

O-344-07

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2406509
BY PELGAR INTERNATIONAL LTD TO REGISTER A
TRADE MARK IN CLASS 5**

AND

**IN THE MATTER OF OPPOSITION
THERE TO UNDER NO. 94273 BY FMC CORPORATION**

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trade mark in Class 5**

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**IN THE MATTER OF Opposition thereto
under No. 94273 by FMC Corporation**

BACKGROUND

1. On 15 November 2005, PelGar International Ltd (which I will refer to as PelGar) applied to register the word **BRIGAND** as a trade mark. Following examination, the application was accepted and published in Trade Marks Journal No. 6615 on 6 January 2006 for the following specification of goods in Class 5: "Preparations for destroying vermin."

2. On 6 April 2006, FMC Corporation of Philadelphia (which I will refer to as FMC) filed a notice of opposition. There is only one ground of opposition which is based on Section 5(2)(b) of the Act. I note that FMC are the owners of the following trade marks:

UK No. 1230068 – BRIGADE

Date applied for: 12 November 1984
Date Registered: 1 May 1987
Goods: Pesticides for use in agriculture.

CTM No. 4127271 - BRIGADE

Date applied for: 16 November 2004
Date Registered: 22 November 2005
Goods: Preparations for the destruction of vermin and weeds, pesticides, herbicides and fungicides.

3. On 8 June 2006, PelGar filed a counterstatement in which they comment as follows:

“1. The marks BRIGADE and BRIGAND have completely separate meanings in the English language as well as not being identical or similar in pronunciation.

2. There are numerous marks registered containing the prefix BRIG.

3. The Opponent's mark BRIGADE appears to be used for insecticides for use on minor crops in agriculture (artichoke, strawberries, etc) and no evidence has been found to indicate that Brigade products have been supplied to the UK market.

4. The Applicant's mark was first used in January 2006 in relation to a rodenticide for use by Gamekeepers and Pest Control Operators who would know and recognise the specialist product they are buying.

5. The two marks are not identical or similar and the products are not identical or similar and we can see no possibility of confusion occurring."

4. Both sides filed evidence and both ask for an award of costs in their favour. The parties were invited to say whether they wished to be heard; neither indicated a wish to do so. However, written submissions have been received on behalf of both parties. Acting on behalf of the Registrar, I give this decision.

EVIDENCE

FMC's evidence-in-chief

5. This consists of a witness statement, dated 6 October 2006, by Angela Thornton-Jackson. Ms Thornton-Jackson explains that she is a trade mark attorney and partner in the firm of D Young & Co, FMC's professional representatives in these proceedings. Having provided copies from the Community and UK IPO databases of the two registrations relied upon by FMC at exhibit ACT1, Ms Thornton-Jackson then explains why in her view a likelihood of confusion exists between the respective parties' trade marks. As these views amount to submissions and not evidence I do not propose to summarise them here; I will of course keep them in mind when reaching my decision.

PelGar's evidence-in-chief

6. This consists of a witness statement and statutory declaration. The witness statement, dated 28 February 2007, is by Sally Schupke who is a trade mark attorney in the employ of Chancery Trade Marks, PelGar's professional representatives in these proceedings. Attached to her witness statement at exhibit SAS1 are two letters from customers of PelGar. Both are addressed to the Registrar of Trade Marks and dated 23 February 2007. The first is from Richard Lunn of Essex Environmental Supplies Limited and reads as follows:

"I am the Managing Director of Essex Environmental Products who are distributors to the professional pest control industry in the UK. I have been involved in the industry for 10 years and have a good knowledge of both products and trade marks used in this industry.

I have been asked to provide this letter to endorse the application filed by PelGar International Limited to register their trade mark BRIGAND and support the evidence of use of the trade mark in the UK.

I confirm that I first became aware of PelGar's use of the trade mark BRIGAND in mid 2005 and that I have purchased Brigand and other rodenticides (Roban and Rodex) from PelGar. I am aware of no other identical or similar mark in this industry being used and I recognise the trade mark BRIGAND as belonging to PelGar International Limited."

7. The second letter is from David Tavernor of Labtec Ltd. Having explained that he is the Managing Director of Labtec Ltd who are wholesalers to the agricultural and animal health sectors in the UK, he goes on to say that he has been involved in the industry for over 20 years adding that he too has a good knowledge of both products and trade marks used in the industry. Beyond this, the letter is in substantially identical terms to that of Mr Lunn. I note that in *Ashford Property Services Ltd and APS Project Management Limited (O-301-07)*, the Hearing Officer said:

"11. Both sides filed a substantial volume of evidence, particularly APS. Some of the material exhibited to the witness statements of Ashford's primary witness takes the form of letters addressed "To whom it may concern" or to Ashford. In this connection I note that Rule 55 of the Trade Marks Rules 2000 (as amended) (the Rules) states:

"(1) Where under these Rules evidence may be admitted by the registrar in any proceedings before her, it shall be by the filing of a statutory declaration or affidavit.

(2) The registrar may in any particular case take oral evidence in lieu of or in addition to such evidence and shall, unless she otherwise directs, allow any witness to be cross examined on his statutory declaration, affidavit or oral evidence.

(3) Where these Rules provide for the use of an affidavit or statutory declaration, a witness statement verified by a statement of truth may be used as an alternative; the Registrar may give a direction as she thinks fit in any particular case that evidence must be given by affidavit or statutory declaration instead of or in addition to a witness statement verified by a statement of truth.

(4) The practice and procedure of the High Court with regard to witness statements and statements of truth, their form and contents and the procedure governing their use are to apply as appropriate to all proceedings under these Rules.

(5) Where in proceedings before the registrar, a party adduces evidence of a statement made by a person otherwise than while giving oral evidence in the proceedings and does not call that person as a witness, the registrar may, if she thinks fit, permit any other party to the proceedings to call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the statement were his evidence in chief."

12. Letters sent to a party for a purpose unconnected with the proceedings may be exhibited to a witness statement (or statutory declaration or affidavit) as support for a claim that unsolicited letters of that kind have in fact been received. In suitable circumstances, a fact finder may be prepared to draw appropriate inferences from the fact

that such letters were received. However, letters containing statements and opinions that have been solicited by the party for the purpose of the proceedings are not suitable as a means for introducing those statements and opinions as evidence. This is because such letters do not comply with the requirements of Rule 55. In particular, there is no statement of truth. The consequence of such non-compliance is that the persons providing the letters do not themselves become witnesses in the proceedings whose evidence can, if necessary, be tested in cross examination. APS has drawn attention to this deficiency but did not object to the admission of this “evidence” at the time that it was filed. Neither did the Registrar on this occasion, although I expect that he will do so in similar circumstances in the future. Accordingly, I intend to deal with the matter as a question of the weight to be attached to such letters rather than as a matter of admissibility. **In my view, for the reasons stated above, statements contained in letters of this kind can be given little weight unless they are supported by contemporaneous documentary evidence.”** (my emphasis)

8. Similar circumstances apply in these proceedings i.e. neither FMC or the Registrar objected to the admission of this evidence. That being the case, I intend to approach these letters on the same basis indicated above i.e. given their solicited nature, the format in which they were filed, and the similarity of the wording used, I propose to give them little weight when reaching my decision.

9. The statutory declaration, dated 23 February 2007, is from Gareth Williams. Mr Williams is the Managing Director of PelGar a position he has held since July 2000. The information in his declaration comes from his own knowledge or from his company’s records.

10. Mr Williams explains that PelGar first made use of the BRIGAND trade mark in September 2005 and that use of the trade mark continues to the present time. Exhibit GCW1 consists of promotional literature showing the BRIGAND trade mark in use in relation to: “Whole Wheat Bait For the control of Rats and Mice Indoors and outdoors”. BRIGAND was, says Mr Williams, approved as a rodenticide for use and sale in the UK by the Health & Safety Executive under Approval No. HSE7669.

11. Mr Williams says that as one can see from the literature provided at exhibit GCW1, PelGar’s customer area is very different to that of FMC’s and suggests that while his company’s BRIGAND product is aimed at, for example, gamekeepers and pest control operators, products sold under FMC’s BRIGADE trade mark are aimed at arable and horticultural farmers. He adds that the physical nature of the products are also very different; PelGar’s product is a rat poison based on whole grains of wheat which is currently supplied in primarily 20kg sacks, whereas FMC’s product is typically in the form of dispersible liquid or powder and supplied in small, high value units.

12. Mr Williams explains that a total of 5,000 printed sacks have been produced since the product launch, with the value of this material “at ex-PelGar level” amounting to £105,000, with £5k spent “..to date” on the printing of promotional materials and promotional activities. Exhibit GCW2 consists of a range of invoices dated from 22 September 2005 to 5 December 2006, only three of which (i.e. those dated 22 September, 11 October and 8 November 2005) are before the material date in these proceedings of 15 November 2005; I note that the three invoices

mentioned all refer to: “Brigand Whole Wheat”. He adds that PelGar’s customers are geographically spread throughout the UK, and comments that given the specialist nature of the products sold under the BRIGAND trade mark the customer will have an expertise in the marketplace and be a knowing and educated consumer. He comments that to PelGar’s knowledge there have been no instances of confusion between the respective parties’ trade marks.

13. Mr Williams comments that the words BRIGAND (meaning “a member of a robber band living by pillage and ransom”) and BRIGADE (meaning “subdivision of army, infantry unit”) whose definitions have he says been taken from The Concise Oxford Dictionary, have very different meanings which would be easily recognised by a member of the English speaking public.

14. Finally, Mr Williams says that from the research he has been able to undertake, he believes that FMC’s BRIGADE trade mark is used for insecticides for use on minor crops in agriculture and horticulture such as artichokes and strawberries. To support this contention in his witness statement he refers to exhibit GCW3 which he says is a list of approved products within the Health & Safety Executive (who are the UK registration authority for rodenticides) or Pesticide Safety Directorate (who are the UK registration authority for agrochemicals) approvals list which he says includes PelGar’s product but does not include FMC’s product. The Global Insecticide Directory Index does, he says, list FMC’s product (shown at page 5 of the listing) which in his view clearly shows the difference between the respective parties’ products. Whilst this may be the case, exhibit GCW3 only consists of the 2002 Global Insecticide Directory Index, so I am unable to verify the position in respect of the first two lists mentioned by Mr Williams.

FMC’s evidence in reply

15. This consists of a further witness statement, dated 1 June 2007, from the same Angela Thornton-Jackson mentioned above. Not surprisingly this statement contains, *inter alia*, submissions in response to PelGar’s evidence and as such it is not necessary or appropriate that I summarise them here in any detail; I will of course bear them in mind when reaching my decision. That said, the main points emerging from this statement are, in my view:

- that despite Mr Williams’ evidence that the BRIGAND trade mark has been in use in the UK since 2005 without any instances of confusion having occurred, a range of decided cases (exhibit ACT-J1 refers) indicates that the absence of confusion between trade marks is not necessarily telling;
- that BRIGADE and BRIGAND have a common root and are clearly related terms (the extracts from the Merriam-Webster online dictionary and the Compact Oxford English Dictionary at exhibit ACT-J2 refer); there is therefore conceptual as well as visual and phonetic similarities between the respective trade marks;
- that insecticides and rodenticides are both considered pesticides (The Food and Environment Protection Act 1985 (FEPA) and The Control of Pesticides Regulations 1986 (COPR) at exhibit ACT-J3 refer);

- that PelGar sells both insecticides and rodenticides (the extracts from PelGar's website at exhibit ACT-J4 refer);
- that PelGar's attempts to distinguish the respective parties' goods on the basis of package size and physical state should be discounted.

That concludes my summary of the evidence filed in so far as I consider it necessary.

FMC's written submissions

16. The main points emerging from FMC's written submissions are, in my view, as follows:

- that the average consumer of FMC's products is any prospective purchaser or consumer of pesticides;
- that given the doctrine of imperfect recollection prospective purchasers or consumers are likely to believe that pesticides branded BRIGAND and BRIGADE originate from the same source;
- that the first element of a trade mark is generally the most memorable;
- that in relation to visual similarity, both trade marks consists of 7 letters beginning with the letters BRIG with the BRIG element being the more dominant part of both trade marks. There is only a 1 letter difference in the make up of the two trade marks i.e. the letter N in PelGar's trade mark and the letter E in FMC's trade mark both of which get swallowed up when you look at the trade marks as a whole;
- that there is a high degree of phonetic similarity. Both trade marks begin with the sound BRIG which is a strong and harsh sound. Whilst PelGar's trade mark differs to the end of FMC's trade mark, the E at the end of FMC's trade mark is indistinct rendering the end of both marks sounding like they end in a harsh D sound. Each trade mark is made up of two syllables so that they have the same rhythmic pronunciation when spoken;
- that notwithstanding PelGar's arguments to the effect that the respective trade marks have different meanings in the English language, FMC have filed evidence to show that both words share a common root i.e. meaning "to fight". The two words are therefore conceptually similar;
- that PelGar's application has been filed in relation to goods which are identical or similar to all the goods covered by FMC's trade marks, and that FMC has shown that even if its trade marks have been used in relation to insecticides as PelGar claims, insecticides are in fact deemed to be pesticides.

PelGar's written submissions

17. The main points emerging from PelGar's written submissions are, in my view, as follows:

- that the trade marks BRIGADE and BRIGAND are not similar and each have a distinctive meaning in English that would be recognised by members of the public notwithstanding the differences between the trade marks from a visual and verbal standpoint;
- that although FMC's product is an insecticide, it is specifically for the control of insects on crops onto which it is sprayed as a liquid, whereas PelGar's product is specifically a rat poison supplied to the market as a ready for use solid bait that rats and mice eat, it is a rodenticide and as such is classified as a biocide. Crop protection products and biocides are recognised in law as quite separate uses and the products are regulated separately which is an indication that the markets are perceived as distinct;
- that the physical nature of the goods on which the respective parties use their trade marks are different;
- that as website layout and content change, FMC's reliance on PelGar's website is misplaced;
- that for FMC to succeed in these proceedings one would have expected them to show use of their BRIGADE trade mark in relation to their products, such use to have included sales and advertising data, details of where the products were sold, price lists and product literature.

DECISION

18. The sole ground of opposition is based on section 5(2)(b) of the Act. This reads:

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

(a)

(b) it is similar to an earlier 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.”

An earlier right is defined in section 6 of the Act, 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), Community trade mark or international trade mark (EC) 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,”

19. In these proceedings, FMC is relying on two registered trade marks. The trade marks have filing dates of 12 November 1984 (UK No. 1230068) and 16 November 2004 (CTM No. 4127271) respectively, both of which are earlier than the date of application of PelGar's trade mark which is 15 November 2005. FMC's trade marks are therefore "earlier trade marks" as defined by Section 6(1) of the Act.

20. I note that only one of FMC's earlier trade marks i.e. No. 1230068 is subject to the provisions of the Trade Marks (Proof of Use, etc) Regulations 2004. However, I note that in response to the question in box 5 of the counterstatement i.e. If a statement of use of any earlier trade marks has been given in support of the opposition or invalidation action, do you accept this statement? PelGar have left the box blank. Consequently, I shall proceed on the basis that PelGar have accepted the statement contained in FMC's Notice of Opposition to the effect that trade mark No.1230068 has been used on the goods covered by the registration.

21. In reaching a decision I take into account the well established guidance provided by the European Court of Justice (ECJ) in: *Sabel BV v. Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [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 the relevant factors: *Sabel BV v. Puma AG*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and 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* 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*, paragraph 23;
- (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*, paragraph 23;
- (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*, 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*, 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*, paragraph 26;

(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 + Adidas Benelux BV*, 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*, paragraph 29.

22. In essence, the test under Section 5(2) is whether there are similarities in trade marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the trade marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed.

Comparison of goods

23. FMC's earlier trade marks are registered in respect of: "Pesticides for use in agriculture" (No. 1230068) and "Preparations for the destruction of vermin and weeds, pesticides, herbicides and fungicides" (No. 4127271); PelGar have applied for their trade mark in respect of "Preparations for destroying vermin." Whilst a good deal of the evidence filed by PelGar in these proceedings has focused on the goods on which they actually use their BRIGAND trade mark, and on the goods on which they say FMC use their BRIGADE trade mark, the fact remains that PelGar have sought registration for the goods mentioned above, and exactly the same goods are included in the phrase "Preparations for the destruction of vermin.." in FMC's registration No. 4127271 which is not, I note, subject to the proof of use provisions. Consequently, I shall proceed on the basis that the respective parties' goods are identical.

Comparison of marks

24. Both of FMC's trade marks are for the word BRIGADE presented in block capital letters and without any accompanying device element or stylisation. As FMC's CTM registration No: 4127271 is for a wider specification of goods and is not subject to the proof of use provisions, I propose to make the comparison on the basis of this trade mark. For the sake of convenience, the respective trade marks in issue in these proceedings are reproduced below:

FMC's trade mark:

BRIGADE

PelGar's trade mark:

BRIGAND

25. The reputation of a trade mark is an important consideration when making a determination under Section 5(2) of the Act, as it may enhance the distinctive character of the earlier trade mark and in so doing widen the penumbra of protection. FMC have not filed any evidence in these proceedings to demonstrate what, if any, use they have made of their trade mark; I have therefore only the inherent characteristics of the trade mark to consider. Both parties have provided evidence as to the meaning of the word BRIGADE with both FMC's and PelGar's evidence indicating that the word means, *inter alia*, a large body of troops, a group of people organised for special activity, a sub-division of an army, infantry unit. In relation to the goods for which it is registered, the word BRIGADE is in my view neither descriptive or allusive. Whilst not in the category of an invented word, it is nonetheless in my view a trade mark deserving of a high, but not the highest degree of protection.

26. With these observations on the distinctive character of FMC's trade mark in mind, I now go on to compare the respective trade marks from the visual, oral/aural and conceptual standpoints.

27. Turning first to the visual comparison. As mentioned above, FMC's trade mark consists of the word BRIGADE presented in block capital letters. Similarly, PelGar's trade mark consists of the word BRIGAND again presented in block capital letters; neither trade mark has any accompanying device elements or stylisation. As FMC point out in their written submissions, both trade marks consists of seven letters with the first five letters being identical, adding that for comparison purposes it is generally the first element of a trade mark that is likely to be the most important (as per *Tripcastroid* [1925] 42 RPC 264). I agree with FMC's comments in this regard, and conclude there is a marked degree of visual similarity between the respective trade marks.

28. Turning now to the oral/aural comparison. In their written submissions, FMC point out that both trade marks consist of two syllables and both begin with the same "strong and harsh" sounding BRIGA elements. They argue that both trade marks will have the same rhythmic pronunciation when spoken and that whilst the ends of both trade marks differ, the E at the end of their BRIGADE trade mark is indistinct which will lead to both trade marks sounding as if they end with a harsh D sound. Whilst I find myself in general agreement with FMC's comments, it is in my view likely that the A in FMC's BRIGADE trade mark will be pronounced and heard as a long A sound, whereas the A in PelGar's BRIGAND trade mark will be pronounced and heard as a short A sound, thus contributing to a degree of differentiation between the endings of the respective trade marks. That point aside, there is in my view still a significant degree of oral/aural similarity between the respective trade marks.

29. Turning finally to the conceptual comparison. Both parties have spent sometime in both their evidence and written submissions on this element of the comparison. For their part, PelGar argue that the words BRIGAND and BRIGADE have distinctive meanings in the English language that would be recognised and understood. By reference to the dictionary extracts provided as exhibit ACT-J2, FMC argue that the words have a common root i.e. meaning to fight. In their written submissions, FMC say:

“...A robber who pillages and holds people/objects to ransom would be likely to fight to survive. Equally, the main function of the army or an infantry unit is to defend, a key element of which is to fight. When you consider the meaning of the two words in conjunction with the common root, the two trade marks BRIGAND and BRIGADE are conceptually confusingly similar.”

30. I note that in *Phillips-Van Heusen Corp v Pash Textilvertrieb und Einzelhandel GmbH* Case T-292/01 [2004] ETMR 60 the CFI held:

“54. Next, it must be held that the conceptual differences which distinguish the marks at issue are such as to counteract to a large extent the visual and aural similarities pointed out in paragraphs 49 and 51 above. For there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately. In this case that is the position in relation to the word mark BASS, as has just been pointed out in the previous paragraph. Contrary to the findings of the Board of Appeal in paragraph 25 of the contested decision, that view is not invalidated by the fact that that word mark does not refer to any characteristic of the goods in respect of which the registration of the marks in question has been made. That fact does not prevent the relevant public from immediately grasping the meaning of that word mark. It is also irrelevant that, since the dice game Pasch is not generally known, it is not certain that the word mark PASH has, from the point of view of the relevant public, a clear and specific meaning in the sense referred to above. The fact that one of the marks at issue has such a meaning is sufficient - where the other mark does not have such a meaning or only a totally different meaning - to counteract to a large extent the visual and aural similarities between the two marks.”

31. The word BRIGADE is in my view one that will be known to the vast majority of people in the UK, as a word primarily relating to the military. Whilst the word BRIGAND is clearly a dictionary word with a meaning, I am less certain that this meaning would be widely known. Thus in my view while some may see the word BRIGAND as meaning a bandit or robber, others may attribute it no meaning and see it as essentially an invented word. For those who know the meaning of both words there would in my view (and notwithstanding FMC's comments above) be conceptual dissimilarity. For those who only know the meaning of the word BRIGADE, there would in my view be no conceptual similarity at all.

Likelihood of confusion

32. In reaching a conclusion, I must apply the global approach advocated having assessed the degree of visual, oral/aural and conceptual similarity between the respective trade marks. I must keep in mind the degree of similarity between the specification of goods for which FMC's trade mark is registered and the goods contained in the application, which I have already determined are identical. I must also keep in mind the traits of the average consumer of the goods in question and how the goods are likely to be purchased. In my view, the average consumer of the goods in

question (i.e. as applied for and registered) could be a member of the general public looking to, for example, rid their homes of vermin, a farmer wishing to achieve a similar result in a farming context or specialist operatives performing such a service in either a residential or commercial setting. Given the nature of the goods and their effect (i.e. to kill) it is in my view highly likely that an above average degree of attention will be paid to their purchase, given the need to ensure that the goods are fit for purpose and that their effect on other living creatures (both human and animal) is taken into consideration.

33. I have no evidence on how the goods are likely to be purchased, but in my view self selection either off a shelf, from a catalogue or on-line are the most likely options, although I do not rule out that telephone ordering or oral recommendations may play a part in the selection process. In my view, it is therefore the visual and conceptual considerations that are the most important factors in determining whether or not confusion is likely.

34. Having considered all of these interdependent factors and applying the global approach advocated, I have come to the conclusion that while: (i) identical goods are involved, (ii) there is a high degree of visual and oral/aural similarity between the respective trade marks, there is in my view, (iii) either conceptual dissimilarity or no conceptual similarity at all between the respective trade marks. Given the comments in *Phillips-Van Heusen Corp v Pash Textilvertrieb und Einzelhandel GmbH* namely:

“..The fact that one of the marks at issue has such a meaning is sufficient - where the other mark does not have such a meaning or only a totally different meaning - to counteract to a large extent the visual and aural similarities between the two marks”,

there is in my view no likelihood of confusion between the respective parties' trade marks, and the opposition based on Section 5(2)(b) of the Act fails accordingly

COSTS

35. The opposition has failed and PelGar are entitled to a contribution towards their costs. I order FMC to pay PelGar the sum of £1000. 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 21st day of November 2007

**C J BOWEN
For the Registrar
The Comptroller-General**