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TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2346257 BY
OBESITY LIFELINE LIMITED TO REGISTER A SERIES OF
TRADE MARKS IN CLASSES 5, 16, 25, 29, 30, 31, 32, 41, 42, 43 & 44**

AND

**IN THE MATTER OF OPPOSITION NO 92487
BY BEECHAM GROUP PLC**

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Obesity Lifeline Limited to register a series of
Trade Marks in Classes 5,16,25,29,30,31,32,41,42,43 & 44**

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**IN THE MATTER OF Opposition No 92487 by
Beecham Group Plc**

BACKGROUND

1. On 18 October 2003 Obesity Lifeline Limited applied to register the following series of three marks:



for specifications of goods and services that read as follows:-

Class 5

Dietetic substances adapted for medical use; food for babies; balms for medical purposes; pills for pharmaceutical purposes; medicines for human purposes.

Class 16

Paper, cardboard and goods made from these materials not included in other classes; printed matter; photographs; stationery; instructional and teaching material (except apparatus); brochures; information cards and leaflets; recipe books and cards; bags; bookmarkers; books; calendars; cards; coasters made

of paper; pens; pencils; ledgers; loose-leaf binders; newsletters; newspapers; pads (stationery) paperweights; pen cases; pictures; postcards; printed publications.

Class 25

Clothing; footwear; headgear.

Class 29

Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, and fruit sauces; eggs, milk and milk products; edible oils and fats, nutritional preparations and substances; dietary and nutritional meals and meal replacements; meal replacement bars; food supplements; weight reducing and reduced calorie foods and edibles; dried milk-based products for meal replacements; beverages for meal replacement; food and edible preparations all for use in reducing or maintaining weight; milk based products for foods; milk based beverages; jelly and jelly-based products; vegetable bouillon; all included in Class 29.

Class 30

Cereal preparations; muesli; cereal bars; confectionery bars; peanut bars; flapjacks; coated nutrition bars to be used as meal replacement or nutritional snacks; all included in Class 30.

Class 31

Fresh fruits and vegetables; seeds; bran; oats; maize; nuts; natural plants and flowers; malt.

Class 32

Mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

Class 41

Organisation of meetings; seminars; lectures and forums relating to weight loss, gain and control and dietary matters; educational services relating to weight control; teaching services relating to weight loss, gain and control; all included in Class 41.

Class 42

Conducting scientific research; advisory services relating to scientific research; research and development of nutritional products and diets.

Class 43

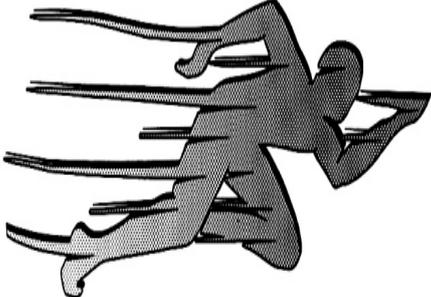
Provision of food and drink.

Class 44

Medical and nutritional counselling; hygienic and beauty care services; advisory services relating to diet.

2. I note that the application was published in the Trade Marks Journal for opposition purposes with the following clause:

<p>2335876 (UK)</p>		<p>5</p> <p>30</p> <p>32</p>	<p>Food and drink preparations and dietetic substances for children, invalids and athletes.</p> <p>Flour and preparations made from cereals, bread, pastry; confectionery, ices, jellies and sauces.</p> <p>Mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; powders, syrups, concentrates and other preparations for making beverages.</p>
<p>2321293 (UK)</p>		<p>16</p> <p>36</p> <p>41</p>	<p>Posters, leaflets, pamphlets, newsletters and printed material all providing information on sport and nutrition.</p> <p>Fund raising and financial sponsorship in support of scientific research.</p> <p>Training workshops and seminars; arranging and conducting conferences and meetings for educational purposes; provision of sporting facilities and activities; provision of information</p>

		42	relating to sports. Development of new products; scientific research into the development of new products; scientific research into nutrition; provision of scientific information.
		44	Provision of information relating to nutrition.
2176426 (UK)		5 32	Dietetic and athletes' food and drinks. Non-alcoholic drinks and preparations for making such drinks; all included in Class 32; fruit juices.

4. The opponent claims use of the mark that is the subject of Nos 2870335 and 2335876 from January 2003 in relation to the goods of the registrations concerned. Neither of these marks had been registered for a period that resulted in them being subject to a statement of use. However, the identical mark is relied on in relation to Section 5(4)(a) where the above-mentioned date of first use is given (but the question of date of use is not without uncertainty as will be apparent from my consideration of the evidence below).

5. A statement of use was required in relation to No 2176426 in accordance with the Trade Marks (Proof of Use etc) Regulation 2004. In this respect the opponent indicated that the mark had been used on “Dietetic drinks and powders containing maltodextrin, dextrose and added energy-releasing B vitamins” and “Non-alcoholic drinks containing fruit flavourings and preparations for making such drinks in the form of powders”.

6. On the basis of these earlier trade marks and the use claimed objections have been raised under Section 5(2)(b), 5(3) and 5(4)(a) of the Act. In relation to the Section

5(2)(b) ground the opponent claims that the applicant's goods in Classes 5, 30 and 32 are identical or similar to those of earlier trade marks Nos. 2870335, 2335876 and 2176426. In relation to earlier trade No. 2321293 the opponent claims that the applicant's goods in Classes 16, 41, 42 and 44 are similar.

7. Earlier trade mark No. 2176426 is also relied on for the purposes of Section 5(3) where the objection is said to arise against all the applied for Classes.

8. In relation to Section 5(4)(a) the opponent does not appear to have identified the goods or services in the application which are the subject of its objection. It identifies the sign it relies on as being the one that is also the subject of earlier trade marks Nos. 2870335 and 2335876. Whether the attack is co-extensive with the identical and similar goods attack under Section 5(2)(b) cannot be determined from the pleaded case.

9. The applicant filed a counterstatement and associated letter (the letter is dated 22 October 2004) denying the above claims. Both sides have included in their pleaded cases what amount to submissions in relation to the marks. I will take these into account in what follows.

10. Both sides filed evidence. Neither side has asked to be heard and neither side has filed written submissions. Acting on behalf of the Registrar and with the above material in mind I give this decision.

Opponent's evidence in chief

11. The opponent filed a witness statement by Emma Sophia Stopford, Vice President and Trade Mark Counsel of GlaxoSmithKline Services Unlimited, part of the GlaxoSmithKline group of companies. Ms Stopford says she has world-wide responsibility for trade marks owned by the opponent company. The opponent is part of the GlaxoSmithKline group. Its nutritional healthcare products include non-alcoholic beverages.

12. The first part of her witness statement deals with the inherent distinctive character of the mark that is the subject of Nos 2870335 and 2335876 (she refers to it later as the 'winner' device). I will do likewise. Ms Stopford exhibits, ESS1, the results of a search of all registered marks and pending applications on the UK Trade Marks Register for devices which consist of human figures (men) in Class 32. Of the 119 devices found no other mark contains a stylised silhouette of a human figure (man) viewed from the same (right) side and featuring outstretched arms where the left leg is bent and the right leg straight back other than the opponent's winner mark. Two registrations on the list are identified and distinguished. The above-mentioned features are thus identified as giving the mark its distinctive character.

13. Ms Stopford goes on to describe the history of the winner device. Prior to the adoption of the winner, the mark of No 2176426 (like Ms Stopford I will refer to it as the 'running man device') was used on packaging and advertising materials for the product Lucozade Sport from approximately 1988 until the end of 2002. Exhibit ESS2 is an image of the running man device submitted for approval by a brand management company and dated 16 December 1998. Exhibit ESS3 is a photograph

showing the running man device in use on the Lucozade Sport range of products. A selection of product packaging is also exhibited at ESS4.

14. Ms Stopford next exhibits, ESS5, a press release which discusses the relaunch of the Lucozade Sport product bearing the winner device. The press release is said to be dated January 2002. I interpose that, as the running man device was in use until December 2002, this appears to be either a typographical error intending to refer to January 2003 or the two brands were used in parallel for about a year. The reference in the statement of grounds (see above) and Ms Stopford's earlier statement (paragraph 8 of her statement) lead me to believe that it may be a typographical error.

15. The next exhibit, ESS6, is a print taken from the current Lucozade Sport website showing the winner device in use in relation to Class 32 goods. The device is embossed on the top part of the plastic bottles and also appears behind the trade mark Lucozade. This website is said to be the same as it was when first created in 2002.

16. The winner device is also shown in Exhibit ESS7 taken from the Lucozade Sports Academy website where it appears in the form shown in earlier trade mark No 2321293 but with the addition of the words Lucozade Sport Science Academy. The website is said to have been created in 2002/3.

17. Ms Stopford exhibits, ESS8, extracts from the initial tender document by Seachange Creative Partners for the intended rebranding of Lucozade Sport. She notes that it identifies yellow and blue as 'pre-existing colour equities'. She comments that yellow is claimed in the application in suit as is purple which she considers to be visually similar to blue.

18. Next, Ms Stopford exhibits at ESS9 extracts from the GlaxoSmithKline Annual Reports of 2000 and 2004 showing the importance of sales of nutritional healthcare products. Net sales figures and advertising/promotional expenditure, for products sold bearing the earlier trade marks are given as follows (taking the matter up to 2003):

YEAR	NET SALES	ADVERTISING & PROMOTIONAL EXPENDITURE
1998	In excess of £15m	In excess of £19m
1999	In excess of £19m	In excess of £19m
2000	In excess of £26m	In excess of £20m
2001	In excess of £34m	In excess of £25m
2002	In excess of £43m	In excess of £38m
2003	In excess of £56m	In excess of £50m

19. Also exhibited at ESS10, are details of market share information from Nielsen's. Ms Stopford says that this shows a UK market share of 10% of the carbonated drinks sector between 2000 and 2005; a 15% share of the energy drinks sector between 2002 and 2005; and a 79% share of the sports drink sector between 2002 and 2005.

20. Exhibit ESS11 is a presentation slide based on data collected by Millward Brown, a market search company, showing that 91% of participants had heard of Lucozade Sport. I note that the results are based on surveying sports participants and deal with

the Lucozade Sport mark rather than the device or at least it is not clear what elements of the Lucozade branding formed part of the research.

21. The remainder of Ms Stopford's witness statement is by way of a detailed response to the counterstatement. I bear her observations in mind but do not propose to record them at this point. Two further pieces of documentary evidence have been provided. The first, Exhibit ESS12, is a copy of an investigation report by Farncombe International into use of the applied for series of marks. It seems that the logo device was designed in 2001 as part of a re-branding exercise. The logo has been used on the applicant's website since 2004. It is suggested that the goods covered by the application are sold only through Obesity Lifeline counsellors.

22. Responding to a claim in the applicant's counterstatement that a number of other companies' marks depict a contoured body, Ms Stopford exhibits, ESS13, copies of the devices concerned. She suggests they can be distinguished by reference to the totality of matter in the marks and in some cases by the goods and services concerned as well.

Applicant's evidence in chief

23. Paul Chambers, Finance Director of Obesity Lifeline Ltd, has filed a witness statement. Much of it consists of submissions which I have read and take into account but will not record here.

24. Mr Chambers says that his company is in the business of research, consultancy and advisory services in relation to a weight management programme specifically for people who are three or four stone overweight. Background information is provided at Exhibit PC1. The document does not appear to be dated but refers in the body of the text to a 2003 document so it is likely to be dated sometime after that. A letter attachment is dated 7 September 2005.

25. Mr Chambers confirms by reference to an invoice at PC2 that the subject mark(s) was designed in 2001 and has been used since that date. A collection of business stationery and leaflets is exhibited at PC3. These usually show a yellow version of the mark preceded by the words 'lighter life'. The device solus is also used in large format as background.

26. Mr Chambers sets out his views on end users of the respective products as follows:

- “7) As stated above, the Applicant is a research and consultation service targeted specifically for people who are three or four stone over weight and who require a weight loss programme such as that of the Applicant's and who may also purchase products in order to assist with such weight loss. This is not the same as the end users of the Opponent who are the general buying public of drinks manufactured by the Opponent such as “Lucozade” or other products relating to similar sports drinks. The Opponents' customers are people who come to the Opponent with a problem with obesity and who require assistance with weight loss [*It would appear that the references to the*

opponent in this sentence should be references to the applicant]. For example, this can be compared to the similar services of a “weight watchers” type service. For this reason, and for the reasons set out above, there can be no likelihood of confusion. The Applicant denies that there is any likelihood of confusion as asserted in the witness statement of Emma Sophia Stopford.”

27. Mr Chambers also notes that the opponent’s mark is normally used with the word Lucozade.

Opponent’s evidence in reply

28. Ms Stopford has filed a further witness statement. This consists largely of submissions in response to Mr Chamber’s evidence. Again I do not propose to record these submissions as part of my evidence summary. Two additional pieces of documentary evidence are provided. Exhibit ESS1 is an extract from the MARQUESA commercial database which show the classification of the applicant’s device mark under the Vienna system. She says that this supports her view that the mark(s) will only be seen as human figures rather than simply a collection of shapes.

29. In relation to Mr Chamber’s attempt to distinguish the end users of the respective products, she says that her company’s earlier trade marks cover dietetic substances and food and beverages that have not been limited away from ‘dietary products’ or such items. Furthermore, even if the earlier trade marks were limited to sports drinks she suggests that the users are still likely to be the same. This is because, as part of any weight loss programme, individuals are strongly advised to partake in exercise or additional exercise. Exhibit ESS2 contains documentation in support of this claim.

30. That completes my review of the evidence.

DECISION

Section 5(2)(b)

31. This reads:

“5.-(2) A trade mark shall not be registered if because -

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

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

32. I take into account the well established guidance provided by the European Court of Justice (ECJ) in *Sabel BV v. Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki*

Kaisha v. Metro-Goldwyn-Mayer Inc [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R. 723. The guidance from these cases is now well known.

Accordingly, I do not propose to set out the relevant passages. Suffice to say that the test is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those various elements, taking into account also the degree of identity/similarity between the goods and services and how they are marketed. In comparing the marks I must have regard to the distinctive character of each and assume normal and fair use of the marks across the full range of the goods and services within their respective specifications. The matter must be considered from the perspective of the average consumer who is deemed to be reasonably well informed and reasonably circumspect and observant.

33. Under Section 5(2)(b) the opponent relies on four earlier trade marks. In *The Infamous Nut Co Ltd's Trade Marks*, [2003] RPC 7 Professor Annand, sitting as the Appointed Person, held:-

“ 35 It is impermissible for Section 5(2)(b) collectively to group together several earlier trade marks in the proprietorship of the opponent.

36 Section 5(2)(b) speaks of registration being refused on the basis of an earlier trade mark (as defined by Section 6). Thus where the opponent relies on proprietorship of more than one earlier trade mark, the registrability of the applicant's mark must be considered against each of the opponent's earlier trade marks separately (*ENER-CAP Trade Mark* [1999] RPC 362).”

34. Professor Annand went on to consider whether it may be possible for an opponent to argue that an element in an earlier trade mark has achieved enhanced distinctiveness in the eyes of the public because it is common to a “family of marks”. I do not understand the opponent to make any such claim here. I must, therefore, consider the matter on the basis of the individual marks relied upon by the opponent.

The 2870335 & 2335876 marks

35. These can be considered together because the mark is the same in each case. The goods of CTM No 2870335 are also the same as those specified in the opponent's equivalent UK registration No 2335876. It does not require an exhaustive analysis to conclude that the goods of the applied for mark in Classes 5, 30 and 32 are identical and/or closely similar to those of the opponent's earlier trade marks. The applicant has not suggested otherwise but has sought to distinguish end users on the basis of the parties' existing trading positions. This argument must fail on the basis that I must consider the full notional scope of the specifications and not just what the parties are doing or have done up to now. There are other reasons why the distinction that the applicant seeks to draw does not greatly assist its case. I will return to this below when I consider the average consumer.

36. The main issue at the heart of the dispute is the marks themselves. For ease of reference I reproduce them at this point:

Applicant's Series of Marks:



Opponent's Mark:



37. The opponent submits that there are visual and conceptual similarities between the marks; that both consist of stylised human figures; that both are in action form and captured in similar postures. The opponent acknowledges that there are certain differences in the poses notably in the positioning and inclination of the head but submits that consumers are unlikely to make side by side comparisons and due allowance must be made for imperfect recollection. The opponent also considers that the applicant's marks employ or could employ colours that would reinforce the other similarities.

38. The applicant, for its part, submits that the shape of the figures in its application are different in form to that of the opponent. In particular, it points to the 'contoured' nature of the figure in the opponent's mark and the different positioning of the arms.

39. Both sides have introduced state of the register material to demonstrate that other marks exist which consist of or include human shapes or parts thereof. The opponent distinguishes its own mark from others on the register. This material is of limited value without evidence as to the position in the marketplace and the average consumers' reaction to such marks. The most that can be said is that it suggests a strong interest on the part of trade marks owners in adopting devices of human figures in the context of goods of the kind at issue. The opponent's search (Exhibit ESS1) concentrated on Class 32 and found some 119 such devices ranging from straightforwardly representational depictions of humans to near abstract figures.

40. I have no doubt that the applicant's mark, though it is at one level a collection of shapes, will be seen as a human figure. That is the intention behind the mark, and it has been achieved. First impressions of marks are important. The initial and abiding impression of the opponent's mark is that of an athletic figure propelling itself forward. It is aptly referred to as the 'winner' because that is what the figure is doing – striving for the finishing line. The figure itself has definition which is what I take the applicant to mean by referring to a contoured body shape and is of athletic appearance.

41. There is some force to the opponent's submission that on a careful analysis the marks have certain similarities. Thus, the left leg is bent and the right leg trailing and the arms are outstretched. There is a strong sense of movement /forward momentum in both sides' marks.

42. However, I do not think that the average consumer is likely to undertake that sort of analysis. The overwhelming impression left by the applied for mark is of an abstract shape representing a human form. The parts of the body are made up of shapes that have no resemblance to the natural shape and muscular definition of the human body. It is true that the figure is shown in forward motion and in a way that is suggestive of speed or at least activity but that point of conceptual similarity (if it is one) with the opponent's mark is far outweighed by the widely different forms of representation used to achieve the desired image.

43. I note that Ms Stopford's evidence contains the following (which can only amount to submission):

“..... it is the similarities of the marks not their differences that are taken into account when assessing the likelihood of confusion based on an overall impression taking into account imperfect recollection.”

44. That observation was made in response to comments in the applicant's counterstatement. It does not, however, represent what I understand to be the correct approach to the law. A proper comparison of marks must take into account both their similarities and differences (see to that effect *Croom's Trade Mark Application* [2005] RPC 2 where the Appointed Person held that the Hearing Officer had “concentrated on the similarities to the exclusion of the differences between the marks in question”). Certain similarities in pose are, therefore, more than counterbalanced by the differences in the form and style in which the figures are represented. Nor in my view is this state of affairs altered when allowance is made for the respective marks being presented in the same or similar colours. Furthermore, whilst I accept that the 'winner' mark is often used in blue it also appears in embossed form on drinks containers where it will either be seen as colourless or reflect the colour of the contents of the container.

45. Consideration must also be given to the question of whether the opponent's mark can be said to benefit from any enhanced degree of distinctive character through use. This is not an easy matter to determine not least because of my doubt about the date from which the winner took over from the running man logo (see above). As it seems unlikely that the two brands were run in tandem the winner mark was probably not used until January 2003 (contrary to paragraph 12 of Ms Stopford's first witness statement but consistent with paragraph 8 thereof and the statement of grounds). That would suggest no more than 9 or 10 months use prior to the relevant date. It has also been used with another distinctive mark (Lucozade). That does not prevent it acquiring a distinctive character in its own right but may make it more difficult to demonstrate that that position has indeed been achieved.

46. Against that, the Lucozade sport product enjoys an important and leading position in the marketplace, a position that is reflected in significant net sales and advertising/promotion expenditure. I bear in mind too that in addition to use in

association with the brand name Lucozade it is also used independently in embossed form. The combined effect of these considerations suggest to me that even a relatively short period of use may have been enough to improve the distinctive character of the mark. I need to qualify that finding in one important respect. The winner mark (and I believe the running man before it) has not been used across the Lucozade range. It is particularly associated with Lucozade Sport which as its name suggests is promoted in a sport context. Acquired distinctive character must, therefore, be balanced against the fact that a depiction of a human figure in an athletic pose, albeit not a photographic image, is not the most distinctive of marks to start with. As page 8 of ESS8 puts it “The imagery is empathetic and completely understands the sports psyche”. These competing considerations suggest to me that the mark is of moderate distinctive character at best.

47. It was held in *Sabel v Puma*

“24. In that perspective, the more distinctive the earlier mark, the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact that two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either *per se* or because of the reputation it enjoys with the public.

25. However, in circumstances such as those in point in the main proceedings, where the earlier mark is not especially well known to the public and consists of an image with little imaginative content, the mere fact that the two marks are conceptually similar is not sufficient to give rise to a likelihood of confusion.”

48. That case involved marks that both contained or consisted of “bounding felines”. It was acknowledged that conceptual similarities may be enough in their own right to give rise to a likelihood of confusion where the earlier trade has a particularly distinctive character.

49. However, being possessed of a reputation does not necessarily lead to such a finding as the following passage from *Marca Mode v Adidas* makes clear:

“41. The reputation of a mark, where it is demonstrated, is thus an element which, amongst others, may have a certain importance. To this end, it may be observed that marks with a highly distinctive character, in particular because of their reputation, enjoy broader protection than marks with a less distinctive character (*Canon*, paragraph 18). Nevertheless, the reputation of a mark does not give grounds for presuming the existence of a likelihood of association in the strict sense.”

50. I also bear in mind the following judgment of the European Court of Justice in *Vedial SA v OHIM* [2005] ETMR 23:

“51 For the purposes of applying Article 8(1)(b) of Regulation No 40/94, the likelihood of confusion presupposes both that the mark applied for and the earlier mark are identical or similar, and that the goods or services covered in

the application for registration are identical or similar to those in respect of which the earlier mark is registered. Those conditions are cumulative (see to that effect, on the identical provisions of Article 4(1)(b) of First Council Directive 89/104 of 21 December 1988 to approximate the laws of the Member States relating to trade marks ([1989] OJ L40/1, Case C-39/97 Canon [1998] ECR I-5507, [22]).

52 Contrary to Vedral's claim, the Court of First Instance did not rely on the visual, aural and conceptual differences between the earlier mark and the mark applied for in deciding that there was no likelihood of confusion.

53 After making a comparative study, at [48] to [59] of the judgment under appeal, of the two marks in the visual, aural and conceptual senses, the Court of First Instance concluded, as stated at [65] of the judgment, that the marks could in no way be regarded as identical or similar for the purposes of Article 8(1)(b) of Regulation No 40/94.

54 Having found that there was no similarity between the earlier mark and the mark applied for, the Court of First Instance correctly concluded that there was no likelihood of confusion, whatever the reputation of the earlier mark and regardless of the degree of identity or similarity of the goods or services concerned."

51. It was established on the facts of the case that there was a high degree of similarity between the goods. The earlier trade mark was SAINT-HUBERT 41. The applied for mark was described as being a composite word and figurative mark "comprising the name "HUBERT" in black stylised capital letters bordered with white, surmounted by a bust of a chef of jovial appearance raising his right arm with upturned thumb". OHIM's opposition division rejected the opposition and the matter was appealed eventually to the ECJ who in turn dismissed the appeal. The case demonstrates that there can be points of similarity between marks (in that case the word HUBERT) without the marks necessarily being considered to be similar in overall terms. Once that position was reached identity of goods and the reputation of the earlier trade mark ceased to be relevant.

52. In coming to a conclusion on the matter I need to say a little more about the average consumer. As I have indicated above neither side's specification is restricted so as to reflect the precise target market for the goods of primary interest. Taking the notional scope of the specifications into account the goods are of a kind that the public at large would buy. Moreover, even if one were to view the matter from the perspective of the parties' actual trade, the opponent is right to point out that part of any weight loss programme may involve exercise and hence the purchase of the sort of drinks offered by the opponent. I do not accept, therefore, that this matter can be resolved on the basis of differentiation between consumer groups.

53. On a global appreciation of the matter I find that the respective goods are identical and/or closely similar; that the marks are distinctive but not to a particularly high degree especially when used in the context of goods associated with sports or physical exercise; that that state of affairs may be counterbalanced somewhat in the case of the opponent's mark through intensive use and marketing; that the marks have some

visual and conceptual similarities but that these are outweighed by the overwhelming effect of different forms of representation: and that there is no evidence as to how these marks are referred to in oral use (phonetic considerations are clearly going to be of less importance in marks of this kind whose appeal is primarily visual). The position in relation to the marks is critical and I am conscious of the need to allow for imperfect recollection through sequential rather than concurrent contact with the marks. Precise details of posture and shape may well be imperfectly captured in consumers' recollections of the marks. But what is unlikely to be lost is the abstract nature of the applied for mark compared to the more clearly representational style of the winner mark. Allowing for imperfect recollection does not in my view benefit the opponent's case. I have concluded that the marks are not similar and that on the authority of *Vedial* that is an end to the matter. There can be no likelihood of confusion.

The 2321292 Mark

54. This is a composite mark incorporating the winner device between the letters LS and SA and set in a blue rectangle of darker hue than the figure and with a wave effect pattern running from left to right. It must follow that the presence of this additional matter renders this mark even less similar than the applied for marks than the winner device solus.

The 2176426 Mark

55. This is the running man mark. The pose and presentation are quite different to the mark(s) applied for. The presence of the extension lines to the figure presumably suggesting speed add an additional feature of visual differentiation. I regard this as a radically different mark to the mark that is the subject of the application in suit.

56. The Section 5(2)(b) objection fails on the basis of each and every mark relied on.

Sections 5(3) and 5(4)(a)

57. It also follows from the above that, because the marks are not similar, the objections under Section 5(3) and 5(4)(a) must also fail.

Costs

58. The applicant is entitled to a contribution towards its costs. I order the opponent to pay the applicant of sum of **£1000**. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 29th day of June 2006

**M REYNOLDS
For the Registrar
the Comptroller-General**