O/607/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003277293
BY COTTON MOUTON DIAGNOSTICS LIMITED
TO REGISTER THE FOLLOWING TRADE MARK:

αBET

IN CLASSES 1, 5, 9, 10, 42 AND 44

AND IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 412167
BY ABBOTT LABORATORIES

BACKGROUND AND PLEADINGS

1. On 14 December 2017, Cotton Mouton Diagnostics Limited ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 12 January 2018 and registration is sought for the goods and services set out in **Annex 1** to this decision.[1]

2. On 12 April 2018, Abbott Laboratories ("the opponent") opposed the application based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opponent relies upon European Union Trade Mark ("EUTM") no. 13610613 for the trade mark **ABBOTT**. The earlier mark was filed on 29 December 2014 and was registered on 28 September 2015. The opponent relies upon all goods and services for which the earlier mark is registered, as set out in **Annex 2** to this decision.

3. The opponent claims that there is a likelihood of confusion because the marks are similar and the goods and services are identical or similar.

4. The applicant filed a counterstatement, accepting that the goods and services are similar to a "certain degree" but denying that there is similarity between the marks or a likelihood of confusion.

5. Only the applicant filed evidence in chief. The opponent filed evidence in reply. A hearing took place before me on 16 November 2020, by video conference. The opponent was represented by Rachel Wilkinson-Duffy of Baker McKenzie LLP and the applicant was represented by Sonia Amrar of Wynne-Jones IP. Both parties filed skeleton arguments in advance of the hearing.

[1] In her skeleton argument, Ms Amrar set out a request to limit the applied-for specification. The proposed new wording is underlined.

EVIDENCE

6. The applicant filed evidence in the form of the witness statement of Jenna Bowen dated 26 June 2020, with 3 exhibits. Ms Bowen is a Director of the applicant, a position she has held since 2018.

7. The opponent filed evidence in reply in the form of the witness statement of Anamaria E. Cashman dated 28 August 2020, with 2 exhibits. Ms Cashman is Division Counsel, Global Trade Marks for the opponent. This is a position she has held since January 2017.

8. I do not propose to summarise the evidence here, but have taken it into consideration in reaching my decision and will refer to it below where necessary.

PRELIMINARY ISSUES

9. During the course of proceedings, the applicant has made a number of points that I intend to address as preliminary issues.

10. Firstly, Ms Bowen notes that the applied-for mark was “coined independently” and that the applicant was not “influenced” by the opponent’s mark when creating its brand. At the hearing, Ms Wilkinson-Duffy noted that the intention of the applicant in creating its trade mark is irrelevant to the present issues. That is correct. I am required to assess whether the similarity between the marks and their respective specifications are such that they will give rise to a likelihood of confusion. The intentions of the parties are not relevant to that assessment.

11. Secondly, Ms Bowen notes that the applied-for mark is linked with another product name, αCMD. The way in which the applicant uses its mark, either independently or with other trade marks, is irrelevant for the purposes of this decision. I am required to assess the likelihood of confusion based upon the marks before me and the way in which those marks are used in practice is irrelevant to that assessment.

12. Finally, at the hearing, Ms Amrar made submissions regarding the fact that company names are always used on products in the medical field alongside trade marks used for the particular product. Firstly, as Ms Wilkinson-Duffy submitted, no distinction is drawn between the registration of trade marks which are used as part of company names and the registration of product names as trade marks. Secondly, the fact that a party may have both a house brand and various sub-brands does not make the house brand any less distinctive. Thirdly, Ms Amrar was describing the way in which marks might be used upon medical product packaging, but this does not take into consideration the way in which the marks may be used in advertising, on websites or in relation to services. I do not consider that this submission assists the applicant.

DECISION

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

> "5(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."

14. The trade mark upon which the opponent relies qualifies as an earlier trade mark because it was applied for at an earlier date than the applicant's mark pursuant to section 6 of the Act. As the opponent's mark had not completed its registration process more than 5 years before the publication date of the mark in issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods and services it has identified.

15. 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:

(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 greater degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, 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 and services

16. The applicant concedes that some of the goods and services are identical or similar. At the hearing, Ms Amrar accepted that "most" of the goods and services could be categorised as identical or similar. However, no detailed submissions are made as to which goods are identical or similar, or to what extent. Nonetheless, for the purposes of this decision, I will proceed on the basis that all of the goods and services are identical as this represents the opponent's best case.

Average consumer and the nature of the purchasing act

17. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. 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."

18. At the hearing, Ms Amrar made various references to the parties' actual customers. For the avoidance of doubt, in reaching my decision, I must consider the full width of the parties' respective specifications and the average consumer for each of those goods and services. The actual markets targeted by the parties is not relevant to that assessment.

19. I consider that the average consumer will be predominantly medical and scientific professionals, although it may also include members of the general public. With regard to the level of attention paid by the average consumer, Ms Amrar directed me to the judgment of the General Court in *Novartis AG v OHIM,* Case T-331/09, in which it was stated:

> "26. According to the case-law, medical professionals have a high degree of attentiveness when prescribing medicines. Moreover, with regard to end consumers, it is apparent from the case-law that, in cases where pharmaceutical products are sold without prescription, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods. Furthermore, even assuming that a medical prescription is mandatory, consumers are likely to have a high degree of attentiveness upon prescription of the goods at issue, in the light of the fact that those goods are pharmaceutical products (*PRAZOL,* at paragraph 21 above,

paragraph 29 and judgment of 8 July 2009 in Case T-240/08 *Proctor & Gamble v OHIM – Laboratorios Alcala Farma (oli),* not published in the ECF, paragraph 50). Thus medicines, whether or not issued on prescription, can be regarded as receiving a heightened degree of attentiveness by consumers who are reasonably well informed and reasonably observant and circumspect (judgment of 15 December 2009 in Case T-412/08 *Trubion Pharmaceuticals v OHIM – Merck (TRUBION),* not published in the ECF paragraph 28)."

20. That is, of course, correct in relation to medicines. However, it seems to me that the vast majority of the goods and services in issue in this case are not medicines as such, but are medical/scientific apparatus/products or medical/scientific services. Ms Wilkinson-Duffy noted that many of the goods in issue will not be particularly expensive. I have no evidence as to the cost of the goods and services before me. However, for both the goods and the services, I consider that the cost of the purchase is likely to vary, as will the frequency. Nonetheless, various factors will be taken into consideration such as suitability for the user's particular needs, ease of use and reliability. Ms Wilkinson-Duffy accepted that a "higher" degree of attention is likely to be paid given the nature of the goods and services. Taking all of these factors into account, I consider that at least a medium degree of attention is likely to be paid during the purchasing process for the goods and services. However, I recognise that where the goods and services have a particular impact upon the health of the end user, as identified by Ms Amrar by reference to the above case law, the attention paid will be high.

21. At the hearing, Ms Wilkinson-Duffy submitted that the purchasing process for the goods and services would be both aural and visual. When asked to expand upon this further, Ms Wilkinson-Duffy submitted that the goods and services were likely to be purchased from websites or product lists, but that there was a risk that new members of a team might be asked to purchase an "ABBOTT" product, but that when they looked at the purchase list they might mistake the pronunciation of this word for "αBET" products. I agree with Ms Wilkinson-Duffy that the goods are likely to be selected from websites or product lists. It also seems to me that they may be purchased from retail premises or catalogues. I also agree that the services are likely to be purchased following perusal of a website, but that they might also be purchased following sight of

the premises frontage or advertisements. I also do not discount the fact that word-of-mouth recommendations, or instructions to colleagues as per the example given by Ms Wilkinson-Duffy, will play a part. Further, orders may be placed by telephone. However, to my mind, whilst aural considerations cannot be discounted, it is the visual considerations that are more likely to dominate the purchasing process.

Comparison of trade marks

22. 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 Court of Justice of the European Union ("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."

23. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the 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.

24. The respective trade marks are as follows:

Opponent's trade mark	Applicant's trade mark
ABBOTT	αBET

25. The opponent's mark consists of the word ABBOTT. There are no other elements to contribute to the overall impression of the mark which lies in the word itself. The applicant's mark consists of the word αBET. Again, there are no other elements to contribute to the overall impression which lies in the word itself.

26. Visually, the marks overlap to the extent that they both begin with the letters "AB/αB" and end with the letter "T". At the hearing, Ms Amrar submitted that the letter "α" in the applicant's mark will be recognised as a Greek letter i.e. Alpha. In this regard, Ms Amrar directed me to the decision of the First Board of Appeal in *Glaxo Group Limited v Aquimpex S.P.A.,* Case R 76/2003-1, in which the trade mark DERMOVATE was compared with the following mark:

27. In particular, Ms Amrar directed me to paragraph 25 of that decision, in which it is stated:

> "25. If, to begin with, the trade marks in question are compared from a visual point of view, it is seen that they all share the same five letters 'O', 'V', 'A', 'T' and 'E' in the same order. However, the earlier trade marks are in capital letters without any particular style, all from the Latin alphabet, while the trade mark applied for is characterized by the fact that the first letter, which is moreover the most important letter, corresponds to the Greek letter 'alpha' and is followed by the 'provate' element written in a different style from the "α", the letter 'P' also being larger. These differences in style and alphabet are noticed by the consumer and significantly reduce the similarities associated with the fact that the trade marks have five letters that are the same. Taken as a whole, the trade marks are therefore not similar from a visual point of view."

28. Firstly, decisions of the EUIPO are not binding upon this Tribunal. However, secondly, and most importantly, in that case the EUIPO was considering the matter from the perspective of the average consumer across the EU market. This is a different assessment to what the perception of the UK average consumer might be, particularly in terms of recognising letters from other languages. Ms Amrar also submitted that medical professionals are used to seeing Greek letters in formulas and, consequently, are likely to recognise it as such. In this regard, Ms Amrar referred to a scientific reference document which includes a formula.[2] Ms Wilkinson-Duffy accepted that medical professionals are likely to be more used to seeing Greek letters in the context of formulas than the rest of the population. However, Ms Wilkinson-Duffy noted that this is entirely different from being used to seeing Greek letters in UK trade marks. There is no evidence before me on the latter point. In any event, the fact that medical professionals may be used to seeing Greek letters does not prevent them from also being familiar with seeing Roman letters used in the English alphabet. Ms Amrar submitted that UK average consumers are likely to be familiar with Greek alphabet letters. For example, Ms Amrar submitted that the letter 'P' has origins in the Greek language and all UK children will be taught this letter in school. That may be correct. However, UK children are taught the letter 'P' as part of the English language, not by reference to the Greek alphabet. When encountering such letters in words, UK average consumers are far more likely to identify letters from the English language than they are to identify them as part of the Greek alphabet.

29. Ms Amrar submitted that the Alpha letter in the applicant's mark "looks very different from an 'A'". I disagree. The differences between the Greek letter "α" in the applicant's mark and the English lower case letter "a" are so small that I consider it likely that they will be overlooked and that the former will be viewed as a slightly stylised version of the letter "a". The marks differ in that the central letters in the opponent's trade mark are -BOT- whereas in the applicant's trade mark is just the letter -E-. I recognise that the beginning of marks tend to make more of an impact than the ends. Taking all of this into account I consider there to be between a low and medium degree of visual similarity between the marks.

[2] Exhibit JB3

30. Aurally, the opponent's trade mark will be pronounced ABB-BOT. The applicant submits the letter "α" in its trade mark will be recognised by the average consumer as the Greek letter 'alpha' and, consequently, its trade mark will be pronounced ALPHA-BET. I disagree. As explained above, it is far more likely that the slight difference between the Greek letter 'α' and the letter 'a' as it appears in the English language will be overlooked. Alternatively, if the slight difference is noticed then it is likely to be perceived as minor stylisation rather than a reference to a different alphabet. Consequently, I consider that the applicant's mark will be pronounced AYE-BET or AHH-BET. To my mind, the former pronunciation is far more likely given that the letters BET represent a recognisable dictionary word with the effect that it is likely to be read as two words i.e. "A BET". In those circumstances, I consider there to be only between a low and medium degree of aural similarity between the marks. However, in the latter case, I consider there to be between a medium and high degree of aural similarity between the marks.

31. Conceptually, Ms Amrar submitted that the opponent's trade mark is likely to be viewed as a reference to the monk who is in charge of the other monks in a monastery or abbey. However, the spelling of the word referred to by Ms Amrar is "abbot" and not "abbott".[3] In my view, the opponent's trade mark is likely to be recognised as a relatively common English surname. The applicant argues that its mark will be recognised as a play on words i.e. by reference to the word ALPHABET. As explained above, I do not consider that the use of the Greek alphabet letter 'α' will be recognised by the average consumer. Consequently, the applicant's mark is likely to be seen as a conjoining of the letter "A" with the word "BET". In her evidence, Ms Bowen makes reference to the fact that BET is an abbreviation for "Bacterial Endotoxin Test". Ms Amrar submitted that it will be recognised as such as it is "one of the most common tests in medicine". In this regard, Ms Amrar referred to an extract from a publication produced by the United States Pharmocopeial Convention which provides information about these types of tests.[4] However, I have no evidence to suggest that this publication would be known to the UK average consumer for the goods and services

[3] https://www.collinsdictionary.com/dictionary/english/abbot
[4] Exhibit JB3

or that these tests are particularly common in the medical field. Taking all of this into account, I do not consider that the average consumer will perceive it as such, rather than the common dictionary word "bet". When taken as a whole, I consider that any meaning conveyed is likely to be a reference to the sum of money placed when betting.[5] I consider the marks to be conceptually dissimilar.

32. For the avoidance of doubt, even if I am wrong in my finding as to whether the opponent's mark will be recognised as a name or as a reference to a monk, the marks will still be conceptually dissimilar.

Distinctive character of the earlier mark

33. 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 1-2779, 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

[5] https://www.collinsdictionary.com/dictionary/english/bet

commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

34. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

35. In its Notice of opposition, the opponent claims that the distinctive character of the earlier mark has been enhanced through use. However, the opponent did not file any evidence in chief. Nonetheless, at the hearing, Ms Wilkinson-Duffy pointed to the witness statement of Ms Cashman, which had been filed as evidence in reply. In particular, Ms Wilkinson-Duffy referred me to the annual report of the opponent dated 2019.[6] The relevant date for assessing enhanced distinctiveness is the date of the application in issue i.e. 14 December 2017. As the report relied upon by the opponent is dated after that date it is of limited use to the opponent. For example, the worldwide sales figure for 2019 provided within that report does not demonstrate the position prior to the relevant date. I note that there are some parts of the report which do cast light back upon the position prior to the relevant date. For example, the report states that there have been "96 consecutive years of dividends paid", suggesting a long history of the opponent trading. However, the relevant market for assessing enhanced distinctiveness is the UK market. At the hearing, Ms Wilkinson-Duffy acknowledged that this report did not refer specifically to the UK market. Consequently, I do not consider it assists the opponent. No information is provided about how long the opponent has been trading in the UK. Further, no market share information is provided for the years prior to the relevant date. The report does not include information about UK sales, UK advertising expenditure or the geographical scope of the use made of the earlier mark in the UK prior to the relevant date. Taking all of this into account, I do not consider that the opponent has established that its mark has acquired enhanced distinctive character through use and I have only the inherent position to consider.

[6] Exhibit AC-2

36. The earlier mark consists of the word ABBOTT, which will be recognised as a surname. In *Becker v Harman International Industries,* Case C-51/09 P, the distinctive character of a surname was considered and the CJEU stated as follows:

> "Although it is possible that, in part of the European Union, surnames have, as a general rule, a more distinctive character than forenames, it is appropriate to take account of factors specific to the case and, in particular, to the fact that the surname concerned is unusual or, on the contrary, very common, which is likely to have an effect on that distinctive character."

37. In this case, the earlier mark consists of a relatively common surname. I do not consider the name ABBOTT to be particularly unusual in the UK. In her skeleton argument, Ms Amrar made submissions about the distinctiveness of the opponent's mark being "minimal". At the hearing, I invited Ms Amrar to clarify whether the applicant's position was that 1) there is something about the opponent's mark that renders it low in inherent distinctive character or 2) the opponent's mark was medium or average in distinctiveness. Ms Amrar confirmed that the applicant's position was the latter. Taking all of this into account, I consider the earlier mark to be inherently distinctive to a medium degree.

Likelihood of confusion

38. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer of the goods and

services and the nature of the purchasing process. In doing so, I must be alive to 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 that he has retained in his mind.

39. I have found the marks to be visually similar to between a low and medium degree, aurally similar to either between a low and medium degree or between a medium and high degree (depending on how the applicant's mark is pronounced) and conceptually dissimilar. I have found the earlier mark to be inherently distinctive to a medium degree. I have identified the average consumer to be a member of the general public or a medical professional who will purchase the goods and services by predominantly visual means (although I do not discount an aural component). I consider that at least a medium degree of attention is likely to be paid during the purchasing process. I will proceed on the basis that the goods and services are identical.

40. As I have found that the purchasing process will be predominantly visual, I consider that the visual differences between the marks will be significant in avoiding one mark being mistaken for the other. Even in circumstances envisaged by Ms Wilkinson-Duffy, where the average consumer is informed of the trade mark aurally, many consumers will recognise only between a low and medium degree of aural similarity. Even for those that consider them to be similar aurally to between a medium and high degree, they are still likely to consult a product list, premises frontage or catalogue (whether in hard copy or on a website) before making their purchase. I do not, therefore, consider it likely that the marks will be misremembered or mistaken. This is particularly the case given that at least a medium degree of attention is likely to be paid during the purchasing process. Taking all of the factors listed in paragraph **39** above into account, I do not consider there to be a likelihood of direct confusion.

41. Having recognised the differences between the marks, I can see no reason for the average consumer to conclude that they originate from the same or economically linked undertakings. One is not an obvious brand extension or alternative for the other. Consequently, I do not consider there to be a likelihood of indirect confusion.

CONCLUSION

42. The opposition is unsuccessful and the application may proceed to registration for the goods and services as amended by the applicant's limitation to its specification, as set out in Annex 1 to this decision.

COSTS

43. The applicant has been successful and is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,450** calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£200
Filing evidence and considering the opponent's evidence	£500
Preparing for and attending hearing	£750
Total	**£1,450**

44. I therefore order Abbott Laboratories to pay Cotton Mouton Diagnostics Limited the sum of £1,450. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 2nd day of December 2020

S WILSON
For the Registrar

ANNEX 1

Class 1

Reagents for medical research; Reagents for research purposes; Diagnostic reagents for scientific use; Reagents for scientific purposes; Reagents used in science; Reagents for scientific or medical research use; Chemical reagents for non-medical purposes; Chemical reagents for scientific purposes; Reagents for testing the sterility of medical equipment; Reagents for testing the sterility of pharmaceuticals and injectable solutions; Reagents for chemical analyses; Reagents for use with analyzers [other than for medical or veterinary purposes]; Laboratory reagents for scientific use; Reagents for testing water for use in the pharmaceutical and laboratory testing and calibration; Reagents for use in environmental analysis; Reagents for use with magneto-optical sensing platforms for detection of microbial toxins, pyrogens, beta-glucans and endotoxins.

Class 5

Chemical test reagents [medical]; Medical diagnostic reagents; Clinical diagnostic reagents; Clinical medical reagents; Reagents for medical use; Chemical reagents for veterinary use; Chemical reagents for medical use; Biological reagents for medical use; Reagents for analytical purposes [for medical purposes]; Reagents for use in analysis [for medical purposes]; Reagents for use with analyzers [for veterinary purposes]; Reagents for use in diagnostic tests [for medical purposes]; Medical diagnostic reagents and assays for testing of body fluids.

Class 9

Computer software for use in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Computer application software in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Magneto-optical devices; Laboratory apparatus and instruments; Testing and quality control devices for use in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Apparatus and instruments for the detection of contaminants; Apparatus and instruments for the detection of microbial toxins; Apparatus and instruments for the detection of pyrogens;

Apparatus and instruments for the detection of endotoxins; Apparatus and instruments for the detection of beta-glucans; Apparatus and instruments for analysing microbial toxins; Apparatus and instruments for analysing pyrogens; Apparatus and instruments for analysing endotoxins; Apparatus and instruments for analysing beta-glucans; Magneto-optical sensing platforms for detection of microbial toxins, pyrogens and endotoxins.

Class 10

Medical devices for use in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Medical instruments for use in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Pharmaceutical instruments for use in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Testing and quality control devices for medical purposes; Analysers for medical use; Apparatus and instruments for the detection of contaminants for medical purposes; Apparatus for analysing microbial toxins for medical purposes; Apparatus for analysing pyrogens for medical purposes; Apparatus for analysing endotoxins for medical purposes; Apparatus for analysing beta-glucans for medical purposes; Apparatus for detecting microbial toxins for medical purposes; Apparatus for detecting pyrogens for medical purposes; Apparatus for detecting endotoxins for medical purposes; Apparatus for detecting beta-glucans for medical purposes; Analysers for bacterial detection for medical purposes; Analysers for bacterial identification for medical purposes; Analysers for bacterial identification for research purposes; Analysers for bacterial detection for research purposes; Magneto-optical sensing platform for detection of microbial toxins, pyrogens, beta-glucans and endotoxins within raw materials used to make injectable medicines, formulated injectable medicines or on implantable medical devices.

Class 42

Laboratory research; Laboratory research services; Pharmaceutical research services; Quality control services; Quality control testing; Inspection of goods for quality control; Conducting of quality control tests; Testing services for the detection of microbial toxins; Testing services for the detection of pyrogens; Testing services for the detection of endotoxins; Testing services for the detection of beta-glucans;

Pharmaceutical product evaluation; Pharmaceutical research and development; Inspection of pharmaceuticals; Testing of pharmaceuticals; Testing of pharmaceuticals for contaminants; Testing of foodstuff for contaminants; Environmental testing services; Environmental testing services to detect contaminants in water; Quality control of partly manufactured goods; Quality control of raw materials; research services relating to the usefulness of detecting microbial toxins, pyrogens, beta-glucans and endotoxins in clinical samples to aid in the diagnosis of disease.

Class 44

Medical advisory services in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Healthcare advisory services in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Advisory services relating to medical apparatus and instruments in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Advisory services relating to surgical apparatus and instruments; Advisory services relating to dental apparatus and instruments in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Advisory services relating to pharmaceuticals in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Advisory services relating to medical problems in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; Pharmaceutical advice in relation to the analysis and/or detection of endotoxins, beta-glucan, pyrogens and/or microbial toxins; advisory services relating to the usefulness of detecting microbial toxins, pyrogens, beta-glucans and endotoxins in clinical samples to aid in the diagnosis of disease.

ANNEX 2

Class 1

Control preparations and calibrating fluids for medical diagnostic instruments; control preparations and calibrating fluids for laboratory instruments used for in vitro diagnostic testing and/or analysis; Reagents for laboratory use; DNA primers; substances used to extract nucleic acid from biological specimens; polymerase and buffers for use in the biotechnology field; Chemicals for use in the analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; compounds and reagents for use in the analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; diagnostic kits comprising reagents and assays for analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; diagnostic preparations for analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; DNA extraction controls; RNA extraction controls; negative controls; calibrating solutions; sodium chlorite used as a preservative with antimicrobial properties in ophthalmic preparations.

Class 5

Pharmaceutical preparations; Medical reagents for diabetes monitoring; medical test strips for use in monitoring blood glucose levels; medical test strips for use in monitoring blood ketone levels; diagnostic reagents; medical diagnostic reagents; diagnostic preparations for medical purposes; diagnostic test kits; saline solutions including sterile saline solutions for use as irrigants in ophthalmic surgery; ophthalmic preparations and formulations, including lubricating and rewetting solutions; contact lens care preparations, including solutions for disinfecting, cleaning, wetting, neutralizing, cushioning, soaking, storing and rinsing contact lenses, including in solution or tablet form; lubricant eye drops for contact lenses; ophthalmic eye care treatments and preparations including eye drops; medicated wipes; sanitised wipes; eyelid wipes; medicated facial wipes; disinfecting solutions; eye wash and eye care solutions, treatments and preparations; artificial tears; medicated drops; hyaluronic acid solution for intraocular use; reagents for medical purposes, including for use in portable blood analyzers; nutritional supplements; dietetic food substances adapted

for medical use; nutritional supplements for oral or gavage feeding; nutritional supplements to be used as a meal replacement; liquid or powder nutritive supplements for human use; nutritionally fortified beverages and powders for meal replacement; nutritional energy bars for use as a meal replacement and supplement bars for use as a meal replacement; pediatric nutritive preparations; nutritional supplements for children; infant formula; food for babies; prenatal vitamins; lactation vitamins; electrolyte replacement solutions; dietary supplements for humans; insect repellents; compounds and reagents for medical analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; medical diagnostic kits comprising reagents and assays for analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; medical diagnostic preparations for analysis and identification of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; medical sample preparation kits; chemical reagents for medical diagnosis and/or analysis; syringes containing hyaluronic acid for administration to patients during ophthalmic surgery; cartridges containing reagents for use in portable blood analyzers; drug-filled spray consisting of a bucal spray formulation of meloxicam via a metered spray delivery device for veterinary use.

Class 9

Computer software including applications used in the management of diabetes; blood screening instruments; laboratory analyzers for measuring, testing and analyzing blood, bodily fluids and / or tissue; haematology analyzers; clinical chemistry analyzers; immunoassay analyzers; automated clinical molecular laboratory instruments; laboratory sample extraction instruments; molecular diagnostic systems comprised of sequencers, spectrometers, sensors and computers, for analysis of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and / or pathogens; laboratory instruments for microbial screening and identification; computer software and hardware for identification and analysis of nucleic acid sequences, nucleic acids for pathogen identity, drug resistance characteristics and forensic profiles; laboratory apparatus, namely, molecular diagnostic sensors for analysis of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and / or pathogens; computer software for front-end processing, instrument control, data analysis and reporting for molecular diagnostic instruments; computer hardware and

software including for laboratory and scientific apparatus and instruments; computer hardware and software in the field of medical diagnostics including for medical diagnostic apparatus and instruments; electronic publications, including instruction sheets and manuals for in vitro diagnostic instruments, laboratory automation systems, and related software; data management software for medical diagnostic instruments; data management software for haematology analyzers, clinical chemistry analyzers, immunoassay analyzers and blood screening instruments; computer software and hardware for medical diagnostic instruments; computer software and hardware for haematology analyzers, clinical chemistry analyzers, immunoassay analyzers and blood screening instruments; computer software and hardware for managing interface between medical diagnostic laboratory instruments; computer software and hardware for managing medical diagnostic laboratory workflow; laboratory information management software and hardware; computer software and hardware for supporting and / or monitoring medical and / or laboratory diagnostic instruments; computer software and hardware for troubleshooting regarding medical and / or laboratory diagnostic instruments; computer software for processing diagnostic medical testing data; computer software and hardware for use in medical diagnostic testing; hardware and software for remote monitoring of in vitro diagnostic instruments; columns pre-packed with resin for use in separation and purification of DNA and RNA samples; computer software program for use during ophthalmic surgery; software program for calculating the refractive power of phakic intraocular lenses; computer software for controlling medical devices and ophthalmological surgical machines for use during eye surgery; eyeglasses for vision correction and / or enhancement and contact lenses; magnetically encoded patient smart data cards for use with ophthalmological laser surgery systems; computer software and hardware supporting blood testing instruments; data management software and hardware in the field of blood testing; data management software and hardware for medical diagnostic instruments; data management software and hardware in the field for managing data communications between data management software and hardware for blood analyzers; computer software and hardware for remote monitoring of blood testing instruments and / or medical diagnostic instruments; data processing equipment and apparatus; applications for electronic devices; scientific apparatus and instruments and parts and fittings therefor; laboratory apparatus and instruments and parts and fittings therefor; sequencers; spectrometers; sensors; biosensors; thermo cyclers; laboratory

apparatus, namely, desalters; sample preparation instruments; test and collection kits consisting of collection apparatus and laboratory devices; laboratory containers; bio-identification apparatus that enables identification, genotyping and characterization for analysis of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and / or pathogens; DNA preparation bead beating tubes; RNA preparation bead beating tubes; DNA preparation process tubes; RNA preparation process tubes; DNA preparation elution tubes; RNA preparation elution tubes; enzyme mix vials; enzyme mix tubes; software programs, in particular to enable data interfacing, specifically for use in research and diagnostic laboratories; DNA probes; laboratory instruments for in vitro diagnostic testing and/or analysis; data management and laboratory automation systems for use in the field of medical diagnostics; molecular diagnostic instruments; laboratory instruments for microbial screening and identification; laboratory apparatus, namely, molecular diagnostic sensors for analysis of nucleic acid sequences, nucleic acids, genetic materials, infectious agents and/or pathogens; remote controls for operating or controlling surgical or medical apparatus and instruments; software for surgical handpiece for use during phacoemulsication surgery and vitrectomy; instruments for sample preparation and thermocycling; parts and fittings for all the aforesaid goods.

Class 10

Medical devices; medical apparatus and instruments for diabetes monitoring; blood glucose monitors; blood glucose sensors; blood ketone monitors; blood ketone sensors; apparatus for drawing or sampling blood for purposes of diabetes monitoring; medical diagnostic instruments for in vitro diagnostic testing and/or analysis; laboratory equipment for use in the field of medical diagnostics; medical devices for ophthalmic use, namely, laser systems comprised of scanning, imaging, guiding devices and lasers, and structural parts thereof; ophthalmic surgical machines for use during cataract surgery and vitrectomy; cases specially adapted for carrying, holding and storing surgical and medical ophthalmic apparatus and instruments; surgical handpiece for use during phacoemulsication surgery and vitrectomy; knives, blades, needles, aspiration and irrigation tips and tubing; medical eye pads, shields and trays and drainage bags; ocular implants used in the prevention and treatment of intraocular hypertension and glaucoma; capsular tension rings; ocular implants; Intraocular lenses; surgical hand tools, machines, apparatus and instruments; medical machines,

apparatus and instruments, including, an intraocular lens implantation and delivery system; medical lasers; ophthalmological surgery systems comprised of a laser source and optics to deliver laser energy to the eye; ophthalmic diagnostic equipment; aberrometers for use during ophthalmic surgery; medical devices and surgical systems; a sensing device for refractive diagnostic and topographical measurement that may be associated with laser ablation surgery; surgical, medical, dental and veterinary apparatus and instruments; ophthalmological and/or optometric apparatus for diagnostics and/or treatment; apparatus for vision correction and/or enhancement; intraocular devices for vision correction and/or enhancement; stents; catheters; guide wires; bioabsorbable stents; drug-eluting stents; scaffolding for catheters and stents; blood analyzing instruments and systems for medical diagnostic purposes; medical instruments and apparatus for diagnostic purposes sequencers; medical diagnostic device and system, including a hand-held meter, lancets, test strips and control solution for veterinary use; parts and fittings for all the aforesaid goods.

Class 16

Printed matter, including publications, pamphlets, manuals, brochures, books, booklets, newsletters, flyers, posters and publications, including in relation to global citizenship, corporate responsibility programs and healthcare topics, medical conditions, products and treatments, community and environmental issues, and nutrition issues; printed instructional, educational, and teaching material (except apparatus); printed advertising materials.

Class 29

Milk and milk-based products; powdered milk preparations; milk derivatives; preparations containing milk derivatives; Ready to eat food bars with a soy or whey protein base; ready to drink dairy based protein food beverages.

Class 32

Powdered whey based protein food beverages; powdered soy based protein food beverages not being milk substitute.

Class 35

Promoting public awareness and advocacy in the field of health, global citizenship and corporate social responsibility programs; promoting public awareness related to health and nutrition through direct marketing services; social media and search engine marketing, inquiry marketing, mobile marketing through blogging and other forms of passive, sharable or viral communication channels; promoting global citizenship and corporate social responsibility programs that promote innovation, science, access to health care, community involvement, safeguarding the environment, wellness and health.

Class 37

Repair, installation and maintenance of hardware and structural parts of medical devices, including lasers for ophthalmic use.

Class 41

Education and training; workshops and seminars and instructional materials distributed therewith, including in the field of nutrition and in the use, operation and practice development of ophthalmologic surgery systems and devices used therewith; arranging and conducting of colloquiums, conferences, congresses and symposiums; sporting and cultural activities; providing electronic publications, including instruction sheets and manuals for in vitro diagnostic instruments, laboratory automation systems.

Class 42

Providing technical support services regarding medical and diagnostic laboratory instruments and systems, in vitro diagnostic laboratory instruments, laboratory automation systems, and medical and laboratory related software and hardware, including in the field of in vitro diagnostics; providing remote electronic troubleshooting services for laboratories including in the field of in vitro diagnostics; providing operational monitoring services for medical diagnostic instruments and laboratory equipment including in the field of in vitro diagnostics; remote monitoring of medical diagnostic instruments and diagnostic laboratory systems; providing remote electronic monitoring of in vitro diagnostic equipment, medical diagnostic instruments and laboratory automation systems; providing a web-based software platform for laboratory and diagnostic equipment information management, monitoring and analysis including in the field of in vitro diagnostics; software as a service (SAAS)

services featuring software for use in managing data and information including in the field of in vitro diagnostics; providing software for electronic publications; scientific and technological research and development services; biomarker discovery services; providing computer software technical support services in the field of medical diagnostics; providing a web-based software platform for data management, monitoring and analysis in the field of medical diagnostics; software as a service (SAAS) services in the field of medical diagnostics; hosting, managing, developing, and maintaining applications, software, and web sites related to medical diagnostics instruments and systems; computer services, including remote data management for medical diagnostic instruments, remote management of medical diagnostic systems and monitoring and reporting on the performance and errors of medical diagnostic instruments; providing an on-line network environment that features technology that enables users to share data in the field of medical diagnostics; providing temporary use of non-downloadable software and applications for monitoring medical diagnostic instruments and managing data from medical diagnostic instruments; repair, installation and maintenance of software.

Class 44

Medical services, including medical services for the diagnosis of conditions of the human body; providing information in the field of medical diagnostics; treatment of eye diseases and conditions; ophthalmic surgery; lasik and other surgical procedures to correct and improve vision; providing an internet website for medical professionals and medical patients featuring information on ophthalmic medical devices; diagnosis and treatments; medical testing for diagnostic or treatment purposes.