

**O-0821-24**

**TRADE MARKS ACT 1994  
IN THE MATTER OF  
REGISTRATION NO. 365518  
IN THE NAME OF HUX HEALTH LTD  
FOR THE FOLLOWING TRADE MARK:**

**HUX HEALTH**

**IN CLASSES 5, 29, 30, 31 & 32  
AND APPLICATION FOR INVALIDATION UNDER NO. 505775  
BY  
HUXLEY EUROPE LIMITED**

## BACKGROUND & PLEADINGS

1. Hux Health Limited (“HHL”) is the registered proprietor of UK registration no. 3655518 for the mark HUX HEALTH which was filed on 15 June 2021 and registered in classes 5, 29, 30, 31 and 32 on 12 November 2021. The goods affected by this invalidation concern only class 5 for *nutritional supplements*.

2. On 27 January 2023, Huxley Europe Limited (“Huxley”) applied under section 47(2) of the Trade Mark Act 1994 (“the Act”) to partially invalidate the above registration with respect to class 5 on the grounds of sections 5(2)(b), 5(3) and 5(4)(a). Sections 5(2)(b) and 5(3) are based on the following earlier UK registration:

UK TM No. 3021719	Goods relied on
<b>huxd3</b>  <b>hux d3</b>  (series of 2)  Filing date: 12 September 2013 Registration date: 23 January 2015	Pharmaceutical preparations; dietetic food and substances adapted for medical use; dietary supplements for humans; Nutraceuticals for use of dietary supplement; Medicine tonics.

3. Under section 5(4)(a), Huxley claims use throughout the UK of the signs HUX, HUX D3 and HUX Q10. It claims use of the sign HUX D3 from 2012 and HUX Q10 from April 2021. Huxley has not stated a date of first use for HUX but claims,

“through its use of the Earlier Mark and the HUX Q10 Mark [...] the Applicant has also acquired goodwill and reputation in the mark HUX such that such that [sic] the use of the term HUX connotes nutritional/ dietary supplements provided by the Applicant and none other”.<sup>1</sup>

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<sup>1</sup> TM26I, paragraph 49

4. HHL filed a counterstatement in defence of its registration. It denied the similarity of the marks at issue but admitted that the respective goods were similar. It also put Huxley to proof of use.

5. Huxley's registration has a filing date that is earlier than the filing date of the contested registration and is therefore an earlier mark, by virtue of section 47 of the Act. As the registration procedure for the earlier mark was completed more than 5 years prior to the filing date of the contested registration, it is subject to the use conditions, as per section 47(2A) of the Act. Huxley made a statement of use in respect of all the goods it relies on.

6. Only Huxley filed evidence and written submissions in lieu of a hearing. Both parties have been represented throughout these proceedings. Huxley has been represented by Kuit Steinart Levy LLP and HHL by Lewis Silkin LLP.

7. I make this decision following consideration of all the papers before me.

8. 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.

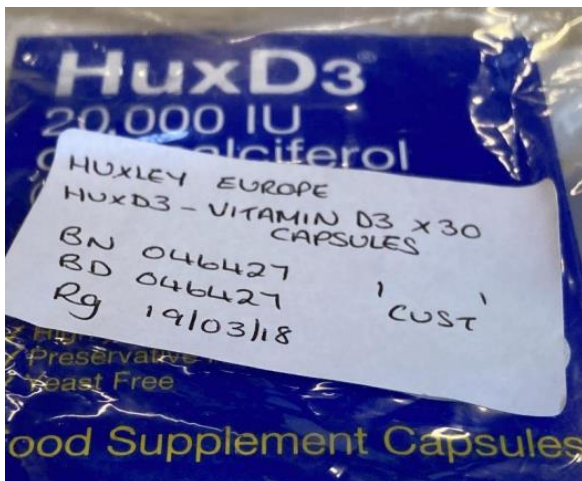
## **EVIDENCE**

### **Relevant period**

9. My first task is to establish whether, or to what extent, Huxley has shown genuine use of its earlier mark within the 'relevant period'. Under section 47(2B) of the Act, the relevant periods are defined as being the period of 5 years ending with the filing or priority date of the contested registration, i.e. 16 June 2016 to 15 June 2021 and the 5 year period ending with the date of the invalidation application, i.e. 28 January 2018 to 27 January 2023.

10. Huxley filed a witness statement in the name of Marc Saul Borson, its sole director and shareholder, on 2 October 2023. Mr Borson attached 37 exhibits. I do not intend to list every exhibit in detail here but rather have highlighted the most pertinent points of Huxley's evidence.

11. Mr Borson states that the mark HUX D3 was first used in 2012 by Huxley's predecessors in title, Dennis Gore (Chemist) Ltd, until the mark was assigned to Huxley in October 2022. The mark is used on a "colecalfiferol (vitamin D3) supplement for use in the healthcare and food supplement market". Mr Borson further states that the product was registered with a publication called Chemist and Druggist ("C+D") in April 2012. C+D is described as the leading publication for the pharmacy industry in the UK. C+D is distributed to approx. 114k users per month and allocates a unique code to each product registered to enable pharmacies to order the product. The mark is displayed on the packaging<sup>2</sup> as illustrated below:



12. By means of the Wayback Machine internet archive service, Mr Borson exhibits screenshots<sup>3</sup> dated between 2014 and 2020 from its website, namely [www.huxley-europe.co.uk](http://www.huxley-europe.co.uk), and the website of Huxley's predecessors in title [www.dennisthechemist.com](http://www.dennisthechemist.com), which displays the HUX D3 mark in text, as a hyperlink or in images of the product packaging.

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<sup>2</sup> Exhibit MB3

<sup>3</sup> Exhibits MB4 & 5

13. Mr Borson states that Huxley has supplied the Alliance Healthcare distributor, which is part of the Boots Group, itself the biggest healthcare retailer in the UK, with the HUX D3 products since 2012.<sup>4</sup> The product is available directly from Huxley's website, or over the counter from major pharmacy chains such as Lloyds and Boots, and from online retailers such as Amazon. Moreover Mr Borson states that Huxley has supplied the NHS with HUX D3 products for prescription usage since 2014. Mr Borson exhibits NHS documentation from six commissioning groups dated between 2013 and 2019<sup>5</sup> which indicates that HUX D3 is recommended for patients suffering vitamin D deficiency.

14. With regard to turnover Mr Borson states that the sales of HUX D3 between 2012 and 2021 totalled £6,078,838.70.<sup>6</sup> Of that figure approximately £3.5m can be attributed to NHS spend. In addition Mr Borson states that HUX D3 is the market leading vitamin D3 product with a market share of approximately 50% in relation to NHS prescribed products.<sup>7</sup>

15. Mr Borson states that the advertising expenditure between November 2018 to November 2022 was £24,375.65. Huxley promotes the products on its Facebook account and HUX D3 was featured in the April 2021 issue of Top Sante magazine in an article on vitamin D highlighting various D3 products, as illustrated below<sup>8</sup>.



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<sup>4</sup> Exhibit MB2

<sup>5</sup> Exhibit MB10

<sup>6</sup> Exhibit MB38

<sup>7</sup> Exhibit MB12

<sup>8</sup> Exhibit MB16

16. The remainder of Mr Borson's evidence relates to the HUX Q10 sign which is used on a dietary supplement coenzyme Q10 product. The product was launched on 1 April 2021 and was registered with C+D on the same date. It has been available for sale from Huxley's website and from third party online and physical retailers since that date.

17. That concludes my summary of the evidence.

**Relevant statutory provision: Section 47**

18. The relevant statutory provisions are set out below.

"47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 5(6).

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered-

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) 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.

(2D)-(2DA) [Repealed]

(2E) 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.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c) that the application for a declaration of invalidity is based on section 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of section 5(3).

(3) [...]

(4) [...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

19. Section 100 of the Act states that:

“100. 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.”

20. 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 Bunderversvereinigung 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].”

21. I also find the following case law to be of use where in *Awareness Limited v Plymouth City Council*<sup>9</sup>, Mr Daniel Alexander Q.C. (as he was then) as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known

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<sup>9</sup> Case BL O/236/13

to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

and further at paragraph 28:

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

### **Form of the mark**

22. Before I assess the evidence further, I firstly consider whether the use of the mark shown in the evidence constitutes use of the mark as registered. The marks as registered are **hux d3** and **huxd3**. The filing of a word mark protects the words contained in the mark, whatever form, colour or typeface are used.<sup>10</sup> I note the marks are used in both upper and lower case variants in evidence, and I find this clearly constitutes fair and notional use of the marks as registered.

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<sup>10</sup> LA Superquimica v EUIPO, Case T-24/17, paragraph 39

### **Sufficiency of use**

23. Huxley's evidence has demonstrated that the **hux d3** mark has been used in the UK healthcare sector within the relevant period as a vitamin D3 supplement. Huxley has demonstrated direct retail sales through specialist healthcare retailers such as pharmacies and other generalist retailers. There is also evidence of use within the NHS. The way the NHS is structured means that it is a customer for large scale volumes of medical products and although the end user/patient using or being prescribed a supplement comes at the end of the chain rather than being a direct point of sale, the NHS is still a customer in the sense that it has purchasing capability and I see it as "warranted in the economic sector concerned to maintain or create a share in the market" as per case law. The NHS documents in evidence indicates that **hux d3** supplements (alongside some other brands) are recommended for vitamin D deficiencies. Therefore it follows that such products are available for prescription to the patient. Although Huxley has not given an indication of a market share for 'over the counter' sales, i.e. non-prescription, its market share for prescribed goods from the NHS was stated to be 50%. Taking all these factors into account, I find Huxley has demonstrated genuine use of the **hux d3** mark.

### **Framing a fair specification**

24. The next stage is to decide whether Huxley's use entitles it to rely on all of the goods for which it made a statement of use and based on my assessments given above. In framing a fair specification, I rely on guidance given in the following judgments. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*<sup>11</sup>, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

"In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

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<sup>11</sup> BL O/345/10

25. Moreover in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors*<sup>12</sup>, Mr Justice Carr summed up the law relating to partial revocation as follows (at [47]):

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

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

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

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand,

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<sup>12</sup> [2016] EWHC 3103 (Ch)

protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

26. Taking the evidence into account, there was no evidence to indicate that **hux d3** was used on anything other than vitamin D3 supplements. Therefore I find the following terms to be a fair specification, namely: *dietetic food and substances adapted for medical use; dietary supplements for humans; Nutraceuticals for use as dietary supplement.*

## DECISION

### Section 5(2)(b)

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

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

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

28. The following principles are gleaned from the judgments 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 C3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L.Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

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

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

(c) The average consumer normally perceives the 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 the goods**

29. HHL accepted in its counterstatement that its class 5 goods, namely *nutritional supplements*, were similar to Huxley's goods. In my view the respective goods are in fact identical, and I will proceed on that basis.

### **Average consumer and the purchasing process**

30. I next consider who the average consumer is for the goods at issue and how they are purchased. It is settled case law that the average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.<sup>13</sup> 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.<sup>14</sup>

31. The average consumer for the contested goods will be members of the general public and healthcare professionals. The goods may be frequent purchases to improve general health or to deal with a chronic medical condition. The purchasing process will be predominately visual, as consumers may see the goods in a physical premises

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<sup>13</sup> *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch)

<sup>14</sup> *Lloyd Schuhfabrik Meyer*, Case C-342/97.

or in an online equivalent, but aural considerations cannot be ruled out entirely if say advice is sought from healthcare staff or pharmacists. As the nature of the goods relates to health or to treat specific medical conditions, then I find the level of attention paid by consumers during the purchasing process will be higher than average.

### Mark comparisons

32. 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 CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*<sup>15</sup>, 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.”

33. 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.

34. The respective trade marks to be compared are:

HUXLEY'S EARLIER REGISTRATION	HHL'S REGISTRATION
<b>huxd3</b>	<b>HUX HEALTH</b>

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<sup>15</sup> Case C-591/12P

<b>hux d3</b>	
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(series of two)

35. Huxley's registration consists of a series of two word/letter/numeral combinations in lower case. The only difference between the marks is the space between **hux** and **d3**. Given that **d3** is descriptive for the vitamin, and acknowledged to be so by Huxley, then I find that **hux** is the dominant and distinctive element.

36. HHL's registration comprises two words **HUX** and **HEALTH** in block capitals without any other aspect to the mark such as stylisation. Given that **HEALTH** is non-distinctive in relation to the goods, I find that **HUX** is the dominant and distinctive element.

37. In a visual comparison, all the respective marks share the letters **HUX** at the beginning of the marks. It is settled case law that the consumers are likely to pay more attention to beginnings of marks where they have a visual and aural impact.<sup>16</sup> As previously stated nothing turns on the use of different casing. The points of difference in the respective marks lie in the non-distinctive elements namely **d3** and **HEALTH**. Overall I find there is a medium degree of visual similarity.

38. In an aural comparison the shared **HUX** element will be pronounced identically as **HUCKS**. The points of aural difference in the respective marks will be the **d3** and **HEALTH** element which will be pronounced in their usual way. As such I find there is a medium degree of aural similarity.

39. In a conceptual comparison, the shared element **HUX** will likely be seen by consumers as an invented word with no "graspable concept".<sup>17</sup> The other elements namely **d3** and **HEALTH** will have a concept, albeit a different concept, in relation to the goods. Overall, I find the marks are not conceptually similar.

### **Distinctive character of the earlier registered trade mark**

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<sup>16</sup> *El Corte Inglés, SA v OHIM*, Case T-39/10

<sup>17</sup> It is settled case law that for a conceptual message to be relevant it must be capable of immediate grasp by the average consumer, *The Picasso Estate v OHIM*, Case C-361/04 P

40. 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 allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

41. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*,<sup>18</sup> 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).”

42. I begin by considering the inherent position. Huxley’s earlier registration consists of a word, letter and numeral combination, namely **huxd3** and **hux d3** as a series of two. The **hux** element is invented and has no meaning in relation to the goods whereas

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<sup>18</sup> Case C-342/97

**d3** is meaningful as the designation of the vitamin. Overall I find that the registration is inherently distinctive to a high degree.

43. Turning to enhanced distinctiveness, the relevant market I must consider is the UK. I note from Huxley's evidence the registration has been used by the relevant date. Turnover between 2012 and 2021 was given as £6,078,838.70 but is not allocated to individual years and around half that total comes from NHS spend. My assumption would be, given the product only launched in 2012, turnover is likely to be lower immediately after launch and growing higher in the successive years. I note that whilst a market share of 50% is given from NHS prescriptions, no market share is given for the remaining 'over the counter' sales. The evidence states that between 2015 to 2021 approximately 1.8m NHS prescriptions for the goods were issued. Given the nature of how distributors for pharmacies, the retail healthcare sector and the NHS supply chain all operate, I am prepared to accept that there has been a geographical spread of customers across the UK. Although Huxley's advertising spend is low and no examples were given of any advertising, other than on Huxley's own website or social media channels, when taking all the above factors into account I find that the marks' distinctiveness has been enhanced through use to a modest degree.

### **Likelihood of confusion**

44. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind.<sup>19</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to 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 vice versa.

45. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that

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<sup>19</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

exists between the marks and the goods and services down to the responsible undertakings being the same or related.

46. In *L.A. Sugar Limited*<sup>20</sup>, Mr Iain Purvis Q.C., sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually 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”.

47. In addition I find the following case law to provide helpful guidance where in *Kurt Geiger v A-List Corporate Limited*<sup>21</sup>, Mr Iain Purvis Q.C (as he then was), sitting as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

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<sup>20</sup> *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10

<sup>21</sup> BL O-075-13

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

48. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

49. So far in this decision I have found that,

- Although HHL conceded the goods at issue were similar, I found the goods to be identical.
- The purchasing process is predominantly visual with consumer paying a higher than average degree of attention as these are health related goods.
- The marks are visually and aurally similar to a medium degree and there is no conceptual similarity.
- The earlier registration overall is inherently highly distinctive and has been enhanced to a modest degree through use.

50. With regard to the respective registrations and taking into account the assessments I have made above, my focus is on the inherently distinctive word **HUX**. It is the dominant and distinctive element of both registrations as per the *Kurt Geiger* guidance. The additional elements, namely **d3** and **HEALTH**, are both meaningful in relation to the goods so have less distinctiveness. As previously stated, a consumer rarely has the chance to make direct comparisons between marks but instead relies on an imperfect recollection. I consider that to be the case here given the distinctiveness of **HUX**. I find that there is a likelihood of direct confusion.

51. In case I am wrong in my finding of direct confusion, I will go on to assess the likelihood of indirect confusion. I remind myself of the guidance given in *L.A. Sugar* that indirect confusion requires a consumer to undertake a thought process whereby

they acknowledge the differences between the marks yet attribute the common element to the same or an economically connected undertaking, taking one mark to be a possible brand extension or sub brand of the other mark. However I am also aware that a finding of indirect confusion should not be made simply because two marks share a common element.

52. I have found that **HUX** is inherently distinctive to a high degree and it is the word shared by the respective registrations. Given that the additional words **d3** and **HEALTH** are meaningful for the goods, it is my view that the registrations may be seen as a logical brand extensions or sub brands, e.g. new supplement ranges emanating from the HUX stable of health products. Therefore I find there is a likelihood of indirect confusion.

53. The invalidation based upon section 5(2)(b) succeeds in relation to HHL's class 5 goods namely *nutritional supplements*.

### **Section 5(3)**

54. Section 5(3) of the Act states:

“5(3) A trade mark which –

(a) 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 repute of the earlier trade mark.”

55. Section 5(3A) of the Act states:

“Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

56. The relevant case law can be found in the following judgments of the CJEU: *Case C-375/97, General Motors, Case 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 C383/12P, 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; *General 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) 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.*

(g) 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.*

(h) 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 40i*). 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*).

57. The conditions of section 5(3) are cumulative. Firstly, Huxley must show that its mark is similar to the HHL's mark. Secondly, that the earlier registration has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Fourthly, assuming that the first three conditions have been met, section 5(3) requires that one or more of the three types of damage claimed will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors

which must be assessed in deciding whether the public will make a link between the marks.

58. Having found that the marks are similar, I now consider reputation. As outlined above, for an invalidation under section 5(3) to get off the ground it is first necessary for Huxley to show that it has the necessary reputation. I must be satisfied that the earlier registration is known by a significant part of the relevant public, namely the general public and health care professionals.

59. Taking the evidence into account, in as much as it relates to the over the counter sales, I find that the earlier registration has been used on Huxley's website and Facebook channel, although no web traffic figures have been provided as to how many consumers visited either the website or Facebook channel and saw the earlier registration. I further note the goods appeared in a single article with other vitamin D3 products in Top Sante magazine. However simply appearing alongside other branded goods does not equate to a reputation. Furthermore no figures are provided for the readership of Top Sante magazine so it follows that there is no evidence on how many readers saw or read the article. Nor is there any information provided by Huxley as to whether its sales increased specifically as a result of that article. Nevertheless in Huxley's favour are the number of NHS prescriptions, approximately 1.8m, issued between 2015 and 2021 and for which half of Huxley's turnover can be attributed. The mark **hux d3** is listed in Dictionary of Medicines and Devices and the British National Formulary, both of which are professional pharmacological guides to prescription products.<sup>22</sup> Therefore I assume that the hux d3 mark is known to a significant number of healthcare professionals.

60. Overall, I find Huxley's evidence is sufficient to demonstrate the requisite reputation for its goods.

61. As I have found that Huxley has the requisite reputation, I can next consider whether a link will be established between the respective marks. In view of my previous finding that there will be a likelihood of confusion, then a link is made out. It

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<sup>22</sup> TM26I, statement of grounds paragraphs 22 & 23

follows then that if reputation and link have been established then an unfair advantage, namely that HHL's registration would benefit, would result.

62. I find that Huxley's ground of invalidation under section 5(3) has succeeded.

**Section 5(4)(a)**

63. I remind myself that under this ground Huxley claims it has acquired goodwill through the use of the three following signs in relation to nutritional supplement goods:

- **HUX D3**
- **HUX Q10**
- **HUX**

64. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(a) [...]

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

65. Subsection (4A) of Section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

66. In *Discount Outlet v Feel Good UK*<sup>23</sup>, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

### **Relevant date**

67. In terms of the relevant date for assessment of section 5(4)(a), in *Advanced Perimeter Systems Limited v Multisys Computers Limited*,<sup>24</sup> Mr Daniel Alexander QC, sitting as the Appointed Person, quoted with approval the summary made by Mr Allan James, acting for the Registrar, in *SWORDERS Trade Mark*:<sup>25</sup>

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

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<sup>23</sup> [2017] EWHC 1400 IPEC

<sup>24</sup> BL O-410-11

<sup>25</sup> BL O-212-06

68. The filing date of HHL's registration is 15 June 2021. As such, all factors will be assessed as at this date ("the relevant date").

### **Goodwill**

69. The first hurdle for Huxley is to show that it had the required goodwill at the relevant date. The issue of what constitutes goodwill was discussed in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd*<sup>26</sup> viz,

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

70. The following case law extracts provide helpful guidance in establishing goodwill.

71. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)*<sup>27</sup> Pumfrey J. stated:

"27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX) (1946) 63 R.P.C. 97* as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation;

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<sup>26</sup> [1901] AC 217 (HOL)

<sup>27</sup> [2002] RPC 19 (HC)

evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

72. In *Smart Planet Technologies, Inc. v Rajinda Sharm*<sup>28</sup> Mr Thomas Mitcheson QC, sitting as the Appointed Person, reviewed the following authorities about the establishment of goodwill for the purposes of passing-off: *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31, paragraph 52, *Reckitt & Colman Product v Borden* [1990] RPC 341, HL and *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd* [1980] R.P.C. 31. After reviewing these authorities Mr Mitcheson concluded that:

*“.. a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon.”*

73. After reviewing the evidence relied on to establish the existence of a protectable goodwill Mr Mitcheson found as follows:

“The evidence before the Hearing Officer to support a finding of goodwill for Party A prior to 28 January 2018 amounted to 10 invoices issued by Cup Print in Ireland to two customers in the UK. They were exhibited to Mr Lorenzi’s witness statement as exhibit WL-10. The customers were Broderick Group Limited and Vaio Pak.

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<sup>28</sup> BL O/304/20

37. The invoices to Broderick Group Limited dated prior to 28 January 2018 totalled €939 and those to Vaio Pak €2291 for something approaching 40,000 paper cups in total. The invoices referred to the size of “reCUP” ordered in each case. Mr Lorenzi explained that Broderick Group Limited supply coffee vending machines in the UK. Some of the invoices suggested that the cups were further branded for onward customers e.g. Luca’s Kitchen and Bakery.

38. Mr Rousseau urged me not to dismiss the sales figures as low just because the product was cheap. I have not done so, but I must also bear in mind the size of the market as a whole and the likely impact upon it of selling 40,000 cups. Mr Lorenzi explained elsewhere in his statement that the UK market was some 2.5 billion paper coffee cups per year. That indicates what a tiny proportion of the market the reCUP had achieved by the relevant date.

39. Further, no evidence was adduced from Cup Print to explain how the business in the UK had been won. Mr Rousseau submitted to me that the average consumer in this case was the branded cup supplier company, such as Vaio Pak or Broderick Group. No evidence was adduced from either of those companies or from any other company in their position to explain what goodwill could be attributed to the word reCUP as a result of the activities and sales of Cup Print or Party A prior to 28 January 2018.

40. Various articles from Packaging News in the period 2015-2017 had been exhibited but again no attempt had been made to assess their impact on the average consumer and these all pre-dated the acquisition of the goodwill in the UK. I appreciate that the Registry is meant to be a less formal jurisdiction than, say, the Chancery Division in terms of evidence, but the evidence submitted in this case by Party A as to activities prior to 28 January 2018 fell well short of what I consider would have been necessary to establish sufficient goodwill to maintain a claim of passing off.

41. This conclusion is fortified by the submissions of Party B relating to the

distinctiveness of the sign in issue. Recup obviously alludes to a recycled, reusable or recyclable cup, and Party B adduced evidence that other entities around the world had sought to register it for similar goods around the same time. The element of descriptiveness in the sign sought to be used means that it will take longer to carry out sufficient trade with customers to establish sufficient goodwill in that sign so as to make it distinctive of Party A's goods."

74. The relevant market for assessing goodwill is the UK. As there are three different signs claimed I will take each in turn.

### **HUX D3**

75. I find that Huxley has demonstrated sufficient use for *dietetic food and substances adapted for medical use; dietary supplements for humans; Nutraceuticals for use as dietary supplement* and I would likely find goodwill in those goods based on the criteria set out in the case law guidance given above. As such Huxley's claim under Section 5(4)(a) for this sign does not provide any better an outcome than for section 5(2)(b). Therefore I need not consider this ground any further.

### **HUX Q10**

76. I note that the first use of this sign is 1 April 2021 and the relevant date I must consider is 15 June 2021. Huxley has provided evidence to the effect that the sign was registered with C+D on 1 April 2021 and therefore available for order by pharmacists. Evidence of actual sales were provided in the form of a receipt for £11.99 on 17 May 2021<sup>29</sup> and an invoice dated 28 May 2021 totalling £401.76.<sup>30</sup> Huxley also provided evidence that there was some promotional activity in May 2021 with a third party. Therefore in total the sign was in use for just two and a half months before the relevant date and achieved sales of just over £412.76. Taking all this into account, in conjunction with the case law guidance, I do not find that Huxley has established a protectable goodwill in relation to the HUX Q10 sign. Its claim under section 5(4)(a) in relation to this sign falls at this hurdle.

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<sup>29</sup> Exhibit MB29

<sup>30</sup> Exhibit MB34

## **HUX**

77. Finally I turn to the **HUX** sign for which Huxley submits that goodwill has accrued to it through use of the other **HUX D3** and **HUX Q10** signs as it is the distinctive element of these signs. Huxley have provided no evidence to demonstrate that **HUX** has been used solus on its goods. Therefore whilst I accept that **HUX** is the distinctive element of the other signs, it does not follow that goodwill has accrued to that element alone if it has not been used on its own. As such I do not find that Huxley has established a protectable goodwill in relation to **HUX**. Therefore its claim under section 5(4)(a) in relation to this sign falls at this hurdle.

## **Overall conclusion**

78. Huxley was successful in its claim under sections 5(2)(b) and 5(3) but was not successful under Section 5(4)(a). Subject to any appeal against this decision, the contested registration will be invalidated in respect of class 5 but will remain registered in classes 29, 30, 31 and 32 which did not form part of these proceedings.

## **Costs**

79. Huxley has been mostly successful and as such is entitled to a contribution towards costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2/2016. Bearing in mind the guidance given in TPN 2/2016, I award costs to Huxley as follows:

£200 Official fee

£350 Preparing the Notice of Invalidation and considering the counterstatement

£600 Preparing evidence

£300 Preparing written submissions

**£1450 Total**

80. I order Hux Health Ltd to pay Huxley Europe Limited the sum of £1450. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 28<sup>th</sup> day of August 2024**

**June Ralph**

**For the Registrar**

**The Comptroller-General**