

O/770/22

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION
NO. 01581812 BY
INVENTUS POWER, INC.
TO REGISTER AS A TRADE MARK:**

U1LIFEPRO

IN CLASS 9

AND

**OPPOSITION THERETO
UNDER NO. 60002000 BY
KEVIN LEE**

Background & Pleadings

1. Inventus Power, Inc. (“the applicant”) is the holder of the International Registration (“IR”) WO0000001581812 (“the designation”) in respect of the mark shown on the front page of this decision. Protection in the UK was requested on 29 January 2021. The IR was accepted and published in the Trade Marks Journal for opposition purposes on 20 August 2021 in respect of the following goods:

Class 9: Batteries; battery chargers; power supplies and adapters.

2. In its submissions, the applicant offered the following fall-back specification:

“Class 9 - Lithium iron phosphate batteries; battery chargers for lithium iron phosphate batteries; power supplies and adapters relating to lithium iron phosphate batteries.”

3. Kevin Lee (“the opponent”) opposes (using the Fast Track provisions) the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent is the proprietor of the following UK comparable TM registration number 917880612 for the following mark:

LIFEPRO

4. The opponent’s mark was filed on 27 March 2018 and registered on 7 August 2018 for the following goods:

Class 9: Batteries, excluding batteries for mobile phones; inverters; control apparatus for use with batteries; control apparatus for use with inverters.

5. In his notice of opposition, the opponent states that all the goods covered by his earlier mark are relied upon.

6. Under Section 6(1) of the Act, the opponent's trade mark clearly qualifies as an earlier trade mark. Further, as the registration of the opponent's earlier mark was completed less than five years before the application date of the contested mark, proof of use is not relevant in these proceedings, as per Section 6A of the Act.
7. The opponent, in his notice of opposition, claims that the marks are "are similar to an extremely high degree, also approaching identity." The opponent also adds that the prefix "U1" in the contested mark will be viewed as "a mere extension" of the earlier mark. Further, he contends the respective goods in Class 9 are "similar to a degree approaching identity".
8. The applicant filed a defence and counterstatement, denying that "that the signs are identical or similar or, to the extent there is any similarity, alleges that this is at a low level." The applicant also claims that "the prefix "U1" in the sign subject of the Application will be noted as a significant difference [...]". Further, the applicant asserts that the respective goods in Class 9 are dissimilar.
9. Rules 20(1)-(3) of the Trade Marks Rules (the provisions which provide for the filing of evidence) do not apply to fast-track oppositions such as the present proceedings, 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.”

10. The net effect of these changes is to require parties to seek leave in order to file evidence in fast-track oppositions. On 10 February 2022, the applicant sought leave to file evidence of what it stated would "assist the Hearing Officer in determining the distinctive and dominant elements of both signs and assessing the distinctive character of the Earlier Mark for the purposes of determining whether there exists a likelihood of confusion between them." Leave was granted, and the evidence was formally

admitted into proceedings on 26 April 2022. The opponent was afforded the opportunity to file evidence in reply but chose not to do so.

11. A hearing was neither requested nor was it considered necessary. Both parties filed written submissions, which will not be summarised but will be referred to as and where appropriate during this decision. Along with its written submission, the applicant provided the fall-back specification I mentioned above and to which I will later in this decision. This decision has been taken following a careful consideration of the papers.
12. In these proceedings, the opponent is represented by Harrison IP Ltd and the applicant by Haseltine Lake Kempner LLP.
13. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

Applicant's Evidence

14. The applicant's evidence consists of the witness statement of Laura Robyn, who is a trade mark attorney at Haseltine Lake Kempner LLP, and Exhibits LR01-LR24.
15. I have read and considered all of the evidence and will refer to the relevant parts at the appropriate points in the decision.

Decision

Section 5(2)(b)

16. 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”.

17. The principles, considered in this opposition, stem from the decisions of the European 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

- 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 Goods

18. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon Kabushiki Kaisha*, the Court of Justice of the European Union (CJEU) stated that:

“23. 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 complementary.”

19. Guidance on this issue was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] RPC 281. At [296], he identified the following relevant factors:

- “(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.”

20. The General Court (GC) confirmed in *Gérard Meric v OHIM*, Case T-133/05, paragraph 29, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another, or vice versa:

“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 für 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”.

21. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment, he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“[...] the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

22. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

“[...] 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) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the 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.”

23. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU held that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The GC clarified the meaning of “complementary” goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06, at paragraph 82:

“[...] 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.”

24. The competing goods to be compared are shown in the following table:

Opponent's Goods	Applicant's Goods
Class 9: Batteries, excluding batteries for mobile phones; inverters; control apparatus for use with batteries; control apparatus for use with inverters.	Class 9: Batteries; battery chargers; power supplies and adapters.

25. In his submissions, the opponent stated that:

“32. The Applicant's evidence, even if accepted as relevant to these proceedings, is premised on an assumption that the Opponent's Earlier Registration is or would be applied only to lithium iron phosphate (lithium ferrophosphate) batteries. This is denied, and is nowhere apparent from the specification covered by the Opponent's Earlier Registration [...].

33. Notably, notwithstanding its dozens of pages of supposed evidence on lithium batteries, the Contested Application also seeks to cover a general specification even more wide-ranging in its scope than that of the Earlier Registration [...].

34. With the above broad specifications in mind, even if the Applicant's evidence is accepted as mitigating or precluding confusion insofar as lithium batteries are concerned - and it is denied that it does or should for the reasons stated above, but is raised here for the sake of argument -- the Applicant's evidence makes out no defence to likelihood of confusion or mitigation for the totality of all other battery types (of which there are many) not containing lithium.”

26. I note that the applicant's fall-back specification, as shown earlier in this decision, is non-binding, and I will compare the respective goods as they stand, only considering the applicant's fall-back specification at the end of this section to the extent I deem it necessary.

Batteries

27. The contested term is a broad term encompassing the earlier goods “*Batteries, excluding batteries for mobile phones*”, regardless of the limitation appearing in the earlier specification. Thus, I find the respective goods to be identical as per *Meric*.

Battery chargers

28. The contested goods are accessories that recharge batteries. These are similar to the opponent’s “*Batteries, excluding batteries for mobile phones*” as the batteries are a key component to be (re)charged by the contested goods. Thus, there is a prominent complementary relationship between the goods. Further, the respective goods could be sold through the same trade channels and overlap in users. I find them to be similar to a medium degree.

Power supplies and adapters

29. The contested goods relate to devices which provide power either internally (i.e. power supplies) or externally (i.e. power adapters), such as AC plugs, to another device. I find that there is similarity with the opponent’s goods “*Batteries, excluding batteries for mobile phones*”. A battery is an enclosed cell that releases electrical charge and is a source of power by storing and harnessing energy/electricity. Against this background, although the respective goods differ in nature, they share the same general purpose of powering a device. There is the potential that the respective goods could be sold in the same retail shops, including specialist stores, and, thus, they will overlap in trade channels. In this respect, they will be sharing the same users. Also, I find that there is competition between the goods as the consumers may select to use a battery over a power supply or adapter. There is a degree of complementarity where the average consumer would assume that the

responsibility for these type of goods lies with the same undertaking. I find that there is a medium to high degree of similarity.

30. I will turn now to consider the applicant's fall-back specification which reads as follows:

Class 9: Lithium iron phosphate batteries; battery chargers for lithium iron phosphate batteries; power supplies and adapters relating to lithium iron phosphate batteries.

31. I note that the earlier term "*batteries, excluding batteries for mobile phones*" contains a limitation to the scope of its goods, which excludes batteries for mobile phones. I also note from the applicant's evidence that lithium iron phosphate batteries are used, for example, in transportation, solar-powered lights, electronic cigarettes, electronic vehicles, motorhome/caravans/campervans, and cordless machines (e.g. floor machines).¹ That amounts to saying that lithium iron phosphate batteries have a wider application than mobile phones. In this respect, I find that the opponent's term "*batteries, excluding batteries for mobile phones*" is broad enough to cover lithium iron phosphate batteries at large used beyond mobile phones. Against this background, I find that the applicant's fall-back specification does not assist and, essentially, does not change the degree of identity/similarity with the opponent's goods as advanced above.

Average Consumer and the Purchasing Act

32. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes 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 and services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch),

¹ See for example Exhibits LR07, LR11, and LR24.

at paragraph 70, Birss J (as he then was) described the average consumer in these terms:

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”

33. The applicant submitted the following:

“14. The goods covered by the Earlier Mark are batteries (excluding mobile phone batteries), inverters and control apparatus in Class 09. For all these goods, the average consumer is likely to be either a specialist buyer sourcing components for electronics or other battery-powered products, or a member of the general public purchasing batteries for household or personal devices/appliances.

15. The cost of batteries varies between very low (£2.50 for 10 AAA batteries in the supermarket) to high (over £2,500 for solar panel power storage or power stations). Whilst the average cost of batteries purchased from the supermarket, DIY store or ironmonger's by a member of the general public is not particularly high, special attention will be paid to select the correct type of battery, often following a visual inspection and/or after taking recommendations from a shop assistant. In a market where many different types of batteries are available (further illustrated below), any buyer of batteries will need to ensure the product purchased fits the technical requirement of the device/appliance/purpose to be powered.

16. Therefore, even if some of the goods may be purchased by a member of the general public, the level of attention paid by consumers in purchasing these goods is likely to be high.”

34. I find that the average consumer of the goods at issue will be a member of the general public without excluding professionals/businesses. Such goods can be selected from stores, including specialist ones, brochures and catalogues, and online. In retail premises, the goods will be displayed on shelves, where they will be viewed and self-selected by consumers. Although I consider this purchasing act to be primarily visual, aural considerations will not be ignored in the assessment. The level of attention paid to the purchase will also vary considerably. For goods such as “*batteries*”, the average consumer is likely to consider the type of battery and other factors, for example, the advertised life and performance of the battery, but for some low-cost items (e.g. AAA/AA) there is the potential that the average consumer may buy them without examining them closely. As a result, the degree of attention will range from relatively low to medium, depending on the cost of the item. As for the rest of the goods, namely “*battery chargers*” and “*power supplies and adapters*”, I consider that the average consumer will examine them to ensure compatibility with their devices, and, thus, they will pay a medium degree of attention. Last, in any event, professionals and businesses may pay a higher than a medium degree of attention to ensure the product chosen is fit for purpose.

Comparison of Trade Marks

35. 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.”

36. 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.

37. The marks to be compared are:

Opponent's Mark	Applicant's Mark
LIFEPRO	U1LIFEPRO

Overall Impression

38. The applicant submitted that “[t]he additional dominant and distinctive feature “U1” at the start of the sign applied for will create a different overall impression on the average consumer as a result of the significant visual, aural and conceptual distinctions.”

39. The earlier mark consists of the single word “LIFEPRO” presented in a standard font and upper case. Registration of a word mark protects the word itself presented in any regular font and irrespective of capitalisation.² The overall impression of the earlier mark lies in the conjoined words, with neither word component dominating the other. Likewise, the same applies

² See *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

to the contested mark “U1LIFEPRO”, notwithstanding that it additionally opens with the alpha numeric “U1-” followed by “-LIFEPRO”, and with none of these components dominating the other.

Visual Comparison

40. The earlier mark is seven letters long whereas the contested is nine. The entirety of the opponent’s mark is included in the applicant’s mark. Bearing in mind, as a rule of thumb, that the beginnings of words tend to have more impact than the ends,³ the alpha numeric string “U1”, positioned in the beginning of the contested mark, creates the only point of visual difference. Considering all the factors, including the overall impression of the marks, I find them to be visually similar to a medium degree.

Aural Comparison

41. On the one hand, the earlier mark is a two-syllable mark which the average consumer will articulate as “LYF-PRO”. On the other, the contested mark is four-syllables long and will be pronounced as “YOU-ONE-LYF-PRO” sharing the third and fourth syllable of the earlier mark. Therefore, I consider that the marks are aurally similar to a degree that is between low and medium.

Conceptual Comparison

42. The opponent in his submissions contended the following:

“30. The Applicant has adduced no evidence for any of the following points:

30.1 that the chemical compounds *LiFe* or *LiFePo₄* are commonly known to the average British consumer of batteries;

³ See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.

30.2 that the abbreviated chemical compounds *LiFe* or *LiFePo₄* are commonly or habitually used as a way to refer to lithium or lithium-ion batteries (the common parlance, in fact, being just these phrases --"lithium battery" or "lithium-ion battery"), rather than merely listed as the main chemical compound ingredient, in line with legal requirements; and

30.3 that the chemical compound *LiFe*, even to those aware of it, is pronounced as the English word "life". If it is noticed or pronounced at all by the average consumer of batteries, the consumer would vocalise the elements of the periodic table separately as is done with other compounds better known to laypeople, such as *HCl*, *NaCl*, *H₂O* or *CO₂*, all of which are pronounced as initialisms and not acronyms.

31. The Opponent denies that anybody but perhaps a lithium battery designer or ultra-specialist would make any connection between the word LIFE in LIFEPRO and the chemical compounds *LiFe* or *LiFePo₄*. The average consumer does not colloquially refer to water as *H₂O* or salt as *NaCl* or bleach as *NaOCl*. That the Applicant's defence rests not only on the average lay consumer being aware of the compounds *LiFe* and *LiFePo₄* but also immediately associating the mark LIFEPRO with them without any further thought, strains credulity.

[...]

36. Even were it conceded - again, for the sake of argument only, and not admitted here - that *LiFe* or *LiFePo₄* had *some* amount of descriptiveness connected with the words LIFE or LIFEPRO for a very particular, technically-minded consumer, nothing in the evidence shows that this rises to a level that would obviate or preclude confusion between LIFEPRO and U1LIFEPRO when applied to identical class 09 goods."

43. In its counterstatement, the applicant asserted that:

“10. Phrases such as "battery life" or "long-life" are also frequently used in relation to batteries, and PRO is a well-known abbreviation for 'professional' that is common promotional language for a variety of goods.”

44. Further, I note that the applicant has made lengthy submissions, which I have taken into account, but I do not propose to reproduce in full but only in part. In its submissions, the applicant claims that:

“17. *In summary*, it can be concluded based on the Applicant's evidence that the element LIFE (or LiFe or Li-Fe) is widely used in the battery industry and will be recognised by the relevant consumer, who will be familiar with the range of batteries on the market, as an abbreviation of "Lithium Iron", which relates to a particular type of battery technology that is in widespread and increasing use.

[...]

19. As the shared elements of the marks, the meaning of the elements LIFE and PRO is of central relevance to this case. Aside from the clear and specific descriptive meaning of LIFE in relation to batteries based on Lithium Iron (LiFe) technology as set out in the evidence above, we note the dictionary meanings of these two word elements are as follows:

o PRO: "**A pro is also someone who is very good at something:** *Debbie is a real pro at arranging flowers.*" [footnote omitted]

o LIFE: "**the period for which a machine or organization lasts:** *The newer batteries have a much longer life.*" [footnote omitted]

[...] PRO is often used in marketing language to indicate the claimed goods are intended for "professionals". The inference here is that the products are of a higher quality.

[...]

35. **Conceptually**, the marks coincide in the elements LIFE and PRO, both of which are English dictionary words. However, it is clear from the case law that the coincidence of descriptive or non-distinctive elements does not lead to a relevant conceptual similarity. As such, the addition of the arbitrary and unusual alphanumeric "U1" to the start of the sign, which has no equivalent in the Earlier Mark, is significant also from a conceptual standpoint. The presence of this distinctive component at minimum creates conceptual intrigue and, in all likelihood, would elude interpretation entirely. As a result, there is no relevant conceptual similarity between the signs."

45. My view on the conceptual position is as follows. Although the earlier mark consists of the conjoined words "LIFE" and "PRO", each of which contributes to the overall impression, both are well-known words to the average consumer in the UK, who will perceive them in accordance with their dictionary meanings. The word component "LIFE-" will likely be understood as "the period between birth and death, or the experience or state of being alive"⁴ and the word component "-PRO" as an abbreviation of professional. Together these words in the earlier mark may be perceived as alluding to the quality of the goods, but I do not accept from the materials filed that the mark is descriptive per se. I note that case law makes clear that a registered trade mark must be assumed to have "at least some distinctive character".⁵ Nor from the materials filed do I consider that the UK average consumer will conceptualise these word components as the abbreviated chemical compounds LiFe or LiFePo₄ found in the lithium iron phosphate battery as per applicant's submissions. Notably, in paragraph 35 of its submissions, the applicant itself recognises that these words will be perceived as dictionary words, stating that "the marks

⁴ See <https://dictionary.cambridge.org/dictionary/english/life>.

⁵ See for instance paragraph 41 of the CJEU ruling in *Formula One Licensing BV v OHIM, Case C-196/11P*.

coincide in the elements LIFE and PRO, both of which are English dictionary words." (Emphasis added)

46. The contested mark comprises of the conjoined alpha numeric prefix and word components "U1LIFEPRO". It is my view that the average consumer will treat the prefix "U1-" as such without extracting any particular concept from the given alpha numeric string. In addition, no evidence shows that the average consumer will attribute any meaning to the prefix "U1-" that could modify the concept of the conjoined word components "-LIFEPRO". Thus, I consider that the word components "-LIFEPRO" will retain their meaning and be construed as having the same meaning as in the earlier mark. As a result, notwithstanding the presence of the prefix highlighted above, there is still a high degree of conceptual similarity between the marks.

Distinctive Character of the Earlier Trade Mark

47. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

"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 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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).”

48. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.
49. The applicant, throughout its counterstatement and submissions (which I have taken into account and do not propose to reproduce here), put forward claims about the descriptiveness and non-distinctiveness of the earlier mark. However, in his notice of opposition, the opponent claims that his mark has a high degree of distinctiveness.
50. The opponent has not shown use of his mark and, thus, he cannot benefit from any enhanced distinctiveness; hence, I have only the inherent distinctiveness of the earlier mark to consider. The earlier mark consists of the word “LIFEPRO” which is a made-up word consisting of the conjunction of the ordinary dictionary words LIFE and PRO. Although the word may be considered “invented”, the mere conjoining of those words is not especially fanciful, and the mark has an allusive significance in relation to the goods for which it is registered. Consequently, the earlier mark is inherently distinctive to a slightly less than medium degree.

Likelihood of Confusion

51. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred above in this decision. Such a global assessment is not a mechanical exercise. I must

also have regard to the interdependency principle, that 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.⁶ It is essential to keep in mind the distinctive character of the opponent's trade mark since the more distinctive the trade mark, the greater may be the likelihood of confusion. I must also keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon imperfect recollection.⁷

52. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking.

53. In *L.A. Sugar Limited v Back Beat Inc*, Case BL O/375/10, Iain Purvis Q.C., sitting as the Appointed Person, explained 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

⁶ See *Canon Kabushiki Kaisha*, paragraph 17.

⁷ See *Lloyd Schuhfabrik Meyer*, paragraph 27.

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)."

I note that the categories identified above by Mr Purvis Q.C. are not exhaustive.⁸

54. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

55. In *Bristol Global Co Ltd v EUIPO*, T-194/14, the General Court held that there was a likelihood of confusion between AEROSTONE (slightly

⁸ *Thomson Hotels LLC v TUI Travel Amber E&W LLP* BL- O-440/14 at paragraph 29.

stylised) and STONE if both marks were used by different undertakings in relation to identical goods (land vehicles and automobile tyres). This was despite the fact that the beginnings of the marks were different. The common element – STONE – was sufficient to create the necessary degree of similarity between the marks as wholes for the opposition before the EUIPO to succeed.

56. Earlier in this decision I have concluded that:

- the goods at issue are identical or similar to a medium to high degree;
- the average consumer of the Class 9 goods will be a member of the general public or professionals/businesses. The selection process is predominantly visual without discounting aural considerations. In relation to “*batteries*”, the level of attention paid will range from relatively low to medium depending on the cost of the item. As for the rest of the goods, i.e. “*battery chargers*” and “*power supplies and adapters*”, the degree of attention paid will be at a medium degree. In any event, professionals and businesses may pay a slightly higher than a medium degree of attention to ensure the product chosen is fit for purpose;
- the competing marks are visually similar to a medium degree, aurally between low and medium degree, and conceptually similar to a high degree;
- the earlier mark has a slightly less than medium degree of inherent distinctiveness.

57. Taking into account the above factors and considering the identical goods in play, there is no likelihood of direct confusion. The marks have different beginnings, which is an important consideration in the case at hand. However, I note that there is no rule that different beginnings necessarily

preclude the likelihood of confusion.⁹ The difference created by the presence of the prefix “U1-” in the contested mark will not go unnoticed. Thus, despite the similarity between the marks, including the high conceptual similarity, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. Therefore, I do not find there is a likelihood of direct confusion.

58. Nevertheless, I find that there is a likelihood of indirect confusion for the respective goods, which are identical. In particular, even when the difference created by the presence/absence of the alpha numeric prefix “U1-” between the marks is identified by the average consumer, they will assume that the goods offered under the respective marks originate from the same or economically linked undertakings. This is mainly due to the shared use of the conjoined words “-LIFEPRO” in the competing marks, creating the same concrete concept that the consumers would retain in their minds when encountering the competing marks.¹⁰
59. While the distinctive character of the earlier mark is not especially strong, this does not preclude a likelihood of confusion.¹¹ Based on the identity of the goods in question and the principle of imperfect recollection, it is likely that the average consumer would erroneously conclude that the goods are offered by the same or an economically linked undertaking, with the marks perceived as an extension/variation of the other. This finding extends to the rest of the contested goods that I have found to be similar to at least a medium degree.

⁹ See, for example, *CureVac GmbH v OHIM*, Case T-80/08 (similar beginnings not necessarily important or decisive).

¹⁰ See *Bristol Global Co Ltd v EUIPO*, T-194/14.

¹¹ See for instance paragraph 45 of the CJEU ruling in *L'Oréal SA v OHIM*, Case C-235/05 P

Outcome

60. The opposition under Section 5(2)(b) of the Act is **successful in its entirety**. Therefore, subject to appeal, the application will be refused.

Costs

61. The opponent has been successful and is entitled to a contribution towards his costs. Awards of costs in fast-track opposition proceedings are governed by Tribunal Practice Notice 2 of 2015. I award costs to the opponent on the following basis:

Filing a notice of opposition	£200
Opposition fee	£100
Filing written submissions	£300
Total	£600

62. I, therefore, order Inventus Power, Inc. to pay Kevin Lee the sum of £600. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 8th day of September 2022

Dr Stylianos Alexandridis

For the Registrar, The Comptroller General