O/0977/25

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF REGISTRATION NO. 3624021
IN THE NAME OF MURRAY COLIN CLARKE
IN CLASSES 5, 30 & 35

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY THERETO
UNDER NO. 504605
BY TNSG HEALTH CO., LTD.

AND

IN THE MATTER OF REGISTRATION NO. 918105147
IN THE NAME OF TNSG HEALTH CO., LTD.
IN CLASS 5

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY THERETO
UNDER NO. 505340
BY MURRAY COLIN CLARKE & BIOZEAL, LLC T/A CHILDLIFE ESSENTIALS

Background and pleadings

1. Murray Colin Clarke is the registered proprietor of the trade mark **童年时光**, under number 3624021 ("Dr Clarke's mark"). Dr Clarke's mark was filed on 9 April 2021 and became registered on 20 August 2021. It stands registered for goods and services in classes 5, 30 and 35. These are set out in full in the annex to this decision, but broadly consist of nutritional and dietary supplements, pharmaceuticals and foodstuffs, as well as advertising, business, wholesale and retail services.

2. On 21 February 2022, TNSG Health Co., Ltd. ("TNSG") made an application for a declaration of invalidity in respect of Dr Clarke's mark. The application is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is directed at all of Dr Clarke's goods and services.[1] TNSG relies upon its UK trade mark registration number 918105147, which consists of the following:

童年时光

("TNSG's mark")

3. TNSG's mark was filed on 9 August 2019 and became registered on 30 November 2019.[2] It stands registered for goods in class 5, all of which are relied upon for the purposes of TNSG's claim. These are outlined in full in the annex to this decision, but broadly consist of nutritional supplements.

4. In its statement of grounds, TNSG argues that the competing marks are highly similar, both comprising the same Chinese word in slightly different fonts. Moreover, TNSG contends that all of the parties' goods and services are identical or similar. As

[1] Section 5(2)(b) has application in invalidation proceedings by virtue of the provisions of section 47(2) of the Act.
[2] TNSG's mark is a comparable mark based upon its EU trade mark number 18105147. On 1 January 2021, in accordance with the Withdrawal Agreement between the UK and EU, a comparable UK trade mark was automatically created. It is now recorded on the UK register, has the same legal status as if it had been applied for and registered under UK law, and retains its original filing date.

a result, TNSG submits that there is a likelihood of confusion, including a likelihood of association.

5. Dr Clarke filed a counterstatement, denying the ground of invalidation. Dr Clarke's pleaded position appears to be as follows:

> (i) It is not denied that there is a *prima facie* conflict between the competing marks;
>
> (ii) It is admitted that the competing marks both comprise the same Chinese word, resulting in them being highly similar (if not identical);
>
> (iii) It is admitted that the parties' respective goods in class 5 are similar, if not identical;
>
> (iv) TNSG is put to proof of its claim of identity and/or similarity between the remaining goods and services;
>
> (v) His mark is not contrary to section 5(2)(b) of the Act since TNSG's mark is, itself, invalid.

6. On 6 September 2022, Dr Clarke and Biozeal, LLC t/a Childlife Essentials ("Biozeal") made an application for a declaration of invalidity against TNSG's mark. The application is based upon sections 3(6) and 5(6) of the Act and is directed at all of TNSG's goods.[3]

7. In their statement of grounds, Dr Clarke and Biozeal claim that TNSG was fully aware (through its affiliates) of their use and ownership of the mark, having been their exclusive distributor of goods sold under the same in China, Hong Kong and Macau for many years. Having reason to believe that Dr Clarke and Biozeal may wish to use the mark in the UK in the future, they argue that TNSG made the application in its own

[3] Sections 3(6) and 5(6) of the Act have application in invalidation proceedings because of the provisions of sections 47(1) and 47(2ZA), respectively.

name, without their consent, for the purposes of a number of dishonest intentions, including, *inter alia*, blocking their entry into the UK market and gaining an unfair advantage over their potential UK distributors. On this basis, Dr Clarke and Biozeal submit that the application to register TNSG's mark was made in bad faith. Moreover, Dr Clarke and Biozeal submit that TNSG (through its affiliates) was their agent or representative and applied for the mark in its own name, without their consent.

8. TNSG filed a counterstatement, denying the grounds of invalidation. It denies that the application to register its mark was made in bad faith under section 3(6) and that it was an agent or representative of Dr Clarke and Biozeal under section 5(6). It denies that it is not the true owner of the mark and denies that any consent from Dr Clarke and Biozeal to register the mark was required. The various alleged dishonest intentions are also specifically denied.

9. On 16 December 2022, the proceedings were consolidated pursuant to rule 62(1)(g) of the Trade Marks Rules 2008 ("the Rules").

10. Both parties filed evidence. A hearing was requested and held before me, by video conference, on 23 July 2024. Dr Clarke and Biozeal were represented by Rachel Wilkinson-Duffy of Baker & McKenzie LLP. TNSG was represented by Dominic Hughes of counsel, instructed by Baker Botts (UK) LLP.

Relevance of EU law

11. 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

12. Mr Clarke and Biozeal's evidence in chief consists of the following:

(i) The witness statement of Brian Harty, dated 10 April 2023, together with 61 exhibits (BH1-BH61);

(ii) The witness statement of Yu-San Chan, dated 7 June 2023, accompanied by one exhibit (YSC1); and

(iii) The witness statement of Dr Clarke, dated 10 April 2023.

13. Mr Harty is Executive Vice President and General Counsel of Biozeal. He has held this position since 2019 but has been involved with the company since 2017. He gives evidence on Dr Clarke and Biozeal's business, their trade marks, the relationship between the parties, and the conduct of TNSG and its affiliates.

14. Mr Chan is a director at SanTranslate Limited, a position he has held since 2001. He produces a certified English translation of parts of Mr Harty's evidence which are in Chinese.[4]

15. Dr Clarke is one of the parties in these proceedings. Aside from a brief overview of his professional and commercial background, his statement serves as mere confirmation that he relies on the facts as set out by Mr Harty.

16. TNSG elected not to file any evidence in chief. However, it did file evidence in reply in the form of a witness statement from Neil Coulson, dated 8 February 2024, together with three exhibits (NC2-NC4).[5] Mr Coulson is a solicitor and a partner with TNSG's

[4] Whilst I do not intend to refer specifically to Mr Chan's translations in Exhibit YSC1, I confirm that these have been read in conjunction with Mr Harty's evidence. Where a Chinese-language document has been provided by Mr Harty, I will still refer to it using Mr Harty's labelling convention but confirm that my understanding of the same comes from Mr Chan's translation.

[5] Whilst the filing of TNSG's evidence in reply may appear to have been out of chronological order, this was because the opportunity to file evidence in reply was only provided following a query from TNSG. The original evidence timetable had, in fact, allowed for a period in which to file evidence in reply, but this was not provided before the original evidence timetable was concluded on 19 November 2023.

representatives. He provides a certified translation, a printout from the Australian trade marks register, and a decision from IP Australia, which is all said to go to the meaning of the mark(s) at issue in these proceedings.

17. After a request to file additional evidence which was granted by the Tribunal, Dr Clarke and Biozeal filed the witness statement of Shiny Wang, dated 12 December 2023, together with one exhibit (SW1). Ms Wang is a paralegal with Dr Clarke and Biozeal's representatives. She provides a copy of a decision from the Intermediate People's Court of Hangzhou Municipality, Zhejiang Province, dated 10 November 2023 ("the Chinese decision"), along with a certified English translation of the same.[6] The Chinese decision made findings against a Chinese company called Nanjing TNSG Biotech Co., Ltd. ("TNSG Biotech") in favour of, *inter alia*, Dr Clarke and Biozeal. Ms Wang confirms that the translation was done by an external translation agency, and that she is, herself, competent in both Chinese and English.

18. After being given the opportunity to respond to Ms Wang's evidence, TNSG filed the following:

(i) The witness statement of Li Zhanke, dated 5 January 2024, together with five exhibits (LZ1-LZ5); and

(ii) The witness statement of Liu Tianqi, dated 27 March 2024, filed with one exhibit (LTQ1).

19. Mr Zhanke is a partner of a Beijing-based law firm which represented TNSG (and affiliated entities) in the subject proceedings of the Chinese decision. He gives evidence as to the status of the Chinese decision, essentially that it was not final at the date of his statement.

20. Mr Tianqi is an associate at a Hong Kong-based law firm involved in the co-ordination of these proceedings on behalf of TNSG. The purpose of his evidence is to

[6] The version of the Chinese decision I will take into account is that provided on 14 February 2024 which identifies the specific parts of it relied upon by Dr Clarke and Biozeal.

highlight alleged inaccuracies in the translation of the Chinese decision evidenced by Ms Wang. Mr Tianqi confirms that he is proficient in both English and Mandarin.

21. After another request to file additional evidence which was granted by the Tribunal, Dr Clarke and Biozeal filed the following:

(i) A second witness statement from Ms Wang, dated May 2024 (no day given), together with one exhibit (SW2); and

(ii) The witness statement of Ms Wilkinson-Duffy, dated 18 June 2024, alongside one exhibit (RWD1).

22. Ms Wang provides a copy of a decision from the Beijing Intellectual Property Court dated 8 April 2024 ("the Chinese appeal decision"), along with a certified translation of the same. The outcome was that TNSG Biotech's appeal against the Chinese decision was dismissed.

23. Ms Wilkinson-Duffy is a trade mark attorney and a partner with Dr Clarke and Biozeal's representatives. She provides a copy of a decision from the US District Court of California, dated 15 May 2024 ("the Californian decision"). The Californian decision issued a default judgement against, *inter alia*, TNSG in favour of Dr Clarke and Biozeal.

24. After being given the opportunity to respond to Ms Wang's second statement, TNSG filed a second witness statement from Mr Zhanke, dated 6 June 2024. He gives evidence as to the status of the Chinese appeal decision, essentially that it was not final at the date of his statement.

25. I have taken all the evidence into account in reaching my decision and will refer to it below where necessary.

Procedural developments

Cross-examination

26. In its correspondence dated 4 December 2023, alongside its request for a hearing TNSG made a request to cross-examine Dr Clarke and Mr Harty. This was on the basis that (i) the grounds raised against it are of a serious nature, (ii) the allegations in Mr Harty's witness statement are clearly important to the outcome of the case against it, (iii) many key issues in these proceedings predate Mr Harty's involvement with Biozeal, (iv) Dr Clarke has been involved at all material times but largely just relies on Mr Harty's evidence, and (v) these proceedings comprise complex cancellation actions.

27. In the official letter dated 18 December 2023, the Tribunal indicated that insufficient information had been provided regarding the specific issues to which cross-examination would be directed. Time was permitted for TNSG to provide further detail to support its request so that it could be properly considered.

28. On 8 January 2024, TNSG responded to the Tribunal. Whilst more detail was provided in respect of the cross-examination request, and TNSG highlighted the ways in which it was limited, TNSG largely reiterated its points from its original request. It also argued that it would defeat the purpose of cross-examination if witnesses were provided with specific topics in advance, but did refer to some passages of Mr Harty's statement that it wished to test by cross-examination.

29. On the same date, Dr Clarke and Biozeal wrote to the Tribunal to object to TNSG's cross-examination request. They argued that the request, itself, corresponded with a pattern of behaviour by TNSG to inconvenience them and to show disregard for the proper running of proceedings. They also argued that the nature of the allegations against TNSG did not automatically entitle it to cross-examine their witnesses, and that no aspects of their evidence had previously been challenged.

30. On 18 January 2024, the Tribunal issued a preliminary view to deny TNSG's request. TNSG then requested a case management conference ("CMC") to discuss the same on 24 January 2024.

31. The CMC took place on 7 February 2024, at which Mr Hughes and Ms Wilkinson-Duffy represented the parties. After carefully considering their submissions and dealing with an intervening issue (discussed below), I refused TNSG's cross-examination request for the reasons outlined in the official letter dated 23 February 2024. TNSG did not seek leave to appeal this decision. As the issue is now resolved and final, I will not repeat those reasons here.

Translation

32. On 12 December 2023, Dr Clarke and Biozeal filed the evidence of Ms Wang alongside a request for permission to file it as additional evidence. This was granted by the Tribunal. This was not challenged by TNSG, thought it did trigger a satellite dispute in these proceedings regarding the accuracy of the translation of the Chinese decision.

33. On 8 January 2024, TNSG made a request for an extension of time to its deadline for filing evidence in reply to Ms Wang's evidence for the purposes of obtaining its own translation of the Chinese decision.

34. In the official letter dated 18 January 2024, the Tribunal directed TNSG to confirm the extent to which the translation was in dispute, as it had only referred to the first several pages of the translation.

35. These developments coincided with the CMC which took place on 7 February 2024. At the CMC, I discussed the translation issue with Mr Hughes and Ms Wilkinson-Duffy, namely, to establish the extent to which Dr Clarke and Biozeal sought to rely upon the Chinese decision so that an appropriate course of action could be taken. Ms Wilkinson-Duffy indicated at the CMC that it was the bad faith finding itself that was being relied upon but wished to obtain instructions on the point. I provided interim directions for Dr Clarke and Biozeal to confirm this a short time after the CMC.

36. On 14 February 2024, Dr Clarke and Biozeal wrote to the Tribunal to advise that it was not only the finding of bad faith in the Chinese decision that was being relied upon. They provided copies of the decision (original and translated) with highlighted passages they intended to rely upon. As a result of this, in the official letter dated 23 February 2024, I directed TNSG to identify which parts of those passages it claimed were inaccurate.

37. On 8 March 2024, TNSG duly responded with a list of alleged inaccuracies in the translation. In the official letter dated 18 March 2024, I indicated that, since the alleged inaccuracies appeared to focus on grammar and nuances of linguistic expression, they were unlikely to have any impact on the reading of the Chinese decision, the material findings of the court, or the determination of these proceedings. Therefore, obtaining a further translation of the Chinese decision would be disproportionate and not in keeping with the Tribunal's overriding objective.[7] Instead, I directed TNSG to file the list of alleged inaccuracies as evidence in reply, exhibited to a witness statement prepared by the individual who identified them.

38. On 28 March 2024, TNSG complied with this direction by filing Mr Tianqi's evidence. This now forms part of TNSG's evidence in reply.

Other

39. For the sake of completeness, I record here the other procedural developments not already referred to in this decision.

40. Firstly, in the official letter of 24 October 2022, the Tribunal indicated that TNSG's application to invalidate Dr Clarke's mark was being suspended pending the filing of a defence in Dr Clarke and Biozeal's application to invalidate TNSG's mark. In that same letter, the Tribunal issued a preliminary view that the proceedings would thereafter be consolidated. On 7 November 2022, Dr Clarke and Biozeal requested a hearing to challenge that preliminary view. Reasons for the preliminary view were provided by the Tribunal by official letter 11 November 2022, but the matter was discussed in full

[7] Tribunal Practice Notice 2/2011 refers.

at a CMC held on 30 November 2022. Following the CMC, it was directed that the proceedings were being consolidated for the reasons given in the official letter dated 5 December 2022.

41. Moreover, both parties made multiple requests for extensions of time during the evidence rounds. Such requests were made by Dr Clarke and Biozeal on 15 February 2023, 15 March 2023 and 30 May 2023; these were granted by the Tribunal in the official letters dated 17 February 2023, 17 March 2023 and 1 June 2023. TNSG made its requests on 8 August 2023, 8 September 2023, 10 October 2023 and 26 October 2023; these were granted by the Tribunal in the official letters dated 9 August 2023, 11 September 2023, 13 October 2023 and 1 November 2023.

42. Finally, on 8 January 2024, Dr Clarke and Biozeal made a request to file additional evidence in the form of a witness statement from Ms Wilkinson-Duffy and two exhibits (RWD1-RWD2).[8] Dr Clarke and Biozeal sought to rely on the same for the purposes of their objection to TNSG's cross-examination request. In the official letter dated 18 January 2024, The Tribunal issued a preliminary view to refuse their request. This matter was also discussed at the CMC held on 7 February 2024. Ultimately, the issue fell away because of my decision to refuse TNSG's cross-examination request. However, I indicated that the evidence would not have been admitted in any event for the reasons given in the official letter dated 23 February 2024.

My approach

43. If Dr Clarke and Biozeal's invalidation action is successful, TNSG will have no valid earlier marks to rely upon in its own invalidation action. As such, it is convenient to first deal with Dr Clarke and Biozeal's application for invalidation, returning to consider TNSG's application for invalidation if or to the extent that it is necessary to do so. For ease of reference, I shall hereafter refer to Dr Clarke and Biozeal collectively ("the applicants").

[8] This Exhibit RWD1 was distinct from Exhibit RWD1 filed alongside Ms Wilkinson-Duffy's statement of 18 June 2024.

The application for invalidation against TNSG's mark

Section 3(6)

44. Section 3(6) of the Act states:

> "(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith."

45. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36,[9] Lord Kitchin summarised the general principles applicable to bad faith (at paragraph 240) as follows:

> "(i) […]
>
> (ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).
>
> (iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation […], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 ([*Malaysia Dairy Industries Pte Ltd v Ankenaevnet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 ("*Malaysia Dairy*")], para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 ("*Sky CJEU*"), para 73).
>
> (iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law,

[9] The Supreme Court's judgement was handed down after the hearing was conducted. However, I do not consider the Supreme Court's statement of the general principles applicable to bad faith (as summarised here) to have materially altered the state of the law insofar as it is relevant to these proceedings. On 2 October 2025, I wrote to the parties to inform them that I did not consider it necessary to take submissions on the impact of the Supreme Court's judgement on these proceedings. An opportunity was given for the parties to explain why if they disagreed. No response was forthcoming.

which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the […] law of trade marks, namely the establishment and functioning of […] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45; [*Koton Mağazacilik Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 ("*Koton*")], para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case ([*Hasbro Inc v EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 ("*Hasbro*")], paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; [*AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for

obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to the goods or services in relation to which it is sought to register the mark, or that the applicant has a bona fide intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87)."

46. According to *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

(i) What, in concrete terms, was the objective that the applicant has been accused of pursuing?

(ii) Was that an objective for the purposes of which the contested application could not be properly filed?

(iii) Was it established that the contested application was filed in pursuit of that objective?

47. It is necessary to ascertain what TNSG knew at the relevant date.[10] In these proceedings, that is 9 August 2019. Evidence about subsequent events may be relevant if it casts light backwards on the position at the relevant date.[11]

48. In his skeleton arguments, Mr Hughes refers to the following comments of Mr Simon Thorley QC, sitting as the Appointed Person, in *David Matthew Scott Holder*

[10] *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch)
[11] *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited* and others, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

T/A Velocette Motorcycle Company v Eicher Limited - Royal Enfield Motor Units, BL O/363/01:

> "31. An allegation that a trade mark has been applied for in bad faith is a serious allegation. It is an allegation of a form of commercial fraud. A plea of fraud should not lightly be made (see Lord Denning M.R. in *Associated Leisure v. Associated Newspapers* (1970) 2 QB 450 at 456) and if made should be distinctly alleged and distinctly proved. It is not permissible to leave fraud to be inferred from the facts (see *Davy v. Garrett* (1878) 7 Ch. D. 473 at 489). In my judgment precisely the same considerations apply to an allegation of lack of bad faith made under section 3(6). It should not be made unless it can be fully and properly pleaded and should not be upheld unless it is distinctly proved and this will rarely be possible by a process of inference. Further I do not believe that it is right that an attack based upon section 3(6) should be relied on as an adjunct to a case raised under another section of the Act. If bad faith is being alleged, it should be alleged up front as a primary argument or not at all."

49. An allegation of bad faith is, of course, a serious allegation which must be distinctly proved. As highlighted by Mr Hughes, the authorities have also established that it is not enough to prove facts which are as consistent with good faith as bad faith.[12]

50. However, it is worth noting that, in deciding whether bad faith has been proved, the usual civil evidence standard applies, i.e. balance of probability.[13] I also bear in mind the following comments of Mr Iain Purvis KC, sitting as the Appointed Person, in *Maya Appliances Pvt. Ltd v Prapaharan Sivaratnam*, BL O/0052/25:

> "27. It is obviously wrong to expect a party to Cancellation proceedings to be able to give direct evidence of the motivation of someone who has adopted their mark. All they can reasonably be expected to do in the vast majority of cases is to make inferences from the objective facts and invite the other party to respond to this. If they establish a prima facie case consistent with bad faith,

[12] *Red Bull*
[13] *Red Bull*

then in the absence of a response from the other party the Cancellation should succeed."

51. As such, it is not necessary for me to look for direct evidence of TNSG's intentions. If it is possible to make inferences from the objective facts that it acted in bad faith, this may give rise to a *prima facie* case of bad faith. In such circumstances, it is for the owner (or applicant) of a trade mark to provide a plausible explanation of the objectives and commercial logic pursued in making the application for registration.[14] In the absence of such a rebuttal, the *prima facie* case will be sufficient to conclude that the contested mark was applied for in bad faith.

What, in concrete terms, was the objective that the applicant has been accused of pursuing?

52. The applicants' pleaded case under this ground is that, since 1997, Biozeal (of which Dr Clarke was the founder) has been marketing and selling supplements for children around the world under the trade marks 'CHILDLIFE' and 'CHILDLIFE ESSENTIALS', as well as the following figurative mark:

("the heart logo")

53. The applicants claim that the husband (Lu Qidong) of the sole director and shareholder of TNSG (Guo Zhijuan) approached them in 2009 with an interest in marketing 'CHILDLIFE' products in China. A distribution agreement was entered into in 2010. The commercial relationship continued until 23 March 2021. The applicants claim that TNSG's mark is the Chinese version of 'CHILDLIFE', used in China since 2012 and affixed to the packaging of all 'CHILDLIFE' products sold in China, Hong Kong and Macau. The applicants argue that, at the relevant date, TNSG (through its affiliates) was fully aware of their use and ownership of the mark and was their

[14] *Hasbro* (cited above)

exclusive distributor of goods sold under it in China, Hong Kong and Macau. Absent an agreement between the parties, they contend that a distributor making an application to register a mark owned by its commercial partner is not acceptable business practice.

54. Having reason to believe that the applicants may wish to use the mark in the UK in the future, they argue that TNSG made the application in its own name, without their consent, to:

(i) Misappropriate the foreign goodwill accrued in the mark;

(ii) Disrupt their business by blocking entry to the UK market;

(iii) Extract payment or other consideration from them;

(iv) Damage their reputation and potential UK distribution network;

(v) Gain an unfair advantage over them and their potential UK distributors; and/or

(vi) Establish itself as their authorised or exclusive UK distributor.

Was that an objective for the purposes of which the contested application could not be properly filed?

55. If so proven, the above represent objectives for which TNSG's mark could not be properly filed. To my mind, if successful, this would apply to all the goods for which TNSG's mark stands registered. Whilst it is possible to apply to register a trade mark for certain goods in bad faith, yet apply to register the same mark for others in good faith, it seems very likely that TNSG's motives for making the application were probably the same for all the goods in class 5. They are all similar to the goods for which the applicants say their marks have been used, i.e. nutritional and dietary supplements for children.

Was it established that the contested application was filed in pursuit of that objective?

The evidence

56. Mr Harty gives evidence that Dr Clarke started formulating nutritional and dietary supplements for children in 1996, developing the first complete line of such goods under the brands 'CHILDLIFE' and 'CHILDLIFE ESSENTIALS'. Biozeal was founded in 1997 with the objective of bringing those goods to market around the world and, trading as 'CHILDLIFE ESSENTIALS', has at all material times been overseeing the production and distribution of the goods. 'CHILDLIFE' products received various awards between 2008 and the relevant date, such as, for example, the "ChildLife First Defense" product being awarded 'Best of Supplements' by betternutrition.com in 2018.[15]

57. Biozeal is said to operate an official website (childlifenutrition.com) and various social media accounts to promote the 'CHILDLIFE' brand and products. Printouts of the website are in evidence; the word 'ChildLife' in normal font and the mark shown below can be seen throughout in connection with multivitamins, but the printouts are not dated.[16]

("the composite mark")

58. This mark (or highly similar variants), as well as the words 'ChildLife' and 'ChildLife Essentials' in normal font, can be seen in printouts from Facebook, Twitter and TikTok.[17] The printouts appear to have been obtained after the relevant date, though I note that the Twitter account was created in 2018.

[15] Exhibit BH3
[16] Exhibit BH4
[17] Exhibit BH4

59. According to Mr Harty, 'CHILDLIFE' products are sold in pharmacies and supermarkets in over 25 countries, including the UK, China and Hong Kong. He also says that Biozeal has appointed authorised suppliers/distributors to supply and market 'CHILDLIFE' products around the world.

60. Mr Harty provides a table of trade marks owned by Dr Clarke, as well as printouts from various trade mark registers and registration certificates relating to the same.[18] I note that they all comprise or contain the words 'CHILDLIFE' or 'CHILDLIFE ESSENTIALLS', the heart logo, the composite mark, or highly similar. The jurisdictions include, *inter alia*, Australia, China, the EU, Macau, and the UK. The marks are all registered in classes 5, 30 and/or 35. Many of the applications were filed before the relevant date.

61. Mr Harty says that Biozeal sells 'CHILDLIFE' products in the UK, in pharmacies and supermarkets, as well as via dedicated e-commerce websites, including Amazon UK. Mr Harty has provided copies of invoices evidencing sales through its UK distributor, OrganAx Ltd.[19] However, they are from 2020 and 2021, i.e. after the relevant date.

62. Mr Harty says that 'CHILDLIFE' products are sometimes marketed in different jurisdictions with a local version and/or translation of the brand. In Chinese-speaking markets, Mr Harty says that '童年时光' ("the Chinese mark") has been adopted; this mark is said to have been used in China since 2012.

63. Mr Harty says that 'CHILDLIFE' products were first introduced to distributors in Hong Kong and China in or around 2002. In 2004, 2005 and 2007, GDS Group Inc ("GDS") – the overseer of worldwide distribution of 'CHILDLIFE' products at the time – participated in the Natural Products Expo Asia, Hong Kong. Printouts of directories, floorplans and photographs for those in 2005 and 2007 have been provided; GDS is listed/shown in each, as is the word 'CHILDLIFE' and what appear to be products

[18] Exhibits BH5, BH5A, BH6, BH7 and BH8
[19] Exhibit BH8A

bearing the heart logo.[20] In 2006, GDS also participated in the International Healthcare Fair, China. A copy of the floorplan and photographs are in evidence, in which GDS, the heart logo and the composite mark can be seen.[21]

64. Between 2002 and 2006, Mr Harty says that numerous enquiries were received from China and Hong Kong about being appointed distributor of 'CHILDLIFE' products. In 2005, a company called Green Century was appointed exclusive distributor in China. Photographs of products adorned with the word 'CHILDLIFE' and the composite mark can be seen in photographs, purportedly within a Green Century store in 2005.[22] Mr Harty says that the commercial relationship with Green Century ended in 2008. In 2006, a company called Global Wellness Logistics was appointed exclusive distributor in Hong Kong. Whilst this relationship was also terminated (date not specified), Mr Harty says that 'CHILDLIFE' products were available in that territory through direct imports from 2007.

65. Mr Harty says that TNSG Biotech was incorporated in China on 26 March 2010. Its Chinese company name contains the Chinese mark: "南京童年时光生物技术有限公司". Documents from the Chinese company register confirm the date of incorporation and show that Mr Lu and Guo Guilin are both shareholders, the former being the company's supervisor and the latter having the title of Executive Director and General Manager.[23] Mr Harty then explains that TNSG was incorporated in the UK on 3 September 2012. Printouts from Companies House confirm the date of incorporation and show that Ms Guo is TNSG's sole director and shareholder.[24] The aforementioned documents from the Chinese register show that Ms Guo was a shareholder of TNSG Biotech until May 2014, after which her shares were transferred to Mr Guo. Mr Harty says that Ms Guo is Mr Guo's daughter and Mr Lu's wife.

66. Mr Lu is said to have first approached the applicants in August 2009, before TNSG Biotech and TNSG were incorporated. A copy of an email sent on 25 August 2009

[20] Exhibit BH9
[21] Exhibit BH10
[22] Exhibit BH11
[23] Exhibit BH13
[24] Exhibit BH14

from Mr Lu to mailroom@childlife.net is in evidence.[25] Mr Lu introduces himself as the marketing manager of a company called High Hope, described as a leading import and export company in China. In the email, Mr Lu says that High Hope "[…] choose and import leading children products including omega-3, chewable multi-vitamins tablet from Australia and America, and then distribute them to chain drug stores, supermarket, etc. […] we are interested in your child life products include multi vitamins, calcium-mag-zinc, vitamin c, etc". By that time, Mr Harty says that 'CHILDLIFE' products were widely available in China and trade mark protection had already been obtained.

67. Mr Lu's email was passed to GDS. Its Operations Manager, Wen Lin, responded to Mr Lu on 8 December 2009, inviting him to submit for consideration, *inter alia*, a marketing plan for 'CHILDLIFE' products in China and purchasing targets. A chain of resulting correspondence between Mr Lu and Ms Wen has been provided.[26] On 7 January 2010 and 11 January 2010, Mr Lu stated High Hope's desire to become exclusive distributor in China and made enquiries as to what the conditions of such an arrangement were. On 29 January 2010, Mr Lu advised that a subsidiary of High Hope, Asambly Chemicals Co. Ltd ("Asambly") would be operating the 'CHILDLIFE' project in China. Arrangements were made within the email correspondence for GDS's CEO, Christof Ballin, to visit High Hope in Nanjing in February 2010. The General Manager of Asambly, Cheng Peng, was due to attend the meeting with Mr Ballin.

68. The meeting took place, as arranged, on 2 February 2010. Mr Lu is said to have presented High Hope's marketing plan for 'CHILDLIFE' products. On 7 February 2010, Mr Lu emailed Mr Ballin and Ms Wen with a revised marketing plan.[27] The word 'CHILDLIFE', the heart logo and the composite mark can be seen throughout the presentation. The plan was for Mr Lu to be the Project Leader on the 'CHILDLIFE' team, whilst Ms Guo is also listed.

[25] Exhibit BH15
[26] Exhibit BH16
[27] Exhibit BH17

69. On 1 April 2010, GDS and Asambly entered into an exclusive distributor agreement with respect to 'CHILDLIFE' products in China.[28] The agreement was signed by Messrs Ballin and Cheng on behalf of GDS and Asambly, respectively. Under the agreement, Asambly was permitted to use 'CHILDLIFE' intellectual property only in connection with advertising, promotion, sale and distribution of the goods. Intellectual property was defined in the agreement as including, *inter alia*, company trade marks and any translations or other non-English versions thereof. On 11 April 2011, the agreement was amended to reflect Asambly's appointment as exclusive distributor of 'CHILDLIFE' products in Hong Kong and Macau.[29]

70. Mr Harty explains that, within a month of TNSG Biotech being incorporated and less than three weeks after the 2010 agreement had been entered into, TNSG Biotech applied to register 'CHILDLIFE' marks in China without authority to do so. Printouts from the CNIPA show that applications were filed on 20 April 2010 by TNSG Biotech for the Chinese mark (classes 5 and 30) and for the word 'childlife' in a stylised typeface (class 30).[30] Mr Harty says that the applicants were not aware of the applications at the time.

71. On 19 September 2010, Mr Lu emailed Mr Ballin seeking Dr Clarke's signature on an authorisation document regarding Asambly's use of 'CHILDLIFE' in China; Mr Ballin's response was that 'CHILDLIFE' was already a registered trade mark in China and that the distributor agreement already made it clear that Asambly could use such intellectual property.[31] Nevertheless, two authorisations were subsequently provided.[32] The first was dated 5 October 2010 and was signed by Mr Ballin, whilst the second was dated 1 November 2010 and was signed by Dr Clarke; they both confirmed that Asambly had been authorised to use 'CHILDLIFE' intellectual property (including trade marks) in the same terms expressed in the agreement. The second also stated that Dr Clarke was "the registered owner of the Childlife trademark on a global basis as well as in China".

[28] Exhibit BH18
[29] Exhibit BH19
[30] Exhibit BH20
[31] Exhibit BH21
[32] Exhibit BH22

72. Mr Harty says that, whilst GDS was not informed of it until May 2011, TNSG Biotech was appointed as a sub-distributor of Asambly sometime in 2010. He provides copies of three emails sent by Mr Lu on 10 May 2011.[33] Mr Lu states as follows in the first email, which I reproduce as originally written:

> "[…] Recently we found a lot of personals and small companies selling fake or smuggled childlife products on www.taobao.com […], they have seriously disturbed our the market of our agent Nanjing TNSG Biotech Co. Ltd which is our sole agent in Jiangsu province, Shanghai, Zhejiang province […], at the end of 2010, Nanjing TNSG Biotech Co. Ltd has opened "Childlife flagship store" on www.taobao.com […].
>
> […]
>
> I have also attached two authorization models for Dr. Murray […] to authorize and only authorize Nanjing TNSG Biotech Co. Ltd to open "Childlife Flagship Store" on Taobao […] please can you ask Dr. Murray to sign the authorization as soon as possible?"

73. The draft authorisation statements were attached to his third email. Mr Harty also provides a document issued by Asambly, dated 15 August 2011, which certified that TNSG Biotech was the sole agent of 'CHILDLIFE' products in Jiangsu, Shanghai, Zhejiang, Anhui and Taobao (worldwide) and that TNSG Biotech "has the rights to use the CHILDLIFE mark and the related intellectual property".[34]

74. On 28 August 2011, Mr Lu notified Mr Ballin that he was leaving Asambly to work for TNSG Biotech.[35] In his email, Mr Lu stated that the TNSG Biotech team (which included Ms Guo) had wanted to be the Chinese distributor of 'CHILDLIFE' since 2009. Mr Harty points out that this was before the incorporation of TNSG Biotech. Further emails from Mr Lu in September 2011 and November 2011 are in evidence, in which

[33] Exhibits BH24 and BH25
[34] Exhibit BH26
[35] Exhibit BH27

he made several requests for signed authorisation documents in respect of use by TNSG Biotech.[36]

75. Whilst TNSG Biotech continued to be a sub-distributor of Asambly, it was Mr Lu who continued contact with GDS in early 2012. In an email dated 10 April 2012, Mr Lu described how TNSG Biotech had talked to Asambly about seizing an opportunity in the market to no avail; he said how regrettable it was for 'CHILDLIFE' to miss so many opportunities.[37] The distribution agreement with Asambly was terminated by GSD on 1 June 2012.[38] The official reason given in the notice was Asambly being unable to fulfil its purchase volume commitments for 2012. Mr Harty says that this was part of the reason, but that Mr Lu's persuasion behind the scenes also played a key part.

76. TNSG Biotech immediately took over the distribution of 'CHILDLIFE' products, the first purchase order being made on 5 June 2012.[39] Emails between Mr Lu and Ms Wen regarding the signing of a final contract between the parties were exchanged on 13 June 2012 and 14 June 2012.[40] Whilst Mr Harty says he was unable to locate a copy of the 2012 distributor agreement, he provides one entered into by Biozeal and TNSG Biotech for a period of five years from 1 February 2013.[41] The agreement had the same definitions and terms as that entered into in 2010. Mr Lu and Dr Clarke were signatories to the agreement.

77. Mr Harty says that TNSG Biotech applied to register the Chinese mark in Hong Kong in classes 3 and 35 on 11 September 2013 and 20 December 2013. The applicants purportedly had no knowledge of this.

78. On 1 January 2018, Biozeal and TNSG Biotech entered into two new distribution agreements; one to cover China and the other to cover Hong Kong and Macau.[42] Again, Mr Lu and Dr Clarke were signatories to the agreements. The agreements were

[36] Exhibits BH28 and BH29
[37] Exhibit BH30
[38] Exhibit BH31
[39] Exhibit BH33
[40] Exhibit BH32
[41] Exhibit BH34
[42] Exhibit BH35

intended to be in force until 31 December 2022.[43] The following terms were present in both agreements:

> "I. **DEFINITIONS**
>
> (a) **"Affiliate"** means any person or entity which, directly or indirectly, controls, is controlled by or is under common control with one party to this Agreement. As used in this Agreement, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the policies and management of such person or entity, whether by the ownership of stock, by ownership of voting security, by contract or by any other method.
>
> […]
>
> (c) **"Intellectual Property"** shall include, but is not limited to, all CHILDLIFE […] trademarks […] and any translations thereof or other versions of same in languages other than English.
>
> […]
>
> V. **OBLIGATIONS OF DISTRIBUTOR**
>
> […]
>
> (c) **Permitted Use of Intellectual Property.** DISTRIBUTOR may display and/or use the Intellectual Property solely in connection with the advertising, promotion, sale and distribution of the Products. DISTRIBUTOR's use of the Intellectual Property must be in strict conformity with all applicable laws and regulations and only within the class and category of the Products. DISTRIBUTOR and/or its Affiliates shall not register or file for registration of any

[43] Although the initial term of the Hong Kong and Macau agreement was six months, with the agreement to be reviewed and extended to 31 December 2019 "if all ok", an amendment to the agreement on 1 February 2019 extended the supply period to 31 December 2022.

mark or slogan of the Products within any class or category without prior written approval from CHILDLIFE."

79. Mr Harty says that Asambly and TNSG Biotech were each the exclusive distributor of 'CHILDLIFE' products in China, Hong Kong and Macau when they made purchase orders. He provides copies of invoices issued by GDS to Asambly and by Biozeal to TNSG Biotech dated between 24 August 2011 and 19 June 2014.[44] They show orders of multivitamins and the like in quantities largely in the thousands. Mr Harty adds that TNSG Biotech operated and maintained a website at childlife.cn to provide information on 'CHILDLIFE' products to Chinese consumers. Printouts from the website have been provided.[45] As they are dated 12 April 2021, it is not possible to ascertain how the website looked at any time before the relevant date. Mr Harty has, however, exhibited information from Whois, which at least demonstrates that TNSG Biotech registered the domain on 31 August 2011 and that it is currently owned by Dr Clarke.[46] This transfer is said to have resulted from settlement of a domain name dispute in China.

80. Mr Harty says that, having been adopted by the applicants as the local version and/or translation of 'CHILDLIFE' for Chinese-speaking markets, the Chinese mark was affixed to the packaging of all 'CHILDLIFE' products sold in China, Hong Kong and Macau by TNSG Biotech. Mr Harty adds that TNSG Biotech has expressly acknowledged, stated and represented that the Chinese mark was a brand created by Dr Clarke in 2000 as the Chinese translation of 'CHILDLIFE'. In support of these points, Mr Harty provides the following:

(i) Printouts from JD Worldwide and various e-commerce stores on tmall.hk, dated 8 June 2021 and 6 August 2021, showing 'CHILDLIFE' children's supplements for sale (prices given in Chinese Yuan).[47] The Chinese mark and the word 'CHILDLIFE' are used in conjunction with one another. For instance, "童年时光Childlife" and "Childlife/童年时光" can be seen in the product descriptions and brand names. The websites indicate that the goods are

[44] Exhibit BH35A
[45] Exhibit BH36
[46] Exhibit BH36A
[47] Exhibit BH37

imported from the US. Dr Clarke is pictured and described as the creator/founder of '童年时光'.

(ii) A printout from Baidu dated 13 April 2021.[48] The Chinese name of 'childlife' is given as '童年时光' and its founder is listed as Dr Clarke. Mr Harty says that Baidu is the largest Chinese-language search engine in the world.

(iii) Printouts from childlife.cn dated 13 May 2013, 29 August 2016 and 29 October 2016, obtained via the Wayback Machine.[49] Mr Harty says this was TNSG Biotech's own website. The Chinese mark and the word 'CHILDLIFE' are used in conjunction with one another. For example, "CHILDLIFE童年时光" is in the title of the brand introduction section. Dr Clarke is described as the founder of the brand. An article dated 15 August 2016 from the news section says that '童年时光' is the Chinese translation of the American brand 'CHILDLIFE'. One of the brand-related questions is whether the products are genuine '童年时光' products imported from the US. The answer states that they are the exclusive distributor of 'CHILDLIFE' products in China. Another question is what type of brand "Childlife童年时光" is. The answer states that it was developed by Dr Clarke.

(iv) On 28 September 2012, Dr Clarke signed a statement to confirm that TNSG Biotech was the only authorised distributor of 'CHILDLIFE' products in China.[50] In the Chinese part of the statement, the brand is referred to as "CHILDLIFE童年时光". Mr Harty says that this statement was drafted by Mr Lu and signed upon the request of TNSG Biotech. In this connection, Mr Harty provides email correspondence between Messrs Lu and Ballin, dated between 8 September 2012 and 24 September 2012, in which the issue of counterfeit 'CHILDLIFE'

[48] Exhibit BH38
[49] Exhibits BH39-BH41
[50] Exhibit BH42

products was discussed; Mr Lu suggested writing such a statement to combat the same.[51]

(v) A similar statement was signed by Dr Clarke in 2017.[52] Again, Mr Harty says that the statement was drafted by Mr Lu. The statement explicitly says that business cooperation with TNSG Biotech involves the sale of 'CHILDLIFE' branded products with the Chinese mark. It also says that all 'CHILDLIFE' products sold within China should bear the same.

(vi) Printouts from the Nature's Story store on tmall.hk, dated 4 December 2021.[53] Mr Harty says that this company is associated with TNSG Biotech. The website says that Dr Clarke is the creator of the Chinese mark. It also lists "Childlife/童年时光" as the brand.

(vii) Printouts from the Pelican Hills store on JD.hk, dated 6 March 2021.[54] Mr Harty says that this is the Hong Kong version of JD.com, one of the largest online retailers in China. He says that Pelican Hills is also associated with TNSG Biotech. Again, the website credits Dr Clarke with creating the Chinese mark.

(viii) Photographs of 'CHILDLIFE' products in stores said to be in Hong Kong.[55] The Chinese mark can be seen on labels in conjunction with the word 'CHILDLIFE'. The photographs are not dated, though labels adorned with the dates 7 July 2020 and 18 October 2021 can be seen in two.

(ix) A copy of an advertisement placed in the Hong Kong edition of *The Metro*.[56] It is dated 4 August 2017. The Chinese mark can be seen next to the composite mark.

[51] Exhibit BH43
[52] Exhibit BH23
[53] Exhibit BH44
[54] Exhibit BH46
[55] Exhibit BH47
[56] Exhibit BH48

81. Mr Harty says that the applicants' professional representatives conducted a search for "ChildLife" in the National Library of China to identify coverage in the Chinese media. A copy of the search report has been provided.[57] The search period was from 1 January 2000 to 18 April 2021. I note that several articles published before the relevant date used 'CHILDLIFE' and/or the Chinese mark to refer to the applicants' products. For example, the Chinese mark appeared in *Wuhan Evening News* and *China News Service* on 11 January 2019 and 9 July 2019, respectively, in relation to products on Amazon. Moreover, "Childlife童年时光" was referenced in *Qingdao Evening News* and *Information Times* on 26 August 2016 and 20 June 2017, respectively. I also note that the brand was referred to as "America's infant healthcare giant 童年时光 […]" in *Wuhan Morning Post* in an article dated 25 December 2015.

82. Mr Harty clarifies that 'CHILDLIFE' products marketed in China did not bear any Chinese mark prior to 2012. He says that the idea of having a Chinese mark affixed to product packaging was first considered in or around 2011, when Mr Cheng suggested it to Mr Ballin. In an email on 17 June 2011, Mr Cheng proposed that "赛儿乐" be used in China on the basis that many doctors were purportedly having difficulty pronouncing 'CHILDLIFE'.[58] Mr Cheng acknowledged that "all the intellectual properties relating to ChildLife belong to your side", as per the agreement between the parties. On 22 June 2011, Messrs Ballin and Cheng signed an agreement which confirmed that Asambly would register "赛儿乐" as a trade mark but that ownership thereof remained with the applicants.[59] Mr Harty says that the commercial relationship with Asambly did not last long, being ultimately terminated on 1 June 2012. As such, he says that use of the "赛儿乐" mark would have been very limited. Notwithstanding Mr Lu's prior protestations about printing Chinese characters on product packaging,[60] Mr Harty states that the Chinese mark was ultimately adopted by the applicants.

---

[57] Exhibit BH49
[58] Exhibit BH50
[59] Exhibit BH51
[60] On 17 January 2012, Mr Lu emailed Mr Ballin to say that he thought that printing a Chinese mark on product packaging was a bad idea. His feeling was that it would undermine consumer confidence in the products being imported. See Exhibit BH52.

83. According to Mr Harty, the 2018 agreements were eventually terminated upon discovery of what he describes as various serious breaches by TNSG Biotech. Letters were sent to TNSG Biotech on 23 March 2021 by the applicants' representatives to inform them of the same.[61] One of the breaches described in the letters was that TNSG Biotech and/or its affiliates had filed to register multiple 'CHILDLIFE' related marks in various jurisdictions without approval (contrary to section V(c) of the agreements). Termination was effective from the date of the letters.

84. Mr Harty says that, despite the termination of the agreements, TNSG Biotech and its associated companies, including TNSG, were found to have continued making unauthorised use of and applications to register the 'CHILDLIFE' marks and the Chinese mark. He provides copies of multiple decisions from courts in, *inter alia*, the US, Hong Kong and China in which issues surrounding TNSG Biotech and the Chinese mark were determined.[62] Ms Wang and Ms Wilkinson-Duffy also provided copies of decisions from China and the US, respectively.[63] I confirm that I have read these decisions, along with the evidence in response from Messrs Zhanke and Tianqi. However, for the purposes of the present decision, it is not necessary for me to comment on them.

Mr Harty's standing

85. At the hearing, Mr Hughes criticised Mr Harty's standing as the applicants' main witness. He submitted that many of the key issues discussed in Mr Harty's evidence came many years before he was involved with the company. In this connection, the applicants were criticised for not calling a witness who was around at the relevant time. I note that this issue was not raised during the evidence rounds. Therefore, notwithstanding the numerous rounds of evidence observed in these proceedings, the applicants have not had an opportunity to respond to it.

86. In *Tui UK Ltd v Griffiths* [2023] UKSC 48, the Supreme Court endorsed the general rule set out in *Phipson on Evidence* that "[i]n general a party is required to challenge

[61] Exhibits BH57 and BH58
[62] Exhibits BH59-BH61
[63] Exhibits SW1, SW2, RWD1

in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases […]". The basic tenants of the Supreme Court's judgement are to be applied to Tribunal proceedings; the rule set out in *Phipson on Evidence* is necessary to ensure fairness. The way it is applied must, of course, take account of the exceptions and alternatives to cross-examination set out in the Supreme Court's judgement; they must also be adapted to recognise the specific procedural rules of the Tribunal, which are not governed by the Civil Procedure Rules. Instead, they are set out in the Rules, which envisage a primarily written procedure for giving evidence.[64] As Mr Richard Arnold QC (as he then was), sitting as the Appointed Person, explained in *BRUTT Trade Marks* [2007] RPC 19, this has an important consequence, namely that:

> "[…] in proceedings such as these evidence is served sequentially and that giving a witness a proper opportunity to deal with a point will not necessarily require cross-examination."

87. The rules of evidence plainly cannot preclude any criticism of a witness' evidence made for the first time at a hearing. For example, there is nothing unfair about highlighting that a party has omitted to file customer invoices to support its case on genuine use. However, it is my view that the issue raised by Mr Hughes ought to have been raised at a much earlier point in these proceedings, and for me to give weight to the criticism is likely to result in procedural unfairness. In any event, Mr Harty confirms that he is duly authorised to give evidence on behalf of Biozeal, his employer since 2017. He does not say that all of his evidence comes from his personal knowledge. Rather, he states that the evidence comes from either his own personal knowledge or from his full and free access to the applicants' records. Therefore, even in respect of matters preceding Mr Harty's involvement with the company, I have no reason to doubt the truthfulness or accuracy of his evidence.

[64] See rule 64(3) of the Rules.

Analysis

88. The evidence establishes that, at the relevant date, TNSG Biotech was the exclusive distributor of 'CHILDLIFE' products in China, Hong Kong and Macau, through agreements which came into force on 1 January 2018. TNSG Biotech had also been the applicants' exclusive distributor for at least the previous five years. Under the terms of the 2018 agreements, TNSG Biotech was permitted to use the 'CHILDLIFE' intellectual property in connection with the promotion, sale and distribution of the products. However, it was not permitted to register, or file applications to register, any marks relating to 'CHILDLIFE' products without prior approval. Under the terms of the agreements, the intellectual property included all 'CHILDLIFE' marks. Mr Harty's evidence shows that, at the relevant date, there were multiple (English-language) 'CHILDLIFE' trade mark registrations covering, *inter alia*, China. Crucially, the term of the agreements also included "[…] any translations thereof of other versions of [the] same in languages other than English".

89. On the face of it, it is my view that this would have included the Chinese mark. At the hearing, Mr Hughes contended that the applicants have failed to demonstrate ownership of the Chinese mark. This is said to be due to a lack of information about the applicants' creation of the mark, the evidence pointing to the adoption of another Chinese mark, and the applicants' acceptance that the Chinese mark does not literally mean 'CHILDLIFE'. I agree that the evidence could have been more specific in terms of how the Chinese mark was created and/or adopted, but that does not mean that it could not have been used as an alternative to 'CHILDLIFE'. In fact, the evidence shows that it was. The printouts from TNSG Biotech's own website from before the relevant date show that the English and Chinese marks were used together or interchangeably. The English and Chinese marks were also presented together in statements drafted by Mr Lu in 2012 and 2017. In addition, the Chinese mark was presented alongside the composite mark in *The Metro* (Hong Kong) in August 2017. There were also instances of the Chinese mark being used in other publications before the relevant date to refer to 'CHILDLIFE' products, sometimes in combination with the English mark. On the balance of the evidence, I find that the Chinese mark had been used and referred to as the Chinese version of 'CHILDLIFE' by the relevant date. This

is not undermined by any intention in June 2011 for the "赛儿乐" mark to be used as an alternate 'CHILDLIFE' mark, and it is Mr Harty's evidence that use of that mark was actually very limited before the Chinese mark was adopted.

90. I also consider that there was no attempt by TNSG to controvert Mr Harty's narrative evidence that the Chinese mark was the Chinese version of 'CHILDLIFE' at the appropriate time. Its only evidential response to Mr Harty's evidence came in the form of a translation of the Chinese mark, and documents from IP Australia concerning the same, all provided by Mr Coulson. The translation states that the Chinese mark has a number of meanings, namely 'CHILDHOOD', 'CHILDDAYS', 'CHILDHOUR', 'CHILDMOMENTS', 'KIDHOUR', 'KIDHOOD' and 'KIDMOMENTS'.[65] The extract from the Australian trade mark register shows that Dr Clarke's application for the Chinese mark in that territory included the following 'endorsement':[66]

> "The applicant has advised that the CHINESE characters appearing in the trade mark may be transliterated as TONG NIAN SHI GUANG and translated into English literally as "Child; year; time; light" and together meaning "Childhood time""

91. In a decision of IP Australia dated 14 December 2023, concerning opposition proceedings between the parties over the Chinese mark, the Hearing Officer reproduced this endorsement.[67] Whilst Mr Coulson's evidence on this point is noted, I do not consider it to be determinative. Even if the Chinese mark does not literally translate into English as 'CHILDLIFE', the applicants' case under this ground is not predicated on it being a literal translation. Whether or not the Chinese mark literally and specifically translates into 'CHILDLIFE', that does not undermine its use as an alternate version of the brand for Chinese-speaking markets.

92. At the hearing, Mr Hughes also submitted that the applicants' case that they are the rightful owners of the Chinese mark is undermined by TNSG Biotech's "long use"

[65] Exhibit NC2
[66] Exhibit NC3
[67] Exhibit NC4

of it without objection. Mr Hughes submitted that the applicants had for many years been happily dealing with a separate organisation which used the Chinese mark as part of its company name (as highlighted in Mr Harty's evidence). However, this issue was not raised in the evidence rounds, meaning that the applicants have not had a proper opportunity to respond to it. Whether the applicants were fully aware of TNSG Biotech's use of the mark in its company name and whether they were content with that are matters which the applicants could have provided evidence in response to. As things stand, it would not, in my view, be appropriate to make inferences in TNSG's favour that the applicants had no objections to TNSG Biotech's use of the Chinese mark or, if there were no objections, the reasons for that. In any event, I do not agree with TNSG that the inclusion of the Chinese mark in TNSG Biotech's Chinese company name means that the applicants cannot claim to be the rightful owner of it as a trade mark. Firstly, use of a company name is not the same as owning a trade mark. Moreover, it seems to me that a distributor could reasonably use another organisation's brand in its company name to indicate (i) the products they are responsible for distributing and/or (ii) the commercial relationship between the parties. As Ms Wilkinson-Duffy said at the hearing, the applicants would have known about TNSG Biotech's use of the Chinese mark as the Chinese alternative of 'CHILDLIFE', even encouraged it, since distributing 'CHILDLIFE' goods was what the agreement between the applicants and TNSG Biotech was for.

93. A related point raised by Mr Hughes relates to dates. He highlighted Mr Harty's evidence that the applicants started using the mark in 2012, around two years after TNSG Biotech registered its company name and applied for a trade mark in China. It was intimated that this also undermines the applicants' case. The issue with this line of argument is that the evidence demonstrates that Mr Lu (more on his connection with TNSG below) had already approached the applicants about distributing 'CHILDLIFE' products in China in August 2009. Not only have the applicants not been given an opportunity to respond to the point Mr Hughes made, but there is also no evidence from TNSG (or TNSG Biotech) regarding its rationale for adopting a Chinese company name which included the Chinese mark. The reason for this could have been precisely because it was the Chinese version of 'CHILDLIFE'. As Ms Wilkinson-Duffy highlighted at the hearing, TNSG Biotech was incorporated a matter of days before the distributorship agreement was signed between GDS and Asambly (Mr Lu's

employer at the time), after several months of negotiations. I also note from the evidence that an application for the English-language trade mark 'childlife' was filed by TNSG Biotech in China on exactly the same day as that for the Chinese mark. In the circumstances, it seems extremely unlikely that TNSG Biotech's application to register the Chinese mark in China was independent from its involvement with the applicants and its distribution of 'CHILDLIFE' products.

94. In consideration of all the above, I find that TNSG Biotech knew, or reasonably ought to have known, that the Chinese mark was the Chinese version of 'CHILDLIFE'. That is not the end of the matter, since TNSG Biotech is not the proprietor of the mark at issue.

95. I note that the contractual obligations surrounding the use of 'CHILDLIFE' intellectual property extended to "affiliates" of TNSG Biotech, defined under the terms of the 2018 agreements as:

> "[…] any person or entity which, directly or indirectly, controls, is controlled by or is under common control with one party to this Agreement. As used in this Agreement, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of the policies and management of such person or entity, whether by the ownership of stock, by ownership of voting security, by contract or by any other method".

96. The evidence establishes that Mr Guo and Mr Lu were both shareholders of TNSG Biotech, the latter also being its supervisor. Ms Guo is TNSG's sole director and shareholder, having been a shareholder of TNSG Biotech until May 2014. Mr Harty's unchallenged narrative evidence is that Ms Guo is Mr Guo's daughter and Mr Lu's wife. In this context, there is a clear connection between TNSG and TNSG Biotech. To my mind, it is arguable whether TNSG can be properly considered an affiliate under the terms of the agreements in force at the relevant date. It appears that Ms Guo was a shareholder of both companies at the same time when the 2013 agreement was entered into, but she ceased to be a shareholder of TNSG Biotech before the 2018 agreements were entered into and around five years before the relevant date. However, in any event, in *Joseph Yu v Liaoning Light Industrial Products Import and*

Export Corporation, BL O/013/05, Professor Ruth Annand, sitting as the Appointed Person, held that:

> "22. […] A claim of bad faith is not avoided by making an application in the name of an entity that is owned or otherwise controlled by the person behind the application."

97. Moreover, in *John Williams and Barbara Williams v Canaries Seaschool SLU,* BL O/074/10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, held that:

> "51. It seems to have been a matter of administrative convenience that the opposed application for registration was filed in the name of Andrew Williams' partner, Janet Wills, before being assigned to the Applicant. No argument to the contrary has been raised on its behalf. On the basis of the evidence on file, the knowledge, intentions and motives of Andrew Williams can properly be attributed to the Applicant. […]"

98. Given the closeness of the connection between those with significant (or total) control of TNSG and TNSG Biotech, I find it implausible that the former, through its sole director and shareholder Ms Guo, would not have been aware of the latter's contractual obligations, that the 'CHILDLIFE' marks belonged to the applicants, or that the Chinese mark was the Chinese version of 'CHILDLIFE'. This is particularly the case, given that Ms Guo was herself involved with TNSG Biotech until May 2014. Her involvement with the company would have spanned Asambly first entering into the distributor agreement with GDS; the 'CHILDLIFE' marks being applied for by TNSG Biotech in China; TNSG Biotech being appointed a sub-distributor of Asambly; TNSG Biotech taking over from Asambly as distributor in China; and TNSG, itself, being incorporated in the UK. Ms Guo was also listed as being on the prospective (at that time) "Childlife Team" in the marketing plan presented to GDS by Mr Lu. On the balance of probabilities, it is my view that the knowledge, intentions and motives of TNSG Biotech can properly be attributed to TNSG.

99. I acknowledge that the commercial relationship between the applicants and TNSG Biotech was based around an agreement to distribute 'CHILDLIFE' goods in specific

territories, namely China, Hong Kong and Macau. I also accept that the evidence regarding the distribution of 'CHILDLIFE' products in the UK by OrganAx Ltd is from after the relevant date. However, I note that Dr Clarke owned several UK registrations concerning 'CHILDLIFE' before the relevant date. Additionally, Mr Harty's uncontroverted evidence is that 'CHILDLIFE' products have been sold in the UK through various channels. Even without there being any solid documentary evidence of actual sales into the UK before the relevant date, it seems to me that TNSG (through TNSG Biotech) would have, or ought to have been, aware of the applicants' potential wish as the global brand owner to expand into other territories, including the UK. TNSG Biotech was, after all, the exclusive distributor in only three specific territories.

100. A trade mark is a monopoly right. It is not in dispute that TNSG's mark is identical (or effectively so) to the Chinese mark. The effect of TNSG having applied for its mark was to exclude all others, including the applicants (for whom TNSG Biotech was acting as a distributor) from being able to use it, without first obtaining permission or paying a licence fee. On the face of it, it is my view that, objectively, this is not consistent with honest and reasonable business practices. Based on all the above, I find that the applicants have raised a *prima facie* presumption of a lack of good faith.

101. Despite being best placed to explain its own intentions, TNSG has elected not to lead its own evidential case or to provide any explanation of its objectives in making the application to register its mark. There is no rebuttal of the circumstances as put forward by the applicants. There are multiple authorities which highlight the importance of doing so.[68] For instance, in *Rui Qu (Shanghai) Enterprise Management Consulting Company Limited v Accessible Labs Ltd*, BL O/0534/25, Mr Daniel Alexander KC, sitting as the Appointed Person, explained that:

> "47. […] the case law from the Court of Appeal prior to *SkyKick* suggests that where, in principle, evidence from those with knowledge of intention is available, it is reasonable to expect it to be adduced to rebut a prima facie case

[68] See, for example, *Metro-Goldwyn-Mayer Studios Inc v Meteoric Games Ltd*, BL O/791/21, *Maya Appliances Pvt. Ltd v Prapaharan Sivaratnam*, BL O/0052/25, *Rui Qu (Shanghai) Enterprise Management Consulting Company Limited v Accessible Labs Ltd*, BL O/0534/25, *SkyKick* (cited above), and *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262.

of bad faith. That proposition is supported by *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where Arnold LJ said at [180] of one of the grounds of appeal (namely that it was not realistic for the judge to expect that either witness testimony or documentary evidence would be available to explain Lidl's intentions) that despite the passage of time, the applicants for registration were best placed to explain their intentions. The court expected a proper explanation.

48. In the light of these authorities, where there is evidence from which it is proper to infer that an application for registration has been made in bad faith (on the basis that it was not applied for to protect one or more of the legitimate functions of a trade mark) an applicant can reasonably be expected to provide a sufficiently coherent explanation for the application specifically in the UK including as to its scope. An applicant may be able to justify the application (including its scope) on the basis of credible evidence as to its purposes in making it, for example by reference to the width of the underlying business, actual or reasonably contemplated, which the trade mark is intended to protect. If no adequate or sufficiently credible explanation is provided or one which justifies the UK application, there may be a proper basis for a finding of bad faith in whole or in part.

[…]

"72. Cases in which there are prima facie grounds for considering that there has been bad faith and in which no evidence is provided by the applicant to rebut that inference are comparatively straightforward. […]"

102. TNSG's counterstatement contained only bare denials of the applicants' claims. In the absence of any counter narrative, I accept the applicants' case is likely to reflect the correct position. As a result of this, I find that the motive of TNSG in applying for the mark was for one or more of the reasons the applicants allege such as, for instance, blocking their use in the UK, extracting some form of consideration from them, or leveraging the mark to establish itself as their distributor in this territory. Therefore, I find that the application for TNSG's mark was made in bad faith.

103. The applicants' claim under section 3(6) of the Act is successful in its entirety.

Section 5(6)

104. Section 5(6) of the Act states as follows:

> "(6) Where an agent or representative ("R") of the proprietor of a trade mark applies, without the proprietor's consent, for the registration of the trade mark in R's own name, the application is to be refused unless R justifies that action."

105. In *Mouldpro ApS v EUIPO*, Case T-796/17, the General Court summarised the case law about when a party may be regarded as 'agent' or 'representative' of an opponent or applicant for invalidation. The court stated that:

> "21. It is apparent from the wording of Article 60(1)(b) of Regulation 2017/1001 that, for an opposition to succeed on that basis, it is necessary, first, for the opposing party to be the proprietor of the earlier mark; second, for the applicant for the mark to be or to have been the agent or representative of the proprietor of the mark; third, for the application to have been filed in the name of the agent or representative without the proprietor's consent and without there being legitimate reasons to justify the agent's or representative's action; and, fourth, for the application to relate in essence to identical or similar signs and goods. Those conditions are cumulative (judgment of 13 April 2011, *Safariland* v *OHIM — DEF-TEC Defense Technology (FIRST DEFENSE AEROSOL PEPPER PROJECTOR)*, T-262/09, EU:T:2011:171, paragraph 61)."

106. The European Courts have also given the following guidance:

> (a) The terms 'agent' and 'representative' must be interpreted broadly, covering all kinds of relationships based on a contractual agreement where one party represents the interests of the other. It is sufficient that the agreement or commercial cooperation between the parties gives rise to a fiduciary relationship by imposing on the applicant, whether expressly or implicitly, a general duty of trust and loyalty as regards the interests of the proprietor of the

earlier mark (*EUIPO v John Mills Ltd & Jerome Alexander Consulting Corp.*, Case C-809/18 P, EU: C:2020:902, paragraph 85);

(b) It does not matter how the contractual relationship between the proprietor or principal, on the one hand, and the applicant for the trade mark, on the other, is categorised (*FIRST DEFENSE AEROSOL PEPPER PROJECTOR*, T-262/09, EU:T:2011:171, paragraph 64, and *Moonich Produktkonzepte & Realisierung v OHIM — Thermofilm Australia (HEATSTRIP)*, T-184/12, not published, EU:T:2014:621, paragraph 58);

(c) Nevertheless, some kind of agreement must exist between the parties. A mere purchaser or client of the proprietor cannot be regarded as an 'agent' or as a 'representative' (*FIRST DEFENSE*, paragraph 64);

(d) The misuse of the mark may occur both where the earlier mark and the mark applied for by the agent or representative are identical, and where the marks at issue are similar (*EUIPO v John Mills Ltd*, paragraphs 70-73);

(e) The protection also extends to cases where the goods and services are only similar and not identical (*EUIPO v John Mills Ltd*, paragraphs 98-99);

(f) The specific protection afforded by Article 8(3) is not to be assessed on the basis of whether the similarity between the marks results in a likelihood of confusion (*EUIPO v John Mills Ltd*, paragraph 92);

(g) The assessment of similarity between the goods and services should take all relevant factors into account, including, in particular, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary (*EUIPO v John Mills Ltd*, paragraph 100 and *The Tea Board v EUIPO*, C-673/15 P to C-676/15 P, EU:C:2017:702, paragraph 48).

107. The applicants' claim under this ground is largely made on the same basis as that under section 3(6). The case law referred to above establishes that one of the

cumulative conditions of a successful claim of this kind is that the application must have been filed in the name of the agent or representative without the proprietor's consent and without legitimate reasons to justify the action. As already outlined, the evidence establishes that TNSG Biotech was the exclusive distributor of 'CHILDLIFE' products in China, Hong Kong and Macau at the relevant date. I acknowledge that the terms 'agent' and 'representative' must be interpreted broadly under this ground. Moreover, I appreciate my finding under section 3(6) that the knowledge, intentions and motives of TNSG Biotech could be attributed to TNSG. Nevertheless, neither TNSG nor Ms Guo personally acted as an agent for the applicants or had a direct commercial relationship with them. As a result, the applicant's claim does not satisfy that condition.

108. The applicants' claim under section 5(6) of the Act is dismissed.

Conclusion

109. Dr Clarke and Biozeal's application to invalidate TNSG's mark has been successful. Subject to any appeal against this decision, TNSG's registration is deemed never to have been made pursuant to section 47(6) of the Act.

110. The effect of this is that TNSG has no valid earlier mark for the purposes of its own application for invalidation against Dr Clarke's mark. Consequently, TNSG's application to invalidate Dr Clarke's mark has failed. Subject to any appeal against this decision, Dr Clarke's mark will remain registered.

Costs

111. Dr Clarke and Biozeal have been successful and are entitled to a contribution towards their costs. At the hearing, Ms Wilkinson-Duffy made a request for a partial 'off-scale' costs award. This was limited to the work resulting from TNSG's request for cross-examination.[69]

[69] Ms Wilkinson-Duffy confirmed that scale costs were being claimed in relation to the remainder of the proceedings.

112. Ms Wilkinson-Duffy explained that such costs were appropriate on the basis that Dr Clarke and Biozeal were put to considerable effort in responding to the request and attending the resulting CMC. She argued that the request was made as a 'fishing exercise', to put Dr Clarke and Biozeal to additional expense, and to be obstructive. Mr Hughes resisted the request for off-scale costs. He submitted that it is not abusive to seek cross-examination where bad faith is alleged. Rather, he argued that it was reasonable in circumstances where serious allegations have been made.

113. Rule 67 of the Rules provides:

> "The registrar may, in any proceedings under the Act or these Rules, by order award to any party such costs as the registrar may consider reasonable, and direct how and what parties they are to be paid."

114. Tribunal Practice Notice ("TPN") 4/2007 indicates that the Tribunal has a wide discretion when it comes to the issue of costs, including making awards above or below the published scale where the circumstances warrant it.[70] The TPN stipulates that costs off the scale are available "to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behaviour". The matter at issue is whether TNSG's request to cross-examine Dr Clarke and Biozeal's witnesses should be considered unreasonable behaviour.

115. Having considered the nature of TNSG's request and the circumstances surrounding it, I do not consider its conduct in making the request to be demonstrative of unreasonable behaviour. The request to cross-examination was made in a timely manner, alongside TNSG's request for a hearing. When doing so, it provided reasons for its request, albeit that I considered them to be insufficient. When invited to do so by the Tribunal, TNSG provided further detail in support of its request by the deadline given. When the Tribunal issued its preliminary view to refuse the request, a CMC was requested, as was TNSG's right under rule 63 of the Rules. Mr Hughes provided a helpful skeleton argument in advance of the CMC and made clear, focused

[70] The more recent TPN on costs (1/2013) reiterates the Tribunal's discretion in this regard, though these proceedings commenced before that TPN was published.

submissions at the same. Ultimately, I refused TNSG's request. However, that does not mean that making the request was unreasonable. As the TPN makes clear, losing is not, in itself, indicative of unreasonable behaviour. I do not consider there to be any evidence that the cross-examination request was made with the intention of inflating costs or being obstructive. In light of this, having considered the conduct of the proceedings, it is my view that off-scale costs are not appropriate in this instance.

116. The relevant scale is that published in TPN 2/2016.[71] Based upon the guidance in the TPN, I jointly award Dr Clarke and Biozeal the sum of **£2950**, which is calculated as follows:[72]

Considering TNSG's statement and preparing a counterstatement (cancellation no. 504605)	£250
Preparing a statement and considering TNSG's counterstatement (cancellation no. 505340)	£450
Preparing evidence and considering TNSG's evidence	£1200
Preparing for and attending a hearing	£850
Official fees (cancellation no. 505340)	£200

[71] These proceedings having commenced after 1 July 2016 but before 1 February 2023.
[72] Although the costs associated with preparing for and attending the CMC on 7 February 2024 have been considered, I have concluded that an award for this activity is not merited. This is on the basis that (i) both parties made unsuccessful applications which were discussed at the CMC and (ii) an earlier CMC was held at the request of Dr Clarke and Biozeal to discuss the consolidation of the proceedings, a point on which they were, ultimately, unsuccessful.

117. I order TNSG Health Co., Ltd. to pay Murray Colin Clarke and Biozeal, LLC t/a Childlife Essentials the sum of **£2950**. 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 the proceedings if any appeal against this decision is unsuccessful.

Dated this 20th day of October 2025

James Hopkins
For the Registrar

Annex

Goods and services of UK registration no. 3624021

Class 5: Dietary supplements for human beings; dietetic food and substances adapted for medical use; food for babies, infants and invalids; anti-oxidant nutritional supplements; cod liver oil; colostrum supplements; compounds derived from fruits, herbs or plant extracts for use as dietary supplements; dietary fiber; flaxseed dietary supplements; food supplements in the form of capsules, tablets, caplets, powder, liquids, syrups, chews, chewing gums, gummies, gels, oral sprays and dissolvable strips, all for medical purposes; health food supplements; herbal supplements; lecithin dietary supplements; liquid nutritional supplements; mineral food supplements; nutritional supplements; probiotic supplements; protein supplements; vitamin supplements; gummy vitamins; medicated candies; medicated chewing gum; nutritional supplements in the form of capsules, tablets, caplets, powder, liquids, syrups, chews, chewing gums, gummies, gels, oral sprays and dissolvable strips; pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietary supplements for animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.

Class 30: Coffee, tea, cocoa and artificial coffee; rice, pasta and noodles; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; chocolate; ice cream, sorbets and other edible ices; sugar, honey, treacle; yeast, baking-powder; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments; ice (frozen water); candies; chewing gum.

Class 35: Advertising; business management, organization and administration; office functions; presentation of goods on communication media, for retail purposes; online distributorship, wholesaling and retailing services;

retail store services, distributorship, wholesaling, retailing and sales promotion in relation to dietary and nutritional supplements, dietetic food and substances adapted for medical use, food for babies, infants and invalids, food and beverages.

Goods of UK registration no. 918105147

Class 5: Preparations of trace elements for human and animal use; dietetic beverages adapted for medical purposes; dietetic substances adapted for medical use; mineral food supplements; nutritional supplements; food for babies; dietetic foods adapted for medical purposes.