O/0502/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004015680
BY IMUNO PURE LTD
TO REGISTER:

AS A TRADE MARK IN CLASSES 5 AND 30

AND

IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 447723
BY EBEAUTY LTD

BACKGROUND AND PLEADINGS

1. On 19 February 2024, Imuno Pure Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision, in the UK. The application was accepted and published in the Trade Marks Journal on 01 March 2024 in respect of the following goods:

> **Class 5:** *Nutritional supplements; Herbal supplements; Health food supplements made principally of minerals.*
>
> **Class 30:** *Herbal tea; Herbal teas.*

2. On 28 May 2024, the application was opposed by eBeauty Ltd ("the opponent") based upon Sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act").

3. Under both the Section 5(2)(b) and the Section 5(3) ground, the opponent relies on (and claims reputation for) its two earlier registrations as shown below:

UK00003027591 ("the first earlier mark") INNOPURE Filing date: 23 October 2013 Registration date: 24 January 2014 **Class 5:** *Food supplements for dietetic use.*
UK00003724560 ("the second earlier mark") INNOPURE Filing date: 23 November 2021 Registration date: 25 February 2022

Class 30: *Teas; Tea mixtures; Herbal tea; Tea extracts; Tea bags; Fruit teas; Herbal teas; Tea pods; Tea for infusions; Coffee bags; Coffee oils; Mixtures of coffee.*

4. By virtue of their earlier filing dates, the trade marks relied upon by the opponent are “earlier marks” in accordance with Section 6 of the Act. Only the first earlier mark had been registered for more than five years at the filing date of the contested mark, and, as such, it is subject to the use conditions under Section 6A of the Act.

5. Under Section 5(2)(b), the opponent claims there is a likelihood of confusion because the goods are similar, and the marks are similar.

6. Under Section 5(3), the opponent claims that its earlier marks enjoy a reputation in relation to all of the goods identified above. In particular, the opponent states that the brand ‘INNOPURE’ was established in 2011 and that since then the opponent has invested substantial sums of time and money into establishing ‘INNOPURE’ as a trustworthy recognisable brand which markets its products on-line via its own website and on-line marketplace. Further, the opponent states that use of the applicant’s mark will take unfair advantage of, or be detrimental to, the distinctive character or the repute of the opponent’s earlier marks.

7. The applicant filed a defence and counterstatement, denying the opponent’s claims and putting the opponent to proof of use. In particular, the applicant states that it applied for the mark in good faith and that allowing its mark to be registered would serve a public interest because it would prevent confusion and ensure that consumers can rely on the distinct identity of their brand. Lastly, the applicant states that the applicant has developed its own goodwill and that the opposition would harm both the brand and their customers.

8. Both parties are unrepresented.

9. Both parties filed evidence. Neither party requested a hearing, nor did they file submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

Relevance of EU Law

10. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

11. The opponent's evidence came in the form of five witness statements from the following individuals: Jane Hodgson (with exhibits JH1 to JH83), James Caseley, Sarah Wynne, Dr David Field and Adrian Young (with exhibits AY1 to AY6). The main evidence about use of the earlier mark comes from Ms Hodgson who is the Managing Director, Owner and Person of significant interest for the opponent. In addition, Mr Young, who is a director of the opponent, provides legal submissions rather than evidence of fact, though they are in the form of a witness statement. Mr Caseley, who is the Chief Commercial Officer of Parkacre Limited, only confirms that his company is one of the UK's leading manufacturers and suppliers of vitamins, minerals and supplements, and has been supplying the opponent with its range of 'Innopure' products since 2013. Likewise, Ms Wynne who is a UK accountant, merely confirms that she has been managing the opponent's accounts since 2008 and that 'INNOPURE' has been the opponent's principal source of income since 2012 when it was introduced. Finally, Dr Field states that the opponent has provided him with its vitamin products for the purpose of carrying out academic research.

12. The applicant's evidence came in the form of a witness statement from Dena Omar (with exhibits A, B and C). Mr Omar is the founder of the applicant's company. In his witness statement he provides legal submissions and states that he applied for the contested mark in good faith. In addition to that, he also provides examples of packaging, a screenshot from Amazon showing the opponent's product for sale and a customer testimonial, all of which, he states, are meant to show the market segment targeted by the applicant and the absence of confusion.

13. I do not intend to summarise the evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

Preliminary matters

14. Whilst the applicant has filed some evidence, it is wholly irrelevant. This is because first, the assessment I am required to make, including the comparison of the marks and the goods, is a notional one based on the marks and goods as they are registered and applied-for. Consequently, the segment of the market in which the parties have so far chosen to trade, is not something that I can take into account. Second, the likelihood of confusion must be assessed from the point of view of the UK average consumer and the applicant's state of mind when the application was filed (i.e. good faith) is not something that the consumer will be aware of, or that might influence the consumer's perception of the marks and the likelihood of confusion. There is no bad faith ground pleaded by the opponent. Accordingly, I will say no more about this evidence.

15. Lastly, as regards the applicant's claim that it has developed its own goodwill, as far as I am aware, the earlier mark is not subject to any challenge and as such (the applicant not having applied to invalidate it), the existence of a prior right is irrelevant to the issue I have to decide.[1]

Proof of use

Relevant statutory provision: Section 6A:

> "(1) This section applies where
>
> (a) an application for registration of a trade mark has been published,

[1] The issue of earlier use has no bearing upon the instant proceedings. Tribunal Practice Notice 4/2009 "Trade mark opposition and invalidation proceedings – defences", under the heading "The position with regard to defences based on use of the trade mark under attack which precedes the date of use or registration of the attacker's mark", outlines the approach.

(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 section 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)-(5A) [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."

16. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *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 Bundervsvereinigung 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], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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]."

17. Section 100 of the Act is also relevant. It states:

"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."

18. In *Awareness Ltd v Plymouth City Council, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:*

"28. […] Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered […]."

9. The genuine use provision is not there to assess economic success or large-scale commercial use.[2] Further, an assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[3]

20. Accordingly, the opponent can rely on its first earlier trade mark only to the extent that the evidence filed establishes that it had been put to genuine use in the relevant territory in respect of the goods for which it is registered and which are relied upon within the five years leading up to the date on which the contested trade mark application was filed. The relevant period in which the opponent must establish use of the first earlier mark is **20 February 2019** to **19 February 2024.**

The evidence of use

21. Ms Hodgson's evidence is quite concise; nevertheless, it nicely establishes all the relevant facts that are material to an assessment of genuine use. This includes:

a) the fact that the opponent's products have been produced by a UK manufacturer since the 'INNOPURE' brand was launched in 2011 and products began being sold on Amazon UK in 2012.

b) the types of products sold under the brand 'INNOPURE', which include a variety of vitamins, minerals, food and health supplements.[4]

c) the trade channels through which the opponent's 'INNOPURE' products are sold, which include Amazon UK, eBay UK, and the opponent's website at www.innopure.com, all with price in pound sterling.[5]

d) turnover figures amounting to over £10 million between 2014 and 2024.

[2] MFE Marienfelde GmbH v OHIM, Case T-334/01.
[3] New Yorker SHK Jeans GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-415/09, paragraph 53.
[4] JH1-JH25
[5] JH1-7

e) marketing figures amounting to £643K between 2014 and 2024.

22. The only point which I think is arguable is whether all of the sales relate to the UK. I say this because Ms Hodgson does not specifically state that all of the sales are UK sales but simply says that the opponent has generated that amount, and provides the following table:

Table 1 - SALES AND FINANCIALS
(The dates provided are the earliest dates that records still exist).

Year	Amazon		Innopure Website		EBAY		Total	
	QTY	Value	QTY	Value	QTY	Value	QTY	Value
2014-15	125,889	£1,833,312.54	n/a	n/a	n/a	n/a	125,889	£1,833,312.54
2015-16	88,558	£1,207,818.38	n/a	n/a	n/a	n/a	88,558	£1,207,818.38
2016-27	104,395	£1,271,784.88	1,068	£13,107.57	n/a	£37,911.44	105,463	£1,322,803.89
2017-18	123,358	£1,406,436.09	1,275	£12,425.10	n/a	£29,254.95	124,633	£1,448,116.14
2018-19	97,070	£1,005,789.60	784	£7,387.44	n/a	£19,572.19	97,854	£1,032,749.23
2019-20	87,092	£930,104.24	764	£7,278.69	n/a	£12,926.80	87,856	£950,309.73
2020-21	60,598	£660,074.96	619	£5,935.08	416	£3,736.37	61,633	£669,746.41
2021-22	38,492	£388,195.80	536	£5,494.41	517	£6,247.39	39,545	£399,937.60
2022-23	62,437	£619,073.04	1,223	£14,105.50	480	£5,190.59	64,140	£638,369.13
2023-24	75,557	£863,265.61	2,369	£36,952.57	369	£5,719.13	78,295	£905,937.31
Total	863,446	£10,185,855.14	8,638	£102,686.36	1,782	£120,558.86	873,866	£10,409,100.36

23. Nevertheless, I think it is reasonable to conclude that the figures provided in the table are UK sales. I say this first, because the sale figures are provided in pound sterling, but also because the opponent is a UK company and two out of three of the opponent's sale platforms clearly target the UK consumers (Amazon UK and eBay UK). In this connection, it is also important to note that Ms Hodgson states that the opponent's primary source of sales and turnover is derived from the Amazon UK sales platform and that the majority of those sales relate to the opponent's 'INNOPURE' brand.

24. Also, although the opponent's website has a .com address, the webpages exhibited in evidence show prices in pound sterling (rather than euros or USD) and there is no evidence of the opponent selling goods outside the UK. On the contrary, Ms Hodgson states that *"the opponent in addition to its presence in the UK is preparing to expand into Amazon EU before the end of March 2025 and has appointed a specialist firm of Amazon accelerators to assist with this process"* – this statement further corroborates the picture painted from the evidence that the only market the opponent has been selling its goods on is the UK market. Accordingly, bearing in mind that the relevant period runs from **20 February 2019** to **19 February 2024** most of the totals from the period 2019-2020 must fall within the relevant period, in addition to those between 2020/2021 and 2022/2023 which plainly fall within it. However, I will exclude the figures from 2023 to 2024 because I do not know whether they include turnover generated from 20 February 2024 onwards (which would fall outside the relevant period). Based on the table provided above, the approximate turnover for the relevant period amounts to over £2.6million. Likewise, most of the marketing figures relate to Amazon (which can only be Amazon UK) and amounts to £262,000 within the relevant period.

25. Bearing in mind all of the above, including the details about turnover and marketing which fall within the relevant period and the continuity of the use (all of which are unchallenged and are supported by evidence, especially that from Amazon UK), I conclude that the opponent has satisfactorily demonstrated genuine use of the earlier mark within the relevant period in the UK for or a variety of food supplements..

26. In terms of framing a fair specification, although the turnover is not broken down by product there are plenty of examples of food supplements being offered under the earlier mark.[6] A food supplement is defined as a preparation intended to supply a nutrient that is missing from a diet. It can include vitamins, minerals, amino acids, and other substances that are concentrated sources with nutritional or physiological effects. The evidence shows plenty of examples, including vitamins (i.e. Vitamin B complex), minerals (i.e. magnesium, zinc) and food supplements deriving from food or natural substances (i.e. garlic capsules, sage leaf extract, oregano leaf extract,

[6] Merck KGaA v Merck Sharp & Dohme Corp & Ors [2017] EWCA Civ 1834

turmeric with black pepper and ginger, milk thistle, psyllium husk fibers, apple cider vinegar, acai berry extract, caffeine tablets, aloe vera, raspberry ketones, green coffee beans diet pills, biotin and coconut etc.). Accordingly, I consider that given the variety of products offered by the opponent it can rely on the full specification as it is registered, namely:

Class 5: *Food supplements for dietetic use.*

DECISION

Section 5(2)(b)

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

"5(2) A trade mark shall not be registered if because –

(a) …
(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

28. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 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

29. In *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T- 133/05, the General Court ("GC") 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."

30. The contested goods are as follows:

The applicant's goods	**The opponent's goods**
Class 5: *Nutritional supplements; Herbal supplements; Health food supplements made principally of minerals.*	**Class 5:** *Food supplements for dietetic use.*
Class 30: *Herbal tea; Herbal teas.*	**Class 30:** *Teas; Tea mixtures; Herbal tea; Tea extracts; Tea bags; Fruit teas; Herbal teas; Tea pods; Tea for infusions; Coffee bags; Coffee oils; Mixtures of coffee.*

31. The opponent's goods in class 5, namely *Food supplements for dietetic use*, are sufficiently broad, to encompass the applicant's goods in class 5. These goods are identical (*Meric)*.

32. Likewise, the applicant's *Herbal tea; Herbal teas* are self evidentially identical to the opponent's *Herbal tea.* These goods are identical.

Average consumer

33. 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.

34. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

35. The average consumer of the parties' goods in classes 5 and 30 is a member of the general public who are seeking to manage their health and well-being or buy tea products. I have nothing to suggest that the goods are available via specialist medical retailers, on the contrary the evidence about the goods being offered for sale on Amazon UK and eBay UK supports the conclusion that the goods are likely to be sold through a range of ordinary retailers, either in physical stores or online. In physical environments, the goods will be displayed on shelves or racks, where they will be viewed and self-selected by the consumer. A similar process will take place for online purchases where the consumer will select the goods having viewed an image on a webpage. The selection of these goods is, therefore, primarily visual, although I do not discount that aural considerations may play a part by way of word-of-mouth recommendations and advice from sales assistants.

36. The goods at issue are not expensive items and, as far I understand it, they will be selected on a relatively infrequent basis. In respect of the level of attention paid, the goods are not overly specialist but have health benefits and would be selected after having given due consideration to their effects and a range of ordinary factors resulting in the average consumer paying a medium degree of attention.

Comparison of marks

37. 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 CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

The applied-for mark	The opponent's earlier marks
	INNOPURE

39. The applicant's mark consists of the word 'IMUNOPURE' written in capital letters in a slightly stylised font; above this verbal element there is a figurative element which looks like a flower with a little heart in the middle. Although the figurative element plays a role in the overall impression, the principle that words speak louder than devices applies in this case because the word 'IMUNOPURE' is not descriptive and the figurative element will be perceived as ornamental.

40. The earlier marks consist of the word 'INNOPURE' presented in capital letters with no other elements to contribute to the overall impression.

Visual similarity

41. Visually, the verbal elements 'IMUNOPURE' in the application and 'INNOPURE' in the earlier marks coincide in the first letter 'I' and the six-letter sequence 'NOPURE'. The only difference between the marks is in the presence of the letters 'MU' in the application which is replaced by the letter 'N' in the earlier marks. Whilst the marks are of different length, namely 9 and 8 letters respectively, as they are long marks, this difference is not really noticeable. Likewise, the fact that the differentiating letters are placed in the middle of other letters and that the second letters 'M' and 'N' look quite similar, means that these differences are less apparent. Overall, I consider that the verbal elements of the marks are similar to a very high degree. The figurative element adds a visual difference, but it is only ornamental and whilst the applicant states that they created their own font, it seems pretty standard with a minimal degree of stylisation. In this regard, I bear in mind that the earlier marks are word-only marks which could be used in any font. Overall, I consider the marks to be similar to a high degree.

Aural similarity

42. Aurally, the verbal elements 'IMUNOPURE' in the application and 'INNOPURE' in the earlier marks will be pronounced in a similar manner, i.e. as IMM-YOU-NO-PURE vs INN-OHH-PURE. The initial 'I', and the long sequence 'NOPURE' at the end of the marks will be identically pronounced, whilst the short sequence 'MU' and 'NO' in the

middle of the marks are not too dissimilar. Overall, I consider the marks to be similar to a slightly less than high degree.

Conceptual similarity

43. Conceptually, whilst both marks are presented as one word, they will be split into two elements, namely 'IMUNO – PURE' and 'INNO – PURE'. Insofar as the concept created by the word 'PURE' is present in both marks, that of being 'clean and free from harmful substances' or 'not mixed with anything else' (which will be well-known to the average consumer), the marks are conceptually similar. However, the sequences 'IMUNO' and 'INNO' are not English words and will not be given any meaning. Nevertheless, in the context of the food supplement goods at issue, and maybe even for some herbal teas, I think the element 'IMUNO' is likely to be understood as a reference to immunity, i.e. like supplements that will help give the user's immune system a boost. Finally, although the figurative element depicted in the applied-for mark convey the idea of a flower, it will be perceived as ornamental and also as allusive of the fact that the products are of plant origin. Overall, I find the marks to be similar to a medium degree.

Distinctive character of the earlier marks

44. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV,* Case C-342/97, the CJEU stated that:

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

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

46. The word 'INNOPURE' in the earlier mark is not an English word and although the element 'PURE' has some meaning in relation to the goods at issue and will be perceived as meaning, for example, goods which do not contain any harmful substance, the mark as whole is 'INNOPURE' which will be perceived as invented. However, bearing in mind the meaning of 'PURE' but also the fact that it is subsumed within the word 'INNOPURE', I consider the mark to be distinctive to a medium to high degree.

47. Although the evidence filed by the opponent is sufficient to establish genuine use, the lack of details about the market share held by the trade mark and the limited evidence about advertising and promotion, combined with the not particular high level of turnover (which is about £10million over a 10 year period) means that the evidence fails to establish that the distinctiveness of the mark has been increased to any material extent.

Likelihood of confusion

48. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind, including that a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and vice versa. I must keep in mind the distinctive character of the earlier marks, the average consumer for the goods and the nature of the purchasing process. I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

49. Confusion can be direct or indirect. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.C., 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 recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark'.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite

distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)."

50. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ approved Mr Purvis's formulation but added:

> "13. As James Mellor QC sitting as the Appointed Person pointed out in Cheeky Italian Ltd v Sutaria (O/219/16) at [16] 'a finding of a 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 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."

51. It is not sufficient that a mark merely calls to mind another mark: *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17. This is mere association not indirect confusion.

52. Earlier in this decision I found that:

- The goods are identical.

- The average consumer is a member of the general public who will select the goods visually, with a medium degree of attention, although aural considerations cannot be discounted completely.

- The marks are visually similar to a high degree, aurally similar to a slightly less than high degree, and conceptually similar to a medium degree.

- The earlier mark is distinctive to a medium to high degree. The evidence filed fails to establish that the distinctiveness of the mark has been materially enhanced.

53. In my view, the similarity between the shared elements 'IMUNOPURE' in the application and 'INNOPURE' in the earlier mark is sufficiently strong to warrant a finding of direct confusion when identical goods are involved. I say this because (1) the presence of the figurative element in the application which will be perceived as ornamental means that this element is likely to be easily overlooked and (2) the words 'INNOPURE' and 'IMUNOPURE' are visually and aurally similar to a degree which would easily enable them to become confused with one another in the perception and recollection of the average consumer of the goods. In this connection, whilst I bear in mind that the 'IMUNO' in the application will convey the concept of immunity which has not counterpart in the earlier mark, conceptual differences do not always overcome visual or aural similarities. This principle was reiterated in *Nokia Oyj v OHIM,* Case T 460/07, where the General Court stated that:

> "Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P Éditions Albert René [2008] ECR I-0000, paragraph 98)."

54. Hence, in those circumstances, it would be easily foreseeable for the consumer to directly confuse the marks. If I am wrong and the consumer will not overlook the figurative element, imperfect recollection is still likely to result in the average consumer

misremembering or mis-recalling the elements 'INNOPURE/IMUNOPURE' and perceiving the differences between the marks as indicating a brand variant rather than having independent trade mark significance, giving rise to indirect confusion.

55. There is a likelihood of confusion.

Section 5(3)

56. Section 5(3) states:

> "(3) A trade mark which-
>
> is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark".

57. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors,* Case C-252/07, *Intel,* Case C-408/01, *Adidas-Salomon,* Case C-487/07, *L'Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora* and Case C-383/12P, *Environmental Manufacturing LLP v OHIM.* The law appears to be as follows:

> (a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.
>
> (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; G*eneral Motors*, paragraph 26.
>
> (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68*;* whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) the more immediately and strongly the earlier mark is brought to mind by the later mark, the greater the likelihood that use of the latter will take unfair advantage of, or will be detrimental to, the distinctive character or the repute of the earlier mark; *L'Oreal v Bellure NV*, paragraph 44.

(g) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel,* paragraphs 76 and 77 and *Environmental Manufacturing*, paragraph 34.

(h) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(i) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a

characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV,* paragraph 40. The stronger the reputation of the earlier mark, the easier it will be to prove that detriment has been caused to it; *L'Oreal v Bellure NV*, paragraph 44.

(j) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure).*

58. In *General Motors,* Case C-375/97, the CJEU held that:

"25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence

> of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

59. In *Spirit Energy Limited* v *Spirit Solar Limited* - BL O/034/20 – Mr Phillip Johnson, as the Appointed Person, held that the opponent had not established a qualifying reputation for Section 5(3) purposes. The opponent traded in solar energy equipment and installations and had used its mark in relation to such goods/services for 7 years prior to the relevant date in the proceedings. During the 5 years prior to the relevant date, it had installed solar energy generation equipment in over 1000 domestic homes and made over 700 installations for commercial customers. These sales had generated nearly £13m in income. However, there was limited evidence of advertising and promotion, and the amount spent promoting the mark had fallen in the years leading up to the relevant date. Additionally, the mark had only been used in South East England and the Midlands. Taking all the relevant factors into account, the Appointed Person therefore decided that such use of the mark was not sufficient to establish a reputation for the purposes of Section 5(3).

60. In *GNAT and Company Ltd & Anor v West Lake East Ltd & Anor* [2022] EWHC 319, HHJ Hacon held that the claimants had not established a qualifying reputation for the purposes of Section 10(3). The claimants had operated a restaurant at the Dorchester Hotel in Park Lane for around four years prior to the relevant date. Turnover was between £5m and £6m each year, which equated to approximately 70,000 customers served per year; advertising spend had varied significantly, from around £5,000 at its lowest to over £47,000. The claimants had provided dining vouchers worth about £17,000 to charities and there had been some press coverage and awards but only 7 such articles appear to have been in evidence. The judge stated that, although it was likely that a spread of individuals across the UK would have read the articles or been made aware of the awards, the claimants' market share was tiny relative to the UK restaurant business as a whole. The advertising sums were also very small in that context and the business was in relation to a single restaurant. The judge concluded that the evidence satisfied the 'geographic' aspect of the test but not the 'economic' one, and that the use was not sufficient to establish that the claimants' mark had a reputation.

61. I have already commented on the evidence above. Whilst enhanced distinctiveness and reputation are not the same things, the same factors are born in mind when assessing them. In the present case, although there is some evidence of the opponent trading under the earlier mark in the UK in relation to the goods concerned, the absence of market share and the little evidence about promotion and advertising means that the evidence fails to establish the fundamental factors for assessing the existence of a reputation in the UK at the relevant date of 19 February 2024.

62. As the opponent's evidence does not establish the necessary reputation, the claim under Section 5(3) fails at the first hurdle.

OUTCOME

63. The opposition has been successful under Section 5(2)(b) and the contested mark will be refused registration.

COSTS

64. The opponent has been successful and is, therefore, entitled to a contribution towards its costs. The opponent was given the opportunity to submit the standard costs pro forma but since it failed to do so, I decline to make a costs award in respect of the opposition.

Dated this 12th day of June 2026

TERESA PINTO
For the Registrar