O/0964/25

TRADE MARKS ACT 1994

IN THE MATTER OF
TRADE MARK APPLICATION NO. 4106924
IN THE NAME OF ORIGIN ENTERPRISES PLC
TO REGISTER AS A TRADE MARK

Agrii-Fortis

IN CLASS 1

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 600003582
BY SULPHUR MILLS LIMITED

BACKGROUND AND PLEADINGS

1. On 1 October 2024, ORIGIN ENTERPRISES PLC ("the applicant") applied to register the trade mark "**Agrii-Fortis**" in the United Kingdom. The application was accepted and published for opposition purposes on 29 November 2024, in respect of goods in class 1, namely:

Chemicals used in industry, science, agriculture, horticulture and forestry; manures and fertilisers.

2. The application is opposed by Sulphur Mills Limited ("the opponent"). The opposition was filed on 22 January 2025 under the fast-track opposition procedure[1] and is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the goods in the application. The opponent relies upon the following mark:

AGROFERTIS

UK trade mark registration number 3766979

Filing date: 17 March 2022

Registration date: 5 August 2022

Registered in Class 1

Relying on all goods, namely:

Fertilizers; plant nutrients; organic manures; manures; organic fertilizers; biofertilizers; compost; biochemical catalyst; plant growth regulating preparations.

3. The above mark qualifies as an earlier mark under section 6(1) of the Act. As it had not completed its registration procedure more than five years before the application date for the contested mark, it is not subject to the use provisions contained in section 6A of the Act.

4. The opponent submits that the marks are aurally, visually and conceptually very similar and that the class 1 goods under both marks overlap.

[1] Pursuant to The Trade Marks (Fast Track Opposition) (Amendment) Rules 2013.

5. The applicant filed a counterstatement denying the claims. Although the applicant accepts that some of the goods of the application are identical to the goods protected under the opponent's mark, it submits that the marks are sufficiently different to avoid confusion.

6. Neither party requested leave to file evidence or for an oral hearing in this fast-track opposition. Nor did either party file written submissions. Therefore this decision is taken following careful consideration of the papers on file.

7. In these proceedings, the opponent is represented by Michal Przyluski of JD&P Patent Attorneys and the applicant is represented by Maclachlan IP.[2]

DECISION

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.

Section 5(2)(b)

9. Section 5(2)(b) is relied on and reads as follows:

> "5(2) A trade mark shall not be registered if because -
>
> (a) …

[2] Formerly Ansons, as recorded on the Form TM8, Notice of defence and counterstatement.

(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".

10. Section 5A states:

"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."

11. I am guided by the following principles which 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 Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

12. The opposing goods are both in class 1, as follows:
The opponent's goods are " *Fertilizers; plant nutrients; organic manures; manures; organic fertilizers; biofertilizers; compost; biochemical catalyst; plant growth regulating preparations."*

The applicant's goods are "*Chemicals used in industry, science, agriculture, horticulture and forestry; manures and fertilisers."*

13. I am mindful that pursuant to section 60A of the Act, goods are not to be automatically regarded as being similar to each other on the ground that they appear in the same class.

14. Where the goods in the specification of one party are included in a broader term from the other party's specification, those goods are considered to be identical: See *Gérard Meric v OHIM,* Case T-133/05 at [29].

15. In *Canon*, Case C-39/97, the Court of Justice of the European Union ("CJEU") stated that:

> "23. In assessing the similarity of the goods or services concerned, … all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

16. Additionally, the factors for assessing similarity between goods and services identified in *British Sugar Plc v James Robertson & Sons Limited* ("*Treat*") [1996] R.P.C. 281 include an assessment of the users and the channels of trade of the respective goods or services.

17. I note that in the counterstatement, the applicant admits that its *manures and fertilisers* are identical to the fertilisers and manures identified in the opponent's

registration. It further admits that the remaining goods of the application are similar to the other goods relied upon by the opponent, although it has not said to what degree it considers them similar. I will therefore proceed to make my own comparison of the degree of similarity between the applicant's remaining goods, being "*Chemicals used in industry, science, agriculture, horticulture and forestry".*

18. To the best of my knowledge, biochemicals are found only in living organisms, while the broad term "chemicals" refers to those found in both living and non-living organisms and may be manufactured. In my view, the applicant's broad term "*Chemicals used in industry, science, agriculture, horticulture and forestry"* encompasses the opponent's "*biochemical catalyst"*, rendering them identical as per the principle outlined in *Meric*. I consider that the applicant's chemicals could also encompass the likes of the opponent's "*plant nutrients*" and "*plant growth regulating preparations"*. If I am wrong in this assessment, then I consider there to be an overlap in purpose and method of use, as well as in users of the goods and in the channels of trade. There could also be an element of competition, with the consumer choosing between either a chemical or a biochemical product to achieve a similar result. Therefore, I find the goods to be similar to a high degree.

The average consumer and the nature of the purchasing act

19. The average consumer is a legal construct, deemed to be reasonably well informed and reasonably circumspect: see *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), paragraph 60. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97, at [26].

20. The opponent submits that as both trademarks relate to chemical substances used in agriculture, the average consumer will comprise of farmers, who will pay a medium-low level of attention. It submits that the products in this field are often recommended by one farmer to another. The applicant submits that "it is obviously extremely important that farmers use particular chemical preparations and fertilisers for different

purposes and are likely to exercise great care in their choice of preparations of this nature".

21. In my view, the average consumer for the overlapping goods will most likely be those within the agriculture and horticulture industries, although I consider that the likes of fertilisers, manures and plant nutrients will also be consumed by the general public.

22. The goods at issue are likely to be provided through specialist suppliers, as well as garden centres and via general DIY/garden stores. The goods may be procured online, through tele-sales, or in bricks and mortar stores. I consider the selection of the goods will be a predominantly visual one, although aural considerations will play a part, and I note the opponent's reference to word-of-mouth recommendations between farmers. Considerations during the selection of the goods will include the suitability of the product for the consumers' individual requirements, i.e. the type of chemical/biochemical or fertiliser most befitting the consumer's particular needs, as well as cost. I would expect the degree of attention paid by the general public to the selection of the goods to be medium. The requirements of the professional consumer such as farmers and horticulturists are likely to be more specific: they will want to ensure that they select the most appropriate product, as the consequences of not doing so could be costly, having an adverse effect on their yield and on their business reputation as a whole. They will therefore pay between a medium to high degree of attention to the selection of the goods at issue.

Comparison of marks

23. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM* Case C-591/12P, that:

> "34. ....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."

24. 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.

25. The opponent's trade mark consists of the single word "**AGROFERTIS**" presented in upper case, while the applicant's mark comprises the hyphenated words "**Agrii-Fortis**", presented in title case. Both marks are in a standard black typeface, with no other elements to contribute to the overall impression. The overall impression of each of the marks therefore rests in the words themselves.

26. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the General Court ("GC") noted that the beginning of words tend to have more visual and aural impact than the ends, however, I accept that this is not always the case.

27. Visually, the opponent's mark consists of ten letters, while the applicant's mark is formed of two words which are hyphenated, comprising eleven letters in total. For the avoidance of doubt, I do not consider the difference in capitalisation/title case to be relevant to the visual impact, as the registration of a word mark gives protection irrespective of capitalisation: see *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17. The marks share in common the first three letters "AGR" as well as the last four letters "RTIS". The marks also share in common the letter "F" in the middle of each mark, being the first letter of the second word in the applicant's mark, and is positioned as the fifth letter of the opponent's mark. While the hyphen that is present only in the applicant's mark will not go entirely unnoticed, considering the marks as a whole, I find there to be a medium to high degree of visual similarity between them.

28. Aurally, both marks will be articulated as four syllables. The opponent's mark will most likely be voiced as either "AGG-ROE-FUR-TISS" or "AH-GROW-FUR-TISS", and the applicant's mark as either "AGG-REE-FOUR-TISS" or "AH-GREE-FOUR-TISS", depending on the consumer's particular pronunciation. In either case, the first and last syllables will be articulated identically. In spite of the slight difference in pronunciation of the middle two syllables in each mark, overall, I consider the marks to be aurally similar to a high degree.

29. With regard to conceptual comparison, in *Luciano Sandrone v European Union Intellectual Property Office (EUIPO)*, Case T-268/18, the GC held:

> "8. … In that regard, it must be borne in mind that the purpose of the conceptual comparison is to compare the 'concepts' that the signs at issue convey. The term 'concept' means, according to the definition given, for example, by the Larousse dictionary, a 'general and abstract idea used to denote a specific or abstract thought which enables a person to associate with that thought the various perceptions which that person has of it and to organise knowledge about it."

30. While there have been no submissions made by the opponent in relation to a possible concept conveyed by either of the marks, in its counterstatement, the applicant submits that "Agrii" denotes agriculture, while "AGRO" denotes agronomy, and that "Fortis" indicates strength , while "Fertis" suggests fertility. It further submits that "the fact that both marks commence with the prefix "agr" should be discounted because that prefix is entirely descriptive in relation to the goods".

31. In my view, while a proportion of the average consumer may recognise the distinctions between the words which make up the individual marks, this requires a level of analysis that the average consumer is unlikely to undertake. To my mind, a significant proportion of consumers are likely to consider that both the "Agrii" and the "Agro" elements at the forefront of the marks suggest a connection with agriculture, being allusive of the type of goods being offered. However, I do not consider that either element would be taken solus and I disagree that the letters "AGR" are directly descriptive. I further consider that while some consumers may understand "Fortis" as

indicating strength, others will consider it an invented word with no immediate conceptual message. The Fertis element of the opponent's mark is likely to be seen as an invented word, which to some will be evocative of fertilisers, thus creating a conceptual disparity between the marks. Overall, given the allusive nature of the AGRO/AGRII elements, I consider the marks *as a whole* to be conceptually similar to a medium degree.

Distinctive character of the earlier marks

32. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. The factors I must take into account in assessing the level of distinctive character were set out by the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97:

> "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)."

33. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. The opponent has not claimed that its mark has enhanced distinctiveness and no evidence has been filed. Therefore, I only have the inherent characteristics of the mark to consider.

34. The opponent's mark comprises the word "AGROFERTIS", which is likely to be perceived by the average consumer as an invented word which, nonetheless, alludes to the nature of the goods as those used in agriculture, with some consumers making a connection between the mark and goods used as fertilisers. Overall, I consider the earlier mark to be inherently distinctive to a medium degree.

Likelihood of confusion

35. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

36. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings. The distinction between these was explained by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

> "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)."

37. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

38. Earlier in this decision, I found the contested goods to be either identical or *Meric* identical/similar to a high degree to those of the opponent. I found the degree of attention paid by the general public to the selection of the goods to be medium, rising to between a medium to high degree for the professional consumer, with the goods being selected by predominantly visual means, although I did not discount aural considerations. The competing trade marks are visually similar to a medium to high degree and aurally similar to a high degree, with a medium degree of conceptual similarity overall. I found the earlier mark to be inherently distinctive to a medium degree.

39. I have weighed up each of the competing factors in my decision, including the differences and the similarities between the competing marks, and I take into consideration the medium degree of inherent distinctive character of the earlier mark. I bear in mind that in relation to the assessment of the likelihood of confusion, it is the section of the public with the lowest level of attention which must be taken into consideration.[3] While the degree of attention paid by a specialist consumer may, for some, be sufficient to avoid confusion, I do not consider this to be true for all professional consumers. Further, the general public as consumer are more likely to mis-remember the exact nature of the marks. I also consider that although the applicant's chemicals have been specified as those *"… used in industry, science, agriculture, horticulture and forestry"*, the general public may still utilise them for their home horticultural needs. I acknowledge that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind. Given the degree of visual, aural and conceptual similarity between the marks, in my view, the similarities between the marks are such that they are likely to be mistakenly recalled as each other. Consequently, I find that there is a likelihood of direct confusion in relation to all the goods at issue.

40. The opposition under section 5(2)(b) of the Act succeeds in its entirety.

CONCLUSION

41. The opponent has been successful. Subject to any successful appeal, the application by ORIGIN ENTERPRISES PLC is refused registration.

COSTS

42. The opponent has been successful, and is therefore entitled to a contribution towards its costs. Awards of costs in fast-track opposition proceedings are governed by Tribunal Practice Notice ("TPN") 1/2023. Applying the guidance in that TPN, I award the following:

[3] Case T-247/12, *Argo Group International Holdings Ltd. v OHIM*.

Official fee:	£100
Preparing a notice of opposition:	£250
Total:	**£350**

43. I therefore order ORIGIN ENTERPRISES PLC to pay Sulphur Mills Limited the sum of £350. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 15th day of October 2025

Suzanne Hitchings
For the Registrar,
the Comptroller-General