

O-505-17

**TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO 3205796
BY EASIPETCARE LTD
TO REGISTER**



**AS A TRADE MARK
IN CLASSES 5 AND 44
AND OPPOSITION THERETO (UNDER NO. 60000633)
BY
ANDREW BENNETT**

BACKGROUND AND PLEADINGS

1. Easipetcare Ltd ('the applicant') applied under No. 3205796 to register the following mark on 10 January 2017:



2. The mark was accepted and published on 20 January 2017 for the following goods and services:

Class 5: Veterinary vaccines.	Class 44: Veterinary dentistry; Veterinary advisory services; Veterinary assistance; Veterinary services; Veterinary surgical services; Veterinary surgery.
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3. Mr Andrew Bennett ('the opponent') opposes the trade mark under Section 5(2)(b) of the Trade Marks Act 1994 (the Act) using the fast track opposition procedure. This is on the basis of its earlier UK Trade Mark set out below. This mark is registered in classes 9, 16, 18, 21, 28, 31, 35, 36, 41, 44 and 45 but it is only class 44 which forms the basis of the opposition.

UK TM 3088446 EEZEEVET Filing date: 8 January 2015 Registered on: 26 June 2015	Class 44: Veterinary services; veterinary practice services; veterinary hospital services; animal and pet welfare services; animal and pet hygiene services; advisory, information and consultancy services relating to the aforesaid.
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4. The applicant filed a counterstatement denying the grounds of opposition.

5. The opponent's above mentioned trade mark is an earlier mark, in accordance with Section 6 of the Act, but is not subject to proof of use requirements as it had not been registered for five years or more before the publication date of the applicant's mark, as per section 6A of the Act.

6. Rules 20(1)-(3) of the Trade marks Rules ("TMR") (the provisions which provide for the filing of evidence) do not apply to fast track oppositions but Rule 20(4) does. It reads:

"(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit".

7. The effect of the above is to require parties to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast track oppositions. No leave was sought in respect of these proceedings.

8. Rules 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise, written arguments will be taken. A hearing was not requested nor considered necessary in this case. Both parties supplied written submissions. This decision is taken following a careful reading of all the papers.

9. The applicant represented themselves in these proceedings whilst the opponent was represented by Urquhart-Dykes & Lord LLP.

SECTION 5(2)(B)

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

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

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

11. The leading authorities which guide me are from the Court of Justice of the European Union ('CJEU'): *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.

The principles

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

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

(c) the average consumer normally perceives 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 great 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 THE GOODS & SERVICES

12. The goods and services to be compared in this case are:

Opponent's services	Applicant's goods & services
Class 44: Veterinary services; veterinary practice services; veterinary	Class 5: Veterinary vaccines.

hospital services; animal and pet welfare services; animal and pet hygiene services; advisory, information and consultancy services relating to the aforesaid.	Class 44: Veterinary dentistry; Veterinary advisory services; Veterinary assistance; Veterinary services; Veterinary surgical services; Veterinary surgery.
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13. With regard to the comparison of goods and services, in *Canon*, the CJEU stated at paragraph 23 of its judgment 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”.

14. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) 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;
- e) 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.

15. In *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM Case T-133/05) (*‘Meric’*), the General Court (*‘GC’*) held:

“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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedial v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

16. Both the opponent’s and applicant’s class 44 specifications contain the identical terms ‘veterinary services’ and ‘advisory services relating to veterinary services’. With regard to the applicant’s remaining terms, namely ‘Veterinary dentistry; Veterinary assistance; Veterinary surgical services; Veterinary surgery’, these will be covered by the opponent’s term ‘veterinary services’ at large and therefore falls under the *Meric* principle outlined above.

17. With reference to the *Treat* points given above in relation to the applicant’s class 5 goods for ‘veterinary vaccines’, I must consider the issue of whether such goods are complementary or competitive to the services of the earlier mark. In *Kurt Hesse v OHIM*, Case C-50/15 P, The CJEU stated that complementarity is an autonomous criteria capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court 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”.

18. In *Sanco SA v OHIM*, Case T-249/11, the General Court 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, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

"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."

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."

19. On the basis of the case law given above, I find that the end users are likely to be vets or those operating veterinary practices. The physical nature is that of goods specifically designated for use in animal health. Such animal vaccines will be marketed directly to veterinary practices. So the end user, the nature of the goods and trade channels are different to the services of the earlier mark. Therefore I do not consider 'veterinary vaccines' to be similar to the services of the earlier mark.

AVERAGE CONSUMER AND THE PURCHASING ACT

20. I must now consider the role of the average consumer and how the goods and services are purchased. 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*.

21. 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.”

22. The average consumer for the contested services are members of the general public with responsibility for the health and welfare of animals. Whereas as I have found above, the average consumer for the goods will be a vet or those who run veterinary practices. The selection of a vet or veterinary surgery is likely to be a considered process. Consumers will consider specific criteria such as animal specialisms, location and treatment prices. In my view I consider the average consumer will be paying a higher than average degree of attention. With regard to the purchasing process, I consider the selection of veterinary provision to be a visual act. Consumers are likely to search the internet or local area directories to find a suitable provider or they may see signage outside veterinary surgeries. I also consider there could be an aural element if veterinary providers are recommended by word of mouth or at animal related events, e.g. dog shows or livestock markets.

COMPARISON OF MARKS

23. The marks to be compared are:

Opponent's mark	Applicant's mark
EEZEEVET	

24. 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 Court of Justice of the European Union 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.”

25. 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.

26. The opponent's trade mark consists of a single word **EEZEEVET** in plain block capital letters. The overall impression of the mark and its distinctiveness rests solely on that word.

27. The applicant's mark is a composite mark in colour consisting of a paw print device placed in front of the conjoined lower case word **easipetcare** and a heart device placed to the top of the final letter E. The word element **easipet** is depicted in a blue colour whereas the **care** element is in red. The whole word is presented above a capitalised slogan **LOW COST VETS WHO CARE**. The word **VETS** is coloured using the same red as the word **CARE** above it. As a general rule of thumb

and I think is applicable here, words speak louder than devices. The device elements in this mark are prominently placed at the front of the **easipetcare** element, so will be seen first when reading the mark from left to right, and at the end of the same word. However it is the word element by which the mark is likely to be referred and which carries the greater weight in the overall impression of the mark.

28. With regard to the visual similarity, the opponent refers to the applicant's mark and submits that:

“the paw print and the strap line do not make a significant contribution to the visual appeal of the mark and the *de minimus* heart device would go unnoticed”.

I disagree with this submission. The paw print device is not *de minimis* within the mark overall. It has the same proportions and colour as the word that follows it and it is positioned at the front of the mark so the eye will be drawn to it. Although the heart device is smaller in size it follows the last letter of the word and is in the same red colour as the **care** element so I believe it would be seen. There is no reason to believe that it would go unnoticed. In my view the same would apply to the strap line. Although it is placed in a subordinate position under the word **easipetcare**, it is clear and legible and is at least the length of the second half of the mark. Overall I find there is a low degree of visual similarity.

29. In an aural comparison, both marks use a phonetic equivalent of the word 'easy' and a consumer will accord the usual pronunciation of that word. Both marks consist of conjoined word elements so consumers are likely to vocalise the marks in full. It is unlikely that a consumer would vocalise the device elements. The elements 'vet' and 'pet' share the same 'et' sound. However the applicant's mark has the suffix element 'care' which is not present in the opponent's mark. I consider it unlikely that the consumer will vocalise the **LOW COST VETS WHO CARE** part of the opponent's mark. It is more likely that only **easipetcare** will be pronounced. Overall I find there is a medium degree of aural similarity.

30. In a conceptual comparison, the opponent's word only mark will bring to mind a vet and a notion of something that is straightforward and easy to access. The applicant's mark is likely to present a similar message of pet care that is straightforward and easy to access. This message of pet care will be further reinforced by the paw print device and the clearly understood slogan **LOW COST VETS WHO CARE**. In relation to the contested services, there is a similarity of concept between vets and pet care but this will be further emphasized as the later mark actually contains the word Vets. Overall I find there to be a medium degree of conceptual similarity between the marks.

DISTINCTIVE CHARACTER OF THE EARLIER MARK

31. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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).”

32. The opponent did not file any relevant evidence showing use of the earlier mark for the services relied on so I can only consider its inherent distinctiveness.

33. The earlier mark consists of an invented word EEZEE, being a phonetic equivalent of a known English word ‘easy’, conjoined with the descriptive word ‘vet’. The whole does not describe the services for which it is registered. On that basis I find the earlier mark to have an average level of distinctiveness.

LIKELIHOOD OF CONFUSION

34. I must now draw together my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors:

- a) The interdependency principle, whereby a lesser degree of similarity between the goods and services may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc*).
- b) The principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*).
- c) The factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*).

37. So far I have found that the respective services in class 44 are identical but the goods in class 5 are not similar. I have also found that the average consumer is a member of the general public with a responsibility for the health and welfare of animals who will pay a higher than average degree of attention during the purchasing process. In addition I have found that the earlier mark has an average degree of inherent distinctiveness and that when comparing the marks they are aurally and conceptually similar to a medium degree but visually similar only to a low degree.

38. Although I have found that there is a conceptual similarity to a medium degree, it is in relation to a concept which is not greatly distinctive for the services. Further, the marks at issue only have a low degree of visual similarity. In fact the lowest point of similarity is in the visual impact. This is important as I found that these are services which are primarily purchased visually. Therefore, even after making some allowance for imperfect recollection, I do not consider there to be a likelihood of direct confusion between the applicant's mark and the opponent's mark, on the part of an average consumer paying a higher than average level of attention. The differences are sufficient to avoid this. Nor do I consider that the average consumer will be indirectly confused and are unlikely to put the coincidence of a misspelt 'easy', namely 'eezee' or 'easi' down to the respective undertakings being the same or related.

CONCLUSION

39. The opposition fails under section 5(2)(b) of the Act.

COSTS

40. As the applicant has been successful, it is entitled to a contribution to its costs. Awards of costs in Fast Track Proceedings are governed by Tribunal Practice Notice (TPN) 2/2015. Bearing in mind the guidance given in TPN 2/2015, I award costs to the applicant as follows:

Considering the notice of opposition and filing a counterstatement:	£200
Filing written submissions:	£200
Total:	£400

41. I order Mr Andrew Bennett to pay Easipetcare Ltd the sum of £400. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 10th day of October 2017

June Ralph

For the Registrar

The Comptroller-General