O-156-09

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 2461520
BY MOLAR LTD TO REGISTER THE TRADE MARK

ALIVA

IN CLASSES 3, 5, 10, 21 AND 44

AND IN THE MATTER OF OPPOSITION
THERETO UNDER NO 96653
BY GRUNENTHAL GmbH

TRADE MARKS ACT 1994

IN THE MATTER OF Application No. 2461520
By Molar Ltd to register the trade mark
ALIVA in Classes 3, 5, 10, 21 and 44

and

IN THE MATTER OF Opposition thereto under No. 96653
by Grunenthal GmbH

BACKGROUND

1) On 16th July 2007 Molar Ltd of The Yard, The Borough, Wedmore, Somerset BS28 4EB (hereafter "Molar") applied to register the following trade mark:

ALIVA

2) On 21st December 2007 the application was published for opposition purposes and on 19th March 2008, Grunenthal GmbH of Zieglerstr. 6, Aachen 52078, Germany (hereafter "Grunenthal"), filed notice of opposition to the application. The opposition is solely based on grounds under Section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is a partial opposition. That is to say, only the following goods are the subject of attack, and are therefore relevant for the purposes of these proceedings:

Class 5

Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; pharmaceutical and medicinal preparations and substances for human use; chewing gum and lozenges for dental hygiene; medicated oral care products, medicated tooth polishing preparations; medicated tooth whitening preparations; medicated mouthwashes; medicated bleaching preparations.

3) Grunenthal rely on their earlier Community registration 4337077. The relevant details of this trade mark are:

Trade Mark	Filing and registration dates	Goods relied upon as identical or similar
ESLIVA	14th March 2005 and 18th April 2006	Class 5 Pharmaceutical preparations for human application except cardiovascular preparations.

4) Molar subsequently filed a counterstatement denying the grounds for opposition.

5) Neither side has filed evidence and neither party has requested to be heard and the matter has now come to me for a decision based on the papers filed. However, both sides have filed submissions which I shall take into account and also, both parties request costs.

DECISION

Section 5(2) (b)

6) The opposition is founded upon Section 5(2) (b) of the Act. This reads:

> "(2) A trade mark shall not be registered if because –
>
> …….
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier 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."

7) An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

> "6.-(1) In this Act an "earlier trade mark" means –
>
> (a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,"

Grunenthal's mark was filed on 14th March 2005 and Molar's on 16th July 2007. Thus Grunenthal's mark is clearly an earlier trade mark in accordance with the Act.

Moreover, given that its date of registration is 18th April 2006 (within the period of five years prior to the date of publication of Molar's mark (being 21st December 2007)), it is not subject to proof of use requirements.

8) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the ECJ in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] ETMR. 723, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG,*

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG,* who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.,*

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG,*

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG,*

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.,*

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

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,*

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV,*

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.,*

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

The average consumer

9) Firstly, I turn to the question of how the average consumer would judge the respective trade marks. In Case T-483/04 *Armour Pharmaceutical Co v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),* the Court of First Instance stated:

> "79. The Court finds that the level of attention of the average consumer of pharmaceutical preparations must be determined on a case-by-case basis, according to the facts in the case-file, especially the therapeutic indications of the goods in question. Likewise, the Court finds that, in the case of medicinal products subject to medical prescription such as those being considered in the present case, that level of attention will generally be higher, given that they are prescribed by a physician and subsequently checked by a pharmacist who delivers them to the consumers."

10) That said, there is no evidence in this case as to whether either parties' goods are sold only through prescription. I note however that even in a prescription only scenario, where highly attentive healthcare professionals influence or determine the choice of product by or on behalf of the end-user, this should not rule out the possibility that the end user should be included as a relevant consumer, with an

active rather than passive role in the acquisition process (see paras 57-63 *of Case C-412/05P Alcon Inc v OHIM and Biofarma SA* ("*Alcon*")).

11) As there is no indication that either parties' goods are available only on prescription or only for specialised use by medical professionals, I must take into account that they could be purchased over the counter or from the shelf in a pharmacy or supermarket by the general public and may be of low cost. In other words, without more specific evidence here or a clear indication in the respective specifications, I must take the average consumer to be *both* end –user (as per the *Alcon* case) and healthcare professionals, such as doctors, pharmacists and pharmaceutical wholesalers and distributors.

12) It is appreciated that this does not represent a single, homogenous group of customers but allows for a varying degree of knowledge and brand discrimination. Medical professionals will be at one end of the spectrum and ordinary members of the public at the other (cf *Case T-256/04 Mundipharma AG v OHIM* at paras 44 and 45). It is submitted on behalf of Molar that, being medical/pharmaceutical products, by their nature the average consumer (even if that is the end-user) will take great care when purchasing such items, regardless of the fact that they may be low cost. Adverse effects will follow if the selection is wrong. There is simply no evidence on the specific nature of the products involved which would persuade me to adopt an approach which confers a particularly high degree of attentiveness, product knowledge or circumspection on the average consumers (cf para 19 of Case BL O-079-07, *Astra Zeneca AB v Ratiopharm GmbH ("Astra"),* before the appointed person). I proceed therefore on the basis that there is not a single, homogenous group in this case and that the various groupings will, in relative terms, have varying degrees product knowledge and brand discrimination. The *Astra* case referred to above expressly approves such an approach at para 19, already referred to.

Comparison of goods

13) In assessing the similarity of goods, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v.Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23 of the Judgment:

> 'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors includ*e, inter ali*a, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.'

14) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, paragraph 53 of the judgment of the Court of First Instance (CFI) in Case T-164/03 *Ampafrance v OHIM – Johnson & Johnson (monBeBé).*

15) Three further cases on the way that specifications ought to be interpreted should be borne in mind. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd ("Thomson")* [2003] RPC 32, at para 31, Aldous LJ, says

> "In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use."

Although this was in the context of arriving at a fair specification consequent to an attack of revocation on the grounds of non-use, the principle that it is the public and circumstances of the relevant trade that should underpin consideration as to the terms used in a specification nonetheless holds good. Secondly, there is the case of *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd ("Beautimatic")* [2000] FSR 267, in which the principle of giving words their ordinary (rather than an unnaturally narrow) meaning was enshrined. It is worth noting also that this case dealt, inter alia, with whether a 'skin lightening cream' and a 'dry skin lotion' could be considered to be 'cosmetics', as opposed to medicines or pharmaceuticals. Mr Justice Neuberger (as he then was) concluded that they could as both had the primary purpose of improving the appearance even though the products may have had some chemical, hydrating, effect on the skin. Finally, there is the case of *Avnet Incorporated v Isoact Ltd ("Avnet")* [1998] FSR 16 where Jacob J (as he then was) says:

> "In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

Although his comments relate to specifications for services the same principle applies also to goods. In summary, the *Beautimatic* and *Avnet* cases urge an approach that is neither unnaturally narrow nor overly wide, whilst the Thomson case stresses that the exercise is not one of lexical analysis in a vacuum but by reference to how the average consumer may perceive matters in the relevant trade.

16) Finally, before I start my analysis of the goods, it is important to recognise that even though I do not have the benefit of evidence on the matter from the parties on the similarity of goods, I nevertheless do have submissions and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the Appointed Person said in *Raleigh International trade mark* [2001] R.P.C. 11 at paragraph 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items, evidence may not be necessary. The tribunal may, in an appropriate case, consider the question of

similarity from the viewpoint of the notional member of the relevant purchasing public.

17) I notice first of all that it is submitted on behalf of Grunenthal that Molar do not deny (and therefore implicitly admit) in its counterstatement that the goods of the application are identical or similar to Grunenthal's goods. Although this is strictly speaking the case, Molar did nevertheless deny any valid grounds of objection under section 5(2)(b) (within which the question of similarity of goods is subsumed), and moreover have plainly contested the question of similarity of goods in their later filed submissions. I will proceed on the basis that the matter cannot be determined on the basis that Molar have conceded identity or similarity of goods.

18) By way of reminder, Grunenthal's specification is:

Class 5

> "Pharmaceutical preparations for human application except cardiovascular preparations"

Although there is an express exclusion relating to 'cardiovascular preparations' it is well established that goods covered by an earlier mark are considered identical if included in a wider term by a later mark (or vice versa) – see para 29 of the CFI Case, *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-133/05. On that basis it is self-evident that the following constitute identical goods:

> "Pharmaceutical and medicinal preparations and substances for human use."

It will be noted that I consider the words 'medicinal preparations' in Molar's specification to be synonymous with, or at least subsumed within, the term 'pharmaceutical preparations'. I will now go on to consider what goods may be considered similar to Grunenthal's specification.

19) Next I turn to consider "sanitary preparations for medical purposes" and "dietetic substances adapted for medical use". The end user for these products is likely to be the same as for pharmaceutical preparations, namely a person who has a health problem requiring treatment. The method of use may be the same, ingestion in the case of dietetic substances and many pharmaceutical preparations. Other pharmaceutical preparations may, similarly to sanitary preparations, be applied or sprayed externally. It is likely they could be used to complement pharmaceutical preparations in certain treatments or even as alternative treatments having the same objective. The channels of trade are likely to be the same, that is that they are available through pharmacies and supermarkets even. I conclude that these products are similar to pharmaceutical preparations for human use.

20) Next I turn to "veterinary preparations" and it will be recalled that Grunenthal's specification is restricted to pharmaceutical preparations for human use and this is

an important limitation. The end consumers are going to be different, the one seeking treatment for a human health problem, the other an animal problem. The method of use will also accordingly be different. The respective goods are not in competition with each other or complementary. Finally, the channels of trade will be different; human pharmaceutical preparations being available through pharmacies and the veterinary products being available through pet shops or the vets, unless perhaps they are everyday treatments which may be available through supermarkets. If that is the case however, they will most certainly not be in the same area of the supermarket, let alone the same shelves. I conclude that these products are not similar to pharmaceutical preparations for human use.

21) Next I shall turn to "plasters" and "materials for dressings". These goods have the same intended purpose as pharmaceutical preparations in that they treat human health problems. The end users will accordingly be the same, namely people requiring to be treated. Their method of use is on the face of it different, being stuck or applied to the body rather than, in the main, ingested or applied externally (in the case of ointments) or sprayed. They could be complementary in the sense that many human health problems involve a combined treatment of pharmaceutical preparations and plasters and dressings. They are not, on the face of it, in competition with pharmaceutical preparations. The respective channels of trade may be the same, that is to say that they are sold in pharmacies and supermarkets. In the latter context it is likely that they will be found in the same area as pharmaceutical preparations, if not on the same shelf. My conclusion is that these products have a low level of similarity to pharmaceutical preparations.

22) In respect to "materials for stopping teeth" and "dental wax", my assumption here is that these are specialist products, used or recommended only be dentists. The intended purpose may be the treatment of health problems but given, what I have assumed to be their specialised nature, it is unlikely that the average consumer would, out of the blue, simply walk into a pharmacy and acquire such goods without first being referred to a dentist. It could even be the case that such goods are not even available in pharmacies or supermarkets as their use and application is for and by the dentist only. Given the absence of evidence on the nature of these goods I am left to conclude that there is no similarity with pharmaceutical preparations.

23) Next, I consider "chewing gum and lozenges for dental hygiene"; "medicated oral care products"; "medicated tooth polishing preparations"; "medicated tooth whitening preparations"; "medicated mouthwashes"; and "medicated bleaching preparations". It is conceivable that some of these may be for the purpose of treating specific health problems, such as mouth ulcers, but others may be for primarily cosmetic purposes such as tooth whitening, or simply for reasons of oral hygiene. There may well then be some overlap of end user. The method of use may be different in that these products are not ingested. It is most unlikely that they will be in competition with each other and there is no evidence to say that they are complementary, in the sense of being indispensable to or important to pharmaceutical products. In terms of trade channels, if there is a known pattern of trade that pharmaceutical preparations are made by the same manufacturers as these products then no evidence has been brought to establish that. I am aware that both respective products are sold in pharmacies and supermarkets. In the supermarket context, both sets of products

can generally be found in the same area but not necessarily the same shelves. In my experience as a consumer I generally find all the oral care products grouped together along with toothbrushes, floss etc. I would add that it would be contrary to the case law I've referred to, to treat all such products inevitably as identical, or highly similar to, pharmaceuticals by virtue of the fact that in Molar's specification, they are preceded with the word 'medicated'. Whilst this may suggest an active ingredient of some sort it is not necessarily determinative of them being regarded as 'pharmaceuticals', in the sense that that word conveys to the average consumer and in everyday trade. I find echoes of the question posed in the *Beautimatic* case, namely whether 'skin lightening treatment' and 'dry skin lotions' can be regarded as a 'cosmetics' or 'pharmaceuticals'. Although the products had therapeutic effect involving a chemical, the Judge in that case found that such products were primarily designed to improve the appearance. There are products in this group in the same category, such as whitening or bleaching treatments, as well as products which may a dual effect (both curative and with the general aim of better hygiene). I conclude in relation to this group that there is only a low level of similarity with pharmaceutical preparations.

24) Then, finally we have the remaining goods:

> "Food for babies; disinfectants; preparations for destroying vermin; fungicides and herbicides."

These goods I regard as no similarity with Grunethal's goods. This is because; (a) they are not for use in the treatment or prevention of human health problems. Having said that it is conceivable that a 'fungicide' may be use in the treatment of, eg athlete's foot, but in the absence of evidence that such a treatment would be referred to as a 'fungicide' in natural use I am not prepared to conclude that that would be the case. Whilst I am sure humans can be afflicted with fungal infections it would be unwise to conclude all treatments relating thereto would be regarded as fungicides; the normal application would in my view be in relation to fungus treatments for, eg the garden; (b) it is at least questionable that there is an exact match in regard to the respective trade channels are (for example preparations for destroying vermin, fungicides and herbicides are sold, additionally, through garden centres) ; (c) even if the trade channels are the same, it is highly unlikely that they will be in the same area of a supermarket or pharmacy; and (d) the average consumer is going to be different. In terms of the submissions made to me, Molar submit that 'preparations for destroying vermin' are definitely dissimilar as they in a different aisle in the supermarket. Grunenthal concede that they are less similar than the other products but nonetheless should be considered in the overall likelihood of confusion assessment.

25) At this point I need to set out clearly my findings in relation to similarity in the following table:

Identical	Pharmaceutical and medicinal preparations and substances for human use.
Similar	Sanitary preparations for medical purposes; dietetic substances adapted for medical use
Low level of similarity	Plasters; materials for dressings; chewing gum and lozenges for dental hygiene; medicated oral care products; medicated tooth polishing preparations; medicated tooth whitening preparations; medicated mouthwashes; medicated bleaching preparations.
Not similar	Veterinary preparations; materials for stopping teeth; dental wax; disinfectants; food for babies; preparations for destroying vermin; fungicides, herbicides.

Comparison of marks

26) I will now go on to consider the similarities and differences between the trade marks themselves and the impact of any differences upon the global assessment of similarity. The trade marks to be compared are:

Grunenthal's mark	Molar's mark
ESLIVA	ALIVA

27) In visual terms, both marks are of similar, but not exactly the same length, both comprising three syllables. They share the same suffix, string or stem – "LIVA", and differ as regards the opening letters, being "A" and "ES". Molar say that "ES" and "AL" elements are very different visually, but I am obliged to consider the marks as totalities. **Given that the marks share the same suffix, string or stem, globally, I regard them as being visually similar to a reasonable degree.**

28) In aural terms, Molar's mark will be pronounced "A-LEE-VAH", "A- LIE-VAH" or "AL-EE-VA". The letter "A" will be pronounced either as "AY" or simply "A". Grunenthal's mark will be pronounced "ES-LEE-VAH" or "ES-LIE-VAH". Molar say that, aurally these marks are different given that "ES" is completely different to "AL" and that it has been acknowledged that the beginnings of words tend to be the most important (see *TRIPCASTROID* [1925] 42 RPC 264 at para 279 is cited, but there is much more recent case law to this effect, eg Case T-133/05

Meric v OHIM (PAM-PIM'S BABY PROP) [2006] ECR II-2737 at para 51). There is force in the submission that the beginnings of these respective words will, however one forms the "A" element in Molar's mark, be formed and will sound differently. "A"s and "S"s can readily be differentiated by speaker and listener alike and this is an important factor in aural use. Grunenthal say that the comparison should be made on the basis that the first letters in both marks are both vowels, 'A' and 'E', which are phonetically similar, but this is to ignore the impact of the second letters 'S' and 'L' respectively, which renders the beginnings of the words markedly different phonetically. This must be balanced against the identical nature of the remainder of the words – "LIVA" – however one chooses to pronounce it. **I conclude that the marks are aurally similar, but only to a reasonable degree.**

29) Conceptually, it is submitted on behalf of Molar that one has to consider whether the respective marks conjure up any particular meaning, notwithstanding that they are invented words. In this respect, they say that ALIVA will bring to mind the word 'alive', whilst ESLIVA will bring to mind the word 'saliva'. Grunenthal say that as neither word has any meaning, conceptual comparison does not influence the assessment of similarity. In other words, the marks are conceptually neutral. In terms of legal principle, I prefer Molar's submissions on this point. Just because words may be invented it does not prevent people seeking meanings which can be deduced if the invented word can be seen to be derived from words which are familiar (see paras 62 – 68 of CFI Case T-189/05 *Usinor SA v OHIM* ("Galvalloy"). On that basis I believe that Molar are correct in that ALIVA will be seen to be derived from, and bring to mind, the word 'alive'. I am not however convinced that the word ESLIVA will bring to mind 'saliva'. It may possibly be the case in certain contexts of usage, but as a bare submission it does not persuade, given the completely dissimilar beginnings to the words. Nonetheless, the logical consequence of my view that the consumer will derive conceptual meaning from the word 'ALIVA', but not in respect of 'ESLIVA'. Therefore there is a degree of conceptual dissonance between the two words. One will be seen to be derived from a known word, the other will not. **Consequently, I find that conceptually the marks are not similar.**

Likelihood of confusion

Distinctiveness of the earlier mark

30) I need now to bring my respective findings together in a global assessment of likelihood of confusion. But before doing so, there is one final element to consider, namely an assessment of the distinctive character of the earlier mark – ESLIVA. It will be recalled that one of the legal principles set out in para 15 supposes that the likelihood of confusion will be greater, the more distinctive the earlier mark. **In this case I can only conclude that ESLIVA is highly distinctive for the relevant goods.** I have already concluded that it has no

obvious meaning and must be regarded as an invented word. That puts it at the top of the scale, so to speak, of distinctiveness.

31) There are just two further submissions on behalf of Molar with which I need to deal. Firstly, that no evidence of confusion has been brought to bear which must be telling, and secondly, I have been referred to the preliminary indication in this case which found no likelihood of confusion. As regards the first submission, it is well established that the tribunal is charged with assessing likelihood of confusion. The fact that there is no evidence of actual confusion may in certain circumstances be a relevant factor in this assessment, in cases for example of 'peaceful co-existence' or 'parallel trading'. If the evidence establishes that the respective marks have actually been put to use in the same market (as opposed to the notional use which is normally considered) without the consumer being confused regarding economic origin, then this can inform the tribunal's decision. Alan Steinfield QC, sitting as a deputy judge of the High Court, in *Fiorelli Trade Mark* [2007] RPC 18 gave weight to an absence of confusion in the marketplace, however, this should be tempered by a number of decisions which express caution about the circumstances in which it is appropriate to give these factors weight (see the Court of Appeal in *The European Ltd v. The Economist Newspaper Ltd* [1998] FSR 283 at page 291, Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at 809 and the Court of Appeal in *Phones 4U Ltd v Phone 4u. co. uk Internet Ltd* [2007] RPC 5 at paragraphs 42 to 45.) In the first of the above cases, Millet LJ stated:

> "Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

Crucially, in this case there simply is no evidence from either side in this case which may lend weight to Molar's submission. The notional position has to prevail and so the first submission carries no weight.

32) As regards the second submission, the status of the preliminary indication has been effectively considered in the judgment of Mr Justice Lindsay in *esure Insurance Limited* and *Direct Line Insurance plc*, [2007] EWHC 1557 (Ch), dealt with the status of preliminary indications (paras 14 to 17 of the Judgment). He concluded that:

> "The Registrar's view was arrived at before there was any evidence on either side, before there was any argument on either side and in a context in which it could not be regarded as a decision against the interests of either side without the prospective loser being given an opportunity to be heard, an opportunity which was not given. So far from it being an error of principle to fail to take the Registrar's preliminary view into account, it would, in my judgment, have been a serious error of principle for it to have been taken into account."

This I think effectively deals with the second submission inasmuch as it urged me to take into account the preliminary indication.

33) The various findings I have arrived at above need now to be factored into an overall assessment of likelihood of confusion, which includes both direct confusion (mark against mark), and indirect confusion (even though the marks may not be confused, the consumer will consider the goods or services to come from the same source). I need to adopt a global approach, which takes into account 'imperfect recollection' on the part of the consumer as advocated by the ECJ in *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*

34) Bringing my conclusions together in a global assessment, in particular, the nature of the average consumer, my findings on the identical and similar nature of the goods, the highly distinctive nature of the earlier mark and my conclusions on aural, visual and conceptual similarities and differences, **I come to the conclusion that the opposition succeeds in respect of the goods identified as identical or similar in para 32, namely the following:**

> *Pharmaceutical preparations; pharmaceutical and medicinal preparations and substances for human use; sanitary preparations for medical uses; sanitary preparations for medical purposes; dietetic substances adapted for medical use.*

35) The opposition fails however in respect of goods I have found to have a low level of similarity, or to be not similar, namely the following:

> *Veterinary preparations; material for stopping teeth, dental wax; chewing gum and lozenges for dental hygiene; medicated oral care products; medicated tooth polishing preparations; medicated tooth whitening preparations; medicated mouthwashes; medicated bleaching preparations; disinfectants; food for babies; preparations for destroying vermin; fungicides, herbicides.*

36) These conclusions also recognise the interdependency principle whereby a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

Costs

37) As both parties have achieved an even measure of success which cannot be said to be balanced in favour of either side, I do not propose to favour either party with an award of costs.

Dated this 8th day of June 2009

Edward Smith
For the Registrar,
the Comptroller-General