

**TRADE MARKS ACT 1994  
IN THE MATTER OF APPLICATION No 2168224  
BY NUTRICULTURE LIMITED**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER No 49155  
BY NORSK HYDRO ASA**

**TRADE MARKS ACT 1994**  
**IN THE MATTER of Application No 2168224**  
**by Nutriculture Limited**

**and**

**IN THE MATTER OF Opposition thereto under No 49155**  
**by Norsk Hydro ASA**

**BACKGROUND**

1. On 30 May 1998 Nutriculture Limited applied under the Trade Marks Act 1994 to register the trade mark HYDROCROP in respect of a specification of goods which reads:

Class 1

Chemicals used in agriculture and horticulture, manures, compost, loam plant growing media, peat, soil conditioning chemicals; but not including calcium carbonate powder, calcium carbonate suspensions or any other goods similar thereto.

Class 5

Algicides, biocides, fungicides, herbicides, insecticides, slug and vermin exterminating preparations, weed killers.

Class 7

Pumps and filters, electric motors, parts and fittings therefor all included in class 7.

Class 9

Pre-recorded instructional videos, tapes, CDs and CD-ROMs.

Class 16

Instructional and teaching materials and printed publications.

Class 20

Tanks, trays and containers for horticultural use.

Class 31

Plants, plant seeds, seedlings, bulbs, herbs.

2. The application is numbered 2168224.

3. The application was accepted and published and on 10 November 1998, Norsk Hydro ASA filed notice of opposition to the application. The statement of grounds set out two grounds of opposition to the application. These can be summarised as:

- (a) under section 5(2) of the Trade Marks Act 1994 in that the trade mark the subject of the application is similar to the opponents' earlier trade mark HYDRO registration number 1247326 and is to be registered for goods identical or similar to the goods for which the earlier trade mark is protected;
- (b) under section 5(4)(a) of the Act, in that by virtue of the extensive use made by the opponents of their mark HYDRO in respect of industrial chemicals, that registration of the trade mark the subject of the application at least as far as Classes 1, 5, 20, and 31 is concerned is liable to be prevented by the law of passing off.

4. The applicants filed a counterstatement denying the grounds of opposition. Both sides seek an award of costs. The matter came to be heard on 18 June 2001 when the opponents were represented by Mr Rackham of Lloyd Wise Tregear & Co, the applicants were not represented and did not file any written submissions in lieu of attendance.

## Evidence

### Opponents' Evidence

5. The opponents' evidence consists of four statutory declarations. The opponents' main statutory declaration, dated 19 July 1999, is by Susan Karen Anthony, Company Secretary of Hydro Agri (UK) Limited whose parent company is Norsk Hydro ASA, the opponents. Ms Anthony explains that her company sells fertilizers in the United Kingdom. Overall sales figures for fertilizers are given for the years 1994- 1997. These are all in the region of £200 million per annum. It is stated that her company is the largest supplier of agricultural fertilizers in the United Kingdom. Sales are made through merchants who are effectively wholesalers and reference is made to two declarations by such wholesales, details of these declarations are summarised below.

6. Ms Anthony states that her company and her parent company own various trade marks and that the most important marks are the company logo and the word HYDRO which appears in that mark. Reference is made to the trade mark registration number 1247326 for the word HYDRO and to registration number 1588610 which is reproduced below.



7. Ms Anthony states that on any packaging of their product, such as a solid fertilizers, the company logo always appears and at Exhibit SKA5[sic] she exhibits a pamphlet promoting a product called EXTRAN. The pamphlet shows the product with the trade mark shown above. Ms Anthony goes on to explain that it is company practice to emphasise the word HYDRO and that in their literature they tend to call themselves HYDRO. At SKA7 she exhibits a range of publications and promotional material. An example can be seen on the front cover of a pamphlet “Hydro Agri Specialities Growing your potential - Hydro Golf Care Range of Fertilizers”. The company logo together with the word HYDRO is also shown on the front cover. The references inside this pamphlet are all to HYDRO solus. I should note that many of these pamphlets appear to be undated. Ms Anthony states that the “HYDRO FERTILIZERS HANDBOOK” was published in 1993 when her company was called Hydro Fertilizers Limited. On page 8 is a photograph of a stand at an agricultural show this shows a large stand with the word HYDRO prominently displayed alongside the logo of the Viking ship. Ms Anthony also gives dates and venues for agricultural and horticultural shows at which her company has taken exhibition stands for the last four years. These cover shows in England and Scotland and also Amsterdam.

8. Ms Anthony states that the company has developed a range of fertilizers and that in the last 15 years has supplied chemicals to the developing hydroponics market. Over the years it is stated that they have developed a host of products under the name HYDRO together with some other word. Ms Anthony gives an example of a product launched in 1999 called HYDROPLUS. Other brands which are sold include HYDROCOMPLEX, HYDROTOP, HYDROEXPRESS and HYDROFLOW. I note that no date or turnover figures are given for any of these products and so I can take no account of the opponents’ use of these trade marks.

9. The opponents’ filed a statutory declaration by John Keyte dated 22 July 1999. Mr Keyte is the Marketing Manager Specialities of Hydro Agri (UK) Limited. He gives evidence as to the way in which customers address his company and he states that they tend to refer to the company as HYDRO. He then makes comments concerning the possible use of HYDRO by any other company in this field and the likely reaction of his customers. I need not summarise these comments.

10. The opponents also filed two statutory declarations from customers. The first is by Mr Michael Bannister, Sales Manager of Monro South Limited and is dated 22 July 1999. His company supplies horticultural sundries to customers such as market gardeners and commercial nurseries and the like. He explains some history concerning the growth of the Hydroponics industry in the United Kingdom. He states that one of their major suppliers is Hydro Agri (UK) Limited which he calls Hydro Fertilizers. He states that in all his dealings with horticultural fertilizers he has never come across a company other than Hydro Agri (UK) Limited that call themselves HYDRO or a mark which includes the word HYDRO. He states,

“A mark that I have never come across as a name for chemical fertilizers or crops is the mark HYDROCROP. If I had done, I would unquestionably have assumed that the product came from Hydro Agri (UK) Limited.”

He goes on to state that if HYDROCROP was used on plants his customers might also be confused.

11. The second statutory declaration is by Derek Atkinson the manager at the East Yorkshire

depot of Nursery Supplies Bourne Limited. This is dated 22 July 1999. Mr Atkinson states that his company supplies horticultural sundries to customers such as professional hydroponic and ornamental growers, market gardeners, horticultural gardeners and the like. As with Mr Bannister, Mr Atkinson states that one of their major suppliers in the hydroponics area is Hydro Agri (UK) Limited. He makes similar comments to those made by Mr Bannister about the likely reaction of his customers to the use of the trade mark HYDROCROP.

### Applicants' Evidence

12. The applicants' evidence consists of a single statutory declaration dated 20 January 2000 by Mr Charles Joseph Molyneux, the Managing Director of Nutriculture Limited, the applicants in this matter. He has held this position since his Company was incorporated in 1976.

13. Mr Molyneux states that he has spent his entire adult working life in the business of horticulture, firstly in the commercial horticulture sector, that is nurseries and market gardens, and subsequently with Nutriculture Limited in producing and/or supplying products for the private gardener. He states that Nutriculture Limited supply a wide range of gardening products as reflected in the specification of goods of the application in suit. Mr Molyneux says that in his experience there is no overlap between the business of companies which supply products to the commercial horticulture sector and the business of companies which supply products for the private gardener.

14. Referring to Ms Anthony's declaration, he notes that she states that her company is the market leader in the manufacture and supply of agricultural fertilizers in the United Kingdom. Mr Molyneux does not dispute that and states that he is well aware of both her company and the opponents and their reputation in the supply of fertilizers. However, Mr Molyneux states that in his view, the market sector with which Ms Anthony's company is concerned is that of commercial horticulture and that the shows and exhibitions they attend, are all intended for commercial horticulturalists who are involved in growing vegetables, salad stuffs, fruit, flowers seeds and seedlings on a large scales. He states that they are not suitable for private gardeners.

15. Mr Molyneux goes on to state that the quantities in which the fertilizers and other chemicals are supplied by Hydro Agri (UK) Limited is not consistent with the requirements of private gardeners. He believes that their minimum pack size is probably 25kg; too heavy to be easily manhandled and far more that any private gardener would require in the course of a year or several years. Based on this premise, Mr Molyneux states that he does not believe that the name HYDRO is at all well known by private gardeners.

16. Mr Molyneux says that in his view the opponents' registration in Class 1 does not provide an adequate basis for opposition to his companies application for registration in respect of classes 7, 9, 16, 20 and 31. Mr Molyneux also refers to various registrations in class 1 and 5 which contain the word HYDRO. At exhibit CJM2 he provides an example of literature relating to one such product marketed under the name HYDROLECA. This is a clay aggregate.

17. Mr Molyneux concludes by stating that he does not believe that his company's proposed use of HYDROCROP in respect of the goods specified in the application which will be for sale to garden centres and then to private gardeners will in any way lead to confusion with products sold under the HYDRO mark by Hydro Agri (UK) Limited.

#### Opponents' Evidence in reply

18. The opponents filed a witness statement dated 18 August 2000 by John Keyte. Mr Keyte states that there are commercial horticultural distributors who also supply to the retail market, he gives as examples; Nursery traders, Nursery Suppliers (Gibbs Palmer) and Monro South Limited. He also says that his company Hydro Agri (UK) Limited does supply some fertilizers direct to retail customers. By way of example, he notes that they sell a fertilizer named PADDOCK ROYALE which is designed to promote grass in paddocks for the owners of horses. At JK1 he exhibits the packaging for this product which shows the company logo with the work HYDRO.

19. Referring to Mr Molyneux's comments concerning the use of other HYDRO marks Mr Keyte states that he is unaware of any other users in the commercial or horticultural field where there is use of the mark HYDRO or HYDRO together with another word or syllable in respect of fertilizer. In particular, he notes that the product exhibited at CJM2, HYDROLECA, is a clay aggregate and is not a fertilizer.

20. That concludes my review of the evidence.

#### **DECISION**

21. The grounds of opposition pursued by the opponents were those under section 5(2) and 5(4) of the Trade Marks Act 1994. The relevant provisions read as follows:

"5.- (1) .....

(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."

(3)....

- (4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -
- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or
  - (b) ....

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.

22. The term ‘earlier trade mark’ is defined in section 6 of the Act as follows:

- “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,”

23. I will consider first the opponents’ ground of opposition under section 5(2)(b). 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] R.P.C. 199, *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 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-Mayer 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-Mayer Inc* page 9 paragraph 29.

24. The opponents' statement of grounds lists one trade mark on which the opponents seek to rely, that is registration number 1247326. As noted above, in their evidence they also refer to trade mark registration number 1588610. This registration is for the company logo together with the word HYDRO. Mr Rackham accepted that the opponents' best case under section 5(2)(b) was in respect of their registration for the word HYDRO under registration number 1247326; this is an earlier trade mark within the meaning of section 6. For convenience, I reproduce the opponents' and the applicants' trade marks below.

Applicants' trade mark	Opponents' trade mark
HYDROCROP	HYDRO
Class 1	Class 1
Chemicals used in agriculture and horticulture, manures, compost, loam plant growing media, peat, soil conditioning chemicals; but not including calcium carbonate powder, calcium carbonate suspensions or any other goods similar thereto.	Fertilizers, magnesium oxide (other than pigments), gases and plastics and chemical substances none being for cleaning or descaling; calcium chloride; all included in Class 1; but not including any such goods being reducing agents or for use in the textile industry and not including organic peroxides.
Class 5	
Algicides, biocides, fungicides, herbicides, insecticides,	



slug and vermin exterminating preparations, weed killers.

Class 7

Pumps and filters, electric motors, parts and fittings therefor all included in class 7.

Class 9

Pre-recorded instructional videos, tapes, CDs and CD-ROMs.

Class 16

Instructional and teaching materials and printed publications.

Class 20

Tanks, trays and containers for horticultural use.

Class 31

Plants, plant seeds, seedlings, bulbs, herbs.

25. The likelihood of confusion must be appreciated globally taking into account the various factors listed above. One of those factors is the reputation that the earlier trade mark enjoys. Much of the opponents' evidence seems to me to show use of opponents' trade mark registered with the device of the Viking ship and the word HYDRO. That said, the word HYDRO is in my view a prominent element of that mark and the turnover figures are at a consistently high level before the relevant date in these proceedings. Whilst there is only limited evidence showing the use of HYDRO solus I do not find it surprising that there is evidence showing that customers refer to the company as HYDRO. Having regard to the use that has been made of the company logo I find that HYDRO had gained a significant reputation in respect of agricultural fertilizer at the relevant date. Indeed, the applicants accept that this is the case; see paragraph 4 of Mr Molyneux's declaration.

26. That said, the applicants claim that there is no likelihood of confusion because the opponents' products are for agricultural and commercial horticultural use and it is intended that the applicants' use will be directed to garden centres and the private gardener. I note the distinction that is drawn between these two areas and it may well be the case that there is a difference between fertilizers that might be used on a large scale on a farm or market garden and those that are more suited to use in ones garden. The differences may include not only the way in which such products are sold but also their composition. Mr Rackham referred to the witness statement of Mr Keyte and the sale of a fertilizer PADDOCK ROYALE to retail customers. This fertilizer is aimed at those who keep horses and I would not have said that those customers necessarily represent ordinary private gardeners. Based on the evidence that is before me I find that the opponents' reputation is confined to the area of fertilizers sold for commercial agricultural and horticultural use.

27. However, the opponents' and applicants' specifications are not limited in any way. Whilst the opponents reputation may be limited to those who are familiar with the use of fertilizers in agriculture and commercial horticulture, their specification covers fertilizers per se. Equally, whilst the applicants state that they intend to use their trade mark on products aimed at the private gardener their specification is not so limited. Thus, I must consider notional and fair use of both the opponents' mark as registered and the applicants' trade mark as applied for; *Reactor* [2000] R.P.C. at page 288.

28. At the hearing Mr Rackham narrowed his clients attack. He accepted that the registration of the applicants' mark in many of the classes listed could not be prevented under section 5(2)(b); even taking account of the global appreciation, the goods he accepted were not similar. In fact, Mr Rackham narrowed his main attack to only part of Class 1, although he did maintain an objection to the goods in Class 31. In opening, Mr Rackham stated:

“It [the trade mark application] is for the mark HYDROCROP but there are seven or eight classes covered. As I said in my skeleton, really the class we are attacking is class 1 and really that is in respect of fertilizers. The term, “chemicals used in agriculture and horticulture” and the term “manures”, are clearly in my view fertilizers. They embrace that. I do not believe there is any room for argument about that. The rest of the terminology in class 1, basically we are not really attacking. We have no great reputation in that area..... Again, as I said in my skeleton the only other class which is perhaps relevant is the class 31, where the result of putting fertilizer on to a seedling gets you a plant or ultimately a crop which is of course then what the mark is, our client's trade mark, HYDRO, with the resulting product. Basically, as I said, I think we are concentrating really on fertilizers.”

29. Later in his submissions he stated:

“I am making no attack whatsoever on 5, 7, 9, 16 and 20, no attack whatsoever. I made a fairly half hearted attempt I think an attack on 31, in the sense that there is some evidence from Bannister and Atkinson, one or other or both of them that if you saw HYDROCROP you would think that it is the final crop....That potentially is confusing but I make no attack on the other classes, or even loam, plant growing media, peat. As I said, soil conditioning chemicals I do not think was intended to cover fertilizers, but I suppose in the broadest concept it might do because fertilizer does condition soil.”

30. It seemed to me from his submission that Mr Rackham's only objection to the applicants' specification was that, as currently worded, it covered fertilizers. Indeed, in Mr Rackham's view, if I found a likelihood of confusion between the opponents' and applicants' trade marks when used on fertilizers then a limitation to the applicants' specification would overcome this objection. He suggested a limitation to the effect of “none being fertilizers or having a fertilizing action”. As the opponents' objection has been narrowed in this way, I have not considered whether any other goods in Class 1 could be deemed to be similar goods. It seems clear to me that the opposition is only proceeding in so far as it relates to fertilizers. I will consider the question under section 5(2)(b) in respect of this narrow ground of opposition and, if I find the necessary likelihood of confusion, consider whether the limitation proposed by Mr Rackham is acceptable.

31. Mr Rackham did not withdraw his clients' objection to registration of the application in Class 31 but he did not pursue his argument in this area with any vigour. The applicants' specification covers plants, plant seeds, seedlings, bulbs, and herbs and I will consider the opponents' objection to this class below.

32. The applicants' specification in class 1 covers "Chemicals used in agriculture and horticulture", I agree with Mr Rackham that this would include fertilizers covered by the opponents' specification. As such, the applicants' specification could include use on identical goods to those covered by the opponents' earlier trade mark. It seems to me that the term "manure" in the applicants' specification also falls within the term fertilizers. With this in mind I will go on to consider the visual, aural and conceptual similarities of the trade marks.

33. Visually, whilst the two trade mark are clearly different in length, they share the same first five letters. Trade marks must be assessed as a whole but with regard to their distinctive and dominant components. The word HYDRO in HYDROCROP would I believe have a strong impact on the mind of the average consumer but the presence of the word CROP, whilst introducing a clear visual difference between the two marks, would not, in my view, have such a strong impact on the mind of the average consumer. The word crop when used on products relating to agriculture or horticulture would be seen as having a semi-descriptive meaning. Thus, I find some visual similarity between the two trade marks.

34. Aurally again I find some similarity brought about by the presence of the opponents' trade mark in the first five letters of the applicants' trade mark and the semi-descriptive nature of the second element of the applicants' trade mark. In considering any conceptual similarity, I am informed by the evidence that some of these products may relate to the growing of plants using hydroponics. It could therefore be argued that it is not surprising that both parties seek to use the term HYDRO. However, neither party's specification is limited to such use and the opponents' use of the trade mark HYDRO in the agricultural field is not limited in this way. Consequently, the use of HYDRO on other products would appear arbitrary.

35. Having considered all the factors listed above, I find that direct confusion between HYDRO and HYDROCROP would be unlikely if used only on similar goods. But, use of the applicants' trade mark HYDROCROP on fertilizers for use in agriculture and commercial horticulture would, in my view, taking into account the opponents' reputation and the descriptive nature of the suffix CROP result in a likelihood direct of confusion. Equally, whilst the opponents' reputation is limited to fertilizers for agriculture and commercial horticulture, given the presence of the word HYDRO in the applicants' mark and the descriptive nature of the suffix, I find that use of HYDROCROP on fertilizers for use by private gardeners would, taking into account notional and fair use of HYDRO on such fertilizers, cause the average consumer to wrongly believe that they came from the opponents or some economically linked undertaking. As such, I find that the necessary likelihood of confusion is present and the opponents' case under section 5(2)(b) in respect of fertilizers and manure is made out.

36. The outcome of the opponents' objection to the goods in Class 31 is in my view less clear cut. This argument was not really pursued by Mr Rackham and it seems to me that the goods here, plants and seeds etc are somewhat further away from the goods covered by the opponents' specification and their reputation in fertilizers for use in agriculture and commercial horticulture. As such I find that there is no likelihood of direct confusion, nor in my view is there any likelihood of the sort of association I found in respect of use on fertilizers. As such I find that there is no likelihood of confusion within the meaning of section 5(2)(b) in respect of the applicants' goods in Class 31.

37. Mr Rackham also referred to his ground of opposition under section 5(4)(a). As I have found for the opponents under section 5(2)(b) I need not go on to consider this ground of opposition. However, I should state that Mr Rackham acknowledged that he could be in no better position under section 5(4)(a) than he was under section 5(2)(b). In my view he was right to make that concession.

38. That is not an end to the matter as the opposition has only been successful in part. The opponents suggested that a limitation to the applicants' specification excluding fertilizers or substances having a fertilising action would overcome the opposition. The opponents specifically stated that they did not oppose use on compost, loam plant growing media, peat and soil conditioning chemicals not being fertilisers. Therefore, having regard to the narrow ground on which the opposition was based, I find that an appropriate limitation together with the deletion of the term manure from the applicants' specification in class 1 would overcome the opposition.

39. The applicants have one month from the end of the appeal period within which to file a Form TM21 requesting an amendment of the specification in Class 1 as follows:

Class 1

Chemicals used in agriculture and horticulture, compost, loam plant growing media, peat, soil conditioning chemicals; but not including fertilizers or any goods having a fertilizing action and not including calcium carbonate powder, calcium carbonate suspensions or any other goods similar thereto.

40. In the event that no TM21 is filed, the application will be refused in its entirety.

41. The opponents have been successful, albeit in part, and are entitled to a contribution towards their costs. The nature of the opponents' attack was not immediately apparent from the statement of grounds as filed. In particular, the wording in this document suggested that the opposition under section 5(2) was wider than was eventually pursued at the hearing. At the hearing it became clear that the opponents' area of interest was restricted to fertilizers and the opposition was only pursued for part of Class 1 and Class 31 of the application. It seems to me that this is a factor that I should take into account when considering the award of costs which will therefore be less than would otherwise be the case. Therefore, I order the applicants to pay the opponents the sum of £300 as a contribution towards their costs. 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 3<sup>RD</sup> day of August 2001**

**S P Rowan  
For the Registrar  
the Comptroller General**