

O/396/11

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO 2 523 519**

**IN THE NAME OF ASPEN VETS LIMITED**

**TO REGISTER IN CLASS 44 THE TRADE MARK: VETMEDUK**

**AND**

**OPPOSITION THERETO UNDER NO 100 110**

**BY VET UK LTD**

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**The Background and Pleadings**

1. Aspen Vets Limited (the applicants) applied to register the trade mark VETMEDUK on 12/08/2009. The application was published in the Trade Marks Journal on 06/11/2009 in respect of the following services in class 44:

*Medical services; veterinary services; hygienic and beauty care for animals; veterinary advisory services; veterinary assistance; professional consultancy relating to veterinary services; veterinary surgeons' services; veterinary surgical services; information services relating to veterinary pharmaceuticals; information services relating to the veterinary pharmaceutical industry, pharmacy advice; medical analysis for the diagnosis and treatment of persons.*

2. Vet UK Ltd oppose the registration on the basis of the following earlier trade marks United Kingdom trade mark No 2 498 893  and Community trade mark No 7 277 635 . These are registered in respect of the following goods and services:

Class 03:

*Shampoos; shampoos for animals; shampoos containing insecticides.*

Class 05:

*Pharmaceutical preparations; veterinary preparations; insecticides; veterinary products; preparations for use in dental care of animals; pre-filled syringes for medical use.*

Class 18:

*Collars for animals, collars for cats, collars for dogs; covers for animals; name tags for animals; clothing for animals; leads for animals; muzzles for animals; articles for equestrian use; bags.*

Class 20:

*Beds for animals; heat pads for animals; beds for domestic pets; cat and dog flaps not made of metal; dog kennels.*

Class 21:

*Grooming apparatus for animals; litter trays for animals; litter trays for birds; litter scoops for use with pet animals and bags and accessories therefor; cages for animals; food and/or drink bowls for animals; water drinking fountains for animals, including electrical water fountains; food and/or drink trays for animals.*

Class 28:

*Toys for animals; play equipment for animals.*

Class 31:

*Foodstuffs for animals; animal chews and bones.*

Class 35:

*Retail services connected with the sale of shampoos, shampoos for animals, shampoos containing insecticides, pharmaceutical preparations, veterinary preparations, insecticides, veterinary products, preparations for use in dental care of animals, pre-filled syringes for medical use, collars for animals, collars for cats, collars for dogs, covers for animals, name tags for animals, clothing for animals, leads for animals, muzzles for animals, articles for equestrian use, bags, beds for animals, heat pads for animals, beds for domestic pets, cat and dog flaps not made of metal, dog kennels, grooming apparatus for animals, litter trays for animals, litter trays for birds, litter scoops for use with pet animals and bags and accessories therefor, cages for animals, food and/or drink bowls for animals, water drinking fountains for animals, including electrical water fountains, food and/or drink trays for animals, toys for animals, play equipment for animals, foodstuffs for animals, animal chews and bones; mail order retail services connected with the sale of shampoos, shampoos for animals, shampoos containing*

*insecticides, pharmaceutical preparations, veterinary preparations, insecticides, veterinary products, preparations for use in dental care of animals, pre-filled syringes for medical use, collars for animals, collars for cats, collars for dogs, covers for animals, name tags for animals, clothing for animals, leads for animals, muzzles for animals, articles for equestrian use, bags, beds for animals, heat pads for animals, beds for domestic pets, cat and dog flaps not made of metal, dog kennels, grooming apparatus for animals, litter trays for animals, litter trays for birds, litter scoops for use with pet animals and bags and accessories therefor, cages for animals, food and/or drink bowls for animals, water drinking fountains for animals, including electrical water fountains, food and/or drink trays for animals, toys for animals, play equipment for animals, foodstuffs for animals, animal chews and bones; electronic shopping retail services connected with the sale of shampoos, shampoos for animals, shampoos containing insecticides, pharmaceutical preparations, veterinary preparations, insecticides, veterinary products, preparations for use in dental care of animals, pre-filled syringes for medical use, collars for animals, collars for cats, collars for dogs, covers for animals, name tags for animals, clothing for animals, leads for animals, muzzles for animals, articles for equestrian use, bags, beds for animals, heat pads for animals, beds for domestic pets, cat and dog flaps not made of metal, dog kennels, grooming apparatus for animals, litter trays for animals, litter trays for birds, litter scoops for use with pet animals and bags and accessories therefor, cages for animals, food and/or drink bowls for animals, water drinking fountains for animals, including electrical water fountains, food and/or drink trays for animals, toys for animals, play equipment for animals, foodstuffs for animals, animal chews and bones.*

3. The grounds upon which the opposition is based are as follows:

- Under Section 5(2) (b) of the Trade Marks Act 1994 (“the Act”) as the most distinctive element of the earlier marks is “VetUK” which is wholly contained within the trade mark applied for. The services applied for are similar to the goods and services of the earlier marks, particularly those in class 05. As such and bearing in mind the similarity of signs, there is a likelihood of confusion;
- Under Section 5(3) of the Act as there would be an inappropriate increase in the reputation of the applicant which will be to the unfair advantage and detriment of the opponent. The opponent has developed a large reputation in the UK and use of the contested trade mark in respect of similar services is likely to lead the public to believe that they are connected with the opponents. This may not only divert trade from the opponents but also risk its reputation if the service provided by the applicants was inferior to those of the opponents.

- Under Section 5(4)(a) of the Act in respect of the earlier unregistered trade mark VETUK which it is claimed has been in respect of the same goods and services as contained in the specifications of the earlier registered trade marks relied upon (as shown above). The basis of this claim is that the opponent's have a reputation in VETUK and use of the contested trade mark on similar services would lead to a misrepresentation and damage is therefore inevitable.
4. The applicants filed a counterstatement denying the grounds of opposition. In particular, it claims that the element VETUK is devoid of distinctive character, it is not fully contained within the contested trade mark and so there is no likelihood of confusion and the public would not be misled. Further it is denied that the applied for services are similar to those of the earlier trade marks. Finally, it is denied that the opponents have a reputation or goodwill or that unfair advantage or detriment would result from the use of the contested trade mark or that there is a misrepresentation and that damage would be caused by the use of the later trade mark.
  5. Neither side requested a hearing and both sides filed evidence. Further, written submissions were received which have been taken into account in reaching this decision.

### **The Opponent's evidence**

6. This consists of two witness statements, together with a number of exhibits. The first, dated 26<sup>th</sup> August 2010, is from Sarah Atkinson, a trade mark attorney with BRANDED! who are the representatives of the opponent in this matter. Her evidence includes the following information:
  - A search of the trade marks register of the terms VETUK has the result of only the opponents trade marks and that of the trade mark application, registration of the later mark would therefore lead to dilution of the opponents rights to the detriment of the opponent;
  - Print outs from the pages of the applicants and opponents websites highlight the similarity of the respective layouts, e.g. each have a banner across the top containing the respective trade marks; each have a product listing down the left hand side of the page; each contain a "featured product" and each offer advice/support services. This similarity helps to promote a misrepresentation that that the services of the applicant are somehow linked to those of the opponent and the applicant chose its layout in order to take unfair advantage from the reputation of the opponent;
  - The services provided by the applicant are in direct competition with those of the opponent.

7. The second witness statement, dated 25<sup>th</sup> August 2010, is from Iain Booth, who is the Director of the opponent company. His witness statement includes the following information:

- The earlier trade marks have been used in the United Kingdom in respect of the goods and services for which they are registered since September 2008. The name VETUK has been used since October 2005<sup>1</sup>. Exhibit IB2 is samples of the opponent's letterhead, business card and order confirmation. I note that these are all dated after the filing date (the relevant date) in these proceedings;
- The total sales revenue under VETUK and the earlier trade marks is:

Year	Retail sales
2005	£50,000
2006	£550,000
2007	£2,000,000
2008	£3,800,000
2009	£6,000,000
2010 to date	£5,500,000

- A selection of invoices is contained in Exhibit IB3. There are around ten in total, spanning a period from December 2006 to August 2010 (three of the invoices are after the relevant date). I note that the figurative earlier trade mark is displayed on some of the invoices, though only two of these are prior to the relevant date, whereas on five of the invoices a different logo is displayed, that of a snake device with a large letter V appearing in the centre of it, encased in an incomplete circle. However, even in respect of this, the words VETUK are clearly contained within it.
- Advertising spend is as follows:

Year	Advertising spend
2006	£6,500
2007	£20,000
2008	£21,000
2009	£11,000
2010 to date	£50,000

<sup>1</sup> This use was in respect of a variant VETUK trade mark, which I will further refer to where necessary during my decision.

- The services have, according to Mr Booth, been promoted via the opponent's website since 2005. Exhibit IB4 contains a sample of invoices from website developers regarding fees for hosting services and operational support. I note that this at least supports the assertion that the website has been in use, the set up of the website appears to have been commenced in June 2005 and was being developed and/or supported as from December 2005 onwards. The applicant argues that one of the invoices refers to a different company. However, I note that it is addressed to Mr Booth and clearly states that is in respect of [www.vetuk.co.uk](http://www.vetuk.co.uk).
- Exhibit IB5 contains copies of invoices from the search engine Google regarding advertising amounts spent on advertising. I note that the actual terms advertised are not clear from these invoices.
- IB6 is, according to Mr Booth, an article which appeared in the Daily Express newspaper, featuring the opponents. I note however, that the article is in respect of amounts spent on taking care of pets and, as argued by the applicants, the opponents are not specifically mentioned.
- IB7 is a VETUK feature which appeared in the Yorkshire Post newspaper. The article is dated 13<sup>th</sup> April 2010 which is after the filing date. However, the content is relevant as it details the history of the opponent company, for example it states the opponent started selling on an auction website in February 2005 and provides details as to its current financial position, which at the date of the article was turnover of just short of £10 million. Vetuk is specifically mentioned in the article.
- IB8 is an example of a mailshot which was sent to 100,000 homes across Yorkshire. I note that it bears the earlier trade marks, though it is not dated, so it is unclear as to when these mailshots occurred.
- IB9 are samples of monthly invoices from marketing agencies to the opponent. However, there are no details of the precise activities which gave rise to these invoices and indeed some are in respect of activities internal to the opponent company such as the provision of training for employees of the opponent company in respect of marketing etc.
- IB10 are examples of testimonials/reviews received from customers of the opponent, from both the opponent's website and those of a third party. I note that these span a date range from December 2006 to around May 2010 and are invariably positive in tone and content as regards the opponent's retail service.
- According to Mr Booth, the opponent enjoys a 17.5 % market share, though this is not supported by any documentary evidence, despite the reference to the source of this information being provided by Mr Booth (Veterinary GFK Wholesale data).

### **The applicant's evidence**

8. This is comprised of a witness statement and written submissions. In respect of the written submissions, I do not intend to summarise their contents, though I have taken them into account in reaching my decision. I will pick out the points and arguments that I deem pertinent as and where appropriate during this decision. The witness statement, dated 27<sup>th</sup> November 2010, is from Rai Dutta, who is a Director of the applicant company. Mr Dutta is also a qualified veterinary surgeon. The witness statement includes the following relevant information:

- Mr Dutta explains that he always intended to start an e-commerce website in respect of veterinary products and commenced working on a site in 2008;
- Mr Dutta describes how he chose a website designer to work with and how the design of the applicant's website progressed, in particular, he explains that the picture of a cat and other animals was used due to the nature of the products in question;
- The name VetmedUK was chosen because no other party owned the domain name and also as it is believed that the combination of "vet" and "med" are distinctive and unique and which serves to differentiate from "vet" or "med" alone and so the combination would efficiently identify and distinguish the applicant's website from others;
- At the time of adopting this name, Mr Dutta asserts he was unaware of the opponent company;
- The applicant has, according to Mr Dutta, been using VETMEDUK since March 2008, prior to the filing date of the earlier trade marks and the total turnover since then has been in the region of £18,000. I note there is no supporting evidence of this;
- Further, the trade mark has been advertised. There is no supporting evidence of this;
- Exhibit RD3 contains the results of an internet search which reveals that many web-sites use the descriptive element "vet" in relation to their services. They should, according to Mr Dutta, be free to do so;
- Mr Dutta concludes by stating that he is not aware of any instances of confusion between the applicant's and the opponent's trade marks.

### **The Opponent's evidence in reply**

9. This is comprised of written submissions, together with a further witness statement from Mr Iain Booth. As above, I will not summarise the written submissions here but have fully taken them into account in reaching my decision. I will highlight any points that I consider to be important in giving my



reasoning throughout this decision. The witness statement from Mr Booth is dated 11<sup>th</sup> February 2011. He provides sales figures which are purely in respect of the UK which are around £6.5 million prior to September 2008 and £18 million from September 2008 to the current date (which I take to be the date of the witness statement). These dates are important to Mr Booth as those prior to September 2008 indicate those made under the old vetuk logo whereas the remaining follow the adoption of those earlier trade marks which form the basis of this opposition. I have already noted that in respect of the earlier logo, the words vetuk are clearly displayed. I will return to this point, if necessary, later in my decision. Mr Booth also exhibits a list showing the number of orders the opponent has received via its website, which run into over 600,000. He also exhibits more evidence regarding PR and advertising activities. In respect of the market share enjoyed by the opponent, Mr Booth advises that this has changed as the baseline as to how the figure is calculated has changed. The written submissions now claim this market share to be 13%. Mr Booth accepts that no independent evidence to support this is provided and there is a suggestion that this is due to the sensitive nature of the information. I note that there is no real explanation as to how exactly this information is sensitive.

## **DECISION**

### **Preliminary remarks**

10. In its evidence, the opponent appears to suggest that similarities between the layout of the parties' respective websites is a relevant factor that I should bear in mind in considering the grounds of opposition raised in these proceedings. As an aside, I observe that the similarities noted by the opponent in its evidence seem to me to be common to a large number of websites in respect of layout, in that many will place the website name at the top of the home page, have a menu on the left hand side, use the technique of a "product feature" and have an advice/support section as part of its customer service. Further, crucially, the assessment I am required to undertake is notional in nature. This means that I must consider the respective trade marks and goods and services as they appear on the register, irrespective of the manner of actual use which is taking place in the marketplace.

### **The proof of use provisions**

11. The contested trade mark was published on 6<sup>th</sup> November 2009. The earlier trade marks were registered on 24<sup>th</sup> April 2009 and 23<sup>rd</sup> July 2009 respectively. As a five year period has not elapsed prior to the publication of the contested trade mark, the proof of use provisions do not apply. I must

therefore make a notional assessment based on the earlier specification of goods and services as they are registered.

**Likelihood of confusion – Section 5(2)(b) of the Act.**

12. The relevant parts of section 5 of the Act read as follows:

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

(a) .....

(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.

13. The leading authorities which guide me in this ground are from the CJEU: *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 B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 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 for 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) 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*

(f) 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*.

(g) 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*,

(h) 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*,

(i) 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*,

(j) 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*,

(k) 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*,

(l) 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.*

14. For reasons of procedural economy, I will focus upon the earlier trade mark which, in my view, represents the opponents best case, namely Community trade mark No 7 277 635. Further, it seems to me that the opponent's best case rests upon a comparison of its goods in classes 03 and 05 with the contested services. If the opponent is unable to succeed here, then it is unlikely to succeed in respect of the remaining goods and services. I will therefore consider the remaining earlier goods and services (and indeed the remaining earlier trade mark) only if necessary.

### **Comparison of the goods and services**

15. When making the comparison, all relevant factors relating to the goods and services in the respective specifications should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of its 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 include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”*

16. Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

“(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

17. The earlier goods are:

Class 03:

*Shampoos; shampoos for animals; shampoos containing insecticides.*

Class 05:

*Pharmaceutical preparations; veterinary preparations; insecticides; veterinary products; preparations for use in dental care of animals; pre-filled syringes for medical use.*

The contested services are:

Class 44:

*Medical services; veterinary services; hygienic and beauty care for animals; veterinary advisory services; veterinary assistance; professional consultancy relating to veterinary services; veterinary surgeons' services; veterinary surgical services; information services relating to veterinary pharmaceuticals; information services relating to the veterinary pharmaceutical industry, pharmacy advice; medical analysis for the diagnosis and treatment of persons.*

18. The earlier *veterinary preparations; veterinary products* aim to treat or otherwise manage illness or disease in animals. This is identical in purpose to the contested *veterinary services; veterinary assistance; veterinary surgeons' services; veterinary surgical services*. Further, the end users, namely the public at large who are pet owners coincides. The distribution channels can also be identical in that the earlier goods can be sold and/or provided via the contested services, such as in a veterinary practice. Finally, there is a complementary relationship in that the contested services cannot reasonably be executed without the earlier goods. They are considered to be similar. For the same reasons, albeit in respect of humans as opposed to animals, *medical services* are considered to be similar to *pharmaceutical preparations*. Further, the ultimate aim of *medical analysis for the diagnosis and treatment of persons*, is to treat illness and so it also coincides in purpose to the earlier goods. They are also similar.
19. Similarly, many veterinary products and preparations contain leaflets of information which offer advice on products, in particular how they should be used and also advice as regards treatments. This is identical or at least very similar in purpose to many of the contested services which either explicitly offer advice or are those where the provision of advice is included therein. Further, many of the advice related contested services may include advice as regards particular veterinary products and so there is to some degree, a complementary relationship between them. The end users are also likely to coincide. The following services are also, therefore, found to be similar to the earlier veterinary preparations and veterinary products:

*veterinary advisory services; professional consultancy relating to veterinary services; information services relating to veterinary pharmaceuticals; information services relating to the veterinary pharmaceutical industry.*


As above, for the same reasons, the contested *pharmacy advice* is also deemed to be similar to *pharmaceutical preparations*.

20. The purpose of the contested service *hygienic and beauty care for animals* is to cosmetically care for animals by washing them and maintaining levels of hygiene. In carrying out this task, they are highly likely to utilize the earlier class 03 goods, particularly shampoos which have the same purpose. Indeed the services are unlikely to be able to be provided without the use of such products and so they are complementary. The providers of such services can also reasonably provide the earlier products for sale at the same premises and so the distribution channels can coincide. The end users are potentially the same. They are similar.

### Comparison of the marks

21. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account any distinctive and dominant components.

22. The respective trade marks are shown below:

	VETMEDUK
Earlier trade mark	Contested trade mark

23. The earlier trade mark is a figurative mark though I note that the elements “vetuk” appear in a fairly standard script, albeit in the colours purple and lilac. The contested trade mark is a word only mark. The marks coincide in respect of the elements “vet” and “uk” which comprise the entirety of the earlier sign and the first and final elements of the contested sign. They differ in respect of

the particular stylisation present in the earlier sign and the colours used, though the earlier sign is clearly the words “vet” and “uk”. Further, they differ in respect of the additional verbal element “med” which appears in the centre of the contested sign and has the effect of separating the coincidental elements between the signs. Though the visual similarity is tempered to some extent by these differences, the presence of the elements “vet” and “uk” in each of the signs lead me to the conclusion that they are similar overall, to a moderate degree.

24. Aurally, the respective first and final syllables of each are identical. They differ in respect of the additional middle syllable which appears in the contested trade mark and has no counterpart in the earlier trade mark. This addition has the effect of lengthening the contested sign, which does influence the degree of aural similarity between the signs. However, this is only one syllable and so despite this, I consider them to be, overall, similar to a moderate degree.

25. Conceptually, the word vet in the earlier trade mark is likely to be understood as making a reference to the practitioner who treats sick animals or the practice where one would take a sick animal for it to be treated. The “uk” will be understood as referring to the United Kingdom. As a combination, I consider it likely that the earlier trade mark will be understood as referring to nationwide veterinary practitioners or veterinary practices/services. The elements vet and uk in the contested trade mark be accorded the same meanings as already described. The element “med” is likely to be understood as an abbreviation for medicine or medical. As a combination, the contested trade mark also alludes to veterinary practitioners/practices on a nationwide scale and also medicine or medical practices on a nationwide scale. I accept that these potential meanings are not as cogent as that which is likely to be accorded to the earlier trade mark. However, the allusion to the same or a similar kind of idea is present. In my view, the impact is that there is at least a degree of conceptual similarity between the signs. They are not exactly the same, but they are not clearly different either.

### **Distinctive and dominant components**

26. As regards dominant components, I am of the view that neither sign has any element which can clearly be viewed as visually outstanding. Rather, each will be appreciated instantly as a complete whole.

27. In respect of distinctive components, the applicant argues that VETUK is very low in distinctive character (if indeed it has any distinctive character at all) as they are in respect of goods and services relating to veterinary products for use on animals provided by a company in the United Kingdom.



28. The opponent has filed evidence which it claims supports the assertion that they have a reputation in respect of the goods and services for which the earlier trade marks are registered. If proven, such a claim would be relevant to the issue of distinctiveness and in particular the penumbra of protection to be accorded the earlier trade mark. In respect of the evidence filed, it is exclusively in respect of retail services of veterinary products and related products for animals. There is no evidence in respect of the class 03 and 05 goods per se, which I have already found to represent the opponent's best chance of success under section 5(2)(b) of the Act. As such, the evidence even if it does indicate that the earlier trade mark has a reputation, does not advance the opponent's case here.
29. This leaves me to consider the distinctiveness of the earlier trade mark on a prima facie basis, in respect of the class 05 goods which form the high point of the opponent's case. To my mind, the earlier trade mark is strongly allusive of at least of the goods relied upon, most notably veterinary preparations, veterinary products and preparations for use in dental care of animals. However, it is no more than that and is certainly not directly descriptive. It is the combination of the elements "vet" and "uk" which to my mind, accord it at least a degree of distinctive character with the effect that it becomes more than simply the sum of its parts. Overall therefore, I consider that the earlier trade mark is distinctive, to a relatively low degree in respect of such products. For those goods that are not specifically related to vets, the mark is distinctive to an average degree. I will consider the impact of this further below in relation to the overall likelihood of confusion, bearing in mind that the more distinctive the earlier mark(s) (based either on inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24).
30. Though there is no requirement for me to consider the degree of distinctiveness of the contested trade mark per se, I must bear in mind whether there are any particular components of it which are distinctive in order to reach a view as to the overall degree of similarity between the signs. To my mind, the situation is similar to that of the earlier trade mark in that it is the combination as a whole that is distinctive and notably this includes the commonality of joining of "uk" with other elements.
31. In my view, this joining of "uk" with other elements, one of which is also identical (vet) to that contained within the earlier trade mark, lead to the marks creating a similar impression. I therefore consider their overall similarity to be moderate.

## **The average consumer**

32. The case-law informs me that the average consumer is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). The degree of care and attention the average consumer uses when selecting goods or service providers can, however, vary depending on what is involved (see, for example, the judgment of the GC in *Inter- Ikea Systems BV v OHIM (Case T-112/06)*).
33. In this case, the majority of the goods and services are related to treatment and maintenance of health and wellbeing in respect of both animals and humans. The average consumer therefore will be the public at large, including pet owners and, bearing in mind the nature of the goods and services, as already described, I would expect the level of attention to be displayed to be reasonably high. In respect of the earlier class 03 goods and the hygiene and beauty care for animal services, the level of attention may be fairly low in that they may be purchased or frequented on a more regular basis and are of more of a cosmetic nature. However, many shampoos and indeed hygiene related services are used to treat or manage a particular medical condition (such as a skin condition) and so there is at least potential for the level of attention to be higher.

## **Global Assessment – Conclusions on Section 5(2)(b)**

### **Parallel Trading**

34. The applicants argue (as part of their written submissions), that the opponent has not provided any evidence that there have been actual instances of confusion between the marks. They add that they are also unaware of any instances of confusion having taken place. They further argue that they have used the marks since prior to the filing date of the earlier trade marks is a factor that should be considered in determining whether there is a likelihood of confusion.
35. As regards actual confusion and the lack of evidence thereof, I must simply state that an absence of actual confusion does not affect the assessment I am required to make which is notional in nature and considers whether or not, bearing in mind the marks and the goods and services, confusion is likely.
36. Evidence of parallel trading is a factor which could, potentially, assist in deciding whether there exists a likelihood of confusion. This is because if the evidence establishes that the respective marks have actually been put to use in the same market 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 approach must also take in account the decisions which advise 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 these 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.”

37. Some evidence of use has been provided to this tribunal, which I have already summarised. Bearing in mind the case-law referred to above, for concurrent trading to play a meaningful role in the assessment of the likelihood of confusion I must be satisfied that the parties have traded in circumstances that provide consumers the opportunity for exposure to both marks and, further that they have been able to differentiate between them without confusion as to trade origin. There has been no evidence to this effect here. As a result, this factor can be given no weight in determining whether or not there is a likelihood of confusion.

38. In considering the likelihood of confusion therefore, it is clear that the factors assessed have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17) and that a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

39. The goods and services have been found to be similar and the respective trade marks are visually and aurally similar to a moderate degree. They are both comprised of a combining form, with the elements “vet” and “uk” appearing in both, with a differing middle in the contested trade mark, namely “med”. This differing element does not however, offer a clear difference in concept and so the trade marks have been found to share at least a degree of conceptual similarity. The marks are moderately similar overall. It is true that for these goods and services, the level of attention of the average consumer will be either reasonably high or at least potentially so. However, I must also take into account the principle of imperfect recollection. The common combining form of “uk” with “vet” has the impact of the marks creating a similar overall impression. Though there is an additional element “med” present in the contested sign, I am of the view that it is an inadequate differentiating feature, due to the overall degree of similarity and due to the fact the marks may be imperfectly recalled. It is also true that in respect of

some of the earlier goods, the degree of distinctiveness of the earlier trade mark is relatively low. However, this is only one factor to be considered in the global assessment and in my view, does not sufficiently counteract the important impact of the similar overall impression created by the use in each mark of the aforementioned combining form of the elements “uk” with “vet”. To my mind, taking into account the degree of similarity of the trade marks, the similarity of the services and the notion of imperfect recollection, I am persuaded that the average consumer is likely to mistake one trade mark for the other. Further, I consider that it is likely that a consumer upon being confronted with the later trade mark in respect of the services applied for may well consider that the earlier trade mark has simply branched out to provide medical and veterinary services to complement its business in the provision of the related goods. As such in my view, a consumer is likely to believe the marks to be used by economically linked undertakings.

40. The effect of this is that the opposition, based upon section 5(2)(b) of the Act succeeds in its entirety. The opponent has also opposed on the basis of section 5(3) and 5(4)(a) of the Act. However, I note that I have already decided that there is confusion and that the goods and services are similar. As such, the opponent cannot be in any better position under these grounds and so there is no need to consider them further.

### **COSTS**

41. The opponent has been successful and is entitled to a contribution towards its costs. Neither party sought costs off the normal scale and I am of course mindful that neither party sought a hearing. In the circumstances I award the opponent the sum of £1000 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Statutory fee for filing opposition - £200

Filing notice of opposition and considering counterstatement- £300

Filing evidence and submissions and considering the applicant's evidence - £500

Total - £1000

42. The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful

**Dated this 16<sup>th</sup> day of November 2011**

**Louise White**

**For the Registrar,**

**The Comptroller-General**