

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 2184706
TO REGISTER A TRADE MARK IN THE NAME OF
HYDROGARDEN WHOLESALE SUPPLIES LIMITED
IN CLASS 1, 11, 20 & 21

AND IN THE MATTER OF OPPOSITION THERETO
UNDER No 50194
BY NORSK HYDRO ASA

BACKGROUND

1) On 18 December 1998 GroWell Distribution Ltd of P O Box 605, Coventry West Midlands, CV1 5ZY applied under the Trade Marks Act 1994 to register the following trade mark:



2) The application was published in respect of the following goods:

Class 1:Chemical products included in Class 1 for use in hydroponics; nutrients, cloning gel, rooting gel, growth promoters, growing media, clay media and clay pebbles.

Class 11:Apparatus and installations for use in hydroponics; lighting, heating, water supply, ventilating apparatus and installations; fans, humidifiers; parts and fittings for all the aforesaid goods.

Class 20:Devices for supporting plants.

Class 21:Apparatus, instruments and utensils, all for use in hydroponics, including tanks, pots, containers; parts and fittings for all the aforesaid goods.

3) On 24 December 1999 the applicant informed the Registry of a change of name from GroWell Distribution Ltd to Hydrogarden Wholesale Supplies Limited. The specification for Class 1 was also amended at this time to read:

“Class 1:Chemical products included in Class 1, nutrients, cloning gel, rooting gel, growth promoters, growing media, clay media and clay pebbles; all for use in hydroponics.”

4) Opposition to the registration was filed by Norsk Hydro ASA of NO240 Oslo, Norway, on 22 September 1999. The grounds of opposition in summary are:

a) The opponent is the proprietor of the UK registration shown below and so the application offends against Section 5(2)(b).

Number	Mark	Effective Date	Class	Specification
B1247326	HYDRO	31.7.85	1	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.

b) Use of the trade mark applied for is liable to be prevented by virtue of any rule of law protecting an unregistered trade mark including an action for passing off based on the opponent's reputation in the trade mark HYDRO. The application therefore offends against Section 5(4)(a).

5) The applicant filed a counterstatement denying all the grounds apart from conceding that the opponent is the registered proprietor of trade mark registration B1247326.

6) Both sides ask for an award of costs. Both sides filed evidence in these proceedings and the matter came to be heard on 8 October 2001, when the applicant was represented by Mr Armitage of Messrs Withers & Rogers while the opponent was represented by Mr Rackham of Messrs Lloyd Wise Tregear.

OPPONENT'S EVIDENCE

7) The opponent's evidence is in the form of two Witness Statements from John Keyte and David Kenneth Spindler.

8) Mr Spindler is the Chief Accountant, Finance Director and Company Secretary of Hydro Agri (UK) Limited a subsidiary of the opponent company.

9) Mr Spindler states that his company is a market leader in the manufacture and supply of agricultural fertilisers in the UK. He states that the overall sales of agricultural fertilisers by his company in recent years have been as follows:

Year	Total £million
1994	200.5
1995	240.7
1996	242.4
1997	184.8
1998	166.5

10) Mr Spindler points out that the parent company, Norsk Hydro ASA, and his company emphasise the word HYDRO on all products and literature. The company logo (the Viking ship and word HYDRO) is used on all products as well as the individual names or trade marks of the products. He provides a variety of publications at exhibits DKS6 &7 which show extensive use of the word HYDRO and also the company logo.

11) Mr Spindler states that the company supplies a number of products under the HYDRO label. These include Kristalon, Hydroplus, Hydrocomplex, Hydrotop, Hydroexpress, Hydroflow, Hydrocomplex-Grower, Hyrdocomplex-Sprinter, Krista-MKP and Antibloc. All of these products he claims are designed specifically for growers in the horticultural section including those using hydroponic methods. However, no actual usage of these products or turnover figures are provided.

12) Mr Spindler provides a list of agricultural and horticultural shows in which his company have participated. These cover much of England and Scotland. The stand display shows the word HYDRO as can be seen in a photograph at page eight of the Hydro Fertilisers book at exhibit DKS7.

13) Mr Spindler claims that as a result of the usage of the mark HYDRO by his company the average consumer would be confused if any other company entered the market using a mark containing the word HYDRO.

14) Mr Keyte is the Marketing Manager Specialities of Hydro Agri (UK) Ltd, a position he has held since December 1994. He states that he has checked his facts with the records of Hydro Agri (UK) Ltd.

15) Mr Keyte states that as a result of his position he has an in-depth knowledge of the horticultural and speciality fertiliser markets in the UK. He claims that he and his staff are in direct contact with their customers in the UK. These customers range from farmers, distributors to professional growers using hydroponic growing techniques, and soil and peat based substrate growing media under cover. Typical hydroponic technique products are tomatoes, cucumbers & capsicums whilst the soil and peat based substrates typically grow bedding plants, pot plants and nursery stock (ornamentals). He states that his company sells products called CaliNit, Krista-K and Hydroplus to hydroponic growers. To ornamentals they sell PG Mix and Kristalon.

16) At exhibit JK1 he provides copies of promotional material and advertisements for these products. Only four of the items carry a date and all of these are in 1999 ie after the relevant date. All of the advertisements carry a mark of a Viking ship with the word HYDRO written under it. They all also have the name term Hydro Agri Specialities and carry the name of Mr Keyte's company and his name and contact number. They feature a variety of product names including those mentioned by Mr Keyte.

17) Mr Keyte claims that customers refer to his company as HYDRO and regard the products as being sold under the HYDRO mark. He states that he is unaware of any other company trading in the UK in fertilisers using the mark HYDRO solus or in combination with other syllables.

18) Mr Keyte states that his company's products are made available to commercial

horticultural distributors and that some of these also supply the retail market. He also mentions that his company sells one product PADDOCK ROYALE which is directed to owners of horses. An example of the packaging for this product is supplied and shows use of the Viking ship and Hydro mark in addition to the product name.

APPLICANT'S EVIDENCE

19) The applicant's evidence is in the form of three witness statements from Justin Henry, Ian Stansfield and Iain Reynolds.

20) Mr Reynolds is the Managing Director of the applicant company. Mr Reynolds states that his company initially wished to register the word "Hydrogarden" solus but were advised by their agents that the word was not registrable as it consisted of the word "Hydro" meaning water and the descriptive word "garden". He claims that his company therefore incorporated a distinctive logo into the mark. He provides at exhibit IR1 an extract from the Collins Millennium Dictionary showing a number of words with the prefix "hydro" which are connected with water in some way.

21) Mr Reynolds comments:

"I would have to concede that the word HYDROGARDEN as such is indeed descriptive of the products of interest to my company, which are all in the field of hydroponics which is a method of cultivating plants by growing them in gravel through which water containing dissolved inorganic nutrient salts is pumped. Indeed the word "hydro" is in common use in the hydroponic industry as a convenient shorthand for "hydroponics", so that the actual meaning of the mark is hydroponics gardening. "

22) Mr Reynolds states that the opponent's evidence shows that they "have used HYDRO in relation to their business as a whole which does not focus particularly on hydroponic products, and relates more to the agricultural market than to the garden centre market". Mr Reynolds states that others use the word "Hydro" as part of a trade mark and provides some copies of literature of companies using the word Hydro as part of a name or mark at exhibit IR4.

23) Mr Reynolds continues:

"In any case my company's trade mark is completely different from the opponents' trade mark in every respect apart from the descriptive prefix HYDRO-. The word part of the mark also contains the word GARDEN which makes it into a much longer word, and because they are conjoined there is no risk that the word part of the mark will be shortened to HYDRO. Certainly that is not how my company uses the mark in practice and none of my customers ever order products by using the form HYDRO without GARDEN. Furthermore my company's trade mark also includes a very distinctive logo consisting of a highly stylised design of overlapping leaves, and this is quite different from the opponents' logo which includes a distinctive device of [sic] a presumably intended to be a Viking longship."

24) The statements of Mr Henry and Mr Stansfield are very similar. Both men are directors of

company's (other than the applicant company) involved in hydroponics. Both claim that the word "Hydro" is commonly used in the trade and is understood to be an abbreviation of the word hydroponics.

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

DECISION

26) At the hearing Mr Rackham withdrew all grounds of opposition in respect of all the goods in the application under Class 11, 20 and 21. He also refined his opposition to the goods under Class 1, withdrawing all opposition to "Cloning gel, rooting gel, clay media and clay pebbles". He made it clear, if it were not already, that the opposition was to any form of fertiliser or nutrient being included in the specification. In response Mr Armitage confirmed that the exclusion of fertiliser from the specification would be acceptable to his client, but the reference to nutrients could not be excluded. He contended that fertilisers and nutrients were not "one and the same thing" as claimed by the opponent but were distinct products.

27) Mr Rackham also accepted that there was no difference between his arguments under 5(2) and 5(4) and that if he could not persuade me under 5(2) then his 5(4) argument would also fail.

28) I therefore consider the grounds of opposition under Section 5(2) 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 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."

29) 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.

30) 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 Schfabrik 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 Schfabrik 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;

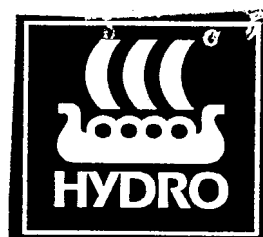
(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel Bv v Puma AG* page 8, paragraph 24;

(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.

31) 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 opponent's evidence seems to me to show use of the opponent's logo device of a viking ship and the word HYDRO. I reproduce the logo here for ease of reference:



32) Mr Armitage contended that the logo would not be seen as a HYDRO mark because of the strength of the visual element of the Viking ship. In my view the average consumer would view the word HYDRO as being the distinctive element of the logo mark. Although the Viking ship is a strong element, when compared to the word it does not overcome the basic tenet that words speak louder than devices. The word clearly indicates the origin of the goods and use of the logo is use of the registered trade mark B1247326 which forms the basis for this opposition. This is the opposite of the *Elle* case where use of a word was not accepted as use of a composite word and device mark. By contrast use of a registered word mark with additional figurative or graphical elements, necessarily entails use of the whole of the registered word mark.

33) The turnover figures are at a consistently high level before the relevant date in these proceedings. I do not find it surprising that customers would refer to the company as HYDRO. Having regard to the use that has been made of the company logo I find that the opponent had gained a significant reputation in the mark HYDRO in respect of fertiliser at the relevant date.


34) The opposed items in the applicant's specification for Class 1 are "Chemical products included in Class 1; nutrients, growth promoters: all for use in hydroponics." The opponent has the following specification registered under Trade Mark B1247326 "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."

35) Clearly, "fertilizers" as included in the opponent's specification is subsumed within "Chemical products included in Class 1". In my view the terms "fertilizers", "nutrient" and "growth promoters" are synonymous. All are designed to nourish plants and assist growth and / or yield. I do not accept Mr Armitage's contention that there is a difference between these goods. That said, the applicant's claim that there is no likelihood of confusion because the opponent's products are for agricultural and commercial horticultural use whilst the applicant is concerned solely with growers both commercial and amateur who use hydroponics.

36) Whilst the application in suit has a limitation upon it ("all for use in hydroponics"), the opponent's specification is not limited in any way and their specification covers fertilisers per se. In the opponent's evidence it is stated categorically that they supply growers who use hydroponic growing techniques. This evidence was not challenged. The goods are therefore identical.

37) It is clear from the above cases that in the overall assessment of a likelihood of confusion, the similarity of goods is but one aspect. Due regard should be given to the closeness of the respective marks, the reputation the earlier mark enjoys in respect of the goods or services for which it is registered, and any other relevant factors.

38) For ease of reference I reproduce the marks of the two parties below.

Applicant's mark	Opponent's mark
	<p style="text-align: center;">HYDRO</p>

39) Mr Armitage contended that the applicant's mark would be viewed as a "leaf device" mark as the leaves were the dominant part of the mark. He based this view on the contention that the word "Hydro" would be recognised as meaning water. He stated that "hydro" is a conjoining word and that when "garden" is added on to the end of "hydro" the whole would be seen as meaning "water garden" which in the context of hydroponic products was descriptive. He also espoused the view that the leaves were distinctive as, in nature, leaves would not grow in this fashion. I reject these notions. In my view the mark would be referred to by the words, the dictum "words speak louder than devices" is highly applicable here. The leaves are not particularly distinctive forming little more than a string of ellipses around the word aspect of the mark. Despite the specification being restricted to hydroponic goods, for which the words "hydro" and "garden" are semi-descriptive, the mark would be seen by the average consumer as HYDROGARDEN rather than as a leaf device.

40) When comparing the marks visually, they are of clearly different lengths. However, the whole of the opponent's mark appears at the start of the mark in suit. The word GARDEN, 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 as the word HYDRO.

41) Clearly the presence of the opponent's mark at the start of the mark in suit provides a level of similarity even if the mark in suit then has the word GARDEN conjoined. It is well established (and no less true under the 1994 Act) that the beginnings of words are of particular importance - see for instance the following passage from London Lubricants (1920) Ltd's application (Tripcastrid) (1925) 42 RPC 264 at page 279 lines 36-40:-

"But the tendency of persons using the English language to slur the termination of words also has the effect necessarily that the beginning of words is accentuated in comparison, and, in my judgement, the first syllable of a word is, as a rule, far the most important for the purpose of distinction."

42) With all of this in mind I come to the conclusion that while there are differences, they are more than counterbalanced by the similarities, and when all factors are considered, that there was a realistic likelihood of confusion at 18 December 1998. Consequently, the opposition under Section 5(2)(b) succeeds.

43) As grounds for refusal exist only in respect of part of the Class one products the application will be allowed to proceed to registration if, within one month of the end of the appeal period for this decision, the applicants file a TM21 restricting the specification as set out below:

“Class 1:Chemical products included in Class 1 excluding fertilisers; cloning gel, rooting gel, growing media, clay media and clay pebbles; all for use in hydroponics.

Class 11:Apparatus and installations for use in hydroponics; lighting, heating, water supply, ventilating apparatus and installations; fans, humidifiers; parts and fittings for all the aforesaid goods.

Class 20:Devices for supporting plants.

Class 21:Apparatus, instruments and utensils, all for use in hydroponics, including tanks, pots, containers; parts and fittings for all the aforesaid goods.”

44) If the applicants do not file a TM21 restricting the specification as set out above the application will be refused in its entirety.

45) The opposition having succeeded the opponent is entitled to a contribution towards costs. However, I take note that the grounds of opposition were significantly refined at the hearing and that had the true nature and extent of opposition been made clear the applicant might have reduced their costs in submitting evidence and preparing for the hearing. I order the applicant to pay the opponent the sum of £435. 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 24 day of October 2001

George W Salthouse
For the Registrar
The Comptroller General