O-207-04

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 2288643
BY AMGEN INC TO REGISTER A TRADE MARK IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO UNDER No. 90600
BY MAY & BAKER LIMITED

TRADE MARKS ACT 1994

IN THE MATTER OF Application No. 2288643
by Amgen Inc to register a Trade Mark in Class 5

and

IN THE MATTER OF Opposition thereto under No. 90600
by May & Baker Limited

BACKGROUND

1. On 20 December 2001 Amgen Inc applied to register the trade mark NEULASTIM in Class 5 of the register for the following specification of goods (as amended):

> "Pharmaceutical preparations for stimulating white blood cell production".

2. The application was accepted by the Registrar and published in the Trade Marks Journal.

3. On 20 May 2002 May & Baker Limited filed a Notice of Opposition to the application. The grounds are as follows:

> (i) Under Section 5(2)(b) of the Act because the mark applied for is similar to the following earlier trade mark owned by the opponent and is to be registered for identical or similar goods and there exists a likelihood of confusion on the part of the public –

Registration No.	**Mark**	**Registration Effective**	**Specification of goods**
835753	NEULACTIL	14 June 1962	**Class 5:** Neuroleptics being pharmaceutical preparations for use in the treatment of disorders of the central nervous system; hypnotics; and sedatives; all for human use and for veterinary use.

> (ii) Under Section 5(4)(a) of the Act by virtue of the law of passing off.

4. On 20 March 2003 the applicant filed a Counterstatement denying the above grounds.

5. Both sides filed evidence and asked for an award of costs in their favour. The matter came to be heard on 29 June 2004 when the applicant for registration was represented by Mr Charlton a partner in Elkington & Fife, the applicant's professional advisors in these proceedings, and the opponent by Mr Malynicz of Counsel instructed by J A Kemp.

Opponent's Evidence

6. The opponent's evidence consists of two witness statements, one each by Caroline Julia Crowe and Joëlle Sanit-Hugot, dated 24 July 2003 and 5 August 2003 respectively.

7. Ms Crowe is a trade mark attorney employed by J A Kemp, the opponent's professional advisors in these proceedings.

8. Ms Crowe draws attention to Exhibit CJC1 to her statement, which is a print-out from the UK Patent Office database dated 16 May 2002 showing the results of a search on marks with the prefix "neula" in Class 5. The print-out shows only one registration – the opponent's registration No. 835753. Six remaining marks are shown – one advertised and five new applications. Ms Crowe confirms that these remaining marks are in the name of the applicant, Amgen Inc.

9. Next, Ms Crowe refers to Exhibit CJC2 to her statement which, she states, are print-outs showing the results of "Pharma In-Use" searches conducted on the Saegis on-line database on 15 and 24 July 2003, together with a print-out explaining that the database contains 200,000 pharmaceutical trade marks and trade names used in about fifty countries worldwide. Ms Crowe explains that the first search covered the fifteen Member States of the European Union and was on pharmaceutical trade marks and trade names having the prefix "neula". This produced five "citations" all of which refer to the opponent's trade mark NEULACTIL, one of which concerns the UK and records "Year of last recorded sales" as 2002 with "recent and historic sales recorded" and "Sales Value Indicator : High". The second search covered the UK only and was in respect of any pharmaceutical trade mark or trade name with the prefix "neu". This produced sixteen "citations" of which six refer to the opponent's mark NEULACTIL. She adds that, of the rest, No 1 INSULIN NEUTRL MV shows year of last recorded sales 1992, No 4 PUR IN NEUTRAL shows year of last recorded sales 1995, No 7 INSULIN NEUPHAN BW shows year of last recorded sales 1993 and No 10 NEUTROLACTIS shows year of last recorded sales 1991, which, she states, indicates that these names have not been in use in the UK for the five years preceding the filing of this opposition or indeed for the five years preceding the date of application of No. 2288643.

10. Ms Sanit-Hugot is the Trademark Counsel of May & Baker Limited, the opponent.

11. Ms Sanit-Hugot explains that her company is part of the Aventis Pharma group, a global developer, producer and manufacturer of pharmaceutical products with corporate headquarters in Strasbourg, France. She adds that Aventis Pharma in the UK is based at West Malling in Kent and that in the United Kingdon, Aventis Pharma achieved export sales for 2001 of over £570 million and UK sales of circa £200 million.

12. Ms Sanit-Hugot states that the trade mark NEULACTIL was first used in the United Kingdom in 1965 and has been in continuous use in the United Kingdom by the registered proprietor or with its consent since that date. She further states that the mark NEULACTIL has been and is used by her company in respect of a prescription only medication containing pericyazine which is available in the United Kingdom in both tablet and liquid form and that products bearing the NEULACTIL trade mark are currently manufactured for and on behalf of Aventis by JHC Healthcare Ltd. Turning to the uses of NEULACTIL, Ms Sanit-Hugot explains that it belongs to a group of medicines known as the phenothiazine anti-psychotics and that anti-

psychotic drugs are also known as neuroleptics, as described in the specification of goods of UK Registration No. 835753. It is used in the treatment of schizophrenia and other psychotic illnesses.

13. By way of example Ms Sanit-Hugot attaches at Exhibit NEULA 1 to her statement, three samples of packaging bearing the NEULACTIL trade mark, together with the Patient Information Leaflet for each. These are:

a) NEULACTIL tablets 2.5 mg
b) NEULACTIL tablets 10 mg
c) NEULACTIL Forte Syrup 100 ml

14. In each case the Lot No, Date of Manufacture and Expiry Date are printed on the packaging. The Copyright and revision dates are indicated on each of the Patient Information Leaflets.

15. Ms Sanit-Hugot states that recent invoiced sales for NEULACTIL in the United Kingdom are as follows:

Date	Invoiced amount	Invoiced Quantity
November to December 2000	£119,696	11,890
January to March 2001	£276,650	27,472
April to June 2001	£305,392	30,962
July to September 2001	£266,211	26,620
October to December 2001	£341,304	33,836
January to March 2002	£293,744	29,434
April to June 2002	£254,449	28,391
July to September 2002	£250,931	26,744
October to December 2002	£316,892	33,174
January to March 2003	£213,625	21,810

16. Ms Sanit-Hugot explains that on a month-by-month basis, NEULACTIL sales vary, but during the period November 2000 to April 2003 (which includes the date at which the opposed application for the mark NEULASTIM was filed) they were at no point less than £50,000 and were often in excess of £100,000. She confirms that the NEULACTIL trade mark has been and is used throughout the United Kingdom.

17. Ms Sanit-Hugot goes on to refer to Exhibit NEULA 2 to her statement, which consists of pages downloaded from the website of the British National Formulary ("BNF"), which is a joint publication of the British Medical Association and the Royal Pharmaceutical Society of Great Britain. She states that the BNF aims to provide doctors, pharmacists and other healthcare professionals with sound up-to-date information about the use of medicines and is a standard clinical reference text. Ms Sanit-Hugot draws attention in particular to the extract from BNF No 45 of March 2003 which refers to Pericyazine and "Neulactil®" and provides information as to the pericyazine content of NEULACTIL and the price for both tablet and liquid form. Ms Sanit-Hugot is not aware of any other pharmaceutical product being sold in the United Kingdom with the prefix NEULA-.

Applicant's Evidence

18. The applicant's evidence consists of two witness statements, one each by Peter John Charlton and Stuart L Watt, dated 6 November 2003 and 4 December 2003 respectively.

19. Mr Charlton is a partner in the firm Elkington & Fife, the applicant's professional advisors in these proceedings.

20. Mr Charlton draws attention to the following Exhibits which are attached to his statement:

(i) Exhibit PJC1 which consists of pages downloaded from the website of the British National Formulary (BNF), this being the same organisation referred to in the Statement of Joelle Sanit-Hugot. BNF 46 dated September 2003 gives information about a "Neulasta" product.

(ii) Exhibit PJC2 which consists of pages from the Monthly Index of Medical Specialities ("MIMS") for the months of April to September 2003 giving further information about Amgen's NEULASTA product in the UK.

(iii) Exhibit PJC3 which is a print-out from the database of the UK Patent Office dated 31 October 2003 showing marks in Class 5 prefixed NEULA-. This shows that, in addition to the opponent's mark, four registrations – the marks NEULARTA, NEULASTA, NEULASTIM and NEULASTYL.

(iv) Exhibit PJC4 which consists of print-outs from OHIM's website giving details of the status and specifications of goods of the marks listed in Exhibit PJC3 which belong to Amgen Inc., other than the present UK application.

21. Mr Watt is Vice President of Amgen Inc, the applicant.

22. Mr Watt states that although the mark NEULASTIM has not gained approval in Europe, his company's similarly named product NEULASTA has been given approval by the European Commission, following the recommendation of the Committee on Proprietary Medicinal Products. Exhibit SLW1 to Mr Watt's statement is a copy of the Marketing Authorisation for NEULASTA for the reduction of chemotherapy – induced neutropenia. He adds that the NEULASTA product is on sale in the UK.

23. This completes my summary of the evidence filed in this case. I now turn to the decision.

DECISION

Section 5(2)(b)

24. Section 5(2) of the Act reads as follows:

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

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

(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."

25. An earlier right is defined in Section 6, the relevant parts of which state:

"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,"

26. I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] 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 24, 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-Mayer Inc*, page 132 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 224;

(g) account should be taken on the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it was registered; *Lloyd*, paragraph 29;

(h) 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;

(i) 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*, paragraph 41;

(j) 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-Mayer Inc*, paragraph 29.

27. The reputation of a trade mark is an element to which importance may be attached in Section 5(2) considerations in that it may enhance the distinctive character of the mark at issue and widen the penumbra of protection of such a mark. The opponent has filed evidence relating to the reputation of its earlier trade which shows that the mark has been in use since 1965 in relation to anti-psychotic drugs or neuroleptics used in the treatment of schizophrenics and other psychotic illnesses. The evidence submitted provides a break down of sales figures and invoiced quantity figures from November 2000 to March 2003, the relevant date for these proceedings being 20 December 2001. The evidence provides no indication of the market share this represents and there is no supporting evidence from the trade or medical profession going to the reputation of the mark.

28. While the opponent's mark had/has a real and substantial presence in the UK market place in relation to anti-psychotic drugs, the evidence does not demonstrate a reputation among the relevant public in its earlier mark. The onus is upon the opponent to prove that its earlier mark enjoyed a reputation or public recognition and on the basis of the evidence filed in this case I do not believe that the opponent has discharged this onus. In DUONEBS (BL O/048/01) a decision of Simon Thorley QC sitting as the Appointed Person, it was said:

> "In my judgement I believe what the ECJ had in mind was the sort of mark which by reason of extensive trade had become something of a household name so that the propensity of the public to associate other less similar marks with that mark would be enhanced. I do not believe that the ECJ was seeking to introduce into every comparison required by Section 5(2), a consideration of the reputation of a particular existing trade mark."

29. While the nature of the goods at issue does not lend itself to the "household name" scenario, I would add that there is no evidence to demonstrate that the opponent's mark is well known to the medical profession, pharmacists or those members of the public who have been diagnosed with psychotic illnesses.

30. I conclude that the opponent cannot claim an enhanced level of distinctive character for its marks. However, I would add that the word NEULACTIL is an invented word which, in my view, possess a strong inherently distinctive character.

31. Even if I am wrong in relation to the reputation of the opponent's mark, I would point out that reputation is only one element which forms part of a global consideration under Section 5(2). It was held in *Marca Mode v Adidas AG* [2000] ETMR 723.

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

32. In essence the test under Section 5(2) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those differing elements, taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, in addition to making comparisons which take into account the actual use of the respective marks, I must compare the mark applied for and the opponent's registration on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods within the respective specifications.

33. The applicant's mark has not been in use prior to the relevant date for these proceedings and the opponent's mark has been used only in relation to anti-psychotic drugs. However, for the purposes of this opposition I must take into account notional fair use of the opponent's mark on neuroleptics being pharmaceutical preparations for use in the treatment of disorders of the central nervous system, hypnotics and sedatives.

34. I turn now to a consideration of the respective goods covered by the specification of the mark in suit and the opponent's earlier registration. At the hearing, Mr Malynicz sensibly conceded that the goods were not the same given their specific functionality and use. The opponent contends that the goods are similar.

35. In determining whether the goods covered by the application are similar to the goods covered by the opponent's trade mark, I am assisted by the guidelines formulated by Jacob J in *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281 (pages 296 and 297) as set out below:

"The following factors must be relevant in considering whether there is or is not similarity:

(a) The respective uses of the respective goods or services;
(b) The respective users of the respective goods or services;
(c) The physical nature of the goods or acts of services;
(d) The respective trade channels through which the goods or services reach the market;
(e) In the case of self-serve consumer items, where in particular they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."

36. Whilst I acknowledge that in view of the CANON-MGM judgement by the European Court of Justice (3-39/97) the Treat case may no longer be wholly relied upon, the ECJ said the factors identified by the UK government in its submissions (which are listed in TREAT) are still relevant in respect of a comparison of goods and/or services.

37. In his submissions on similarity of goods at the hearing, Mr Malynicz contended that it is important to adopt the appropriate level of generality. While individual pharmaceutical products may be specifically different, he pointed out that the respective goods cover medicines which are for treating illnesses and could well be manufactured by the same company ie a manufacturer of pharmaceutical products, as the producers of pharmaceuticals do not specialise in the manufacture of one product only but rather in a whole range of products with medicinal application. He drew my attention to the decision of OHIM Opposition Division 302.2002 on Coversyl/Coviracil, where at page 8 it is stated:

"In any case, despite the different specific purposes of the medicines covered by the trade marks the goods under comparison are similar to the extent that they are medicines. Thus they have the same nature, the same general purpose (to treat health problems), they can be manufactured by the same undertaking and they are sold at the same places. The goods covered by the trade marks are therefore similar to each other."

38. It seems to me that the opponent's submissions relating to the similarity of the respective goods must be correct. If respective medicines are intended to treat the same illnesses and conditions they are likely to be the same (they would share the same specific uses and users and be in competition with each other). Medical products, in particular pharmaceutical products intended to treat different conditions are in general similar. The respective goods in the case before me are medicines for treating illness which are likely to pass through the same trade channels in reaching the market. I conclude that the respective goods are, in general terms, similar to each other.

39. I go on now to a comparison of the mark in suit with the opponent's earlier registration. In the evidence the applicant has drawn attention to the state of the UK and European Community Trade Mark registers in relation to trade marks prefixed NEULA. I am not assisted by such

evidence and am guided on this point by the following comments of Mr Justice Jacob in *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 281:

> "Both sides invite me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word "Treat". I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the sort of work in which traders would like a monopoly. In particular the state of the register does not tell you what the circumstances were which led the Registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration; see eg *MADAM* Trade Mark and the same must be true under the 1994 Act. I disregard the state of the register evidence."

40. There is no evidence to demonstrate use of any of the applicant's NEULA …. marks prior to the relevant date for these proceedings. Furthermore, while the applicant has produced evidence to show that its NEULASTA trade mark has been granted approval by the "European Office for Drugs Assessment" and was in use in the UK in 2003, this is not the mark in suit. At the hearing Mr Malynicz stated that the opponent was not seeking to monopolise the term NEULA through these proceedings, but was contending that the mark applied for was, in it's totality, similar to the opponent's earlier registered trade mark.

41. My decision involves a comparison of the applicant's and opponent's particular marks and must be made on its merits.

42. I now go on to compare the mark in suit with the applicant's earlier mark.

43. The respective marks are both comprised of invented words. As pointed out by Mr Malynicz, the marks NEULASTIM and NEULACTIL are both nine letter marks which share their first five letters and their seventh and eight letters ie both are NEULA-TI-. However, the opponent contends that the suffix LASTIM is very different to the suffix LACTIL.

44. It is clear from the guiding authorities that I must compare the marks as a whole. Furthermore, I must be careful not to overanalyse the marks as the real test is how customers would perceive the marks in the normal course and circumstances of trade.

45. Firstly, I go on to a visual comparison of the respective marks. As mentioned above, they are of the same length (nine letters) and share their first five letters and their seventh and eight letters. In my decision similarity must be considered in the light of overall impression and notwithstanding the different sixth and final letters, after bearing in mind the potential for imperfect recollection, it seems to me that both marks possess an obvious visual similarity overall and that there is considerable likelihood of visual confusion.

46. Turning to aural use, the marks share the same first syllable but the remaining syllables differ. It was accepted under the Trade Marks Act 1938 that the beginning of words is more important as the endings of words tends to become slurred – London Lubricants Limited' Application (TRIPSCASTROID) 42 [1925] RPC 264 at page 279 and I see no reason why this

should not apply under the Trade Marks Act 1994. While aural similarities exist I take the view that the opponent's case is less strong here than it is in relation to visual similarity.

47. I now go on to a conceptual comparison of the marks. Mr Charlton on behalf of the applicant submitted that the suffix STIM indicates stimulation or alludes to filgrastim, whereas the suffix LACTIL is suggestive of lactive acid (whether or not this is relevant to the product). However, it seems to me that this would be far from obvious to the average consumer coming across the respective marks in ordinary and normal trading conditions. Both marks comprise invented words and it seems to me that any real conceptual similarity is not readily identifiable. However, invented words of this nature are far less readily distinguishable than dictionary words with similar appearances but different meanings. Imperfect recollection of the marks may well be a factor.

48. In assessing the degree of similarity between the respective marks and whether it is sufficient to give rise to a likelihood of confusion I must also consider in relation to the goods at issue, who the average customer is and make allowance for imperfect recollection.

49. The specifications of goods, while both relating to medicinal products in Class 5 cover fairly precise specifications of goods. At the hearing Mr Malynicz submitted that both specifications would include "over the counter" goods sold to the public eg in supermarkets, as well as prescription only products. In particular he saw no reason why the applicant's "preparations for stimulating white blood cell production" and the opponent's "sedatives" would not include readily available natural remedies. While I have no evidence before me on this point, it seems to me unlikely that "natural remedies" would be sold under the description "sedatives". While such preparations may be sold over the counter to calm, de-stress or sooth, the term sedative has stronger connotations and one would expect such products to be prescribed by medical professionals. Furthermore, as Mr Charlton pointed out the applicant's specification makes it clear that their preparations for stimulating white blood cells are in the nature of pharmaceutical products and it would be most unlikely for such goods to be available without prescription in this country. In my view the respective goods of the applicant and opponent would only be likely to be available on prescription.

50. At the hearing both parties agreed that there is no special test as standard to be applied in relation to pharmaceutical or medicinal products. The following statements of principle set out by Professor Annand, acting as the Appointed Person in the cases of Oropram/Seropram (BL O/208/02) and Allergan's Application (BL O/293/02), were accepted:

> "I have arrived at this view without engaging in the debate whether a higher or lower threshold needs to be reached before confusion can be established in conflicts between pharmaceutical trade marks. 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 consideration may include those mentioned by the First Board of Appeal in TMPOVATE.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)."

51. As mentioned above, it is my opinion that the respective goods in the present case would only be available via a medical practitioner. However, it does not follow that no likelihood of confusion will result. While this is certainly not a bag of sweets case, the relevant goods could still be perceived by the customer as emanating from the same economic undertaking and the doctrine of imperfect recollection still applies.

52. At the hearing, Mr Malynicz reminded me of the following comments of Mr Hobbs QC, The Appointed Person in the case of EPTISET/EPISTAT (BL O/312/03), page 8:

> "The issue, as I see it, is whether the level of attention and effort required to perceive and remember the differences between the two distinctive marks is greater than people in the relevant sector would actually bring to bear on them. I do not think it would be right to proceed on the assumption that everyone normally involved in the supply of goods of the kind in issue in the present case would exercise a particularly high level of perspicacity and attention to detail, either when noting the use of the marks by others or when using them for the purposes of dispensing or administering drugs or arranging for further supplies to be procured."

and at page 9, in relation to the applicant's offer to limit its specification in that case:

> "It appears to me that this line of argument assumes a level of perspicacity and attention to detail which is greater than that which the average consumer, whose perceptions I am required to consider, would actually bring to bear on the matter."

53. Notwithstanding that this is certainly not a "bag of sweets" case, the guidance set out in the Lloyd Case (mentioned earlier in this decision) that the average customer rarely has the change to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, remains very relevant to the current proceedings.

CONCLUSION

54. On a global appreciation, taking into account all the relevant factors, I have come to the following conclusions:

(i) The respective marks are visually similar and there is a considerable likelihood of visual confusion;

(ii) The respective marks are aurally similar but aural similarity is less strong than visual similarity;

(iii) The respective goods are similar although they involve the medication of different specific ailments;

(iv) The customer for the goods would be relatively discerning but it would be wrong to presume "a particularly high level of perspicacity or attention to detail" and on behalf of the customer and accordingly, imperfect recollection remains highly relevant.

55. Considering the position in its totality I believe there is a likelihood of confusion on the part of the relevant public. In reaching this conclusion I have bourne in mind that the average consumer rarely has the chance to make direct comparisons between marks, but must instead rely upon the imperfect picture of them he/she has kept in his/her mind.

56. The opposition is successful under Section 5(2)(b).

Section 5(4)(a)

57. As the opponent has been successful under Section 5(2)(b), I have no need to go on to consider the Section 5(4)(a) ground. I would only add that I do not believe the opponent's case under this ground to be any stronger.

COSTS

58. The opponent has been successful and is entitled to a contribution towards costs. I order the applicant to pay the opponent the sum of £1,900. 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 8th day of July 2004

JOHN MacGILLIVRAY
For the Registrar
the Comptroller-General