

O/797/22

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3658500
BY MEDTRUM TECHNOLOGIES INC.**

TO REGISTER:

APGO

AS A TRADE MARK IN CLASSES 9, 10 & 44

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 427629 BY
BRITANNIA PHARMACEUTICALS LIMITED**

BACKGROUND AND PLEADINGS

1. Medtrum Technologies Inc. (“the applicant”) applied to register **APGO** as a trade mark in the United Kingdom on 21 June 2021. The application was accepted and published on 20 August 2021 in respect of the following goods and services:

Class 9

Computer operating programs, recorded; Computer software, recorded; Computer software applications, downloadable; Flashing lights [luminous signals]; Electronic publications, downloadable; Acoustic alarms; Buzzers; Monitoring apparatus, other than for medical purposes; Measuring instruments; Diagnostic apparatus, not for medical purposes.


Class 10

Needles for medical purposes; Probes for medical purposes; Medical apparatus and instruments; Trocars; Glucometers; Catheters; Pumps for medical purposes; Syringes for injections; Diagnostic apparatus for medical purposes; Apparatus for blood analysis.

Class 44

Medical clinic services; Telemedicine services; Therapy services; Health counselling; Dietary and nutritional guidance; Hospital services; Nursing, medical; Rest home services; Massage; Rental of sanitary installations.

2. The application was opposed by Britannia Pharmaceuticals Limited (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods and services in the application. The opponent is relying on the following UK Trade Marks (“UKTM”):

Earlier mark	Goods and services relied upon
<p>UKTM No. 900342907 (“the earlier word mark”)</p> <p>APO-GO</p> <p>Application date: 18 July 1996 Registration date: 3 May 1999</p>	<p><u>Class 5</u> <i>Pharmaceutical preparations and substances.</i></p> <p><u>Class 10</u> <i>Medical and surgical apparatus and instruments; apparatus and instruments for injecting pharmaceutical preparations injectors for medical purposes.</i></p>
<p>UKTM No. 3178744 (“the earlier stylised mark”)</p>  <p>Application date: 5 August 2016 Registration date: 4 November 2016</p>	<p><u>Class 5</u> <i>Pharmaceutical preparations and substances.</i></p> <p><u>Class 10</u> <i>Medical and surgical instruments; apparatus and instruments for injecting pharmaceutical preparations; injectors for medical purposes.</i></p>

3. The opponent claims that the contested mark is highly similar to the earlier marks and that the goods and services covered by the marks are either identical or similar. Consequently, it claims that there exists a likelihood of confusion on the part of the relevant public in the UK.

4. The applicant filed a defence and counterstatement denying the claims made and putting the opponent to proof of use of the earlier word mark. It accepted that there was some overlap in the goods covered in Class 10 of the parties’ marks, but denied that there would be a likelihood of confusion between them.

EVIDENCE AND SUBMISSIONS

5. The opponent filed evidence in the form of a witness statement from Mark Slater, Director of International Sales and Business Development of Britannia Pharmaceuticals Ltd. He has held this position since January 2021 and has been employed by the opponent since March 2015. It is accompanied by seven exhibits which go to the use that has been made of the earlier word mark. The evidence is dated 28 March 2022.

6. Neither side requested a hearing and the opponent filed written submissions in lieu on 4 August 2022. The applicant did not file any evidence or submissions.

REPRESENTATION

7. The opponent is represented by Potter Clarkson LLP and the applicant by Barker Brettell LLP.

DECISION

8. Section 5(2)(b) of the Act is as follows:

“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.”

9. In considering the opposition, I am guided by the following principles, gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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 BV (Case C-342/97), Marca Mode CV v Adidas AG & Adidas Benelux BV (Case C-425/98), Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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-334/05 P) and Bimbo SA v OHIM (Case C-519/12 P):¹

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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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;

¹ Section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts, although the UK has left the EU.

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 the earlier mark to mind, is not sufficient;

j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

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

10. An “earlier trade mark” is defined in section 6(1) of the Act as:

“(a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired,

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired,

(ba) a registered trade mark or international trade mark (UK) which –

(i) prior to IP completion day has been converted from a European Union trade mark or international trade mark (EC) which itself had a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired, and

(ii) accordingly has the same claim to seniority, or

(c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark.”

11. The registrations upon which the opponent relies qualify as earlier trade marks under the above provision. The earlier stylised mark was registered within the five years before the date on which the application for the contested mark was made and therefore is not subject to proof of use. The opponent is entitled to rely on all the goods for which that mark stands registered. The earlier word mark was registered more than five years before the date on which the application for the contested mark was made and the applicant has required the opponent to prove that it has made genuine use of that mark.

Proof of Use

12. Section 6A of the Act is as follows:

“(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), (aa) or (ba) in relation to which the conditions set out in sections 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section ‘*the relevant period*’ means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(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 relevant period 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 (the ‘variant form’) differing in elements which do not alter the distinctive character of the

mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), 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) Repealed]

(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.

...

13. Section 100 of the Act is also relevant. It provides that:

“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.”

14. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Limited v Verweij Fashion BV*, [2018] EWHC 1608 (Ch):

“114. *The law with respect to genuine use.* The CJEU has considered what amounts to ‘genuine use’ of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11

Leno Merken BV v Hagelkruis Beheer BV [EU:C:2012:816] [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(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 to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the

form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving 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. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

15. The relevant period for the proof of use assessment is the five years ending with the date of application for the contested mark. This is 22 June 2016 to 21 June 2021.

16. The opponent is a pharmaceutical company specialising in therapies for patients with neurological conditions, such as Parkinson's Disease.² Its products include a chemical called apomorphine hydrochloride which is injected under the skin using a needle to bring rapid relief from symptoms. This product may be prescribed when oral medication becomes less reliable and is available in pen and pump form, as shown below. The images are taken from patient information brochures prepared in March 2019.³



² Exhibit MS1, page 2.

³ Exhibit MS4, pages 9 and 38.

17. Mr Slater states that sales of APO-GO branded products in the UK were as follows:

YEAR	SALES – GBP
2016	£11,566,741.00
2017	£11,070,773.00
2018	£10,758,973.00
2019	£10,747,547.00
2020	£10,076,954.00
2021	£ 9,100,385.00

18. Exhibit MS3 contains a selection of 25 sample invoices to customers throughout the UK. The earliest is dated 27 July 2016 and the latest 19 March 2021. They show sales of pre-filled syringes and pen injectors.

19. Throughout the evidence the mark appears in plain word and stylised form, as shown in the promotional material below. This is aimed at prescribers and was prepared in October 2017.⁴



When the increasing frequency and severity of daily 'OFFs', dyskinesias or pill burden threaten everything they live for,^{1,2,6} it's time to prescribe APO-go PUMP³ – continuous subcutaneous infusion of apomorphine, delivering smooth, predictable control of motor fluctuations.^{3,4}

APO-go PUMP
apomorphine hydrochloride
Continuous, reliable 'ON'^{3,5} 

⁴ Exhibit MS5, page 25.

20. The word mark as registered is in capitals, but I remind myself that the registration of a plain word mark covers use of that mark irrespective of form, colour or font: see *LA Superquimica v EUIPO*, Case T-24/17, paragraph 39. I find that “APO-go” is an acceptable variant of “APO-GO”.

21. The earlier word mark is a UK comparable mark and therefore the practice set out in Tribunal Practice Notice (“TPN”) 2/2020 applies. This states that where use falls to be considered at any time before IP Completion Day (31 December 2020), I am to take into account use in the EU of the corresponding EU Trade Mark (“EUTM”) or International Registration designating the EU (“IR(EU)”) until IP Completion Day.⁵

22. All but six months of the relevant period falls before IP Completion Day. There are invoices to UK consumers following IP Completion Day and these show sales of around £26,000 of pre-filled syringes.⁶ However, there is no evidence of any use outside the UK before 31 December 2020. In *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, the CJEU noted that:

“36. It should, however, be observed that ... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.

...

50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the

⁵ Paragraph 4.

⁶ Exhibit MS3. The total figure has been calculated by multiplying the number of items sold by £73.11. Exhibit MS4, page 26, confirms that as of January 2021 this was the price for a carton of five pre-filled syringes of apomorphine hydrochloride.

territory of a single Member State in order for the use to be regarded as 'genuine use', it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national mark.

...

55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77)."

23. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited* [2016] EWHC 52, Arnold J (as he then was) reviewed the case law since *Leno* and concluded as follows:

"228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issue in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument is not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that 'genuine use in the Community will in general require use in more than one Member State' but 'an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State'. On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use."

24. The General Court (“GC”) restated its interpretation of *Leno* in *TVR Automotive Ltd v OHIM*, Case T-398/13, paragraph 57. This case concerned national (rather than local) use of what was then known as a Community trade mark (now an EUTM). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM or an IR(EU) in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM or IR(EU). This applies even where there are no special factors, such as the market for the goods or services being limited to that area of the EU.

25. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the EU during the relevant five-year period. In making this assessment, I am required to consider all relevant factors, including:

- The scale and frequency of the use shown;
- The nature of the use shown;
- The goods and services for which use has been shown;
- The nature of those goods/services and the market(s) for them; and
- The geographical extent of the use shown.

26. During the relevant period, UK sales have been in the region of £9 million to £11 million per year. I have no information on the number of people in the UK (or the EU) with Parkinson’s Disease, but the opponent’s products are not prescribed to every single patient. The symptoms the drug is designed to alleviate (motor fluctuations, dyskinesia) “*represent an important milestone in the progression of Parkinson’s disease and characterizes the transition from early to advanced PD*”.⁷ It is clear that the goods sold under the mark are intended for people at a particular stage in the development of the disease. The evidence tells me that the unit costs for the goods are £123.91 for the injector pens and £73.11 for a carton of five pre-filled syringes. A

⁷ Exhibit MS2, page 2.

simple calculation suggests that at least 70,000 units would have been sold a year in the UK.

27. I remind myself that there is no *de minimis* level of use that must be reached, and that the end users of the goods represent a part, not the whole, of the general public. With these considerations in mind, I believe that the evidence is sufficient for me to find that the mark has been genuinely used. I must now address the question of the goods in respect of which the mark has been used.

28. In *Property Renaissance t/a Titanic Spa v Stanley Dock Hotel Ltd t/a Titanic Hotel Liverpool & Ors* [2016] EWHC 3103 (Ch), Carr J summed up the law relating to fair specifications as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd (Extreme Trade Mark)* [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot

reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 (“Asos”) at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, 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 to 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; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”⁸

29. The opponent’s specification contains the broad term *Pharmaceutical preparations and substances*, while the evidence shows that it has used the mark on pharmaceutical preparations to treat a particular medical condition. In my view, it would not be fair to allow the opponent to rely on such a general term. In *PLYMOUTH LIFE CENTRE*, BL O/236/13, Daniel Alexander QC, sitting as the Appointed Person, stated that:

“... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as ‘tuition services’, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to ‘tuition services’ even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification

⁸ Paragraph 47.

when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”⁹

30. Mr Slater states that the goods on which the earlier word mark has been used includes pharmaceuticals and medical and surgical apparatus and instruments.¹⁰ He also says that his company is “*dedicated to improving the lives of people with long-term neurological conditions*”. The opponent does not explain why, in the light of the evidence, it considers that the broader category is appropriate. To my mind, a fair specification would be *Pharmaceutical preparations and substances for the treatment of neurological conditions*.

31. Turning to the Class 10 goods, I consider that the term, *Medical and surgical apparatus and instruments*, is a broad one, and the opponent has only shown use in relation to a specific type of apparatus and instruments, namely *Apparatus and instruments for injecting pharmaceutical preparations* and *Injectors for medical purposes*. In my view, it would be fair to allow the opponent to rely on these more specific terms.

32. A fair specification for the earlier word mark is therefore:

Class 5

Pharmaceutical preparations and substances for the treatment of neurological conditions.

Class 10

Apparatus and instruments for injecting pharmaceutical preparations; Injectors for medical purposes.

⁹ Paragraph 28.

¹⁰ Paragraph 7.

Comparison of goods and services

33. It is settled case law that I must make my comparison of the goods and services on the basis of all relevant factors. These may include the nature of the goods and services, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon*, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. Goods and services are complementary when

“... there is a close connection between them in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”¹¹

34. The goods and services to be compared are shown in the table below:

Earlier goods	Contested goods and services
<u>Class 5 (Word mark)</u> <i>Pharmaceutical preparations and substances for the treatment of neurological conditions</i>	
<u>Class 5 (Stylised mark)</u> <i>Pharmaceutical preparations and substances.</i>	
	<u>Class 9</u> <i>Computer operating programs, recorded; Computer software, recorded; Computer software applications, downloadable; Flashing lights [luminous signals]; Electronic publications, downloadable; Acoustic alarms; Buzzers; Monitoring apparatus, other than for medical purposes; Measuring instruments;</i>

¹¹ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82.

Earlier goods	Contested goods and services
	<i>Diagnostic apparatus, not for medical purposes.</i>
<u>Class 10 (Both marks)</u> <i>Apparatus and instruments for injecting pharmaceutical preparations; Injectors for medical purposes.</i>	<u>Class 10</u> <i>Needles for medical purposes; Probes for medical purposes; Medical apparatus and instruments; Trocars; Glucometers; Catheters; Pumps for medical purposes; Syringes for injections; Diagnostic apparatus for medical purposes; Apparatus for blood analysis.</i>
<u>Class 10 (Stylised mark only)</u> <i>Medical and surgical apparatus and instruments.</i>	
	<u>Class 44</u> <i>Medical clinic services; Telemedicine services; Therapy services; Health counselling; Dietary and nutritional guidance; Hospital services; Nursing, medical; Rest home services; Massage; Rental of sanitary installations.</i>

35. Section 60A of the Act states that:

“(1) For the purposes of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear to be in the same class under the Nice Classification,

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the ‘Nice Classification’ means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

Class 9

36. The opponent submits that the contested Class 9 goods are similar to its Class 5 and Class 10 goods on the grounds of complementarity:

“The list of goods in Class 9 covers broad terms such as ‘computer operating programs’; ‘computer software applications, downloadable’; ‘electronic publications, downloadable’. These goods are not limited to a particular field and could therefore encompass computer programs, applications and electronic publications in relation to pharmaceutical preparations and/or medical apparatus and instruments.”¹²

37. I shall take the Class 9 goods in groups where this is appropriate and in line with the guidance in *SEPARODE Trade Mark*, BL O-399-10.¹³ The first group is *Computer operating programs, recorded; Computer software, recorded; Computer software applications, downloadable*. I agree with the opponent that these are broad terms. Thomas Mitcheson QC, sitting as the Appointed Person, considered the level of similarity between *Computer software* and *Financial services* in *MFS Africa Trade Mark*, BL O/531/22. He said:

“19. ...I have difficulty with the conclusion that there are no complementary elements, particularly in light of the Hearing Officer’s earlier finding that computer software and mobile applications may be used to support the provision of financial services. As I have noted above, it is clearly the case that financial services can and often are provided using computer software, often of a bespoke nature. This seems to me to be a classic example of complementary goods and services whereby the nature of the software plays an integral and important part in the delivery of the financial services.

...

¹² Submissions in lieu of a hearing, paragraph 16.

¹³ See paragraph 5.

21. ... I disagree with the conclusion that there are no similarities between computer software and mobile applications and the financial services in the Opponent's specification. The supportive/complementary nature of the former is apparent and that is sufficient in my mind to render the goods/services as having a low degree of similarity. As the Hearing Officer explained in relation to 'electronic payment apparatus' in §55, the average consumer might expect a single or related entity to offer both. This mainly arises because of the hugely broad nature of the Applicant's specification, which means that one form of computer software or another is likely to be similar to large swathes of goods and services in other classes, so ubiquitous is the use of computers and software in present day life. The solution to this is for applicants to be more specific in what they apply for, and to narrow down the classes of software to make it more difficult to allege that such software could be used to support or be complementary to other goods and services."

38. I agree that the contested terms could include software that supports, and is essential for, the use of medical and surgical apparatus, including the specific goods that constituted a fair specification for the earlier word mark, and that there is a degree of complementarity. For example, software could be used to control the delivery of the drug. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services.¹⁴ I find that there is a low level of similarity between the applicant's software and the opponent's medical apparatus.

39. I am less persuaded that there is complementarity between *Electronic publications, downloadable* and the opponent's goods. I do not see that one is indispensable or important for the use of the other in the sense that the average consumer would think that the responsibility for the goods lies with the same undertaking. There may be some overlap in user, but the purpose, method of use and trade channels are likely to be different. There is no competition between the goods. I find that they are dissimilar.

¹⁴ Paragraph 23.

40. The opponent has not explained why it considers that the remaining Class 9 goods are similar to its goods. The contested *Flashing lights [luminous signals]; Acoustic alarms; Buzzers* are components that could be used in a wide range of different types of equipment, including medical apparatus. In *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found that:

“The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”¹⁵

The users of the respective goods will be different, as will the intended purpose, physical nature and method of use. I find that the goods are dissimilar.

41. The final group of goods in Class 9 comprises *Monitoring apparatus, other than for medical purposes; Measuring instruments; Diagnostic apparatus, not for medical purposes*. The applicant's goods perform similar functions to the opponent's goods, although in a different field. However, they are likely to be similar in physical nature. I have no evidence to suggest whether there would be any shared trade channels, competition or complementarity. There may be some degree of overlap in user. Overall, I find there to be a low degree of similarity between these goods and the opponent's *Medical and surgical apparatus and instruments*, for which the stylised mark is registered. Turning to the goods in the fair specification of the word mark, I consider that these do not perform the same function as the contested goods, as they would not be used for monitoring, measuring or diagnosing conditions. Therefore, I find that *Monitoring apparatus, other than for medical purposes; Measuring instruments; Diagnostic apparatus, not for medical purposes* are dissimilar to the *Apparatus and instruments for injecting pharmaceutical preparations and Injectors for medical purposes*.

¹⁵ Paragraph 61.

Class 10

42. All the applicant's Class 10 goods are included in the opponent's broader *Medical and surgical apparatus and instruments*, which are covered by the earlier stylised mark. Goods can be considered to be identical when the goods of one party are included in a broader category to be found in the specification of the other party: see *Gérard Meric v OHIM*, Case T-133/05, paragraph 29. I find that they are identical. In the event that I need to consider both marks when I come to the global assessment of likelihood of confusion, I shall continue to assess the applicant's Class 10 goods against the goods in the fair specification of the word mark.

43. The opponent's *Apparatus and instruments for injecting pharmaceutical preparations* and *Injectors for medical purposes* are included in the applicant's *Medical apparatus and instruments*. These are also identical per *Meric*.

44. The opponent's evidence shows that *Apparatus and instruments for injecting pharmaceutical preparations* includes *Pumps for medical purposes* and *Syringes for injections*. I find that these are also identical.

45. The remaining goods are *Probes for medical purposes; Trocars; Glucometers; Catheters; Diagnostic apparatus for medical purposes; Apparatus for blood analysis*. Both these and the opponent's goods would have the same users and be distributed through the same trade channels. At a general level, they would have a similar purpose (medical treatment and diagnosis), but the method of use would be different and I have no evidence of any competition or complementarity between the goods. I find that they are similar to *Apparatus and instruments for injecting pharmaceutical preparations* and *Injectors for medical purposes* to a low to medium degree.

Class 44

46. The opponent submits that:

“The goods covered by the Opponent's Earlier Marks in Classes 5 and 10 and the services covered by the Applicant's Mark in Class 44 are considered

highly similar as they are complementary to the goods covered in Classes 5 and 10. Pharmaceutical preparations and substances, and medical apparatus and instruments are core to the offering of services in medical clinics, hospitals, nursing, rest home and therapy and counselling services. Therefore, it is inevitable that services being provided in relation to a highly similar mark would result in a likelihood of confusion amongst medical and healthcare professionals as well as patients under care, as the relevant consumers.”¹⁶

47. The opponent’s evidence shows that it provides access to nursing care to people using the pens and pumps supplied under the earlier marks.¹⁷ I accept that there is complementarity between the opponent’s goods and the following medical services in the applicant’s specification: *Medical clinic services; Telemedicine services; Therapy services; Health counselling; Hospital services; Nursing, medical*. The goods and services share the same purpose and end users. I find that they are similar to between a low and medium degree.

48. The remaining services are *Dietary and nutritional guidance; Rest home services; Massage; Rental of sanitary installations*. In my view, these services are not primarily medical services. Any overlap in trade channels with the opponent’s goods is likely to be small. The method of use is different, as is the purpose. I do not consider that there is any competition or complementarity between them. Consequently, I find that they are dissimilar to the opponent’s goods.

Conclusions

49. Where there is no similarity between the goods and services, there can be no likelihood of confusion under section 5(2)(b): see *eSure Insurance Limited v Direct Line Insurance Plc* [2008] EWCA Civ 842 CA, paragraph 49. The opposition fails with respect to the following goods and services:

¹⁶ Paragraph 17.

¹⁷ See, for example, Exhibit MS4, page 27.

Class 9

Flashing lights [luminous signals]; Electronic publications, downloadable; Acoustic alarms; Buzzers.

Class 44

Dietary and nutritional guidance; Rest home services; Massage; Rental of sanitary installations.

Average consumer and the purchasing process

50. In *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”¹⁸

51. The opponent submits that the average consumer will be a member of the general public or a medical professional. I agree. Some of the goods are more likely to be bought by a professional, but even so the GC has said that the average consumer of pharmaceutical and medicinal products in Class 5, whether a professional or a member of the public, would pay a higher than average degree of attention when purchasing the goods: see *Olimp Laboratories sp. z o.o. v EUIPO*, Case T-817/19, paragraphs 39-42. I see no reason why the position would be any different for the Class 10 goods, except perhaps where they are less expensive, standardised items such as syringes or needles. Even so, I do not consider that attention would be any lower than average. I also take the view that a higher than average degree of attention would be paid when purchasing software that is complementary to the medical

¹⁸ Paragraph 60.

apparatus, given the importance of the quality of the software for patient health. The monitoring, diagnostic and measuring instruments would include a range of goods, from simple household objects, such as measuring spoons, to highly sophisticated technical instruments. In my view, the average consumer will be either a member of the general public or a professional and pay at least an average degree of attention. The consumer of the services will be a member of the public or a professional acquiring the services for their clients. I consider that they will pay a higher than average degree of attention, given the health-related nature of the services.

52. In all cases, the visual aspect of the mark will play a significant role during the purchasing process. Consumers will see it on in promotional material, websites, or on packaging and the goods themselves in a retail environment. In addition, I believe that the aural element will be important. The consumer may seek the assistance of sales staff in a store or discuss products and services with sales representatives or other advisors.

Comparison of marks


53. It is clear from *SABEL* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo* that:

“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”¹⁹

¹⁹ Paragraph 34.

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

55. The respective marks are shown below:

Earlier marks	Contested mark
APO-GO 	APGO

Comparison with the earlier word mark

56. The contested mark consists of a single word “APGO”. In *LA Superquimica v EUIPO*, Case T-24/17, the GC held that such plain word marks protected the word or words contained in the mark in whatever form, colour or font.²⁰ The overall impression of the mark lies in the word itself.

57. The earlier word mark consists of the words “APO” and “GO” separated by a hyphen which, in my view, is likely to go unnoticed by the average consumer. Both words make an equal contribution to the overall impression of the mark.

58. The beginning and end of the marks are identical, with the only difference being the “O” and hyphen in the middle of the earlier mark. I find that they are visually highly similar.

59. The contested mark has two syllables and would be pronounced as “APP-GO”, while the earlier mark has three syllables and would be pronounced as “APP-O-GO”. On this basis, I find that the marks are aurally highly similar.

²⁰ Paragraph 39.

60. The contested mark would, in my view, be seen as an invented word with no meaning. The first part of the earlier mark is derived from the chemical name of the pharmaceutical preparation sold under it, but the average consumer is not likely to be aware of this. The “GO” element would bring the idea of movement to the mind of the average consumer. I find that the marks are conceptually dissimilar.

Comparison with the earlier stylised mark

61. The earlier stylised mark consists of the words “APO” and “GO”. The first of these is in large white capital letters, with a red outline; the second is in large red lower case letters. Between these two words is a device of four highly stylised overlapping people in red and grey. Where a mark contains both verbal and figurative elements, the words are, in principle, to be considered as more distinctive, as the average consumer will refer to the goods or services by using the words rather than describing the device: see *Wassen International Ltd v OHIM (SELENIUM-ACE Trade Mark)*, Case T-312/03, paragraph 37. I believe that to be the case here. The words “APO” and “GO” make the greater contribution to the overall impression of the earlier mark, although the device is not negligible.

62. As has been seen, the earlier stylised mark contains additional visual elements which reduce the level of similarity between it and the contested mark. I find that the marks are similar to between a low to medium degree.

63. The device element cannot be pronounced and the verbal element is identical to the earlier word mark, and so I find that the contested mark is aurally highly similar to the earlier stylised mark.

64. The device in the earlier mark reinforces the message of movement. I therefore adopt the findings I made in paragraph 60 above.

Distinctive character of the earlier mark

65. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [1999] ECR I-0000, 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. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

67. I found that the average consumer would consider that “APO” in the earlier word mark had no meaning, while “GO” is a dictionary word that has no meaning in the context of the goods on which the opponent can rely. I find that this mark has a high level of inherent distinctive character. Turning to the earlier stylised mark, I find that the combination of the verbal and figurative elements also results in a high degree of inherent distinctiveness.

68. The opponent has not claimed that the distinctiveness of the marks has been enhanced through use. Its evidence does not tell me how great a market share was

held by the mark, how long standing the use has been or how much has been invested in promoting it. While it was sufficient to prove use of the earlier word mark for some of the goods in the specification, it falls short of what would be required to demonstrate enhanced distinctiveness.

Conclusions on likelihood of confusion

69. There is no scientific formula to apply in determining whether there is a likelihood of confusion. It is a global assessment where a number of factors need to be borne in mind. I must also take account of the interdependency principle, i.e. that a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services or vice versa. I keep in mind 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 they have in their mind.

70. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Iain Purvis QC, sitting as the Appointed Person, explained 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 recognised 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. In *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ commented that:

"This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition."²¹

72. He also said:

"As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/291/16) at [16] 'a finding of likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no

²¹ Paragraph 12.

likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."²²

Class 9 goods

73. I found that the contested *Computer operating programs, recorded; Computer software, recorded; Computer software applications, downloadable* were similar to a low degree to the Class 10 goods of both earlier marks. Given the high degree of visual and aural similarity between the earlier word mark and the contested mark, and the earlier mark's high level of inherent distinctiveness, it is my view that, despite the higher than average degree of attention paid during the purchasing process, the average consumer will imperfectly recall the marks and mistake one for the other. In making my finding, I have kept in mind the interdependency principle. There is a likelihood of direct confusion.

74. The second group of goods in this class is as follows: *Monitoring apparatus, other than for medical purposes; Measuring instruments; Diagnostic apparatus not for medical purposes*. I found that these were dissimilar to the goods in the fair specification for the earlier word mark and so I must consider whether there is a likelihood of confusion between the contested mark and the earlier stylised mark. I found that this mark was visually similar to the contested mark to a low to medium degree, aurally similar to a high degree, and conceptually dissimilar. The goods are similar to a low degree, and I found that the average consumer would be paying at least an average degree of attention and that both visual and aural aspects of the mark would be important during the purchasing process. I have also borne in mind the imperfect recollection of the average consumer and the high level of distinctiveness of the verbal element of the mark, which I found to be the more distinctive part of the mark as a whole. Taking all these factors into account, I consider that there is a likelihood of direct confusion between the marks.

²² Paragraph 13.

75. If I am wrong in this, and the differences between the marks are such that the average consumer would not mistake one for the other, it is my view that there would be a likelihood of indirect confusion, given the high level of distinctiveness of the earlier verbal element and the high degree of similarity between them. The average consumer would in that case believe the contested mark and the earlier mark came from the same undertaking, with one being a figurative mark and the other a plain word mark.

Class 10 goods

76. The applicant's *Medical apparatus and instruments, Pumps for medical purposes and Syringes for injections* are identical to goods covered by the earlier marks. Given the high degree of visual and aural similarity between the contested mark and the earlier word mark, I find that there is a likelihood of direct confusion.

77. When considering the remaining Class 10 goods, I take the view that the interdependency principle will apply and that the high degree of visual and aural similarity between the marks offsets the low to medium degree of similarity between the goods, particularly given the high level of distinctive character enjoyed by the earlier word mark. I find that direct confusion is likely.

Class 44 services

78. In my view, the argument set out in the previous paragraph applies in the case of the Class 44 services, which I found to be similar to the opponent's goods to a low to medium degree. There is a likelihood of direct confusion.

79. The opposition succeeds for all the goods and services which were found to be similar.

OUTCOME

80. The opposition has been partially successful. UKTM No. 3658500 will proceed to registration for the following goods and services:

Class 9

Flashing lights [luminous signals]; Electronic publications, downloadable; Acoustic alarms; Buzzers.

Class 44

Dietary and nutritional guidance; Rest home services; Massage; Rental of sanitary installations.

81. Registration is refused for the following goods and services:

Class 9

Computer operating programs, recorded; Computer software, recorded; Computer software applications, downloadable; Monitoring apparatus, other than for medical purposes; Measuring instruments; Diagnostic apparatus, not for medical purposes.

Class 10

Needles for medical purposes; Probes for medical purposes; Medical apparatus and instruments; Trocars; Glucometers; Catheters; Pumps for medical purposes; Syringes for injections; Diagnostic apparatus for medical purposes; Apparatus for blood analysis.

Class 44

Medical clinic services; Telemedicine services; Therapy services; Health counselling; Hospital services; Nursing, medical.

COSTS

82. Both parties have enjoyed a degree of success, with the greater part going to the opponent, which is entitled to a contribution towards its costs, based on the scale published in TPN 2/2016. The award is calculated as follows and takes into account the relative share of success enjoyed by each party:

<i>Preparing a statement and considering the applicant's statement:</i>	£150
<i>Preparing evidence:</i>	£500
<i>Preparing of written submissions in lieu of attendance at a hearing:</i>	£250
<i>Official fees:</i>	£100
TOTAL:	£1000

83. I therefore order Medtrum Technologies Inc to pay Britannia Pharmaceuticals Limited the sum of £1000. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 15th day of September 2022

**Clare Boucher,
For the Registrar,
Comptroller-General.**