

O-257-11

**THE TRADE MARKS (INTERNATIONAL REGISTRATION) ORDER 2008 AND
TRADE MARKS ACT 1994**

**IN THE MATTER OF INTERNATIONAL REGISTRATION NO 896237
IN THE NAME OF ST. HIPPOLYT NUTRITION CONCEPTS MARKETING- UND
VERTRIEBS GMBH**

IN RESPECT TO THE TRADE MARK

MICROVITAL

IN CLASSES 5, 30 AND 31

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 71456
BY ADISSEO FRANCE S.A.S.**

TRADE MARKS ACT 1994

IN THE MATTER OF International Registration No. 896237

In the name of St Hippolyt Nutrition Concepts Marketing-und Vertriebs GmbH in respect to the trade mark

MICROVITAL

in Classes 5, 30 and 31

and

IN THE MATTER OF Opposition thereto under No. 71456

by Adisseo France S.A.S.

BACKGROUND

1) St Hippolyt Nutrition Concepts Marketing-und Vertriebs GmbH ("Hippolyt") is the holder of the above international registration ("IR"). Protection in the UK was requested on 2 March 2006. The request for protection was published in the United Kingdom, for opposition purposes, in The Trade Marks Journal on 22 December 2006. Protection is sought in respect of the following goods:

Class 5

Dietary products for medical and veterinary purposes; dietary products for rehabilitative food, adapted for medical purposes and dietary beverages (included in this class); food products and beverages for increasing the force and enhancing the physical form of humans and animals, adapted for medical purposes (including in this class); cereal preparations as dietary products for dietetic substances for medical or veterinary purposes and as food for babies and rehabilitative food for medical purposes; mineral and enzyme mixtures for dietary purposes; vitamin preparations.

Class 30

Cereal preparations for nutritional purposes; foodstuffs with the addition of mineral and enzyme mixtures.

Class 31

Plant seeds, unprocessed grains, fresh fruits and vegetables; fresh herbs, fodder additives and additives for fodder; seed preparations in raw and processed form, seeds, fodder; cereal preparations for animal consumption; mineral and active ingredients for feeding purposes.

2) On 8 March 2007, Adisseo France S.A.S. (“Adisseo”) filed notice of opposition to the granting of protection in the UK. The original grounds were subsequently amended and limited to a single ground of opposition. This ground is based upon Section 5(4)(a) of the Trade Marks Act 1994 (“the Act”) by virtue of the law of passing off protecting its goodwill associated with its mark. Adisseo claims that it has used its brand name MICROVIT in the UK since at least as early as the mid-1990s in respect of *animal foodstuffs, additives for animal foodstuffs and vitamins for animal nutrition*. It states that it objects to the IR in respect of all the goods listed.

3) Hippolyt subsequently filed a counterstatement denying Adisseo’s claims and stating that it believes that Adisseo has only ever intended its mark to be used in respect of *vitamin supplements for animal feeds*. It further claims that because Adisseo has had a registration (1497390) for MICROVIT since 13 April 1992 in respect *animal foodstuffs and additives for animal foodstuffs* (in Class 31) then it cannot rely on unregistered rights after that date in respect of those goods.

4) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 22 June 2011 when Adisseo was represented by Ian Wilkes for Groom Wilkes & Wright LLP and Hippolyt represented by Malcolm Chapple of Counsel, instructed by Dr Walther & Wolff & Co.

Opponent’s Evidence

5) This takes the form of three witness statements and a statutory declaration. The pertinent points from these statements are recorded below.

6) A witness statement, dated 9 April 2008, by Joanna Richmond, Nutritional Buyer for a company called Provimi Ltd, in which she explains that she is familiar with Adisseo’s MICROVIT brand name and has known of it since at least 2002. Ms Richmond states that she recognises the brand as denoting vitamin additives for animal foodstuffs.

7) The second witness statement, dated 18 April 2008, is by Gérard Deman, CEO of Adisseo. He states that Adisseo uses MICROVIT in relation to a non-medicated additive for animal foodstuffs. At Exhibit B, Mr Deman provides copies of pages from Adisseo’s website, *adisseo.com*, dated 25 February 2008, illustrating MICROVIT being promoted prominently as one of its brands. The goods are described as “[v]itamins for high performance”. A number of different MICROVIT products are discussed on these pages, such as “Microvit™ A Promix 1000” and “Microvit™ A Supra 1000”, both described as “a stabilized source of vitamin A acetate”. A page providing contact details in the UK is also shown.

8) At Exhibit C, Mr Deman provides copies of product labels featuring the mark MICROVIT stating that they are examples of how the mark is displayed

prominently on all labelling relating to products sold under the brand. Ingredients lists appear on these labels in numerous languages including one list headed “GB/US/CA/AU” in English. The label also includes the following text in the bottom corner of the label:

“USA Guaranteed by Adisseo USA Inc., 3480 Preston Ridge Rd., Alpharetta, GA 30005 USA
AUS Guaranteed by Adisseo Australia Pty Ltd, 66 Antimony Street, Carole Park, Queensland 4300 – Australia”

9) Mr Deman states that Adisseo first used MICROVIT in the UK in 1990 and has continually used it since then. To support this, he provides the following turnover figures for the UK relating to Adisseo’s MICROVIT products:

Year	Turnover (€)
2002	4,101,857
2003	3,391,865
2004	2,267,209
2005	1,162,904

10) A statutory declaration, dated 11 April 2008, by Simon Green, Sales Manager for Adisseo. He has held the position since 2004. Prior to working for Adisseo, he was employed by Adisseo’s predecessors in business between the years 1991 and 1997. Mr Green states that he joined Rhone Poulenc Animal Nutrition (“Rhone”), as a Sales Manager, in August 1991 and he was responsible for sales of various products including a vitamin additive for animal foodstuff under the brand MICROVIT. Therefore, to the best of his knowledge, MICROVIT has been used in the UK since at least as early as 1991.

11) At Exhibit SG1, Mr Green provides a copy of a newsletter for Rhone’s sales people produced in October 1991 headed “MICROVIT INFORMATION. This contains numerous occurrences of MICROVIT appearing as a brand name for various vitamin supplements relating to animal nutrition. Further copies of similar newsletters are produced at Exhibit SG2 and dated from 1992, 1994 and 1995. At Exhibit SG3, Mr Green produces a copy of a product information guide headed MICROVIT™ A PROMIX 1000. This is dated October 2006.

12) Mr Green explains a chain of changes resulting in the manufacturer and seller of MICROVIT products moving from Rhone to Adisseo. He further states that “Adisseo manufactures and sells vitamin additives for animal foodstuffs which are bought by companies involved in “pre-mixing” – that is the addition of additives to animal foodstuffs, including the major companies in this area such as Premier Nutrition, Trouw, Provimi and Devenish.” Mr Green explains that, due to the nature of the vitamin additive, it is not unusual for companies to not undertake promotional activities and that is generally the case with Adisseo, but

he states that in the past, there have been promotions in *Feed Compounder* magazine, a UK-based monthly journal for the industry.

13) Mr Green discloses approximate turnover figures for Adisseo. Whilst these are broadly consistent with those disclosed by Mr Demen, he provides no indication as to the proportion that relates to MICROVIT products.

Applicant's Evidence

14) A witness statement by David Neville Peters, Chartered Patent Attorney and Registered Trade Mark Attorney of Hippolyt's representatives Dr Walther Wolff & Co consists almost exclusively of submissions. I do not intend to detail these here but will bear these in mind during my considerations.

15) A second witness statement, dated 16 December 2008, is by Stewart Gregory Rayment of Lockhart & Hastings, Intellectual Properties Consultants. Mr Rayment explains that he was instructed by Hippolyt's representatives to carry out investigations in order to ascertain the extent and nature of use of the mark MICROVIT in the UK by Adisseo. At Exhibit SGR1 there is a copy of a current (as of December 2008) page from the website adisseonorthamerica.com providing product information about MICROVIT products.

16) Mr Rayment contacted two cattle and sheep farmers who had not heard of MICROVIT but did provide Mr Rayment with the names of feed suppliers. He subsequently contacted these suppliers, namely Cargills Countrywide Stores or Cirencester, Cox & Robinson of Buckingham, Dalgety, H & C Pearce of Thame, Jerry's Agricentre of Calne, KW Alternative Feeds and Scats Countrystores of Andover. None of the representatives of these companies had heard of MICROVIT. Checks of some of these supplier's websites did not disclose any reference to MICROVIT.

17) Mr Rayment also contacted *Farmers Weekly*, the UK's leading farm trade periodical and was informed that they had no record of carrying advertisements for MICROVIT products. He was referred to their Agricultural Register, a copy of which is provided at Exhibit SGR3 illustrating that it holds no UK trade or brand name for MICROVIT.

18) Mr Rayment also consulted the Index of Veterinary Specialities for various dates between 1993 and 2000. He reports that this index does not contain any listing for MICROVIT.

19) Mr Rayment called the UK telephone number given for Adisseo but received no reply and he states that the number is listed as Mr Green's personal number. The office address relates to a serviced office, but there is no external indication that the building was, or contained the offices of Adisseo.

Opponent's Evidence in reply

20) This consists of two witness statements. The first of these is a further statement by Mr Green, dated 3 February 2011. Mr Green provides a number of promotional brochures that he states were distributed to customers and potential customers in the UK. At Exhibit SG1 there is a copy of a brochure with a heading in French, Spanish and English. The English heading reads "MICROVIT Packaging and packing characteristics". Mr Green explains that the code visible on the edge of the final page indicates the year 1996. At Exhibit SG2 there is a brochure entitled "MICROVIT E Perfect Flowability for a Winning Run" with a code indicating the year 1998. At Exhibit SG3 is a similar brochure with a code also indicating the year 1998. Exhibit SG4 is a copy of a further brochure, entitled "Newsletter Microvit E Setting the Standard for Vitamin E Quality" and dated 13 June 1998.

21) All these brochures include Rhône-Poulenc Animal Nutrition's contact details in France and some also provide contact details for North America, Latin-America and Asia Pacific.

22) At Exhibit SG5, Mr Green provides a copy of a letter, dated 11 March 2003, from Minsups Limited, a customer of Adisseo, and is entitled "Microvit Vitamin E Vitamin B12". It is addressed to Mr Green at Adisseo's address in France and requests that, as part of its assessment for the Ukasta Feed Assurance Scheme, it requires up-to-date details of its raw materials and requests such information as "full specification sheet".

23) Mr Green confirms that the turnover figures disclosed in his earlier statement relate to MICROVIT sales in the UK.

24) Finally, Mr Green provides the details of eight companies at a number of locations around England and two in Northern Ireland that, he states, have sold MICROVIT branded products to customers in various parts of the UK.

DECISION

Section 5(4)(a)

25) Section 5(4)(a) reads as follows:

"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”.

26) The requirements for this ground of opposition have been restated many times and can be found 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.

27) Hippolyt contends that as Adisseo’s mark is registered in respect of the relevant goods then it cannot be claimed to be an unregistered right and, therefore, to rely upon Section 5(4) (a) of the Act, insofar as there is a claim to passing off, is without substance. The law of passing off is not restricted to protecting unregistered marks and further, the Act, at Section 2(2) contains a proviso that nothing contained within the Act will affect the law of passing off. As such, this contention cannot be correct. It was not pursued at the hearing and therefore, I do not intend to comment further on this.

The Relevant Date

28) The relevant date for determining the opponent’s claim will be the filing date of the application in suit (*Last Minute Network Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Joined Cases T-114/07 and T-115), that is to say 2 March 2006. The earlier right must have been acquired prior to that date (Article 4.4(b) of First Council Directive 89/104 on which the UK Act is based). The position at an earlier date may also be relevant. It could establish a senior user status, or that there has been common law acquiescence or that the status quo should not be disturbed as the parties have a concurrent goodwill (*Croom’s Trade Mark Application* [2005] RPC 2 and *Daimlerchrysler AG v Javid Alavi (T/A Merc)* [2001] RPC 42).

Goodwill

29) In order to make an assessment of whether or not Adisseo has goodwill in a business conducted under the MICROVIT mark, I must be possessed of sufficient information to reach an informed conclusion. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership) (SOUTH CONE)* [2002] RPC 19 Pumfrey J said:

“27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the Registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under Section 11 of the 1938 Act (See *Smith Hayden (OVAX)* (1946) 63 RPC 97 as qualified by BALI [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed at the relevant date. Once raised the applicant must rebut the prima facie case. Obviously he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of possibilities that passing off will occur.”

30) In *Minimax GmbH & Co KG v Chubb Fire Limited (MINIMAX)* [2008] EWHC 1960 (Pat), Floyd J commented directly upon South Cone in the following terms:

“8 Those observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

31) Mr Green makes repeated statements that MICROVIT products have been sold in the UK by Adisseo, or its predecessors in business, since at least 1991. In support of this, turnover in the UK is disclosed in the region of £1.1 million to £4.1 million a year for each of the four years up to and including 2005. Mr Wilkes

confirmed at the hearing that Adisseo only relies upon goodwill in respect of *additives for animal foodstuffs*. The exhibits supporting this claim of goodwill are far from overwhelming and attracted much criticism from Mr Chapple at the hearing.

32) Firstly, he argued that there was insufficient evidence to illustrate the claimed chain of transfer of goodwill. Whilst no documentation has been presented to illustrate this, nevertheless Mr Green, in his statutory declaration of 11 April 2008 provides an explanation of the chronological chain of companies from Rhone Poulenc Animal Nutrition in the early 1990s to Adisseo. It is not open to Hippolyt to invite me to disbelieve such factual evidence without Mr Green being given the opportunity to respond. In reaching this conclusion, I have borne in mind the comments, to that affect, of Richard Arnold QC (as he then was) sitting as the Appointed Person in *EXTREME Trade Mark* BL 0/161/07. As such, I accept Mr Green's explanation regarding the chain of ownership and Adisseo's predecessors in business.

33) Mr Chapple made a comprehensive attack upon the exhibits provided as part of Adisseo's evidence, and I summarise these as follows:

- Mr Deman, in his witness statement, states that he joined Adisseo in June 2006 and that this is after the relevant date in these proceedings and therefore could not have known of the position regarding MICROVIT during the period between 1991 and 2006;
- Mr Deman uses the present tense in witness statement when making statements about the use of MICROVIT;
- The brochures exhibited are dated 1996 and 1998 and there is little or no evidence of use closer to the relevant date in 2006;
- The same brochures do not provide any indication that they were intended for the UK market. Where contact details are provided, they are Adisseo's French address or addresses on other continents;
- The newsletters exhibited are clearly internal documents intended for sales staff and not customers as Mr Green claimed. This point was conceded at the hearing, but Mr Wilkes pointed out that there would be no newsletter regarding MICROVIT products unless there was an ongoing trade in MICROVIT products;
- No details are provided regarding the volume or value of sales of MICROVIT products;
- No dates or further substantiation are provided regarding the claimed promotion in the *Feed Compounder* publication;
- There is no documentary evidence, such as invoices, to identify customers or geographical spread of sales;
- In Ms Richmond's witness statement, it is not obvious that her declared familiarity with MICROVIT is obtained from the UK. Her recognition could relate to business in France or elsewhere;

- In Mr Deman's statement, he refers to a ".com" website. Such a website may not be specific to the UK, despite it containing contact details in the UK;
- The MICROVIT labels exhibited by Mr Deman are printed in various languages and, therefore, not specific to UK;
- Many of the Internet extracts have been obtained from Adisseo's US website;
- There is no evidence to support Mr Deman's claim that MICROVIT has been used continuously in the UK since 1991;
- There is no evidence that any brochures or sales staff newsletters have ever been produced specifically for the UK.

34) I note all these criticisms, however, I also note that just because promotional material or packaging has not been produced specifically for the UK market, this does not demonstrate that it was not intended to cover this market in addition to others. To support this point, it can be seen that the heading for the English language list of ingredients on the packaging exhibited includes "GB", being indicative that Great Britain was at least one of the intended markets. Further, there is a letter from 2003 that demonstrates that Minsups Ltd of Winsford in Cheshire were consumers of MICROVIT products at that time and accessed Mr Green, the UK sales manager, by writing to him at Adisseo's address in France. There is also the list of UK customers provided by Mr Green (one of which is Minsups Ltd). Whilst none of this is overwhelming evidence when considered in isolation, when taken together and also taking into account of the fact that Adisseo has a UK sales manager (Mr Green), and that Mr Green has stated that MICROVIT has about 7% of the relevant UK market, this all combines so that, on the balance of probability, Adisseo has a longstanding goodwill in the UK as identified by its MICROVIT mark.

35) It is true to say that the overall impression created by the evidence is that the UK is not a major focus of Adisseo's MICROVIT products, but none the less it has developed a business in these goods in the UK. Due to the specialist nature of the market for these goods, I do not see it as surprising that there is not a more extensive customer list.

36) Therefore, whilst many of Mr Chappel's criticisms are noted, I do not agree with the conclusion that he reaches, namely, they do not support use of the mark MICROVIT in the UK. I must consider the evidence in its totality and taking all of this into account together with the guidance provided in *SOUTH CONE* and *MINIMAX*, I conclude that the MICROVIT mark identifies goodwill enjoyed by Adisseo on the UK market at the relevant date in respect of *vitamin additives for animal foodstuffs*.

37) This finding is not disturbed by the evidence provided by Mr Rayment on behalf of Hipplyt. Mr Rayment's research failed to uncover use of MICROVIT in the UK. However, despite an attempt to investigate likely sources of records of its

existence on the UK market, this was by its nature somewhat hit and miss. He did not contact any of the specialist consumers of MICROVIT, as later identified by Mr Green. He contacted farmers and feed suppliers, neither of which are the consumers of MICROVIT. The lack of adverts for MICROVIT in Farmers Weekly is also far from conclusive. He also consulted an Index of Veterinary Specialities, but without knowing the scope and intended purpose of such an index, it is not possible to consider the significance of MICROVIT's absence from the index. As such, I find that Mr Rayment's evidence adds no weight to the argument that Adisseo has no goodwill, identified by the mark MICROVIT, in the UK.

Misrepresentation and damage

38) Having reached this conclusion, I must go on to consider if there has been misrepresentation and whether any such misrepresentation is such as to cause damage to Adisseo. In this respect, I am mindful of the comments of Morritt L J in the Court of Appeal decision in *Neutrogena Corporation and Anr. V Golden Limited and Anr.* [1996] RPC 473 when he confirmed that the correct test on the issue of deception or confusion was whether, on the balance of probabilities, a substantial number of the opponent's customers or potential customers would be misled into purchasing the applicant's products in the belief that it was the opponent's. Further, Lord Fraser in *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1980] RPC 31 HL, stated that the opponent must show that "he has suffered, or is really likely to suffer, substantial damage to his property in the goodwill".

39) As part of the consideration into whether Adisseo's customers or potential customers would be misled into purchasing Hippolyt's products, I will consider the similarity of the respective marks. Adisseo's mark consists of the word MICROVIT. In light of the goods identified by the mark, namely *vitamin additives for animal foodstuffs*, this will be perceived by the consumer as the prefix MICRO and VIT being an allusion to "vitamin". On the other hand, whilst the MICRO element of Hippolyt's mark will be perceived in the same way, the second element of its mark will not. The word VITAL will be perceived as an allusion to essential or very important element¹ or even possibly to "life" (because the word "vital" originates from the Latin word "vita" meaning "life"). Whilst I recognize that there is some similarity between the respective marks, regardless of which of these allusions is uppermost in the minds of the consumer, the overall impression created by the mark MICROVITAL will be different to the mark MICROVIT.

40) Whilst there is no requirement for there to be a common field of activity of the respective parties, see *Lego Systems A/S v Lego M Lemelstrich Ltd* [1983] FSR 155, the level of similarity of the respective goods is, nonetheless, a relevant factor. Adisseo's best case relies upon Hippolyt's *vitamin preparations* in Class 5

¹ <http://www.collinslanguage.com/results.aspx?context=3&reversed=False&action=define&homonym=-1&text=vital>

as these clearly include Adisseo's *vitamin additives for animal foodstuffs*. Therefore, if Adisseo's case cannot succeed against these goods, it cannot succeed against any of Hippolyt's other goods. It is clear from Adisseo's evidence that the market for its MICROVIT goods involves only a relatively small number of specialist consumers who are manufacturing animal feed products. When purchasing ingredients for such products, it is likely that more than the average degree of attention will be involved. Issues such as cost negotiation, suitability of the product and potential benefits to the animals who will consume the end product will all form part of this careful consideration. The letter to Mr Green at Adisseo from Minsups Ltd provides an insight into the level of information that Adisseo's consumers may require regarding its products.

41) Taking all of the above into account, it is unlikely that a substantial number of Adisseo's customers or potential customers would be misled into purchasing MICROVITAL *vitamin additives for animal foodstuffs* believing them they are Adisseo's goods. A combination of the different conceptual allusions created by the respective marks together with the specialist nature of the goods and the market for them outweighs the fact that the respective marks are visually and aurally similar and that the respective goods may be the same or similar.

42) In light of this finding, it is not necessary for me to consider the exclusion offered by Mr Chapple, at the hearing, as a fall-back position if I were to find against Hippolyt.

43) In summary, I find that despite Adisseo enjoying goodwill identified by the mark MICROVIT, this alone is insufficient for use of Hippolyt's mark, in respect of identical or similar goods, to result in misrepresentation and damage. As such, the opposition fails in its entirety.

COSTS

44) The opposition having failed, Hippolyt is entitled to a contribution towards its costs. I take account of the fact that a hearing has taken place and that both sides filed evidence. I award costs on the following basis:

Considering Notice of Opposition and preparing counterstatement	£400
Preparing and filing evidence and considering other side's evidence	£800
Preparing and attending hearing	£700
TOTAL	£1900

45) I order Adisseo France S.A.S. to pay Hippolyt Nutritional Concepts Marketing-und Vertriebs GmgH the sum of £1900. 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 22nd day of July 2011

**Mark Bryant
For the Registrar,
the Comptroller-General**