

O-319-17

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3107547

BY BERKSHIRE AND HARLEY LLP

TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 9, 10 & 44:



THE HARLEY STREET
— EYE CLINIC —

AND

OPPOSITION THERETO (NO. 405421) BY HCA INTERNATIONAL LIMITED

Background and pleadings

1. This dispute concerns whether the following trade mark should be registered for the goods and services shown below:



Class 9: Anti-dazzle spectacles, anti-glare spectacles, cases (eyeglass-), chains for spectacles, children's eye glasses, contact lenses, contact lens blanks, corrective eyewear, correcting lenses [optics], eyeglass cases, eyeglass frames, eyeglass lenses, eyeglasses, eyepieces, eyepieces (instruments containing-), eyewear, frames for spectacles and sunglasses, glass ophthalmic lenses, instruments containing eyepieces, instruments for diagnosis [for scientific use], laboratory optical apparatus, lens blanks for eyesight correction, lenses (optical-), optical devices, enhancers and correctors, optical glasses, optical goods, optical lens sights, optical lenses, optical lenses for use with sunglasses, optical measurement apparatus, optical measuring components, opticians' goods, ophthalmic lenses, plastic lenses, sight glasses [optical], spectacle lenses, spectacles, spectacles [glasses], spectacles [optics], corrective glasses.

Class 10: Artificial lenses for implantation in the eye, artificial surgical implants, eye baths, eye droppers, eye pads for surgical use, eye shields for medical use, eye shields for surgical use, eyes (artificial-), implants consisting of artificial materials, intra-corneal implants, intra-ocular implants, intraocular lens biometers, intra-ocular lenses, intraocular lenses, intraocular lenses for surgical implantation, laser beam delivery instruments for medical use, laser instruments for medical use, laser light treatment instruments for medical use, lasers for ophthalmic purposes, ocular implants, ophthalmoscopes, prostheses (intraocular-) [lenses] for surgical implantation, surgical implants comprised of

artificial materials, surgical implants made of artificial materials, ultrasonic eye axis length meters.

Class 44: Advisory services relating to degenerative diseases, advisory services relating to the treatment of degenerative diseases, consultancy services relating to surgery, health care consultancy services [medical], information services relating to contact lenses, laser vision surgery services, optician services, performing diagnosis of diseases, providing laser therapy for treating medical conditions, provision of medical treatment, sight-testing [opticians'] services, surgery, surgical treatment services, technical consultancy services relating to medical health.

2. The mark was filed on 2 May 2015 by Berkshire and Harley LLP (“the applicant”) and was published for opposition purposes on 7 August 2015.

3. HCA International Limited (“the opponent”) opposes the registration of the mark under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). Under both grounds, the opponent relies on UK registration 2308643 for the mark **THE HARLEY STREET CLINIC** which was filed on 22 August 2002 and registered on 7 May 2004. The mark is registered in respect of the following class 44 services: Medical, hospital, clinical and healthcare services; therapeutic and medical diagnostic services. Given its date of registration, the mark is potentially subject to the use conditions set out in section 6A of the Act; to this extent, the opponent made a statement of use that its mark has been genuinely used for all of the services for which it is registered.

4. The opponent claims that the respective marks are highly similar and that the services are identical or highly similar (and the applied for goods similar) such that there exists a likelihood of confusion under section 5(2)(b). Under section 5(3), the opponent claims that the earlier mark has a reputation and the use of the applied for mark will take unfair advantage or be detrimental to the repute or distinctive character of the earlier mark, although, I note that its pleading appears to be based upon the relevant public assuming that there is some form of economic link between the respective undertakings.

5. The applicant filed a counterstatement denying the claims. It did not put the opponent to proof of use in respect of its earlier mark with the consequence that it may be relied upon without the need to show genuine use. It denies the points about goods/services similarity. It highlights that its mark contains an H logo (which is also registered separately) which represents 60% of the depth of the mark. It highlights that in its mark EYE CLINIC is deliberately set apart to specifically denote the nature of its practice.

6. Both sides filed evidence. A hearing took place before me on 26 May 2017 at which the opponent was represented by Ryan Pixton of Kilburn & Strode. The applicant represented itself, with the hearing being attended on its behalf by Mr Robert Lucas.

The evidence

The opponent's evidence

7. This comes in the form of a witness statement from Mr Aida Yousefi, chief executive officer of the opponent. He states that the opponent is London's leading private hospital group. He lists five hospitals: The Portland Hospital, London Bridge Hospital, The Harley Street Clinic, The Harley Street Clinic Diagnostic Centre and The Harley Street Clinic Children's Hospital. The Harley Street Clinic was founded in 1965 and, according to Mr Yousefi, has provided medical services in the field of general medicine, cardiology, dermatology, endocrinology, gastroenterology, haematology, infectious diseases, neurology, oncology, respiratory function and rheumatology. He adds that it is one of London's top heart surgery centres and is the leading provider of cancer services in the UK outside the NHS. He says the centre is also "known for its excellence in research, services and success".

8. In 2010 the clinic launched a site in New Malden, Surrey. Exhibit AY-1 relates to this, consisting of an article from surreycomet.co.uk. It is headed "New private clinic brings Harley Street to New Malden". The article is not clearly dated – there is a date in 2016 at the top of the print, but this may be indicative of the date on which the witness took the print as opposed to the date on which it was first published. Beyond the reference to Harley Street in the title, there is little which indicates the name the

clinic goes by, other than a quote about the services provided which is given by Neil Buckley, chief executive of The Harley Street Clinic.

9. Exhibit AY-2 provides details of revenue and patient numbers (of the Harley street Clinic) since 2011. Revenue has fluctuated between £95million in 2011 and £118million in 2015 (the peak year was 2014, with £124million), marketing spend between just over and just under £0.5million and patient numbers between 71k and 105k. Examples of marketing are said to be included in Exhibit AY-3. They are mainly in the form of information leaflets about the services provided and/or information for patients – they use the plain words THE HARLEY STREET CLINIC as the heading of each (the words are conjoined, but a slight difference in shading means that they stand clearly as separate words). Extracts from the opponent’s website are provided in Exhibit AY-3 (clearly headed THE HARLEY STREET CLINIC), and reference to the clinic is also made on the websites of what are described as partners e.g. The Cyberknife Centre which operates out of The Harley Street Clinic.

10. Exhibit AY-5 contains what are said to be press releases. Some date back to 2011, some are about the Cyberknife Centre, but within them reference is made to The Harley Street Clinic. One is for the Children’s Hospital, some are for the clinic itself. Exhibit AY-6 and AY-7 contain extracts from press publications. As is typical with this type of article, the name itself, THE HARLEY STREET CLINIC, is not the most prominent form of use in the article - sometimes the reference to the clinic is fairly well hidden within the body of the article as a whole. Further articles are provided in Exhibit AY-8 which focus on stories of well-known people and celebrities who have attended the clinic. Exhibit AY-9 contains articles from healthcare publications, some of these mention THE HARLEY STREET CLINIC in the title. Exhibit AY-10 contains information about an award the clinic won (the Laing Buisson Award) and, also, some reviews it received. It is stated that the clinic has achieved HQS and ISO 9001:2000.

The applicant’s evidence

11. This comes from Mr Ahmed El-Amir, operations manager of The Harley Street Eye Clinic. It is explained that the applicant is a leading ophthalmic clinic group comprising The Harley Street Eye Clinic and The Berkshire Eye Clinic, specialising in

ophthalmology. The former is located in Harley Street, London. The applicant was incorporated in March 2014 and it is stated that, since then, it has grown rapidly in reputation, with a client base across the UK and as far afield as Saudi Arabia, Morocco, the USA and Libya. I note the following exhibits:

- AE-1 contains two examples of promotional materials which use the words THE HARLEY STREET EYE CLINIC and the logo form of those words as per the application.
- AE-2 contains two newspaper articles in which The HARLEY STREET EYE CLINIC is mentioned.
- AE-3 contains website prints (the applicant's website) with the mark as per the application.
- AE-4 contains a leaflet/brochure used in-house and for mail shots which features the H logo, the words THE HARLEY STREET EYE CLINIC and the mark the subject of the application.

12. Both sides also filed written submissions along with their evidence which I take into account, but will not summarise separately here.

Section 5(2)(b)

13. Section 5(2)(b) of the Act states that:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

14. The following principles are gleaned from the judgments of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case 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 the earlier mark to mind, is not sufficient;

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

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

Comparison of goods/services

15. I will first consider the applied for services in class 44 which are:

Class 44: Advisory services relating to degenerative diseases, advisory services relating to the treatment of degenerative diseases, consultancy services relating to surgery, health care consultancy services [medical], information services relating to contact lenses, laser vision surgery services, optician services, performing diagnosis of diseases, providing laser therapy for treating medical conditions, provision of medical treatment, sight-testing [opticians'] services, surgery, surgical treatment services, technical consultancy services relating to medical health.

16. The opponent's specification reads:

Class 44: Medical, hospital, clinical and healthcare services; therapeutic and medical diagnostic services.

17. The applicant denies identity/similarity. At the hearing Mr Lucas was keen to stress what the applicant actually provides compared to what the opponent provides, with the submission being that there is no overlap. There are two points to make in relation to the comparison. First, the comparison must be based made upon the services as they stand in the respective specifications, not on what may or may not have been provided in the marketplace. Second, when one looks at the opponent's specification, it is clear that it covers a number of broad terms which encompass all of the applied for services. Goods and services which fall within the ambit of a competing specification are to be approached on the basis of the guidance provided by the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05 ("*Meric*") where it was stated:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut 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".

18. To illustrate the point, the opponent's specification covers medical and healthcare services at large. These terms alone are broad enough, in my view, to encompass all of the applied for services. The services are identical.

19. That then leads to whether the goods of the applied for mark are similar to the services of the earlier mark. When making a comparison of goods/services, all relevant factors relating to them should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of its judgment:

"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."

20. Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

- “(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.”

21. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06 it was stated:

“It is true that goods are complementary if 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 (see, to that effect, Case T-169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P Rossi v OHIM [2006] ECR I-7057; Case T-364/05 Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL) [2007] ECR II-

757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri* (PiraÑAM diseño original Juan Bolaños) [2007] ECR I-0000, paragraph 48).”

22. In relation to complementarity, I also bear in mind the guidance given by Mr Daniel Alexander QC, sitting as the Appointed Person, in case B/L O/255/13 *LOVE* where he warned against applying too rigid a test:

“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in Boston is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, 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. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to Boston.”

23. In relation to understanding what terms used in specifications mean/cover, the case-law informs me that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”¹ and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning². I also note the judgment of Mr Justice Floyd (as he then was) in *YouView TV Limited v Total Limited* where he stated:

“..... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IPTRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the

¹ See *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281

² See *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

way it was because the ordinary and natural, or core, meaning of "dessert sauce" did not include jam, or because the ordinary and natural description of jam was not "a dessert sauce". Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

24. I will make the comparison with reference to the applicant's goods. It will, though, be necessary to break them down into certain groups of goods. I begin with the following class 9 goods:

Anti-dazzle spectacles, anti-glare spectacles, children's eye glasses, contact lenses, contact lens blanks, corrective eyewear, correcting lenses [optics], eyeglass lenses, eyeglasses, eyewear; glass ophthalmic lenses, lens blanks for eyesight correction, lenses (optical-); optical glasses, optical goods, optical lenses, optical lenses for use with sunglasses, opticians' goods, ophthalmic lenses, plastic lenses, sight glasses [optical], spectacle lenses, spectacles, spectacles [glasses], spectacles [optics], corrective glasses.

25. All of the above goods comprise (or include within ambit) either glasses or lenses for correcting a person's vision. Mr Pixton relied on the complementary link between the goods and the various healthcare services and argued that consumers and end users would believe that the responsibility of the goods lay with the undertaking responsible for the services. Mr Lucas felt there was no link as the goods and the provision of the service were so different.

26. The greatest prospect for a finding of similarity lies in healthcare services which relate to eye care. Even though they are not explicitly listed in the specification, I consider the term "healthcare" to be broad enough to cover services which care for the health of one's eyes, such as optician and other ophthalmic services.

27. Clearly, the nature of the goods and services differ, although, both have (a fairly superficial) purpose of helping a person to improve their eyesight. The goods and

services do not strongly compete as most people would not make a choice between buying glasses or going to an optician. I accept, though, that it is possible to buy off-the-shelf glasses which some people may make do with. However, the more realistic relationship is that one is dependent on the other e.g. glasses and lenses may be purchased/prescribed as a result of using the service. Whilst this could be said to create a complementary relationship, it would not be a pertinent one unless it was “in such a way that customers may think that the responsibility for those goods lies with the same undertaking” (as per the *Boston Scientific* case). In relation to the goods here, it would not be unusual for them to be offered by an optician, being sold and selected in the same location as the optician service is provided.. Whilst such goods may also include those of third parties, it would not be uncommon for them to also offer their own versions. I consider there to be a moderate (between low and high) degree of similarity.

Eyeglass frames; frames for spectacles and sunglasses; cases (eyeglass-), chains for spectacles, eyeglass cases

28. These are all goods which are sold in conjunction with, or are accessories for, the goods set out in the preceding paragraph. Although they are not the items which correct vision, their close connection means that the goods will still be sold in the same outlets (in which the service is provided) and will still be seen as being complementary to the services. I consider there to be a moderate degree of similarity.

Eyepieces, eyepieces (instruments containing-), instruments containing eyepieces, instruments for diagnosis [for scientific use], laboratory optical apparatus, optical devices, enhancers and correctors, optical lens sights, optical measurement apparatus, optical measuring components,

29. The above goods strike me as ones used in the diagnosis and, possibly, the treatment of medical (eye related) problems. There is no evidence as to the probability of a medical/healthcare service provider being responsible (economically) for any goods used in the treatment and diagnosis of illnesses. The most probable position is that a medical/healthcare service provider will purchase equipment which has been manufactured by a third party. In terms of how that impacts upon the goods/service

assessment, the nature of the goods and the service is quite different. The purpose may be similar in that both the goods and the service are engaged in helping people with eye related problems, although, this is of a very superficial level as the exact purpose is different - the purpose of the service is to engage with the patient to understand, diagnose and treat the problem whereas the goods are used by the healthcare professional on the patient to assist in that process. The users differ – the user of the service is the patient, the user of the goods is the healthcare professional. The channels of trade differ, the goods will be purchased from healthcare equipment suppliers, the services from a healthcare service provider. The goods do not compete - you would not buy one instead of the other, and neither is it probable that a patient would purchase the goods for any form of self-diagnosis/treatment. Mr Pixton's primary submission was based on complementarity, however, whilst I accept that one is important for the use of the other, there is nothing to demonstrate that this is the type of relationship where customers may think that the responsibility for those goods lies with the same undertaking. My conclusion is that the goods are not similar to the services, although, if I am wrong on that then they are similar to only a very low degree.

30. I now turn to the class 10 goods, again grouping them when it is reasonable to do so:

Artificial lenses for implantation in the eye, artificial surgical implants, eyes (artificial-), implants consisting of artificial materials, intra-corneal implants, intra-ocular implants; intra-ocular lenses, intraocular lenses, intraocular lenses for surgical implantation; ocular implants; prostheses (intraocular-) [lenses] for surgical implantation, surgical implants comprised of artificial materials, surgical implants made of artificial materials

31. The above goods will be inserted into a patient's eye/eye socket during a surgical procedure. There is nothing to show that the patient will ever be aware of the brand of implant that has been used. Thus, the users of the service (the patient) differ from the user of the goods (the surgeon), neither can the patient be considered as a pertinent end-user because they do not encounter the trade mark (of the goods). The channels of trade differ. There may be a similar type of superficial similarity in purpose as that described for the goods considered in the previous assessment I made. I also come to the same view on complementarity. My conclusion is that the goods are not similar

to the services, although, if I am wrong on that then they are similar to only a very low degree. I note that some of the above terms, whilst they include eye implants within their ambit, also cover other types of implants. However, the same analysis is applicable to such goods and same findings made.

Intraocular lens biometers, laser beam delivery instruments for medical use, laser instruments for medical use, laser light treatment instruments for medical use, lasers for ophthalmic purposes, ophthalmoscopes, ultrasonic eye axis length meters.

32. By parity of reasoning, I come to the same view here as I did with the goods assessed at paragraph 29 above. My conclusion is that the goods are not similar to the services, although, if I am wrong on that then they are similar to only a very low degree.

Eye shields for medical use, eye shields for surgical use

33. It is not clear what such goods are for, but the most probable explanation is that they are worn by a surgeon to protect their face whilst carrying out operations. Thus, even the superficial aspect of purpose similarity expressed earlier is absent. The nature of the goods is different as are the users and channels of trade. The argument in terms of complementarity is also weaker. The goods are not similar to the services. It is possible that the term may also cover post-operative shields applied to a patient's eye along with other dressings. I do not consider the opponent to be in any better position here. Even though the patient may have the item applied to them, they are not the consumer and unlikely to be considered a pertinent end user as it is unlikely to be the case that they even know what type or brand of eye shield was applied to their face.

Eye pads for surgical use

34. I extend the above finding to these goods for similar reasons. The goods are not similar to the opponent's services.

Eye baths, eye droppers.

35. The main difference in the assessment with regard to these class 10 goods (compared to the other class 10 goods) is that eye baths and droppers could be purchased by members of the public, or, at the very least, prescribed to patients who take them home for follow-up treatment and are, therefore, end users. The users are the same and they may come from the same trade channels as the service (i.e. the service provider provides them after treatment). The purpose has a superficial aspect of similarity, the nature, of course, differs. The complementary relationship still exists in terms of the link/importance of one to the other, although there is nothing to demonstrate that this is the type of relationship where customers may think that the responsibility for those goods lies with the same undertaking - the probability that such a link will exist is higher than the other goods I have found to lack similarity because this is at least something which the service provider may offer as part of follow-up treatment. I consider the goods to be similar to the service, albeit to only a low level.

Average consumer and the purchasing act

36. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

37. Although pharmaceuticals are not in play here, it is still worth recalling the decision of the General Court in *Mundipharma AG v OHIM*, Case T-256/04, where it was accepted that there were two groups of relevant consumers for a pharmaceutical product, professional users and the general public:

“70. It has been established above, first, that the goods in question were identical and, second, that the opposing marks were somewhat similar for the professional public and highly similar for the end consumers.

71. As to the distinctive character of the earlier mark, the Court observes that it will be understood as being descriptive by both types of relevant public, although to varying degrees. As mentioned above in the discussion of the conceptual similarity, the professional public will perceive both components as being descriptive of the purpose of the active ingredient of the product in question, whereas the end consumers will not ascribe any particular conceptual meaning to the component ‘cort’, but will be able to understand the reference made by the component ‘respi’.”

38. I have touched on the users of the goods/services in my assessment already. I think it worth breaking the goods/services down to identify the average consumer(s) of the goods/services, whether there is just one, and whether a different end consumer is also relevant.

Class 44

39. The applicant’s class 44 services cover:

Advisory services relating to degenerative diseases, advisory services relating to the treatment of degenerative diseases, consultancy services relating to surgery, health care consultancy services [medical], information services relating to contact lenses, laser vision surgery services, optician services, performing diagnosis of diseases, providing laser therapy for treating medical conditions, provision of medical treatment, sight-testing [opticians'] services,

surgery, surgical treatment services, technical consultancy services relating to medical health.

The opponent's class 44 services cover:

Medical, hospital, clinical and healthcare services; therapeutic and medical diagnostic services.

40. I consider the average consumer of the above services to be a member of the general public who is seeking treatment for a particular medical problem. The only exception to this is in respect of the services which relate to diagnosis for which the average consumer could be a member of the public, or, alternatively, a healthcare provider who requires some form of specialist diagnosis service which it cannot undertake itself.

41. For all of the services, given the likely importance in respect of one's health, the services will be considered with a reasonably high level of care and attention. Websites, brochures, leaflets will all be considered, highlighting the importance of the visual characteristics of marks in this area, however, the aural impacts of the marks are also important as word of mouth recommendations may be given (including by GPs to patients), appointments booked by telephone etc.

Class 9

42. I first consider the following of the applied for goods:

Anti-dazzle spectacles, anti-glare spectacles, children's eye glasses, contact lenses, contact lens blanks, corrective eyewear, correcting lenses [optics], eyeglass lenses, eyeglasses; eyewear; glass ophthalmic lenses; lens blanks for eyesight correction, lenses (optical-); optical glasses, optical goods; optical lenses, optical lenses for use with sunglasses; opticians' goods, ophthalmic lenses, plastic lenses, sight glasses [optical], spectacle lenses, spectacles, spectacles [glasses], spectacles [optics], corrective glasses; Eyeglass frames;

frames for spectacles and sunglasses; cases (eyeglass-), chains for spectacles, eyeglass cases.

43. The average consumer is most likely to be a member of the general public who requires corrective eyewear (or accessories for corrective eyewear). It could also be the case that healthcare providers may purchase the goods for onward provision to its patients after treatment/diagnosis. The goods will often be self-selected (at least in terms of frames and complete spectacles) from displays, websites, leaflets etc, although this is less so for the lenses *per se*. However, there is often much discussion with healthcare providers or retail assistants in this process so the visual/aural balance is fairly even (the visual being slightly more important). At least a reasonable degree of care and consideration will be deployed.

Eyepieces, eyepieces (instruments containing-), instruments containing eyepieces, instruments for diagnosis [for scientific use], laboratory optical apparatus, optical devices, enhancers and correctors, optical lens sights, optical measurement apparatus, optical measuring components; Artificial lenses for implantation in the eye, artificial surgical implants; eyes (artificial-), implants consisting of artificial materials, intra-corneal implants, intra-ocular implants; intra-ocular lenses, intraocular lenses, intraocular lenses for surgical implantation; ocular implants; prostheses (intraocular-) [lenses] for surgical implantation, surgical implants comprised of artificial materials, surgical implants made of artificial materials; intraocular lens biometers, laser beam delivery instruments for medical use, laser instruments for medical use, laser light treatment instruments for medical use, lasers for ophthalmic purposes, ophthalmoscopes, ultrasonic eye axis length meters; eye shields for medical use, eye shields for surgical use; eye pads for surgical use

44. Members of the general public are neither average consumers nor (pertinent) end users of these goods. Instead, the average consumer is a healthcare provider who needs to use the goods in the operation of their business when inspecting/treating patients. One would imagine that the goods will be considered by looking at brochures and websites etc, although there may also be an aural component in terms of speaking to sales representatives. With the exception of shields and eye pads, more than an

average level of care will be deployed in selection, but not of the very highest level. An average level of care will be deployed in relation to eye shields and eye pads.

Eye baths, eye droppers.

45. Here, the average consumer will either be a member of the public or a healthcare professional. However, even from the perspective of the average consumer being a healthcare professional, a member of the public may also be an end-user, for example, due to onward treatment at home. The goods will be considered through leaflets/websites etc, and possibly even via product shelves, suggesting that the visual characteristics of the marks are important, however, their aural characteristics will also be important because of consultations with people such as pharmacists. The level of care is likely to be average, no higher or lower than the norm.

Comparison of marks

46. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

47. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore

contribute to the overall impressions created by the marks. The marks to be compared are:



THE HARLEY STREET

— E Y E C L I N I C —

v **THE HARLEY STREET CLINIC**

48. In terms of overall impression, the opponent's mark comprises four words, none of which dominate the others. They come together to form a unit as a joined element in which its distinctiveness and overall impression lie.

49. In terms of the applicant's mark, this is a true composite mark. Even though the H in the logo element may be understood by some average consumers to represent the initial letter of the word HARLEY, it still stands as an individual component of the mark playing, in my view, a roughly equal role in the overall impression with the other component(s). The logo is also more than just the letter H as it contains a circular aspect with a contrasting coloured outer edge in half of its circumference. The mark also contains the words THE HARLEY STREET EYE CLINIC, with the first three words presented above the last two (which also have two short horizontal lines on either side). The words read through and the average consumer will regard this as a single component (again playing a roughly equal role in the overall impression as the H logo). Although the words HARLEY STREET are larger than EYE CLINIC, it is still a unit based element, albeit, the visual dominance of HARLEY STREET (over EYE CLINIC) is something that needs to be borne in mind in the comparison.

50. Visually, both marks contain the words THE-HARLEY-STREET-CLINIC in that order. However, the application also contains an additional element comprised in the H logo. There is also a difference in the additional word EYE in the application, although this is less significant a difference because it is one of the smaller words in the mark and, also, because it could more easily be overlooked as part of the string of

words in the applicant's mark. I consider that there is a medium level of visual similarity.

51. Aurally, whilst some average consumers will articulate the H in the applicant's mark, I suspect that most will not and will, instead, refer to the mark by what they see as the name – THE HARLEY STREET EYE CLINIC. This is clearly highly similar to THE HARLEY STREET CLINIC. For average consumers who articulate the H, the similarity is less, although still of a reasonably high degree.

52. Conceptually, the key concepts that the average consumer will take away from the respective marks is that the respective undertakings, are, or operate from, clinics/eye clinics in Harley Street. There is a high degree of conceptual similarity.

Distinctiveness of the earlier mark(s)

53. The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically

widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

54. Inherently, the earlier mark is weak in distinctive character. Indeed, I note from the official file that the earlier mark was accepted on the basis of distinctiveness acquired through use. Mr Pixton accepted that judicial notice could be taken of the fact that Harley Street was a well-known street in London famed for the provision of high quality private healthcare services. Further, there can be little doubt that the word CLINIC is an appropriate descriptor of various forms of healthcare operation. Any inherent capacity for the mark to individualise the opponent’s services from those of others must, therefore, stem from the combination of words THE HARLEY STREET CLINIC being seen as the name of the service provider itself.

55. The use made of the mark is not insignificant, however, the target audience (and customers) of the opponent’s services must be relatively niche given the exclusive (and expensive) nature of the private healthcare services provided in Harley Street. Thus, whilst a not insignificant number of consumers will have heard of The Harley Street Clinic and its reputation in the field of healthcare, the vast majority of consumers will not. For those who are aware of the reputation, it appears to be the case that it is most well-known for cancer treatment and heart surgery, although, I accept that more general medical services are also provided, although nothing specifically in the field of ophthalmology.

Likelihood of confusion

56. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average

consumer and determining whether they are likely to be confused. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). In terms of indirect confusion, this was dealt with by Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 where he noted that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

57. I will consider first the identical services in class 44. Mr Pixton focused his submissions primarily upon indirect confusion. His argument was, put simply, that consumers would believe that THE HARLEY STREET CLINIC had opened a new branch for ocular care and had, inevitably, called it the HARLEY STREET EYE CLINIC. He felt the addition of the H logo was not sufficient to remove this assumption. Mr Lucas stated that some confusion may be possible, but it would be with an extremely small number of people; he felt that the presence of the H logo was enough to avoid confusion more generally.

58. I do not take Mr Lucas’ statement that there may be some confusion as an admission against interest. He was keen to stress that such a possibility was very low. The case-law suggests that for a successful finding under this ground, confusion does not need to be universal, or even with a majority of consumers, what is required is confusion amongst a sufficiently significantly percentage of people. This can be seen in *J.W.Spear & Sons Ltd and Others v Zynga Inc.* [2015] EWCA Civ 290, where Floyd L.J. summed up the Court of Appeal’s earlier judgment in *Interflora Inc. and another v Marks and Spencer plc* [2014] EWCA Civ 1403 like this:

“37. In relation to what the court described as the crucial question, namely whether the average consumer, as a hypothetical person, necessarily has a single reaction and so precludes a consideration of the perceptions of a proportion of the relevant public the court in *Interflora* identified the following propositions:

- i) the average consumer test provides the court with a perspective from which to assess the particular question it has to decide, for example whether a statement is liable to mislead purchasers.
- ii) a national court may be able to assess this question without the benefit of a survey or expert evidence.

iii) a national court may nevertheless decide, in accordance with its own national law, that it is necessary to have recourse to an expert's opinion or a survey for the purpose of assisting it to decide whether the statement is misleading or not.

iv) absent any provision of EU law dealing with the issue, it is then for the national court to determine, in accordance with its own national law, the percentage of consumers misled by the statement that, in its view, is sufficiently significant in order to justify banning its use.”

59. At no point did Mr Lucas come close to accepting that there would be confusion amongst a sufficiently significant percentage of the relevant public. I must, though, still consider the competing arguments and decide the matter for myself.

60. Although the words HARLEY STREET and CLINIC are separately descriptive, the inclusion in both marks of THE HARLEY STREET CLINIC/THE HARLEY STREET EYE CLINIC are likely to be seen as the name of the particular service provider. Thus, I agree with Mr Pixton that the addition of the word EYE before CLINIC in the applicant's mark means that there is potential for the average consumer to believe that this a new branch of the opponent, albeit with a specific focus on eye care. I think that such an assumption is even more likely on the part of the not insignificant number of consumers who will be aware of the opponent's reputation. The presentational difference must, though, also be borne in mind. However, notwithstanding this, my view is aligned with that of Mr Pixton, a sufficiently significant percentage of consumers will believe that the services offered under the applicant's mark are economically connected in some way to the services provided under the opponent's THE HARLEY STREET CLINIC trade mark, albeit with some form of new branding. Those confused will predominantly be those who are aware of the opponent's reputation, but I also consider it likely that significant numbers of people who may just encounter the respective marks will also be confused on account of the verbal elements indicating the name of the undertakings themselves.

61. I must now consider the applied for goods. In relation to:

Class 9: Anti-dazzle spectacles, anti-glare spectacles, children's eye glasses, contact lenses, contact lens blanks, corrective eyewear, correcting lenses [optics], eyeglass lenses, eyeglasses; eyewear; glass ophthalmic lenses; lens blanks for eyesight correction, lenses (optical-); optical glasses, optical goods; optical lenses, optical lenses for use with sunglasses; opticians' goods, ophthalmic lenses, plastic lenses, sight glasses [optical], spectacle lenses, spectacles, spectacles [glasses], spectacles [optics], corrective glasses; Eyeglass frames; frames for spectacles and sunglasses; cases (eyeglass-), chains for spectacles, eyeglass cases

I consider that there is a likelihood of confusion when one bears in mind that the services for which I have found a moderate level of similarity with these goods covers healthcare services such as those provided by opticians and other eye care specialists. The similarity between the marks will indicate that these are goods provided by THE HARLEY STREEY CLINIC eye care service provider. Further, although there is only a low degree of similarity between the goods, I extend this finding to: eye baths, eye droppers, for similar reasons.

62. That leaves:

Eyepieces, eyepieces (instruments containing-), instruments containing eyepieces, instruments for diagnosis [for scientific use], laboratory optical apparatus, optical devices, enhancers and correctors, optical lens sights, optical measurement apparatus, optical measuring components; Artificial lenses for implantation in the eye, artificial surgical implants; eyes (artificial-), implants consisting of artificial materials, intra-corneal implants, intra-ocular implants; intra-ocular lenses, intraocular lenses, intraocular lenses for surgical implantation; ocular implants; prostheses (intraocular-) [lenses] for surgical implantation, surgical implants comprised of artificial materials, surgical implants made of artificial materials; intraocular lens biometers, laser beam delivery instruments for medical use, laser instruments for medical use, laser light treatment instruments for medical use, lasers for ophthalmic purposes, ophthalmoscopes, ultrasonic eye axis length meters; eye shields for medical use, eye shields for surgical use; eye pads for surgical use

63. To the extent that I found these goods to be dissimilar, there can be no likelihood of confusion. However, even if I am wrong on that and there is a very low level of similarity between them, the factors do not combine to convince me that confusion will arise. Here, the consumers are different. I accept that some healthcare professionals may have heard of the opponent's mark, and thus its reputation could assist, but, as stated earlier, the opponent's reputation does not extend to the field of ocular care. I simply believe there are too many steps (even for eye shields and eye pads) for the average consumer to assume that there is some form of economic link. The opposition under this ground is rejected for these goods.

Section 5(3) of the Act

64. For procedural economy, I will consider this ground only in relation to the goods for which the opposition has so far failed. Section 5(3) of the Act reads:

“5-(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of Community trade mark, in the European Community) 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.”

65. The leading cases are the following CJEU judgments: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and Case C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the later mark would cause an average consumer to bring the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious likelihood that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a

characteristic or quality which is liable to have a negative impact of the earlier mark; *L’Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L’Oreal v Bellure*).

Reputation

66. I accept that the opponent's earlier mark has a reputation, although, the degree of knowledge that the relevant public has of it, whilst not insignificant, is at the lower end of the reputation requirement. The reputation is strongest in the field of cancer/heart treatment, weaker for more general medicine.

The required link

67. In addition to having a reputation, a link must be made between the subject trade mark and the earlier mark. In *Adidas-Salomon*, the CJEU stated:

“The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 23). The existence of such a link must, just like a likelihood of confusion in the context of Article 5(1)(b) of the

Directive, be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, in respect of the likelihood of confusion, SABEL, paragraph 22, and Marca Mode, paragraph 40).”

68. In *Intel* the CJEU provided further guidance on the factors to consider when assessing whether a link has been established. It stated:

“41 The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case...

42 Those factors include:

- the degree of similarity between the conflicting marks;
- the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;
- the strength of the earlier mark’s reputation;
- the degree of the earlier mark’s distinctive character, whether inherent or acquired through use;
- the existence of the likelihood of confusion on the part of the public”.

69. In relation to the goods for which the opponent failed under section 5(2)(b), I do not consider that a link will be made. The goods are mainly for ocular use and the absence of any reputation in that field, together with the levels of similarity and distinctiveness touched on earlier, and the inherent differences between the goods and the services, means that the earlier mark will not be brought to mind when the applicant’s mark is encountered. I think the same applies even in relation to eye shields and eye pads. The ground under section 5(3) is dismissed.

Conclusion

70. The opposition fails and, subject to appeal, the applicant's mark may proceed to registration for:

Class 9: Eyepieces, eyepieces (instruments containing-), instruments containing eyepieces, instruments for diagnosis [for scientific use], laboratory optical apparatus, optical devices, enhancers and correctors, optical lens sights, optical measurement apparatus, optical measuring components;

Class 10: Artificial lenses for implantation in the eye, artificial surgical implants; eyes (artificial-), implants consisting of artificial materials, intra-corneal implants, intra-ocular implants; intra-ocular lenses, intraocular lenses, intraocular lenses for surgical implantation; ocular implants; prostheses (intraocular-) [lenses] for surgical implantation, surgical implants comprised of artificial materials, surgical implants made of artificial materials; intraocular lens biometers, laser beam delivery instruments for medical use, laser instruments for medical use, laser light treatment instruments for medical use, lasers for ophthalmic purposes, ophthalmoscopes, ultrasonic eye axis length meters; eye shields for medical use, eye shields for surgical use; eye pads for surgical use

71. The remaining goods and services are refused registration.

Costs

72. Given the roughly equal measure of success, I decline to favour either side with an award of costs.

Dated this 12th day of July 2017



Oliver Morris

For the Registrar,

The Comptroller-General