

O-237-06

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2366967
BY NUTRIGREEN HEALTH PRODUCTS LTD
TO REGISTER A TRADE MARK IN CLASS 5**

AND

**IN THE MATTER OF OPPOSITION No. 93046
BY ALTICOR INC**

TRADE MARKS ACT 1994

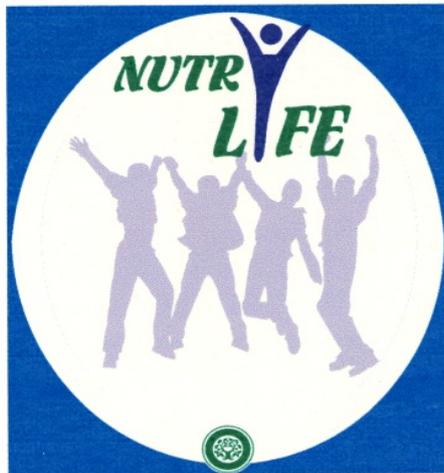
**IN THE MATTER OF Application No. 2366967
by Nutrigreen Health Products Ltd to register a
Trade Mark in Class 5**

and

**IN THE MATTER OF Opposition No. 93046
by Alticor Inc**

BACKGROUND

1. On 29 June 2004 Nutrigreen Health Products Ltd applied to register the following mark for a specification of goods that reads “Blend of plant extracts relating to health products, formulated into vitamins and minerals” (Class 5):



The application is numbered 2366967.

2. The application has been opposed by Alticor Inc. Alticor is the proprietor of the application and registrations shown in the Annex to this decision. On the basis thereof the opponent objects to the application in suit under Section 5(2)(b) of the Act. The objection relates to all the goods of the application.

3. Additionally, the opponent objects under Section 5(4)(a) on the basis of use since 1983 of its mark NUTRILITE in relation to nutritional supplements; energy and nutritional food in the form of powders, bars, biscuits and beverages; and nutritional supplements being beverages, energy giving beverages. Again, the ground gives rise to an objection against all the applied for goods.

4. The applicant filed a counterstatement denying the grounds of opposition principally on the basis of lack of similarity between the marks. A number of submissions are offered as to why

this should be the case. In relation to the goods, the applicant says that “Class 5 categorizes goods or services (sic) of a similar nature so all trade marks in this category will be for goods of a similar nature. The nature of the goods is not in contention as there is no restriction of any nature on the marketing of plant extracts, vitamins, minerals and nutritional supplements”. I take that to be a concession that identical or at least closely similar goods are involved. There are further claims and submissions in relation to the development and use of the applied for mark. It is said that no conflict or confusion has been experienced.

5. Both sides have filed evidence. The parties were offered the customary option of either a hearing or the opportunity to file written submissions in lieu thereof. Neither side requested a hearing. Written submissions have been received from W P Thompson & Co on behalf of the opponent (under cover of a letter dated 21 June 2006).

Opponent’s evidence

6. A witness statement has been filed by Malcolm Humphrey of Amway (UK) Limited, a wholly owned subsidiary of the opponent.

7. Mr Humphrey says that the trade mark NUTRILITE was first used in the UK in November 1983 in relation to dietary supplements and mineral and vitamin preparations (“the Goods”). The range of products has expanded over the years and now comprises meal replacement drinks, meal replacement food bars, energy drinks, energy bars and protein powders. Sales figures for goods sold under the mark in the UK are given as follows:

<u>Year</u>	<u>£Sterling</u>
1999	148,800
2000	107,100
2001	129,600
2002	168,770
2003	301,100
2004	454,330

8. Promotional expenditure in the UK during the same period was:

<u>Year</u>	<u>£Sterling</u>
1999	61,658
2000	55,856
2001	40,373
2002	40,325
2003	53,509
2004	75,857

9. The goods are sold in the UK by the following means:

- through direct sales. NUTRILITE goods are supplied to registered Independent Business Owners (IBOs) who buy from Altacor Inc at preferential rates and sell the goods at retail prices to their customers. There are said to be about 27000 IBOs in the

UK. The IBOs are responsible for expanding sales, recruiting new IBOs and training them.

- directly to about 7000 individual members.
- through catalogues distributed via Alticor's IBOs.
-

There are also said to be sales in the UK from the Amway website.

10. In support of these claims Exhibit ALT1 contains the following:

- Item 1 - copies of product brochures distributed to IBOs and members.
- Item 2 - extracts from Alticor's Amagram magazine which is distributed to IBOs and members. The magazine contains articles of interest on Amway products including the NUTRILITE range.
- Item 3 - sample price lists showing order numbers that correspond to the numbers in the product brochures.
- Item 4 - artwork for product labels.
- Item 5 - NUTRILITE advertising and promotional literature distributed in the UK post 2002.
- Item 6 - details of all trade mark applications and registrations worldwide.
- Item 7 - copy invoices dated between 2001 and 2004 for NUTRILITE goods.

11. Mr Humphrey says that NUTRILITE is a global brand. In a study conducted by Euromonitor International, an international research company, NUTRILITE was found to be the world's leading brand of vitamins, minerals and dietary supplements based on 2002 sales.

12. Worldwide sales figures are given in the witness statement. The figure given for 2002 is £826,600. That has since risen to £1,284,000 in 2004.

13. A further witness statement has been filed by Jennifer Margaret Maddox, a partner of W P Thompson & Co who act for the opponent in this matter. She exhibits (JMM1) price lists sent by the applicant to an enquiry firm that she instructed. She notes that the typescript used on the price lists "makes the word NUTRILIFE virtually indistinguishable from the word NUTRILITE".

14. Both Mr Humphrey and Ms Maddox offer submissions on the respective marks. I bear these comments in mind and will deal with them in my decision below.

Applicant's evidence

15. The applicant has filed a witness statement by Reginald Michael Arundel, a director of, inter alia, Nutrigreen Health Products Limited.

16. He firstly disputes Ms Maddox's claims in relation to the similarity of typescripts. The documents relied on are said to have been temporary retailer price lists (and not for the public domain). He exhibits, RMA1, an example of how the trade mark NUTRI LIFE is registered and used. Sample labels are also exhibited at RMA2.

17. Mr Arundel offers what amounts to submissions on the elements LIFE and LITE, their meanings and significances in the context of the goods. I will return to this below. He goes on to suggest that the company's respective products do not generally have similar ingredients. He also exhibits, RMA4, a page constructed to show the different composite marks used by the parties. However, as these do not correspond to the mark as applied for or the mark relied on by the opponents, it does not assist me. Mr Arundel also suggests that the goods are sold through different outlets/methods. His company's goods are sold through retail health shops whereas NUTRILITE is, as he describes it, sold by way of a network of pyramid marketing. Finally, I should mention that there is a reference to a South African registration, details of which are said to be exhibited at RMA5. In fact, no such exhibit is appended to the witness statement.

18. There is a further affidavit from Jennifer Birkett. She does not say in her statement what her position is or what her relationship is with the applicant but I understand from the papers on file that she is agent/address for service for the applicant.

19. She exhibits, JB1, a business profile of Amway and JB2, a NUTRILITE products document. The first of these contains the statement "This unique business opportunity has enabled Amway to grow into one of the world's leading direct-selling companies". Ms Birkett concludes that NUTRILITE is a direct selling company whereas NUTRI LIFE is sold via retail health shops and, therefore, the goods have different sales outlets. She also notes from JB2 that Amway has a presence in South Africa where NUTRI LIFE products were developed but that no evidence of confusion has been noted. She too offers submissions on the respective marks.

DECISION

Section 5(2)(b)

20. 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."

21. The term earlier trade mark is defined in Section 6(1) of the Act. Subject to the use requirement (dealt with below) the opponent's marks are all earlier trade marks within the meaning of the Section.

Proof of use

22. The application in suit has a filing date of 29 June 2004 and was published for opposition purposes on 17 September 2004. Opposition was filed on 17 December 2004. The Trade Marks (Proof of Use, etc) Regulations 2004 came into force on 5 May 2004 and require an opponent who bases his opposition to the registration of a trade mark on certain earlier trade marks to show use of those marks. The relevant part of the Regulations read as follows:

“4. After section 6 there shall be inserted –

6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where –

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark in relation to which the conditions set out in section 5(1),(2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the period of five years ending with the date of publication of the application the earlier trade mark has 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, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

- (a) 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
- (b) 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.

(5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(7) Nothing in this section affects –

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

23. Consistent with these provisions the opponent acknowledges that its UK registrations are subject to the proof of use requirement. Its Community Trade Mark application (No. 2498863) is not subject to the proof of use requirements. In relation to the latter, the opponent’s written submissions advise that the CTM application has now progressed to registration. Unfortunately, the supporting CTM-online print does not record this status. The mark is still shown as ‘opposition pending’. This may be no more than the result of a time lag between the application having received clearance to proceed to registration and the official records being updated. Technically it still falls to be treated as a pending application at the time of writing this decision. For reasons that will become apparent I do not think this state of affairs materially impacts on the decision.

24. In relation to the use claimed by the opponent I note that Mr Humphrey defines ‘goods’ for the purposes of his statement as being dietary supplements and mineral and vitamin preparations. He refers to an expanded range of goods (meal replacement drinks etc) but, as I read his witness statement, these items are not included in the turnover etc figures that follow. That appears to be consistent with the thrust of the evidence which shows use of NUTRILITE in relation to the claimed goods in Class 5. As I do not consider that the applicant has challenged the fact of use (as distinct from making submissions in relation to the nature of that use), I accept that the evidence confirms a trade in the Class 5 goods of No. 1167754.

25. The opponent’s CTM application which I have referred to above, has a specification which is framed in somewhat different terms to No. 1167754 but appears to encompass the same underlying goods. As the opponent is entitled to rely on No. 1167754 its case is not, I think, dependent on its Community Trade Mark application achieving registration.

Comparison of goods

26. The goods for comparison are “Blend of plant extracts relating to health products, formulated into vitamins and minerals” (applicant’s) and “Preparations included in Class 5 consisting of minerals and/or vitamins and/or proteins for use as nutritive adjuncts to foodstuffs” (opponent’s). In essence both parties’ goods are, or include, vitamin and mineral preparations albeit that the specifications are expressed in slightly different terms. On that basis identical and/or closely similar goods are involved.

The parties’ trading activities

27. There has been an attempt on the part of the applicant to put distance between the parties’ goods and their trading activities by reference to the composition of the products and the different marketing methods employed.

28. It is well established that it will rarely, if ever, be possible to differentiate between goods by reference to marketing methods or features. Thus, it was held in *Daimler Chrysler v OHIM* (CARCARD), [2003] E.T.M.R. 61 that:

“Whether or not there is a marketing concept is of no consequence to the right conferred by the Community trade mark. Furthermore, since a marketing concept is purely a matter of choice for the undertaking concerned, it may change after a sign has been registered as a Community trade mark and it cannot therefore have any bearing on the assessment of the sign’s registrability.”

29. The issue in that case was an absolute grounds objection. A similar point was dealt with in the context of relative grounds in *Croom’s Trade Mark Application*, [2005] R.P.C. 2.

30. Two points need to be made in the context of the arguments advanced in this case. Firstly, Mr Arundel says that very few of the products in his company’s range are similar in ingredient composition or presentation to the NUTRILITE products. Save in so far as the applied for goods are vitamins and minerals formulated from plant extracts there is no restriction on the precise composition of the products. Nor is it likely to be a practical proposition to construct a trade mark specification based on the precise composition of such products. In any case, the opponent’s specification is unrestricted as to the nature or composition of the vitamins and mineral preparations involved save that they are for use as adjuncts to foodstuffs. The applicant’s goods could also be adjuncts to foodstuffs so no meaningful differentiation can be drawn on this point. Due allowance must also be made not just for the parties’ existing trade but potential developments in that trade (or, indeed, use by successors in title should the marks be assigned).

31. The second point relates to the claimed differences in the parties’ chosen marketing methods. Again, these marketing methods are not (and probably could not be) reflected in the specifications of goods. They may also change over time in a way that brings the parties’ activities into closer contact in a commercial context than may have been the case hitherto. In short, I must consider what it is notionally open to the parties to do within the boundaries of normal and fair use and not simply how their actual trade has been conducted to date.

Comparison of marks

32. It is well established that I must consider the marks through the eyes of the average consumer of the goods in question bearing in mind that contact with the marks is more likely to be a sequential rather than concurrent process. As a result imperfect recollection may play a part. The average consumer normally perceives marks as wholes and does not undertake a process of analysis. Visual, aural and conceptual similarities must be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components. These principles are derived from *Sabel BV v Puma AG* [1998] E.T.M.R. 1 and *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77.

33. The opponent’s principal submissions are that the predominant element of the applied for mark is the word NUTRI LIFE and that that is how the mark would be referred to; that the pictorial elements in the mark do not assist the process of distinguishing because human figures are commonly used for “wellness” products; that the letter style is such that the letter F would not in fact look very different from a letter T; that colour does not assist in distinguishing because the opponent’s mark could also be used in the same colours; that whilst LIFE and LITE

have different meanings both words are commonly used in a healthy lifestyle context; and that, even accepting that the opponent cannot claim exclusivity in the NUTRI- prefix, the totalities of the word elements differ by only one letter.

34. The applicant submits that NUTRI is an abbreviation of nutrition and is in common use; that LIFE and LITE have different meanings; that LITE can mean “of stone or stone like” but in the context of the products in question may also be an abbreviation or misspelling of ‘light’ signifying a lower content of one or more ingredient; that the English language has many words with only slight differences in spelling but which are easily distinguishable e.g. line, lime, life, live etc; that LIFE is not commonly used in product labels whereas LITE is; that the applied for mark has NUTRI and LIFE displayed as two words one above the other with a logo depicting a person in place of the I; and that as a result the marks are not similar.

35. The opponent’s mark is the word NUTRILITE in plain block capitals. Notional fair use would include the word being presented in a variety of typescripts, in upper and lower case and in colour.

36. Mr Humphrey has conceded that the opponent cannot claim exclusive rights in NUTRI-. I infer that this is for the reason suggested by the applicant that it is commonly used or recognised as a combining form alluding to nutrition or nutritious etc. I doubt that -LITE carries any material degree of distinctiveness in its own right. It is a word/element that is commonly used these days in relation to products associated with a healthy diet often signifying low levels of, for instance, fat, sugar or salt. Nevertheless, non-distinctive elements can produce a distinctive whole. That is the case here. It is not suggested that NUTRILITE is a combination that is in use in the trade. Whilst it may be said to allude to certain desirable qualities of the products, it is in my view a moderately distinctive mark.

37. The applied for mark is a composite one. It is presented in the colours blue (predominantly) and green but colour is not claimed as a feature of the mark. The central and dominant visual feature consists of four figures in active poses. Above them and on separate lines are the elements NUTR(I) and L(I)FE. The missing I in each case is represented by a heavily stylised, semi-abstract device that is presumably intended to characterise a human form. These elements are contained within or set against a white circle which is in turn set in a square block. At the base of the circle and overlapping into the square is a roundel device with a tree or plant device contained within it.

38. I tend to agree with the opponent that figures in active poses are unlikely to be distinctive in relation to products intended to give or contribute to a healthy lifestyle. The mere fact that the figures are in silhouetted rather than photographic form is only of marginal assistance in imparting distinctive character. I do not think the same can be said of the semi-abstract form that serves as a letter I in both NUTRI and LIFE. This device makes a material contribution to the visual appeal of the mark. In my view consumers will note the synthesis of these elements and consider that the content and arrangement of these features is the core feature and the dominant distinctive element of the mark. The other elements, that is to say the circle and square background and the roundel device at the base of the mark are either commonplace features or visually subordinate (in the case of the roundel). They are in my view unlikely to feature as strongly in the average consumer’s perception and recollection of the mark. That is not to say that they do not contribute at all to the overall visual impact of the mark but they are more likely to be seen as providing a containing setting for the more distinctive elements of the mark.

39. Turning to the elements that are at the heart of this dispute, a comparison between NUTRILITE and NUTRILIFE reveals a single letter difference in the penultimate letter of the two nine letter words. But the effect of presenting the abstract shape in substitution for the letter I is to draw attention to and emphasise the elements that make up the verbal element of the mark. Contrary to the opponent's written submissions and view based on the applicant's price lists exhibited at JMM 11 do not accept that the letters F and T in NUTRILIFE and NUTRILITE are likely to be mistaken for one another in normal use. But in any case that is not the mark applied for. When the totality of the applicant's mark is taken into account there is limited visual similarity between the competing marks. Phonetically, I consider the opponent has a somewhat stronger case because in oral use the applicant's mark is likely to be referred to as NUTRI LIFE. Consumers are less likely to attempt to refer to the other elements that go to make up the composite mark.

40. Conceptually, the marks may be said to allude to desirable characteristics of the underlying goods namely that they have a part to play in a health lifestyle. However, they do so in different ways. The ideas conveyed by –LITE and –LIFE are distinct. That independent identity is not lost when combined with the NUTRI prefix which is itself of low distinctive character.

Likelihood of confusion

41. This is a matter of global appreciation (*Sabel v Puma*, paragraph 22). There is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character either per se or because of the use that has been made of it (*Sabel v Puma*, paragraph 24). The opponent's use is set out above. On the basis of that use the opponent claims an enhanced degree of distinctive character for its mark. The effect of acquired reputation was considered by David Kitchin QC, sitting as the Appointed Person in *Steelco Trade Mark*, 0/268/04. He concluded that:

“17. The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr Thorley Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

42. The benefits of a claim to acquired distinctive character are, accordingly, not reserved solely for those marks that are or have become household names. The particular circumstances of the case must be considered including the recognition of the earlier trade mark in the market. It is

clear from the opponent's evidence that they have an established presence in the UK market reflected in a material level of sales and an enduring trade. For the last full year that I can take into account prior to the material date (2003) sales amounted to just over £300,000. That in itself represented a significant increase over the previous year. The opponent's trade is through a significant number of so called Independent Business Owners (27,000) and members (7000). Although these numbers are large it suggests that the trade is rather thinly spread when considered in the context of overall turnover. Furthermore, it is not possible to say what impact this trade has had on the relevant consumer population as a whole and what position the opponent's NUTRILITE mark holds in comparison to other players in the market. I accept that there will be some market recognition but, without more information to contextualise the use, I am unwilling to infer that the opponent's mark falls to be considered other than on the basis of its inherent qualities.

43. I must also identify the relevant consumer group(s). Clearly it embraces the general public who are purchasers of vitamin and numeral supplements etc. It will also include those who trade in such goods which will include retailers, large and small, and those involved in the distribution chain. I regard the likely reaction of end consumers to be of paramount importance. As the goods are likely to be purchased by people with an interest in health issues or the need to correct a dietary deficiency of some kind, I consider that a reasonable, but not necessarily the highest, degree of care will be exercised in the purchasing process.

44. In reaching a view on likelihood of confusion regard must be had not just to the visual, aural and conceptual similarities and dissimilarities considered above but also the relative importance of each of these. In the absence of evidence to the contrary I consider that the goods at issue are most likely to be purchased on the basis of visual appraisal in a retail environment or (on the basis of the opponent's trade) through catalogues where again the consumer will have the opportunity to see the product name, packaging and related information.

45. Oral usage cannot be ruled out. It may arise through word of mouth recommendation or in telephone ordering though, generally speaking, when the latter takes place the required source of the goods has already been identified as a result of visual acquaintance with the mark. Visual considerations, therefore, seem to me to be of rather greater importance than oral/aural ones.

46. The opponent's written submissions have rightly reminded me that a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc* [1999] R.P.C. 117). In this case identical and/or closely similar goods are involved. Because I attach importance to the fact that consumers are most likely to rely on visual acquaintance with the marks, the composite nature of the applied for mark suggests that there is a limited degree of similarity between the marks. Balanced against that is the need to allow for imperfect recollection in marks where the word elements, although made up of commonplace elements, are distinctive. In that respect the opponent can reasonably say that there is not much between NUTRILITE and NUTRILIFE. What would be the effect of sequential acquaintance with the marks particularly when allowance is made for imperfect recollection?

47. The effect of presenting NUTRI and LIFE on separate lines is to draw attention rather more than would otherwise be the case to the individual elements that make up the mark. Furthermore the authorities counsel against extracting components from composite marks and making the comparison solely on the basis of the allegedly conflicting elements. I bear in mind also that the

average consumer is deemed to be reasonably well informed, circumspect and observant. It is not appropriate to assume that consumers will be too careless in their approach to the marks.

48. To find in the opponent's favour requires a likelihood of confusion amongst a significant number of people not just a risk or possibility that a few will be confused. Making the best I can of it I favour the applicant's position. I have also considered whether, even if direct confusion between the marks is not likely, consumers might be led to think that the applied for mark is a variant of the opponent's mark or a brand from a related (economically linked) undertaking. Taking all the elements of the marks into account I can see no reason why the consumer who noted the similarities and difference and was not confused, should fall prey to the misconception that the opponent or a related undertaking was making itself responsible for the goods sold under the mark. The overall differences are too great for that. The opposition fails under Section 5(2)(b).

Section 5(4)(a)

49. This reads in so far as is relevant:

“5.-(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or
- (b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

50. The requirements for this ground of opposition are summarised in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person in *WILD CHILD Trade Mark* [1998] R.P.C. 455. Adapted to opposition proceedings, the three elements that must be present can be summarised as follows:

- (1) that the opponent's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the applicant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the applicant are goods or services of the opponent; and
- (3) that the opponent has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the applicant's misrepresentation.

51. The evidence filed by the opponent in this case shows use of the mark in the form in which it is registered (broadly speaking plain block capitals) and in relation to goods which fall within the terms of the registered specification. The only slight qualification to that state of affairs is that the word NUTRILITE is usually presented vertically rather than horizontally on container packaging. There is also some use of NUTRILITE with a leaf device (see, for instance, Item 5 of Exhibit 1). Neither of these points appears to improve the opponent's position. In these

circumstances it is unlikely that Section 5(4)(a) will yield a result that is more favourable to the opponent than the position under Section 5(2)(b). The two grounds stand or fall together.

COSTS

52. The applicant has succeeded and is entitled to a contribution towards its costs. I order the opponent to pay the applicant the sum of £1100. 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 the case if any appeal against this decision is unsuccessful.

Dated this 18th day of August 2006

M REYNOLDS
For the Registrar
The Comptroller-General

Opponent's earlier trade marks:

No.	Mark	Class	Specification
2498863 (CTM)	NUTRILITE	05 29 30 32	Dietary and/or food supplements comprised of vitamins and/or minerals. Dietary and/or food supplements comprised of vitamins and/or minerals, fruit and/or nut-based snack bars fortified with vitamins and/or minerals; protein powder. Grain-based dietary and/or food supplements; breakfast cereal; snack foods, including cookies, flavoured puffs of corn and grain-based snack bars fortified with vitamins and/or minerals. Mixes for use in the preparation of non-alcoholic fruit, chocolate, vanilla or similarly flavoured drinks fortified with vitamins and minerals; non-carbonated fruit and/or vegetable drinks, non carbonated calcium fortified drinks; sport drinks and/or drink mixes.
1167754 (UK)	NUTRILITE	05	Preparations included in Class 5 consisting of minerals and/or vitamins and/or proteins for use as nutritive adjuncts to foodstuffs.
1167755 (UK)	NUTRILITE	30	Non-medicated confectionery; food bars included in Class 30
1167756 (UK)	NUTRILITE	32	Non-alcoholic drinks; drink mixes; all included in Class 32.
2147247 (UK)	NUTRILITE THE BEST OF NATURE – THE BEST OF SCIENCE	05	Dietary and/or food supplements, including supplements comprised of vitamins and/or minerals, herbs, plant concentrates, protein powder, fatty acid, fibre, algae, amino acids, and live active cultures.
1237000 (UK)	NUTRILITE	29	Fruits, vegetables and foodstuffs made from the aforesaid goods; beverages, desserts, preparations for making beverages and for making desserts; all included in Class 29; dairy products, and milk products all for food; foodstuffs containing milk products,

			snack foods and foods supplements, all included in Class 29.
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