

**O-683-22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION UK00003606465 BY NOVARTIS AG  
TO REGISTER:**

**COUVRI**

**AS A TRADE MARK IN CLASS 5**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 425021  
BY GLAXO GROUP LIMITED**

## Background & Pleadings

1. On 8 March 2021, Novartis AG (“the applicant”) applied to register the trade mark **COUVRI** in the United Kingdom in respect of *pharmaceutical preparations* in class 5. The application was published for opposition purposes on 7 May 2021.

2. On 17 June 2021, Glaxo Group Limited (“the opponent”) opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following trade mark and the following goods for which it is registered, as laid out below:

United Kingdom Trade Mark (“UKTM”) 3286523

## QUVORSI

Filing date: 31 January 2018

Registration date: 27 April 2018

*Class 5: Pharmaceutical and medicinal preparations and substances*

3. The opponent contends that there exists a likelihood of confusion on the part of the public, including a likelihood of association, on account of the identity between the respective goods and the high similarity between the respective trade marks.

4. In its counterstatement, the applicant accepts that the parties’ goods are identical, but denies that the respective marks are sufficiently similar to give rise to a likelihood of confusion, citing both visual and phonetic differences.

5. The applicant is represented by Abel & Imray LLP and the opponent by CSY London<sup>1</sup>. Both parties filed evidence during the evidential rounds, which will be summarised to the extent that it is considered necessary. Neither party requested a

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<sup>1</sup> Effective from the filing of the applicant’s counterstatement. The opponent was originally represented by Glaxosmithkline Services Unlimited.

hearing, though both elected to file submissions in lieu. Whilst I do not propose to summarise those submissions here, I will keep them in mind throughout.

6. 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 my decision will continue to make reference to the trade mark case law of EU courts.

## **Decision**

7. Section 5(2)(b) of the Act reads 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.”

8. An earlier trade mark is defined in section 6 of the Act, which states:

“6. - (1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

9. Under the provisions outlined above, the opponent's trade mark clearly qualifies as an earlier mark. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the filing date of the applicant's mark, it is not subject to the proof of use requirements. Consequently, the opponent can rely upon its earlier mark and all goods it has identified without providing evidence of use.

### **The opponent's evidence**

10. The opponent's evidence comprises a witness statement from Ms Danielle Jeeves, an Associate at CSY London, dated 17 November 2021 and supported by Exhibit DJ1. The exhibit comprises photographs of pages from both The Collins English Dictionary (Pocket Edition) and The Oxford English Dictionary (Second Edition), alongside online extracts from the Collins English dictionary and Cambridge English dictionary, all provided to show that there are no entries for words beginning QUV-.

### **The applicant's evidence**

11. The applicant's evidence comprises a witness statement from Ms Rebecca Atkins, Senior Associate at Abel & Imray. The statement is dated 13 January 2022 and is supported by Exhibit RA1. Ms Atkin encloses, within the exhibit, extracts from the online Cambridge and Merriam Webster dictionaries showing entries for multiple words beginning QU- showing, alongside definitions, how the prefix QU- would typically be pronounced.

12. In addition, the applicant filed observations in reply to the opponent's evidence, predominantly going to its relevance. I do not intend to summarise the observations further.

### **Section 5(2)(b) - Case law**

13. The following principles are gleaned from the decisions of the courts of the European Union 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 Office for Harmonization 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-334/05P 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 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 and services**

14. As the parties agree, the following goods in class 5 are present in both parties' specifications and are, self-evidently, identical:

*Pharmaceutical preparations*

### **The average consumer and the nature of the purchasing act**

15. 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 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.”

16. In *Olimp Laboratories sp. z o.o. v EUIPO*, Case T-817/19, EU:T:2021:41, the General Court considered the average consumer for, and level of attention which would be paid in, the selection of pharmaceutical and medical products in class 5. It said:

“39 Where the goods in question are medicinal or pharmaceutical products, the relevant public is composed of medical professionals, on the one hand, and patients, as end users of those goods, on the other (see judgment of 15 December 2010, *Novartis v OHIM – Sanochemia Pharmazeutika (TOLPOSAN)*, T-331/09, EU:T:2010:520, paragraph 21 and the case-law cited; judgment of 5 October 2017, *Forest Pharma v EUIPO – Ipsen Pharma (COLINEB)*, T-36/17, not published, EU:T:2017:690, paragraph 49).

40 Moreover, it is apparent from case-law that, first, medical professionals display a high degree of attentiveness when prescribing medicinal products and, second, with regard to end consumers, in cases where pharmaceutical products are sold without prescription, it must be assumed that those goods will be of concern to consumers, who are deemed to be reasonably well informed and reasonably observant and circumspect where those goods affect their state of health, and that these consumers are less likely to confuse different versions of such goods. Furthermore, even assuming that a medical prescription is mandatory, consumers are likely to demonstrate a high level of attentiveness upon prescription of the goods at issue in the light of the fact that those goods are pharmaceutical products. Thus, medicinal products, whether or not issued on prescription, can be regarded as receiving a heightened level of attentiveness on the part of consumers who are normally well informed and reasonably observant and circumspect (see judgment of 15 December 2010, *TOLPOSAN*, T-331/09, EU:T:2010:520, paragraph 26 and the case-law cited).

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42 In the present case, having regard to the nature of the goods concerned, namely medical or pharmaceutical products in Class 5, the Board of Appeal acted correctly in finding in paragraphs 18 to 21 of the contested decision – which, moreover, is not disputed by the applicant – that, in essence, the relevant public was made up of medical professionals and pharmacists and consumers belonging to the general public with a higher than average degree of attentiveness.”.

17. As the case law indicates, the average consumer of the goods at issue here is likely to comprise both medical professionals and members of the general public. Members of the general public will, where applicable, self-select the goods from the shelves of a traditional retail establishment such as a pharmacy. Alternatively, they could seek advice from a pharmacist, for example, or request a product which is kept ‘behind the counter’. The professional consumer will likely encounter the goods in publications such as medical journals or during discussions with peers or colleagues. On that basis, I find that both visual and aural considerations play important roles in consumers’ selection of the goods. Depending on the specific needs of the consumer, the goods are not necessarily purchased, or selected, with any real degree of frequency.

18. The goods which are selected are inevitably going to affect the health or wellbeing of the end consumer. Whether they are selected by a professional consumer or a member of the general public administering self-care with or without a prescription, such a consequence is likely to attract a reasonable degree of consideration, with the consumer’s health generally held in high regard. I acknowledge that the severity of conditions likely to necessitate the use of pharmaceutical preparations can vary widely, so the degree of attention paid to the selection will naturally fluctuate. The purchase of an off-the-shelf cold remedy will likely call for a lesser degree of attention than the purchase of treatment for a more serious condition or injury, for example. Still, weighing all factors, I find the average consumer of the goods likely to apply at least a medium degree of attention, ranging to very high.

## Comparison of trade marks

19. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“CJEU”) stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. ...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.”

20. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create.

21. The trade marks to be compared are displayed in the table below:

Opponent's mark	Applicant's mark
QUVORSI	COUVRI

22. The opponent's mark comprises a single word of seven letters. In the absence of any additional components, its overall impression resides solely in the word itself.

23. The applicant's mark comprises a single word of six letters. The mark's overall impression lies in the word itself.

24. Visually, the marks share the letters U-V (sequentially), O, R and I, albeit in different positions (with the exception of the letter I, which is the final letter in both marks). The opponent's mark begins with a Q and the applicant's begins with a C and the opponent's mark contains an additional letter (S) toward the end of the mark. Keeping in mind that the beginnings of marks typically have more of an impact on consumers than their endings, I find the visual similarity to be of a fairly low degree.

25. I keep in mind the parties' submissions regarding how the marks will be aurally articulated. To my mind, the earlier mark will likely be articulated in three syllables; KWUH-VOR-SEE. The applicant's mark will likely be articulated in two syllables; KOO-VREE. The marks differ in one syllable and none of the syllables are identical, though there is some similarity in the phonetic effect of the marks' first syllables and their final syllables. That said, the softer percussive sound created by the 'S' in the earlier mark has no equivalent in the latter. I find the aural similarity to be of no more than a medium degree.

26. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.<sup>2</sup> Both parties agree that neither mark will convey a specific concept; instead, each will be viewed as an invented word with no apparent meaning. On that basis, there is no conceptual comparison to be conducted.

### **Distinctive character of the earlier trade mark**

27. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

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<sup>2</sup> *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

“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 *Windsurfing Chiemsee 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).”

28. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services for which they are registered, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will typically fall somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; generally, the more distinctive the earlier mark, the greater the likelihood of confusion. The distinctive character of a mark may be enhanced as a result of it having been used in the market.

29. Given that the opponent has not made a pleading of enhanced distinctiveness, and in the absence of evidence of use, I have only the inherent distinctiveness of the earlier mark to consider. I have already found that the earlier mark will be viewed as an invented word. As it is absent of any identifiable meaning, the mark can have no

relationship or allusive connotation with the goods it relies upon. That being so, I find the mark to possess a high degree of inherent distinctiveness.

### **Likelihood of confusion**

30. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion.

31. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

32. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he 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 later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.””

33. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of my earlier conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

34. I will begin by considering a likelihood of direct confusion. I have found that the parties' respective goods are identical and that the parties' trade marks are visually similar to a fairly low degree and aurally similar to no more than a medium degree. It was not appropriate to conduct a conceptual comparison. With regards the average consumer, I have found it likely to comprise both members of the general public and medical professionals and that, all things considered, the consumer will apply at least a medium degree of attention, ranging to very high. I have found both the visual and aural impact of the marks to play an important role in the selection process. Notwithstanding the high degree of inherent distinctiveness awarded to the earlier mark, in my view, even where the consumer is paying only a medium degree of attention to the goods' selection, there is not sufficient similarity between the marks to engage a likelihood of confusion. The consumer will readily identify the marks' visual differences, particularly in their beginnings, and the aural differences in the marks' respective syllables and percussive impacts. Having found that a consumer applying a medium degree of attention would successfully distinguish between the marks, I have no hesitation in concluding that a consumer applying an elevated degree of attention, such as a healthcare professional, would readily identify the differences. In short, I do not consider that the average consumer would directly confuse the marks.

35. I turn now to consider whether there is a likelihood of indirect confusion. As indicated above, this type of confusion requires a thought process on the part of the average consumer, in which they recognise that the marks are different but put their similarities down to the marks being related in some capacity. A finding of indirect consideration should not be considered a consolation prize for those who fail to establish a likelihood of confusion; it requires a "proper basis"<sup>3</sup>. In the present proceedings, what the marks have in common is five of their letters (five of seven letters in the opponent's mark and six in the applicant's), with the U-V besides one

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<sup>3</sup> *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

another in both marks. Simply because the marks share some of the same letters, in different positions nonetheless, in my view, the consumer is not likely to conclude that the marks are connected, if the coincidence of several letters is even identified. The marks are not what I consider, nor what the average consumer would likely consider, natural variants or brand extensions of one another. The marks will be viewed as two distinct words, which are likely invented. Having identified that the competing marks are different, there is nothing tangible between the two which will lead the consumer to erroneously conclude that they originate from a single or related entity. I do not find a likelihood of indirect confusion.

## **Conclusion**

**36. The opposition has failed and, subject to any successful appeal, the application will proceed to registration.**

## **Costs**

37. The applicant has succeeded and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (“TPN”) 2/2016. In accordance with that TPN, I award costs as follows:

Considering the statement of grounds and preparing a counterstatement:	£200
Preparing evidence and commenting on the other side’s evidence:	£300 <sup>4</sup>
Preparing written submissions in lieu of a hearing:	£200
<b>Total:</b>	<b>£700</b>

**38. I order Glaxo Group Limited to pay Novartis AG the sum of £700. This sum is to be paid within twenty-one days of the expiry of the appeal period or within**

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<sup>4</sup> Reduced to reflect the limited nature of the evidence

**twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.**

**Dated this 16<sup>th</sup> day of August 2022**

**Laura Stephens  
For the Registrar**