

O/0361/23

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3731110
IN THE NAME OF INFORM NUTRITION IRELAND LTD.
IN RESPECT OF THE TRADE MARK**



IN CLASS 1

AND

**THE OPPOSITION THERETO UNDER NO. 432248
BY HYPRED**

Background and pleadings

1. Inform Nutrition Ireland Ltd. (“the applicant”) applied to register the trade mark no. 3731110 as shown on the cover page of this decision in the UK on 9 December 2021. It was accepted and published in the Trade Marks Journal on 31 December 2021 in respect of the following goods:

Class 1: Food preservatives; preservatives for foodstuffs; preservatives for animal feeds; enzymes to assist in digestion for use in the manufacture of animal feeds; enzymes for use in foodstuffs; enzymes for food or drinks; additives (chemical -) for use in the preparation of animal foodstuffs.

2. HYPRED (“the opponent”) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier comparable trade mark no. 917912371¹ for the mark KERSIA. The following goods are relied upon in this opposition:

Class 1: Chemicals, biological and enzymatic preparations for use in the agricultural, food, agrifoodstuff, industries, for use by the health sector and veterinary sector, and by the restaurant and hotel sector; Silage preservatives; Biological substances for preserving foodstuffs; Milk ferments for the preservation of silages.

Class 31: Animal foodstuffs.

3. By virtue of its priority date of 1 March 2018, this mark constitutes an earlier mark in accordance with section 6 of the Act. The earlier mark was registered on 31 October 2018. As it had not been registered for a period of over five years at the date on which

¹ On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent’s EUTM number 17912371 being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and retains its original priority date.

the application was filed, it is not yet subject to proof of use provisions in accordance with section 6A of the Act.

4. The opponent argues that the respective goods are identical or highly similar and that the marks are similar. As such, the opponent argues there will be a likelihood of confusion including a likelihood of association between the marks.

5. The applicant filed a counterstatement denying the claims made.

6. Only the opponent filed evidence in these proceedings, but the applicant filed submissions during the evidence rounds, in response to which the opponent filed further evidence in reply. The evidence and submissions will not be extensively summarised but will be referred to where appropriate.

7. A Hearing took place on 23 February 2023. The opponent is represented in these proceedings by Boulton Wade Tennant LLP and was represented at the hearing by Georgina Messenger of Three New Square Chambers. The applicant was represented at the hearing by Paul Kelly of its representative FRKelly.

8. Although the UK has left the EU, 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 Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to the case law of the EU courts.

Evidence

9. The opponent filed evidence in the form of a witness statement in the name of Naomi Clare Jenkins, a chartered trade mark attorney at the opponent's representative firm. The statement is dated 14 July 2022 and attached three exhibits, namely Exhibit NCJ01 – Exhibit NCJ03. Exhibit NCJ01 comprises an extract showing the earlier mark on the UK register, Exhibit NCJ02 comprises a print out from the opponent's webpage and Exhibit NCJ03 comprises a print out from the applicant's webpage.

10. The applicant's written submissions provided comment on how the marks differ, the average consumer and their level of attention, how the goods are purchased, and the likelihood (or lack thereof) of confusion between the marks.

11. The opponent filed evidence in reply to these submissions in the form of a witness statement dated 21 November 2022 in the name of Laura Kusserow, a trade mark assistant at the opponent's representative firm. The statement introduces a single exhibit namely Exhibit L XK01, comprising a decision issued by the EU Intellectual Property Office to reject an EU application for the contested mark due to the similarity between the marks and identity between the goods in class 1, and the likelihood of confusion on the relevant part of the public. I note here that I am not bound nor am I persuaded by decisions issued by the EU Intellectual Property Office, and I will reach my own determination on this matter based on the facts of the case and the evidence before me.

Section 5(2)(b)

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

“5(2) A trade mark shall not be registered if because-

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

Section 5A

13. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

14. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia*

Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

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

(k) if the association between the marks creates a risk that the public might 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

15. At the hearing, Ms Messenger submitted for the opponent that the goods are identical. She also submitted that whilst the applicant offered a denial that the goods were identical or highly similar within its TM8, it appeared that this had since been abandoned, on the basis that it is not addressed within the skeleton arguments filed.

16. From his initial submissions at the hearing it was not entirely clear whether Mr Kelly for the applicant was conceding that the goods were identical. When questioned on this, Mr Kelly stated that he was happy for the Tribunal to determine the similarity of the goods. When asked to confirm if he was therefore *not* accepting that the goods are identical, he submitted that he was “remaining silent on the issue of similarity of goods”.

17. Although Mr Kelly chose not to offer a firm position on the possible identity of the goods at the hearing, I note the denial of identity or high similarity within the applicant’s counterstatement, and as such I do not find identity between the goods has been conceded as such. I therefore find it appropriate to consider the identity/similarity between the goods as filed.

18. Where terms are expressed identically, and where they are expressed slightly differently but describe an identical product or service, they will clearly be considered identical. Further, in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that:

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

19. The applicant's goods in class 1 include *food preservatives; preservatives for foodstuffs*. It is my view that these terms will include *biological* food preservatives, and that these will therefore include the opponent's goods in class 1 namely *biological substances for preserving foodstuffs*. It is my view that these goods are therefore identical in accordance with the principles set out in *Merica*. However, if I am wrong I in finding identity I consider that the nature and intended purpose will be shared, the user will likely be shared, and there will likely be competition between the goods. I therefore consider these to be at least similar to a high degree.

20. The applicant's goods in class 1 include *enzymes to assist in digestion for use in the manufacture of animal feeds; enzymes for use in foodstuffs; enzymes for food or drinks*. The opponent's goods in class 1 include [...] *enzymatic preparations for use in the agricultural, food, agrifoodstuff, industries, for use by the health sector and veterinary sector, and by the restaurant and hotel sector*. It is my view that *enzymatic preparations* will include *enzymes* and the opponent's goods will therefore encompass the applicant's goods, and they are therefore identical in accordance with the principles set out in *Merica*. However, if I am wrong, I consider these goods to be highly similar due to the at least highly similar nature, purpose, method of use and the shared users and trade channels.

21. The applicant's goods in class 1 include *additives (chemical -) for use in the preparation of animal foodstuffs*. The opponent's goods in class 1 include *chemicals*

[...] for use in the [...] agrifoodstuff, industries for use by the veterinary sector. It is my view that the opponent's goods will encompass the applicant's goods, and I therefore consider these to be identical in accordance with the principles set out in *Meric*.


Comparison of marks

22. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union 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 dissect the trade marks artificially, 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 shown below:

Earlier trade mark	Contested trade mark
KERSIA	

25. The earlier mark is the single word KERSIA. The overall impression resides in the mark as a whole.

26. The contested mark is made up of the device element that appears to depict a stem of wheat, the following word element and the incorporated device element. It is my view that a significant portion of consumers would read the word element as KERVA, despite the 'v' appearing to be a device of sorts, and in these instances, I find the word KERVA to play the most dominant and distinctive role in the mark. I note there may be a further portion of consumers who read the mark as KER A with the letters separated by a device element. Where this is the case, I still find the verbal elements KER A to play the most dominant and distinctive role in the overall impression of the mark, with the device elements playing a secondary role within the same. Whilst not negligible, it is my view the use of the single block colour red plays a lesser role still in the overall impression of the mark.

Visual comparison

27. The marks coincide visually through the use of the three letters KER featuring at the beginning of each word where I note the consumer tends to pay more attention,² and the letter 'A' featuring at the end of each word. They differ through the use of the wheat device at beginning of the contested mark and the 'V' device in the middle of the contested mark, compared to the two letters SI used in the earlier mark. The earlier mark is a word mark and may also notionally be used in the colour red. As such, the use of red in the contested mark does not add to the visual differences between the marks.

28. Whilst Ms Messenger submitted in the hearing that the use of the 'V' device may be considered to replace two letters rendering the words the same length, she was unable to confirm what two letters this device would be considered to replace. It is my view that this would not be considered as two letters, but rather as previously stated it would most likely be viewed as the stylised letter 'V', or alternatively as a simple device. Either way its visual impact in the mark remains the same, and I note the earlier mark appears to be at least one letter longer than the contested mark.

29. Considering the similarities and the differences, it is my view the marks are visually similar to an above medium degree.

² See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Aural comparison

30. It is my view that the earlier mark will most likely be pronounced as in the three syllables 'KUR-SEA-AH'. However, I note that there may be a further group of consumers who may pronounce this as KER-SHA. Depending on the consumer's interpretation of the 'V' device element, it is my view the contested mark will either be pronounced as 'KUR-VA' or 'KUR AY'. In either case, the similarities lie in the use of the same initial syllable, and I find them to be aurally similar to a medium degree in most instances, and aurally similar to a relatively high degree where the marks are pronounced as KER-SHA and KER-VA.

Conceptual comparison

31. Both parties submitted that neither word element in either mark has a conceptual meaning, and as such the marks are conceptually neutral. I note for completeness that the image of a stem of wheat in the contested mark will create a concept in the mind of the consumer and act as a point of conceptual difference between the marks, however, this concept is clearly very weak in the context of the goods.

Average consumer and the purchasing act

32. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

33. 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.”

34. At the hearing, both parties agreed that the goods would be purchased by professional consumers. However, Ms Messenger for the opponent submitted that this does not mean there would be a high degree of attention paid to the goods, which may be used by professionals across a large range of industries, from the local butcher and baker to mass market producers. Ms Messenger also submitted that preservatives and indeed other food additives are regulated in law both in the EU and UK, and that there are EU regulations that still apply in the UK after Brexit. She submitted that the result of these legal regulations is that any risk to health has already been taken out of the equation to a significant extent. She also submitted this means there will be a core of well-established products and that the price will be a more important consideration to the consumers when considering these than the brand. Ms Messenger submitted that the degree of attention paid will be no more than average for at least a substantial portion of consumers.

35. On the contrary, Mr Kelly submitted that as these consumers are professionals they will pay a higher degree of attention to the goods, and that they “would pay an above average attention to all of the details relating to the product of choice to ensure that they get the correct product.” Mr Kelly submitted there would be the possibility of harm in the event the consumer did not get the correct product. Within his skeleton arguments Mr Kelly had provided more detail on the type of harm that might be caused to the consumer and referred to increased attention this has received from the medical community and the tens of thousands of corresponding studies that have been published in the last five years alone.

36. It is clear that various arguments made by both parties attempt to rely on facts that have not been supported in the evidence, and I will not take these unsupported facts into account within my assessment. However, I note in any case that whilst it seems likely food preservatives are subject to regulation, this does not necessarily mean the professional consumer will pay a lower level of attention to the same. The same could be said for pharmaceutical goods, and it is well established that professionals will pay

a high degree of attention in those instances. Even where particular goods are regulated, it is my view that the professional consumer is likely to pay at least an above medium degree of attention to these goods to ensure that the correct products are used. The use of an incorrect product in error (even if that incorrect product is subject to regulations) may not only have an adverse effect on their business due to the possible harm it may cause to consumers or animals if consumables are not properly preserved, but also to profits, for example, in the case of spoiled foodstuffs or sick animals. However, I do not accept that there would be a reason for the consumer in this instance to ignore the trade mark and instead focus on the price, as I see no reason that the trade mark would not continue to be used as an indication of origin in these circumstances. Overall, I accept the parties' submissions that the consumers would be professionals, and I find these consumers would pay at least an above medium degree of attention to the goods.

37. It is my view that the goods will primarily be purchased following a visual inspection, either from online or physical wholesalers or via brochures or catalogues. However, I accept the possibility for aural assistance to be sought from wholesale staff or for orders to be placed over the phone, and so I cannot completely discount the aural comparison.

Distinctive character of the earlier trade mark

38. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the Court of Justice of the European Union 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 *WindsurfingChiemsee v Huber and Attenberger* [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).”

39. The earlier mark is the word KERSIA. This does not appear to be descriptive or allusive in the context of the goods. Further, it appears to be a made-up word with no meaning within the English language. I therefore consider it to hold relatively high degree of inherent distinctive character.

40. At the hearing, Ms Messenger for the opponent submitted that the distinctiveness of the earlier mark had also been enhanced through use. When considering if a mark has been enhanced through the use made of the same, it is the perception of the UK consumer at the relevant date, namely the application date of the earlier mark, that is key.

41. On the point of enhanced distinctive character, Ms Messenger referred me to Exhibit NCJ02. This comprises a print out from the opponent’s (.com) webpage dated after the relevant date. She referred me to the statements made on this page that refer to the opponent as a global leader and note its presence in 120 countries. When asked if there was any evidence in relation to the UK consumer, Ms Messenger confirmed “[i]t is not broken down any more than the fact it is a global presence. There is no specific UK evidence.” It is clear that the evidence falls considerably short of showing that the distinctive character of the earlier mark had been enhanced above its inherent level in respect of the UK consumer at the relevant date.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

42. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 14 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion. I must remember that the distinctiveness of the common elements is key.³ I must keep in mind that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the goods are obtained will have a bearing on how likely the consumer is to be confused.

43. There are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.⁴

44. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this

³ See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

⁴ *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

45. In this instance, I found the marks to be visually similar to an above medium degree, and to be aurally similar to a medium degree, or aurally similar to a relatively high degree depending on how the marks are pronounced. I found the word elements to be conceptually neutral, and to the extent that the stem of wheat acts as a point of conceptual difference, this will be weak in the context of the goods. I found that the earlier mark holds a relatively high degree of inherent distinctiveness in the word KERSIA, and I found the goods to be identical, or at least similar to a high degree. I found that the consumers will comprise of professionals paying at least an above medium degree of attention to the goods, which will be primarily purchased visually, although I could not completely discount the aural aspects of the purchasing process. I remind myself the similarities lie at the beginning of the marks which tend to have more visual and aural impact, but I note that this is not always decisive.⁵ Having carefully considering all of the factors in this case and whilst keeping in mind the consumers imperfect recollection and the interdependency principle, and the points in the opponent's favour, it is my view that for the relevant consumer who will be paying an at least an above average degree of attention to the goods, the differences between the marks in this instance are such that they will be noticed and recalled, particularly the use of the 'V' device in the place of the two letters SI in the earlier mark. I find this to be the case whether or not it is interpreted as the letter 'V'. I therefore do not consider that in the circumstances the consumer will mistake one mark for the other, and as such, there will be no direct confusion between the same.

46. I therefore consider the likelihood of indirect confusion between the marks. In *L.A. Sugar Mr Iain Purvis Q.C.* (as he then was), as the Appointed Person set out three examples of when indirect confusion may occur as below:

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

⁵ See *CureVac GmbH v OHIM, T-80/08*

(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).”

47. I note that the examples above were intended to be illustrative and are not exhaustive. However, I also note *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, in which Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

48. At the hearing, Ms Messenger for the opponent argued that being that it is at the beginning of the marks, it would be entirely logical to keep the element KER as the ‘brand identifier’ from the marks, and that a change in endings would be a logical way of extending the brand. Expanding on this point, Ms Messenger submitted:

“I say it is logical because the way that the earlier is pronounced in full “ker-see-ya”, so the KER element is effectively a stand-alone element that comes at the beginning, and we say because it comes at the beginning where consumers would place the most emphasis, it would be the logical part of the mark to keep if you were going to change it to create a brand extension or sub-brand. You

would keep that first part as the distinguishing proportion and then you would change the end bits whereas if you were splitting up a syllable that was a single syllable, it might not be as logical, but in this case the logical part to effectively hive off if you were going to extend the brand would be those first three letters.

49. I am not convinced by this line of argument. I do not consider that taking the first syllable of a word and changing the remainder of the word would lead the consumer to believe that the contested mark is a sub brand or brand extension, even considering the identical goods and all of the additional factors in this case. Whilst it is possible that this commonality between the marks will be noticed by some consumers, it is my view this would simply be put down to coincidence and not to an economic link between the marks. At best, I consider that this would result in one mark calling the other to mind, which as is set out in *Duebros* is mere association and not indirect confusion. I do not consider there is a proper basis on which to find a likelihood of indirect confusion in this instance.

50. As I have found no likelihood of confusion between the marks, the opposition based on section 5(2)(b) of the Act fails.

Final Remarks

51. The opposition has failed in its entirety, and subject to a successful appeal, the application will proceed to registration.

COSTS

52. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £1400 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the TM7 and statement of grounds	
and preparing and filing the counterstatement:	£200
Considering the other side's evidence and preparing	
and filing written submissions during the evidence rounds:	£500

Preparing for and attending a hearing: £700

Total: £1400

53. I therefore order HYPRED to pay Inform Nutrition Ireland Ltd. the sum of £1400. 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 14th day of April 2023

Rosie Le Breton

For the Registrar