

## THE HIGH COURT

Record No. 2015/3905P

Between:

NUTRIMEDICAL B.V.

AND BY ORDER

AYMES INTERNATIONAL LIMITED

Plaintiffs

– and –

NUALTRA LIMITED

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 26th May, 2016.

## Part 1

## Background

1. Nutraceutical BV is a manufacturer of nutritional supplement products. It previously had exclusive title to EU Trade Mark No. 10876381 'NUTRILETE'. Nualtra has hitherto been supplying and distributing nutritional supplements for medical use bearing the signs 'NUTRILEN' and 'NUTRILEN PROTEIN'. On 17th June, 2015, following the commencement of these proceedings, Nutraceutical licensed and assigned the NUTRILETE, NUTRILEN and NUTRILEN PROTEIN marks to Aymes International.

2. On 21st February, 2013, Nualtra applied to what is now the European Union Intellectual Property Office (EUIPO, formerly OHIM) to register three Community Trade Marks (now EU Trade Marks) in respect of 'NUTRILEN' (application no. 11593209), 'NUTRILEN PROTEIN' (application no. 11593233) and 'NUTRILEN SMOOTHIE' (application no. 11593266). On 11th June, 28th July, and 20th August 2014, OHIM (as was) rejected Nualtra's applications concerning, respectively, NUTRILEN SMOOTHIE, NUTRILEN PROTEIN and NUTRILEN, holding that Nutraceutical's opposition to those applications was well-founded on its Community Trade Marks (now EU Trade Marks). On 10th October, 2014, Nualtra lodged notices of appeal to OHIM in respect of each of its applications. On 24th April, 2015, OHIM rejected Nualtra's appeal in respect of its application for NUTRILEN.

3. On 20th May, 2015, the plaintiffs' lawyers served Nualtra with the plenary summons in these proceedings, indicating that they would prosecute the proceedings if Nualtra did not give an undertaking (a) to withdraw all products bearing the name NUTRILEN, (b) to destroy all remaining stocks of such products, and (c) not, for the duration of Nutraceutical's Community Trade Mark, to manufacture, import into, market or sell within the European Union, products bearing the mark NUTRILEN. Such undertaking not having been provided, these proceedings continue.

## Part 2

## Some Peculiar Behaviour

4. Without seeking to diminish the seriousness of the trade mark dispute arising between the parties – and alleged infringement of another's intellectual property rights is a most serious matter – it would not be unfair to describe the facts identified in Part 1 as comprising a fairly typical intellectual property dispute. Adding some untypical colour to the proceedings is certain peculiar behaviour in which Aymes International has hitherto engaged.

5. By its own admission, Aymes International is responsible for sending 'poison pen' correspondence about Nualtra to recipients in the United Kingdom. Thus, in November 2014, an e-mail was circulated to an as yet unquantified number of NHS employees in the United Kingdom concerning "several disturbing and worrying facts surrounding the use of a product made by the company Nualtra". Subsequently, in July 2015, hundreds of medical practices in the United Kingdom, received an anonymous letter making various deprecatory comments about Nualtra.

6. By the time this Court embarked upon its first discovery hearing, on 12th February last, Aymes International had accepted responsibility for the July 2015 letter; however, it stridently denied that it was responsible for the November 2014 e-mail. Unfortunately for Aymes International, a *Norwich Pharmacal* order obtained by Nualtra in the English High Court has since revealed the truth to be rather different, forcing Aymes International to acknowledge in a letter of 29th March to the Irish solicitors for Nualtra that it was in fact responsible for the e-mail of November 2014 also.

7. It is alleged too that Aymes International, *inter alia*, has (1) (a) contacted a company by the name of Even Santé International, the manufacturer of certain of Nualtra's packaging, and (b) sought to put improper pressure on that company to terminate its contract with Nualtra, (2) organised hoax e-mail complaints and other enquiries to Nualtra, (3) commenced the within proceedings as a means of causing commercial detriment to Nualtra's business, and (4) engaged in a conspiracy with Nutraceutical to cause loss and damage to Nualtra.

8. All of the above-mentioned behaviour of Aymes International has had at least two consequences:

- first, it has prompted Nualtra to bring a counterclaim for unlawful interference with its trade or business and for what is referred to

in Nualtra's amended defence and counterclaim as "abuse of civil process" and described by counsel for Nualtra, in the course of the hearings, as "a claim of malicious abuse of civil process which is the tort that I have actually pleaded" (Transcript, 3rd May, 2016, 103).

- second, and of more immediate significance perhaps in the context of this discovery application, Aymes International's duplicity in allowing its lawyers (who at all times acted with complete honesty and in full compliance with their professional obligations) to communicate a falsehood to the court last February concerning the authorship of the July 2014 e-mail, suggests that the court must bring more than a suspicion of scepticism when it comes to assessing the position and evidence of Aymes International. Even so, it is important that the court be careful not to draw the longbow in this regard; our courts may be temples of truth, but few within them are saints.

### **Part 3**

#### **The Discovery Applications**

##### **A. Overview.**

9. By notice of motion of 27th January, 2016, Aymes International sought seven categories of discovery. By the time of the February hearing only five categories had not been agreed (categories 2, 9, 11, 14 and 17). Following the revelation, consequential upon the Norwich Pharmacal order, that Aymes International was responsible for the e-mail of November 2014, the pleadings were amended and a further day's discovery hearing was required in May. At the May hearing it was indicated that categories 9, 11 and 14 were no longer being sought. The remaining disputed categories (2 and 17) are considered below.

10. As to Nualtra, by notice of motion of 27th January last, it sought three categories of discovery (categories 1, 2 and 5). By the time of the February hearing, category 5 was no longer being sought. However, at the May hearing, Nualtra sought an additional further category of discovery. Categories 1, 2 and this additional category are considered below.

##### **B. The Categories of Discovery Sought by the Plaintiffs.**

###### **i. Category 2.**

*"All documents which concern or refer to instances of confusion regarding the origin of goods bearing the signs 'Nutriplen', 'Nutriplen Protein and/or 'Nutriplen Smoothie' and the CTM 'Nutriplete' in any jurisdiction of the EU."*

11. There appears to be agreement between the parties that discovery of this documentation is relevant and necessary, subject to a contention by Nualtra that some form of temporal constraint ought to apply. In essence, Nualtra contends that Nutraceutical only acquired the mark on 3rd December, 2013 and felt confident enough to sue on it on 19th May, 2015. Ergo, Nualtra maintains, those two dates present a fitting temporal limit for the court to apply.

12. The court, with respect, does not accept this logic. A key thrust of Nualtra's contentions is that there is no likelihood of confusion between its products and the EU Trade Mark. In point of fact, the court could proceed to determine that there was a likelihood of confusion merely on the basis of the similarity of the EU Trade Mark and the allegedly infringing signs. However, the court would undoubtedly be assisted in its analysis in this regard by whether, for example, there was an incidence of confusion on 20th May, 2015 (and the elapse of time from 19th May, 2015 to the present time is not in any event that great).

13. As to the start-date of 3rd December, 2013, on its face the logic here seems initially persuasive: if a party only became the owner of a mark on one date, surely that provides a suitable commencement date for any discovery that is to follow. However, this logic flounders for the converse of the reason just offered by the court in respect of the later date: when it comes to determining whether there is any likelihood of confusion, the court will undoubtedly be assisted in its analysis in this regard by whether, for example, there was an instance of confusion on 2nd December, 2013.

14. For the reasons just stated, the court will order discovery of this category of documentation without the application of a temporal limit.

###### **ii. Category 17.**

*"All documents which evidence or otherwise pertain to the alleged efforts by the Plaintiffs or either of them to procure a breach of the Defendant's packaging contract with Even Sante Industrie (ESI) including but not limited to all correspondence between the Defendant and ESI in respect of the Community trade mark the subject of these proceedings."*

15. There appears to be agreement between the parties that discovery of this documentation is relevant and necessary, subject to a contention by Nualtra that this category ought to be temporally constrained from 15th October, 2014 to 15th September, 2015.

16. The reason for these suggested dates is that 15th October, 2014 is the date when it first came to Nualtra's attention that the suggested behaviour had been engaged in. As to 15th September, 2015, this is the date when ESI ceased manufacturing products bearing the NUTRIPLEN signs so, thereafter, it is not possible, nor is it alleged by Nualtra, that the plaintiffs were guilty of interference.

17. Again, this logic has an ostensible appeal. But, on closer analysis, it seems to the court that there is no natural limitation arising by reference to the suggested dates. The dates on which Nualtra became aware of something and the date on which the alleged conduct ceased do not mark the natural beginning and end of a timeframe within which relevant and necessary documentation will, for example, have been created.

18. For the reasons identified above, the court will order discovery of this category of documentation without the application of a temporal limit.

## **C. The Categories of Discovery Sought by the Defendant.**

### **i. Categories 1 and 2.**

#### **I. Discovery Sought.**

19. When it comes to Categories 1 and 2, Nualtra seeks discovery of the following documentation:

*"All documents in the possession, power or procurement of the First Named Plaintiff (to include, but not limited to, all communications issued on the instructions of the First Named Plaintiff, or received by or on behalf of the First Named Plaintiff) in the period between 15 October 2014 and 23 July 2015 relating to the Defendant's business, products, manufacturing, websites, insurances, marketing, sales, advertising, customers and potential customers."*

*"All documents in the possession, power or procurement of the Second Named Plaintiff (to include, but not limited to, all communications issued on the instructions of the Second Named Plaintiff, or received by or on behalf of the Second Named Plaintiff) in the period between 11 September 2013 and 14 September 2015 relating to the Defendant's business, products, manufacturing, websites, insurances, marketing, sales, advertising, customers and potential customers."*

20. In approaching these categories of discovery, the court is mindful of the reprehensible behaviour in which Aymes International has hitherto engaged in terms of:

- (i) its now admitted responsibility for the deprecatory e-mail of November 2014, as well as the letter of July 2015, and
- (ii) its history of giving false instructions to its lawyers and allowing those lawyers, in complete innocence, to act on those false instructions.

21. So when it comes to Nualtra's seeking to prove its counterclaim, the above category of documentation is not, as it might at first glance appear, an exercise in general discovery or, as counsel for Nualtra put it in his oral submissions some "wild goose chase". Rather, Nualtra comes to court having done the best it can in terms of 'joining the dots' in relation to Aymes International's conduct and in looking to ensure that parties that it maintains have engaged in an effort to undermine its business are brought to account. It seems to the court that Nualtra is entitled, on the basis of well-settled and apposite case-law (considered below), to both of these categories of discovery.

## **II. Some Applicable Case-Law.**

### **a. Digicel (St Lucia) v. Cable & Wireless plc and ors**

22. In *Digicel (St Lucia) v. Cable & Wireless plc and ors* [2009] 2 All E.R. 1094, the defendants, in resisting an application for discovery, claimed that the claimants' particulars of conspiracy were inadequate, with the result that discovery should be refused. The substance of what was argued before Morgan J. in the High Court of England and Wales, and the decision that he was asked to reach on the basis of the facts before him, were not greatly removed from the arguments and issues with which this Court is confronted in the within proceedings. Per Morgan J., at paras. 13–15:

*"[13] At the hearing of these applications for specific disclosure, the defendants submitted to me that I should approach the application on the basis that claimants' allegations were without any substantial or proper foundation. The defendants submitted that the amended particulars of claim were 'manifestly adequate' as a matter of pleading and, in particular, the allegations of conspiracy were 'seriously deficient' as a matter of pleading. The defendants sought to persuade me that, not only were the pleadings inadequate, the claimants' prospects of success were poor. The defendants submitted that this should influence me in disposing of these applications for disclosure. In particular, it was submitted that I should regard the applications for disclosure as 'mere fishing', that is, an attempt by the claimants with no proper basis for their allegations and no ability to particularise their allegations to search for documents in case 'something might turn up.'*

*[14] The claimants responded to these submissions by exhibiting a number of documents which they had so far obtained from the defendants by way of disclosure and pointing to statements and comments in those documents as supporting the claimants' case that there was not only deliberate unlawful delay in the interconnection process but also that such delay was pursuant to a conspiracy between all or at least some of the defendants. The claimants also stressed that where there is a conspiracy, the conspirators generally go to some lengths to conceal their conspiracy and cover their tracks. In an action where a claimant alleges conspiracy, it may very well be, in the early stages of the action, that the claimant is not able to give detailed particulars of all the steps in the conspiracy but this produces the result that the process of disclosure is more important rather than less important in such an action.*

*[15] Although the defendants pressed their submissions as to the alleged weakness of the claim and the alleged lack of particulars, I did not, in the end, find the defendants' approach on these matters to be of much assistance in determining what I should do on these applications. Given the considerable length of the pleadings, there are obvious difficulties in a judge hearing an interlocutory application of the present kind in forming a fair assessment of the degree of particularity of the pleaded case. Further, even if a claim of conspiracy might lack particulars of the individual steps and the individual participants in the conspiracy, the fact of a conspiracy is often proved at a trial by inference from overt acts and, so far as I can tell in this case, the claimants have pleaded overt acts of delay and obstruction and can ask the court to infer that the similarity in the defendants' behaviour across several jurisdictions was not a matter of coincidence, but was a matter of conspiracy. Further, I accept the claimants' general submission that because the tendency of conspirators is to conceal rather than to reveal, proper disclosure is all the more important in a conspiracy claim."*

### **b. National Educational Welfare Board v. Ryan**

23. Closer to home, in *National Educational Welfare Board v. Ryan* [2008] 2 I.R. 816, Clarke J. considered the thresholds that a claimant is forced to meet in making discovery where allegations of fraud are concerned, looking to a line of authority that commenced with the decision in *Leitch v. Abbott* (1886) 31 Ch.D. 374, in which the distinguished British judge, Bowen L.J., the son of

an Irishman as it happens, noted insightfully, at 376:

*"There is here a general allegation of fraud, and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not, however, think that that case applies, for there is here a statement of the nature of the fraud alleged. The plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not entitled to have this discovery now, because he has not given full details of the fraud which he alleges. We may possibly have to decide to what extent the defendant is obliged to go into all these matters, but, in my opinion, it would be wrong to say that the Court has a discretion to deprive the plaintiff of discovery altogether, either until the trial of the action, or until he has given details of the fraud which he alleges. He wants the discovery in order to enable him to give those details, and to establish his right to relief at the trial. I think, therefore, that the defendant must give a further answer to the interrogatories."*

24. Clarke J. later endorses in the course of his judgment, at 824, the observation of Bowen L.J. in Leitch, that if a plaintiff is not to be able to have the benefit of discovery before defining the precise parameters of his claim, it is likely in cases of fraud "or other clandestine activity", to place very great limits on the benefit of discovery.

25. Moving from the 19th century to the 20th, Clarke J. mentions the decision of Hoffmann J. in *Arab Monetary Fund v. Hashim* (No. 2) [1990] 1 All E.R. 673, noting, at 823, how Hoffman J in that case:

*"...took the view that the plaintiff...was entitled to plead in general terms that a non-fiduciary had actual or constructive knowledge of the fraudulent or dishonest breach of trust in respect of which it was sought to make him accountable. Hoffmann J. went on to determine that, in the circumstances of that case, it was appropriate to defer particularisation of both allegations until after discovery provided that there was some evidence of conduct on which the plaintiff was entitled to plead a want of probity."*

26. In addressing the balance that a court must strike between allowing a plaintiff to engage in, per Clarke J. at 824, "a widespread trawl of the alleged fraudster's confidential documentation in the hope of being able to make his case", Clarke J. summarises the test that the court should apply as follows, again at 824:

*"Firstly, no latitude should be given to a plaintiff who makes a bare allegation of fraud without going into some detail as to how it is alleged that the fraud took place and what the consequences of the alleged fraud are said to be. Where, however, a party in its pleadings, specifies, in sufficient, albeit general, terms the nature of the fraud contended together with specifying the alleged consequences thereof and establishes a prima facie case to that effect, then such a party should not be required, prior to defence and, thus, prior to being able to rely on discovery and interrogatories, to narrow his claim in an unreasonable way by reference to his then state of knowledge. Once he passes the threshold of having alleged fraud in a sufficient manner to give the defendant a reasonable picture as to the fraud contended for, and establishes a prima facie case to that effect, the defendant should be required to put in his defence, submit to whatever discovery and interrogatories may be appropriate on the facts of the case, and then pursue more detailed particulars prior to trial."*

27. Why did Bowen L.J. and Clarke J. proceed as they did? What is the logic in applying a lesser threshold to be met as regards discovery in the context of allegations of fraud or other "clandestine activity" or unconscionable wrongdoing? Clarke J. expressly identifies the applicable rationale, at 825, stating:

*"[T]o do otherwise would...be to strike an inappropriate balance against the legitimate requirements of persons who can make out a stateable case in fraud. It is in the very nature of fraud that (or other unconscionable wrongdoing) that the party who is on the receiving end will not have the means of knowing the precise extent of what has been done to them until they have obtained discovery. To require them to narrow their case prior to...discovery...would be to create a classic Catch-22. The case will be narrowed. Discovery will be directed only towards the case as narrowed. Undiscovered aspects of the fraud or the consequences of fraud will, as a natural result never be revealed. This would, in my view, be apt to lead to an unjust solution."*

28. The approach adopted by Clarke J. in the High Court has recently been endorsed as the correct test to apply in the relatively recent decision of our Supreme Court in *Keaney v. Sullivan & ors* [2015] IESC 75.

29. It is difficult to imagine a case in which the above-mentioned observations of Bowen L.J. and Clarke J. would have a greater resonance than in the peculiar circumstances presenting in this case, given (i) the admitted past behaviour of Aymes International *vis-à-vis* Nualtra, (ii) the fact that Aymes International has not scrupled in the past to see its lawyers and this Court misled, and (iii) consistent with a general pattern behaviour on the part of Aymes International, the fact that the truth as to the November 2014 e-mail was not volunteered by Aymes International but had to be wrung from it by way of a *Norwich Pharmacal* order – and even after that order had brought about the revelations that it did, there was some 'dancing on a pinhead' by Aymes International as to the full truth of matters before its eventual admission of responsibility in the letter of 29th March.

30. Nualtra is not a party that has made a bare allegation of unconscionable wrongdoing without going into some detail as to how it is alleged that this wrongdoing took place and what its consequences are. It has specified in detail the nature of the unconscionable wrongdoing, establishing a *prima facie* case of such wrongdoing. As a consequence (following the logic of Clarke J. in *National Educational Welfare Board*, as affirmed in *Keaney*) Nualtra ought not to be required, prior to obtaining discovery, to narrow its claim in an unreasonable way by reference to its present state of knowledge.

### III. Conclusion

31. Having regard to the factors considered in Section I above and the case-law considered in Section II, the court will order the discovery of Categories 1 and 2 as sought.

#### iii. Additional Category.

*"All documents in the possession, power or procurement of the Second Named Plaintiff (to include, but not limited to, all communications issued on the instructions of the Second Named Plaintiff, or received by or on behalf of the Second Named Plaintiff) in the period between 11 September 2013 and 29 March 2016 relating to the planning of, institution of,*

or conduct of, these proceedings.”

32. This category of documentation arises from the plea in Nualtra’s counterclaim – which was amended following the revelations and admission that ensued upon the issuance of the Norwich Pharmacal order – that Aymes International has engaged in the tort of abuse of process. It is undoubtedly possible for there to be a counterclaim of abuse of process in trade mark infringement proceedings. As to various related matters raised during the hearing of these discovery applications, it does not appear to the court that for it properly to adjudicate upon the issues at hand, it need resolve such matters as (i) whether an abuse of process claim may proceed during the currency of the proceedings that are the subject of that claim, (ii) whether, when it comes to the naissance of the modern tort of abuse of process, Costello J. ought more rightly to have referred in *Dorene Limited v. Suedes (Ireland) Limited* [1981] I.R. 312 to *Grainger v. Hill* (1838) 4 Bing. (N.C.) 212, and not *Savile v. Roberts* (1698) 1 Ld. Raym.374, or (iii) the extent to which reliance may be placed on *Speed Seal Products Ltd. v. Paddington* [1985] 1 W.L.R. 1327 as support for the proposition that an abuse of process claim may proceed during the currency of the proceedings that are the subject of that claim.

33. If the court turns instead to the character and substance of the within proceedings and the issues presented by Nualtra’s counterclaim in the context of the plaintiffs’ trade mark infringement claim, it seems to it that the following critical features present:

(1) Clearly the establishment of any (if any) abuse of process committed by the plaintiffs (a) is no defence to the trade mark infringement claim, and (b) is necessarily dependent on whether the alleged trade mark infringement is proven. For if the trade mark infringement is proven, how can the institution or maintenance of the trade mark infringement proceedings have been an abuse of process? Moreover, any (if any) proven misconduct of or in the trade mark infringement proceedings can be reflected in one or more costs orders, while any abuse of process still perceived to arise can be the subject of a successively prosecuted claim, should Nualtra continue to be desirous of prosecuting same.

(2) To allow the breadth of the discovery being sought in respect of the abuse of process dimension of the proceedings would and does raise a significant issue as to proportionality.

(3) More fundamentally and more troublingly perhaps, such discovery as is sought in the additional category, were it to be granted, would afford Nualtra, even in the mere recital of privileged correspondence in an affidavit of discovery, so great an insight into the plaintiffs’ conduct of its trade mark infringement proceedings as to completely skew the state of play between the parties, giving Nualtra a litigious advantage over the plaintiffs that no party to proceedings could or should as a matter of fair procedures be allowed, even in the peculiar circumstances here presenting.

34. Having regard to the just-mentioned features, the court will invoke its power under O.31, r.12(2)(a) of the Rules of the Superior Courts (1986), as amended, to adjourn this aspect of Nualtra’s discovery application, i.e. it will adjourn further consideration of the additional category of discovery sought. The court is mindful that this last decision may have consequences for the case-management of these proceedings but rather than having two judges manage the one set of proceedings, it seems more appropriate and efficient that this matter be listed for further and prompt case-management, if and as appropriate, by the judge in charge of the Commercial List.