O-294-07

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2364795
BY Dr REDDY'S LABORATORIES (UK) LIMITED
TO REGISTER THE TRADE MARK:

ENTRONAP

IN CLASS 5

AND

THE OPPOSITION THERETO
UNDER NO 92900
BY NAPP PHARMACEUTICAL HOLDINGS LIMITED

Trade Marks Act 1994

IN THE MATTER OF Application No 2364795
by Dr Reddy's Laboratories (UK) limited
to register the trade mark:

ENTRONAP

in Class 05
and the opposition thereto
under no 92900
by Napp Pharmaceutical Holdings Limited

BACKGROUND

1. On 2 June 2004, Dr Reddy's Laboratories (UK) Limited, hereafter referred to as Reddy, of 208-214 York Road, Battersea, London SWE11 3SD, applied to register the word mark ENTRONAP (the sign) for the following goods:

> "Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides; herbicides; pharmaceuticals used for pain management."

The above goods are all in class 5 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2. This trademark application was published for opposition purposes on 23 July 2004.

3. On 25 October 2004, Napp Pharmaceutical Holdings Limited, hereafter referred to as Napp, of Cambridge Science Park, Milton Road, Cambridge, CB4 4GW filed notice of opposition to the registration of this mark under two grounds of opposition.

4. Napp is the registered proprietor of Community Trade Mark (CTM) no. 000894469 for the word mark NAPP (the mark) which is registered for the goods and services in classes 3, 5, 9, 16, 21, 38, 40, 41 and 42 (of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.). This CTM has a filing date of 29 July 1998 and completed its registration procedure on 3 January 2000.

5. For the purposes of this opposition, I am concerned only with the goods for which the mark is registered in classes 3 and 5, namely:

> Class 3:
> Skin and scalp cleansers; shampoos; soaps; hair lotions; dentifrices; mouthwashes

Class 5:
Pharmaceutical, veterinary, diagnostic and sanitary preparations and substances; infants and invalids foods; medicated food supplements; food supplements for destroying vermin; disinfectants for hygiene purposes.

6. The first ground of opposition claimed by Napp under Section 5(2)(b) of the Trade Marks Act 1994, hereafter referred to as the Act, states that:

> "4. The mark of the Present Application is made up of two distinct parts, the elements "ENTRO" and "NAP". The element "ENTRO" is strongly reminiscent of the common medical combining term "ENTERO" which means 'pertaining to the intestine'. In respect of goods in class 5, this element therefore has relatively low distinctive character.
>
> 5. The dominant part of the mark of the Present Application is therefore the word "NAP". This is phonetically identical to the mark of the earlier registration and is visually highly similar.
>
> 6. The marks of the Present Application and that of the earlier Registration are therefore similar marks"

7. The second ground for opposition to the mark by Napp is made under Section 5(4)(a) of the Act and states that

> "9. There has been substantial and continuous use of the mark NAPP and marks consisting of "NAPP" by the Opponent or by its wholly owned subsidiaries, Napp Pharmaceuticals Limited and Napp Laboratories Limited or their predecessors in title in the UK over many years and at least since the early 1930's. This use has been in relation to pharmaceutical preparations and substances and preparations for cleansing, antiseptic and disinfectant purposes. In consequence, substantial goodwill and reputation exists in the mark NAPP in the UK. Use of the mark ENTRONAP of the present Application in respect of the goods covered by the present Application, will lead to confusion and/or deception of the public, leading to damage to the goodwill in the Opponent's mark NAPP. In consequence, such use of the mark ENTRONAP of the present Application is liable to be prevented by virtue of the law of passing off. Accordingly, the present Application should be refused in accordance with Section 5(4)(a) of the Trade Marks Act 1994"

8. In a notice of defence and counterstatement filed on 13 January 2005, Reddy denies that the mark applied for, ENTRONAP, is similar to the registered trademark NAPP. Reddy also state that, even if these marks are found to have some similarity, this is not sufficient to cause a likelihood of confusion on the part of the public. As a result, Reddy considers that the ground of opposition under Section 5(2)(b) should be rejected. Reddy also denies that use of the mark ENTRONAP in relation to the goods claimed in class 5 will lead to confusion and/or deception of the public, resulting in damage to the goodwill in the Opponent's mark NAPP. Reddy puts the opponent to provide proof of their reputation in the mark NAPP, stating that:

> "In particular, the Opponent has given only broad indications of the goods on which it claims use has been made, and we request specific details of all good [*sic*] used within

this general indication. Without such proof, there can be no finding of goodwill in the Opponents mark."

As a result, Reddy also requests rejection of the ground under 5(4)(a). Reddy make no mention of costs.

9. In their counterstatement, Reddy also claim that Napp "….. is effectively seeking to claim exclusive rights in the suffix (or prefix) "NAP" in class 5". They provide a list of trademark registrations and applications to show that there are a large number of trademarks registered in class 5 in the UK that contain NAP as a suffix or prefix.

10. Both sides filed evidence.

11. Napp requested a hearing, which took place before me on Thursday 29 March 2007. The applicant, Reddy, was represented by Mr Stuart Nield of Mewburn Ellis LLP who instructed Mr Michael Edenborough of Counsel while the opponent, Napp, was represented by Mr Peter Charlton of Elkington & Fife who instructed Adrian Speck of Counsel.

EVIDENCE

OPPONENT – EVIDENCE IN CHIEF

12. Napp filed 11 witness statements. I consider that these fall into 3 categories and I will consider them in this order:

(a) Statement & Exhibits from Mr Peter J Carlton, the opponent's Trade Mark agent,
(b) Statements from Medical & Pharmaceutical Practitioners
(c) Statement & Exhibits from Mr William Heath, Director of the Opponent

Witness Statement of Peter John Carlton

13. Mr Charlton has worked in the area of Trademarks for 25 years. He is a partner in Elkington & Fife LLP who represents the opponent in these proceedings. He provides 5 exhibits (Exhibits PJC1 to PJC5). Mr Charlton argues that the word mark applied for 'ENTRONAP' is made up of two parts, 'ENTRO' and 'NAP. 'ENTRO' is an abbreviated form of the word 'ENTERO'. In Exhibit PJC1, Mr Charlton provides printouts from a number of on-line medical dictionaries to show that the word 'ENTERO' means "pertaining to the intestine". Exhibits PJC2 and PJC3 are printouts from the UK Trade Mark Register that list trade marks beginning with the word element ENTERO and ENTRO respectively. Mr Charlton claims that ENTERO is a 'common medical combining term', that ENTRO is almost identical to ENTERO, and that, as a result, ENTRO will be seen as descriptive and so not distinctive in the mark ENTRONAP. Exhibit PJC4 comprises an extract from the medical information journal MIMS which shows an index of manufacturers. Napp is the only company whose name begins with the letters NAP or NA. Exhibit PJC5 is a printout from the World Health Organisation's 2004 Guide to the Use of Stems in the Selection of International Non-proprietary Names (INN) for Pharmaceutical Substances which, Mr Charlton, states shows that the suffix NAP is not a common stem and, as a result, it has distinctive character.

Witness Statements from Medical & Pharmacy Practitioners

14. This comprises the witness statements of Laurence A. Goldberg, Dr Adrian Tookman, Professor Ian Power, Beverly Collett, Dr Jeremy Richard Johnson, Marie Fallon, Christine Clark, Timothy John Hunt and Phillip Howard.

15. Seven of these individuals work or have worked in hospital medicine as medical consultants where they deal with medical conditions that require the use of significant amounts of pharmaceutical products to relieve pain, in particular, in the treatment of cancer. Dr Tookman is a consultant in Palliative Medicine with 20 years experience; Professor Power is a Professor of Pain Medicine with 10 years experience; Ms Collett is a Consultant in Pain Management with 25 years experience; Dr Johnson is the Medical Director of a Hospice and has 25 years experience in the field of oncology. Ms Fallon is a Consultant in Palliative Medicine and has worked in the latter field for 15 years and in pain research for 13 years. Mr Hunt is a Consultant in Palliative Medicine and has 23 years experience at this level.

16. Three of these individuals are pharmacists who work or have worked in hospitals supplying the necessary pharmaceutical drugs to the medical staff. Mr Golberg is a pharmacist of 35 years experience, Ms Clark is a pharmacist with 30 years experience and Mr Howard is a pharmacist with 17 years experience working in NHS hospitals.

17. All of these individuals state that they are aware that the Napp Pharmaceutical Group of Companies is particularly active in the fields of pain management and palliative care. They all indicate that this group provides a number of pharmaceutical products for the treatment of pain that have a reputation for reliability. They are all aware that this group produces a wide range of products that are used in the fields of anaesthesia and pain medicine. They all state that the Napp group of companies are well known for the research it carries out and for the funding it provides for research in the area of pain.

18. Mr Hunt states that Napp Group of companies provide training courses for nurses who look after cancer patients in their own homes. It has also provided funding for the Napp European Course on Advanced Cancer. It funds an annual essay award on the subject of pain control and provides a range of training courses for nurses, medical practitioners, hospital pharmacists, community pharmacists and those who care for the elderly. As a result of this work which is supplemental to its role as a manufacturer of pharmaceuticals, the Napp Pharmaceutical Group of companies has gained a reputation within the fields of pain relief and palliative care amongst researchers, universities and charities for the work it has carried out.

19. Six of these nine individuals (Ms Clark, Mr Goldberg, Mr Howard, Mr Hunt, Dr Johnson and Dr Tookman) indicated that they would expect that any pain relief product which included, as one of the recognisable elements in its name, the word “NAP” or “NAPP”, would to be manufactured by or associated with the Napp Group of Companies.

First Witness Statement of William Heath

20. Mr Heath is director of Business Strategy at Napp Pharmaceuticals Limited. He has worked for the Napp Pharmaceutical Group of companies for 27 of his 34 years in the pharmaceutical industry. He is authorised to make his statement on behalf of all the companies in the Napp Pharmaceutical Group which comprises five companies: Napp

Laboratories Limited; Napp Pharmaceutical Group Limited; Napp Research Centre Limited; Napp Pharmaceutical Holdings Limited and Napp Pharmaceuticals Limited. The parent company of the Group is Napp Pharmaceutical Holdings Limited, which took over from Napp Pharmaceutical Group Limited in 1998.

21. Mr Heath states in paragraph 7 that the trade mark NAPP was first used in the 1920's by Napp Laboratories Limited, then known as H.R. Napp Limited and that it has been used continuously in relation to pharmaceutical products since then. The mark appears on the packaging of all products sold by the Napp Pharmaceutical Group in the UK and it is also present on most of the tablets themselves.

22. A list of all the products promoted in the UK using the trademark NAPP from 1983 to 2004 is provided as Exhibit WH2. There are 123 products listed here and I note that 2 of these are NAPP comb and NAPP detector comb. Exhibit WH2 also includes examples of the packaging and promotional material used with some of these products. In these examples, the mark appears as the word NAPP in upper case letters within an oval border, either on its own, or as the crown on black stripe sloped at a 45° degree. The NAPP mark appears separate to the name of the product and is serving clearly to indicate trade origin by identifying who is the producer of the product.

23. Exhibit WH1 provides details of turnover and annual profit and loss accounts for the companies in the Napp Pharmaceutical Group. Exhibit WH4 provides details of sales of products bearing the NAPP mark in the UK. Exhibit WH4(a) shows annual net sales figures in the UK for all products bearing the NAPP mark from 1980 to 2004. In 1980, total sales were £7,682,000; in 1994, they were £45,67,000 and in 2004, total sales were £71,863,000. These values are calculated as sales ex-factory. Exhibit WH4(b) provides a breakdown of sales figures by therapy area of products sold in the UK bearing the NAPP trade mark in the period 2001 to 2004. This is obtained from the IMS MIDAS database according to Mr Heath but the nature of this database is not explained further. The values quoted are in Euros at manufacture level which according to Mr Heath equates to the ex-factory value. Exhibit WH5 provides details of expenditure on promoting Napp products in the UK from 1988 to 2004. Mr heath indicates that this expenditure is for "placing of advertisements in the medical press and trade directories, dictionaries, brochures, leaflets, promotional gifts bearing the mark NAPP and the costs of direct marketing and sales force teams". In 1994, promotional expenditure was £13, 368,700, by 2004 it had increased to £23,570,055.

24. In Exhibit WH3, Mr Heath provides 3 printouts from the publication DataMonitor all of which were published in 2001. These printouts discuss the position of products produced by Napp in relation to those produced by other manufacturers in the fields of asthma, arthritis and analgesia (i.e. the relief of pain) in the period 1997-1999. For example, Napp was producer of three of the top ten opioid drugs for analgesia in 1997 and 1998 (MST, Paladone and Sevredol) and of one of the top four non-opoid, non-NSAID (Non-steroidal anti-inflammatory drug) analgesics in the same period. However, I note that this data refers to the situation some 5 years before the relevant date, the date of application for the sign ENTRONAP.

25. Mr Heath then provides a number of exhibits, Exhibits WH5 to WH9, which relate to the information and promotional activities provided by the Napp Pharmaceutical Group. This evidence takes two forms, firstly, information and advice provided directly by Napp to the medical profession, for example, sponsorship by Napp of over one thousand district nurses

through a series of three day training courses in palliative care. This is referred to in Exhibit WH6 which consists of pages downloaded from the Group's website (www.napp.co.uk) in the section "Educational Services". I note also that in the section entitled "products & services", various products made by Napp are shown (Oxycontin, Adizem & Zanidip) and it is possible to discern the NAPP mark within the oval roundel in the bottom left hand corner of each package shown.

26. The second form of evidence in these exhibits is information and advice regarding pain and its management for medical practitioners, patients and the wider public provided as a result of the sponsorship and financial support from the Napp Group. This includes sponsorship and financial support for textbooks, information booklets, research projects, surveys, magazines, educational projects. Exhibit WH7 provides examples of :

- A text book on palliative care (Oxford Handbook of Palliative Care) for medical students and practitioners sponsored by Napp Pharmaceuticals Limited;
- An information booklet for doctors on pain management entitled MIMS handbook of Pain Management also sponsored by Napp Pharmaceuticals Limited,
- Two booklets produced by the charity CancerBacup on controlling pain in cancer, both of which were funded by Napp;
- A booklet entitled "control Pain, live life" for patients with chronic pain produced by Napp Pharmaceuticals Limited and endorsed by the Pain Association. This title is also a registered trademark owned by Napp.
- A magazine entitled "paineurope" provided by Napp Pharmaceuticals Limited that is produced quarterly and distributed throughout Europe at no charge. This appears to provide information and updates on developments in the area of pain research and management including research projects, surveys and reports from conferences that cover this issue. I note that the research projects referred to and discussed are not only those funded by the Napp Group,
- A report from a research project and survey funded by an educational grant from Napp Pharmaceuticals Limited entitled "Adult Chronic Pain management Services in the UK
- A single page article from employees of the Medical Affairs Department, Napp Pharmaceuticals Limited aimed at the medical profession entitled "An analysis of healthcare costs associated with transdermal opiods for the treatment of chronic non-malignant pain". I note that the other side of this article contains prescribing information for the Napp produced drug Transtec that is one of the drugs analysed in the article.
- Various pages from the website of the charity CancerBacup acknowledging the funding and sponsorship provided by Napp Laboratories and Napp Pharmaceuticals Limited for various activities,
- Various pages from the website of the British Pain Society acknowledging the funding and sponsorship provided by Napp Pharmaceuticals Limited in relation to its Annual Scientific Meetings in 2002, 2003 and 2004, its 2003 Pain in Europe Survey and for an educational grant.
- Photocopies (first page only) of information on morphine for patients including a CD-ROM and a guide for patients

27. Exhibit WH8 comprises a large number of articles and items from a wide range of publications in the UK which, Mr Heath states, make reference to:

(a) various products produced by Napp in the period 1988 to 2004

(b) the companies of the Napp Pharmaceutical Group and their activities in the period 1984 to 2004.
(c) the marketing campaigns carried out by Napp and their effectiveness' published in the journals Pharmaceutical Times and Pharmaceutical Marketing in the period 1992 to 2004.

These articles are all from publications which from their titles are clearly directed at those working in the medical and pharmaceutical fields, such as doctors, nurses, pharmacists as well as those involved in sales, promotion and marketing of pharmaceutical products within these fields.

28. Exhibit WH9 provides examples of 19 articles from more general publications in the UK which Mr Heath states will have made the public at large more aware of the Napp Pharmaceutical group. However, I note that 14 of these are from 2003-2005 editions of the Cambridge Evening News which is a regional paper covering the area where the Napp Pharmaceutical Group has its UK headquarters and operation. I note also that 2 of those occur after the filing date of the applicant's trademark. Of the remaining 5 articles, only 3 are from UK national Newspapers and the dates of these articles are significantly before the filing date of the applicants trade mark (An article from The Times dated in 1995, two from the Independent dated in 1998 and 1990). The final two items are a report from the BBC news in 1999 downloaded from the BBC website and an article from a publication entitled Daily Essentials in 1997.

29. The final exhibit WH10 provided by Mr Heath comprises a list of the trademark registrations for the mark NAPP held by the Napp group. Such state of the register evidence will be noted accordingly.

30. The final two paragraphs of his witness statement Mr Heath comprise submission regarding the likelihood of confusion between the mark NAPP and the applied for mark ENTRONAP (see paragraph 17) and the likelihood that an association made between the applied for mark ENTRONAP and the Napp Pharmaceutical Group would be damaging to the latter's reputation and goodwill. And, as a result, it will be treated accordingly.

APPLICANT - EVIDENCE IN REPLY

Witness Statement of Alan Sheppard

31. Mr Sheppard is Head of European Business at Dr Reddy's laboratories (UK) Limited, a position he has held for 18 months. Many of the comments in the witness statement from Mr Sheppard and much of the material submitted with it are directed towards pointing out problems and deficiencies in the evidence provided by Mr Heath on behalf of the Opponent. This falls into the category of submission and will be treated accordingly. One exhibit, AS10, an extract from the website of the Office of Fair Trading, does not appear to have any relevance to issue under consideration and has been treated accordingly.

32. Exhibit AS3 comprises two examples of packaging used by Reddy for its products Amlovasc and Omeprazole. Mr Sheppard states that the name of the product appears dominantly and the company name, i.e. Dr Reddy, appears less prominently. He comments that this presentation is in the same fashion as that used by the opponent in their packaging.

He reproduces copies of two examples of packaging from the opponent (see exhibit WH2) in Exhibits AS1 (for FLEXIN) and AS2 (for OxyNorm) to illustrate this point. In Exhibit AS8, Mr Sheppard provides an example of the packaging that his company proposes to use for the product ENTRONAP that also follows the same fashion.

33. Mr Heath then goes on to say that this fashion is usual for all forms of packaging of goods, not just pharmaceuticals. The name of the product is of most interest to the consumer and the name of the proprietor or manufacturer is secondary. However, I note that no evidence is provided regarding this generalisation.

34. Much of the rest of the evidence submitted by Mr Sheppard is directed towards showing that the three letter string 'NAP' is commonly used in the names of companies and products including those that sell pharmaceuticals.

(a) Exhibit AS4 provides a list of pharmaceutical products sold in the UK that include the three-letter string "NAP" in their name. The origin or source of this list is not clear and it is not possible to conclude if this is a list of examples only or a list of all those pharmaceutical products sold in the UK with this element. Mr Sheppard states that he is aware that this list includes generic names, for example, NAPROXEN; registered trade marks not owned by the opponent Napp; brand names; and general terms such as NAPPY (in the name SAVLON NAPPY RASH).

(b) In exhibit AS6, Mr Sheppard provides a list of companies taken from the Companies House Website which all contain the three letter string 'NAP'. No information is provided about the goods and/or services or business provided by these companies. In Exhibit AS7, Mr Sheppard provides a printout from the Medicines.org.uk website which lists all the products sold by Napp Pharmaceuticals limited. He notes that none of these contain the three-letter string 'NAP'.

(c) In exhibit AS9, an article from the on-line edition of New Scientist magazine, the three-letter string 'NAP' is used to identify a protein fragment that can help to prevent Fetal Alcohol Syndrome which is caused when the developing brains of unborn babies is exposed to toxic levels of alcohol.

35. In his statement, Mr Sheppard makes comments regarding 8 of the 9 witness statements provided by various third parties in the Opponents evidence. Most of these comments fall into the category of submission and are treated accordingly. However, he does provide a number of items in Exhibit AS5, which, he states, show that some of the medical and pharmacy practitioners who submitted witness statements in support of Napp have a relationship with the Napp group of companies that goes directly to their usefulness and ability to act as independent third parties. These include:

- A list of references comprising an entry "142: Tookman AJ, Napp Pain Advisory Service. Palliative Care Today, VIII, 13, 1999". I note also the following reference "143. Tookman AJ and Kurowska A, management of terminal pain and distress, Prescriber 10, 29-41, 1999. The list of references is from a website www.ucl.ac.uk but no other explanation of its origin is provided.
- A photocopy of a 2 page press release announcing the 2003 pain in Europe Survey which lists 'Dr Tim Hunt, Emeritus Consultant Palliative Medicine, Cambridge University, EU Advisor on Palliative medicine' as the author of the introduction.

This survey was sponsored by Napp Pharmaceuticals (see end of second page). I note also that the Control Pain Live Life device mark registered to Napp appears at the top of this press release (see Exhibit WH7).

- An extract from the on-line version of the Pharmaceutical Journal dated 11 May 2002, which indicates that Dr Beverley Collet, Consultant in Pain Management, issued a statement on behalf of Napp in relation to the lunch of 'Buprenorphine Transdermal patches'.
- A poorly reproduced photocopy of a newsletter listing Marie Fallon as principal investigator in a research project sponsored by Napp Laboratories in the area of cancer pain. It is not stated where this newsletter comes from, although it appears to be from a university in Scotland but which one is not clear.

Witness Statement of Stuart Nield

36. Mr Nield is a registered trademark attorney with Mewburn Ellis LLP who has 15 years experience in the area of trademarks. He is responsible for handling the trademark matters of the applicant, Reddy.

37. His statement is comprised entirely of comments on the evidence provided by Napp in particular the statement provided by Mr Charlton. Thus, it falls squarely into the category of submission and will be treated accordingly.

OPPONENT - EVIDENCE IN REPLY

Second Witness Statement of William Heath

38. Much of this second statement from Mr Heath comprises comments regarding the statement and associated exhibits provided by Mr Sheppard on behalf of the Applicant and various comments on how to interpret trademarks comprising the three-letter string NAP. As such it is submission and will be treated accordingly.

39. In paragraph 4. Mr Heath outlines the relationship between the Napp and the medical and pharmacy practitioners who gave evidence in support of the opposition. These can be summarised as follows:

(a) Dr Tookman is author of the Palliative Care Today article identified by Mr Sheppard. He has chaired an advisory board on opioid myths and issues arising from the Shipman Enquiry although Mr Heath does not explain the relevance of this to the issue under consideration
(b) Dr Tim Hunt is a retained advisor of the company
(c) Prof Ian Power is chair of the Napp Scottish Pain Advisory Board
(d) Philip Howard is a member of the Napp Pain Advisory Group
(e) Christine Clarke is a member of the Napp Pain Advisory Board
(f) Dr Beverly Collett is a member of the Napp Pain Advisory Board and has appeared in educational materials
(g) Dr Jeremy Johnson is a regular contributor to the Napp District Nurse Course and speaker at Napp sponsored educational events

(h) Dr Marie Fallon has provided advice to Napp Pharmaceuticals Limited (the company) on an ad-hoc basis. It is not stated whether this advice was paid for or not but I consider it unlikely that it was not paid for by Napp.

References to 'the company' by Mr Heath in paragraph 5, I deduce is to Napp Pharmaceuticals Limited. Thus Dr Hunt is a paid adviser of and Dr Fallon has provided ad-hoc advice to Napp Pharmaceuticals Limited. No explanation is provided regarding the relationship between the company and the Napp Pain Advisory Board, the Napp Pain Advisory Group and/or the Napp Scottish Pain Advisory Boar.

40. Exhibit WH1 shows that the National Association of Patient Participation uses the term "N.A.P.P" and not NAPP to refer to itself.

41. Mr Heath provides Exhibit WH2, an extract from The British National Formulary (52nd edition) and a publication entitled 'Chemist & Druggist Price List' dated December 2006, to show that not all of the trade marks with the three letter string 'NAP' referred to by Mr Sheppard in paragraph 7 of his statement and in his Exhibit AS4 are in use in relation to pharmaceutical products in the UK. However, these publications do not appear to relate to the situation in 2004 when the application to register the mark was filed.

Second Witness Statements from Medical & Pharmacy Practitioners

42. Laurence A. Goldberg, Dr Adrian Tookman, and Christine Clark provided a second statement. These statements are almost identical in content and layout and comprise their comments in relation to Exhibit AS4 filed on behalf of the Applicant. They each provide very similar accounts of how they would interpret or analyse various trademarks comprising the three-letter string 'NAP' depending on its position in the mark.

43. All three state that ENTRONAP appears to be a combination of 'entro', which they would interpret as 'entero', and 'nap' which they would interpret as being associated with the Napp Group of companies.

PLEADINGS

44. At the hearing, both sides accepted that there was no significant difference between the objection under Section 5(2)(b) and that under Section 5(4)(a). If the opponent succeeds under the first he also succeeds under the second, if he fails under the first he also fails under the second.

DECISION

Section 5(2)(b) of the Act - Likelihood of confusion

45. According to section 5(2)(b) of the Act a trade mark shall not be registered if because:

> "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."

46. Section 6(1)(a) of the Act defines an earlier trade mark as:

> "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"

47. As mentioned above CTM registration 000894469 has a filing date of 29 July 1998 and so constitutes an earlier mark under Section 6(1)(a). As this mark did not complete its registration procedure until 3 January 2000, it is not necessary for Napp to provide evidence of use of this mark

48. In determining the question under section 5(2)(b) of the Act, I take into account the well established guidance provided by the European Court of Justice (ECJ) in:

(i) *Sabel BV v Puma AG* [1998] RPC 199;

(ii) *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117;

(iii) *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* [2000] FSR 77;

(iv) *Marca Mode CV v Adidas AG and Adidas Benelux BV* [2000] ETMR 723;

and

(v) *Vedial SA v Office for the Harmonization of the Internal Market (marks, designs and models) (OHIM)* (case C-106/03 P) [2005] ETMR 23.

49. It is not required that actual confusion results between the marks in order for an opposition under Section 5(2)(b) to succeed. The test is the likelihood of confusion. In essence the test under section 5(2)(b) is whether there are similarities in marks and goods that would combine to create a likelihood of confusion in the mind of a consumer. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgments of the European Court of Justice mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the applicant's mark and the mark relied upon by the opponent on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications.

50. The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was considered by David Kitchen Q.C., sitting as the Appointed Person, in Steelco Trade Mark (BL O/268/04). Mr Kitchen concluded at paragraph 17 of his decision:

"The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks, which have become household names. Accordingly, I believe the observations of Mr. Thorley Q.C. in DUONEBS should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trademark in the market is one of the factors that must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v. Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks that are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details that would differentiate one mark from another. Where a mark has become more distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case."

ANALYSIS

51. The applied for registration and the earlier mark and their respective specifications are shown below

	CTM no. 000894469	Applicants Sign (GB Application no. 2364795)
	NAPP	ENTRONAP
Class 3	Skin and scalp cleansers; shampoos; soaps; hair lotions; dentifrices; mouthwashes	
Class 5	Pharmaceutical, veterinary, diagnostic and sanitary preparations and substances; infants and invalids foods; medicated food supplements; disinfectants for hygiene purposes, food supplements for destroying vermin;	Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides; herbicides; pharmaceuticals used for pain management.

Comparison of the Goods

52. In his skeleton argument Mr Edenborough, for the applicant, accepted that the goods covered by the earlier specification and those applied for in class 5 are either broadly identical or similar. However, he states that "*food for babies, …, material for stopping teeth, dental wax, … herbicides*" are, if held similar, only very slightly so. At the hearing, Mr Edenborough made less of this distinction than he had in his skeleton argument stating that the "goods in question are identical or they are fairly similar".

53. It is established law that, in the case where the earlier mark has not been registered for a period of more than five years, I have to assume normal and fair use of the mark for all the goods for which it is registered and I have to compare this with what would be considered normal and fair use of the goods for which the sign is seeking registration (see, for example, summary in Kerly's Law of Trade Marks and Trade Names, 14th edition, para 9.070 and relevant case-law referred to in footnote 83).

54. Taking account of the specification in classes 3 and 5 for which the mark NAPP is registered and of the specification applied for by Reddy, I consider that the goods in question are identical or similar. I consider that "food for babies" is very similar, if not, identical, to "infants foods"; "dental wax", a product used for cleaning teeth, is sufficiently similar to "dentrifices", a substance, usually a paste or powder, for cleaning teeth (see registration in class 3); "disinfectants for hygiene purposes" is identical to "disinfectants" and that it also covers more specific terms such as "herbicides" and "fungicides; and that "preparations for destroying vermin" will be brought to mind by "food supplements for destroying vermin"; "plasters and materials for dressings" falls within the general definition of "sanitary preparations". The only term for which I do not see an identical or similar term is "material for stopping teeth", which I consider to be material for filling teeth, such as dental cement or amalgam used by dentists. Thus, I conclude that the goods for which registration is sought are similar or identical to the goods as registered except in relation to "material for stopping teeth".

55. I note in particular that both specifications cover pharmaceutical and veterinary products and preparations in class 5. This will cover those products that will be available only through prescription obtained from a medical or veterinary professional as well as those products available by direct sale 'over-the-counter' (OTC) at a pharmacy or a supermarket or via an internet based store. Examples of pharmaceutical products and preparations made by Napp and available by prescription only (see Exhibit WH2) include, FLEXIN for arthritis pain relief, DEPOCYTE or OXYNORM for cancer pain relief, DIUMIDE-K for those with oedema (fluid retention) in the heart, lungs, kidney or liver, PHYLLOCONTIN or UNIPHYLLIN for treatment of asthma. Examples of OTC preparations produced by Napp include treatments for head lice, e.g., CARYDERM, PRIODERM and 'Full Marks' Shampoo; cold sores, e.g. 'Brush Off' liquid; and various infant ailments such as cradle cap, e.g. CARDOCAP; teething pain, e.g. TEEJEL; or nappy rash, e.g. MORSEP.

Reputation of the Earlier mark

56. From the evidence supplied by Mr Carlton and Mr Heath I am satisfied that the opponent has a reputation in the pharmaceutical field as a company that supplies prescription and OTC pharmaceutical products and that it is particularly well known as a producer of pain medication for palliative care and the treatment of cancer. Napp provides pharmaceutical preparations of various types such as analgesics (for pain relief), laxatives, bronchodilators (improve breathing) that can be used in the treatment of conditions such as cancer, arthritis

and asthma. It is the supplier of 3 of the top 10 opioid pain medications most often used in cancer care in the UK (MST Continuous, PALLADONE, SEVREDOL), and one of the top 10 selling non-opioid non-steroidal anti-inflammatory drugs (NSAIDs) (REMEDENE) used for treatment of pain in the UK.

57. Through its promotional activities, Napp has gained recognition within the wider medical and healthcare profession as a leading supplier of pain medication and for promoting training and best practice in pain management. There is also evidence to support that Napp have gained some recognition from that part of the general public who have an interest in pain management as a result of their own or family experience, for example, Napp has been involved in the development of best practice and research in the area of pain management through its funding of a number of programmes and publications with charities such as CancerBacup (see Exhibit WH7).

58. Thus I consider that the trade mark Napp will be recognised by members of the medical profession and by those members of the general public who have some knowledge or experience of pain as being a reference to the Napp Pharmaceutical company and so indicate the trade origin of the goods on which this trade mark is used. I do not consider that the opponent has provided evidence to show that the trade mark NAPP has acquired a reputation through use in relation to a particular category or sub-category of goods in class 5.

Comparison of the Marks

59. Both the registered mark and the sign applied for are word marks without any device elements. The registered mark is a four letter, one syllable word NAPP. The sign applied for is an eight letter, three syllable word EN-TRO-NAP. The only similarity between the mark and the sign is that the final syllable of the sign uses three of the same four letters as the registered mark, i.e., NAP.

60. The earlier mark NAPP is a made up word and thus has no specific meaning attached to it. Although it does not have a dictionary meaning, the word NAPP may bring to mind its homonym NAP which can have a number of meanings (e.g., a short sleep, the raised pile on textiles, a type of betting). However, in the context of these goods and in the minds of the persons who will be using them, I do not think that the word NAPP will be seen as anything other than a made up word used to indicate the trade origin. Words such as NAPP that contain the fragment -PP are not common in the English language and thus may be quite noticeable in a visual sense. From an aural point of view there is no difference between the sound of NAP and NAPP.

61. The difference between the lengths of these words will be noticeable in a visual and in an aural sense. The beginning of the mark is very different to that of the sign in both how it is written and how it will be said. The only similarity between the mark and the sign is that the final third syllable of the mark is pronounced as the same sound as the sign, i.e., -NAP is the same sound as NAPP.

The Market for the goods

62. Goods in class 5 such as those for which the NAPP mark has been used (see above) and those for which the sign ENTRONAP has been applied for (see above) are sold either directly to end-users as ‘over-the-counter’ (OTC) products or ‘off-the-shelf’ products in supermarkets

and pharmacies or with the aid of medical professionals, such as general practitioners or hospital doctors, who prepare and issue prescriptions. Increasingly, such prescriptions are being prepared and sent electronically. Customers may not need to ask for the goods at all because they can hand the prescription to the pharmacist or a doctor or healthcare professional may be able to use a catalogue, paper or electronic, to select and order these goods.

63. As a consequence I consider that visual means will be the most important means that consumers will use when making decisions about buying and selling these goods.

64. As the evidence from Mr Heath shows, the mark NAPP is strongly associated with the name of the company who produces these various class 5 products. As mentioned above in my summary of the evidence, none of the pharmaceutical products listed by Mr Heath in Exhibit WH2 use the word fragment NAPP (or NAP) in their name (the 2 items that do are types of combs for headline which do not fall into class 5).

65. The mark NAPP has been stamped onto all the tablets produced by the opponent and is used on all packaging as a means to identify the trade origin of the goods. Mr Heath in his first statement (see paragraph 7) states that the word NAPP appears "on the majority of the tablets themselves". This serves to identify the sources of the tablets and not the product that the tablets contain. Exhibit WH2 shows that the NAPP mark has been used on all packaging produced by Napp Pharmaceuticals in the period 1983 to 2004. The packaging for all the products sold by Napp shows use of the mark NAPP in various places on the front, side and/or rear of the package in addition to the name of the product held within the packaging (see Exhibit WH2 also). The name of the product in the package is the most prominent and eye-catching part of the packaging and the name NAPP while also quite easy to see is less prominent. Thus the NAPP mark is being used to clearly indicate trade origin.

66. In his evidence for the applicant, Mr Shepherd, comments that this is a common approach in the pharmaceutical field. The packaging of various pharmaceutical products, both prescription and OTC types, will comprise the name of the product, usually a trade mark in its own right, as a prominent feature and also the name of the company that produces it as a less prominent feature. The latter is often also a trademark as well. Mr Shepherd refers to the numerous examples from Napp in Exhibit WH2 and also provides some examples from Reddy in Exhibit AS3 to illustrate this general point.

The Relevant Public (average consumer)

67. In deciding the likelihood of confusion under section 5(2)(b), I have to take account of who is the average consumer who makes up the relevant public for the goods for which the mark has been registered and the sign has been applied for. This decision has to be made in relation to all the goods covered by the registration and the specification applied for. It is well established in the case law when making a global assessment of the likelihood of confusion, account should be taken of the average consumer of the category of products concerned, who is reasonably well informed and reasonably observant and circumspect. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question [see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [2000] FSR 77 (referred to above)].

68. The NAPP mark is registered for a variety of goods in class 5 and no distinction has been made in this registration between over-the-counter (OTC) and prescription type

pharmaceuticals, i.e. between products that an end-user can purchase directly and those that require the use of a prescription prepared by a medical professional. The specification applied for also does not make a distinction between prescription and OTC pharmaceutical preparations. It is clear that the relevant consumers for such goods will not be a homogenous group. It will include medical professionals such as hospital doctors and general practitioners at one end, via those who supply such goods both retail and wholesale, down to the general public at the other end who will be patients, users and purchasers of both prescription and OTC products. These consumers will display a varying degree of knowledge and brand discrimination in relation to the pharmaceutical and OTC products and the companies who supply them. Medical practitioners will be the most knowledgeable while members of the public will be much less knowledgeable.

69. The approach to be taken when considering who are the relevant public and the average consumer in relation to pharmaceutical preparations and substances is one that has been considered by the Court of First Instance (CFI) in case T-256/04, *Mundipharma AG v OHIM*. The CFI found that account has to be taken of the relevant public for the goods covered by the mark. It stated (at paras. 44 and 45) that "*… the relevant public for the goods covered by the mark applied for, namely therapeutic preparations for respiratory illnesses, is made up of patients in their capacity as end consumers, on the one hand, and health care professionals, on the other*" and "*.. Since some of those goods may be purchased by patients without a medical prescription, the Court finds that the relevant public for those goods includes, in addition to health care professionals, the end consumers.*"

70. Mr Speck argues that the sign ENTRONAP will be perceived by the relevant public as being made up of a descriptive part ENTRO which brings to mind ENTERO meaning "of the intestine" and a distinctive part –NAP. The relevant public in his view appears to be made up mostly of medical practitioners and others who are involved in the sale and use of prescrition drugs. They will recognised this sign as having something descriptive in front of the fragment –NAP. This leaves NAP as the distinctive element of the sign and this will bring the registered trade mark NAPP to mind. This earlier registered mark is very well known in the pharmaceutical field as an idicator of trade oprigin for Napp Pharmaceuticals. Thus a connection will be made in the mind of the consumer between ENTRONAP and NAPP so that they will think that the goods referred to by the sign ENTRONAP and the mark NAPP come from the same trade source, or in the words of Mr Speck, are from " the Napp stable". As a result there is a likelihood of confusion between the sign ENTRONAP and the registered trade amrk NAPP. In support of his arguement, Mr Speck refers to the evidence of Mr Carlton and the witness statements of the Medical and Pharmacy practitioners. He also argues that even if medical practitioners and others who are involved in the sale and use of prescription drugs are not the whole of the relevant public, they represent a significant element of it and if this group are likely to be confused then the opposition should succeed

71. Despite the differences between ENTRONAP and NAPP as words referred to above, Mr Speck argues that the relevant public of medical doctors and other healthcare professionals will have a sufficient level of knowledge to know that ENTRO is very close to ENTERO meaning 'of the intestine' which is a descriptive of the place where the drug identified by the sign will be administered. This drug is formulated to pass through the stomach and into the intestine where it will be digested and will pass into the bloodstream. Once they realise this similarity, these medical doctors and other healthcare professionals will consider that the distinctive part of the mark is –NAP. As a result, this will bring to mind the

registered trademark NAPP and they will consider that the product identified by the applied for ENTRONAP mark is from the same undertaking as a product bearing the NAPP mark.

72. I do not agree with Mr Speck's argument. Firstly, if the relevant public is made up of only or predominantly medical doctors and other healthcare professionals then the average consumer in this group has a high level of knowledge and brand awareness (see Mundipharma AG v OHIM referred to above). As a consequence he/she will be aware (a) that NAPP indicates the name of a pharmaceutical company that supplies a range of prescription and OTC products and (b) that it is common practice in the market for pharmaceutical goods to be sold under a particular trade name (which is usually a registered trade mark) and also with a clear identifier of the company who produced the product (this is also often a registered trade mark). The latter is sometimes referred to as a house mark because it identifies the company that produces the product and allows a consumer to identify different products made by the same company. Both applicant and opponent have provided examples of the get-up used in packaging their respective products and it is clear that Napp produces many different products with many different names but it uses the trade mark NAPP to identify these as being products produced by the Napp group of companies (see Exhibit WH2). Similarly, there are a number of different products produced by Reddy that have a variety of names but each is also clearly labelled with the Dr Reddy house mark (see Exhibit AS3). I am satisfied that medical doctors and other healthcare professionals will be very familiar with this practice and will be easily able to discern the difference between the name of the pharmaceutical products that they want to prescribe for a patient or purchase for their pharmacy and the company who produces these products.

73. Furthermore, I think that if a consumer is sufficiently knowledgeable to make the two steps required to get from ENTRONAP to NAPP, i.e., *step 1*: ENTRO = ENTERO; followed by *step 2*: ENTERO is descriptive meaning 'of the intestine', both of which are required for confusion to arise between the sign applied for and the registered mark, then this consumer will also be knowledgeable enough to discern that ENTRONAP is the name of a product but the NAPP is the name of a pharmaceutical company that supplies a range of different pharmaceutical products. I am satisfied that this will certainly apply in the visual comparison of the marks even allowing for imperfect recollection. I am also satisfied that this will apply in the oral comparison of the marks also allowing for imperfect recollection because they will be sufficiently discerning to know that NAPP is not the name of a product but of a company which has a reputation as a supplier and producer of pharmaceutical products, in particular, those for the treatment of cancer pain. Saying or hearing ENTRONAP as the name of a product they want to prescribe/purchase will not cause them to being to mind the name of the pharmaceutical company. I think that this is an example where a consumer may make an association between NAPP and ENTRONAP but that this is not likely to lead to confusion, as he/she will be able to discern that Napp is the name of a company and ENTRONAP is the name of the product.

74. Mr Speck provides 9 witness statements from third parties to support the opponent's analysis. These third parties are all medical or pharmacy professionals who work principally in hospitals and with prescription drugs in the area of cancer treatment and palliative care. There was much discussion in the written submissions and at the hearing as to the relevance and weight to be attached to these third party statements. Mr Speck indicated at the hearing that these statements "provide evidence of the medical profession saying what the medical profession would think" and that "they are explaining why, the group of people of which they are a member, would be confused". Mr Edenborough argues on the other hand these

statements are problematic whether they are considered to be the evidence of individuals and how they are confused or whether they are considered as the evidence of experts saying how they think that other medical professionals would respond. Having taken account of the comments from both sides, I do not consider that these third parties are expert witnesses. I consider that at best they represent the views of individuals who fall within one part of the relevant public.

75. The opponent in response to questions raised by the applicant confirmed that there was a relationship between 8 of the people making these statements and the Napp group of companies (see second witness statement of Mr Heath). I note that the applicant did not apply to cross-examine the persons making these statements. Mr Goldberg is the only one of the 9 who does not appear to have an explicit link to Napp, although this may be because Mr heath forgot to state the relationship between Mr Goldberg and Napp. I note that Mr Heath does not make any comment excluding a link between Mr Goldberg and Napp in his second witness statement. I have no information on how these 9 witnesses were chosen and how their witness statements were prepared. There appears to be sufficient similarity of language between some of these statements to raise a question regarding whether or no these represent their own words prepared by themselves in an independent fashion. In the absence of any explanation of this selection process, I have to conclude that selection was most likely based on the fact that the opponent knew these people because they had been involved in various activities and projects funded by the Napp group of companies.

76. The above considerations make it difficult for me to accept that these witnesses can be taken as representative of an average consumer from the relevant public. Firstly they represent only a part of the relevant public as discussed above and, secondly, I do not consider that they represent an average consumer from that relevant public. I consider that because of their involvement with Napp they have, in effect, a predisposition to make the connection that Mr Speck is arguing between the sign ENTRONAP and the mark NAPP. I consider that their connection with Napp has made it more likely or predisposed them to make a connection between the mark as registered and the sign.

77. In each of the second witness statements filed by Dr Tookman, Mr Goldberg and Ms Clark, there is a high degree of similarity in the words and phraseology used to explain their understanding of the names of pharmaceutical products that contain the word fragment ‘NAP’ and in their assertion that the pharmaceutical product name ENTRONAP would be confused with or bring to mind the mark NAPP which is the name of the company that sells pharmaceutical products. As I have mentioned above I do not consider that, on balance, I can accept that these would be the views of an average consumer.

78. I also consider that these statements do point to the fact that such medical and pharmacy practitioners do have sufficient knowledge and brand awareness to make the distinction between the name of a pharmaceutical product and the name of a pharmaceutical company. On balance I do not think that they will confuse the two as easily as the opponent thinks. At most I think that such consumers may make an association between the trademark ENTRONAP for a pharmaceutical product and the trademark NAPP that brings to mind the name of a pharmaceutical company. However, at that point I think that they would realise the difference. A medical or pharmacy professional will exercise great care in specifying which drug he wants to use to treat a patient with cancer. Such treatment usually is long term and has to be tailored to the individual situation. This level of attention would also mean that the name of the company who supplied that product would also be clearly identified or fixed in

their mind to make sure that the correct product was being ordered and supplied to the patient. In such a situation, the patient with cancer would also be likely to have a greater level of knowledge and brand awareness so that they too would be able to distinguish between the sign and the mark NAPP that indicates the company who supplies such drugs/products.

79. Furthermore, I think that these statements illustrate the fact that such professionals may have the ability to distinguish the names of pharmaceutical products that are in use as part of their normal work activity and to recognise that the word fragment -NAP may refer to NAPROXEN. They may use this as a means to remind themselves what product they want to prescribe or purchase. Consumers such as these would possibly also be aware that Naproxen is easily broken down in the stomach and that it needs to pass through the stomach intact and into the intestine where it can then be digested and thus pass into the bloodstream and exercise its therapeutic effect. If they are sufficiently aware that ENTRO means ENTERO, it is also difficult not to conclude that they would be able to bring to mind that the intestine is the best place to administer a cancer pain treating drug such as Naproxen. This would led them to conclude that the mark ENTRONAP is referring to the delivery means of the drug (ENTRO = ENTERO referring to intestine) and NAP referring to naproxen, the material that actually provided the pharmaceutical effect they want, e.g. a product to relieve pain in cancer treatment. From a conceptual point of view, this would reduce further the chance that such consumers would be likely to confuse the sign ENTRONAP with the registered mark NAPP. If this were the case, it would in my view teach away from the likelihood of confusion between the sign and the mark.

80. Mr Speck considers that the statements from the medical and pharmacy practitioners' amount to statements from those involved in the trade and are important because they are people who are part of the relevant purchasing public. However, as I have said above, this interpretation of the relevant public is too narrow. Specialist medical and pharmacy practitioners are not the only group that make up the relevant public, it also includes other healthcare professionals involved in wholesale and retail supply and purchase and members of the general public as patients and users. Also the goods as registered and as applied for are not just limited to cancer treating pharmaceutical products or even to prescription only pharmaceutical products. The opponent has focused only on part of the relevant public and on a portion of the goods for which the mark is registered and for which use has been shown.

81. The relevant public also comprises members of the general public who will be patients and users of the goods as registered and as applied for which are both prescription and non-prescription OTC pharmaceutical products. This part of the relevant public will not have the level of knowledge and brand awareness to discern that ENTRO easily brings to mind ENTERO and that ENTERO is descriptive and means 'of the intestine' and so the sign applied for is in effect a NAP mark. They will not have any reason to see the sign as anything other than ENTRONAP and even allowing for imperfect recollection they are not in my view likely to confuse this with the registered mark NAPP taking account of visual, oral and conceptual comparisons.

82. I do not think that the situation of the end user and consumer public falls into the same category as was the situation in *Mundipharma v OHIM* (referred to above). The CFI found that end user consumers would recognise the first part of each mark as being descriptive because they referred to the condition that the drugs covered by the marks were designed to treat, i.e. respiratory illness. The CFI stated (see para 59):

> "As to the end consumers, it has been noted above that their level of attention and knowledge is higher than average because of the serious nature of the illnesses from which they suffer. They will thus be able to distinguish the component 'respi' in the two marks in question and to understand its conceptual content, which refers generally to the nature of their health problems. However, their limited knowledge of medical terminology will prevent them from being able to discern the conceptual references of the components 'cur' and 'cort'. The opposing marks will thus be conceptually similar for them because of the identical component 'respi', the only component with a clear and definite conceptual content."

I do not think that end-user and consumer public will recognise ENTRO as relating to the intestine. I consider that amongst this part of the relevant public 'entero' (and 'enteric') is a much less commonly known or recognised term then, for example 'respi'. Also it involves the additional step of recognising that 'entro' is a common shorthand or expression for 'entero'.

Conclusion

83. Taking all of the above into account, I find that the relevant public for the goods as registered and for the goods as applied for is made up of medical and pharmacy professionals at the one end and general members of the public at the other with those who, for example, market and sell pharmaceutical products somewhere in between. There is a varying degree of brand awareness and knowledge across this relevant public. The medical and pharmacy professionals use pharmaceutical products and the names of the companies that supply them as part of their every day work because they have to exercise care in how they chose pharmaceutical products. Thus they will be able to distinguish that the sign ENTRONAP is not the name of a company that supplies pharmaceutical products. Thus they would be unlikely to confuse the trademark NAPP which has a reputation as the name of a company that supplies pharmaceutical products and in particular such products for the treatment of cancer. They will also be readily familiar with the practice of using a house mark to indicate the company that supplies or manufactures a pharmaceutical product.

84. **Napp has failed in its opposition to the registration of the trademark ENTRONAP for goods in class 5 on grounds of section 5(2)(b).**

Section 5(4)(a) of the Act – Passing Off

85. It was common ground at the hearing that this is not a case where section 5(4)(a) gives rise to materially different issues to section 5(2)(b). I agree. As the opponent has accepted that if he fails under Section 5(2)(b) he is also likely to fail under Section 5(4), I do not propose to consider the grounds under this section of the Act.

COSTS

76. Napp has failed in its opposition to the registration of the trade mark ENTRONAP for goods in class 5 on grounds of section 5(2)(b) and 5(4)(a) of the Act. As a consequence I consider that Reddy is entitled to a contribution to their costs. I order Napp to pay Reddy the sum of **£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 4th day of October 2007

Dr Lawrence Cullen
For the Registrar,
the Comptroller-General