



Neutral Citation Number: [2023] EWHC 2589 (Ch)

CLAIM No. IL-2021-000055

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
SHORTER TRIALS SCHEME

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 18 October 2023

Between:

TVIS LIMITED

Claimant

- and -

(1) HOWSERV SERVICES LIMITED
(2) HOWSERV LIMITED
(3) TICORP LIMITED

Defendants

MR PHILIP ROBERTS KC and MR. JONATHAN MOSS (instructed by
Mishcon de Reya LLP) for the **Claimant**
MR. SIMON MALYNICZ KC and MR. CHRIS AIKENS (instructed by
Simmons & Simmons LLP) for the **Defendants**

Hearing dates: 11-14 July 2023

Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.


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Ian Karet:

Introduction

1. This is an action concerning trade marks used for pet insurance. The Claimant claims that the Defendants have infringed their registered trade mark VETSURE by use of their sign PETSURE, and they apply for a declaration that the First Defendant’s registration for PETSURE is invalid.
2. According to a Mintel report entitled “Pet Insurance, UK 2022” the UK market for pet insurance was predicted to be worth over £1.48 billion that year. Over 3.7 million pet owners obtained cover from a wide range of insurers. Policies for dogs were likely to cost around £400 and for cats around £250. In 2021 there were over one million claims on pet insurance policies.
3. The Mintel report says that the top 6 insurers hold 89% of the market. 42% of pet insurance policyholders hold their policy with a traditional general insurance brand. Pet owners use specialist brands for 31% of pet insurance.
4. The Claimant was founded in 2009. It is a specialist insurer providing pet insurance under the brands VETSURE and VETSURE PET INSURANCE. It also provides pet health plans (which may include vaccinations and flea and worm treatments) under the brand VETSURE PET HEALTH PLANS. The Claimant has a network selling directly to consumers through veterinary practices.
5. The Claimant relies on the following registered trade marks:

Trade Mark No.	Mark	Classes Relied Upon
UK00002541905	VETSURE	Class 16 (printed publications). Class 36 (insurance etc.). Class 44 (medical services; veterinary services etc.).
UK00917924856	VETSURE PET INSURANCE	Class 16 (printed publications). Class 35 (advertising;

		business management etc.). Class 36 (insurance etc.).
UK00003033304		Class 16 (printed publications) Class 36 (insurance etc.) Class 44 (medical services; veterinary services etc.)

6. The Claimant also relied on its goodwill attached to the name VETSURE for pet insurance services.
7. At trial the parties addressed in detail only the first registered mark.
8. The Defendants are part of the Staysure Group, which was launched in 2004. They initially offered travel insurance, in particular for ‘hard to insure’ travellers. In 2020 when the Covid19 pandemic reduced dramatically the market for travel insurance, they moved into pet insurance under the name PETSURE. In October 2020 the Second Defendant applied to register PETSURE as a UK Trade Mark.
9. The First Defendant is the proprietor of UK Trade Mark No. 3539451 PETSURE. It is registered for the following goods and services: Class 5 - Dietary supplements for animals; Class 36 - Pet insurance; and Class 44 – Advisory services relating to the care of pet animals; animal healthcare services.
10. The issues at trial were:
 - i) Validity of the PETSURE mark under sections 5(2), 5(3) and 5(4)(a) Trade Marks Act 1994 (the “Act”);
 - ii) Infringement under sections 10(2) and 10(3) of the Act; and
 - iii) Passing off.
11. The Claimant addressed its claim in this order and encouraged me to follow that. The Claimant said that this was the logical order because the assessment of validity looks

at an earlier date than infringement and is predominantly paper-based. Infringement is assessed at a later date and may involve a range of evidence. I have followed the Claimant's suggestion.

12. It was common ground that the Defendants began use of the PETSURE sign in July 2021 and have used it in relation to pet insurance. That is identical to a service for which VETSURE is registered. The Second and Third Defendants would be liable if the First Defendant was.
13. Philip Roberts KC and Jonathan Moss appeared for the Claimant and Simon Malynicz KC and Chris Aikens for the Defendants. I am grateful for their careful submissions.

Shorter Trials Scheme

14. The trial took place under the Shorter Trials Scheme, but it did not appear that either party really wanted to be subject to the limitations that involves, and the approach adopted and materials included on both sides went beyond what the Scheme is intended to achieve.
15. Two significant preliminary issues remained after the PTR because there had not been sufficient time to deal with them at that hearing. One was to strike out parts of a witness statement and the other was for the admission of substantial further disclosure; together those applications would have added a further half day to the trial.
16. There were over 20 files in the trial bundle. There were over 7,700 pages of disclosure documents. Just before trial, the Defendants had sought to serve a further bundle of over 900 new documents running to over 1,800 pages of transcripts of telephone calls – I discuss that below.
17. Only a few of the instances of alleged confusion were addressed in the witness statements. The parties thus asked me to review after the trial a significant volume of evidence that there was no time to address in the time allocated and I have not had the benefit of oral submissions on that evidence.
18. The matters in dispute were suitable for the Scheme and the parties could have made the case fit within the Scheme. However, that would have required a substantially different approach by both sides from a much earlier stage in the case.

Preliminary matters

Disclosure

19. The Claimant was highly critical of the Defendants' alleged failures to disclose documents relating to the choice of the PETSURE name or why, on the launch of the PETSURE business, many people mistook the Defendants' brand for some other. This was not restricted to VETSURE alone.
20. It appears that the Defendants' description to the court at a CMC of what materials would be reviewed was not accurate. That is unfortunate and should not have happened. However, the Claimant had an opportunity to cross-examine fully the Defendants' witnesses on this matter and, in particular, to put to them the allegation that the choice of the Defendants' name was intended to take advantage of the Claimant's work. The Claimant does not allege that the answers which the Defendants' witnesses gave, which I discuss below, were untrue.
21. The Claimant asks the court to draw adverse inferences from the lack of documents from the Defendants. I decline to do so. This is not a case where there appears to be a conspicuous absence of relevant documentation, as the Claimant alleges. I have seen the witnesses, and I have also reviewed numerous examples alleged to show confusion.

Further evidence

22. The Defendants sought very close to trial to introduce a further bundle of documents that were said to show that Petsure was linked to a number of third parties as well as the Claimant. The argument, in effect, was that there was a base level of confusion between all participants in the market.
23. The Claimant objected to this on the basis that the argument was not pleaded (and was thus irrelevant) and that the material was introduced too late.
24. There was no time available to deal with a review of the material or rule on its admission. It was dealt with as follows. First, the parties made submissions as to data on whether there was a base level of confusion and I have considered them as an overall part of the case. I did not consider the Defendants' late bundle in its entirety, and I do not have to deal with the parties' submissions as to the effect of that.

Secondly, the parties asked me to consider examples of alleged actual confusion and were able to select individual incidents from the late bundle.

25. Where I have reviewed individual documents in the bundle or data about them (rather than the actual text) those are admitted in evidence. The rest of the material is not admitted beyond that purpose.
26. I note that the Claimant says that in any event the late evidence does not benefit the Defendants and only shows that the Defendants have run their business in such a manner to invite administrative confusion upon themselves.

The witnesses

27. The Claimant called Dr Ashley Gray, the Managing Director and a founder of the Claimant. He is a veterinary surgeon. He gave evidence about the Claimant's business and their concern about the Petsure business.
28. The Defendants criticised Dr Gray for arguing the Claimant's case and giving opinions. The Defendants argued that parts of Dr Gray's second witness statement were inadmissible because they did not comply with the rules set out in PD57AC and were inadmissible commentary, speculation or opinions. They applied at the PTR to strike out those parts. There was no time at that hearing to deal with the application and it was carried over to the trial.
29. There was not time to deal with this application separately at the trial, and I therefore considered Dr Gray's evidence as the trial proceeded. I was referred to the judgment of Fancourt J in *Greencastle MM LLP v Payne* [2022] EWHC 438 (IPEC).
30. There is no need to strike out this evidence. *Greencastle* was a case of serious non-compliance with the Practice Direction. This case was not. Dr Gray's evidence could have been given without the contested matters, but that evidence was consistent with and did not have a significant impact upon his admissible evidence. It reflected his emotional investment in the dispute. I have evaluated it accordingly.
31. Dr Gray was rather intense and the case appeared to weigh somewhat on him. However, his evidence was generally helpful.

32. The Claimant relied on the evidence of Mr Martin Paterson, shareholder and director of Donaldson Vets, which is an independent practice in the Vetsure network. He was not cross-examined on his witness statement. Mr Paterson is a veterinary surgeon, and his business has 42 vets working across seven sites. His evidence addressed the benefits of the network, promotion of the Claimant's business and the process for making a claim. He outlined the possibilities for confusion between the parties' names but he made clear that he was not aware of any mix-ups.
33. The Claimant planned to but did not call Ms Rene Mathiesen, a Vetsure policy holder. Shortly before trial the Claimant withdrew her statement. They continued to rely on evidence concerning her as part of the bundle of instances of alleged confusion that I considered after trial. The Defendants submitted that this withdrawal was fatal to the Claimant's evidence of alleged confusion. I reject that submission and deal with the evidence below.
34. The Defendants called Mr Ryan Howsam, CEO and founder of the Staysure Group. He gave evidence on the business of the group and the founding of the Petsure business.
35. The Claimant alleged that the Defendants' name had been chosen in order deliberately to free-ride on the Claimant's name. There were no documents disclosed that helped on this point. Mr Howsam was not certain about a number of dates put to him by the Claimant and the reasons for the absence of documents showing the dates on which decisions had been taken to choose the name.
36. The Claimant criticised Mr Howsam for saying that everything in the business is documented, which did not appear to be the case for the choice of name. However, I understood Mr Howsam to be making a different point, which was that as an insurance business all the relevant documentation is in place. It was not surprising that Mr Howsam insisted on this point as it appears relevant to the regulation of the business. It appears that Mr Howsam sees himself as in charge of the business and would expect to take decisions such as the name of the new venture, and that was, accordingly, agreed easily with his team.

37. The Claimant also criticised Mr Howsam as uncaring about the Claimant's business and having a condescending attitude towards them. I do not accept that. I found Mr Howsam straightforward.
38. Mr Brad May is the Chief Marketing Officer of the Staysure Group. He gave evidence about the creation of the Defendants' brand and their marketing. He was a fair witness.
39. Mr Andrew Simpson was the Product Manager and Interim Head of the PETSURE business. He gave evidence on the UK market for pet insurance. He was a fair witness.
40. Mr Simon McCulloch is the Chief Growth Officer of the Staysure Group. He gave evidence about price comparison websites and how consumers use them. He was a fair witness.
41. Ms Kayleigh Edwards is an employee of the Defendants working on the PETSURE customer service team. She gave evidence about customer calls and queries, including calls to the Defendants where VETSURE was mentioned. The Claimant criticised her as in part contradictory and in part unsatisfactory, particularly in respect of a call that I will discuss below, suggesting her recollection was implausible. I disagree. Ms Edwards was clearly focussed on her evidence and the dispute. She was somewhat nervous and was trying to give her evidence truthfully. She did her best to help the court.

The Vetsure business

42. Dr Gray explained that the Claimant's business had three strands. The first is pet insurance sold under the names VETSURE and VETSURE PET INSURANCE. This covers the cost of veterinary treatments and optional benefits such as pet death, loss or theft. The second is pet health plans sold under the name VETSURE PET HEALTH PLANS. These cover costs for vaccines and the prevention of problems such as fleas and worms. The third is a group buying service for vet practices securing products and services at reduced prices. At the end of 2022 there were 471 practices in the group.

43. Customers may buy pet insurance through a vet's introduction or online directly from the Claimant or by telephone. The website vetsure.com is important for sales, and in recent years more policies have been sold online than by telephone. The Claimant has a strong score on the Trustpilot website and is a reputable business.
44. Part of the Claimant's offer is that vets claim directly from them rather than taking payment from a customer who then reclaims the payment from their insurer. This is not as simple as it may sound, because not all insurers are suitably fast or reliable, and vets may prefer to take payment directly from customers who will pay immediately. The Claimant is also selective about which vets they are happy to involve. At the end of 2021 there were 746 vet practices in the Vetsure network.
45. Vetsure does not market the business through insurance aggregator sites such as Comparethemarket.com. Dr Gray does not believe they reflect the true value of the brand. The Claimant does not use TV, national press or radio advertising for the same reason. The Claimant does advertise in the veterinary trade press and each year runs a series of adverts in The Veterinary Times and The Veterinary Edge. The Claimant has been the subject of some coverage in those publications.
46. The Claimant runs 'think tanks' on selected topics, using a panel of experts, some of their network of vets and Dr Gray will chair.
47. The Claimant uses a PR agency and has run various campaigns aiming to secure press coverage. It maintains the usual range of social media accounts which it uses to promote the business.
48. The Claimant has won a number of regional and national awards, which Dr Gray said were the highest awards for all insurers in all sectors.
49. In 2021 the Claimant had over 14,000 active policies and received total revenues in premiums of around £5.5 million. (This indicates that the average policy costs just under £400, aligning with the Mintel figures.)
50. Dr Gray explained that the largest providers of pet insurance are Petplan, More Than, Animal Friends, Tesco, Sainsbury's, Many Pets and Direct Line. The rest of the pet insurance market is made up of many other smaller brands. It is difficult to ascertain their market shares.

51. Dr Gray estimated that the top four underwriters (whom I understand from Mintel to be Allianz, RSA, Animal Friends and Direct Line) represent 80% of the market. Mr Gray said that there were 60-70 providers on the market. This estimate is slightly different from Mintel's figures, giving a slightly bigger market share to smaller players; but it still means that well over 50 providers (of whom the Claimant is one) serve 20% of the market between them and have correspondingly small market shares.
52. I note from an overview of the market exhibited by Mr McCulloch that a number of insurers use "pet" in their name. They include Petplan (the market leader), petprotect, Petwise, petGuard, Petsathome, PerfectPet, HealthyPets, Purelypets and Manypets. There are providers with "vet" in their names - VetsMediCover and the Claimant. There are other services which allude to animals e.g. Waggel, everypaw, 4paws and K9cover.
53. General insurers such as Direct Line, Tesco and MORE TH>N use their brand names across a range of products.

The Petsure business

54. Mr Howsam explained that the Petsure business was set up in 2020 as the Covid19 pandemic affected foreign travel. The Staysure business is a substantial travel insurance business with a current turnover in the region of £400 million. It specialises in travel for those with pre-existing medical conditions who may find it hard to find insurance. Mr Howsam and his team considered urgently how to protect their business against this sudden adverse turn of events and decided to set up a pet insurance business under the PETSURE name. Mr Howsam devised the name – it was similar to "Staysure" - and his team agreed with his choice. Mr Howsam was not aware of the Claimant at that time.
55. The Defendants checked the UK Trade Mark Register for PETSURE in 2020 and bought the .com domain in September 2020. They began trading under the PETSURE name in respect of pet insurance in the UK in July 2021.
56. The Defendants market their business through substantial use of the internet and social media, including pay per click advertising, search engine optimisation, paid for

social media and through affiliates. They also use events to generate publicity. This is a very different approach to that taken by the Claimant.

57. The Claimant became aware of the Defendants' application to register their trade mark PETSURE and in January 2021 notified the Second Defendant of its objections to the PETSURE mark. Mr Howsam's evidence was that he did not know of the VETSURE mark before coming up with the PETSURE name. I accept Mr Howsam's explanation that he liked the name because it was similar to his existing STAYSURE brand. I do not accept that there was a deliberate attempt to take the benefit of the VETSURE name.
58. The Defendants have around 15,000 active pet policies.
59. The Claimant's and Defendants' businesses are now of similar sizes. Each is a small player in the market.

Validity

60. Section 47(2) of the Act provides:

“(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground—

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

61. Sections 5(2), 5(3) and 5(4)(a) of the Act provide:

“(2) A trade mark shall not be registered if because—

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

(3) A trade mark which—

(a) is identical with or similar to an earlier trade mark

...shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom ...and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

...

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

62. The parties agreed that the relevant date for the assessment of validity of the PETSURE registration is 21 October 2020.
63. I assume that, insofar as it is relevant, the materials relating to the pet insurance market, e.g. the market overview to which I refer below and the Mintel report can be taken to apply at the 2020 date even though they are later. The trial proceeded on the basis that the various materials referred to were relevant at all dates considered and neither party suggested otherwise.

The law on validity

64. The principles which apply to validity under sections 5(2) and 5(3) of the Act (and infringement under sections 10(2) and 10(3) of the Act) were set out by Arnold LJ in *Match Group, LLC & Ors. v Muzmatch Ltd & Anor* [2023] EWCA Civ 454 at paragraphs 26 to 29 and 55 to 56:

“26. In order to establish infringement under Article 9(2)(b) of the EUTM Regulation, Article 10(2)(b) of Directive 2015/2436 and section 10(2) of the 1994 Act, six conditions must be satisfied by the proprietor of a registered trade mark: (i) there must be use of a sign by a third party within the relevant territory; (ii) the use must be in the course of trade; (iii) it must be without the consent of the proprietor of the trade mark; (iv) it must be of a sign which is at least similar to the trade mark; (v) it must be in relation to goods or services which are at least similar to those for which the trade mark is registered; and (vi) it must give rise to a likelihood of confusion on the part of the public.

27. The manner in which the requirement of a likelihood of confusion in Article 9(2)(b) of the EUTM Regulation and Article 10(2)(b) of Directive 2015/2436, and the corresponding provisions concerning relative grounds of objection to registration in the Directive and the Regulation, should be interpreted and applied has been considered by the Court of Justice of the European Union in a large number of decisions. In order to try to ensure consistency of decision making, a standard summary of the principles established by these authorities, expressed in terms referable to the registration context, has been adopted in this jurisdiction. The current version of this summary (see e.g. *Sazerac Brands LLC v Liverpool Gin Distillery Ltd* [\[2021\] EWCA Civ 1207](#), [\[2021\] ETMR 5](#) at [8]) is as follows:

- "(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all

other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) 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; and

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion."

28. The same principles are applicable when considering infringement, although it is necessary for this purpose to consider the actual use of the sign complained of in the context in which the sign has been used: see *Specsavers International Healthcare Ltd v Asda Stores Ltd* [\[2012\] EWCA Civ 24](#), [\[2012\] FSR 19](#) at [45], [87] (Kitchin LJ, as he then was).

It is well established that there are two main kinds of confusion which trade mark law aims to protect a trade mark proprietor against. The first, often described as "direct confusion", is where consumers mistake the sign complained of for the trade mark.

29. The second, often described as "indirect confusion", is where the consumers do not mistake the sign for the trade mark, but believe that goods or services denoted by the sign come from the same undertaking as goods or services denoted by the trade mark or from an undertaking which is economically linked to the undertaking responsible for goods or services denoted by the trade mark. I discussed the distinction between the two in *Sazerac v Liverpool Gin* at [10]-[14].

...

55. A proprietor of a registered trade mark alleging infringement under Article 9(2) (c) of the EUTM Regulation, Article 10(2)(c) of Directive 2015/2436 and section 10(3) of the 1994 Act must show that the following requirements are satisfied: (i) the registered trade mark must have a reputation in the relevant territory; (ii) there must be use of a sign by a third party in the relevant territory; (iii) the use must be in the course of trade; (iv) it must be without the consent of the proprietor; (v) it must be of a sign which is identical with or similar to the trade mark; (vi) it must be in relation to goods or services; (vii) it must give rise to a link between the sign and the trade mark in the mind of the average consumer; (viii) it must give rise to one of three types of injury, that is to say, (a) detriment to the distinctive character of the trade mark, (b) detriment to the repute of the trade mark, or (c) unfair advantage being taken of the distinctive character or repute of the trade mark; and (ix) it must be without due cause.

56. It is sufficient for the use of the sign to give rise to a link in the mind of the average consumer that the sign would call the registered trade mark to mind even if the average consumer would not be likely to be confused as a result: see Case C-252/07 *Intel Corporation Inc v CPM United Kingdom Ltd* [2008] ECR I-8823 at [60]. This must, like the question whether there is a likelihood of confusion, be appreciated globally taking into account all factors relevant to the circumstances of the case: see *Intel* at [41].”

65. The principles relating to confusion were set out by Arnold LJ in *Sazerac Brands LLC v Liverpool Gin Distillery Ltd* [2021] EWCA Civ 1207 at paragraphs 10 to 14.

“10. It is well established that there are two main kinds of confusion which trade mark law aims to protect a trade mark proprietor against (see in particular Case C-251/95 *Sabel BV v Puma AG* [1997] ECR I-6191 at [16]). The first, often described as “direct confusion”, is where consumers mistake the sign complained of for the trade mark. The second, often described as “indirect confusion”, is where the consumers do not mistake the sign for the trade mark, but believe that goods or services denoted by the sign come from the same undertaking as goods or services denoted by the trade mark or from an undertaking which is economically linked to the undertaking responsible for goods or services denoted by the trade mark.

11. In *LA Sugar Ltd v Back Beat Inc* (O/375/10) Iain Purvis QC sitting as the Appointed Person said:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning - it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (‘FAT FACE’ to ‘BRAT FACE’ for example).”

12. This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition. For example, one category of indirect confusion which is not mentioned is where the sign complained of incorporates the trade mark (or a similar sign) in such a way as to lead consumers to believe that the goods or services have been co-branded and thus that there is an economic link between the proprietor of the sign and the proprietor of the trade mark (such as through merger, acquisition or licensing).

13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Mr Mellor went on to say that, if there is no likelihood of direct confusion, “one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion”. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion.

14. “Likelihood of confusion” usually refers to the situations described in paragraph 10 above. As this Court held in *Comic Enterprises*, however, it also embraces situations where consumers believe that goods or services denoted by the trade mark come from the same undertaking as goods or services denoted by the sign or an economically-linked undertaking (sometimes referred to as “wrong way round confusion”).”

The average consumer

66. Approaching the trial there was a dispute about the average consumer, but at trial it was agreed that the average consumer in this case will be a pet owner with an average level of attention. There is in the UK a wide range of pet owners and they will not have a particularly high or low level of attention.

67. The average consumer will be prepared to spend the sums described above. They will see that the market contains many providers with names that refer to pets and their care.
68. The average consumer would understand (as Mr Gray accepted) that the word “sure” in the name is liable to be understood as “insurance”. That is relevant because there are a substantial number of insurance providers with names that end in “sure”. While the pet insurance market may be discrete, in the sense that that is where that type of insurance is found, the average consumer will know that a “sure” suffix is used by providers of insurance services in relation to such services.

Section 5(2) - validity

69. I turn to the assessment of validity applying the approach set out in *Match Group*. The comparison is with the VETSURE word mark, which the Claimant accepted was the closest mark to the Defendants’ mark.
70. The Claimant argued that the marks were thus highly similar and registered for identical goods. It was thus straightforward that there was a likelihood of confusion under section 5(2) such that the PETSURE mark should be invalidated.
71. The Defendants accepted that for purposes of section 5(2)(b) of the Act the PETSURE mark was registered for the same or similar services in classes 36 and 44 as the Claimant’s mark. They argued that the registration in class 5 was not for similar goods or services so that section 5(2)(b) of the Act did not apply.
72. In my view the registration in Class 5 for “Dietary supplements for animals” is similar to that in Class 44 for “Veterinary services” because they share both a purpose and a class of consumers.
73. In considering visual similarity between the marks, the Claimant relied upon as persuasive a number of cases in which the marks in issue differed by one letter. For example *Nitto Pharmaceutical Industries v EUIPO - Chiesi Farmaceutici (NOSTER)*, T-550/19, ECLI, EU:T:2020:290 the marks were FOSTER/NOSTER. In this and the other cases relied upon (KITANA/GITANA, EURODONT/CURODONT, NORVIR/SORVIR and XENTEO/PENTEO) the difference in the first letter of the later mark was not enough to overcome a finding of similarity. The Claimant said that

the marks in this case were highly similar to each other. Both consist of seven letters and only the first is different; they were thus visually highly similar.

74. The Claimant said that the marks were also aurally similar, having the “identical element” “ETSURE” which ensures that the marks are pronounced in the same way.
75. The Claimant said that the marks were conceptually identical because both evoke insurance of pets.
76. The Defendants argued that the average consumer does not generally perceive a descriptive word within a mark as dominant in the overall impression (relying on *Gateway, Inc.* [2007] ECR II-163 at [40]) and that the average consumer attaches greater importance to the beginnings of marks than to endings in visual and aural comparisons.
77. The Defendants also argued that the marks both contained common descriptive elements. In *Planet Art v Photobox* [2020] EWHC 713 (Ch) Daniel Alexander KC noted that the case law does not suggest that there are general rules as to how descriptiveness should be taken into account but it is clear that it should be done.
78. Considering *Nicoventures Holdings Ltd v The London Vape Co Ltd* [2017] EWHC 3393 (Ch) and *White and Mackay Ltd v Origin Wine UK Ltd* [2015] ETMR 29 he concluded that the cases show that:

“...there is no hard rule that use of a descriptive term cannot lead to a finding that there is confusion but they also show that such a case is harder to establish. It also has the impact of somewhat downgrading the significance of conceptual similarity in the evaluation of the likelihood of confusion at least in so far as the mark is descriptive of the goods and services in question.”
79. The question of the likelihood of confusion must be appreciated globally taking account of all relevant factors. The judgment is made through the eyes of the average consumer who may not have a chance to make direct comparisons between the marks and relies instead on the imperfect picture of them kept in mind. I have those points in mind.
80. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities are to be

assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components.

81. In this case the marks are visually and aurally similar. The words PETSURE and VETSURE have the same number of letters and similar sounds.
82. The mark VETSURE would be perceived by the average consumer as made up of two well-known words, VET and SURE. VET is descriptive of veterinary services and SURE will be understood to describe insurance services. The VETSURE mark is thus a combination that is itself descriptive.
83. The words VET and PET mean different things, and the average consumer will, perceiving the marks as a whole, understand that. The marks are not conceptually similar; each refers to a different descriptive concept and the average consumer will distinguish them from one another. Both marks are descriptive and narrow in scope. The common feature between the signs is the word SURE, which is itself descriptive.
84. This is case where the descriptive nature of the words will have a significant impact on the overall impressions made by the marks. The average consumer would know that descriptive terms are commonly used in this field so that VET and PET are unlikely to indicate any particular source of pet insurance. The marks are for different concepts and that indicates the absence of a likelihood of confusion.
85. The VETSURE mark has a descriptive nature and is used in a market in which many providers use descriptive or allusive names, as illustrated above. As a result it does not have a highly distinctive character and there is no greater likelihood of confusion.
86. Looking at the matter in the round I conclude that there is not a risk that the public might believe that the goods and services come from the same or economically linked undertakings. The use of the VETSURE mark in a network is of little relevance to the average consumer because that network is for vets and purchasing products.
87. The Claimant relied on consumers' imperfect recollection when buying pet insurance. However, the market for pet insurance is full of names that relate to pets and their care and I do not think that it is likely that these two will be confused in a trade mark sense more than any other descriptive and allusive names.

Conclusion on section 5(2)

88. Applying the principles in *Sazerac Brands*, as considered in *Match Group* at paragraph 27, I conclude that the PETSURE mark is not invalid under section 5(2) because there is no likelihood of confusion. The VETSURE mark is for a different concept, and both marks are combinations of descriptive terms.

Section 5(3) - validity

89. The test for infringement under Section 10(3) of the Act (corresponding to 5(3) of the Act) is considered in *Match Group* at paragraph 55.
90. It is a requirement that the use complained of must give rise to a link between the sign and the trade mark in the mind of the average consumer. The relevant factors for assessing a link as set out in *Intel Corp v CPM United Kingdom C-252/07 EU:C:2008:565 [2009] RPC 15* at paragraph 42 include: (a) The degree of similarity between the conflicting marks; (b) the nature of the goods and services which the marks cover; (c) the strength of the earlier mark's reputation; (d) the degree of the earlier mark's distinctive character (inherent or acquired); and (e) the existence of a likelihood of confusion on the part of the public.
91. The Claimant argued that the VETSURE mark has a reputation in relation to pet insurance, based on factors including its revenue, customer numbers, marketing spend, press coverage and awards, network and market share.
92. The Defendants argued that the mark did not have a reputation. The mark relies more on personal recommendation and does not use comparison sites; it engages in almost no above the line advertising. Instead it relies on word of mouth recommendation by vets. It was not mentioned in the Mintel report.
93. In my view the VETSURE mark has the required reputation, but the strength of the mark is not high. It is made up of descriptive elements and it exists in a market full of signs containing descriptive references. The mark indicates that it is for a service relating to vets. It has some character acquired through use, but as a descriptive mark, it will have started from a low base. It adopts in particular a marketing route through vets, which compounds its descriptive nature.
94. The Claimant relied on the fact that the Defendants consider the Claimant a competitor of theirs. Given the competition in the market and the wide use of

descriptive or allusive names that is not surprising. It does not make the point for which the Claimant argues.

95. While the existence of a likelihood of confusion is a relevant factor, it is not required for a link to be found. The standard of “calling to mind” required to substantiate a link is a lower standard than the threshold for a likelihood of confusion. The standard is not met in this case. The descriptive nature of the marks means that it does not follow that one such mark will call another to mind. Accordingly there is no link.
96. The Claimant relies on two forms of injury, detriment to distinctive character (dilution) and unfair advantage (*Match Group*, paragraph 55(viii)(a) and (c)). In my view, neither arises in this case.
97. In order to establish dilution there is no need for the Claimant to show actual and present injury. A serious risk of injury, which is assessed on the same factors as relate to a link, will be sufficient (*British Sky Broadcasting v Microsoft Corporation* [2013] EWHC 1826 (Ch) at paragraph 188). Considering the analysis of a link above, the same result arises. There is no dilution in this case.
98. There is also no unfair advantage as is described in *L’Oreal v Bellure NV*, EU:C:2009:378, [2009] ECRT I-5185 at paragraph 41. The Claimant’s mark does not have a high reputation and there is, for the reasons set out above, no risk of confusion.
99. There is, accordingly, no need for the Defendants to establish that its use is made with due cause.

Conclusion on section 5(3)

100. Considering the requirements set out in *Match Group*, I conclude that that the PETSURE mark is not invalid under section 5(3) of the Act.

Section 5(4) - validity

101. This argument was dealt with very lightly at trial.
102. The elements of a claim for passing off are set out in *Reckitt & Colman* [1990] 1 WLR 491 (HL).

103. It was accepted that the Claimant owns goodwill in VETSURE for pet insurance in the UK. However, there is in my view no actionable misrepresentation in this case. The PETSURE mark is not likely to cause confusion and deception for a substantial proportion of consumers.
104. Absent any misrepresentation, the argument under section 5(4) fails.

Infringement

105. The Claimant alleges infringement under sections 10(2) and 10(3), which mirror sections 5(2) and 5(3), as discussed above. So far as material, sections 10(2) and (3) provide as follows:

10 Infringement of registered trade mark

...

(2) A person infringes a registered trade mark if he uses in the course of trade a sign

where because—

...

(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade, in relation to goods ... a sign which—

(a) is identical with or similar to the trade mark ...

...

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

Section 10(2) - infringement

106. The requirements for infringement under section 10(2) of the Act are set out in *Match Group* and *Sazerac Brands*, above.

107. The date at which the assessment of infringement is to be made is July 2021, when the Defendants commenced trading.
108. The Claimant asserts that the VETSURE brand enjoys enhanced distinctive character as described in VIENNOSERIE CAPRICE T-628/18 ECLI:EU:T:2019:750 at paragraph 63. That requires an assessment of “(i) the market share held by the mark, (ii) how intensive, geographically widespread and long-standing use of the mark has been, (iii) the amount invested by the undertaking in promoting the mark, (iv) the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking and, (v) statements from chambers of commerce and industry or other trade and professional associations.”
109. This enhanced distinctive character is alleged to increase the likelihood of confusion under section 10(2).
110. In my view the Claimant has not established enhanced distinctive character in the VETSURE mark. The VETSURE business has a relatively small share in a market in which there are numerous providers. It has been trading since 2009 through a network of veterinary practices using a brand that itself contains the word “vet”. There is thus a directly descriptive element in the VETSURE name which is present in the use and presentation of the mark. The business has gained some press coverage and awards, but both of these are available for businesses that seek to promote themselves that way, and they do not in this case show the enhanced character required. The Claimant also relies on positive customer reviews, but these do not in my view establish the reputation in the circumstances of the use made of the mark.
111. The Claimant relies on direct confusion, as described in *Sazerac*. This argument is based on the similarity of the signs, such that the average consumer will simply mistake PETSURE for VETSURE. The Claimant relies in part on its network of veterinary practices and the method of paying vets directly.
112. The Claimant further relies on the network causing use of PETSURE to give rise to an adverse effect on the origin function of the VETSURE mark because this gives a structure within which a connection could be established, as discussed in *Interflora Inc v Marks and Spencer Plc* [2013] EWHC 1291. The Claimant says that the

Defendants would thus be considered part of the VETSURE network. I disagree. It is not clear that the Claimant's network is considered by the average consumer as a relevant network relating to the provision of insurance. It may be that vets (rather than the average consumer) understand the use of the network for payment and bulk purchasing, but it was not suggested that vets were the average consumer.

Evidence of actual confusion

113. In *Match Group, LLC V Muzmatch Ltd* [2022] EWHC 941 (IPEC) Nicholas Caddick KC considered evidence of actual confusion at paragraphs 96 to 98. I note that absence of evidence of actual confusion is not necessarily fatal to a claim for infringement. The weight of such evidence is a matter for the court to determine on the facts.
114. The Claimant referred me to a number of events that were said to show confusion. No witness was called to give evidence on any of them. I was asked to read various records of them following the trial as there was no time at trial to consider them. I have therefore reviewed them as they stand, with the limitations that involves.
115. It is important to note that many of the items were transcriptions of telephone calls, which may often be read a number of ways. In *W3 v EasyGroup Ltd* [2018] FSR 16 at paragraph 254 Arnold J (as he then was) noted that it was necessary to be cautious in trying to interpret emails submitted in a similar way. Transcripts carry the additional risk of errors by the transcriber and each is subject to the transcriber's choice of how to lay out the material.
116. The evidence included that of a witness who was due to be called but was not. I attach no weight to the fact that she was not called.
117. There were a substantial number of examples. This allowed consideration of a range of situations in which confusion might arise, and there are examples of emails, telephone calls and online chats.
118. I have anonymised the descriptions; in some cases, the original documents contained extensive personal data which are not needed to understand the evidence or findings.

Examples from the Claimant's disclosure

119. I first consider the examples taken from the Claimant's disclosure.
120. The first is a transcript of a telephone call between a Vetsure operator and a customer RM. The customer had a policy with the Claimant and intended to call them. At the end of the call the customer sought to "check that you are definitely Vetsure, not Petsure". The operator confirmed that. The customer said that she had received an email from Petsure and was "getting so confused...and I thought... so I'll look for Vetsure."
121. Ms Edwards was challenged about this example in cross examination. The Claimant says that the email had caused the customer to think that she had a policy with Petsure. Having considered this exchange, I disagree. The transcript indicates that the caller was able to distinguish between the parties and had called the right place.
122. It is clear from this example and others below that the staff at Petsure sometimes mentioned the Claimant to callers who were uncertain or mistaken in their calls. I do not take that as proof of a likelihood of confusion on the part of the customers.
123. The second is a transcription of a call-back from Vetsure to a potential customer VW seeking quotations for a replacement for her Petplan insurance. The customer had left a message. She said to the operator 'So you're Petsure are you' and on being told that the call was from Vetsure said 'Right, yeah, you're Vet...'. This does not appear to be an instance of confusion, but rather mis-naming. The customer appears to have called the Claimant deliberately and expected a call back from them.
124. The third is a transcript of a call to Vetsure from a Petplan customer TT who says that she has "Petsure". A background voice said "You've got a Petplan". There is no indication the customer is referring to the Defendants or that they are confused.
125. The fourth is an email from a veterinary practice CVR to the Claimant that was intended for the Defendants. The reception team at the practice apologise and say "I'm so sorry this was the email address I was given by lady at "Petsure"." This appears to be a clerical error in which the practice is not confused as to which party is which. The person who was said to have provided the email address might have been, but that is not clear.

126. The fifth is a transcript of a call to the claimant from customer AW who mis-names the Claimant "Petsure". But they are insured through Vetsure and have correctly called the Claimant. There is no confusion.
127. The sixth is a transcript of a telephone call from a long-time customer of Vetsure Mrs B who said she had used the telephone number on the policy but it "was not the right one". She was calling to cancel the insurance following the death of her pet. The caller had called two other companies, and she said that the number she called was given to her. It appears from the transcript that she was upset, and it is not clear that she was confused between the parties.
128. The seventh is a transcript of a call to the Claimant from CA, a customer seeking to cancel their recently commenced policy on the basis that they cannot afford it. The transcript says "I joined up with your Petsure umm a week ago". The customer is a customer of the Claimant and has called the right place. They do not appear confused.
129. The eighth is a transcript of a call to the Claimant from AD, a customer with two dogs, seeking to renew the policy for one of them. There is some to and fro while the customer is identified by the telephone operator, during which the customer says that their vet had told them to call "Petsure". But the customer was a Vetsure customer and correctly called them. It does not appear that there was any confusion here; the customer called the correct party.
130. The ninth is a Petsure claim form that was mistakenly sent by a vet practice to the Claimant. There is no evidence from anyone explaining why that might have happened in this instance.
131. I was shown a number of claim forms, including those of the Claimant and the Defendants. They have similar formats and seek the similar information at the same places on the forms. It is not suggested that the Defendants have copied the Claimant's form, and it was not clear how the various forms had been derived. It seems that it is quite possible to pick the wrong form by mistake.
132. The tenth is a transcript of a call to the Claimant from KR, a customer who correctly calls the Claimant. They had called the Claimant the previous day to cancel their insurance and they were now calling to ask whether, if they re-started the policy, a treatment could be delivered directly to them rather than to the vet. During the call,

the customer incorrectly calls the claimant “Petsure”. The customer has called the right party and does not appear confused.

133. The eleventh is a social media post in which a company EE which had constructed a display stand for the Claimant showed a picture of the Claimant’s stand and mistakenly called them “Petsure”. The post was corrected to read “Vetsure Pet Insurance”. I was not shown the original posting. It is not clear whether this was an incidence of confusion or a naming error.
134. The twelfth is a claim form for the Claimant which a vet at practice SMV had incorrectly filled with the details of a claim for a pet insured with the Defendants. A transcript of a call from Vetsure indicates that the vet may have used the wrong form. It is not clear that there is any confusion. As I have said, there is considerable similarity in the various forms in use.
135. The thirteenth is a collection of emails and telephone call transcripts relating to an insurance claim by customer LF following the death of their dog. The customer had insurance with Vetsure and incorrectly sent to Petsure materials relating to her claim. It took some time to resolve matters. A Vetsure operator called the customer to check how she had come to email Petsure instead of Vetsure. The customer said that she had searched on Google and said “I was distressed and when I brought what I thought Vetsure was up it was Petsure. It was just an error on my part, on that particular morning when [our pet] was killed, you know.” The operator asks whether the customer has retained that email and the customer responded that she didn’t know if she had them as she had “contacted them right away and said it was an error and to delete it.” This appears to have been a customer making a mistake in a highly stressful situation, and the customer recognised it as such.
136. The fourteenth is a collection of invoices, a claim form and emails relating to a claim made on a Vetsure form by BT, a Petsure customer and relating to a Petsure policy. It appears the policy holder submitted the wrong claim form to their vet, but there is no explanation why the error occurred.
137. The fifteenth is a collection of a claim form, an invoice and call transcripts relating to a Vetsure claim form used in making a claim on a Petsure policy. It appears from the transcript of a call between Vetsure and the vet that the veterinary practice WCV had

downloaded the wrong form. The practice said “There was just a massive miscommunication where someone said Vetsure, when it's actually Petsure.” It is not clear from this exchange that anyone was confused as opposed to mistaken.

138. The sixteenth is another use of a Vetsure claim form for a Petsure insurance. This time the customer BD had provided the form to a vet who submitted it to the Claimant. There is no explanation why the error occurred.
139. The seventeenth is a mistaken claim form. The veterinary practice had misremembered that the customer insured with Vetsure and submitted form. When queried by Vetsure, the vet SA checked and realised their mistake.
140. The eighteenth relates to another claim form submitted to the Claimant instead of the Defendants. There is a transcript of a call from Vetsure to the vet practice GV which shows that EP, the person taking the call, did not know why the error had occurred or whether the vet practice or the owner had generated the form. It is not clear who, if anyone, was confused. The Claimant initiated the call but did not call to follow up.
141. The nineteenth relates to a claim form submitted to the Claimant instead of the Defendants. There is a transcript of a call from Vetsure to the practice. The person taking the call, SJ, was not the person who filed the claim. It appears that the practice may have downloaded the form. The practice suggests that they may have made an error “when we googled Petsure [to download a form] it possibly came up with Vetsure first and they've just gone with the first one that came up”.
142. The twentieth is a transcript of a telephone call to Vetsure by S, a pet owner. The owner has a new policy but has said that her dog is spayed when she is not. The owner gives a Petsure policy number which the operator queries. The owner realises she has called the wrong number and says “...not only do I not know that my dog is not spayed, I don't know who she is insured with.” It is not clear that the caller was confused.
143. The twenty first is a transcript of a call to Vetsure by HE, an owner who wanted to give a microchip number to go with her policy. The caller has insurance with Agria Pet Insurance and also plan with Vetsure. The caller uses “Petsure” to start to describe the plan. It is not clear that the caller was confused.

144. The twenty second is a transcript of a call by Vetsure to AE, a pet owner, to complete the details of a health plan. The customer asks whether there is a “Petsure” because she thinks she had insurance with them before she moved house. Later in the call the customer has some difficulty with details and says she is not good at talking to people on computers and does not appear to know the details of the vet practice she uses. She appears generally confused.
145. The twenty third is an email from Vetsure to a vet practice relating to a claim form submitted by the practice. Vetsure did not recognise the owner. A claims referrals company responded that Vetsure should disregard this because “the client has since advised that they are with Pet Sure”. It is not clear who filled out the claim form or whether anyone was confused.
146. The twenty fourth is a transcript of a telephone call to Vetsure from DH, a potential customer. She refers to the Claimant as “Petsure”. The operator checks the name and the owner confirms that she intended to call Vetsure. She is a returning customer who previously had insurance. There is no indication that she was confused.
147. The twenty fifth is a transcript of a call to Vetsure from TR, an owner who had previously had insurance with Vetsure. She refers to having had “Petsure” before. The customer intended to call the Claimant and did so correctly. She does not appear to be confused.

Examples from the Defendants’ disclosure

148. I now consider the examples taken from the Defendants’ disclosure.
149. The first is a Trustpilot review for the Claimant where customer M mentions both marks. This example pre-dates the Defendants’ first use of the mark.
150. The second is a Trustpilot review for the Claimant where customer KLM refers to “Petsure” more than once. This example also pre-dates the Defendants’ first use of the mark.
151. These two examples show that it was possible to make a mistake about the Claimant’s name before the Defendants were trading. This shows that the VETSURE name may easily be the subject of a mistake. That reflects its descriptive nature.

152. The third is an email from BP to Petsure asking for information about Vetsure's Pet Health Plan. The customer had seen information, possibly a poster, at a vet's practice that said "Pet Plan" in large letters at the top and "Vetsure" in smaller letters at the bottom. The customer mistakenly contacted Petsure. They do not appear to be confused.
153. The fourth is an email from a customer KM to Petsure asking for a change to their email details on a Vetsure policy. It is not clear that the customer is confused.
154. The fifth is a transcript from a call to Petsure by an unnamed customer who is trying to call Vetsure but obtained the Petsure number from an internet search. It is not clear that the caller is confused in a relevant way.
155. The sixth is a transcript of a call to Petsure by an unnamed customer who has been told he is insured with Vetsure. It is not clear why he has called Petsure, and he may not be clear who he has called.
156. The seventh is a transcript of a call to Petsure by an unnamed customer who knows that she is a Vetsure customer and appears to have the wrong telephone number. On being told she has called Petsure she ends the call. It is not clear that she is confused.
157. The eighth is a transcript of a call by A, a Vetsure customer, to Petsure. He had called without his paperwork to hand and had Petsure's number from an online search. On looking at his papers his mistake becomes clear. He was not confused.
158. The ninth is an online chat between LTL, a Vetsure customer, and the Defendants (via their Zendesk system). She had intended to contact Vetsure but had made a mistake in an internet search. She does not appear to be confused.
159. The tenth is a transcript of a call to Petsure by an unnamed customer who does not have her policy details and says that the vet had told her she was insured with Petsure. It is not clear with whom the insurance is. It is not clear whether the error lies with the customer or the vet.
160. The eleventh is a transcript of a call to Petsure by an unnamed customer. She intends to call Vetsure but knows she has called Petsure. She is not sure what the number is for Vetsure and is not confused. The Defendants say this is the same customer as the sixth example from the Claimant's disclosure.

161. The twelfth is a transcript of a call to Petsure by a customer RB calling about her mother's policy and payments shown on bank details. She says that the bank details say Vetsure, so that she intended to call them, but she has called Petsure by mistake.
162. The thirteenth is a transcript of a call to Petsure by a customer GH. Her details do not appear to be for a Petsure policy and she is not sure whom she is trying to call.
163. The fourteenth is DA a customer who calls Petsure instead of Vetsure. The customer has made a claim and is following up, but has called Petsure by mistake. He says the document is labelled "Petplan", then says "Vetsure". He has made a mistake, but it is not clear what is the cause of that.
164. The fifteenth is a transcript of a telephone call to Petsure. The unnamed caller thinks that her ex-partner may have given her bank account details to make a payment. She thinks she intends to call Petsure and gives account details via an email. The call handler Ms Edwards checks the details and says that "we get Vetsure customers come through to us because it's a similar name to us". The customer is not confused.
165. The sixteenth is a series of messages by which a customer PG cancels their insurance with Petsure. She said "I accidentally went for the wrong insurance. I was after Vetsure because they are linked to our vets". The customer refers to this as an accident, but it appears in this case that there was some confusion.
166. The Claimant also included finally an example of an unknown professional transcriber using "Petsure" instead of "Vetsure". The Claimant suggests that if a professional transcriber can make an error and confuse the two names numerous times in this transcript then there is no hope for consumers. I disagree. It is not clear whether the transcriber was confused or simply made an error over words that are visually and aurally similar. That is not, however, the test of confusion which the court must consider. It may instead reflect the low distinctiveness of both the Defendants' and Claimant's marks.
167. The great majority of these examples do not show confusion of the type required for section 10(2) of the Act. They show "administrative" errors of the type described in *The European v The Economist* [1998] FSR 283. This is not surprising given that names in issue contain descriptive elements relating to the services provided.

168. There are thus incidents of mis-naming by consumers and a number of cases of mistakes occurring in a vet's practice. The picture that they give is consistent with the fact that both parties' names are of a descriptive nature and that their elements may be interchanged by mistake – but there does not appear to be confusion as to the parties providing the services. A number of the callers have not taken care before initiating a call and a number have made mistakes based on internet searches. It is not apparent that they are paying attention to the matter at hand in a way that the average consumer would.
169. There is no indication from this selection that the average consumer would be confused in the relevant sense. I note that the absence of actual witnesses is not decisive on the question of confusion; the court may still conclude that there is likelihood of that. In this case the evidence shows the opportunity for mistakes to arise in various ways.
170. In some of the cases it is not possible to conclude what has happened or if there was confusion. It does appear there was confusion in a small number of instances, but I conclude from the evidence overall that there was no likelihood of confusion. I note that a similar result was reached in *W3 v easyGroup* and *easyGroup v easylife* [2021] EWHC 2150 (Ch). The picture here is consistent with people making administrative errors.

Data on “baseline” confusion

171. As I have said, the Defendants sought to introduce at a late stage a bundle of transcripts showing that there was a “baseline” level of confusion in the market such that the average consumer was likely to be confused between all market participants.
172. The Claimant objected to the late introduction of that evidence and the Defendants' argument. The Claimant argued in reply that the Defendants have run their business in a way that invites this confusion, and they say that there is no evidence that this sort of “confusion” arises to any significant degree with any other provider in the market.
173. The Claimant says, further, that while the Defendants' entry into the market caused mistakes or confusion between many providers, the significant confusion that continued after that initial period of confusion was with the Claimant.

174. The parties took the transcripts and presented their numbers in various graphs and charts attempting to show the numbers of instances in different ways that supported their cases. It does appear that there was an increase in mistaken calls when the Defendants entered the market and that this did tail off. But the evidence on the extent and duration of this turbulence (including in respect of particular insurers) is not useful. It does not show whether consumers were confused or simply mistaken, and that is important. It also makes an assumption that each side is right in its characterisation of each instance relied upon as part of the overall data. There was no evidence supporting the validity of the data relied upon or the significance of the presentations.
175. It is not possible to find that there is an enduring baseline level of confusion, as the Defendants say, or that the Defendants have run their business in a way that encourages confusion, as the Claimant alleges. The evidence does not show that there was a likelihood of confusion for the purposes of infringement.

Further matters on section 10(2)

176. The Claimant argued that the Defendants launched their brand with full knowledge of the Claimant's brand and that this is a factor to be taken into account in considering whether there is a likelihood of confusion between the marks under section 10(2). They rely on *Fine & Country Limited v Okotoks Limited* [2012] EWHC 2230 (Ch) and *Planetart* (above) which makes the point in respect of section 10(3).
177. I accept that this is a matter that is to be taken into account where relevant. But in this case I have found that Mr Howsam selected the name because it fitted with the name of his existing STAYSURE business. It is therefore not a case where a defendant deliberately sailed close to the wind. The similarity of the names does not of itself prove that.

Conclusion on section 10(2)

178. Considering the elements set out in paragraph 26 of *Match Group*, I conclude that there is no infringement under section 10(2) of the Act. The use of PETSURE does not in my view give rise to a likelihood of confusion on the part of the public. As Millet LJ noted in *The European* at 289:

“ . . . Where descriptive words are included in a registered trade mark, the courts have always and rightly been exceedingly wary of granting a monopoly in their use.”

This is such a case.

179. The documents which I reviewed said to show actual confusion are consistent with that. The evidence that I considered is in line with my finding that there is no such likelihood. The instances are very largely of administrative errors. The small number that show actual confusion do not show a likelihood of confusion arising.

Section 10(3) - infringement

180. The Claimant relies on the same matters alleged under section 5(3) validity above. Additionally, the Claimant alleges that the Defendants intended to free ride on the Claimant's goodwill and reputation and that this is shown by the timing of the Defendants' adoption of the PETSURE mark.
181. There is also an additional risk of dilution which follows from the Defendants' allegedly aggressive marketing tactics, including pay-per-click advertising, search engine optimisation and use of promoted social media. These are very different from the Claimant's approach to marketing.
182. The Claimant relied on *Monster v Red Bull* [2022] EWHC 2155 to show that an intention to free-ride can be established without proving subjective intention if the defendant intends to influence the economic behaviour of consumers and selects a sign that is similar to that of the claimant.
183. In this case, however, both parties have selected signs that are descriptive of the goods and services offered. The protection which the Claimant enjoys is thus limited by that.

Conclusion on section 10(3)

184. There is no infringement under section 10(3) of the Act. Considering the factors set out in *Match Group* at paragraph 55 there is no link as required and there is no risk of a relevant injury in each case for the same reasons as under section 5(3). There is no intent to free-ride.

185. As with the issue of validity under section 5(3), I do not need to consider the question of due cause.

Passing off

186. I have described above the elements of passing off and noted that this matter was dealt with very briefly at trial.

187. The Claimant alleges in particular, as with section 10(3) of the Act, that the Defendants intended to sail too close to the wind in their use of PETSURE and thereby commit the tort.

188. The Claimant also relies under this heading on the Claimant's use of @VetsurePet as its Instagram handle and in hashtags, such that there is an "inherent propensity for confusion" between the parties.

189. The difficulty with these arguments is that, as before, there is no evidence of confusion or deception as to origin or of any likelihood of that. This is fatal to a claim in passing off. Both marks are descriptive as discussed above.

190. The question of damage therefore does not arise.

191. The claim for passing off fails accordingly.

Conclusions

192. The Claimant's claims for revocation of the PETSURE mark and infringement and passing off in respect of the VETSURE mark all fail.

193. The claims in relation to the Claimant's other marks also fail.