

O/962/22

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3676842

**IN THE NAME OF
CINDY CHAN**

**TO REGISTER THE SERIES OF THREE
FOLLOWING TRADE MARK:**

immuni

Immuni

IMMUNI

IN CLASSES 5, 30, 32 & 35


AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 60002211
BY S.A.M. SERELY PHARMA**

Background and pleadings

1. On 3 August 2021, Cindy Chan (“the applicant”) applied to register the series of trade marks “immuni”, “Immuni” and “IMMUNI” under application number 3676842 in the UK. It was accepted and published in the Trade Marks Journal on 12 November 2021. The applicant seeks registration for the goods and services outlined in paragraph 22 of this decision.

2. The application was opposed by S.A.M. Sérélys Pharma (“the opponent”) on 11 February 2022. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) with the opponent relying upon the following UK Trade Mark:

Trade mark no.	3697853
Trade Mark	 The logo for 'ImmuniX' features the word 'Immuni' in a grey, lowercase, sans-serif font, followed by a stylized green 'X' that incorporates a human figure with arms raised. A small registered trademark symbol (®) is located to the upper right of the 'X'.
Priority, and Registration Date	Priority date: 20 March 2020 ¹ Date of entry in register: 11 February 2022

3. The opponent relies upon all its goods in class 5 as shown in paragraph 22 of this decision.

4. By virtue of its earlier priority date of 20 March 2020, the above registration constitutes an earlier mark within the meaning of section 6 of the Act.

5. The opponent submits that there is a likelihood of confusion because the applicant’s registration is similar to the opponent’s and the respective goods and services are identical or similar.

¹ On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 59 of the Withdrawal Agreement between the UK and EU, applications for EUTMs made before the end of the transition period that had received a filing date can form the basis of a UK application with the same filing date as the corresponding EUTM, provided they were filed within 9 months of the end of the transition period. The opponent’s EUTM number 018213506 was filed at the EUIPO on 20 March 2020, whereas its UK application was filed on 21 September 2021. Accordingly, the UK registration retains a priority date of 20 March 2020.

6. The applicant filed a counterstatement denying all claims made by the opponent.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

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

8. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought to file evidence in these proceedings.

9. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary; however, the opponent filed written submissions in lieu.

10. Both parties are professionally represented in these proceedings; the opponent by Harrison IP Limited and the applicant by Serjeants LLP. Neither party filed evidence in these proceedings although the opponent did file evidential content in their submissions which I have addressed below.

11. 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 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.

Proof of Use

12. As the opponent's mark had not completed its registration process more than 5 years before the filing date of the application in issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods it has identified.

Preliminary Issues

13. Within their submissions, the opponent has provided screen printouts from the website www.healthline.com to illustrate the definition of the term "electrolyte".

14. The opponent did not seek leave to file evidence, nor did they formalise their evidence in the form of a witness statement, statutory declaration or affidavit in accordance with Rule 64. As such, the evidential content has not been considered in this decision; and in any event, I consider that it would have had no material impact on my decision.

Decision

15. 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".

16. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia*

Sales Germany & Austria GmbH, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

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

17. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

18. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;

c) The respective trade channels through which the goods or services reach the market;

d) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

19. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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”.

20. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux- Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

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. The goods and services to be compared are as follows:

Opponent	Applicant
<p>Class 5: Pharmaceuticals and medical preparations; Dietetic food and substances adapted for medical use; Dietary supplements for human beings; all the above including but not limited to for the treatments of diseases and symptoms involving the immune system, and for the treatment of joint and muscle pain, as well as for reducing weight; Sanitary preparations for medical purposes; Disinfectants; Preparations for destroying vermin; Fungicides, herbicides.</p>	<p>Class 5: Fitness and endurance supplements; Vitamin and mineral supplements; Vitamin and mineral food supplements; Mineral supplements; Nutritional supplements; Prebiotic supplements; Food supplements; Vitamin supplements; Probiotic supplements; Mineral food supplements; Anti-oxidant supplements; Mineral supplements to foodstuffs; Food supplements for non-medical purposes; Food supplements for sportsmen; Food supplements in liquid form; Food supplements consisting of amino acids; Food supplements consisting of trace elements; Health-aid foods supplements containing ginseng; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Health-aid foods supplement containing red ginseng; Health food supplements for persons with special dietary requirements; Immunostimulants; Mineral nutritional supplements; Liquid nutritional supplements; Nutritional supplement energy bars; Mixed vitamin preparations; Vitamin preparations; Multi-vitamin preparations; Vitamin and mineral preparations; Vitamin drinks; Gummy vitamins; Liquid vitamin supplements; Nutritional supplement meal replacement bars for boosting energy; Powdered nutritional supplement drink mix; Nutritional supplements consisting primarily of zinc; Powdered nutritional supplement energy drink mix; Nutritional supplements consisting primarily of iron; Nutritional supplements</p>

	<p>consisting primarily of magnesium; Nutritional supplements consisting primarily of calcium.</p> <p>Class 30: Cereal-based snack bars; Cereal snacks; Cereal bars and energy bars; Muesli bars; Cereal bars; Oat bars; Chocolate-coated bars; Flour based savory snacks; Fruit cake snacks; Snacks made from muesli; Snack foods made from cereals.</p> <p>Class 32: Alcohol free beverages; Sports drinks; Sports drinks containing electrolytes; Isotonic drinks; Juice drinks; Carbohydrate drinks; Vegetable drinks; Guarana drinks; Cola drinks; Fruit drinks; Energy drinks; Soft drinks; Frozen fruit drinks; Orange juice drinks; Non-alcoholic drinks; Fruit flavoured drinks; Apple juice drinks; Drinking mineral water; Carbonated soft drinks; Fruit juice drinks; Fruit-flavoured beverages; Fruit-flavored beverages; Fruit-based beverages; Smoothies [fruit beverages, fruit predominating];Fruit beverages and fruit juices; Fruit flavoured carbonated drinks; Smoothies [non-alcoholic fruit beverages];Fruit juice beverages (Non-alcoholic -);Fruit smoothies; Beverages consisting of a blend of fruit and vegetable juices; Green vegetable juice beverages; Mineral and aerated waters; Water enhanced with minerals; Juices; Non-alcoholic beverages; Beverages containing vitamins; Non-alcoholic drinks enriched with vitamins and mineral salts; Drinking water with vitamins; Soft drinks flavored with tea; Nutritionally fortified beverages; Nutritionally fortified water; Protein-enriched sports beverages; Vitamin enriched sparkling water [beverages];Vegetable-based beverages; Soda water; Beverages consisting principally of fruit juices; Coconut-based beverages; Flavoured waters; Flavoured carbonated beverages; Fruit flavored drinks; Fruit-based soft drinks flavored with tea; Fruit nectars, non-alcoholic; Low calorie soft drinks; Low-calorie soft drinks; Fruit beverages (non-alcoholic);Carbonated non-alcoholic drinks; Non-alcoholic fruit drinks; Non-alcoholic carbonated beverages; Non-alcoholic flavored carbonated beverages; Non-carbonated soft drinks; Non-alcoholic sparkling fruit juice drinks.</p> <p>Class 35: Marketing; Promotional marketing; Market research; Product marketing; Marketing information; Event marketing; Market campaigns; Direct marketing; Market surveys; Online marketing; Digital marketing; Marketing services; Internet marketing; Advertising and marketing; Direct market advertising; Market research studies; Advertising, marketing and promotion services; Advertising and marketing services; Advertising, promotional and marketing services; Providing marketing information via websites; Advertising via the Internet; Commercial information services, via the internet; Advertising services provided over the internet; Rental of advertising space on the</p>
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	internet; Online advertisements; Online advertising; Online advertising services; Online ordering services; Online business networking services; Online data processing services; Conducting virtual trade show exhibitions online; Online advertising on computer networks; Sales administration; Sales promotion; Product sales information; Sales promotion services; Publicity and sales promotion; Advertising; On-line advertising.
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23. The opponent has provided submissions in their statement of grounds and submissions in lieu regarding the similarity of the contested goods and services. Whilst I do not propose to reproduce them all here, I have taken them into consideration when reaching my decision and will refer to them when necessary.

Class 5

24. The applicant’s class 5 goods describe particular kinds of supplements and vitamin preparations. They are all encompassed by the broader term ‘*Dietary supplements for human beings*’² covered by the earlier mark. As such, I find that they are identical under the principle outlined in *Meric*.

Class 30

25. The opponent’s specification includes the term ‘*dietetic food and substances adapted for medical use*’. This may include foods enriched with additional ingredients such as vitamins and minerals or the removal or reduction of certain ingredients such as sugar or gluten for consumption by those with particular medical or dietary requirements. Broadly speaking, the applicant’s goods in class 30 consists of various cereal, oat and flour-based snacks and bars. I find that dietetic foods will often come in the form of cereal/flour based snacks and bars as a means of convenience for the consumer and on that basis, I find there would be an overlap in terms of nature. I consider that the respective goods will share users only to the extent they will both be sold to the general public. They may also share trade channels though they may not

² I note that this term in the specification is followed by “*all the above including but not limited to for the treatments of diseases and symptoms involving the immune system, and for the treatment of joint and muscle pain, as well as for reducing weight*”. While this wording describes some of the uses of *Dietary supplements for human beings*, this does not limit the term itself and so my assessment is based on *Dietary supplements for human beings* at large.

be found directly next to one another, they may still be sold in close proximity in health shops and supermarkets. The goods also share an intended purpose being to satiate hunger, though I accept that the purpose of dietetic foods would also be to manage a particular medical need such as diabetes. Considering the opponent's goods would be to deal with a medical need, I do not find there would be any competition between the goods. Further, there is no evidence to suggest that the respective goods would share a complementary relationship. Overall, I consider the goods to be similar to a medium degree.

Class 32

26. I first consider *Sports drinks; Sports drinks containing electrolytes; Isotonic drinks; Beverages containing vitamins; Non-alcoholic drinks enriched with vitamins and mineral salts; Drinking water with vitamins; Nutritionally fortified beverages; Nutritionally fortified water; Protein-enriched sports beverages; Carbohydrate drinks³; and Vitamin enriched sparkling water [beverages]*. The opponent contests that these goods are all highly similar to the applicant's *Dietary supplements for human beings* on the basis of their shared purpose of replacing nutrients in the body which have been lost through illness or exercise. I find there may be some overlap in terms of nature when the opponent's goods come in the form of a liquid however, I consider that *dietary supplements* would also come in the form of tablets, powders and gels. I also consider there may be some overlap in purpose in terms of providing nutrients however, I find that the core purpose of the applicant's goods is to quench thirst and provide hydration with the added benefit of providing some nutrients whereas the opponent's goods would be to either address a specific health concern or to improve health generally. From this I find there would be some user overlap and a slight degree of competition if consumers are seeking to replace lost nutrients from physical exertion or sickness. It is likely that the contested goods would be found in supermarkets however, I do not consider that they would be found near one another or on the same shelves. I do not find there to be a complementary relationship between these goods. I light of the above, I consider there to be a low degree of similarity between these goods.

³ This term was not highlighted in the opponent's submissions along with the other goods outlined in this paragraph however, I consider *carbohydrate drinks* are a type of *sports drink* and as such, I have included it in this part of my comparison.

27. I find the terms *Alcohol free beverages; Non-alcoholic drinks; Non-alcoholic beverages; Carbonated non-alcoholic drinks; Non-alcoholic carbonated beverages; Non-alcoholic flavored carbonated beverages* in the applicant's specification to be particularly broad and would encompass the aforementioned goods in the previous paragraph. Based on my findings above, I consider there to be a low degree of similarity between these terms and the opponent's *dietary supplements for human beings*.

28. I now consider the remaining goods in class 32 of the applicant's specification. As previously outlined above, I find there would be an overlap in nature when *dietary supplements* also come in the form of a liquid however, I bear in mind that dietary supplements are also available in different forms such as powders, tablets and gels. I find the core purpose of these goods differ as the applicant's goods would be to quench thirst whereas *dietary supplements* would be taken to improve overall health or taken for a specific health concern. The respective goods would be available in outlets such as supermarkets, but I am of the view that they would not be found in close proximity to one another. In my view, there is no meaningful degree of competition or complementarity between these goods. Overall, I do not consider there to be any similarity between these goods. At this point, I also acknowledge that the opponent in their submissions included *energy drinks* and *water enhanced with minerals* in the list of terms they considered to be highly similar to dietary supplements. To my mind, *energy drinks* are sugary caffeine drinks with no nutritional benefit and through its ordinary and natural meaning I consider *water enhanced with minerals* to simply be mineral water. I therefore do not find there is any similarity between these goods and the opponent's *dietary supplements*.

Class 35

29. In relation to these services, the opponent states, "These services are directly associated with the goods covered by the earlier right. The retail services seemingly offered under "ordering services" and the advertisement or sales promotion of the goods are services that a manufacturer of class 5 goods would necessarily conduct under its mark. The services are therefore similar."

30. To my mind, users of the contested services would be business professionals whereas users of the opponent's goods would be the general public. Although the opponent believes the term "ordering services" relates to retail, I remind myself that my interpretation of the services should be confined to the core of the possible meanings attributable to the terms. In this case, I consider *online ordering services* through its ordinary and natural meaning relates to the ordering of specific goods through a wholesaler which may be used by businesses for the purposes of replenishing stock rather than retail services provided to the public. Further, I consider the nature and purpose of all of the respective goods and services differ and they would be provided by different users via different trade channels. There is nothing to suggest that the goods and services are important or indispensable to one another for them to enjoy a complementary relationship, nor is there any degree of competition. My overall view is that the applicant's class 35 services are dissimilar to the opponent's goods.

31. As some degree of similarity between goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition must fail against the goods and services of the application that I have found to be dissimilar⁴, namely:

Class 32: Juice drinks; Vegetable drinks; Guarana drinks; Cola drinks; Fruit drinks; Energy drinks; Soft drinks; Frozen fruit drinks; Orange juice drinks; Fruit flavoured drinks; Apple juice drinks; Drinking mineral water; Carbonated soft drinks; Fruit juice drinks; Fruit-flavoured beverages; Fruit-flavored beverages; Fruit-based beverages; Smoothies [fruit beverages, fruit predominating]; Fruit beverages and fruit juices; Fruit flavoured carbonated drinks; Smoothies [non-alcoholic fruit beverages]; Fruit juice beverages (Non-alcoholic -); Fruit smoothies; Beverages consisting of a blend of fruit and vegetable juices; Green vegetable juice beverages; Mineral and aerated waters; Water enhanced with minerals; Juices; Soft drinks flavored with tea; Vegetable-based beverages; Soda water; Beverages consisting principally of fruit juices; Coconut-based beverages; Flavoured waters; Flavoured carbonated beverages; Fruit flavored drinks; Fruit-based soft drinks flavored with tea; Fruit nectars, non-alcoholic; Low

⁴ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, paragraph 49

calorie soft drinks; Low-calorie soft drinks; Fruit beverages (non-alcoholic); Non-alcoholic fruit drinks; Non-carbonated soft drinks; Non-alcoholic sparkling fruit juice drinks.

Class 35: Marketing; Promotional marketing; Market research; Product marketing; Marketing information; Event marketing; Market campaigns; Direct marketing; Market surveys; Online marketing; Digital marketing; Marketing services; Internet marketing; Advertising and marketing; Direct market advertising; Market research studies; Advertising, marketing and promotion services; Advertising and marketing services; Advertising, promotional and marketing services; Providing marketing information via websites; Advertising via the Internet; Commercial information services, via the internet; Advertising services provided over the internet; Rental of advertising space on the internet; Online advertisements; Online advertising; Online advertising services; Online ordering services; Online business networking services; Online data processing services; Conducting virtual trade show exhibitions online; Online advertising on computer networks; Sales administration; Sales promotion; Product sales information; Sales promotion services; Publicity and sales promotion; Advertising; On-line advertising.

The average consumer and the nature of the purchasing act

32. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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.”

33. The goods at issue are, broadly speaking, day-to-day products being foodstuffs or dietary, nutritional and health supplements, foods and beverages. The average consumer for these goods will primarily comprise members of the general public however, there will also be some business users purchasing on behalf of a commercial undertaking. In respect of goods such as the snacks in class 30 and beverages in class 32, these will be purchased fairly frequently and be relatively inexpensive goods and I would therefore expect the general public to pay a fairly low degree of attention during their selection. As for the goods in class 5, dietary and health needs can be fairly basic, for example, multivitamins intended for daily use, however I accept that some health needs may be more complex and would require a greater degree of care from the general public during the purchasing process so overall, I would expect a medium level of attention to be paid when selecting goods such as supplements but an above medium level of attention to be paid when selecting goods adapted for medical use.

34. The goods are likely to be self-selected by the general public from a pharmacy, supermarket or their online equivalents. Visual considerations are, therefore, likely to dominate the selection process. However, given that advice may be sought from sale assistants, and orders may be placed over the phone, I do not discount an aural component to the purchase.

35. In respect of the business user the goods will be available via wholesale websites, catalogues, and stores. They will likely play at least a medium degree of attention when purchasing goods on behalf of a business. Whilst the visual considerations are also likely to dominate in these circumstances the goods may be ordered over the phone, and so I cannot completely discount the aural considerations in this respect either.


Comparison of marks

36. 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 relevant 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.”

37. 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 trade 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.

38. The marks to be compared are as follows:

Opponent's mark	Applicant's marks
 The logo for 'ImmuniX' features the word 'Immuni' in a grey, italicized sans-serif font, followed by a green stylized human figure with arms raised, resembling an 'X'.	<p data-bbox="1038 1608 1158 1637">immuni</p> <p data-bbox="1038 1720 1158 1749">Immuni</p> <p data-bbox="1038 1832 1158 1861">IMMUNI</p>

Overall impression

39. The opponent's mark consists of the word "Immuni" in a slightly stylised grey typeface. Due to this being the verbal element of the mark and owing to its position, I find it to be the most dominant and distinctive element of the mark. To the right of the wording is a slightly larger green figurative element of what appears to be a person holding their legs and arms outwards to create an "X" position. I consider that this plays a secondary role in the overall impression. The opponent in their submissions states that this element may or may not be seen as a letter "X" and I agree that a significant portion of consumers are likely to simply see this as a figurative element depicting a human. I will approach the visual, aural and conceptual analysis with this point in mind. There is also a small ® symbol to the top right of the figurative "X", however, as it will be understood as a sign indicating trade mark registration, its impact in the overall impression of the mark is negligible.

40. The applicant's mark consists of a series of three marks each containing the word "Immuni". The overall impression resides in each of these marks as a whole.

Visual comparison

41. Both parties' marks contain the words "Immuni" however, the opponent's mark contains a figurative element which is not present in the applicant's. As previously stated, in some cases, this may be perceived as a stylised depiction of the letter "X". I do not consider the stylisation of "Immuni" used in the opponent's mark to be a significant difference between the marks since notional and fair use would allow the applicant's mark to be presented in any standard typeface. Overall, I consider the marks to be visually similar to a high degree.

Aural comparison

42. The opponent submits that it is likely that the "X" device will not be pronounced by the consumer as "it visually departs from the letters (Immuni)." I agree that a significant portion of consumers will pronounce the opponent's mark in three syllables as IMM-U-NI, though I do not discount the fact that some consumers may perceive the

figurative element as an “X” and pronounce the mark as IMM-U-NIX. In cases where the opponent’s mark is pronounced IMM-U-NI, it will be aurally identical to the applicant’s mark. In circumstances where the figurative element in the opponent’s mark is pronounced as IMM-U-NIX, I consider this to be only a minor point of difference and find the marks to be aurally similar to a high degree.

Conceptual comparison

43. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the General Court (“GC”) and the CJEU including *Ruiz Picasso v OHIM*⁵. The assessment must be made from the point of view of the average consumer.

44. It is my view that consumers will perceive the “Immuni” element in both marks as relating to immunity or the immune system, even though “Immuni” is not a dictionary-defined word in the English Language. As outlined previously, consumers may perceive the figurative element in the opponent’s mark as a stylised depiction of the letter “X”, or as a person. Overall, I find there is a high degree of conceptual similarity.

Distinctive character of the earlier mark

45. 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 – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik*, the CJEU stated that:

⁵ [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).”

46. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

47. The opponent has not filed any evidence to support that the earlier mark’s distinctive character has been enhanced through use. Consequently, I have only the inherent position to consider.

48. As previously outlined in the conceptual comparison, the average consumer will see the word “Immuni” or “immunix” as invented however, this wording is likely to be suggestive of the immune system and health and therefore allusive in relation to the registered goods. This element in itself therefore holds a slightly below medium degree

of distinctive character. The mark itself is presented in a slightly stylised form and the addition of the figurative element or the stylisation of the 'X' depending on how this is perceived, adds marginally to the level of distinctiveness of the mark overall. Overall, I consider the mark to have a medium degree of distinctive character.

Likelihood of confusion

49. There is no simple formula for determining whether there is a likelihood of confusion. I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them (*Canon* at [17]) and considering the various factors from the perspective of the average consumer. In making my assessment, I must bear in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

50. 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.

51. I have found the marks to be visually similar to a high degree. In cases where both marks are pronounced as "Immuni", I found them to be aurally identical whereas if the opponent's mark is pronounced "Immunix", I found the marks to be aurally similar to a high degree. I found the marks to be conceptually similar to a high degree. I have found the earlier mark to have a medium degree of inherent distinctive character, with the shared element holding a slightly below medium degree of distinctiveness itself. I identified the average consumer to be either a member of the general public or a business user who will select the goods and services predominantly by visual means, though I do not discount an aural element to the purchase. I have concluded that between a low and an above medium degree of attention will be paid during the purchasing process. I have found the goods and services to range from a low degree of similarity to identical.

52. I first note that the respective marks share a dominant and distinctive element and that visual considerations are likely to dominate during the purchasing process. The main point of visual difference between the marks is the stylised “X” or human device element in the opponent’s mark which does not have any counterpart in the applicant’s marks. However, when considering the consumers imperfect recollection and the fact that as a general rule the beginnings of marks make more impact than the endings,⁶ I am of the view that this element in the opponent’s mark may easily be misremembered and the “Immuni” element is likely stick in the consumer’s mind. It is also well-established that the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, the figurative elements being perceived more as decorative elements.⁷ Taking these factors into consideration along with the interdependency principle, I find that the average consumer may not recall the differences between the marks and as such, there is a likelihood of direct confusion in respect of all of the similar goods.

53. I now go on to consider indirect confusion.

54. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis K.C., 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

⁶ See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

⁷ See *Migros-Genossenschafts-Bund v EUIPO – Luigi Lavazza (CReMESPRESSO)*, Case T-189/16, paragraph 52

common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

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

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

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

55. These examples are not exhaustive but provide helpful focus.

56. I note that the respective marks do not appear to fall directly into one of the categories highlighted in *L.A. Sugar*. However, I note that these categories are not exhaustive, and so I consider again all of the factors I have found within this decision. As previously stated, I note that the respective marks share a common element and I found many of the goods to be identical or similar to at least a low degree. I have identified that to a significant portion of consumers, the opponent’s mark will be considered as ‘IMMUNI’ followed by a figurative element depicting a human. In these instances, it is my view that the word ‘IMMUNI’ plays a dominant and an independent distinctive role within the earlier mark. This element also comprises the later marks in their entirety. I am of the view that to these consumers even if they were to notice the differences in the marks by way of the figurative element, they would consider the opponent’s mark to merely be a stylised version of the applicant’s marks, or the applicant’s mark combined with a figurative element, and would therefore consider the

goods to originate from the same undertaking. In view of this, I find there is also a likelihood of indirect confusion in respect of the similar goods to at least a significant portion of consumers.

CONCLUSION

57. The opposition under section 5(2)(b) of the Act has been partly successful. Subject to any successful appeal against my decision, the application will be refused in respect of the following goods:

Class 5: Fitness and endurance supplements; Vitamin and mineral supplements; Vitamin and mineral food supplements; Mineral supplements; Nutritional supplements; Prebiotic supplements; Food supplements; Vitamin supplements; Probiotic supplements; Mineral food supplements; Anti-oxidant supplements; Mineral supplements to foodstuffs; Food supplements for non-medical purposes; Food supplements for sportsmen; Food supplements in liquid form; Food supplements consisting of amino acids; Food supplements consisting of trace elements; Health-aid foods supplements containing ginseng; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Health-aid foods supplement containing red ginseng; Health food supplements for persons with special dietary requirements; Immunostimulants; Mineral nutritional supplements; Liquid nutritional supplements; Nutritional supplement energy bars; Mixed vitamin preparations; Vitamin preparations; Multi-vitamin preparations; Vitamin and mineral preparations; Vitamin drinks; Gummy vitamins; Liquid vitamin supplements; Nutritional supplement meal replacement bars for boosting energy; Powdered nutritional supplement drink mix; Nutritional supplements consisting primarily of zinc; Powdered nutritional supplement energy drink mix; Nutritional supplements consisting primarily of iron; Nutritional supplements consisting primarily of magnesium; Nutritional supplements consisting primarily of calcium.

Class 30: Cereal-based snack bars; Cereal snacks; Cereal bars and energy bars; Muesli bars; Cereal bars; Oat bars; Chocolate-coated bars; Flour based

savory snacks; Fruit cake snacks; Snacks made from muesli; Snack foods made from cereals.

Class 32: Sports drinks; Sports drinks containing electrolytes; Isotonic drinks; Beverages containing vitamins; Non-alcoholic drinks enriched with vitamins and mineral salts; Drinking water with vitamins; Nutritionally fortified beverages; Nutritionally fortified water; Protein-enriched sports beverages; Carbohydrate drinks; Vitamin enriched sparkling water [beverages]; Alcohol free beverages; Non-alcoholic drinks; Non-alcoholic beverages; Carbonated non-alcoholic drinks; Non-alcoholic carbonated beverages; Non-alcoholic flavored carbonated beverages

COSTS

58. As both parties have achieved what I regard as a roughly equal measure of success, I direct that both parties should bear their own costs.

Dated this 4th day of November 2022

Catrin Williams
For the Registrar