

O-320-05

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO 426050
IN THE NAME OF CONSAC INDUSTRIES, INC
OF THE TRADE MARK:**

COUNTRY LIFE

IN CLASSES 1, 2, 3, 5, 28, 29, 30, 31 AND 32

**AND THE APPLICATION FOR REVOCATION THERETO
UNDER NO 81784
BY IPC MEDIA LIMITED**

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**In the matter of registration no 426050
in the name of Consac Industries, Inc
of the trade mark:
COUNTRY LIFE
in classes 1, 2, 3, 5, 28, 29, 30, 31 and 32
and the application for revocation
thereto under no 81784
by IPC Media Limited**

BACKGROUND

1) On 24 June 2004 IPC Media Limited, which I will refer to as IPC, filed an application for the partial revocation of registration no 426050 of the trade mark COUNTRY LIFE (the trade mark). The trade mark was registered on 23 October 1922. On 28 February 1996 as per section 65 of the Trade Marks Act 1994 (the Act) and rule 40 of the Trade Marks Rules 1994 the specification of the registration was converted from schedule 3 of the Trade Marks Rules 1994 to schedule 4 of the Trade Marks Rules 1994. The current specification of the registration is:

chemical substances for preserving foodstuffs; tartaric acid for use as an ingredient in food; anti-ferments for liquors; preservatives and finings for beer and wine; food and drink clarifiers; ferments; neutralizers for fermenting liquors; saccharin for use as an ingredient in food; preparations for tenderising foodstuffs;

colouring substances for food and liquors;

essential oils for food;

vitamins, minerals, and dietary supplements; infants' and invalids' foods; dietetic foods adapted for medical use;

natural fishing bait;

all goods included in Class 29 but not including cheese, canned fruits, bottled fruits, condensed milk, milk, cream, yoghurt or butter, or goods of the same description;

all goods included in Class 30 but not including flour, biscuits, confectionery or chocolate, or goods of the same description.

foodstuffs of agricultural, horticultural and forestry origin; grains for food; fresh fruits and vegetables; foodstuffs for animals; malt;

beverages and preparations for making beverages; fruit juices, fruit syrups and fruit drinks; but not including medicated or aerated goods.

The above goods are in classes 1, 2, 3, 5, 28, 29, 30, 31 and 32 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

The registration currently stands in the name of Consac Industries, Inc, which I will refer to as Consac. Consac has advised, by letter of 8 November 2005, that the registration has been assigned to COUNTRY LIFE LLC and that an application has been made for recordal of the assignment. The change of registered proprietor, at the time of writing, has not been effected by the Registry. Therefore, I will continue to refer to Consac in this decision. However, any award of costs will be made for or against COUNTRY LIFE LLC.

2) IPC claims that the within five years of the completion of the registration process the trade mark has not been put to genuine use within the United Kingdom by the proprietor or with the consent of the proprietor in relation to the goods for which it is registered and there are no proper reasons for non-use. Consequently, IPC seeks revocation of the registration under section 46(1)(a) of the Act.

3) IPC claims, in the alternative, that use of the trade mark has been suspended for an uninterrupted period of five years in relation to all of the goods for which it is registered and there are no proper reasons for non-use. Consequently, IPC seeks revocation of the registration under section 46(1)(b) of the Act. IPC requests, as per section 46(6)(b) that the registration be revoked as from 11 September 2003, in the absence of any evidence of use of the trade mark by the proprietor or with the consent of the proprietor during the five year period up to this date.

4) IPC requests that the registration is restricted, under section 46 of the Act, to *essential oils for food* in class 3 and *vitamins, vitamin supplements and medicinal herbal teas* in class 5.

5) IPC states that it wrote to Consac requesting voluntary restriction of the registration, in the apparent absence of use of the trade mark. It states that Consac has not elected to restrict the registration as requested. At the time of the application three months had elapsed since IPC approached Consac.

6) IPC seeks an award of costs.

7) Consac filed a counterstatement. It denies that use of the trade mark has been limited to the goods identified by IPC. It states that the trade mark has been put to genuine use in relation to a wide variety of the goods of the registration.

8) Consac requests the rejection of the application and an award of costs.

9) Both sides filed evidence.

10) A hearing was held on 24 November 2005. Consac was represented by Mr Edenborough of counsel, instructed by Abel & Imray. IPC was represented by Mr Malynicz of counsel, instructed by fJ Cleveland.

EVIDENCE

Evidence of Consac

Witness statement of Hazel Hearn

11) Ms Hearn is a trade mark attorney. Ms Hearn furnished the initial evidence in the case. She exhibits copies of invoices from 2001 – 2004 (inclusive) and extracts from the country-life.com website. The extracts from the website were downloaded on 6 October 2004, after the date of application. They are not specific to the United Kingdom. The extracts from the website give an explanation of the various goods and put Consac's trade within a particular context. However, they do not go to establishing use before the date of application. A large number of copies of invoices are exhibited. Two of the invoices emanate from after the date of application; 1 July and 2 August 2004, but nothing turns upon this. The vast bulk of the invoices are to Reaction Sales. The invoices to Reaction Sales are headed with five trade marks alongside each other: COUNTRY LIFE, Iron-Tek, Biochem, Desert Essence, Long Life Beverages (all of these are stylised word trade marks or stylised word and device trade marks). The heading of the invoices also includes what appears to be a quality mark: GMP. There are various references to the COUNTRY LIFE website upon the invoices. There is a much smaller number of copies of invoices to Consac Ind UK Ltd; these are for a large variety of Long Life teas. They emanate from 2001 and 2002. The invoices indicate that they emanate from Long Life Teas eg stamps stating that the goods were shipped from Long Life Herbal Teas, Randolph NJ. The heading of the invoices differs from those to Reaction Sales. The same trade marks and quality mark appears but on these invoices the COUNTRY LIFE stylised word and device trade mark appears above the four other trade marks. The invoices show sales, using the January 2003 price list / order form (see below), of all the Soy-Licious products, all the Iron-Tek products with the exception of Size-Tek and all but four of the Biochem Sports products: Tri Protein Plus Vanilla 454g, Tri Protein Plus Chocolate 454g (the same products in other sizes are shown on invoices), Creatine Pyruvate and Ultimate Lo Carb Smoothie Vanilla. They also show sales of goods in each of the of the COUNTRY LIFE categories in the January 2003 price list / order form.

Witness statement of Patrick James Barry

12) Mr Barry is a trade mark attorney. He exhibits at PJB1 a copy of pages from the magazine "Health Food Business" of August 1998. There is a piece headed "New VMS ranged launched especially for independents". The piece begins with the following:

"COUNTRY LIFE VITAMINS has launched a range of supplements into the UK, including a unique range which is remedy specific.

A major American company, Country Life Vitamins is owned by Consac, who also own Desert Essence and Long Life Teas. Consac UK is run by Tom Moses, ex ?ewhurst Sales Director.

The vitamin range is to be dedicated to the independent health food trade..."

13) Exhibited at PJB2 is a catalogue headed "Welcome to our family of companies". The publication is shown as being the 2001 edition; the address upon the front of the publication is in New York State. Mr Barry states that this publication was produced in the United States but was sent to Reaction to provide information to its customers in the United Kingdom. Consequently, the catalogue does not reflect the use of the trade mark in the United Kingdom.

14) The usefulness of the United States catalogue is that it can clarify the nature of the products that are within the price lists / order forms (see below). The catalogue begins with a table of contents which divides the products into the following categories: hypoallergenic, rapid release, time release, amino acids, Biochem formulas, Biochem companion products, Biochem Gel-Eze, Biochem sports and fitness systems, Insta-Fizz, Maximized glandulars, minerals, supplements, Maximized supplements, digestive enzymes, vitamins, vitamins A & D, vitamin B, vitamin C and bioflavonoids, vitamin E, multiple vitamin/mineral formulations, herbal products, Long Life teas, excipients, binders and fillers. The catalogue identifies Biochem, Gel-Eze, Maximized, Insta-Fizz and Long Life as being trade marks.

15) Mr Barry exhibits at PJB3 a copy of a sales report prepared by Consac showing sales of COUNTRY LIFE products in the United Kingdom for the period 2001 – 2003. He also exhibits at PJB4 the same report but with a cross reference to various of the products shown to the invoices exhibited at HH1 and PJB6 (see below). The date of the relevant invoice is given, all of the dates that are given are before 24 June 2004. I have compared this report with the price lists / order forms exhibited at PJB5 (see below) and the catalogue exhibited at PJB2; where I have not been able to identify a product by its serial number I have attempted to identify it by analogy to other products in the publications. The only products I have not been able to identify by cross reference are:

ADJ-CL	COUNTRY LIFE Adjustment;
4500	Cla Tonalin 1000 MG (90);
8150	Beyond food multi caps 120s;
98171	Strip for Vitamin Packets.

All of the products that have been identified, bar three, can be found under the COUNTRY LIFE heading in the publications exhibited at PJB5. The three exceptions are for non-GMO Soy-licious strawberry, Soy-licious Dutch/choc and non-GMO Soy-licious vanilla. Soy-Licious goods are shown at the end of the catalogue exhibited at PJB2. The goods are described as high protein, energising soy powdered drinks. It is stated that the drinks supply all essential vitamins and minerals. The representation of the goods shown in the catalogue has use of a COUNTRY LIFE trade mark. In the material exhibited at PJB5 the goods come under the Iron-Tek sub-heading.

16) Exhibited at PJB5 are price lists / order forms effective from September 2001, February 2002 and January 2003. The January 2003 publication was produced by Reaction and is labelled for the United Kingdom. The February 2002 publication was produced by Consac and is also labelled for the United Kingdom. The September 2001 publication was also produced by Consac and is labelled US/International. The last two publications give carriage prices in pounds sterling. These documents bear

four trade marks - COUNTRY LIFE (stylised), Biochem (stylised word and device), Long Life Teas (stylised word and device) and Iron-Tek (stylised word)-and what appears to be a quality mark – GMP - on the front. Inside the goods are divided into groups by trade mark: Biochem Sports, Iron-Tek, COUNTRY LIFE, Desert Essence (for a range of personal care products) and Long Life Teas. The COUNTRY LIFE goods are subdivided by type: amino acids, biochem formulas, biochem companion, minerals – target mins, supplements, maximised supplements, vitamin A & D, vitamin B, vitamin C, vitamin E, multiple vitamin/mineral, herbals, gel-eze formulas, supplements. The Iron-Tek division has a sub-division for Non GMO Soy-Licious. Items from each of the above COUNTRY LIFE sub-categories appear in the list exhibited at PJB3. Many of the sub-categories, eg vitamin B, are self-explanatory. Consac gives an explanation of the other sub-categories in the catalogue exhibited at PJB2:

Biochem formulas – “BIOCHEM® formulas are designed for specific physiological support. Each one addresses the health and maintenance needs of one or more physiological functions.”

Biochem companion – “*Country Life’s* BIOCHEM® Companion products represent the newest and most technically advanced nutrients.” (In HH1 also – “Each BIOCHEM® formulation is designed to support a particular physiological and biochemical system”)

Gel-Eze formulas – “Biochem’s Gel-eze™ formulations are marketed at softgels to ensure optimum delivery and the highest quality possible. Biochem® Gel-Eze formulas include: Organic Flaxseed Oil, Norwegian AKG, Echinacea Goldenseal, Lutein and Lycopene.”

Herbals – “Herbs have always played a special role in maintaining health. The earliest medicines were herbs. There is a balance found in herbal sources which is harmonious with the body and which herbalists have always called upon to support health. This traditional philosophy is maintained in all *Country Life®* Herbal formulas.”

17) In the pages from the website exhibited at HH1 Iron-Tek® Essentials are described as “the core sports nutrition products used to achieve all of your fitness goals”. Iron-Tek® Nutrition “offers a wide variety of quality supplement for “every body”.”

18) At the beginning of the catalogue exhibited at PJB2 the following appears:

“Welcome to Country Life®, a family-owned business dedicated to nutritional products for a health conscious lifestyle.....With unrelenting attention to product quality, scientific research, customer service and consumer needs, Country Life® supplies an extensive product line which is available in better health food stores nationally and distributed worldwide. Our superior formulations are carefully designed to meet every customer’s nutritional requirements from infancy through maturity. In addition, Country Life® offers its Biochem series, which includes Nutritional Therapeutic Formulations and Biochem Sports and Fitness products. All Biochem

formulations are the result of extensive research in biochemistry and the latest in nutritional science. The synergy of our advanced Biochem formulas creates a total effect far greater than the use of any nutrient.”

19) Descriptions of various Biochem Sports products are given in the catalogue exhibited at PJB2:

Ultimate protein bar: “is perfect for athletes, dieters and also makes a healthy high protein snack for growing children”.

Ultimate Lo Carb bar: “the perfect high-protein, low-carb snack before or after workouts or for others who want to incorporate additional protein into their diets.”

Ultimate Lo Carb whey: “beneficial to athletes, bodybuilders and to others who wish to incorporate additional high-quality protein into their diets”.

Ultimate Lo Carb shake: “provide 35 grams of high quality, peptide bonded, macro-molecular protein”.

Tri Protein Plus:– “Getting enough quality protein is one of the most important factors required for building and maintaining a lean muscular physique.”

Pharmaceutical grade micronized Ultimate Creatine Monohydrate: “Creatine Monohydrate is the most widely accepted sports ergogenic aid.”

Ultimate Lo Carb 2 Bar: “is a wonderful pick-me-up before or after a workout”.

PowerVol ATP: “Maximize your workouts with this powerful NEW advanced creatine formula!”

Total Meal X-Treme TMX: “Biochem’s TMX is the only meal supplement available...”

(The goods in italics do not appear in price lists / order forms exhibited at PJB5.)

20) The catalogue refers to Insta-Fizz products as nutritional drinks and Soy-Licious as a “great energy snack or substitute for a light nutritious meal”.

21) Exhibited at PJB6 are a further five invoices. All are made out to Reaction Sales. The heading of the first invoice is similar to the Consac Ind UK Ltd invoices exhibited at HH1. The other invoices are similar except COUNTRY LIFE (stylised) is without a device element.

22) Mr Barry ends his statement by claiming that the goods listed below are contained within various classes of the registration (the numbers refer to the serial numbers of goods). The italicised words relate to how Consac’s literature describes the goods:

Class 1

Lecithin – products 4201, 4205, 4404, 4405

supplement

Class 29

Flaxseed oil – 1510 – *Gel-Eze - supplement*

Extracts of meat – **3691 and 3694** – *supplement – beef liver tablets*
Vegetable extracts for food – 4050, 4051, - *supplement – garlic softgels*
1648 – *biochem companion*
Seaweed extracts for food – 4135 - *supplement*
Soya protein – 4763, 4761 and 4765 – *soy protein drink – Soy-Licious - supplements*

Class 30

Protein bars and wafers 1738 – 1992 – *all Biochem Sports products - many powders, tablets, softgels, capsules also **Ultimate Lo Carb Shake**, Ultimate protein bars, Ultimate Lo-Carb Whey, Ultimate Lo-Carb Smoothie, Ultimate Protein System drink, Tri Protein Plus, Creatine, Ultimate Lo Carb 2 bar*

Snacks – 2463 – *Minerals – Chewable Milk Free Cal-Snack – a chewable milk free calcium wafer with magnesium and vitamin D for maximum benefits*

Tea extracts (non-medicated) – 9753 – *herbals*

Beverages containing soya – 4763, 4761, 4765 – *Supplements - soy protein drink – Soy-Licious*

Yeast tablets for food for human consumption -3226 – *Supplements - brewer's yeast tablets*

Edible fibres (nutritive) for use as foodstuffs – 4610, **4611** and 4620 – *Supplements – daily fibre capsules and psyllium seed husk powder (a natural dietary fibre useful in maintaining regularity and healthy intestinal function)*

Vitamin enriched wafers – 7233, **7235**, 7243 and **7245** – *vitamin C and bioflavonoids – vitamin c wafers – chewable orange juice*

Class 31

Bee pollen – **3111** – *supplement – chewable bee pollen – 100 tablets*

Class 32

Beverages and preparations for making beverages - 1630, 1633, 1636, 4610, **4611**, 4620¹
-1630, 1633, 1636 – *Biochem – tablets*
4610, 4611- *supplements – daily fibre capsules*
and 4620 – *supplements – super fibre psyllium seed husk powder*

The numbers in bold indicate that the goods do not appear in the price lists / order forms exhibited at PJB5.

¹ At the Hearing Mr Edenborough stated that the product codes 4610, 4611 and 4620 should have read 4763, 4761 and 4765 (Soy-Licious products).

Witness statement of Jodi Billet

23) Ms Billet is executive vice president of Consac. She states that sales of Consac's COUNTRY LIFE branded products commenced in the United Kingdom in 1997. She gives the following sales figures:

1999	£105,203
2000	£302,823
2001	£468,054
2002	£370,934
2003	£406,817

Ms Billet states that the total advertising expenditure for COUNTRY LIFE branded products was as follows:

1999	£3,177
2000	£9,872
2001	£10,391
2002	£11,796
2003	£11,187

24) Ms Billet exhibits copies of packaging used in the United Kingdom for various COUNTRY LIFE products. All but one of the labels describes the product as a dietary supplement. The one exception is for Ginseng Supreme Complex, which is described as a herbal supplement. Ms Billet states the trade mark has been used consistently and continuously in the United Kingdom on the packaging for these types of products during the material time.

Evidence of IPC

Witness statement of Joanna Larkey

25) Ms Larkey is a trade mark attorney. She states that on 3 November 2003 she instructed a firm of investigators to look into whether the trade mark had been used by Consac. She exhibits at JL1 a copy of the subsequent report. Ms Larkey states that following the investigation she wrote to Consac's agents requesting part cancellation of the registration. As they did not do so within three months the application to partially revoke the registration was filed. The rest of Ms Larkey's statement is submission rather than evidence of fact and I need say no more about it here.

26) The investigation was carried out by Carratu International Plc. From Internet investigations Carratu found that COUNTRY LIFE is a family owned business dedicated to nutritional and lifestyle products and that it is a subsidiary of Consac.

27) Under pretext and using a suitable cover, Carratu contacted the customer service department of Consac and spoke to a female employee, named Julie. COUNTRY LIFE was familiar to her and she confirmed that a range of COUNTRY LIFE products was exported to the United Kingdom. The United Kingdom distributor was given as Reaction Sales. Julie informed the investigator that COUNTRY LIFE products were primarily vitamin products, supplements and health tea drinks. Carratu

contacted Reaction Sales and spoke to a female employee, also named Julie. She confirmed that Reaction Sales were the United Kingdom distributors of COUNTRY LIFE products. The investigator was informed that COUNTRY LIFE products were available for purchase nationwide from health food shops. The products could also be purchased on a mail order basis from Reaction Sales. The report from Carratu includes a price list / order form for April 2003, Long Life Teas are absent from this price list / order form but otherwise it is on a similar pattern to the others (see below).

28) Included in the Carratu report is a printout, downloaded on 5 November 2003, from the “about” section of the country-life.com website. Inter alia the following is written:

“We at Country Life are pleased to provide the most innovative and effective health and beauty products for today’s health-conscious lifestyles.....

.....Our superior formulations are carefully designed to meet every customer’s nutritional requirements from infancy through maturity. In addition, Country Life offers its Biochem series, which includes Nutritional Therapeutic Formulations and Biochem Sports and Fitness products. All Biochem formulations are the result of extensive research in biochemistry and the latest in nutritional science. The synergy of our advanced Biochem formulas creates a total effect far greater than the use of any one nutrient.

On the cutting edge of sports nutrition, the Biochem Sports & Fitness Systems provide some of the most up-to-date and innovative formulas available anywhere.”

Witness statement of Fiona Dent

29) Ms Dent is a publisher with IPC. In normal circumstances I would not comment upon Ms Dent’s statement is it contains no evidence of fact but consists of submissions. However, reference was made at the hearing to certain elements of this statement. Ms Dent states:

“With regard to paragraph 2 of Mr. Barry’s Witness Statement, I understand that the contents of Annex PJB1 pre-date the five year period which I understand to be relevant to these proceedings. Hence I do not believe they can substantiate the Proprietor’s assertion of use of the trade mark COUNTRY LIFE in respect of the goods covered by UK trade mark registration no. 426050.”

“I agree that any use which has been made of the mark COUNTRY LIFE by the Registered Proprietor in the UK does appear to be limited to vitamins or vitamin and mineral based dietary supplements.”

“It seems to me that of the goods for which the subject mark is registered, use appears only to have been made in respect of vitamins, vitamin and mineral supplements, which I understand fall in class 5.”

“I ask that the subject registration no longer be allowed to obstruct the Applicant’s aims, in the absence of any validating use of the subject mark during the period which I understand is between 12 September 1998 and 11 September 2003 (as requested under the provisions of Section 46(6)(b)), or, during the five year period (as requested under Section 46(1)(a)).”

DECISION

30) Section 46 of the Act reads as follows:

“(1) The registration of a trade mark may be revoked on any of the following grounds—

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that—

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from——

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

Consideration has to be taken, also, of section 100 of the Act which states:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

Consequent upon section 100 the onus is upon the registered proprietor to prove that it has made genuine use of the trade mark in suit, or that there are proper reasons for non-use.

Preliminary issues

31) Mr Edenborough raised issues in relation to the date that from which any revocation should be effective. It was Mr Edenborough’s submission that the pleading in relation to section 46(1)(a) is fatally flawed. He submitted that a pleading should contain not only the legal basis of an allegation but also the factual basis. He submitted that it is an essential requirement that the date of completion of the registration process be specified as a material fact in order to define unambiguously the starting date of the relevant five-year period of alleged non-genuine use. The date that the trade mark was registered is not available on the Registry’s database, it can only be obtained from an inspection of the file. Files for trade marks registered under the Trade Marks Acts 1905 to 1919, this trade mark was registered under these acts, are not open to public inspection. An interested party can contact the Registry to ascertain the date of registration. However, I am not aware of this being something that normally happens or that it is known that this can be done. Mr Edenborough objects to the basis of the claim under section 46(1)(a) because it does not give a specific date. In fact the claim identifies a date, ie five years after the date of registration but does not specify the date of registration. It seems reasonable to me to expect a registered proprietor to know the date of registration of its trade mark; even when title to that trade mark has been transferred over the years. Indeed it would seem essential to know this sort of detail, in the event of such an attack as this. IPC has identified a claim under section 46(1)(a), Consac should, in my view, be aware of

the date its trade mark was registered. Consequently, I do not consider that the claim under section 46(1)(a) is fatally flawed. Section 46(6)(b) allows me to decide the date from which revocation should take place, it is not an automatic consequence that a claim under section 46(1)(a) will lead to a revocation from the date five years and one day after the date of registration. It will still be a matter for me to decide how or if to apply section 46(6)(b) of the Act.

32) Mr Edenborough also claimed that IPC has irrevocably abandoned any pretext of seeking an earlier revocation date than 12 September 2003 because of Ms Dent's statement. He arrives at this position because of Ms Dent's statement:

“With regard to paragraph 2 of Mr. Barry's Witness Statement, I understand that the contents of Annex PJB1 pre-date the five year period which I understand to be relevant to these proceedings. Hence I do not believe they can substantiate the Proprietor's assertion of use of the trade mark COUNTRY LIFE in respect of the goods covered by UK trade mark registration no. 426050.”

Mr Edenborough's submission appears to require that Mr Barry's witness statement will save all of the goods of the registration, that it is accepted by IPC that the statement proves use and that Ms Dent's statement is a de facto amendment of the statement of grounds. I can accept none of these premises.

33) The attack under section 46(1)(a) stays in.

34) Mr Edenborough went on to submit that any revocation can only take place from 12 September 2003 because of Ms Dent's statement:

“I ask that the subject registration no longer be allowed to obstruct the Applicant's aims, in the absence of any validating use of the subject mark during the period which I understand is between 12 September 1998 and 11 September 2003 (as requested under the provisions of Section 46(6)(b)), or, during the five year period (as requested under Section 46(1)(a)).”

Ms Dent is making a statement, she is not and has not asked to amend the statement of grounds. It is clear from the statement of grounds that revocation is sought from 11 September 2003. I see nothing that would lead to me the conclusion that Ms Dent was attempting to amend the date of revocation. I put it to Mr Edenborough that section 46(6)(b) gives me the power to decide upon the date from which revocation should take place. He agreed that it does although he submitted that this was normally on the basis of a request. I consider the statement of grounds a reasonable basis for considering that there was such a request.

35) The claim for revocation from 11 September 2003 under section 46(1)(b) stays.

36) Of course, Consac would not have had a rod to try and beat IPC in relation to this matter if Ms Dent had not put in evidence which is in fact a compilation of submissions. The registrar's hearing officers have commented on numerous occasions on witness statements consisting partly or totally of submissions rather than evidence of fact. This is also the subject of a tribunal practice notice, TPN 5/2004.

Substantive issues

37) Mr Malynicz's submissions were based on the conceding of use in relation to *essential oils for foods* in class 3 and *vitamins, minerals, and dietary supplements, medicinal herbal teas* in class 5. Mr Malynicz also accepted that use of COUNTRY LIFE in a slightly stylised form on the background of a half petal device (as shown on invoices and specimen labels) was use in a form differing in elements which did not alter the distinctive character of the mark in the form in which it was registered. Mr Edenborough conceded that there was no evidence of use in relation to the following goods:

tartaric acid for use as an ingredient in food; anti-ferments for liquors; preservatives and finings for beer and wine; food and drink clarifiers; ferments; neutralizers for fermenting liquors; saccharin for use as an ingredient in food; preparations for tenderising foodstuffs;

colouring substances for food and liquors

invalids' foods.

natural fishing bait.

38) There was no distance between counsel as to the relevant case law. I list the relevant case law below:

Description of the goods

- *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32:

"29 I have no doubt that Pumfrey J. was correct to reject the approach advocated in the Premier Brands case. His reasoning in paras [22] and [24] of his judgment is correct. Because of s.10(2), fairness to the proprietor does not require a wide specification of goods or services nor the incentive to apply for a general description of goods and services. As Mr Bloch pointed out, to continue to allow a wide specification can impinge unfairly upon the rights of the public. Take, for instance, a registration for "motor vehicles" only used by the proprietor for motor cars. The registration would provide a right against a user of the trade mark for motor bikes under s.10(1). That might be understandable having regard to the similarity of goods. However, the vice of allowing such a wide specification becomes apparent when it is envisaged that the proprietor seeks to enforce his trade mark against use in relation to pedal cycles. His chances of success under s.10(2) would be considerably increased if the specification of goods included both motor cars and motor bicycles. That would be unfair when the only use was in relation to motor cars. In my view the court is required in the words of Jacob J. to "dig deeper". But the crucial question is--how deep?

30 Pumfrey J. was, I believe, correct that the starting point must be for the court to find as a fact what use has been made of the trade mark. The next task is to decide how the goods or services should be described. For example, if the trade mark has only been used in relation to a specific variety of apples, say

Cox's Orange Pippins, should the registration be for fruit, apples, eating apples, or Cox's Orange Pippins?

31 Pumfrey J. in *Decon* suggested that the court's task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under s.10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use.”

- *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281:

“When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all a trade mark specification is concerned with use in trade.”

- *Reckitt Benckiser (España), SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-126/03

“42 The Court observes that the purpose of the requirement that the earlier mark must have been put to genuine use is to limit the likelihood of conflict between two marks by protecting only trade marks which have actually been used, in so far as there is no sound economic reason for them not having been used. That interpretation is borne out by the ninth recital in the preamble to Regulation No 40/94, which expressly refers to that objective (see, to that effect, *Silk Cocoon*, cited at paragraph 27 above, paragraph 38). However, the purpose of Article 43(2) and (3) of Regulation No 40/94 is not to assess commercial success or to review the economic strategy of an undertaking, nor is it to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks (Case T-334/01 *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)* [2004] ECR II-0000, paragraph 32, and Case T-203/02 *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)* [2004] ECR II-0000, paragraph 38).

43 Therefore, the objective pursued by the requirement is not so much to determine precisely the extent of the protection afforded to the earlier trade mark by reference to the actual goods or services using the mark at a given time as to ensure more generally that the earlier mark was actually used for the goods or services in respect of which it was registered.

44 With that in mind, it is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to

earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established.

45 It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories relating to which the goods or services for which the trade mark has actually been used actually belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

53 First, although the last sentence of Article 43(2) of Regulation No 40/94 is indeed intended to prevent artificial conflicts between an earlier trade mark and a mark for which registration is sought, it must also be observed that the pursuit of that legitimate objective must not result in an unjustified limitation on the scope of the protection conferred by the earlier trade mark where the goods or services to which the registration relates represent, as in this instance, a sufficiently restricted category."

- *Animal Trade Mark* [2004] FSR 19:

"20 The reason for bringing the public perception in this way is because it is the public which uses and relies upon trade marks. I do not think there is anything technical about this: the consumer is not expected to think in a

pernickety way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. Thus, for instance, if there has only been use for three-holed razor blades imported from Venezuela (Mr T.A. Blanco White's brilliant and memorable example of a narrow specification) "three-holed razor blades imported from Venezuela" is an accurate description of the goods. But it is not one which an average consumer would pick for trade mark purposes. He would surely say "razor blades" or just "razors". Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods--are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made."

- *Omega SA v Omega Engineering Inc* [2003] FSR 49:

“2. The Hearing Officer has summarised the evidence of use which had been put in by the trade mark owners, the attack being based on non-use. Somewhat sadly, he had apparently good cause to criticise the quality of that evidence. It remains the case that those concerned to prove use of trade marks should provide clear evidence relating to the goods or services which are relevant, not to other goods, and should ensure the evidence is concise, precise but yet complete.

3. The upshot of all this, so far as I am concerned, boils down to a very narrow point. The trade mark owners wish to keep within the specification the following goods, "signalling instruments and apparatus". To justify this the only uses which they have, are for display boards and screens and associated technical equipment for information boards on railway stations and scoreboards at sports grounds. Mr. Edenborough accepts that probably on any basis the specification is too wide. It would include flags used by guards on the trains, or that used to be used by guards on trains. It would include semaphore flags, Morse code transmitters, and so on. He suggested there could be fall-back positions: "public information display apparatus" or perhaps, if he was relying only on the apparatus that was used on railway stations, "passenger information display apparatus".

4. Before one gets, however, to that, one must ask whether scoreboards and railway information screens (for which use has been proved) are properly to be regarded as "signalling instruments and apparatus". Mr. Edenborough submits that they are. In a technical sense there is something in what he says. You look at the screen for information and because it is providing information visually it is, in a sense, sending out a signal. But I do not think it is right to regard trade mark specifications from a technical point of view. It is much more important

to regard them from a trade point of view. These specifications are not patent claims, they are specifications of goods for the purposes of trade. I do not believe that anybody in the ordinary way of things would regard a display screen as a "signalling instrument or apparatus". On the contrary, in the ordinary way of things someone who looks at a television screen or other sort of screen would regard that as the thing which had received the signal. Technically, as a matter of information science, maybe a thing is also providing information and in that sense sending a signal, but in the commercial sense it is not a signalling instrument.

5. The Hearing Officer, I think, approached it completely accurately. He said as follows:

"[The proprietor] showed use of the trade mark in relation to public information display apparatus. However, I cannot see how such goods are encompassed by the specification of the registration. Ms Arenal argued that *signalling instruments and apparatus* would encompass such goods as they receive a signal. Just because a product receives a signal it does not make it a piece of signalling apparatus. Televisions and radios receive signals, it would not be normal to describe them as signalling apparatus."

6. That seems to me to have approached the matter entirely accurately and properly. This appeal is by way of review only. So it has to be shown that the Hearing Officer has gone wrong in principle or made a manifest error on the evidence. To my mind, far from making such a mistake, on the contrary, I think he got it completely right. I therefore dismiss the appeal."

The nature of the evidence

- *Kabushiki Kaisha Fernandes v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) Case T-39/01 [2003] ETMR 98*

"47 In that regard it must be held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned."

- *Laboratoire De La Mer Trade Marks [2002] FSR 51*

"9 In the present cases, use was not proved well. Those concerned with proof of use should read their proposed evidence with a critical eye -- to ensure that use is actually proved -- and for the goods or services of the mark in question. All the t's should be crossed and all the i's dotted."

Basis of genuine use

- *Ajax Brandbeveiliging BV v Ansul BV* Case C-40/01 [2003] ETMR 85:

“1. Article 12(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that there is genuine use of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of the goods or services at issue, the characteristics of the market and the scale and frequency of use of the mark. The fact that a mark that is not used for goods newly available on the market but for goods that were sold in the past does not mean that its use is not genuine, if the proprietor makes actual use of the same mark for component parts that are integral to the make-up or structure of such goods, or for goods or services directly connected with the goods previously sold and intended to meet the needs of customers of those goods.”

39) Mr Malynicz’s position was that Consac had not shown genuine use of the trade mark upon any of the goods of the registration. He criticised the lack of any till receipts, of any invoices to customers. He criticised the specimen labels exhibited to the statement of Ms Billet as not being actual labels used in the United Kingdom. Mr Malynicz submitted that the invoices addressed to Reaction were not proof of sales. He characterised these as representing internal use and did not consider that they showed any use within the United Kingdom as the goods might not have been put on the market or might have been exported.

40) Mr Edenborough followed the position outlined in the statement of Mr Barry in relation to the scope of use. He argued for instance that the lecithin products – 4201, 4205, 4404 and 4405 – would be included in *chemical substances for preserving foodstuffs* in that such a product could be lecithin. It was also the argument that chewable milk free Cal-Snack, 2463, was a food. All these goods are sold by Consac as supplements. In the case of Cal-Snack there are 60 or 120 wafers in a bottle, they are sold as a form of supplement. A picture of the bottle for Cal-Snack appears in the Internet pages exhibited as part of HH1. The instructions state that two wafers should be taken. From the nature of the product and the container I cannot see that such goods can be described as snacks or foods in any ordinary sense of the word. There is a dislocation between the claims of the legal representatives of Consac and Consac. The lists of COUNTRY LIFE goods sold in the United Kingdom all form part of the COUNTRY LIFE parts of the price lists / order forms, other than for Soy-Licious products. All of the literature refers to these goods as vitamins and supplements. Ms Billet identifies use of the COUNTRY LIFE trade mark in the United Kingdom by reference to labels for various supplements. The issue in non-use claims is how the use is perceived by the average consumer. Lecithin might be used as a food

preservative for industry. The evidence shows this is not how Consac has supplied the product. It has supplied the product to health food shops for purposes as a supplement. By no stretch of the imagination can the wafers referred to in the Consac literature be put on a par with the likes of Cadbury wafers. I find the arguments put forward in the statement of Mr Barry untenable, and equally the similar submissions made by Mr Edenborough.

41) The invoices show sales of goods that fall within the categories of the price lists / order forms of Biochem Sports, Iron-Tek and Long Life Teas. Mr Edenborough submitted that use in relation to these trade marks is use in relation to the COUNTRY LIFE trade mark. He based this on use of the trade marks with the COUNTRY LIFE trade mark; the house mark and sub-brand type usage. However, the invoices show use of five separate trade marks. The price lists / order forms on the front cover have four separate trade marks and inside are divided into five main trade mark categories. No sample labels of Biochem Sports, Iron-Tek and Long Life Teas have been adduced. The invoices also describe products by reference to, inter alia, Ultimate Protein System, Lo Carb 2 and Iron-Tek (including references to IT). Ms Billet in her statement talks about COUNTRY LIFE branded products, not multiple branded products. The catalogue exhibited at PJB2 at page 55 shows a picture of Lo Carb 2 bars. The Lo Carb 2 trade mark can be seen, the Biochem trade mark can be seen, Ultimate being used as a trade mark can be seen but there is no sign of the COUNTRY LIFE trade mark. A picture of Long Life iced teas can be seen on page 173 of the catalogue. There is no indication of use of the trade mark COUNTRY LIFE on the packaging of the product. There is nothing, in my view, to suggest that there has been dual branding with COUNTRY LIFE; in fact the evidence suggests the opposite, that there has been discrete branding ie the price lists / order forms. On seeing the price lists / order forms I consider that the average consumer would simply assume that Reaction or Consac is selling a selection of different brands; there is no reason to draw the conclusion that there is a link between them let alone dual or multi branding. Mr Edenborough looked to the pages from the country-life.com website exhibited at HH1 to support his claim of dual multi branding. The COUNTRY LIFE trade mark appears as a banner on the pages. The evidence shows that this is a website based in the United States. It does not represent United Kingdom usage. There is also a large leap from a banner on a web page to dual or multi branding. The page relating to Ultimate Lo Carb 2 has no reference to COUNTRY LIFE in direct relation to the goods. It is shown as being from Biochem sports and fitness, the packaging shows Ultimate Lo Carb 2 and Biochem. The goods product is described as being the Ultimate Lo Carb 2 bar. In the absence of evidence in relation to these matters in the United Kingdom I do not consider that Consac can rely upon the Biochem Sports, Iron-Tek and Long Life Teas products in relation to use of the trade mark COUNTRY LIFE. (I queried with Mr Malynicz the apparent anomaly in accepting use for herbal teas, which have, as far as the evidence shows, all been sold under the Long Life Teas trade mark. He advised that the position in relation Long Life Teas was a result of the original pleadings. It can be equally noted that there is no indication of use of the trade mark for essential oils.)

42) There is one exception to the position of dual / multi branding. This relates to the Soy-Licious products. At page 175 of the catalogue there are pictures of the Soy-Licious products. These show use of the COUNTRY LIFE trade mark on the product; there is clearly dual branding. The evidence of use from the catalogue is

from the United States. It might seem unlikely that the product would be re-branded for sale in the United Kingdom. However, the Soy-Licious products come under the Iron-Tek main heading of the January 2003 price list / order form and under the Biochem Sports main heading of the two other price lists / order forms. In the catalogue the Soy-Licious products are listed as a supplement and not as part of one of the other trade mark groupings used in the catalogue. Taking into account the small size of the orders and the sales in the United Kingdom, I find it difficult to believe that the packaging in the United Kingdom would have been any different to that in the United States of America.

43) As noted above Mr Malynicz argued that Consac had not established genuine use of the trade mark in relation to any goods. He argued that the invoices to Reaction represented internal use. I do not understand the basis of this claim; there is nothing to suggest that Reaction is anything other than a distributor of Consac's products in the United Kingdom, there is no indication that it is part and parcel of Consac. In *Peak Holding AB v Axolin-Elinor AB* Case C-16/03 the European Court of Justice, in relation to exhaustion of right, stated:

“44 The answer to the first question must therefore be that Article 7(1) of the Directive must be interpreted as meaning that goods bearing a trade mark cannot be regarded as having been put on the market in the EEA where the proprietor of the trade mark has imported them into the EEA with a view to selling them there or where he has offered them for sale to consumers in the EEA, in his own shops or those of an associated company, without actually selling them.”

I consider that a similar reasoning should be applied in relation to internal use for revocation purposes. In this case there is nothing to suggest that Reaction is an associated company. Mr Malynicz also argued that there was no evidence that the goods ever left Reaction or were not re-exported. I do not consider that this matters as the sales, many and continuous, are genuine sales to the United Kingdom. Three price lists / order forms have been furnished by Consac and one by IPC. Carratu contacted Contac and Reaction. It concluded that Reaction was selling COUNTRY LIFE goods in the United Kingdom. It obtained a price list / order form from Reaction. There is a tranche of invoices to Reaction spread over a long period of time. There is a statement from Ms Billet about sales in the United Kingdom; Ms Billet's evidence has not been challenged. There is an article in a trade magazine about the launch of COUNTRY LIFE products in the United Kingdom. Even if one does not have contemporaneous labels for the products one does have contemporaneous price lists / order forms which have a clear division for COUNTRY LIFE products. The serial numbers of many of these products can be found on the invoices to Reaction. The presence of COUNTRY LIFE in relation to a grouping of Consac goods is use of the trade mark in relation to the goods. But Mr Malynicz says there are no till receipts. It would have been wise for Consac to obtain evidence directly from Reaction. However, this does not gainsay the evidence furnished by Consac. Mr Malynicz submitted that the goods bought by Reaction might have not been sold to the public or retailers, they could just have been stockpiled; price lists / order forms have been issued over a period of time, an employee of Reaction has advised where and how the goods can be bought, Carratu has been sent a copy of the price list / order form. Nevertheless, according to Mr Malynicz not only has there not

been proof of any use of the trade mark but the *Ansul* requirements have not been satisfied:

“When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of the goods or services at issue, the characteristics of the market and the scale and frequency of use of the mark.”

Mr Malynicz emphasised the comments of Jacob J about crossing ts and dotting is. In this case, on the balance of probabilities, the evidence shows use of the trade mark COUNTRY LIFE for certain goods in the United Kingdom within the five year period prior to the date of the application for revocation.

44) My rejection of Mr Malynicz’s arguments does not greatly affect IPC’s case. In my view all the documentation in this case, especially that directly supplied by Consac, goes to establishing what Consac’s business in the United Kingdom under the COUNTRY LIFE trade mark has been in relation to: *vitamins, minerals, and dietary supplements*. This, in my view, limits the specification to reflect the circumstances of the particular trade and the way that the public would perceive the use, places the goods in coherent categories and is a fair description (as per *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd*, *Reckitt Benckiser (España)*, *SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* and *Animal Trade Mark*. This specification also reflects how Consac describes its goods. Despite Mr Edenborough’s submissions, I do not consider that the goods can be described as foods or in any other way. *Essential oils for food* was conceded at the outset of the proceedings, even though there is no evidence of such use. IPC also at the outset conceded *medicinal herbal teas* in class 5. This leaves me with a problem as I am unable to see how the class 5 specification encompasses such goods. These goods are not foods and I do not see that in any normal reading of the term they would be considered to be *vitamins, minerals, and dietary supplements*. If they are such goods they are encompassed by this wording. However, they could clearly and are likely to be other goods and as such cannot appear in the specification as a stand alone term. Page 157 – 163 of the catalogue covers herbal teas, sold under the Long Life brand. This gives an indication of what the term *medicinal herbal teas* would cover and it is certainly beyond the parameters of the class 5 specification. Mr Edenborough put forward a claim that the goods shown at pages 26 and 27 of the catalogue are teas. The goods are described as green tea are in tablet form and are sold as supplements. They are certainly not designed for the addition of hot water to make a beverage. IPC may have conceded the point as to *medicinal herbal teas* but that does not allow the inclusion into the specification where they were not previously covered.

45) The one set of goods that I consider require separate consideration are the Soy-Licious products. The Soy-Licious product is described in the catalogue as a “high protein, energizing soy powdered drink”. It is fortified with genistein and daidzein, it is advertised as being a source of antioxidant vitamins A, C and E and adaptogenic herbs and as supplying all essential vitamins and minerals. The Soy-Licious products

appear in the supplements section of the catalogue. All of the evidence relating to Soy-Licious products in the United Kingdom relates to the non GMO version of the product. On the pages downloaded from the web site exhibited at HH1 the goods are described as being in powder form. The page from the web site states:

“Vegetarian/Kosher Non-GMO Soy Licious™ is more than just a balanced and complete soy protein drink. Non-GMO Soy Licious™ has been formulated to provide an extremely high total isoflavone content. Non-GMO Soy Licious™ is also fortified with two essential phytonutrients, Genistein and Daidzein. Soy compounds are beneficial as part of any nutritional program. These compounds provide health benefits to both men and women alike.”

The products are shown on the supplements page of the web site. “Nutrition Facts” are then given and a lengthy list of ingredients. Of interest and importance, I believe, are the directions for use:

“Mix two (2) scoops (1.34 oz.) (38g) with one (1) cup (8 fl. oz.) (237 mL) water, milk or your favorite beverage.”

The normal usage of the word beverage or drink is to describe a product in liquid form for drinking. The best that can be said of the goods is that they can be used to make or be put into a beverage. I consider that the instructions for use are enlightening as they identify the real nature of the goods, a supplement to be added to other liquids. Of course, Consac categorise and sell the goods as supplements. In my view the goods fall within the coverage of *vitamins, minerals, and dietary supplements* in class 5. I note that the Soy-Licious products 4728 and 4736 are described as a “great energy snack or substitute for a light nutritious meal. However, these are not the non-GMO versions and there is no evidence that they have ever been sold in the United Kingdom. Also being a substitute for a light nutritious meal is not the same as being a meal, however light or nutritious. The clear evidence relating to the non-GMO versions is that they are sold as supplements and are designed to be used as supplements.

46) The case of Consac for maintaining registration of goods in classes 1, 29, 30, 31 and 32 was not based so much on the evidence, on how and upon what the trade mark had been used but a very strained interpretation of how the goods could be described. An interpretation contrary to the normal meaning of the words, an interpretation contrary to normal usage, an interpretation contrary to Consac’s own usage. In his submissions Mr Edenborough claimed that Norwegian Kelp was sea weed. The tablets were derived from Kelp to supply iodine, they are sold as a supplement. Fresh seaweed falls in class 31, processed seaweed (eg lava bread) in class 29, seaweed fertiliser in class 1 but the kelp tablets are none of these. They are supplements. Mr Edenborough considered that tablets sold as supplements could be described as foods. His interpretation of the word food is very different from mine. I do not consider that a vitamin or supplement tablet will in any normal sense be described as food. The way the goods upon which the trade mark have been used are clearly and readily describable. A form of description that is not, in my view, susceptible to the submissions put forward by Mr Edenborough.

The registration is to be revoked for all goods *except* for the following:

essential oils for food in class 3;

vitamins, minerals, and dietary supplements in class 5.

47) As already discussed, under section 46(6) the date of revocation can be an earlier date than that of the application; if it is considered that such grounds existed at an earlier date. Consac bought an existing trade mark that had been the subject of assignments and registered use since registration in 1922. It is not surprising that earlier proprietors and registered users over the last eighty years have not put in evidence; they may have long since ceased to exist. I am, therefore, not convinced that the claim should succeed under section 46(1)(a). **However, I consider that IPC has established its case that the partial revocation should take place with effect from 11 September 2003.**

COSTS

48) IPC Media Limited having been successful in this action is entitled to a contribution towards its costs. I order Country Life LLC to pay IPC Media Limited the sum of £2,200. 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 7th day of December 2005

**David Landau
For the Registrar
the Comptroller-General**