

O/0714/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3950002

BY MY PET SENSITIVITY LTD

TO REGISTER THE TRADE MARK:



my pet
sensitivity

IN CLASSES 42 AND 44

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 444711 BY

CVS (UK) LIMITED

BACKGROUND AND PLEADINGS

1. On 25 August 2023, My Pet Sensitivity Ltd (“the applicant”) applied to register the trade mark shown on the cover page to this decision in the United Kingdom. Registration is sought for the following services:

Laboratory testing; Laboratory testing services; Genetic testing of laboratory animals for research purposes; Biotechnology testing; Microbiological testing; DNA testing services to determine paternity (laboratory services); Laboratory services for analytical testing (class 42)

Genetic testing of animals; Medical testing; Genetic testing of animals for diagnostic or treatment purposes; Services for the care of pet animals; Advisory services relating to the care of pet animals; Medical testing for diagnostic or treatment purposes; Medical testing services relating to the diagnosis and treatment of disease; Medical services; Genetic testing for medical purposes; Laboratory analysis services relating to the treatment of animals; Medical and health services relating to DNA, genetics and genetic testing (class 44)

2. The trade mark application was published for opposition purposes on 15 September 2023. On 15 December 2023, the application was opposed, in its entirety, by CVS (UK) Limited (“the opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). For the purpose of the opposition, the opponent relies upon the following trade marks and the goods and services laid out below:

United Kingdom Trade Mark (“UKTM”) 911553261¹:



¹ The opponent’s marks are comparable marks based on an earlier EUTM. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs.

Filing date: 7 February 2013

Registration date: 24 June 2013

Pharmaceutical and veterinary products and preparations for animals; animal washes and lotions and other grooming preparations; flea control products; flea collars; flea sprays; flea powders; preparation for destroying vermin; fungicides; insecticides; parasiticides; animal feed additives and supplements; nutritional supplements for animals (non-medicated); additives for animal foodstuffs not for medical purposes (class 5)

Veterinary services; pet and animal care services; grooming salon services for pets and animals; advisory and consultancy services relating to all the aforesaid and animal care and welfare; adoption agency services relating to pets (class 44)

UKTM 917186883:

MIPET ALLERGY

Filing date: 7 September 2017

Registration date: 8 January 2018

Pharmaceutical preparations for the prevention and treatment of allergies in animals; Veterinary preparations for the control and treatment of allergies in animals; Veterinary preparations and substances; Veterinary vaccines; Antibiotics for veterinary use; Immunotherapy preparations for animals; Medicines for veterinary purposes; Anti-infective products and preparations for veterinary use (class 5)

Veterinary Laboratory Services; Laboratory analysis; Laboratory testing; laboratory research; Analytic laboratory services; Blood analysis services; Research and development skills in the field of immunology for animals (class 42)

Veterinary Services; Veterinary assistance; Veterinary advisory services; Laboratory analysis services relating to the treatment of animals; Providing information relating to veterinary services and veterinary pharmaceuticals; Services for the care of pet animals; Pathology services in relation to animals (class 44)

UKTM 917180605:



Filing date: 7 September 2017

Registration date: 8 January 2018

Pharmaceutical preparations for the prevention and treatment of allergies in animals; Veterinary preparations for the control and treatment of allergies in animals; Veterinary preparations and substances; Veterinary vaccines; Antibiotics for veterinary use; Immunotherapy preparations for animals; Medicines for veterinary purposes; Anti-infective products and preparations for veterinary use (class 5)

Veterinary Laboratory Services; Laboratory analysis; Laboratory testing; Laboratory research; Analytic laboratory services; Blood analysis services; Research and development skills in the field of immunology for animals (class 42)

Veterinary Services; Veterinary assistance; Veterinary advisory services; Laboratory analysis services relating to the treatment of animals; Providing information relating to veterinary services and pharmaceuticals; Services for the care of pet animals; Advisory services relating to the care of pet animals; Pathology services in relation to animals (class 44)

3. The opponent submits that the similarities between the parties' trade marks and the identity or similarity between the parties' respective goods and services gives rise to a likelihood of confusion on the part of the public, which includes a likelihood of association.

4. In its counterstatement, the applicant denies that there exists a likelihood of confusion. Instead, the applicant contends that there is a "clear distinction" between the parties' names and "fundamental differences" in their respective goods and services, such that there is "no reasonable basis" as to a likelihood of confusion.

5. The opponent is represented by Murgitroyd & Company, whilst the applicant is unrepresented. Neither party filed evidence during the course of the proceedings. Neither party requested a hearing and only the opponent elected to file written submissions in lieu. This decision is taken following a careful perusal of the papers.

DECISION

Relevance of EU law

6. 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.

Section 5(2)(b)

7. 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.”

8. Section 5A of the Act reads 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.”

9. By virtue of their respective filing dates, the opponent’s trade marks qualify as earlier marks pursuant to section 6 of the Act. As each of the marks had completed its registration process more than 5 years prior to the application date of the mark at issue, they are, in principle, subject to proof of use pursuant to section 6A of the Act. However, in its counterstatement, the applicant was asked whether it required the opponent to provide “proof of use” in respect of its earlier marks and, in reply, the applicant answered “No”. The opponent is consequently able to rely upon all earlier marks and all goods and services it has identified without providing evidence of use.

Section 5(2)(b) – case law

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

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

11. The competing goods and services are laid out at paragraphs 1 and 2 to this decision.

12. In addition to cases of *literal* identity, the General Court (“GC”) set out a further provision as to when goods can be considered identical (though it equally applies to services) in *Gérard Meric v Office for Harmonisation in the Internal Market*². It stated:

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

13. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

² Case T-133/05

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

14. For the purpose of a comparison it is permissible to group goods or services together, as appropriate.³

15. The applicant seeks registration for *services for the care of pet animals* in class 44. This term is reproduced identically in two of the opponent's earlier specifications and, in the third, I find the applicant's term identical to the opponent's *pet and animal care services*. Furthermore, the applicant has applied for *medical services* at large which is likely to be encompassing of, or at least highly similar to, the opponent's veterinary-based services. I will proceed, at least initially, on the basis that at least some of the parties' terms are identical or highly similar.

The average consumer and the nature of the purchasing act

16. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The*

³ *Separode Trade Mark* BL O-399-10 (AP)

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.”

17. The average consumer of the goods and services at issue is likely to comprise both members of the general public (including pet owners) and professional bodies. To my mind, the goods and services are primarily selected via visual means, some from the shelves of a traditional retail outlet or an online resource, whilst others may be viewed from the pages of a professional document or journal. That being said, given that consumers may rely, to a degree, on the advice of peers or a medical professional, for example, I do not discount the significance of the marks’ aural impression, though it will play a lesser role. The cost associated with the terms at issue is likely to vary fairly widely, with the consumer alive to considerations such as quality, compatibility and the reputational standing of the proprietor when approaching its purchase. In light of the above and, where relevant, being mindful of the care that pet owners typically apply, I find at least a medium degree of attention is likely to be applied to the consumer’s selection, ranging to a fairly high degree.

Comparison of trade marks




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

The Court of Justice of the European Union (“CJEU”) stated, at paragraph 34 of its judgment in *Bimbo SA v OHIM*⁴, 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.”

19. 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.

20. For ease, the parties’ trade marks are displayed in the table below:

Opponent’s trade marks	Applicant’s trade mark
<p><u>UKTM 911553261:</u></p>  <p><u>UKTM 917186883:</u></p> <p>MIPET ALLERGY</p> <p><u>UKTM 917180605:</u></p> 	

⁴ Case C-591/12P

21. The opponent's mark ending '261 is figurative, with its elements presented within a rectangular orange shape which acts as a backdrop. The elements positioned on top are a fine, curved white line and, within it, word element "MiPet". In place of the traditional tittle in the letter 'i' is a small cross. "Mi" is presented in white and "Pet" in black. I find the mark's overall impression will reside predominantly in the words (or word) "MiPet", with the mark's background and white line playing a much lesser role. The variation in colour will likely compel the consumer to identify or separate the word "Pet" within the mark and it is likely to be interpreted as an indicator toward the goods or services' nature or intended use, meaning a greater weight will be placed on "Mi".

22. The opponent's mark ending '883 comprises two words of five and seven letters, respectively. Particularly when considered in respect of the relevant goods and services, ALLERGY is likely to be viewed as a nod toward their nature or function. On that basis, I find that MIPET will play a more dominant role in the mark's overall impression.

23. The opponent's mark ending '605 is figurative, comprising word elements atop a green background which is broadly rectangular, though curved at the end. Within the background are the words (or word) Mi/Pet/Allergy. "Mi" is presented in white, with a cross used in lieu of at tittle, whilst "PetAllergy" is presented in black. Whilst the background detail is not entirely negligible, I find the mark's word elements are likely to play the greater role in terms of an overall impression. For the reasons set out in my previous paragraph, the mark's Allergy element is likely to play a lesser role than the preceding "Mi/Pet" element. As above, providing that the distinction in colour will move to the consumer to identify "Mi" and "Pet" independently, "Pet" will also carry a lesser weight.

24. The applicant's mark is a figurative depiction of three words; my-pet-sensitivity. The words 'my pet' are positioned above 'sensitivity' and presented in a pale blue font, whereas *sensitivity* is presented in navy blue. Appearing within the letter 'p' is a fairly generic silhouette of a dog's profile. Taking account of the nature of the words themselves, particularly that both "my pet" and "sensitivity" will, for the most part, be viewed as at least mildly suggestive of the nature of the products or intended purpose, I find the mark's word elements and its presentation will play a roughly equal role in terms of an overall impression.

The opponent's '261 mark

25. Where the marks coincide visually is in their first, third, fourth and fifth letters (M_PET). Where the sequence differs is the respective second digit; a stylized 'i' in the opponent's mark and a lower-case 'y' in the applicant's mark. The marks also differ in their remaining components, namely an orange background and curved white line in the opponent's mark and the word 'sensitivity' with an image of a dog displayed within it in the applicant's mark. Notwithstanding the respective weight attributed to the figurative elements in the parties' marks, they nonetheless have a bearing on the marks' overall visual impact. Weighing all factors, I find the marks' visual similarity is fairly low.

26. Aurally, the opponent's mark is likely to be articulated in two syllables; either MY-PET or MIH-PET. The applicant's mark will likely be articulated in seven syllables; MY-PET-SEN-SIH-TIV-IH-TEE. The marks' first syllable is identical or highly similar and their second syllables are identical, whilst the remaining five syllables in the applicant's mark have no counterpart in the earlier mark. Whilst I keep in mind that the beginnings of marks generally have more of an impact on the consumer,⁵ on balance, I find the aural similarity is of no more than a medium degree.

27. A conceptual comparison must be approached from the perspective of the average consumer. To my mind, the consumer will dissect the word elements in the opponent's mark into "Mi" and "Pet", particularly in light of the adopted colouring⁶ which creates a further distinction. "Mi" is likely to be viewed as an invented word, either with no meaning or a deliberate misspelling of the word "my", which has a meaning which is easily retrievable. "Pet", in either case, will be awarded its ordinary dictionary meaning. The mark's figurative element makes no conceptual contribution. The applicant's mark comprises three ordinary words which the consumer will readily interpret, together creating a concept concerning the sensitivity of an owner's pet. The parties' marks coincide conceptually in that they refer to a 'pet' and, where the "Mi" element in the opponent's mark is perceived as a misspelling of "my", the marks share a notion of ownership. Where "Mi" is viewed instead as an invented word, it does not offer any

⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

⁶ See also, for example, *Usinor SA v OHIM*, Case T-189/05

conceptual significance. The idea of sensitivity in the application creates a point of conceptual difference. Regardless of how the “Mi” element is perceived, having regard to my findings regarding the marks’ overall impressions, I find the marks are conceptually similar to at least a medium degree.

The opponent’s ‘883 mark

28. Visually, the marks share their first, third, fourth and fifth letters, albeit spread across two distinct words in the applicant’s mark. The marks’ second letter is different and the remaining words in the respective marks share little similarity. Taking these factors into account, and having regard to the figurative details in the applicant’s mark, I find the visual similarity is between a low and medium degree.

29. Aurally, the opponent’s mark is likely to comprise five syllables; MY-PET-AL-UR-JEE or alternatively MIH-PET-AL-UR-JEE. When considered against the applicant’s mark, the marks’ length differs by two syllables. The marks’ first two syllables are identical or highly similar, depending on how the opponent’s first syllable is articulated, and there is a percussive similarity in the marks’ final syllable (TEE/JEE). Weighing this against the marks’ differences, I find the aural similarity is of at least a medium degree.

30. Given that there is no distinguishing colour separating “Mi” and “Pet” in the opponent’s word-only mark, nor are they separated by a space, the average consumer is, to my mind, likely to view “MIPET” as an invented word, absent of any conceptual indication. The mark’s second word “ALLERGY” will be readily understood by the average consumer, meaning a particular reaction or intolerance, for example. To my mind, there is a small degree of conceptual similarity between the marks’ respective “ALLERGY” and “SENSITIVITY” elements; whilst being ‘allergic’ to something and being ‘sensitive’ to something are two distinct matters, both are generally environmentally-led and can provoke a reaction. Keeping in mind my conclusions regarding the marks’ overall impressions and giving due weight to the marks’ respective elements, I find the marks conceptually similar to a fairly low degree.

31. If I am found to be wrong in concluding that the average consumer will perceive “MIPET” as an invented word and, instead, the consumer will instinctively dissect it into “MI” and “PET”, the respective marks will consequently share a conceptual reference to a “pet” which will naturally take them closer together. In these circumstances, I find the marks are conceptually similar to a fairly high degree.

The opponent’s ‘605 mark

32. Visually, the marks share their first, third, fourth and fifth letters (albeit with variation in the respective presentation). The opponent’s mark also incorporates a further word element “Allergy”, whilst the applicant’s mark adds “sensitivity”, presented as a distinct word. The marks differ in their second letter, imagery and adopted colour schemes. There is little tangible similarity in the marks’ “Allergy” and “sensitivity” elements. I find the marks visually similar to a fairly low degree.

33. I find the opponent’s ‘605 mark likely to be articulated in the same way as its mark ending ‘883. For that reason, my earlier findings apply and I consider the marks’ aural similarity to be of at least a medium degree.

34. In the opponent’s mark, its “Mi” element is presented in a different colour to its “PetAllergy” element. This encourages a natural distinction between the marks’ *Mi* and *Pet* elements. In this case, my considerations at paragraph 31 apply. The marks share a “pet” concept and there is an element of similarity, albeit limited, in the marks’ Allergy and Sensitivity elements for the reasons already discussed. Applying due weight, I find a fairly high conceptual similarity.

Distinctive character of the earlier trade marks

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or

services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

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

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

37. In the absence of evidence showing the use made of the earlier marks, I have only the inherent position to consider. Beginning with the opponent’s mark ending ‘261, the mark’s reference to a PET will likely be viewed as at least allusive (if not descriptive) when considered in respect of at least some of the relied upon services (*services for the care of pet animals*, for example). The mark’s “Mi” element, viewed as a deliberate misspelling of dictionary word “My” or an invented word, will award the mark some degree of distinctiveness, particularly due to the way in which it is presented, as will the mark’s combination of colour and device elements, though I have found these will play a lesser role. On balance, I find the mark enjoys a medium degree of inherent distinctiveness.

38. The opponent's mark ending '883 comprises two words. Particularly in relation to services such as *veterinary services*, for example, the mark's "ALLERGY" element is likely to carry a lesser weight and will be perceived as a nod toward the nature of the services on offer. The mark's first element "MIPET" is likely to be perceived as an invented word, though I keep in mind that the average consumer may identify that it incorporates the word PET which, again, is likely to be seen as a somewhat allusive reference in respect of at least some goods and services. Still, even in those cases, the mark is likely to enjoy at least a medium degree of inherent distinctiveness, or fairly high in circumstances whereby the mark's MIPET element is viewed as an invented word absent of any allusive properties.

39. In the opponent's mark ending '605, "Pet" and "Allergy" will be readily identified as dictionary words which have somewhat allusive properties when considered in respect of at least some of the goods and services relied upon. "Mi" will either be viewed as a misspelling of "My" or an invented word, albeit a short one. Combining these considerations with the mark's overall aesthetic presentation, including the colour and background devices, I find the mark generally has a medium degree of inherent distinctiveness.

Likelihood of confusion

40. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion. Conversely, the less distinctive it is, the lower the likelihood of confusion.

41. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods and services down to the responsible undertakings being the same or related.

42. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he 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)”.

43. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,⁷ 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.”

44. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of my earlier conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

45. Throughout the course of my decision I have found the earlier marks visually similar to either a fairly low or low to medium degree, aurally similar to a no more than medium or an at least medium degree and conceptually similar to an at least medium or fairly high degree. The parties' respective specifications share at least some terms which are highly similar or identical. The average consumer will comprise both pet-owning members of the general public and professional bodies. The marks' visual weight is likely to be the greatest in the purchasing process, though the relevance of the marks' aural impression cannot be overlooked. The average consumer is likely to apply at least a medium degree of attention to its purchase, ranging to fairly high. The earlier marks are inherently distinctive to either a medium degree, or an at least medium or fairly high degree.

46. I will begin by considering a likelihood of direct confusion. Earlier in my decision I elected to proceed on the basis that each of the earlier marks share at least some highly similar or identical terms with the applied-for specification. Even in these circumstances,

⁷ [2021] EWCA Civ 1207

I find there is sufficient difference between the marks, particularly visually, to allow the average consumer to readily acknowledge that the marks are not the same. The marks' overall presentation, the differences in their comprising elements, and particularly the variation of the respective "Mi" and "My" elements at the beginning of each of the marks will be easily identified by the average consumer (on repeat purchase, for example). Moreover, whilst I have found the marks' visual impression to carry the greatest weight in the purchasing process, I have not overlooked the relevance of the marks' aural position. Particularly where the average consumer elects to articulate the earlier marks' "MIPET" or "Mi/Pet" elements as MY-PET, there may be two identical syllables at the beginning of the respective marks. However, the marks will be easily distinguished by their remaining syllables (or an absence thereof). Given the level of care that the average consumer is likely to take when approaching its selection, even where the attention paid is closer to a medium level than high, the differences in the parties' marks, both visually and aurally, are, to my mind, sufficient to overcome a likelihood of direct confusion.

47. I turn now to consider a likelihood of indirect confusion. The distinctiveness of the earlier marks lies predominantly (if not solely) in the combined elements Mi/Pet or MIPET and, where "Pet" is distinguished, in its "Mi" element. These are not reproduced in the applicant's mark, which adopts the traditional spelling of words "my pet", incorporating a figurative canine depiction. I see no reason why the average consumer would attribute any vague similarity in the marks' Mi/PET and "my pet" elements to a shared or related undertaking, particularly given that any "pet" reference will, for the most part, be perceived as allusive. It also would not seem a natural brand extension, for example, to alternate between a spelling of "Mi" and "my". I have carefully considered whether an aural exchange or purchase would give rise to a likelihood of indirect confusion, especially in circumstances whereby the average consumer articulates the opponent's Mi/Pet element in the same way as "my pet". Particularly, if the purchase is made on aural terms, I have considered circumstances whereby the consumer hears "my/pet/allergy", for example, and "my/pet/sensitivity" and erroneously concludes that the respective "allergy" and "sensitivity" elements are indicative of different product lines, for example. However, in these circumstances, the distinctiveness of the earlier marks' "mi/pet" element is diminished considerably on the basis that it loses the distinctiveness of the "misspelling" of ordinary word "my", or being perceived as an

invented word. This lesser degree of distinctiveness, to my mind, significantly reduces a likelihood of confusion. A greater degree of weight, as a consequence, will be attributed to the marks' remaining elements. In the present context, shared use of "my/pet", if that is how it is perceived, would more likely be viewed as a coincidental shared use of some allusive wording by distinct and unrelated undertakings. In summary, I do not consider the marks' visual differences consistent with what will be perceived as a brand extension or sub-brand, and aurally, even if the consumer believes the marks to share an identical "my pet" element, the perceived distinctiveness of this element on the consumer's part is unlikely to be attributed to a shared or single undertaking. I find there is no likelihood of indirect confusion.

48. Having reached the aforementioned finding in respect of identical or highly similar terms, it would put the opponent in no better position to consider a likelihood of confusion in respect of terms of goods or services which share a lesser degree of similarity. For completeness, I do not consider any of the remaining terms in the parties' specifications would typically engage a level of attention lower than medium, and certainly not low enough to satisfy a finding of confusion.

Conclusion

49. The opposition has failed. Subject to any successful any appeal against my decision, the application will proceed to registration in respect of all goods and services applied for.

Costs

50. The applicant has succeeded and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice ("TPN") 2/2023. In accordance with that TPN, I award the applicant a sum of £300 for considering the other side's statement and preparing a counterstatement.

51. I order CVS (UK) Limited to pay My Pet Sensitivity Ltd the sum of £300. This sum is to be paid within twenty-one days of the expiry of the appeal period or

within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 31st day of July 2025

**Laura Stephens
For the Registrar**