Neutral Citation Number: [2024] EWHC 777 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No. IL-2022-000095**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
B E T W E E N :

Date: 9 April 2024

Before :

James Pickering KC
(sitting as a Deputy High Court Judge)

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Between :

(1) GIBRALTAR (UK) LIMITED
(2) VET PLUS LIMITED **Claimants**

And

VIOVET LIMITED **Defendant**

- -
- -

Georgina Messenger (instructed by **HGF Law LLP)** for the **Claimants**
Maxwell Keay (instructed by **DWF Law LLP)** for the **Defendant**

Hearing date: 5 December 2023

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APPROVED JUDGMENT

James Pickering KC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION
PART II: THE BACKGROUND
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PART I: INTRODUCTION

1. Comparative advertising arises where an advertisement identifies not only the advertiser's own product but also (either explicitly or by implication) a competitor or a product offered by a competitor. The extent to which comparative advertising should be permitted involves balancing different policy considerations: on the one hand, fair competition is to be encouraged; on the other, intellectual property rights ought to be respected. How that balance is to be achieved is currently found in a number of regulations and directives as described in more detail below. At present, however, there is relatively little case law or other guidance on the topic.

2. The present dispute involves veterinary nutraceuticals. Veterinary nutraceuticals are substances which are produced in a purified or extracted form – generally comprising a broad group of natural compounds and/or microbes - with the aim of maintaining or improving the health and well-being of animals. They are not pharmaceuticals and, unlike pharmaceuticals, a prescription is not required to buy them. They are big business.

3. In any event, the matter now before me is the trial of a preliminary issue within a claim for trade mark infringement based on an alleged contravention of the regulations relating to comparative advertising in the context of such veterinary nutraceuticals.

PART II: THE BACKGROUND

The parties

4. The First Claimant, Gibraltar (UK) Ltd ("**GUK**"), is the registered proprietor of various trade marks, including word marks for SYNOQUIN, AKTIVAIT, FIBOR, COATEX, and CYSTAID. Each of the above marks is the brand name of a particular veterinary nutraceutical product.

5. The Second Claimant, Vet Plus Ltd ("**VetPlus**"), is the authorised supplier of each of the above products (together, "**the VetPlus Products**"). VetPlus sells the VetPlus Products to veterinary practices via veterinary wholesalers. The veterinary practices then on-sell the VetPlus Products to customers (i.e. pet owners), usually following a consultation and a veterinary recommendation. According to VetPlus, its products have a reputation in the UK veterinary market as being high quality and efficacious. Indeed, the efficacy of some of the VetPlus Products has been backed up with clinical testing – a fact that is communicated to veterinarians.

6. The Defendant, Viovet Ltd ("**Viovet**"), is a company which, through its website at www.viovet.co.uk, retails its own brand veterinary nutraceutical products. Importantly, however, through the above website it also retails third party veterinary nutraceutical products, including the VetPlus Products. In short, therefore, a customer visiting Viovet's website may buy either Viovet's own brand products or, alternatively, third party products such as the VetPlus Products.

The advertisements

7. Between August 2021 and June 2022, Viovet ran a series of advertising campaigns on its website that offered the VetPlus Products for sale. For present purposes, the relevant advertisements fall into 3 categories.

(a) The Annex A advertisements

8. The Annex A advertisements (so-called because an example appears at Annex A of the Claimant's Amended Particulars of Claim) offered for sale each of the VetPlus Products.

9. When a customer selected one of the VetPlus Products, they were presented with an option of clicking either an orange button with the text "*Add to Basket*" (which, if clicked, would - subject to the Annex B advertisement below - enable the customer to buy the VetPlus Product in question) or, alternatively, a red button containing a reversible arrows symbol and text stating either "*Save £[x] per day*" or "*Swap and Save [£]*" or "*Try something new*" (which, if clicked, would take the customer to one of Viovet's own brand products).

(b) The Annex B advertisements

10. Following on from the above, if a customer clicked the orange "*Add to Basket*" button with a view to adding one of the VetPlus Products to their basket, they were then presented with a further pop-up which displayed not only the selected VetPlus Product but also one of Viovet's own brand products – as set out in Annex B to the Amended Particulars of Claim.

11. Beneath each product was its price (and its price per day) with Viovet's own brand product being cheaper in each case. In between the two products was a reversible arrows symbol and at the foot of the page the customer was presented with an option of clicking either an orange button with the text "*Swap and Save*" (which, if clicked, would take the customer to the Viovet own brand product) or, alternatively, a white button with the text "*No Thanks*" (which, if clicked, would enable the customer to buy the originally selected VetPlus Product).

(c) The Annex C advertisement

12. The Annex C advertisement related just to one of the VetPlus Products – Aktivait.

13. On the webpage on which Aktivait was offered for sale, the customer was presented with a button stating "*Read More*". On clicking this, the customer was taken to an advertisement of one of Viovet's own brand products – "RenewMe". That webpage stated that it "*contains trusted ingredients found in Aktivait*" and was a "*more cost-effective option*".

The present claim

14. On 6 October 2022, GUK and VetPlus issued the present claim by way of a Claim Form and Particulars of Claim. In broad terms, it was alleged that by referring to the VetPlus Products in the above advertisements, Viovet had used the trade marks for the purposes of comparative advertising in a way which contravened the relevant regulations and therefore amounted to trade mark infringement.

15. On 22 November 2022, Viovet filed and served a Defence in which, in broad terms, it denied that any such contravention of the regulations (and therefore any infringement of the trade marks) had taken place.

16. On 21 April 2023, GUK and VetPlus filed and served an Amended Particulars of Claim following which, on 12 May 2023, Viovet filed and served an Amended Defence.

17. On 22 May 2023, the matter came before Master Kaye for a case management conference. At that hearing, and in accordance with a proposal put forward by the parties, she made an order that the following issue should be tried as a preliminary issue:

> "What message is conveyed by the comparative advertising complained of? In particular:
>
> > (a) Would the average consumer when presented with the Disputed Representations regard them as statements that the Defendant's products are comparable in nature and/or composition and/or specification to the Second Claimant's products including, inter alia, the efficacy and quality of the products?
> >
> > [as contended for by the Claimants]
> >
> > (b) Would the comparative advertising at Annexes A and B to the Particulars of Claim be understood as only making a comparison concerning price and not making any comparisons concerning the nature, composition, specification or efficacy of the Defendant's and Second Claimant's products? Would the

comparative advertising at Annex C to the Particulars of Claim be understood as making a comparison concerning price and also as stating that the Defendant's RenewMe product contains some of the ingredients that are found in the Second Defendant's Aktivait product?

[as contended for by the Defendant]"

18. It is the trial of the above preliminary issue which is the matter now before me.

PART III: THE LAW

19. Article 9(3)(f) of the EU Trade Mark Regulation (EU) 2017/1001 ("**EUTMR**") provides that trade mark infringement may arise where a trade mark is used *"...in comparative advertising in a manner that is contrary to Directive 2006/114/EC*".

20. Article 4 of Directive 2006/114/EC - more commonly known as the Comparative Advertising Directive ("**CAD**") - sets out the conditions for permitted comparative advertising. Importantly, the CAD has been substantially implemented in the UK by the Business Protection from Misleading Marketing Regulations 2008 ("**the 2008 Regulations**")[1].

21. Regulation 2(1) of the 2008 Regulations provides that:

> "In these Regulations…
>
> "advertising" means any form of representation which is made in connection with a trade, business, craft or profession in order to promote the supply or transfer of a product…
>
> "comparative advertising" means advertising which in any way, either explicitly or by implication, identifies a competitor or a product offered by a competitor…"

[1] Pursuant to section 2(1) of the European Union (Withdrawal) Act 2018, the departure of the UK from the EU on 31 January 2020 and the end of the transitional period under the UK-EU Withdrawal Agreement do not affect "EU-derived domestic legislation". In short, such legislation remains in effect unless and until it is repealed or amended.

22. Further, regulation 4 of the 2008 Regulations provides:

> "Comparative advertising shall, as far as the comparison is concerned, be permitted only when the following conditions are met:
>
> (a) it is not misleading under regulation 3;
>
> (b) it is not a misleading action under regulation 5 of the Consumer Protection from Unfair Trading Regulations 2008(1) or a misleading omission under regulation 6 of those Regulations;
>
> (c) it compares products meeting the same needs or intended for the same purpose;
>
> (d) it objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price;
>
> (e) it does not create confusion among traders—
>
> > (i) between the advertiser and a competitor, or
> >
> > (ii) between the trade marks, trade names, other distinguishing marks or products of the advertiser and those of a competitor;
>
> (f) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, products, activities, or circumstances of a competitor;
>
> (g) for products with designation of origin, it relates in each case to products with the same designation;
>
> (h) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
>
> (i) it does not present products as imitations or replicas of products bearing a protected trade mark or trade name."

23. In short, therefore, where there is comparative advertising, if all of the above conditions are met, there will be no infringement[2]. If, however, one or more of the above conditions is not met, the comparative advertising is not permitted and it may amount to an infringement for the purposes of EUTMR.

PART IV: DISCUSSION

The parties' respective cases

24. In the present claim, GUK and VetPlus assert that the above-mentioned advertisements do not meet the conditions in regulations 4(a), 4(d) and 4(h) of the 2008 Regulations. They submit, however, that it is regulation 4(d) which is the key one – the asserted non-compliance in relation to regulation 4(a) (being misleading) and regulation 4(h) (taking unfair advantage) is in each case merely parasitical on the non-compliance asserted in relation to regulation 4(d). In other words, if they are unsuccessful in showing that there has been non-compliance with regulation 4(d), GUK and VetPlus accept that it must follow that it will not be open for them to argue non-compliance with regulations 4(a) and 4(h) either. In short, therefore, for present purposes, it is only necessary for me to consider regulation 4(d).

25. As stated above, regulation 4(d) makes it a condition of permissible comparative advertising that the advertisement in question "*objectively compares one or more material, relevant, verifiable and representative features of those products, which may include price*". This being the case, it is necessary, first, to determine what features are being compared – either expressly or by implication. Once it has been determined what features are being compared, it is then necessary to consider whether the relevant comparison is objective as opposed to misleading.

26. It is of course this first step above - the determination of what features are being compared - which is the preliminary issue before me. Depending on my determination of this preliminary issue, the determination of the extent to which any such comparisons

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[2] See, for example, ***O2 v Hutchinson*** [2008] RPC 33 (relating to the predecessor to CAD which was in materially the same terms).

are objective as opposed to misleading will be for a (potentially time consuming and expensive) second trial.

27. As to the features which are <u>expressly</u> compared, it is uncontroversial that the Annex A and Annex B advertisements (I will consider the Annex C advertisement separately) simply compare the prices of, on the one hand, one of the VetPlus Products and, on the other hand, a Viovet own brand product. Nor is there any dispute that what is stated about the respective prices is accurate (and accordingly not misleading).

28. As to features which are <u>impliedly</u> compared, however, the parties disagree. On the one hand, GUK and VetPlus contend that, in addition to the express comparison as to price, each of the advertisements also impliedly conveys the message that the Viovet own brand products are (to use the wording of the preliminary issue contended for by GUK and VetPlus) "*comparable in nature and/or composition and/or specification to [VetPlus's] products including, inter alia, the efficacy and quality of the products*".

29. Viovet, on the other hand, contends otherwise and suggests that the Annex A and Annex B advertisements should be taken at face value: no express comparison is made as to the efficacy and quality of the respective products and, moreover, nor can any such reference or comparison be implied. Instead, they would be understood (to use the wording of the preliminary issue contended for by Viovet) "*as only making a comparison concerning price and not making any comparisons concerning the nature, composition, specification or efficacy of*" the Viovet own brand products and the VetPlus Products.

30. Indeed, the significance of these competing contentions is demonstrated by reference to the important authority of the Court of Justice of the European Union in ***Lidl SNC v Vierzon Distribution SA*** (C-159/09) [2011] 2 CMLR 10. That case establishes that even if goods are the subject of an objective comparison on at least one material, relevant, verifiable and representative feature (for example price), the advertising may nevertheless still be misleading if the comparison suggests by implication that other characteristics of the product in question are also equivalent when in fact they are not, and when, moreover, those characteristics may have a significant effect on the choices made by a consumer. In particular, the CJEU stated:

“51. An advertisement such as that at issue could also be misleading if the referring court found that, for the purposes of the price-based comparison in the advertisement, food products were selected which are in fact objectively different and the differences are capable of significantly affecting the buyer’s choice.

52. If such differences are not disclosed, such advertising, where it is based solely on price, may indeed be perceived by the average consumer as claiming, by implication, that the other characteristics of the products in question, which may also have a significant effect on the choices made by such a consumer, are equivalent…

55. In such cases, the fact that the consumer is not informed of the differences between products being compared in terms of price alone may deceive the consumer as to the reasons for the difference in prices claimed and the financial advantage that can in fact be obtained by the consumer by buying his goods from the advertiser rather than from a given competitor and have a corresponding effect on the consumer’s economic behaviour. The latter may thus be led to believe that he will in fact obtain an economic advantage because of the competitive nature of the advertiser’s offer and not because of objective differences between the products being compared.”

31. In any event, and in summary, for the purposes of the present preliminary issue, I have to determine whether the Annex A and Annex B advertisements are to be understood as only making a comparison as to price (which is the only feature expressly compared) or whether they would be understood (by implication) to be also comparing other features including in particular the quality and/or efficacy of the relevant products.

<u>The average consumer</u>

32. From whose perspective is the above determination to be made? As to this, it is common ground that the assessment should be made from the perspective of an average consumer. Moreover, that assessment should be from the perspective not just of any average consumer – but of an average consumer of the goods or services being

advertised who is reasonably well informed, reasonably observant and reasonably circumspect: ***Lidl Belgium v Colruyt*** [2006] ECR I-8501.

33. And how should I make this determination? Again, it is common ground that, given that the products in question can be considered to be within the category of ordinary goods and services, neither evidence from consumers nor expert evidence is required. Indeed, as Kitchen LJ said in ***Interflora v Marks & Spencer*** [2014] EWCA Civ 1403 at [115][3]:

> "…in a case considering ordinary goods or services, the court may be able to put itself in the position of the average consumer without requiring evidence from consumers, still less expert evidence or a consumer survey. In such a case, the judge can make up his or her own mind about the particular issue he or she has to decide in the absence of evidence and using his or her own common sense and experience of the world."

Analysis

34. The key point made on behalf of Viovet is that when offered a cheaper alternative product, the above-mentioned reasonably well-informed average consumer would not assume that the products are the same in terms of quality and efficacy. On the contrary, so Viovet submits, the average consumer would assume that the reason that the alternative product was cheaper was that it was different (and possibly of a lesser quality[4]) in some way.

35. While superficially attractive, on closer analysis, in my judgment, the above argument fails. In particular:

(1) A consumer who has reached the Annex A or Annex B advertisements will have been looking at one of the VetPlus Products. The purpose of each VetPlus Product is to improve the health and well-being of a pet or animal. The average consumer of such a product will no doubt be keen to achieve that purpose – the health and well-being of

[3] Citing with approval Lewison LJ in the first Court of Appeal judgment in the same case: [2012] EWCA Civ 1501 at [45] to [55].

[4] Viovet accepts and asserts that its products are different in composition to the VetPlus Products. It does not accept, however, that they are of lesser efficacy or quality; that would be a matter for a second trial.

their pet will be of importance to them. So when that consumer is then offered an alternative (Viovet own-brand) product, it seems to me that there will be an assumption that the alternative product is of comparable quality and efficacy. It is not the sort of product where a consumer would be prepared to compromise on such quality and efficacy lightly.

(2) This is all the more so given that the average consumer who has found a VetPlus Product on the Viovet website will probably have done so following a recommendation from a vet. Indeed, as set out in the (unchallenged[5]) evidence, VetPlus sells its products (via veterinary wholesalers) to veterinary practices which then on-sell the VetPlus Products to pet owners usually following a consultation with, and a recommendation from, a vet. In other words, the average consumer of such products is unlikely to have been just carrying out just a random search; it is most likely that they will have consulted a vet and, during that consultation, have been recommend a specific VetPlus Product. In such circumstances, so it seems to me, when on Viovet's website that consumer is then offered an alternative (Viovet own brand) product, it is even more likely that he or she will assume that the alternative product is comparable in nature, composition, quality and/or efficacy.

(3) The above is further reinforced by the particular wording appearing within the Annex A and Annex B advertisements. As stated above, the Annex A advertisements simply state "*Save £[x] per day*". In my judgment, far from it being obvious to the average consumer that what is being offered is a different (and possibly inferior) product, the implication is that what is being offered is going to be equally beneficial for their pet but at a cheaper price. Similarly, the Annex B advertisements refer to saving £X per day and offer the consumer the ability to "*Swap and Save*". Again, so it seems to me, the average consumer - who no doubt will be considering the health and well-being of their pet - will assume that by being offered a "*Swap*" what they would be receiving in the alternative is something comparable in nature.

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[5] Pursuant to the order of Master Kaye, the parties were given permission to serve witness statements. GUK/VetPlus served witness statements from two witnesses, as did Viovet. The above order gave a date by which the parties could apply to cross-examine any witness but (sensibly) neither party did so. Accordingly, the evidence from all four witnesses is unchallenged.

36. In short, therefore, although it is true that the Annex A and Annex B advertisements only expressly refer to price, for the above reasons – and in particular that the average consumer of such products will be keen to ensure the health and well-being of their pet and, moreover, will only have reached the advertisement in question because (in all likelihood) of a recommendation from a vet – in my judgment, that average consumer when offered the chance to save £X per day and/or to swap to an alternative product would assume that that alternative product was comparable in nature, composition, efficacy and/or quality.

37. It therefore follows that in relation to the Annex C advertisement – which additionally referred to the relevant Viovet product as containing some of the ingredients in the VetPlus Product, Aktivait – the average consumer would (even more so) assume that the alternative product was comparable in nature, composition, efficacy and/or quality to that VetPlus Product.

PART V: CONCLUSION

38. In conclusion, therefore, I find in favour of GUK and VetPlus. In particular, in answer to the question as what message is conveyed by the Annex A, Annex B and Annex C advertisements, I find that the average consumer would regard them as statements that the Viovet products offered in the alternative were comparable in nature and/or composition and/or specification to the relevant VetPlus Product including, inter alia, the efficacy and quality of the products.

39. I conclude by expressing my gratitude to all counsel and their respective instructing solicitors.