested decision, when making an overall assessment of the marks at issue, the visual, phonetic and conceptual differences between the conflicting signs are sufficient, in spite of the identical nature of the goods covered, to preclude the resemblances between them giving rise to a likelihood of confusion on the part of the average German consumer.”

So the General Court held that differences in the endings of the word marks negated the conceptual similarity which might have arisen from the marks’ identical, descriptive beginnings. The decision in my view shows that whilst in some respects the first part of a word mark may be the most significant, for instance when assessing the aural impact of a mark, this is just one aspect of the consideration of the overall impression given by a mark, and the need to consider whether there is a dominant element in the mark (see paragraphs 33-35 of the *Matratzen* case above). *Castellani* suggests that where the first part of the mark is descriptive, it may be expected to have less impact and contribute less to the overall impression of the mark than where the first part of the mark is distinctive. This is all a matter of degree, and is very fact-sensitive.

17. The Hearing Officer in this case, as paragraphs 26 and 31 of his decision show, took the descriptive elements of the marks into account in assessing the overall impression given by each mark, and in assessing the overall concept of each mark, but, in the circumstances, he found no *relevant* conceptual similarity. In my judgment, he cannot be said to have erred in this respect either in principle or materially.
18. As Mr Morris himself said in paragraph 32 of the decision under appeal, the question he had to decide was whether the various interdependent factors he had identified led to a likelihood of confusion. As he pointed out in paragraph 33, several of those factors, such as the identity of the goods in Class 1 and the highly distinctive nature of the Sweetex mark, point to such a likelihood. Nevertheless, his view as expressed in particular in paragraph 34 was that the differences between the marks, already discussed, are sufficient to preclude such a likelihood and to preclude both direct and ‘indirect’ confusion. In my judgment, there is no material error and no error of principle in the reasons he gives for reaching that conclusion. In the circumstances, I dismiss the appeal in relation to application in relation to the Class 1 goods.

Class 5 goods

19. Mr Morris did not feel it necessary to consider separately the question of likelihood of confusion in respect of the Class 5 goods, on the basis that Reckitt could be in no better position in relation to such goods. On the appeal, Reckitt submitted that the Hearing Officer ought to have taken in to account the potentially serious consequences of any confusion arising between the marks, if that led to use of inappropriate sweetening preparations by diabetics or others with particular medical needs, such that any likelihood of confusion, however small, should have led to refusal of Vita's application for goods in Class 5. Reckitt did not suggest that this potential danger meant that a different test applied as to the likelihood of confusion, but submitted that the potentially significant consequences of any confusion is one of the factors which ought to be taken into account in the assessment of the likelihood of confusion. It seems to me, however, that there is a distinction between the consequences and the existence of a likelihood of confusion. If no likelihood of confusion exists, as the Hearing Officer found, the point does not arise. Mrs Baxter accepted that point on Reckitt's behalf, and Reckitt did not suggest that the Hearing Officer was otherwise wrong to say its case could be no stronger for the Class 5 goods than for the Class 1 goods. Indeed, it seems to me that its point suggests that Class 5 goods may well be purchased with a higher degree of care and attention than the Class 1 goods, thus reducing any likelihood of confusion. In the circumstances, I dismiss the appeal in respect of the opposition to the Class 5 goods also.

Costs

20. Vita is entitled to a contribution from Reckitt towards its costs of the appeal; such a costs award is not intended to compensate parties in full for the expense to which they have been put, but only to make a contribution towards their costs. The level of costs will reflect the level of any costs which Vita has incurred as an unrepresented party. Where the successful party is a litigant in person, the Appointed Person will apply by analogy the principles applicable to High Court proceedings which are set out in CPR 48.6 of the Civil Procedure Rules. That Rule provides, in particular, at 48.6(2):

“The costs allowed under this rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.”

The amount which may be awarded to a legally represented party is usually subject to a modest scale; see Tribunal Practice Note 4/2007.

21. CPR 48.6(4) also provides:
- “The amount of costs to be allowed to the litigant in person for any item of work claimed shall be –
- (a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work; or
 - (b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the practice direction.”

The relevant Practice Direction about costs, which supplements CPR 48, provides at Section 52 that:

“4. The amount, which may be allowed to a litigant in person under rule 46.3(5)(b) and rule 48.6(4), is £9.25 per hour.”

22. Mr Richard Arnold QC, as he then was, sitting as the Appointed Person in *South Beck*, B/L O/160/08, said:
- “36. In my judgment the approach which should be adopted when the Registrar is asked to make an award of costs in favour of a litigant in person is as follows. The hearing officer should direct the litigant in person ... to file a brief schedule or statement setting out (i) any disbursements which the litigant claimed he has incurred, (ii) any other financial losses claimed by the litigant and (iii) a statement of the time spent by the litigant in dealing with the proceedings. The hearing officer should then make an assessment of the costs to be awarded applying by analogy the principles applicable under r. 48.6, but with a fairly broad brush. The objective should be to ensure that litigants in person are neither disadvantaged nor overcompensated by comparison with professionally represented litigants.”
23. In accordance with the principles set out above, and Rule 62 of the 2008 Rules, if Vita wishes to seek an order for costs in its favour, it should provide a brief schedule of costs setting out any disbursements incurred, any other financial losses claimed and a statement of the time spent in dealing with the appeal. Any supporting documentation should be attached to the schedule. This should be submitted to me (via the Treasury Solicitor’s Office) and copied to

Mrs Baxter of Reckitt, by 5 p.m. on 27 May 2011. Reckitt may provide me with any submissions in answer by 5 p.m. on 10 June 2011.

Amanda Michaels
9 May 2011

Mrs Rosina Baxter, trade mark attorney, of Reckitt Benckiser Healthcare (UK) Ltd 's Trade Marks Group, appeared on behalf of the appellant.

Mr Robert Taylor, Vice President of Vitabiotics Ltd, appeared on behalf of the respondent.