

O-043-16

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3068871
BY COLONIS PHARMA LIMITED**

TO REGISTER THE TRADE MARK:

Q-BLEND

IN CLASS 5

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 403639 BY OLIMED LTD**

Background and pleadings

1. On 15 August 2014, Colonis Pharma Limited (“the applicant”) applied to register the trade mark **Q-BLEND** for the following goods in class 5:

Pharmaceutical and veterinary preparations; medicines for human use; sanitary preparations for medical purposes; vaccines; plasters; materials for dressings; materials for compounding pharmaceutical and veterinary preparations and medicines; vehicles for preparation of dosage forms for pharmaceutical and veterinary preparations and medicines.

The application was published for opposition purposes on 17 October 2014.

2. The application is opposed by Olimed Ltd (“the opponent”). The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the goods in the application. The opponent relies upon trade mark registration no. 1264441 for the trade mark **Q**, applied for on 10 April 1986 and for which the registration procedure was completed on 7 February 1992.

The mark was initially registered in the name of New Era Laboratories Limited (“New Era”) before being assigned in full to Merck Consumer Healthcare Limited (“Merck”) on 15 March 2005. The mark was then assigned from Merck to the opponent on 11 September 2013.

3. Given its date of filing, the opponent’s mark qualifies as an earlier mark in accordance with section 6 of the Act. The opponent relies upon all of the goods for which the earlier mark is registered, namely:

Class 5 Homeopathic salts, tissue salts, preparations containing such salts, all adapted for the relief of catarrh, sinus disorders and all included in Class 5.

The opponent stated in its Notice of Opposition that it has used its mark in relation to all of the goods relied upon. This statement is made because the earlier mark is subject to the proof of use provisions contained in section 6A of the Act.

4. The opponent claims that there is a likelihood of confusion because there are visual, phonetic and conceptual similarities between the marks and because the goods are identical or similar.

5. The applicant filed a counterstatement in which it denies the basis of the opposition and in which it puts the opponent to proof of use. It states that neither the marks nor the goods are identical or similar and denies that there is a likelihood of confusion.

6. Both parties filed evidence, with the applicant also filing submissions during the evidence rounds. I have read all of the evidence carefully; I will summarise it only to the extent that I consider necessary.

7. No hearing was requested and neither party filed written submissions in lieu of a hearing. This decision is taken following a careful reading of the papers.

Evidence

The opponent's evidence in chief

8. This consists of the witness statement of Marcel Ulrich, director of the opponent, and the witness statement of Martin Sillitto, the Site Director of Seven Seas Limited ("Seven Seas"). Although Mr Sillitto's witness statement has been filed as an exhibit to Mr Ulrich's statement, as it contains a good deal of the evidence addressing the proof of use issue, I will deal with it separately, below.

Mr Ulrich's statement

9. Mr Ulrich states that New Era manufactured a range of tissue salts and that "Q" was used to designate the products within the New Era range intended for the relief of catarrh and sinus disorders. He states that Seven Seas Worldwide Limited ("SSWL") acquired New Era and in turn was acquired by Merck. SSWL assigned, among others, the registration being relied upon to Merck on 14 September 2005 and SSWL continued to use the Q mark as a subsidiary of Merck. He indicates that the opponent's mark has been in use since 1994 and that SSWL continued to use the mark as a subsidiary of Merck following the transfer in 2005.

10. Filed as exhibit 3 to Mr Ulrich's statement is a copy of a deed of assignment relating to the earlier mark, dated 11 September 2013. It confirms that the rights, title and interest, along with the goodwill relating to the trade marks and goods subject to the assignment, passed from Merck to the opponent. The applicant has not taken issue with this and I do not need to address it further.

11. Mr Ulrich presents at exhibit 7 a list of companies, which he states was provided by Merck and SSWL as a list of New Era customers in the UK. For the majority of the companies listed, the shipping destination is given as the UK. He states that it reflects the list of invoices to customers at exhibit 2C to the witness statement of Mr Sillitto.

12. Exhibit 8 includes two reviews of "New Era Combination Q – For Catarrh & Sinus Disorders" printed from amazon.co.uk. The dates of the reviews are 1 April 2010 and 31 July 2012. There are also queries regarding New Era tissue salts, which have been taken from www.healthypages.com. They date between 16 March 2013 and 27 July 2013. There are no images of the mark in use in this exhibit.

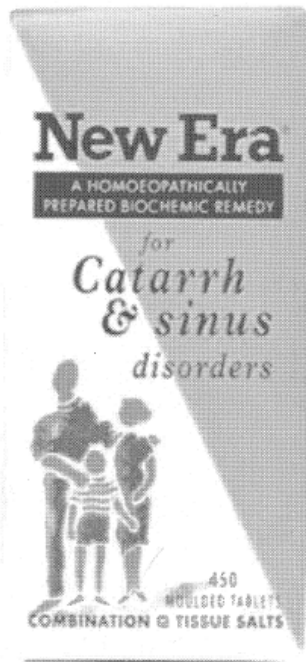
13. Exhibit 10 contains a printout from www.topcashback.co.uk, which provides a description of “Seven Seas New Era Combination Q For Catarrh and Sinus Disorders”. There is no image and it is not dated. The exhibit also includes a printout of a web page from www.amazon.co.uk, displaying an image of the product it describes as “New Era Combination Q - For Catarrh and Sinus Disorders”. The mark “Q” is not visible on the packaging.

Mr Sillitto's evidence

14. Mr Sillitto states that the mark has been used in the UK between 1994 and 2012. Exhibit 2B shows that the sales figures for the “Q” product totalled almost £2,875,000 for the period 1994-2012. The number of units sold was at its peak in 1998 with 144,174 (corresponding to sales worth £216,593.12), falling steadily to its lowest figure of 26,393 in 2012 (sales of £48,160.89 (p. 28)).

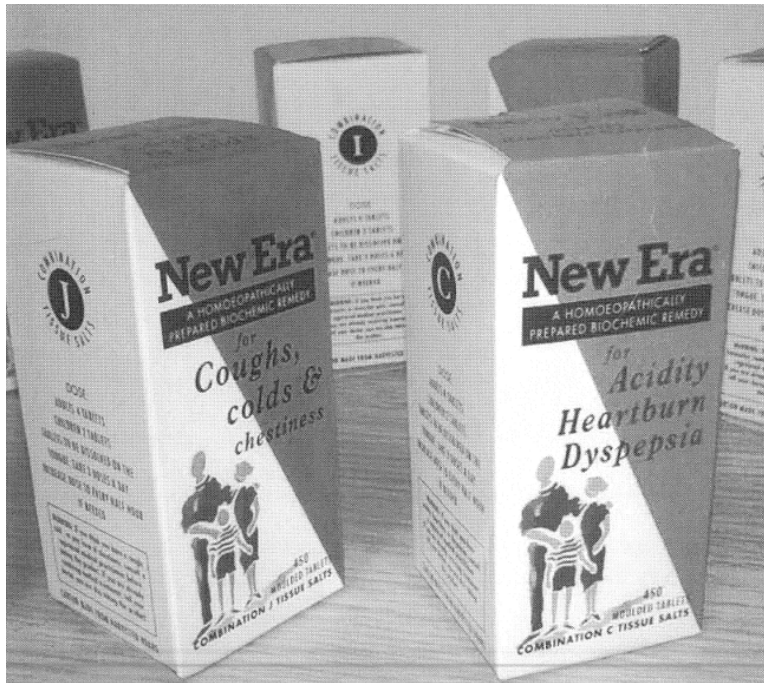
15. A table listing over 8,000 invoices for the “NEW ERA STD COMB Q CATARRH” product is provided at exhibit 2C. Mr Sillitto states that these invoices all relate to customers in the UK; this is borne out by a number of the company names which reference UK cities and towns (e.g. at p. 35, ‘Tesco Cardiff’, ‘Superdrug Croydon’, ‘Roys (Wroxham) Ltd’). The dates of these invoices are between 1994 and 2012. However, no analysis of these invoices is provided and I note that some of the company names are followed by the instruction “DO NOT USE” (e.g. Natures Way Ltd at p. 36) or the comment “DEAD ACC” (e.g. Bolton Health Food at p. 39).

16. Mr Sillitto gives examples of the product on sale at Tesco.com, amazon.co.uk and www.gdcooper.co.uk at exhibit 2D. These pages are undated save for the printing dates of 26 March 2015 (Tesco.com) and 25 March 2015 (amazon.co.uk and www.gdcooper.co.uk). The packaging used appears to be the same across these websites and is as shown in the image below:



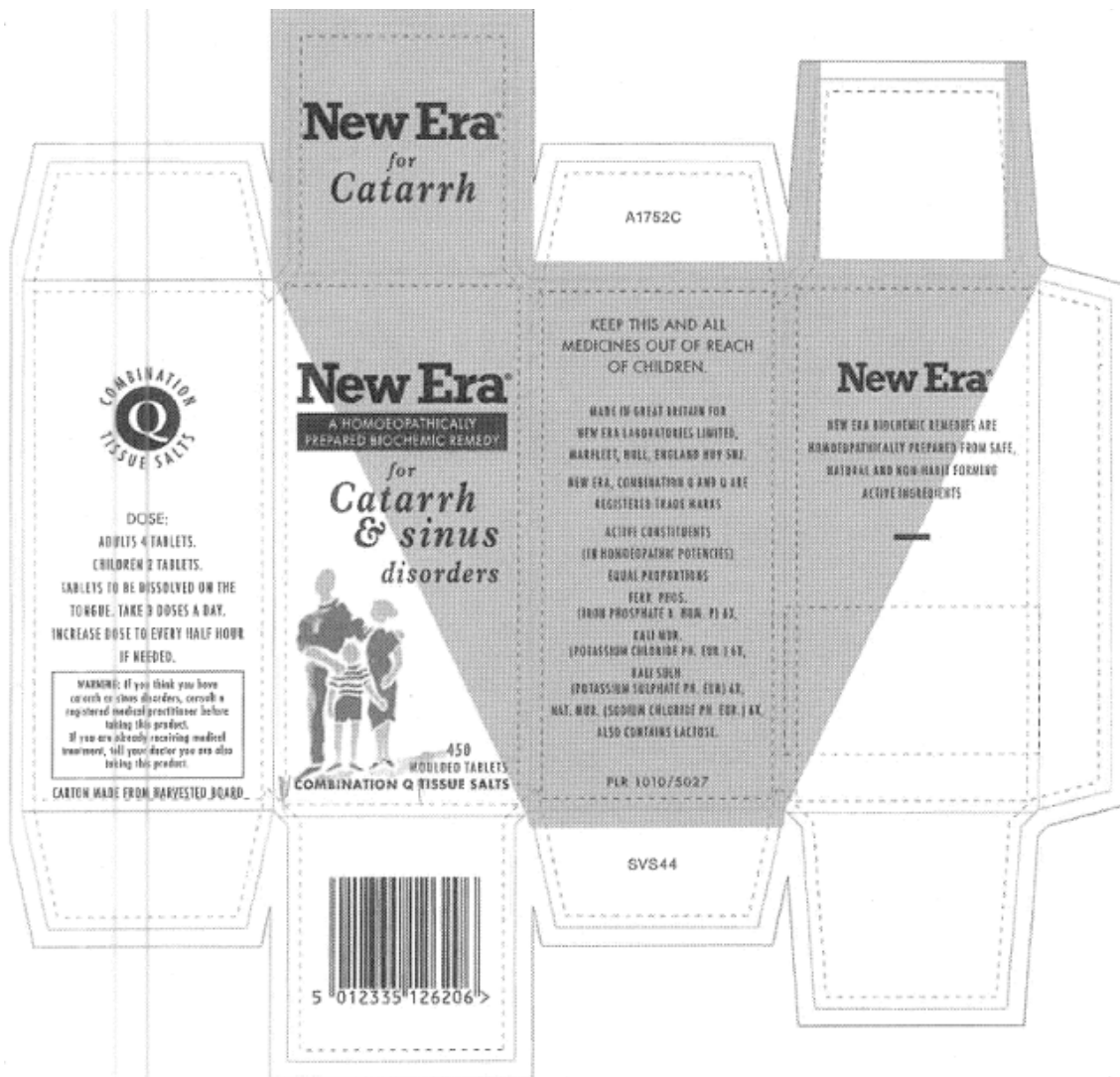
Across the bottom of the box, the words “COMBINATION Q TISSUE SALTS” are visible.

17. At exhibit 2E to his witness statement, Mr Sillitto exhibits what he describes as “printouts of packaging samples displaying the side of the packaging of the New Era range of products” (paragraph 7). He goes on to explain that “I was unable to get hold of a packaging sample for the Q product. However, these show how the letter Q would have been usually displayed on the packages in relation to similar combination remedies which are in the same range of products”. The image is reproduced below:



Across the bottom of the front of the left-hand box are the words “COMBINATION J TISSUE SALTS”. There is, in addition, a letter ‘J’ on a round black background surrounded by the words “COMBINATION TISSUE SALTS”. The equivalent appears for the letter ‘C’ on the right-hand box.

18. Mr Sillitto also provides, amongst others, the carton text for the “Q” product at exhibit 2F and, at exhibit 2L, a copy of the approved artwork for the product, dated 19 August 2011. The latter is shown below:



The words “COMBINATION Q TISSUE SALTS” are visible across the bottom of the front face of the box, while on the side is the letter “Q” on a black circular background surrounded by the words “COMBINATION TISSUE SALTS”.

The applicant’s evidence

19. The applicant’s evidence consists of the witness statement of Anthony Gallafent, with three exhibits; it is accompanied by written submissions. Mr Gallafent is the applicant’s trade mark attorney. The evidence includes two images (exhibits 11 and 12) taken from third party web pages which show products including in their name the words “Combination Q”. The product at exhibit 11 is described on the website as “(Formerly New Era tissue salts) Combination Q Catarrh Sinus 28g”. This appears to be a reference to the opponent’s predecessor in title. The product shown in exhibit 12 is described as “Schuessler Tissue Salts Combination Q (125 tablets)”. Neither exhibit is dated, except for the printing date (13 June 2015). Exhibit 13 consists of state of the

Register evidence, which does not assist me. I will not summarise the submissions here but I have read them carefully and will refer to them, as necessary, below.

The opponent's evidence in reply

20. The reply evidence consists of a second witness statement of Marcel Ulrich and two accompanying annexes. The witness statement consists mainly of submission, which I will not repeat here but will refer to later as I consider appropriate. However, the evidence does provide confirmation that the New Era range was not sold in the UK from 2013 (p. 11). There is also sample packaging which shows the letter "Q" displayed in large text on the product label. The images are not dated and the opponent indicates only that "these printouts are the end result of a design and production process that was underway [sic] and directed by Olimed Ltd and Named S.p.A. during the relevant period of time" (p. 1).

Proof of use

21. The first issue is whether, or to what extent, the opponent has shown genuine use of the earlier mark. The relevant statutory provisions are as follows:

"Raising of relative grounds in opposition proceedings in case of non-use

6A- (1) This section applies where -

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services”.

22. Section 100 of the Act is also relevant, which reads:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it”.

23. When considering whether genuine use has been shown, I bear in mind the leading authorities on the principles to be applied, namely the judgments of the Court of Justice of the European Union (“CJEU”) in *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 (“Ansul”) and *Laboratoire de la Mer Trade Marks C-259/02* (“La Mer”). In *Stichting BDO v BDO Unibank, Inc.*, [2013] EWHC 418 (Ch), Arnold J. stated as follows:

“51. Genuine use. In *Pasticceria e Confetteria Sant Ambroeus Srl v G & D Restaurant Associates Ltd* (SANT AMBROEUS Trade Mark) [2010] R.P.C. 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439; [2003] R.P.C. 40 ; *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159; [2004] F.S.R. 38 and *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759; [2009] E.T.M.R. 28 (to which I have added references to *Sunrider v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (C-416/04 P) [2006] E.C.R. I-4237):

(1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely token, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider* [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22] -[23]; *Sunrider*, [70]-[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]”.

Although minimal use may qualify as genuine use, the CJEU stated in Case C-141/13 P, *Reber Holding GmbH & Co. KG v OHIM* (in paragraph 32 of its judgment), that “*not every proven commercial use may automatically be deemed to constitute genuine use*

of the trade mark in question". The factors identified in point (5) above must therefore be applied in order to assess whether minimal use of the mark qualifies as genuine use.

24. According to section 6A(3)(a) of the Act, the relevant period in which genuine use must be established is the five-year period ending on the date of publication of the applied for mark. The relevant period is, therefore, 18 October 2009 to 17 October 2014.

25. The correct approach to assessing the opponent's collection of exhibits and the witness statements is to view the picture as a whole, including whether individual exhibits corroborate each other. In Case T-415/09, *New Yorker SHK Jeans GmbH & Co. KG v Office for Harmonisation of the Internal Market (OHIM)*, the General Court ("GC") said:

"53 In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (*COLORIS*, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07 P *Ferrero Deutschland v OHIM*, not published in the ECR, paragraph 36)".

26. Much of the evidence provided by the opponent is outside the relevant period. However, even discounting this material, and notwithstanding that trade in the goods appears to have ceased in 2012, the evidence at exhibits 2B and 2C to Mr Sillitto's witness statement clearly shows sufficiency of use in terms of sales between 2009 and August 2012.

27. The applicant has, at paragraph 1.2 of its submissions, identified a principal weakness in the opponent's evidence, namely the limited examples of packaging demonstrating use of the mark "Q". Clearly, if the opponent wished to show use of its mark, it would have been preferable for it to adduce examples of the mark as used itself, rather than illustrative examples of other products within the range (exhibit 2E, shown in paragraph 17, above). However, Mr Sillitto's statement that the earlier mark would have been used in a similar way has not been challenged by the applicant. Given the totality of the evidence and on the balance of probabilities, I find that the packaging at exhibit 2L shows the form of the mark used on packaging for the opponent's "Combination Q Tissue Salts" in the relevant period.

28. The main thrust of the applicant's argument is that "Q always appears [...] as part of the descriptor: COMBINATION Q or COMBINATION Q TISSUE SALTS (either in plain

text or with a small graphical treatment)” (paragraph 1.2). It further argues, at paragraph 1.3, that the use of the mark is not in accordance with section 6A(4)(a) and, throughout its submissions, that the use shown is not use as a trade mark.

29. At paragraph 1.2 of its submissions, the applicant states that:

“[b]oth COMBINATION Q and COMBINATION Q TISSUE SALTS” are signs or indications which serve to designate the intended purpose of the goods with which the signs are used, that is the conditions to be treated by the goods bearing the signs. Further or in the alternative, the signs COMBINATION Q or COMBINATION Q TISSUE SALTS indicate the characteristics of the goods bearing the signs, that is a particular mixture of “tissue salts”.

In support of its claim, the applicant has filed two undated web pages (exhibits 11 and 12 to Mr Gallafent’s witness statement) which show two other traders using “Combination Q” and “COMBINATION Q” on their products, as detailed at paragraph 19, above.

30. I am not aware that “Q” has any particular meaning in relation to the goods for which it is registered. I am not prepared to make such a finding based either on the very limited evidence provided by the applicant or on the applicant’s submissions regarding the way in which the opponent uses its mark. I see no reason why “Q” would not function as a trade mark for the goods for which it is registered. The applicant’s argument that the use of the earlier mark is not use as a trade mark is dismissed.

31. The evidence shows that the mark has been used in a number of ways. On the packaging, the mark has been used in word-only form with no stylisation as “COMBINATION Q TISSUE SALTS” and as the letter “Q” in a slightly stylised font on a black circular background surrounded by the words “COMBINATION TISSUE SALTS”, as shown below:



32. I will consider first the use of the slightly stylised “Q” and circular device. The differences between the mark as registered and the mark as used are the stylised font, the black circular background and the addition of the words “COMBINATION TISSUE SALTS” arranged around the circular background. The typeface, although slightly stylised, is a standard font. I disagree with the applicant that the mark would be perceived by the average consumer as “COMBINATION Q TISSUE SALTS”. Rather, I

am of the view that the average consumer would identify the stylised “Q” on its dark background as the mark, and that the words “COMBINATION TISSUE SALTS” which surround the mark would be seen as additional descriptive elements read as a single unit. This is because the larger font and highlighting of the letter “Q” naturally draw the eye and distinguish the single letter from the other words. I find that the use shown is use of the mark as registered, upon which the opponent is entitled to rely.

33. In case I am wrong, I will also consider whether the use of the stylised mark constitutes variant use as permitted under section 6A(4)(a). In doing so, I note the comments of Mr Richard Arnold Q.C. (as he then was), sitting as the Appointed Person, in *Nirvana Trade Mark* (BL O/262/06) and in *REMUS Trade Mark* (BL O/061/08). He summarised the test under s. 46(2) of the Act as follows (the text is from *Nirvana* but it is also adopted in *REMUS*):

“33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all”.

34. I have outlined at paragraph 33 the differences between the mark as registered and the stylised mark. The same considerations apply for the different typeface used and the background as at paragraph 33. In my view, the background, being a banal shape, adds very little distinctiveness to the mark. The words which surround the stylised “Q” are smaller in size and entirely descriptive of the goods. I do not consider that they significantly alter the mark’s distinctiveness. I am of the view that the differences between the plain letter mark registered and the mark as used do not alter the distinctive character of the registered mark and that the variant form of use may be relied upon. Although I have not commented on the use of the word-only mark, in view of my comments at paragraph 31, I see no reason why word-only use of “COMBINATION Q TISSUE SALTS” would not constitute use as a trade mark in the form as registered or, if I am wrong in that conclusion, as an acceptable variant of the registered mark.

35. The next step is to decide whether the opponent’s use entitles it to rely on all of the goods for which it is registered. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned”.

36. More recently, in *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. (with whom Underhill L.J. agreed) set out the correct approach for devising a fair specification where the mark has not been used for all the goods/services for which it is registered. He said:

“63. The task of the court is to arrive, in the end, at a fair specification and this in turn involves ascertaining how the average consumer would describe the goods or services in relation to which the mark has been used, and considering the purpose and intended use of those goods or services. This I understand to be the approach adopted by this court in the earlier cases of *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2002] EWCA Civ 1828, [2003] RPC 32; and in *West v Fuller Smith & Turner plc* [2003] EWCA Civ 48, [2003] FSR 44. To my mind a very helpful exposition was provided by Jacob J (as he then was) in *ANIMAL Trade Mark* [2003] EWHC 1589 (Ch); [2004] FSR 19. He said at paragraph [20]:

“... I do not think there is anything technical about this: the consumer is not expected to think in a pernickety way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. ... Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods – are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made”.

64. Importantly, Jacob J there explained and I would respectfully agree that the court must form a value judgment as to the appropriate specification having regard to the use which has been made. But I would add that, in doing so, regard must also be had to the guidance given by the General Court in

the later cases to which I have referred. Accordingly I believe the approach to be adopted is, in essence, a relatively simple one. The court must identify the goods or services in relation to which the mark has been used in the relevant period and consider how the average consumer would fairly describe them. In carrying out that exercise the court must have regard to the categories of goods or services for which the mark is registered and the extent to which those categories are described in general terms. If those categories are described in terms which are sufficiently broad so as to allow the identification within them of various sub-categories which are capable of being viewed independently then proof of use in relation to only one or more of those sub-categories will not constitute use of the mark in relation to all the other sub-categories.

65. It follows that protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider belong to the same group or category as those for which the mark has been used and which are not in substance different from them. But conversely, if the average consumer would consider that the goods or services for which the mark has been used form a series of coherent categories or sub-categories then the registration must be limited accordingly. In my judgment it also follows that a proprietor cannot derive any real assistance from the, at times, broad terminology of the Nice Classification or from the fact that he may have secured a registration for a wide range of goods or services which are described in general terms. To the contrary, the purpose of the provision is to ensure that protection is only afforded to marks which have actually been used or, put another way, that marks are actually used for the goods or services for which they are registered”.

37. I am satisfied that the mark has been used for the full range of goods listed in its narrow specification. I consider that the average consumer would describe the goods upon which use has been shown as tissue salts. The opponent may rely on “homeopathic salts, tissue salts, preparations containing such salts, all adapted for the relief of catarrh, sinus disorders and all included in Class 5”.

Section 5(2)(b)

38. Section 5(2)(b) of the Act which reads as follows:

“5 (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”.

Section 5(2)(b) – case law

39. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

- (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 be dominated by one or more of its components;
- (f) however, it is also 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 great 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;

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

Comparison of goods

40. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p><u>Class 5</u></p> <p>Homeopathic salts, tissue salts, preparations containing such salts, all adapted for the relief of catarrh, sinus disorders and all included in Class 5.</p>	<p><u>Class 5</u></p> <p>Pharmaceutical and veterinary preparations; medicines for human use; sanitary preparations for medical purposes; vaccines; plasters; materials for dressings; materials for compounding pharmaceutical and veterinary preparations and medicines; vehicles for preparation of dosage forms for pharmaceutical and veterinary preparations and medicines.</p>

41. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*, the Court of Justice of the European Union (“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”.

42. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) 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.

43. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

44. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context”.

45. The GC confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that, even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

46. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* BL O-399-10 and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs [30] to [38]).

47. In its notice of opposition, the opponent claims that the goods at issue are identical or similar and that “the Opposed Goods in class 5 have the same nature i.e. pharmaceuticals, the same uses, and share the same channels of trade with the goods covered by the Opponent’s UK Trade Mark Registration [...]”. The applicant denies that there is any similarity between the goods on the basis that “conventional medicines and homeopathic are not the same or similar”.

48. The Oxford English Dictionary (“OED”) defines “sanitary” as:

“adjective

relating to the conditions that affect hygiene and health, especially the supply of sewage facilities and clean drinking water: *a sanitary engineer*.

- hygienic and clean: *the most convenient and sanitary way to get rid of food waste from your kitchen*.¹

“Sanitary preparations for medical purposes” would therefore cover products such as disinfectant washes and antiseptic preparations. The physical nature of the goods in the applied for specification may be the same as the goods in the earlier registration (for example, antiseptic preparations may be in powder or soluble tablet form) and they may be sold in the same shops but, to my mind, the intended purpose of the goods at issue is different: the one is for cleaning and medical hygiene, the other is to treat a complaint of the upper respiratory tract. The goods are not in competition and there is nothing to suggest that there is complementarity. In default of any evidence or submissions from the opponent on this point, I cannot see any meaningful similarity between “sanitary preparations for medical purposes” in the application and “the opponent’s goods.

¹ *Oxford Dictionary of English* (3rd ed., OUP 2010)

49. “Plasters” and “materials for dressings” in the opposed application are not, in my view, similar to the goods of the earlier registration. Their physical nature, method of use and purpose are all different. While the channels of trade may be similar, the goods at issue are not in competition, nor are they complementary.

50. I have no submissions from the opponent to explain how “materials for compounding pharmaceutical and veterinary preparations and medicines; vehicles for preparation of dosage forms for pharmaceutical and veterinary preparations and medicines” are similar or identical to the opponent’s goods. My understanding of the terms, in the absence of any submissions on the point, is that these goods are substances used in the mixing of pharmaceuticals or veterinary preparations, as inert carriers or to change the form of the medicine (e.g. from solid to liquid). In accordance with the case law cited above, I have considered the nature, intended purpose, users, trade channels of the goods and whether there is a competitive or complementary relationship between them. Without the benefit of submissions to assist me, I am not satisfied that there is any similarity between the goods at issue.

51. As some similarity between the goods is necessary to engage the test for likelihood of confusion,² my findings above mean the opposition must fail in respect of “sanitary preparations for medical purposes; plasters; materials for dressings; materials for compounding pharmaceutical and veterinary preparations and medicines; vehicles for preparation of dosage forms for pharmaceutical and veterinary preparations and medicines”.

52. “Vaccine” is defined by the OED as:

“**noun**

(Medicine) an antigenic substance prepared from the causative agent of a disease or a synthetic substitute, used to provide immunity against one or several diseases: *there is no **vaccine against HIV infection***.

• *(Computing)* a program designed to detect computer viruses and inactivate them”.³

On the one hand, the physical nature of vaccines and the opponent’s goods, their method of use, channels of trade and users could be the same. On the other hand, the purpose of vaccines is prevention of illness, whereas the opponent’s goods relieve a pre-existing condition. I do not consider that the goods are in competition: one would not buy one as an alternative to the other. Nor, in the absence of evidence to demonstrate otherwise, do I consider it likely that there is a complementary relationship between vaccines and the opponent’s goods. Taking into account all of the above, I consider that there is a medium degree of similarity between the goods.

² *Waterford Wedgwood plc v OHIM*, C-398/07 P (CJEU)

³ *Oxford Dictionary of English*.

53. The remaining terms in the applied for specification are “pharmaceutical and veterinary preparations; medicines for human use”. The specification of the earlier mark falls within these broad terms. Applying the principle in *Meric*, the goods at issue are, therefore, identical. However, the specification of the applied for mark is much wider than that of the earlier right and could, notionally speaking, cover goods which are neither identical nor similar to the goods of the opponent’s mark. As matters stand, no fall-back specification has been provided and I will proceed on the basis that the goods are identical, though I will return to this point when I address the likelihood of confusion.

The average consumer and the nature of the purchasing act

54. As the case law above indicates, it is necessary for me to determine who the average consumer is for those goods I have found to be either identical or similar. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.

55. In *Mundipharma AG v OHIM*, Case T-256/04, the GC accepted that there were two groups of relevant consumers for a pharmaceutical product, namely professional users and the general public. The goods at issue may be purchased over the counter or be made available on prescription only. In my experience, a member of public would purchase such goods from a shelf in a retail outlet or from the pages of a catalogue or website. This method of selection involves primarily visual considerations. As advice may be sought before purchase, however, aural considerations are also likely to play their part. I have no evidence as to how a healthcare professional would select the goods at issue. However, I think it likely that in making their selection they would consult, for example, specialist publications (in both hard copy and online) and also discuss the goods with, for example, sales representatives from pharmaceutical companies. The selection process is therefore likely to consist of a combination of both visual and aural considerations.

56. I consider that the average consumer for vaccines is the professional user. I am of the view that the goods would also be selected by the professional user following consultation of specialist publications (in hard copy and online) or following discussion with, for example, sales representatives. The selection process therefore includes both visual and aural considerations.

57. I would expect the level of attention paid by the general public to vary depending on the nature of the product and the severity of the condition it is intended to treat. My experience tells me that goods at issue are not terribly expensive. However, the member of the public buying the goods at issue will wish to choose the correct product for the condition to be treated. The general public will, in my view, pay a reasonably high, though not the highest, degree of attention. The professional user selecting the goods at issue (which will, for example, be available on prescription or from a doctor, or on request from a pharmacist) will pay a high level of attention to the selection of the goods at issue.

Comparison of trade marks

58. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion”.

It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

59. The trade marks to be compared are as follows:

Opponent’s trade mark	Applicant’s trade mark
Q	Q-BLEND

The opponent submits in its reply evidence (p. 3) that:

“we consider the marks to be similar as they coincide in the letter Q which holds [sic] is at the beginning of the marks and which consumers will consider to be the distinctive and dominant element, as ‘blend’ is descriptive of the goods of interest, and not fit to identify the origin of the products”.

For its part, the applicant submits (p. 6) that:

“Visually the signs Q and Q-BLEND are of very different lengths. [...] Aurally the signs are of different lengths and different numbers of syllables, one compared to three. [...] Conceptually, the sign of British trade mark registration 1264441 would be taken either to be “queue” or “cue”. The letter Q alone has no conceptual significance. In contrast, the sign of the opposed application gives rise to the concept of a blend. Totally different concepts”.

60. The opponent’s mark consists of the single letter “Q”, presented in upper case. There are no other elements to contribute to the overall impression, which is contained in the letter itself.

61. The applicant’s mark is the capital letter “Q” followed by a hyphen and the word “BLEND”, also presented in capitals. In relation to those goods I have found to be identical or similar “BLEND” has little or no distinctive character and the overall impression is therefore dominated by the element “Q”.

62. Visually, the first letter in each mark is identical. There is clearly a difference because of the addition, in the applicant’s mark, of the element “-BLEND”. Even taking into account that difference, I find that there is a high degree of visual similarity.

63. Aurally, the opponent’s mark will be articulated as “CUE”. The applicant’s mark will be articulated “CUE-BLEND”. The first part of the marks is identical but some difference is created by the additional word “BLEND” in the applicant’s marks. Overall, I find that the marks are aurally similar to a high degree.

64. As far as the conceptual meaning of the marks is concerned, I do not agree with the applicant that the opponent’s mark would be perceived as “queue” or “cue”. There is nothing in the mark to suggest either of those meanings to the average consumer and it is not, as far as I am aware, commonplace to misspell either word by using the letter ‘q’ solus. I consider that the average consumer would recognise the opponent’s mark as a letter of the alphabet and would attribute to it no particular concept. I am of the view that the average consumer would perceive the “Q” element of the applicant’s mark in the same way. While the notion of a mixture is introduced into the concept of the applicant’s mark by the word “BLEND”, the word has little or no distinctive character in relation to the goods at issue. As neither of the marks has a distinct conceptual meaning, there is neither conceptual similarity nor conceptual dissimilarity and the position is neutral.

Distinctive character of the earlier trade mark

65. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; 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 statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)”.

66. The applicant has repeatedly asserted that the opponent’s mark is descriptive of the goods. However, no evidence has been provided which persuades me that the letter ‘Q’ is directly descriptive of the goods relied upon. As a single letter without stylisation, the earlier mark has only a low degree of inherent distinctiveness. The evidence of use filed by the opponent does indicate a substantial, although declining, turnover in the period 1994-2012. Whilst I have not been provided with figures showing the size of the market in the goods at issue or the market share enjoyed by goods sold under the earlier mark, I consider it likely that the scale of use will have enhanced the distinctiveness of the mark, although not to the extent that it materially improves the opponent’s position.

Likelihood of confusion

67. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also bear in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

68. I have found the parties' marks to be visually and aurally similar to a high degree and that the position regarding conceptual similarity is neutral. As the use by the opponent of its mark does not materially improve its position, I am proceeding on the basis that it has a low degree of distinctive character. I have found that the average consumer will be a member of the general public or a professional user and that the degree of attention paid will be reasonably high or high, respectively. I have found that both groups of average consumer will identify the goods primarily by visual means but that aural considerations will play a part. I have found the goods at issue to be identical or similar to a medium degree.

69. Whilst I bear in mind the differences between the marks, I also take into account that the overall impression of the competing marks is dominated by the shared letter 'Q'. As the "-BLEND" element in the applied for mark has little or no distinctive character, it has a very low relative weight. In such circumstances, and taking all matters into account, I find that there is a likelihood of direct confusion, i.e. that the average consumer will mistake one mark for the other.

70. In case I am wrong on this point, I will also consider whether there is a likelihood of indirect confusion. I am mindful of the comments of Iain Purvis, Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10, where he stated that:

“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”).

71. There are, undoubtedly, differences between the marks. However, even in circumstances where the average consumer recognises the differences, when considered in relation to the identical and similar goods at issue, it is likely that the applied for mark would be viewed as a brand extension of the earlier mark. I consider that there would be an expectation on the part of the average consumer that the identical and similar goods at issue come from the same or economically linked undertakings. There would be a likelihood of indirect confusion.

Conclusion

72. The opposition fails in relation to “sanitary preparations for medical purposes; plasters; materials for dressings; materials for compounding pharmaceutical and veterinary preparations and medicines; vehicles for preparation of dosage forms for pharmaceutical and veterinary preparations and medicines” but has succeeded in relation to “pharmaceutical and veterinary preparations; medicines for human use; vaccines”.

73. I indicated at paragraph 54 that the applied for specification covers a wide range of goods, some of which are likely to be neither identical nor similar to the goods covered by the earlier mark. Given that the application is to be refused in part, paragraph 3.2.2 of Tribunal Practice Notice (“TPN”) 1/2011 applies. It states:

“In a case where amendment to the specification(s) of goods and/or services is required as the result of the outcome of contested proceedings the Hearing Officer will, where appropriate, adopt one or combination of the following approaches:

a) Where the proceedings should only succeed in part, or where the proceedings are directed against only some of the goods/services covered by the trade mark and the result can be easily reflected through the simple deletion of the offending descriptions of goods/services, the Hearing Officer will take a "blue pencil" approach to remove the offending descriptions of goods/services. This will not require the filing of a Form TM21 on the part of the owner. If, however, any rewording of the specification is proposed by the owner in order to overcome the objection, then the decision of the Hearing Officer will take that rewording into account and the proposed wording being sanctioned by the Registrar as acceptable from a classification perspective;

b) Where the result cannot be easily reflected through simple deletion, but the Hearing Officer can clearly reflect the result by adding a "save for" type exclusion to the existing descriptions of goods/services, he or she will do so. This will not require the filing of a Form TM21 on the part of the owner. If, however, any rewording of the specification is proposed by the owner in order to overcome the objection, then the decision of the Hearing Officer will take that rewording into account subject to it being sanctioned by the Registrar as acceptable from a classification perspective;

c) If the Hearing Officer considers that the proceedings are successful against only some of the goods/services, but the result of the proceedings cannot be clearly reflected in the application through the simple deletion of particular descriptions of goods/services, or by adding a "save for" type exclusion, then the Hearing Officer will indicate the extent to which the proceedings succeed in his/her own words. The parties will then be invited to provide submissions/proposals as to the appropriate wording for a list of goods/services that reflects his/her findings and after considering the parties' submissions, the Hearing Officer will determine a revised list of goods/services. Subject to appeal, the trade mark will be, or remain, registered for this list of goods/services".

74. This practice reflects the comments of Mann J in *Giorgio Armani SpA v Sunrich Clothing Ltd* [2010] EWHC 2939 (Ch) in relation to partial refusals of registration. He stated that:

"[...] the proper scope of registration [...] is the [potential area of dispute]. In some cases it will not be a real area of dispute because the answer is obvious - it might be possible to isolate the permissible part by blue pencilling that which is not admissible, or it might be obvious that a plain express qualification ("save for [the goods in respect of which the opposition succeeded]") will do the trick, in which case there is no real area of dispute there either. On the other hand, it might be that the answer to that part of the case is more disputed - particular formulations might be objected to as falling on one side of the line or the other. Procedures ought to allow for all these possibilities".

75. In deciding the most appropriate approach, I note the comments at paragraph 3.3 of the applicant's submissions, where the applicant states that, if the opposition succeeds, "then it should only succeed in connection with products for catarrh and sinus disorders, an indication that would be easily carved out of the specification of goods of the opposed application". An express exclusion is suitable in the circumstances. **The application, subject to any appeal, will therefore proceed with the following specification:**

"Pharmaceutical and veterinary preparations; medicines for human use; vaccines; but not including homeopathic salts, tissue salts, preparations containing such salts, all adapted for the relief of catarrh, sinus disorders and all included in Class 5 and goods similar to these excluded goods; sanitary preparations for medical purposes; plasters; materials for dressings; materials for compounding pharmaceutical and veterinary preparations and medicines; vehicles for preparation of dosage forms for pharmaceutical and veterinary preparations and medicines".

Costs

76. Both parties having achieved a measure of success, I direct that the parties bear their own costs.

Dated this 26TH day of January 2016

**Heather Harrison
For the Registrar
The Comptroller-General**