O/1166/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003973316
BY LEGUME TECHNOLOGY LIMITED
TO REGISTER THE FOLLOWING TRADE MARK:

MYCOFIX

IN CLASSES 1 AND 31

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 445936
BY DSM AUSTRIA GMBH

BACKGROUND AND PLEADINGS

1. On 30 October 2023, Legume Technology Limited ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 17 November 2023. The applicant seeks registration for the following goods:

> **Class 1:** *Chemical and microbial substances, materials and preparations for use in agriculture, aquaculture, horticulture and forestry; chemical and microbial preparations for the treatment of seeds; chemical and microbial preparations for use in coating seeds [other than fungicides, herbicides, insecticides, parasiticides]; seed coatings [inoculants]; inoculants [other than for medical or veterinary use]; microbial inoculants, other than for medical use; inoculants for seeds; substances for treating seeds, not included in other classes; prepared soils for the cultivation of seeds; prepared soils including inoculants for the cultivation of seeds.*
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> **Class 31:** *Agricultural and aquacultural crops, horticulture and forestry products; seeds; seeds coated with an inoculant.*

2. On 19 February 2024, the application was opposed in full by DSM Austria GmbH ("the opponent") under Sections 5(1), 5(2)(a) and 5(3) of the Trade Marks Act 1994 ("the Act").[1]

3. Under Sections 5(1), 5(2)(a) and 5(3), the opponent relies upon the following trade marks as shown below:

UK00001427670 MYCOFIX

[1] The applicant in its submissions in lieu, noted that whilst the opposition was originally based upon Sections 5(1), 5(2)(a) and 5(3) according to the TM7 filed on 19 February 2024, the submissions of 18 June 2024 in paragraph 5 refer only to Sections 5(2)(a) and 5(3). However, the ground was never formally withdrawn.

Filing date: 15 May 1990 Registration date: 28 August 1992 Priority date: 20 November 1989 Under Sections 5(1) and 5(2)(a), the opponent relies upon all of the goods for which the mark is registered namely: **Class 31:** *Agricultural, horticultural and forestry products; foodstuffs for animals; malt for animals; additives to foodstuffs for animals; mineral additives to foodstuffs for animals; all included in Class 31.* Under Section 5(3) the opponent claims reputation for the same goods.
UK00001427669 MYCOFIX Filing date: 15 May 1990 Registration date: 12 June 1992 Priority date: 20 November 1989 Under Sections 5(1) and 5(2)(a), the opponent relies upon some of the goods for which the mark is registered namely: **Class 5:** *veterinary preparations and substances; products having a fungistatic and fodder toxin inactivating effect; disinfectants.* Under Section 5(3) the opponent claims reputation for the same goods.

4. The trade marks relied upon by the opponent qualify as “earlier trade marks” in accordance with Section 6 of the Act because they were applied for at an earlier date than the filing date of the applicant’s mark. Having been registered for more than five years at the date the applicant’s mark was filed for registration, the opponent’s earlier marks are both subject to the use conditions contained in Section 6A(3) of the Act.

5. Under Sections 5(1) and 5(2)(a), the opponent claims that the marks are identical and that the goods are identical or similar, leading to a likelihood of confusion.

6. Under Section 5(3), the opponent claims that the opponent enjoys a substantial reputation in the earlier trade marks given that the marks have been in use for many years throughout the UK. The opponent also claims to be a market leader in their field and that the use of the applicant's mark, being identical to the opponent's marks, will take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade marks. In particular, the opponent claims that consumers will believe that there is a relationship between the parties. It also claims that there could be a health risk if the applied-for goods are mistakenly administered to animals in the belief that they are the opponent's goods.

7. The applicant filed a counterstatement in which it admits that the marks are identical but denies all the other claims, and put the opponent to proof of use. In particular, the applicant states that the competing goods are completely different products that are used in completely different fields.

8. The opponent is represented by ip21 Limited, and the applicant is represented by Mohun Aldridge Sykes Limited. Only the opponent filed evidence, but the applicant filed written submissions during the evidence rounds. The opponent filed evidence in reply. No hearing was requested and both parties filed written submissions in lieu. This decision is taken after careful consideration of the papers.

EU Law

9. 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.

The evidence

10. The opponent's evidence came in the form of three witness statements of Jackie Tolson dated 18 June 2024, 18 July 2024 and 18 November 2024. Ms Tolson is a Senior Trade Mark Attorney at ip21 Limited, the opponent's representative in these proceedings. Her statements are accompanied by 13 exhibits, being those labelled JT1-JT13, and the purpose of her statements is to prove use of the opponent's earlier marks and reputation for the goods claimed.

11. I do not intend to summarise the evidence filed in full here (or the submissions of the parties, for that matter). However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

PROOF OF USE

12. Section 6A of the Act states:

> "(1) This section applies where
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> (a) an application for registration of a trade mark has been published,
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> (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
>
> (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.
>
> (1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

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

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services."

13. Section 100 is also relevant, which reads:

"If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

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

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at

[36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the

use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32]."

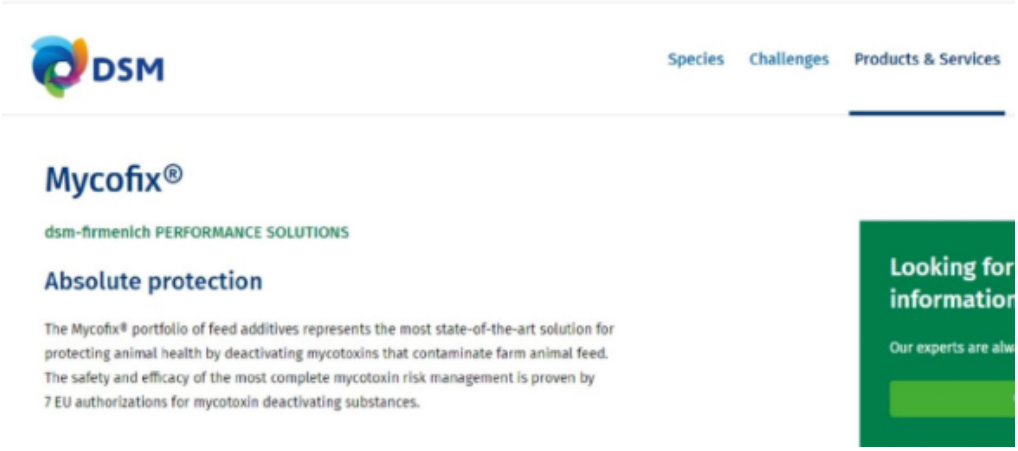
15. The relevant period in which genuine use must be established is the five-year period ending with the filing date of the application for registration: 31 October 2018 to 30 October 2023.

16. Ms Tolson's evidence is as follows:

17. Ms Tolson states that the opponent's earlier trade marks have been in use in the UK since 1990 to the present day. Ms Tolson also states that the products sold under the trade mark 'MYCOFIX' by the opponent or with the opponent's authorisation in the UK are a range of food additives for protecting animals' health and managing mycotoxin risk. He explains that animal feeds such as grains can be contaminated with mycotoxins and that the enzymes in the 'MYCOFIX' products deactivate the mycotoxins thereby improving safety and health. In support of the opponent's claim to use, Ms Tolson provides the following exhibits:

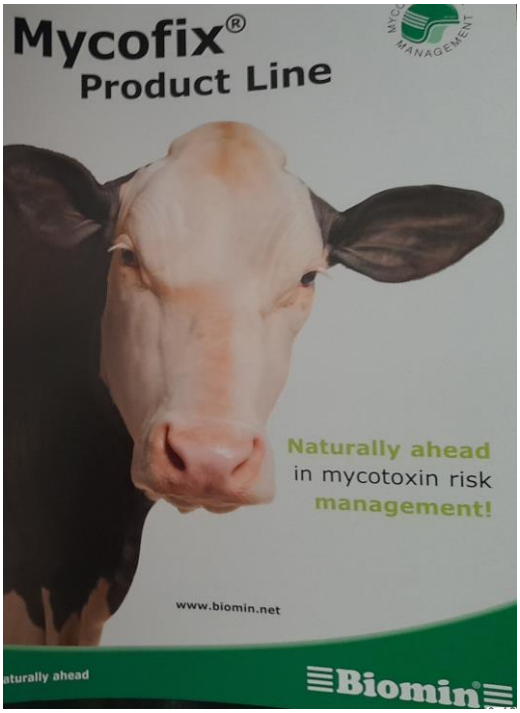
1. **Exhibit JT1:** this consists of an undated extract from what Ms Tolson describes as the opponent's website relating to products sold in the UK under the trade

mark ‘MYCOFIX’. The website address is not visible, but the main brand appears to be ‘DSM’ as shown below. The goods are described as “food additives” and are products designed for protecting animals’ health:



2. **Exhibit JT2:** this consists of an extract from the archive website Wayback Machine showing the relevant pages of the opponent’s website relating to the ‘MYCOFIX’ products dated June 2023 (though Ms Tolson says 2022). If enlarged, the website address is visible as www.dsm.com.

3. **Exhibit JT3:** this consists of an undated product leaflet which Ms Tolson says was used from 2019 onwards in the promotion of the ‘MYCOFIX’ products in the UK. Ms Tolson points out that the distributor’s details are shown on the bottom right of the back page as ‘Biomin UK Ltd’. As it can be seen, the earlier mark is used in relation to products for animals:



4. **Exhibit JT4:** this consists of a selection of invoices for products sold under the trade mark 'MYCOFIX'. Some of the invoices are issued by 'DSM Nutritional Products (UK) Ltd', which Ms Tolson says, is a company related to the opponent; others are issued by 'DMS', but the bottom of the pages also features the company name 'BIOMIN UK Ltd' which, Ms Tolson states, "*is part of DMS".* There are 10 invoices in total dated on various dates in 2020, 2022 and 2023, i.e. 8 December 2020, 3 June 2020, 20 August 2021, 21 April 2021, 19 July 2022, 26 September 2022, 10 June 2022, 6 March 2023, 10 May 2023 and 27 January 2023. They show sales of goods under the mark 'MYCOFIX' to UK postcodes (the customers' details are redacted). The information about the price is redacted, but the quantities are as follows:

    a) 2,000 Kg – this would amount to 160 packs (of 25 kg bags)[2]
    b) 500 Kg - this would amount to 20 packs (of 25 kg bags)
    c) 5,000 Kg – this would amount to 200 packs (of 25 kg bags)
    d) 1,000 Kg – this would amount to 40 packs (of 25 kg bags)
    e) 200 Kg (8 packs of 25 kg bags)

[2] The product appeared to be offered only in 25Kg bags as noted in the leaflet exhibited at JT3 which states: "Packaging: 25 Kg plastic bag in corrugated cartoon".

f) 3,000 Kg (120 packs of 25 kg bags)
g) 1,000 Kg (40 packs of 25 kg bags)
h) 2,000 Kg (80 packs of 25 kg bags)
i) 500 Kg (20 packs of 25 kg bags)
j) 250 Kg (10 packs of 25 kg bags)

On my calculation, that amounts to 420 and 278 bags (each bag weighing 25 Kg) of product sold within the relevant period by BIOMIN and DSM Nutritional Products, respectively. In its submissions, the applicant argues that "*in the relevant 5-year period, only 340 packs (of 25kg) appear to have been sold by BIOMIN and only 278 sold by "DSM Nutritional Products (UK)".* Whilst my calculation corresponds to that of the applicant in terms of the number 278, the discrepancies between my total of 420 and the applicant's total of 340 is down to the invoice at point (a) showing two sales of 2,000 of Mycofix products which maybe have been overlooked by the applicant. That would be a total of 698.

5. **Exhibit JT5** consists of photographs which are said to be of the opponent's stands at industry events held in 2017 (i.e. prior to the relevant period) showing the trade mark 'MYCOFIX' on display. There is no information about the name of the events, and only one page shows a location in the UK, but there is no further information as to the number of people attending the events and/or whether the opponent's participation to those events generated any contracts or business. In its written submissions, the applicant observes that the location shown on the pages appears to be a farm building in Yorkshire, which suggests that the product is being shown internally or to a small number of people, and not at "such events" as suggested.

6. **Exhibit JT6** consists of copies of a product brochure dated 2022 which Ms Tolson says was distributed in the UK. However, there is no information about how many brochures were distributed and to whom.

7. **Exhibit JT7** consists of copy of an article published in the July/August 2023 of the 'Feed Compound' magazine which, Ms Tolson says, is a subscription

magazine for the farming industry, in particular the animal feed industry and its suppliers.

8. **Exhibit JT8** consists of photographs from trade shows which Ms Tolson says were attended in 2022 and 2023 which shows the brand 'MYCOFIX 'on display. Only one photograph is dated within the relevant period, the others being undated or dated after the relevant period.

9. **Exhibit JT10-JT13** consist of 12 invoices dated within the relevant period; however, 9 of them are duplicated because they are the same as those filed under Exhibit JT4 (Invoice INV255-001185, Invoice INV255-001019, Invoice INV255-001406, Invoice INV255-001292, invoice no. 3431106738, invoice no. 3431107741, invoice no. 3431666355, invoice no. 3431667250, invoice no. 3431106111 and invoice no. 3431109591). This is highly regrettable, because these invoices were introduced by Ms Tolson through supplementary exhibits and the expectation would be that they provide new invoices. The invoices that are not duplicated are for the following quantities:

    k) Invoice INV255-001074: 2,000 Kg – this would amount to 80 packs (of 25Kg bags)
    l) Invoice INV255-001466: 3,000 Kg – this would amount to 120 packs (of 25Kg bags)

    On my calculation, that amounts to 200 bags of 25 Kg of product sold within the relevant period, which added to the other quantities (420 and 278) would be a total of 898 bags of 25 kg of product sold within the entire relevant period.

Genuine use

18. In terms of the mark used, the earlier mark is used as registered on invoices dated within the relevant period. There is also evidence of the earlier mark being used on the opponent's website within the relevant period.

19. One of the criticisms raised by the applicant is that the opponent in these proceedings is DSM Austria GmbH and that the evidence should establish use by the proprietor or with its consent. However, the applicant seems to contend that the exhibits provided by the opponent appear to be from Biomin UK Ltd and that there is no evidence of a licence or distribution agreement that gives third parties the authority to use the mark. I do not think that there is anything in this point. In her witness statements, Ms Tolson stated that Biomin UK Ltd is a distributor of the opponent and that the UK company DSM Nutritional Products (UK) Limited identified in a number of exhibits is a related entity to the opponent; I do not find it necessary for those statements to be supported by documentary evidence given that they are consistent with the evidence filed.

20. The applicant also criticises Exhibit JT7 by saying that it shows an advert in the July/August 2023 publication of Feed Compounder magazine, which, the applicant contends, is a subscription magazine that allows one to publish adverts and has just 500 digital subscribers, 20% of which are outside the UK. Whilst, admittedly, the applicant has not provided any evidence of such a claim, equally the opponent has not provided any readership or distribution figure for this publication.

21. The applicant also criticises the opponent's evidence for being indicative of nominal (as opposed to genuine) use. It states:

> *"At a unit price of £2.30 per kg (shown on invoice INV255-001405), that would be a total of just under £39,000 in the relevant period. Again, this suggests nominal use of the mark, rather than sufficient use to justify genuine sales, let alone a reputation in the mark or any goodwill in the United Kingdom for the mark. The UK market for feed additives was estimated to be around US$840,000,000 in the United Kingdom in 2023. Even if all of the sales identified by the Opponent were attributed to the Opponent in a single year (£38,985, which is around US$51,500), that would account for 0.0061% of the market share in the United Kingdom. It is unjustified to claim a substantial reputation in the United Kingdom with such low market share."*

22. I agree that the invoice INV255-001406 shows a price per unit of £2.30, the unit being measured in Kg. I also agree with the opponent that if one multiplies the number of bags sold, which according to my calculation is 898, by the number of Kgs each bag contains (25) and then multiply the total quantity sold by the price per Kg (£2.30), the total value of the goods sold during the relevant five years period would be £51,635. This is, in my view, a reasonable inference to make, especially without anything further disputing this from the opponent.

23. In *Naazneen Investments Ltd v OHIM*, Case T-250/13, EU:T:2015:160, the General Court ("GC") upheld a decision by the OHIM Board of Appeal that the sale of EUR 800 worth of non-alcoholic beverages under a mark over a 5 year period, which had been accepted was not purely to maintain the trade mark registration, was insufficient, in the economic sector concerned, for the purposes of maintaining or creating market share for the goods covered by that Community trade mark. The use was therefore not genuine use. The relevant part of the judgment of the GC is as follows:

> "46. In the fifth place, the applicant argues that, in accordance with the case-law cited in paragraph 25 above, use of a trade mark is to be regarded as token if its sole purpose is to preserve the rights conferred by the registration of the mark. It claims that the Board of Appeal contradicted itself by stating, on the one hand, in paragraph 31 of the contested decision, that the total amount of transactions over the relevant period seemed to be token, and by stating, on the other hand, in paragraph 42 of the contested decision, that it did not doubt the intention of the proprietor of the mark at issue to make real use of that mark in relation to the goods in question.
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> 47. In this connection, suffice it to point out that the applicant's argument is based on an incorrect reading of the contested decision. The Board of Appeal used the term 'token' to describe the total amount of transactions, approximately EUR 800, and not to categorise the use of the mark at issue.
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> 48. In the sixth place, the applicant claims that the Board of Appeal, by relying solely on the insufficient use made of the mark at issue, did not comply with the

case-law according to which there is no quantitative threshold, determined a priori and in the abstract, that must be chosen in order to determine whether use is genuine. The Board of Appeal also failed to comply with the case-law according to which even minimal use may be sufficient in order to be deemed genuine.

49. According to the case-law, the turnover achieved and the volume of sales of the goods under the mark at issue cannot be assessed in absolute terms but must be assessed in relation to other relevant factors, such as the volume of commercial activity, the production or marketing capacities or the degree of diversification of the undertaking using the trade mark and the characteristics of the goods or services on the relevant market. As a result, use of the mark at issue need not always be quantitatively significant in order to be deemed genuine (see, to that effect, judgments in *VITAFRUIT*, cited in paragraph 25 above, EU:T:2004:225, paragraph 42, and *HIPOVITON*, cited in paragraph 27 above, EU:T:2004:223, paragraph 36). Even minimal use can therefore be sufficient in order to be deemed genuine, provided that it is warranted, in the economic sector concerned, to maintain or create market shares for the goods or services protected by the mark. Consequently, it is not possible to determine a priori, and in the abstract, what quantitative threshold should be chosen in order to determine whether use is genuine. A de minimis rule, which would not allow OHIM or, on appeal, the General Court, to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, to that effect, order of 27 January 2004 in *La Mer Technology*, C-259/02, ECR, EU:C:2004:50, paragraphs 25 and 27, and judgment of 11 May 2006 in *Sunrider* v *OHIM*, C-416/04 P, ECR, EU:C:2006:310, paragraph 72).

50. In the present case, contrary to what the applicant claims, the Board of Appeal did not determine a minimum threshold ‘a priori and in the abstract’ so as to determine whether the use was genuine. In accordance with the case-law, it examined the volume of sales of the goods in question in relation to other factors, namely the economic sector concerned and the nature of the goods in question.

> 51. The Board of Appeal accordingly took the view that the market for the goods in question was of a significant size (paragraph 28 of the contested decision). It found also that the goods in question, namely non-alcoholic beverages, were for everyday use, were sold at a very reasonable price and that they were not expensive, luxury goods sold in limited numbers on a narrow market (paragraph 29 of the contested decision). Furthermore, it took the view that the total amount of transactions over the relevant period, an amount of EUR 800, seemed to be so token as to suggest, in the absence of supporting documents or convincing explanations to demonstrate otherwise, that use of the mark at issue could not be regarded as sufficient, in the economic sector concerned, for the purposes of maintaining or creating market shares for the goods covered by that mark (paragraph 31 of the contested decision).
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> 52. It is therefore apparent, contrary to what the applicant claims, that it was in accordance with the case-law cited in paragraph 49 above that the Board of Appeal took the view that, in the present case, minimal use was not sufficient to be deemed genuine."

24. The judgment of the GC was upheld on further appeal to the Court of Justice of the European Union ("CJEU"): see Case C-252/15 P.

25. See also the decisions of the Appointed Person in *Jumpman,* BL O/222/16 and *Strada Del Sole* BL O/528/15.

26. In *Masterbuilders, Heiermann, Schmidtmann GbR v EUIPO*, T-76/21, EU:T:2022:16, the GC held that relatively low sales volumes of timers and downloadable application software in class 9 were sufficient to be genuine use of the trade mark. Approximately 2,700 timers had been sold during the five-year period, some by the unit (with or without an accompanying book), the majority in crates of eight. There was also evidence that 970 items, totalling EUR 28,000, had been sold via an e-commerce platform in 23 Member States during the relevant period. Although this volume was not very significant, the goods were not everyday consumer goods and the sales volume had been achieved in the first few years of the goods being marketed. In addition, the sales covered a wide territory. The Court held that these

factors offset the low volume of sales. In respect of downloadable application software, there had been 1,621 downloads of the software, 99% of which were in the EU. The Court said that the number of downloads was not particularly significant but not token either, and that it was sufficiently significant to demonstrate the frequency and territorial scope of the use of the mark at issue in the marketing of the application, particularly in circumstances where the application had been available for download for less than six months at the end of the relevant period. Although this case was decided after the end of the Brexit transition period and is not binding, it has persuasive value.

27. See also *Industria de Diseño Textil, SA (Inditex) v EUIPO*, T-467/20, EU:T:2021:842. In that case, the GC held that representative invoices showing sales of pasta in Italy totalling something over €40,000 were sufficient to show genuine use in the EU, when taken together with marketing material and evidence of regular use over the relevant period.

28. Admittedly, in the above case, a turnover of €40,000 (which is lower than the total sum I have calculated from the invoices at issue here) was considered by the GC sufficient to establish genuine use. However, pasta is very inexpensive, and it is generally purchased in small quantities – consequently, €40,000 worth of pasta would translate in thousands of customers. It is therefore apparent that the facts of the present case are not on all fours with the reported case. Even disregarding the very low value of the sales as demonstrated by the invoices filed, the latter only show sales to 12 customers within the entire five-year relevant period. Bearing in mind that no information about turnover and promotional spend has been forthcoming, the total amount of transactions seems in my view 'token', and insufficient, in the economic sector concerned, for the purposes of maintaining or creating a market share for the goods covered by the earlier mark. Further, there is nothing to offset the tiny number of consumers and the low level of sales in this case, because, as I have said, there is very little evidence of marketing, and it is mostly undated or dated outside the relevant period. Lastly, whilst it would have been helpful if the applicant had provided evidence to support its argument about the size of the market share for feed additives, in particular feed additives with the same properties as those of the opponent's goods (i.e. feed additives that are used to deactivate mycotoxins), I consider that in the

absence of any evidence (or even submissions) from the opponent that the UK market for these goods is very niche, it is reasonable to conclude that given the very large amount of animal farming in the UK and the criticality of those feed additives for protecting animal's health and farm productivity, the relevant market must be large, or at least, of a reasonable size.

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

> "22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."
>
> and further at paragraph 28:
>
> "28. ..... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as "tuition services", is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to "tuition services" even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification.

Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted."

30. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL O/404/13*,* Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

"21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

> [24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not *'show'* (per Section 100

of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

31. Whilst the evidence has been provided by Ms Tolson based on the information provided by the opponent (and without direct access to the opponent's records), one must wonder why, having had the opportunity to filed further evidence of sales, Ms Tolson filed the same invoices just to be introduced under a different exhibit. Further, most of the evidence is undated or dated outside the relevant period, and lacks important details such as, for example, readership figures and number of people attending events. Although it is possible that the opponent has sold more goods to other customers (other than those indicated in the invoices) genuine use cannot be assessed based on assumptions or probabilities. Finally, I have asked myself whether given the quantities purchased by each customer (which range between 8 and 200 25-kg-bags) it would be reasonable to assume that the goods were sold to retailers and whether this would make any difference. Having considered the question, I have concluded that it would not. This is because:

a. The total amount of 25-Kg-bags sold over the five-year relevant period (and the value of the corresponding sales) is relatively low and it is likely to be tiny in comparison to the likely size of the UK market. In this connection, I bear in mind that Arnold LJ explained that the GC has held on numerous occasions that *"the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use."*

b. The opponent did not claim that the goods were sold to retailers; neither did it claim that sales to 12 retailers means sales to multiple farmers (i.e. more than 12) or that this would be a relevant factor. In this connection, it must be born in mind that the burden of proof in use cases is on the proprietor, and it is not the role of the Tribunal to fill in obvious gaps in the evidence. In addition, in its submissions, the applicant stated that

animal feed and additives are expensive purchases, partly due to the large volume that is brought in a single transaction by livestock farmers; although the opponent stated that such claim should be disregarded because it is not supported by evidence, there is nothing to indicate that the goods are purchased by farmers in small quantities.

c. The opponent sought to rely upon (and claimed use for) a variety of goods in class 31 (*Agricultural, horticultural and forestry products; foodstuffs for animals; malt for animals; additives to foodstuffs for animals; mineral additives to foodstuffs for animals; all included in Class 31)* and class 5 (*veterinary preparations and substances; products having a fungistatic and fodder toxin inactivating effect; disinfectants),* and in relation to most of them there is no evidence of use at all. Ms Tolson had not even gone to the trouble of explaining in any of her witness statements in relation to which goods the mark has been used, claiming twice (in her second and first witness statement) that the marks have been put to use for the relevant goods (which I take to mean all of the registered goods).

d. Even allowing for the assessment of genuine use to be limited to one sub-category of goods (namely, *products having a fungistatic and fodder toxin inactivating effect, namely mycotoxin deactivator in the form of animal feed* in class 5), and for an assumption to be made about the goods being sold to retailers, the quantity of the goods sold (i.e. less than 900 bags of 25 Kg) and total value of the sales (less than £52,000) is not sufficient, without any compensating evidence (for example evidence about the marketing of the goods) to prove genuine use.

e. Whilst there is some very limited evidence of marketing, that is very scant and is also unclear. For example, the evidence about the 'Mycofix' products being promoted on the opponent's website is dated only four months prior to the end of the relevant period and the opponent is an Austrian company with a '.com' website so there is nothing to indicate or

prove that the opponent's website is targeted at the UK consumers. Likewise, the leaflet showing the name of the UK distributor is undated.

32. Overall, bearing in mind all of the above, I consider that the opponent has not satisfactorily demonstrated genuine use of the earlier mark in the UK in respect of the registered goods in class 31 and 5. The opposition fails at the first hurdle under both Section 5(2)(b) and Section 5(3) – the proof of use being relevant under both grounds - and is dismissed accordingly.

33. For the sake of completeness, and in case I was wrong, I will proceed on the basis that if there is genuine use is only in relation to *mycotoxin deactivator in the form of animal feed* which, based on what the parties have said, I consider would fall within the registered term *products having a fungistatic and fodder toxin inactivating effect* in class 5. In its submissions in lieu, the applicant, in fact, stated:

> *"To understand the Opponent's objections properly, one must understand the meaning of mycotoxin risk, which the Opponent has not explained. Mycotoxin is a naturally occurring toxin produced by certain fungi. Mycotoxins can appear in animal fodder, particularly silage, which, if consumed by an animal can decrease performance and potentially kill them. The Opponent's food additive product deactivates mycotoxins that contaminate farm animal feed, thereby making it safe for consumption by animals. Essentially, the mycotoxins are converted into non-toxic metabolites by the food additive provided by the Opponent".*

34. Although the applicant's statements are not supported by evidence, they are consistent with the little information supplied by the opponent and emerging from the evidence.

35. Although Ms Tolson referred in her first witness statement to the opponent's goods being a range of food additives, and the opponent's specification in class 31 includes additives to foodstuffs for animals and mineral additives to foodstuffs for animals, the Explanatory Note to Class 31 states that this class *"includes mainly land and sea products not having been subjected to any form of preparation for consumption, live*

animals and plants, as well as foodstuffs for animals" ; the same note also explains that class 31 excludes "*dietary supplements for animals and medicated animal feed"* which is what the opponent's goods are. Accordingly, I will proceed to consider the likelihood of confusion under Section 5(2)(a) based on the following fair specification:[3]

> **Class 5:** *Products having a fungistatic and fodder toxin inactivating effect, namely mycotoxin deactivator in the form of animal feed.*

Section 5(2)(a)

36. Section 5(2)(a) of the Act reads as follows:

> "5(2) A trade mark shall not be registered if because –
>
> (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or…
> (b) ….
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

37. Section 5A of the Act is as follows:

> "5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

38. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case

[3] As the goods are self-evidently not identical the ground under Section 5(1) fails.

C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P:

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

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

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

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

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

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

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

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

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

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

(k) if the association between the marks creates a risk that the public 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

39. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, 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."

40. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

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

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

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

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

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

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

41. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM***,** Case T-325/06, the GC stated that "complementary" means:

"[…] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking."

42. In *Sanco SA v OHIM,* Case T-249/11, the GC indicated that goods and services may be regarded as 'complementary' and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander QC (as he then was) noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL O/255/13*:*

> "It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes."

43. Whilst on the other hand:

> "[…] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together."

44. In *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T- 133/05, the GC stated that:

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

45. The competing goods are as follows:

The applied-for goods	**The opponent's goods**
Class 1: *Chemical and microbial substances, materials and preparations for use in agriculture, aquaculture, horticulture and forestry; chemical and microbial preparations for the treatment of seeds; chemical and microbial preparations for use in coating seeds [other than fungicides, herbicides, insecticides, parasiticides]; seed coatings [inoculants]; inoculants [other*	**Class 5:** *Products having a fungistatic and fodder toxin inactivating effect, namely mycotoxin deactivator in the form of animal feed.*

than for medical or veterinary use]; microbial inoculants, other than for medical use; inoculants for seeds; substances for treating seeds, not included in other classes; prepared soils for the cultivation of seeds; prepared soils including inoculants for the cultivation of seeds. **Class 31:** *Agricultural and aquacultural crops, horticulture and forestry products; seeds; seeds coated with an inoculant.*	

46. In its submissions in lieu, the opponent presents the following submissions as regards the similarity of the goods:

> *"The Applicant's goods in Class 1 are similar to the Opponent's goods in Classes 5 and 31.*
>
> *The goods of agricultural, horticultural and forestry products in Class 31 are identical with the Opponent's goods in Class 31.*
>
> *The goods of aquacultural crops, seeds, and seeds coated with an inoculant in Class 31 are similar to the Opponent's goods in both Classes 5 and 31.*
>
> *The Applicant's goods in Class 1 are similar to the Opponent's goods in Classes 5 and 31.*
>
> *Both sets of goods are to be used in the food chain or industry; to improve yield or health. One is for use in crop production and the other in animal husbandry.*
>
> *The users for both sets of goods could very well be the same, being farmers, many of which will have both arable and livestock."*

47. These submissions are not very helpful. This is because (a) they rely on the full specification for which the earlier mark is registered, without even attempting to narrow the opponent's goods down to reflect the use made and (b) aside from the reference to the users of the goods being the same, i.e. farmers, none of the *Canon* criteria to measure similarity is mentioned.

48. Nevertheless, one the point that the opponent seems to accept is that the applied-for goods are used in crop production, whereas the opponent's goods are used in animal husbandry. The opponent claims that this creates a similarity because many farmers *"will have both arable and livestock".* First, there is no evidence of how many farmers in the UK are involved in both crop production and animal breeding, as opposed to specialised farmers who focus on just crops or animals. Second, even allowing for a significant number of consumers of the opponent's goods being also consumers of the applied-for goods, there is no evidence that the goods are distributed through the same trade channels. Further, the use, nature and purpose of the goods is different, as it is the method of use, and there is neither competition nor complementarity involved. In my view, considering the specific field in which the respective goods in class 1 and 5 are used, i.e. crop production and animal breed, they are dissimilar, the potential coincidence of users (i.e. farmers) alone not being sufficient to give rise to a meaningful degree of similarity, especially in the absence of shared trade channels. The applied-for goods in class 31 are one step further removed from the opponent's goods, give that they are the products of crop production, rather than goods employed in crop production by farmers. The goods are all dissimilar.

49. In order for there to exist a likelihood of confusion under the present ground, there needs to be a degree of similarity between parties' goods and services.[4] As a result of what I have said above, even if the opponent's evidence was sufficient to give rise to a finding of genuine use, the present ground fails due to the dissimilarity of the goods at issue.

Section 5(3)

[4] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

50. Section 5(3) states:

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

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

> "25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.
>
> 26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.
>
> 27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.
>
> 28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

52. Even if I have proceeded on the basis that there is genuine use, I am not willing to find that there exists any reputation under the opponent's mark. This is because the evidence filed is clearly insufficient to establish that the earlier mark is known by a

significant part of the public concerned by the products covered by that mark. It follows that even if the opponent had established genuine use, the opposition under Section 5(3) would fail for lack of reputation.

CONCLUSIONS

51. The opposition has failed.

52. The application will proceed to registration.

COSTS

53. The applicant has been successful and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of £1,200 as a contribution towards the costs of proceedings. The sum is calculated as follows:

> Filing a counterstatement and considering notice of opposition: £400
> Considering the opponent's evidence: £500
> Submissions in lieu: £300
> Total: £1,200

54. I therefore order DSM Austria GmbH to pay Legume Technology Limited the sum of £1,200. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 15th day of December 2025

TERESA PINTO
For the Registrar