

**O-505-20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3418981**

**IN THE NAME OF LIS MEDICAL LTD FOR THE TRADE MARK**

**Vcience**

**IN CLASS 5**

**AND**

**THE OPPOSITION THERETO UNDER NUMBER 418412**

**BY NOVARTIS AG**

## Background and pleadings

1. LIS MEDICAL LTD (the applicant) applied to register the trade mark no. 3418981 for the mark Vcience in the UK on 5 August 2019. It was accepted and published in the Trade Marks Journal on 16 August 2019 in respect of the following goods:

*Class 5: Medicines for human purposes; Dietetic substances adapted for medical use; Drugs for medical purposes; Pharmaceutical preparations for skin care; Chemical preparations for medical purposes; Chemico-pharmaceutical preparations; Nutritional supplements; Plasters for medical purposes; Mineral food supplements; Vitamin preparations.*

2. Novartis AG (the opponent) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). This is on the basis of its earlier International Trade Mark registration no. 1477263 designating the UK for the mark VENCEUM. This earlier mark has a priority date of 14 May 2019, and was granted protection in the UK on 27 September 2019. The opposition is also based on a second mark, namely EU registration no. 18064349 for VENCEUM with a filing date of 14 May 2019, and a registration date of 31 August 2019. The following goods are relied upon in this opposition in respect of both earlier marks:

*Class 10: Drug delivery devices.*

3. The opponent argues that the respective marks are visually and phonetically similar and the goods are similar stating “In particular, the Opponent’s goods could serve as the method of administration for all, or substantially all, of the Applicant’s goods”.

4. The applicant filed a counterstatement denying there will be any likelihood of confusion under Section 5(2)(b) of the Act. The applicant states that the marks are very different aurally, and that the last syllables are very different both visually and aurally, which distinguishes the applied for mark from the opponent's mark. The applicant denies the goods covered by the application are similar to those covered by the earlier mark, submitting that *drug delivery devices* in class 10 are fundamentally different to those covered by the application in class 5.
5. Neither party filed evidence in these proceedings. Only the opponent filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.
6. Both parties are represented in these proceedings. The applicant is represented by Trademarkit LLP and the opponent is represented by Abel and Imray.

## **DECISION**

### **Section 5(2)(b)**

7. 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”.

### **Section 5A**

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

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

## The Principles

9. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

### *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 might believe that the respective goods or services come from the

same or economically-linked undertakings, there is a likelihood of confusion.

## **Comparison of goods and services**

### **Similarity of goods and services – Nice Classification**

10. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

11. Similarity between goods and services is to be considered based on the criteria set out by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, as well as the factors in *Canon*.<sup>1</sup> These cases references factors including nature, intended purpose, method of use, and whether they are complementary or in competition, alongside other factors namely the trade channels, users, and in the case of self-serve consumer goods, where these are likely to be found. In respect of identity of goods, in *Gérard Meric v*

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<sup>1</sup> *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97

*Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

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

12. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that goods are “complementary” where:

“...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”.

13. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... 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."

14. 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."*

15. With the above factors in mind, the goods for comparison are as follows:

<b>Opponent's goods</b>	<b>Applicant's goods</b>
Class 10: Drug delivery devices.	Class 5: Medicines for human purposes; Dietetic substances adapted for medical use; Drugs for medical purposes;



	Pharmaceutical preparations for skin care; Chemical preparations for medical purposes; Chemico-pharmaceutical preparations; Nutritional supplements; Plasters for medical purposes; Mineral food supplements; Vitamin preparations.
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**Medicines for human purposes; Drugs for medical purposes; Pharmaceutical preparations for skin care; Chemical preparations for medical purposes; Chemico-pharmaceutical preparations;**

16. All of the above items applied for by the applicant cover items that would be classed as 'drugs'. I find that all of these items may be delivered to a patient using the drug delivery devices as covered by the opponent's specification, and I find on this basis that the goods under the headings above will frequently be important and/or indispensable for the use of the opponent's and vice versa. I find it is very possible that the consumer would assume that the goods covered by the opponent and the goods covered by the applicant as above may both be provided by one undertaking, particularly where the opponent's goods are specifically designed for the delivery of products those falling under the applicant's goods. I therefore find that the above goods are complementary to the opponent's goods. It is my view that the trade channels will also often be shared, as will the intended user of the goods. However, I find the nature of these goods to be very different to the opponent's, and that the specific intended purpose of the goods differ, with one for the purpose of delivering drugs and one for the purpose of assisting the body with healing or for dulling pain, although it is true that broadly they are both in the field of medicine. I find overall, the above goods are similar to the opponent's to between a low and medium degree.

**Dietetic substances adapted for medical use**

17. As with the pharmaceutical products discussed above, I find these goods may be administered in a medical setting via drug delivery devices such as those covered by the opponent, meaning in some cases the opponent's goods may be important and/or indispensable for the use of the applicant's. I find that the consumer may well believe that medically adapted dietetic substances derive from the same undertaking as the drug delivery devices used to deliver them. I find these goods to be complementary to the opponent's goods. As these goods are designed for medical use, the goods will likely share trade channels with the opponent's goods. However, again I find the nature of the goods differs significantly to those protected by the opponent, as well as the specific intended purpose, although they are all in the field of medicine. I find there will be an overlap in the intended user of the goods, but that the goods will not be in competition. Overall, I find these goods similar to the opponent's to between a low and a medium degree.

#### **Plasters for medical purposes.**

18. The opponent submits that plasters for medical purposes "can be used to hold in place drug delivery devices such as cannulas and/or are a form of delivery drugs (e.g. transdermal plaster patches). The respective goods are therefore complementary".

19. It is my view that the ordinary and natural meaning of plasters for medical purposes does not stretch to transdermal patches for delivering drugs. I do not dispute that plasters may be used for holding in place items such as a cannula as specified by the opponent, but I also note this may be held in place using a number of methods, such as with a bandage or medical tape. It is my view that whilst plasters for medical purposes may be used for the purpose described, this is not the primary purpose of plasters for medical use. Instead, I find the primary intended purpose of these goods to be for the protection of wounds, which I find differs to the purpose of the opponent's drug delivery devices, although I note the broader purpose of both goods is for assisting with healing. I find it is unlikely there will be any competition between the goods, but I find the intended user and the trade

channels may be shared, and that where these goods are in shops they may be in the same section, although they are less likely to be side by side. I find that at best, there is a very low level of similarity between the opponent's goods and plasters for medical purposes.

### **Mineral food supplements; Nutritional supplements; Vitamin preparations.**

20. I find the above goods covered by the applicant are for the purpose of supplementing diet, which I find to be different to the opponent's goods for the purpose of administering drugs. There may be some overlap in trade channels with the opponent's goods, but that the goods are not in competition with one another, and where these are sold in shops, they are unlikely to be found next to each other. Generally, it is my view that these items are unlikely to be used in conjunction with the opponent's goods, as they will come in edible or drinkable form, although I consider there may be occasions where they are administered using other methods that require items such as needles. However, I find any complementarity will be insufficiently pronounced for the consumer to believe the same economic undertaking is responsible for both these goods and those medical items used occasionally to administer them. Whilst broadly members of the general public or the medical profession may use both the applicant's goods above and the goods protected by the opponent, I do not find this sufficient to render them similar. Overall, I find these goods to be dissimilar to the opponent's goods. As I have found these goods to be dissimilar, a likelihood of confusion cannot be found under Section 5(2)(b), and so I will not consider these further in this decision.

### **Comparison of the marks**

21. 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.”

22. 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.

23. In this instance, the opposition is based on two identical earlier trade marks. As the comparison of the marks will be the same in the case of both earlier marks, I will not repeat the comparison twice, and I will refer to the earlier mark in singular form below. The respective trade marks are shown below:

VENCEUM	Vcience
Earlier trade mark	Contested trade mark

24. There is no element of either mark that is more dominant or distinctive than any other element, and I find the overall impression of both marks resides in

the entirety of the same. I note that the opponent's mark appears to be filed in standard capital letters, whereas the applicant's is filed using both upper and lower case. However, notional and fair use of a word mark means this may be used in any case, and I do not consider this a factor that adds to the overall impression of the marks themselves.

### **Visual comparison**

25. The marks both begin with the letter V, both include the letter 'C', which appears once in the earlier mark and twice in the contested mark, and both include the combination 'ENCE'. Further, the marks are the same length, both comprising of seven letters. However, the positioning of the letters in each mark creates a point of visual difference, with the earlier mark beginning 'VEN', ending 'EUM' and positioning 'C' at the centre of the mark. The contested mark begins 'Vci', ends 'nce' and positions an 'n' at the centre of the mark. The only letter which holds the same position in both of the marks is the letter V. Considering the visual similarities as well as the points of difference, I find the marks visually similar to a very low degree.

### **Aural comparison**

26. The applicant submits that the earlier mark will be pronounced VEN-SEE-UM, whereas its mark will be pronounced as Vee-Science, due to the combination of 'Vc' appearing unpronounceable to the consumer. The opponent submits that the combination of V, N and C in each mark makes them phonetically similar. I am inclined to agree with the applicant that the marks will most likely be pronounced VEN-SEE-UM and VEE-SCIENCE. However, I also believe that the V in the contested mark may be pronounced as a short V, with the consumer attempting to roll this into the word to make Vh-science. I do not find any syllable of the earlier mark to be phonetically reproduced in the later mark. I do note each of the marks have three syllables and the 'V' and 'S' sounds in the first half of the mark. However, I do not find this sufficient to render the marks aurally similar, and overall it is my view that the marks are aurally dissimilar.

## Conceptual comparison

27. Within its comments regarding the phonetic comparison of the marks, the applicant submits that the earlier mark has a “Latin-sounding quality”. I consider that for some consumers, the mark may conjure a vague concept of the Latin language, but it is my view that the majority of consumers will not attribute a conceptual meaning to the opponent’s mark. In contrast, I find the existence of most of the word ‘science’ visually, and the existence of the full word ‘science’ verbally in the applicant’s mark will mean that the consumer will immediately attribute the concept of science to the applicant’s mark. On the basis that the earlier mark will have either no conceptual meaning, or one that will differ to the concept attributed to the applicant’s mark, whereas the applicant’s mark produces a clear concept, I find the marks to be conceptually dissimilar.

## Average consumer and the purchasing act

28. 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.

29. 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.”

30. In respect of both the opponent’s goods and the applicant’s medical and pharmaceutical goods, I find a large portion of the relevant consumer will be professionals in the medical field. I find that in respect of all of the applicant’s goods in this field with the exception of ‘Plasters for medical purposes’, the professional consumer will pay a high degree of attention to the goods in question, due to the heightened degree of responsibility and liability on medical professionals and staff to purchase and/or use the correct product to treat a patient. This is exacerbated by the possibility of serious adverse effects caused by selecting goods that are not correct. I find this also to be true for opponent’s goods, namely goods falling in the category of drug delivery devices in class 10, although I find there may be items within this category which are used more frequently and have less risk associated with them, which may only warrant an average degree of attention. In terms of plasters for medical use, I find it is likely that medical professionals will need to be less selective about the products, and that the consequences of the purchase or use of incorrect items will be less significant, meaning they will also gain a lower level of attention from medical professionals. However, there may still be considerations as to the size, shape, breathability and adhesive properties of the goods, and I therefore find the professional consumer will pay at least an average degree of attention in respect of these goods, with some instances warranting a higher than average degree of attention to be paid.

31. Where pharmaceuticals are to be taken by patients at home, the patients as end users will form part of the relevant public.<sup>2</sup> I find this will extend to both the opponent’s goods for administering drugs, as well as all to of the applicant’s medical and pharmaceutical goods. In *Bayer AG v EUIPO*, Case

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<sup>2</sup> *Biopharma SA v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-154/03, at paragraph 45

T-261/17, the GC held that the average consumer pays a heightened level of attention when selecting pharmaceutical products, including such products available without a prescription (see paragraph 33 of the judgment), and I find this to be the case in respect of the applicant's medical and pharmaceutical goods. Again, I also find this extends to the opponent's goods for administering these. The general public administering drugs at home will need to be careful to ensure that this is done in the correct manner, as doing so in the incorrect manner may lead to these being ineffective, or potentially dangerous. I find that the consumer will therefore pay between an above average and high degree of attention in respect of all of the similar goods, with the exception of plasters for medical use. In respect of the plasters for medical use, I find the general public will also consider factors such as the size and suitability of the plasters themselves, and so they will likely pay an average degree of attention in respect of these goods.

32. Where the goods are purchased by the general public, I find these will primarily be bought on visual inspection being on display in shops and chemists. I also find this to be the case in respect of collecting prescription items as written on the prescription itself. Further, I also find professionals will primarily purchase the goods on visual inspection. However, considering there will be instances in which these items are recommended via word of mouth (by a professional or otherwise), or purchased verbally over the counter, I also find the aural comparison of the marks to be relevant.

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

33. 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 *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).”

34. The earlier mark VENCEUM appears to be a made-up word, which is neither descriptive nor allusive of the drug delivery devices for which the mark is protected. I find the mark to be inherently distinctive to a high degree. No evidence has been filed showing use of the mark, and so I cannot find that the mark distinctive character of the mark has been enhanced through use.

#### **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.**

35. Prior to reaching a decision on this matter, I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 9 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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. I must consider the level

of attention paid by the consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that a likelihood of confusion may be increased where the earlier mark holds a high degree of distinctive character, either inherently, or due to the use made of the same, and that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks and vice versa. I must also consider that both the degree of attention paid by the consumer and how the goods or services are obtained will have a bearing on how likely the consumer is to be confused.

36. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. Direct confusion occurs where the consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.<sup>3</sup>

37. For success to be had under Section 5(2)(b) of the Act, some similarity of the goods is essential.<sup>4</sup> Where I have found that the applicant's goods are dissimilar to the opponent's goods, it follows that no likelihood of confusion will be found. On this basis, I find the opposition fails in respect of the following goods:

*Class 5: Mineral food supplements; Nutritional supplements; Vitamin preparations.*

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<sup>3</sup> *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10,

<sup>4</sup> *Waterford Wedgwood plc v OHIM* – C-398/07 P (CJEU)

38. In respect of the applicant's remaining goods, I found them all to be similar to the opponent's goods to between a low and medium degree with the exception of *Plasters for medical purposes* which I found at best to be similar to a very low degree. I found the overall impression of each mark to reside in its entirety, and I found the marks to be visually similar to a very low degree. I found the marks to be aurally dissimilar, and conceptually dissimilar. I found the consumer to consist both of members of the general public, as well as professionals, and that the degree of attention paid towards the goods will range from average to high. I found that the purchase of the goods will be primarily visual, but that the aural considerations are also relevant. I found the earlier mark to be inherently distinctive to a high degree, but that there is no evidence this has been enhanced further through use.

39. I consider that conceptual dissimilarities between marks should not cause me to completely disregard all other relevant factors and come to a finding that there is no likelihood of confusion without full consideration of all aspects of a case. However, it is the case that on occasion, the conceptual dissimilarity between marks may outweigh the visual and aural similarities found. This is the case where one of the two signs has a clear and specific meaning that may be grasped immediately by the relevant public,<sup>5</sup> but it should be noted that there is not an additional requirement for conceptual differences to be obvious and pronounced, rather it is a case of weighing each factor, keeping in mind the overall impression of the mark.<sup>6</sup> This is relevant even where one mark does not have a specific meaning.<sup>7</sup>

40. I have already identified the very low level of visual similarity and aural dissimilarity of the marks. However, I consider both that the start of the marks both begin with the same letter 'V' and that consumer tends to pay

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<sup>5</sup> See the CJEU decision of *The Picasso Estate v OHIM*, Case C-361/04 P

<sup>6</sup> See the observations of Professor Phillip Johnson, sitting as the Appointed Person, in *Wearwell Inc v. Work Well Mats Limited*, BL O/055/19 at paragraph 29

<sup>7</sup> See the observations of Mr Iain Purvis QC, sitting as the Appointed Person in *JT International S.A. v Argon Consulting & Management Limited* ("Rochester"), BL O/049/17 at paragraph, 39 made after having reviewed *The Picasso Estate v OHIM*.

most attention to the beginning of marks,<sup>8</sup> and I find that this weighs in the opponent's favour when considering the consumers imperfect recollection. I consider the high level of distinctiveness of the earlier mark, and the fact that the purchase of the goods will be primarily visual, and again these factors weigh in favour of the opponent. However, I also consider that the average level of attention paid by the consumer is at least average in respect of the goods in question, and in many cases, this will be high. Further, I consider that neither the similarity between the goods nor the similarity between the marks is at such a level that the interdependency principle comes into play and helps to negate a lower level of similarity found in respect of the marks or the goods. Finally, I consider that despite it technically being a made-up word, it is my view that the applicant's mark will create a clear concept in the mind of the consumer, and that the opponent's mark will not. I find this concept will stick in the mind of the consumer when recalling the mark. It is my view that the sum of all of these factors will result in the consumer will both noticing and retaining the differences between the marks. As such, I find there is no likelihood of direct confusion in this instance.

41. In addition to the above, I have considered the likelihood of indirect confusion between the marks, and I do not find this to be present in the current case. It is my view that upon noticing the differences between the marks, the only thing that the consumer may use to connect the two is the length, both being seven letters, and the letter 'V' at the beginning of the marks. Should one mark bring the other to the consumers mind, it is my view that the similarity of the first letter and the length of the mark will be put down to coincidence, and not indicate any sort of economic connection in the mind of the consumer.

## **Final Remarks**

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<sup>8</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

42. As the outcome is no likelihood of confusion, the opposition on grounds 5(2)(b) fails. The application may proceed in respect of all goods for which it has been filed.

## **COSTS**

43. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £250 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the statement of grounds and preparing the counterstatement	£250
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44. I therefore order Novartis AG to pay LIS MEDICAL LTD the sum of £250. 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 12th day of October 2020**

**Rosie Le Breton  
For the Registrar**