

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 2290921
BY RECKITT BENCKISER HEALTHCARE (UK) LIMITED
TO REGISTER THE TRADE MARK
BREATHE EASY
IN CLASS 5

AND IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 90709
BY NORTON HEALTHCARE LIMITED
THE REGISTERED PROPRIETOR OF
TRADE MARKS 2268656 & 2117179
EASI-BREATHE

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BACKGROUND

1) On 23 January 2002, Reckitt Benckiser Healthcare Limited of Dansom Lane, Hull HU8 7DS applied under the Trade Marks Act 1994 for registration of the trade mark BREATHE EASY in respect of the following goods in Class 5:

“Pharmaceutical preparations and substances; all being for the relief and treatment of the symptoms of colds, influenza, coughs and sore throats; pads or patches impregnated with or containing substances for the relief of symptoms of colds and influenza.”

2) On 13 June 2002 Norton Healthcare Limited of Norton Quays, Albert Basin, Royal Docks, London, E16 2QY filed notice of opposition to the application. The grounds of opposition are in summary:

a) The opponent is the proprietor of the following earlier UK Trade Mark registrations.

Registration Number	Mark	Effective Date	Class	Goods
2268656	EASI-BREATHE	30.04.01	5	Respiratory drugs.
			10	Inhalers; spacers.
2117179	EASI-BREATHE	30.11.96	5	Respiratory drugs.
			10	Inhalers, spacers.

b) The mark in suit is similar to the opponent’s trade marks, and the goods applied for are identical or similar to the goods for which the opponent’s marks are registered. The mark applied for therefore offends against Section 5(2)(b) of the Trade Marks Act 1994.

c) The opponent has made use of the trade marks listed above in relation to the goods for which they are registered since 1996. As a result of this use the opponent has built up goodwill and reputation in the aforesaid marks and use by the applicant of the mark BREATHE EASY would constitute a misrepresentation as to the origin of the goods which would damage such goodwill. Registration of the mark in suit would be contrary to Section 5(4)(a) of the Trade Marks Act 1994 on the basis that use could be prevented by virtue of a rule of law, namely, the rule of passing off.

d) The opponent has a reputation in the UK in respect of its EASI-BREATHE trade marks. Use of the mark in suit without due cause, would take unfair advantage, or be detrimental to, the distinctive character and repute of the earlier trade mark and so would offend against section 5(3) of the Trade Marks Act 1994.

3) The applicant subsequently filed a counterstatement denying the opponent's claims.

4) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 16 December 2003 when the applicant was represented by Mr Edenborough of Counsel instructed by Messrs Alexander Ramage Associates, and the opponent by Mr Colley of Counsel instructed by Messrs R G C Jenkins & Company.

OPPONENT'S EVIDENCE

5) The opponent filed three witness statements. The first, dated 13 December 2002, is by Isabel Moya a Trade Mark Attorney for the opponent. At exhibit IM1 she provides print outs showing details of the opponent's two registered marks 2117179 and 2268656.

6) The second statement, dated 10 March 2002, is by Ewan Livesey the Company Secretary of the opponent company. He states that the first use of the trade mark EASI-BREATHE in the UK was in March 1995 and that it has been in continuous use since in respect of respiratory drugs, inhalers and spacers. At exhibit EL1 he provides brochures dated July 1995- June 1996, which show use of the mark BREATHE-EASI. Mr Livesey provides turnover figures for the UK as follows:

Year	Net Value (£million)	Advertising and promotion (£million)	Units (million)
1997	16.3	-	1.9
1998	23.7	-	2.8
1999	27.6	-	3.4
2000	29.7	4.5	3.7
2001	31.5	5.9	3.9

7) Mr Livesey states that the mark EASI-BREATHE has been advertised in the press and specialised magazines and by use of brochures and flyers. At exhibits EL2 and EL3 he provides examples of such advertising for the period 1995 - 2001. The opponent's mark, EASI-BREATHE is shown prominently on a range of inhalers in these exhibits.

8) At exhibit EL4 Mr Livesey provides articles published on the internet which refer to the opponent's inhaler products by its trade mark. However, only two are dated prior to the relevant date, one of which is of American origin. He also states that the inhaler products have won a number of awards such as the Prince of Wales Award for Innovation 1997, The Royal Academy of Engineering MacRobert Award for Engineering Innovation 1998 and the Millennium Product Status 1999. At exhibit EL5 he provides extracts from the asthma4all.com website which reports on these awards.

9) Mr Livesey states that the applicant's mark is used "in close combination with the well known trade mark LEMSIP". He continues:

"It will be seen that BREATHE EASY is used as a generic descriptor for the LEMSIP product. Other LEMSIP products have similar descriptors such as ORIGINAL LEMON, FLU STRENGTH, ANTI-BACTERIAL and DRY COUGH. It was on this basis that the opponent accepted the registration and use of LEMSIP BREATHE EASY in the UK."

10) Mr Livesey points out that neither sides specification is restricted to prescription only drugs, and that it is "now quite common for a drug that begins exclusively as a prescription drug to become available to the public direct in pharmacies (see, for example ZANTAC and TAGAMET)."

11) Mr Livesey states that there are health dangers to asthma sufferers and pregnant women if they were to use the applicant's product instead of the opponent's and if the applicant were to widen the range of drugs used under the mark in suit.

12) The third statement, dated 10 March 2003 is also by Mr Livesey. At exhibit EL9 he provides a copy of a statutory declaration made by him on 3 March 1997 at the registration stage. In this declaration he confirms that the mark EASI-BREATHE has been used throughout the UK since March 1995. He provides turnover and promotional spending as follows:

Year	Turnover (£) Class 5 goods (approx)	Turnover (£) Class 10 goods (approx)	Promotions (£)
1995	730,000	2,000,000	360,000
1996	3,000,000	8,000,000	360,000

13) He states that the goods were promoted by means of printed publicity material, on the packaging and labelling as well as advertising displays and press advertisements. At exhibits EL1-5

he provides examples of brochures, magazine advertisements, packaging, all of which show use of the mark on a range of inhalers. Also provided is a page from the November issue of MIMS, which circulates weekly to all medical practitioners, which mentions the mark.

APPLICANT'S EVIDENCE

14) The applicant filed a witness statement, dated 10 June 2003, by Rosina Margaret Baxter, the Deputy Director of Trade Marks for Reckitt Benckiser plc. She states that the applicant and its predecessors in business have "for many years" marketed a range of products for making medicated drinks for alleviation of the symptoms of cold and flu under the trade mark LEMSIP. She states that "Variants in the LEMSIP range are distinguished by use of other marks such as the subject application BREATHE EASY, or SIX+ (label registration No 2218945), MAX STRENGTH (application No 2290709), POWERCAPS (registration No 2157094), VAPO-PATCHES (registration Nos 2280407, 2282686 and application No 2321194) and so on".

15) Ms Baxter states that the BREATHE EASY range was first put onto the market in July 1998. She provides the following turnover figures for the BREATHE EASY mark, but does not specify whether this is UK or worldwide:

Year	Sales Value (£million)	Volume (packs)
1999	2.028	792,500
2000	1.801	719,000
2001	1.663	641,100
2002	1.141	438,000

16) Ms Baxter states that the product is available in approximately 50% of all chemists and approximately 25% of all grocery outlets. At exhibit RB3 she provides sales literature issued in 1998 which shows use of the mark in suit together with the mark LEMSIP.

17) Ms Baxter comments on the opponent's claim that the mark in suit is descriptive by pointing out that the mark is not opposed under Section 3 and that the agreement between the parties which allowed the applicant's LEMSIP BREATHE EASY on to the Register does not contain any reference to the mark in suit as a generic descriptor. She also claims that the specification for LEMSIP BREATHE EASY covers the same drugs as the current specification. At exhibit RB5 Ms Baxter provides a copy of the official file relating to the examination of the opponent's EASI-BREATHE mark. However, Ms Baxter does not offer any comment on the exhibit.

OPPONENT'S EVIDENCE IN REPLY

18) The opponent filed two witness statements. The first, dated 5 September 2003, is by Stephen

Richard James the opponent's Trade Mark Attorney. This statement was found to be inadmissible at the hearing, see paragraph 22.

19) The second statement, dated 4 September 2003, is by Mr Livesey who has provided evidence earlier in this case. He states that the evidence provided by Ms Baxter reinforce his view that the product is a LEMSIP product with the words BREATHE EASY being a descriptor to distinguish the product from other LEMSIP products such as "Original Lemon", "Blackcurrant Vit C" and "Max Strength". He states that the co-existence of LEMSIP BREATHE EASY and EASI-BREATHE was agreed to on the basis that LEMSIP was a strong trade mark which would serve to distinguish the applicant's product from that of the opponent.

20) Mr Livesey also comments on the drugs contained in the applicant's products and provides submissions on the dangers to the public if the products are confused.

21) That concludes my review of the evidence. I now turn to the decision.

DECISION

22) At the hearing the applicant raised a preliminary point with regard to the admissibility of part of the opponent's evidence. It was contended that the witness statement of Dr James dated, 5 September 2003, and also paragraphs 7 & 8 of the third witness statement, dated 4 September 2003, of Mr Livesey were not evidence in reply. Having heard the submissions from both parties I ruled that the evidence contained in Dr James' statement was not evidence in reply and so would not be admitted into the case. The evidence of Mr Livesey was, in my opinion, evidence in reply and so would be considered in making my decision.

23) The first ground of opposition is under Section 5(2)(b) which reads:

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

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

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

24) An "earlier trade mark" is defined in Section 6, the relevant part of which states:

"6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the

trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,”

25) The opponent is relying on two UK Trade Marks, 2268656 registered with effect from 30.04.2001 and 2117179 registered with effect from 30.11.1996. Plainly these marks are “earlier trade marks”.

26) In determining the question under section 5(2), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel Bv v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R 723. It is clear from these cases that:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel Bv v Puma AG* page 224;

(b) the matter must be judged through the eyes of the average consumer, of the goods / services in question; *Sabel Bv v Puma AG* page 224, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* page 84, paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel Bv v Puma AG* page 224;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel Bv v Puma AG* page 224;

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.* page 7 paragraph 17;

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel Bv v Puma AG* page 8, paragraph 24;

(g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel Bv v Puma AG* page 224;

(h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV*

v Adidas AG page 732, paragraph 41;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.* page 9, paragraph 29.

27) In essence the test under Section 5(2) is whether there are similarities in marks and goods and/or services which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgements of the European Court of Justice mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the mark applied for and the opponent's registrations on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications, also taking account of any reputation the marks may have developed.

28) As stated above the inherent or acquired distinctiveness of the opponent's mark must be considered. It is accepted that the reputation of a trade mark can assist where it is not particularly inherently distinctive or where there is a low degree of similarity between the respective goods or services. The opponent's mark is registered for goods which are designed to assist the consumer's breathing or which make it "easier to breathe". Although conjoined, both words are descriptive and would be seen by the average consumer as alluding to the basic property of the product which eases breathing. It is well established that a combination of two elements, even if both are individually descriptive, can combine to create a distinctive whole. To my mind the opponent's mark "EASI-BREATHE" has a degree of inherent distinctiveness, but not such that warrants a wide penumbra of protection.

29) The opponent also provided evidence of use of its mark prior to the relevant date. However, whilst the evidence provided shows turnover figures it does not show a breakdown for the drugs as opposed to the inhalers or the market share for either. The advertising material provided all show the mark being used on inhalers. Whilst these come complete with drugs already installed, it is clear from the exhibits that there is a range of drugs offered, all of which are also identified by the name on the inhaler. No figures have been provided for an "easi-breathe" inhaler complete with "easi-breathe" respiratory drugs. Simply showing some use of a trade mark is not sufficient for it to claim an enhanced reputation.

30) The opponent's two registrations are for the same mark EASI-BREATHE and both have the same specification "Respiratory drugs in Class 5" and "Inhalers; spacers in Class 10". As both are identical I shall carry out a single comparison which will determine both. The mark in suit has the following specification "Pharmaceutical preparations and substances; all being for the relief and

treatment of the symptoms of colds, influenza, coughs and sore throats; pads or patches impregnated with or containing substances for the relief of symptoms of colds and influenza.”

31) It was common ground at the hearing that the class 5 goods of both parties overlapped and so were similar. Clearly the opponent’s goods in Class 10 are dissimilar to the specification sought and no submissions were made by the opponent on this issue.

32) I therefore move onto a comparison of the marks. The opponent’s mark is EASI-BREATHE the mark in suit is BREATHE EASY. The applicant contended that the fact that in the opponent’s mark the word EASI is spelt with an “I” was significant. It was claimed that “EASI” would catch the eye as it was different from the normal spelling. I do not accept this contention. The average consumer is well versed to companies using phonetic spelling in relation to trade marks. Use of correct spelling and the punctilious observation of grammar are, regrettably, now things of the past and would not be commented upon or noted even by a reasonably well informed and reasonably circumspect and observant consumer.

33) Clearly there are visual and phonetic differences if one compares the two marks. However, there are also similarities. The fact that one mark is hyphenated is not, to my mind, significant, nor is the minor spelling difference. The marks both consist of the same two words but used in a different order. Conceptually they convey the same message. I accept that when seeking relief from breathing difficulties, as with any medication, the average consumer will take above average care in selecting a product. However, despite their visual and phonetic differences when compared directly to each other the marks have visual and phonetic similarities such that combined with the conceptual identity and allowing for the concept of imperfect recollection, I believe that the marks are similar.

34) The opponent contended that in view of the goods involved in this case that additional protection should be afforded to their mark in order to ensure the public are protected against using an incorrect drug.

35) I was referred to the comments of Professor Annand, acting as the Appointed Person in the cases of *OROPRAM/SEROPRAM* (0/208/02) and *ALLERGAN’s Application* (0/293/02) as well as the views of the OHIM First Board of Appeals in the case of *TEMPOVATE/EMOVATE, EUMOVATE* (dated 14/2/02). In my view the correct approach was set out by Professor Annand in the two cases above when she stated:

“For my own part, I do not believe that different standards exist or are necessary to exist. The test of likelihood of confusion is flexible enough to allow each case to be judged according to its own peculiar facts. Relevant considerations may include those mentioned by the First Board of Appeal in *TEMPOVATE/EMOVATE, EUMOVATE*, supra., namely that some medicinal products are administered over the counter without prescriptions, some consumers resort to self-prescription and professionals are often overworked and may write prescriptions in hardly legible handwriting (although drugs may be prescription only,

professionals may be on hand to assist choice with OTC products and pharmacists usually check illegible prescriptions).”

36) Taking account of all of the above when considering the marks globally, I believe that there is a likelihood of consumers being confused into believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. The opposition under Section 5(2)(b) therefore succeeds.

37) I next consider the ground of opposition under Section 5(3) which reads:

“5.(3) A trade mark which -

- (a) is identical with or similar to an earlier trade mark, and
- (b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

38) To succeed under this ground the opponent must show that it enjoys a reputation in the earlier right. This was commented upon by Mr Thorley Q.C. (Sitting as a Deputy Judge of the High Court) in *Pfizer Ltd v Eurofood Link (UK) Limited* [2001] FSR 3 where he held:

“ To show infringement under section 10(3) it was necessary for the trade mark proprietor to prove the required reputation and then to satisfy the Court that the defendant's use of the sign was without due cause and took unfair advantage of, or was detrimental to, the distinctive character or repute of the trade mark. (paras 31 and 32).”

39) Earlier in this decision I found that, as at the relevant date, the opponent did not possess a reputation in its UK Trade Marks 2268656 and 2117179 “EASI-BREATHE” for either “respiratory drugs” in Class 5 or “inhalers; spacers” in Class 10 such that it is “known by a significant part of the public concerned” (*General Motors Corp. v Yplon SA (Chevy)* [2000] RPC 572). The applicant thus does not qualify for the first requirement of Section 5(3). The ground of opposition under Section 5(3) therefore fails.

40) Lastly I consider the ground of opposition under Section 5(4)(a) which reads:

“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

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.”

41) In deciding whether the mark in question “EASI-BREATHE” offends against this section, I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC, in the *WILD CHILD* case [1998] 14 RPC 455. In that decision Mr Hobbs stated that:

“The question raised by the Grounds of Opposition is whether normal and fair use of the designation WILD CHILD for the purposes of distinguishing the goods of interest to the Applicant from those of other undertakings (see Section 1(1) of the Act) was liable to be prevented at the date of the application for registration (see Art.4(4)(b) of the Directive and Section 40 of the Act) by enforcement of rights which the opponent could then have asserted against the Applicant in accordance with the law of passing off.

A helpful summary of the elements of an action for passing off can be found in Halsbury’s Laws of England 4th Edition Vol. 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd - v - Borden Inc* [1990] RPC 341 and *Even Warnik BV - v - J. Townend & Sons (Hull) Ltd* [1979] AC 731 is (with footnotes omitted) as follows:

The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

- (1) that the plaintiff’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 defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and
- (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.”

42) The date at which the matter must be judged is not entirely clear from Section 5(4)(a) of the Act. This provision is clearly intended to implement Article 4(4)(b) of Directive 89/104/EEC. It is now well settled that it is appropriate to look to the wording of the Directive in order to settle matters of doubt arising from the wording of equivalent provisions of the Act. It is clear from Article 4(4)(b) that the earlier right had to have been “acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed....”. The relevant date is therefore 23 January 2002, the date the application was filed.

43) Although the Section 5(4)(a) claim has to be established at the date of the application, it is clear that the opponent could have had no such right if, the applicant's use is protected in the UK from an earlier date or if, by the relevant date, the applicant had established its own actionable goodwill in the UK, (*Habib Bank* [1982] RPC at 24).

44) In the instant case the applicant company has filed some evidence of use. The applicant claims to have used the mark continuously since July 1998. Whilst turnover figures are provided it is not clear whether they relate solely to UK sales. Whilst the applicant has clearly made some concurrent use of the mark since 1998, the extent of the use and the goodwill enjoyed by the applicant at the material date is unclear.

45) To succeed under this ground the opponent must show that it enjoyed goodwill at the relevant date, 23 January 2002. In *South Cone Inc. v. Jack Bessant, Dominic Greensmith, Kenwyn House, Gary Stringer (a partnership)* [2002] RPC 19 Pumfrey J. in considering an appeal from a decision of the Registrar to reject an opposition under Section 5(4)(a) said:

“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. 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 to the relevant date.”

46) This cannot be interpreted in a prescriptive fashion. There will be occasions when the evidence does not fall within the above parameters but still establishes goodwill for passing off purposes - see the decision of Professor Annand, sitting as the Appointed Person, in *Loaded* (BL 0/191/02).

47) Considered overall it seems clear that the opponent had some trade in the UK prior to the relevant date under its EASI-BREATHE trade mark, relating to the goods in Classes 5 and 10.

48) It is common ground that the Class 5 specifications are similar. The relevant public has not been defined but would appear to be the general public given that the opponent's specification is not limited to prescription drugs and the applicant's goods are sold “over the counter”.

49) Earlier in this decision I found that the marks had similarities. I am persuaded that the relevant public would believe that the goods of the applicant were connected in trade with the opponent. The

opposition under Section 5(4)(a) therefore succeeds.

50) The opposition having been successful the opponent is entitled to a contribution towards costs. I therefore order the applicant to pay the opponent the sum of £2,000. This sum 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 31st day of March 2004

George W Salthouse
For the Registrar-
The Comptroller General