

**O/0076/26**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00004026298**

**BY REVITALIZE HEALTH GROUP LTD**

**TO REGISTER:**

**REVITALIZE HEALTH**

**IN CLASS 5**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. OP000448985 BY**

**T.J. MORRIS LIMITED**

## Background and pleadings

1. On 14 March 2024, Revitalize Health Group Ltd (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision (“the applicant’s mark”). The application was accepted and published for opposition purposes on 7 June 2024 and registration is sought for the following goods:

Class 5: Dietary supplement drinks; Dietary supplements; Vitamin supplements; Nutritional supplements; Dietary supplement drink mixes; Dietary supplements consisting of vitamins; Herbal supplements; Powdered nutritional supplement drink mix; Dietary supplements in powder form; Dietary and nutritional supplements; Protein supplement shakes; Food supplements; Vitamin and mineral supplements.

2. On 7 August 2024, T.J. Morris Limited (“the opponent”) opposed the application in full under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following mark:

Revitalise Healthcare +

UK registration no.UK00003857811

Filing date 9 December 2022; registration date 24 March 2023

Relying on all goods, being:

Class 5: Food supplements.

3. By virtue of relying on section 5(2)(b) of the Act, the opponent’s case is that the marks at issue are similar and that the goods of the parties are either identical or similar, resulting in a likelihood of confusion. The opponent submits that because the applicant’s mark is identical to the opponent’s, consumers will believe that the two companies are economically linked.
4. The applicant filed a counterstatement submitting that the opposition does not hold merit as the marks are distinctly different, differing in several fundamental aspects

including spelling, word choice and overall branding impression and there is no reasonable likelihood of confusion among consumers.

5. The opponent is represented by Ruth Clarke of T.J. Morris Limited. The applicant is not represented. Neither party filed evidence. No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken following a careful perusal of the papers.
6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

## **PRELIMINARY ISSUE**

7. The opponent originally filed the opposition to the application under section 5(2)(b), section 5(3) and section 5(4)(a) of the Act. As per the Registry's correspondence dated 26 February 2025, as the opponent did not file any evidence and/or submissions in support of the opposition, the opposition proceeded relying strictly on section 5(2)(b).
8. As stated at paragraph 5 above, no evidence was submitted by the parties. The Registry's previous correspondence dated 8 May 2025 and 14 May 2025 explained to the applicant that a statement of use, which they had filed as evidence, is not evidence and is not relevant for the applicant to file in these proceedings. The Registry provided guidance as to the correct procedure for filing evidence and the form it must take, but no admissible evidence was filed.

## **DECISION**

### **Section 5(2)(b): legislation and case law**

9. Section 5(2)(b) of the Act reads as follows:

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

(a) ...

(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”.

10. Section 5A of the Act states as follows:

“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.”

11. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark or international trade mark (UK) 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.

12. The opponent’s mark qualifies as an earlier trade mark under the above provisions.

As the opponent’s mark had not completed its registration process more than five years before the filing date of the applicant’s mark, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent may rely on the

goods highlighted in his notice of opposition without having to demonstrate genuine use.

13. 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 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:

- (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**

14. The parties' goods are as follows:

<b>The opponent's goods</b>	<b>The applicant's goods</b>
Class 5: Food supplements.	Class 5: Dietary supplement drinks; Dietary supplements; Vitamin supplements; Nutritional supplements; Dietary supplement drink mixes;

	Dietary supplements consisting of vitamins; Herbal supplements; Powdered nutritional supplement drink mix; Dietary supplements in powder form; Dietary and nutritional supplements; Protein supplement shakes; Food supplements; Vitamin and mineral supplements.
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15. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account, as per *Canon*, where the CJEU stated at paragraph 23 of its judgement:

“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.”

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

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

- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court 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 fur 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.”

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

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining

the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

19. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*.<sup>1</sup>

20. I have not received any submissions from the opponent regarding their position on the similarity of the goods. The applicant’s position is that their business focuses on a different aspect of health and wellness compared to the services provided under the opponent’s mark. The applicant states that the branding, target market and business objectives are not aligned, reducing any potential confusion among consumers. The applicant further submits that their mark represents a broader wellness approach, while the opponent’s mark appears to be more aligned with medical and healthcare services. While noted, this has no bearing on the assessment I am required to make. When considering the likelihood of confusion under section 5(2)(b) the assessment must be based, in fact, on the concept of ‘notional and fair use’ which involves carrying out the comparison of the goods based on the specifications before me, not the goods effectively provided by the parties.<sup>2</sup> Additionally, the way the goods are marketed may vary in time and depend upon the wishes of the parties (or any potential successors in title), so it is not appropriate to take into account the way in which the goods are marketed.<sup>3</sup>

21. I do not intend to summarise the remaining comments of the parties in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent deemed necessary below.

*Food supplements.*

22. The above term of the applicant is self-evidently identical to “food supplements” in the opponent’s specification.

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<sup>1</sup> BL O/399/10

<sup>2</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06 at [66] and *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at [22]

<sup>3</sup> *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P

*Dietary supplement drinks; Dietary supplements; Dietary supplement drink mixes; Dietary supplements consisting of vitamins; Dietary supplements in powder form; Dietary and nutritional supplements; Nutritional supplements; Powdered nutritional supplement drink mix; Protein supplement shakes.*

23. The above goods are all dietary or nutritional supplements of some description. The only term in the opponent's specification is "food supplements". Food supplements are commonly dietary or nutritional in nature used to supplement and improve a person's diet. Consequently, I find the above applicant's terms are identical to the opponent's term "food supplements" under the principle outlined in *Meric*.

*Vitamin supplements; Vitamin and mineral supplements.*

24. The above goods are supplements taken, for example, to address nutrient gaps in diets, to improve or maintain overall health and potentially reduce the risk of certain health conditions. Whilst such vitamins and minerals are normally digested naturally through foodstuffs, they can also be ingested via various supplements. The above terms are food supplements as they help fill dietary gaps and support health without replacing food. The opponent's term "food supplements" is sufficiently broad so as to cover the above applicant's terms. As a result, I find that these goods are identical under the principle outlined in *Meric*.

*Herbal supplements.*

25. I have no submissions regarding the above applicant's goods. However, it is my understanding that herbal supplements are dietary in nature and they are supplements made from one or more herbs. If this is the case, I find that *herbal supplements* are identical to the opponent's "food supplements" under the principle outlined in *Meric*.

26. If my understanding that *herbal supplements* are dietary in nature is incorrect, I do consider that there is similarity with the opponent's "food supplements". As both goods are types of supplements, there is an overlap in nature to an extent as both

goods could be in the same form, i.e. tablet, powder or drink mixes for example. The opponent's "food supplements" could contain the same herbs as the applicant's *herbal supplements*, increasing the overlap in nature. However, even if the opponent's food supplements do not contain herbs there will be an overlap in nature, despite the goods differing in their key ingredients. If the applicant's herbal supplements are not used for a dietary purpose, I understand that they may be used for a medicinal purpose. These purposes clearly differ, however, both purposes can be said to help improve a person's health and wellbeing. I note the method of use is likely to be shared, as are trade channels, with all of the goods likely to be sold in the supplement section of health stores or other retail stores. In addition, the goods will be aimed at the same users. Taking all of the above into account, if they are not identical, I find the goods to be similar to a medium degree.

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

27. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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."

28. I have no submissions from the opponent or the applicant as to who the average consumer for the goods at issue will be.

29. I am of the view that the average consumer will be both members of the general public and professional consumers such as medical professionals or dieticians. When selected by members of the general public, the goods will, for the most part, be subject to self-selection from the shelves of retail establishments such as supermarkets or specialist health stores and their online or catalogue equivalents (where available). When the selection takes place online or via a catalogue, the goods will be selected after viewing an image of them on a webpage or in a catalogue. This means that the mark will be seen and so the visual element of the marks will be the most significant,<sup>4</sup> though I do not discount the aural component entirely as suggestions may come from word-of-mouth recommendations or advice from sales assistants. The goods are generally inexpensive items purchased fairly frequently, and consumers will be alive to factors such as ingredients, suitability, nutritional value and quality. For these goods, I consider that a medium degree of attention will be paid.

30. Turning to the goods selected by professional consumers, the goods are likely to be purchased from suppliers and manufacturers, whereby the selection process will be a combination of visual and aural. Information about the products is likely to be sought primarily from brochures and websites, though professional consumers may also engage in verbal discussions with sales representatives. The professional consumer is likely to select the goods relatively frequently. I do not consider the purchasing act for any of the goods to be merely casual. The level of attention for medical or pharmaceutical products will be medium to high as selecting the correct goods will be important due to the increased liability that will come with their professional role.

### **Comparison of marks**

31. 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

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<sup>4</sup> *New Look Limited v OHIM*, Joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50

impressions created by the marks, bearing in mind their distinctive and dominant components.

32. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

33. It would be wrong, therefore, to dissect the trade marks artificially, 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.

34. The respective trade marks are shown below:

<b>The opponent's mark</b>	<b>The applicant's mark</b>
Revitalise Healthcare +	REVITALIZE HEALTH

35. In its notice of opposition, the opponent argues that as the applicant's mark is identical to the opponent's, consumers will believe that the two companies are economically linked.

36. In its counterstatement, the applicant submits that its mark is distinctly different from the opponent's mark as the two marks differ in several fundamental aspects, including spelling, word choice and overall branding impression. The applicant states its mark uses the American English spelling "Revitalize" while the

opponent's mark uses the British English spelling "Revitalise". The applicant states that these differences create a clear distinction in appearance and pronunciation. Additionally, the applicant states that the term "Health" in its mark conveys a broad and general sense of well-being, which is distinct from "Healthcare +" in the opponent's mark, which more specifically refers to medical care services. The applicant states that the combination of words in its mark creates a unique brand identity separate from the opponent's mark.

37. I do not intend to repeat all submissions from both parties in full here. Instead, I will, where necessary, discuss them further below. For the avoidance of doubt, however, I can confirm that I have taken these submissions into account in making the following comparison.

#### Overall impression

38. The applicant's mark is a word only mark consisting of the words "REVITALIZE HEALTH". I accept that the consumer does not artificially dissect trade marks. However, where a word is descriptive or allusive it may be attributed less weight in the mark as a whole. The word "REVITALIZE" appears first in the mark and is more distinctive than the word "HEALTH". Given this, I find that the word "REVITALIZE" plays the greater role in the overall impression of the mark.

39. The opponent's mark is a word only mark consisting of the words and symbol "Revitalise Healthcare +". In terms of overall impression, given that the mark's "Healthcare" element is likely to be seen as an indicator of the nature of the business, as the "+" symbol is a fairly banal symbol and as the word "Revitalise" appears first in the mark and is more distinctive than the other elements of the mark, I find that the word "Revitalise" has a dominant role in the mark. I find that "Healthcare" plays a lesser role in the opponent's mark, with the "+" symbol, whilst contributing, playing an even lesser role.

#### Visual comparison

40. At the outset of this comparison, I consider it necessary to set out that as both marks are word only marks, they are protected for use in any case. As such, the

use of different cases is not a point of consideration for the present assessment. Visually, the opponent's mark and the applicant's mark overlap through the use of the letters "REVITALI-E" in the first word of each mark and the letters "HEALTH" in the second word of each mark. The marks differ in that the ninth letter of the first word of the opponent's mark is the letter "S", whereas the ninth letter of the first word of the applicant's mark is the letter "Z". Further, the marks differ as the second word in the opponent's mark includes the letters "care" after the letters "health". Finally, the last point of difference, is that the opponent's mark includes a "+" symbol at the end of the mark. Visually, the "+" symbol has less impact with the word element being the dominant feature. Regardless of the various roles these elements play in their respective marks, they all contribute as points of visual difference between the marks. Overall, I am of the view that the shared use of nine letters in the first word of both marks being "R-E-V-I-T-A-L-I-E" (regardless of the different ninth letter in the middle of the word being "S" in the opponent's mark and "Z" in the applicant's mark), this word being the dominant element of both marks, the shared use of six letters in the second word of both marks being "H-E-A-L-T-H" (regardless of "care" being included at the end of the second word in the opponent's mark), the "+" symbol in the opponent's mark having less of an impact, and bearing in mind that consumers tend to focus on beginnings of marks,<sup>5</sup> is sufficient to result in a finding that the marks at issue are visually similar to a medium to high degree.

#### Aural comparison

41. The opponent's mark consists of seven syllables and will be pronounced in the ordinary way as "REE-VIGH-TA-LIEZ-HEALTH-CARE-PLUS". There are no submissions as to the aural impact of the "+" sign, however, I consider that it will be pronounced as "plus" as stated. Whilst some consumers may overlook the "+" symbol, which will mean that it is not articulated, I believe that a greater proportion will articulate it.

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<sup>5</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

42. As for the applicant's mark, this consists of five syllables and will be pronounced in the ordinary way as "REE-VIGH-TA-LIEZ-HEALTH". The first five syllables are identical to the applicant's mark and while the opponent's mark has two additional syllables at the end of its mark, I remind myself that consumers tend to focus on the beginnings of marks. The applicant has stated that as their mark uses the American English spelling "REVITALIZE", while the opponent's mark uses the British English spelling "Revitalise", these differences create a clear distinction in appearance and pronunciation. I note that the ninth letter of the first word of the applicant's mark is "Z" whereas the ninth letter of the opponent's mark is "S", which could be argued result in different pronunciations but I do not consider the majority of consumers will pronounce the first word of the opponent's mark as "REE-VIGH-TA-LICE" as the "S" is not pronounced in this manner. Whether the British or American spelling is used, the ordinary pronunciation of the word "Revitalise" / "REVITALIZE" is identical. Overall, owing to the identical use of the first five out of seven syllables, I find that the marks are aurally similar to a medium to high degree.

#### Conceptual comparison

43. I have no submissions from either party regarding the conceptual comparison of the marks. The applicant submits that the term "HEALTH" used in the applicant's mark conveys a broad sense of well-being which is distinct from the term "Healthcare +" in the opponent's mark, which more specifically refers to medical care services.

44. The opponent's mark consists of the words and symbol "Revitalise Healthcare +". Both words are English dictionary words which are generally understood to mean to give new energy to something and to provide services, possibly medical, to improve health respectively. The word "Healthcare" is allusive of the goods at issue and will play a lesser role in the mark as a whole. The word "Revitalise" could be perceived as being somewhat allusive of the intended purpose/effect of the opponent's food supplements as a consumer could feel revitalised following the administration of the goods. The use of the "+" symbol will be read as PLUS, as above, and indicates the addition of something. It will be understood to refer to an enhanced version or to additional features.

45. The applicant's mark consists of the words "REVITALIZE HEALTH". As was the case with the opponent's mark above, I am of the view that when considered as a whole, the concept of the applicant's mark will derive from both of these individual words. Both words are dictionary words which are generally understood to mean to give new energy to something and a person's state of wellness respectively. I am of the view that a significant proportion of consumers are either likely to see "REVITALIZE" as a deliberate misspelling of "Revitalise" or alternatively they may not know that there is an American spelling and a British spelling of the word in question so will see the different spellings as the same word. The word "HEALTH" is allusive of the goods at issue and will play a lesser role in the mark. As per the preceding paragraph, the word "REVITALIZE" could be perceived as being allusive of the intended purpose/effect of the applicant's supplements as a consumer could feel revitalised following the administration of the goods.

46. The concept of both marks will be dominated by the words "Revitalise" and "REVITALIZE" which both evoke the idea of giving new energy to something, even with the words being spelt differently. This is on the basis that the average consumer is likely to see "Revitalise" and "REVITALIZE" as the same word, albeit misspelt, an alternative spelling or not noticing the different spelling, so they evoke the same concept. I say this because consumers will generally identify elements of a mark that suggest a meaning or resemble words they understand.<sup>6</sup> However, this will be offset to some degree by the different words "Healthcare" and "HEALTH", and the symbol "+". While these additional words will not go unnoticed, as both words have an allusive nature and evoke the concept of health (albeit that their meanings are not precisely the same) they only act as a slight point of conceptual difference. I do not consider the "+" symbol creates a significant conceptual difference. As outlined above, this is because it will likely be understood as referring to an enhanced version or to additional features. As a result, I find the marks conceptually similar to a high degree.

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<sup>6</sup> See paragraphs 62 – 68 of the General Court decision in *Usinor SA v OHIM*, Case T-189/05

## **Distinctive character of the opponent's mark**

47. 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).”

48. Registered trade marks possess varying degrees of inherent distinctive character. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. However, the opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness and no evidence has been filed to that effect. Therefore, I only have the inherent position to consider.

49. It is my view that the distinctive character of the opponent's mark “Revitalise Healthcare +” will predominantly derive from the word “Revitalise”. I say this because (1) the word “Healthcare” will be viewed as allusive of the nature of the goods provided, (2) consumers may overlook the “+” symbol or associate it with

referring to an enhanced version or to additional features and (3) consumers are drawn to parts of the mark that can be read. Given this, I find that both the word “Healthcare” and the symbol “+” are low in distinctive character. Turning back to the word “Revitalise”, it is a well-known word with an immediately graspable meaning. It could be perceived as being somewhat allusive of the intended purpose/effect of the opponent’s food supplements as a consumer could feel revitalised following the administration of the goods. Therefore, I do not consider it to be particularly remarkable from a trade mark perspective. However, I consider “Revitalise” to be more distinctive than “Healthcare” or the “+” symbol. It is my view, that the distinctiveness associated with the word “Revitalise” is, between a low and medium degree. Given what I have said above about the remaining elements of the mark, the consequence of this finding is that the inherent distinctiveness of the opponent’s mark is between low and medium.

### **Likelihood of confusion**

50. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 necessary for me to keep in mind the distinctive character of the opponent’s mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact 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 that they have retained in their mind.

51. Whilst conducting a global assessment of the likelihood of confusion I must be aware of the fact that not all aspects of the respective marks will necessarily have

the same impact. For example, the importance of the respective visual, aural and conceptual aspects will be dependent on factors such as the way the goods at issue are marketed, and in which type of store/platform they are made available.

52. Throughout the course of this decision, I have found that the respective goods range from being identical to similar to a medium degree. The average consumers are both members of the general public and professional consumers such as medical professionals or dieticians. Members of the general public will select the goods via primarily visual means, although I do not discount an aural component. Professional consumers will select the goods by a combination of visual and aural means. I have concluded that, depending on what goods are being selected and by who, the average consumer will pay either a medium or medium to high degree of attention during the selection process. I have found the marks to be visually and aurally similar to a medium to high degree, and conceptually similar to a high degree. I have found the opponent's mark to possess between a low and medium degree of inherent distinctive character.

53. Taking all of the above factors into account and bearing in mind the principle of imperfect recollection, I consider the present case represents an example of direct confusion. I base this finding firstly in reliance upon the similarity between the dominant elements of the marks being "Revitalise" and "REVITALIZE" which appear as the first words in each mark, a position which has the most impact. Secondly, the first words of each mark are very highly similar words. I note that the point of difference (if even noticed) between the first words of the marks, being the ninth letter "Z" in the applicant's mark and the ninth letter "S" in the opponent's mark are subsumed within the body of the dominant element of the marks. With S/Z being aurally identical, consumers may confuse these letters easily. I consider that this is especially the case given the imperfect recollection which will lead consumers to easily misremember whether the mark included the word "REVITALIZE" (with a 'Z') or and "Revitalise" (with an 'S'), whether they involved alternative spelling or a misspelling, especially as the different letter is towards the end of the words. Thirdly, the words "Health" and "Healthcare" play lesser roles in their respective marks as they both allude to the nature of the parties' goods. Both words are similar with a similar meaning and given their allusive nature, I consider

that the consumer could easily misremember them. Finally, the “+” symbol in the opponent’s mark is a fairly banal symbol which will have a much lesser, if any, impact on the mark as a whole. It appears at the very end of the opponent’s mark and the consumer could fail to accurately recall its presence. Therefore, I find that the average consumer will misremember which mark was “REVITALIZE” followed by “HEALTH” and which was “Revitalise” followed by “Healthcare +”. If the average consumer does notice the second word of each mark, I still consider that given imperfect recollection they would still struggle to remember which mark included “HEALTH” and which mark included “Healthcare”. Additionally, I am the view that the identity or level of similarity between the parties’ goods is another factor in the opponent’s favour. I consider this finding applies despite the distinctiveness of the opponent’s mark being between a low and medium degree and despite consumers paying at least a medium level of attention when selecting the goods. As a result, I consider that there exists a likelihood of direct confusion between the marks.

54. In the event I am incorrect above this case being an example of direct confusion, I will now consider whether there is a likelihood of indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.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 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. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria*,<sup>7</sup> where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

56. While indirect confusion requires an assessment on the basis that the differences are noticed by consumers, it does not follow that all differences are always noticed. In the present case, for the same reasons set out above, I find that consumers will still overlook the difference between "REVITALIZE" and "Revitalise". Therefore, the present assessment of indirect confusion is focused on the consumer noticing the differences between "HEALTH" in the applicant's mark and "Healthcare +" in the opponent's mark. The types of examples of indirect confusion as set out in *L.A.*

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<sup>7</sup> BL O/219/16

*Sugar* (cited above) are not exhaustive. However, they are the most usual circumstances where indirect confusion may arise. In the present circumstances, I consider it likely that consumers would, when confronted by the parties' marks, believe them to originate from the same or economically connected undertakings. In my view, the changing of the word "Health" to "Healthcare", or vice versa, could be seen as the use of a sub-brand or brand variant which uses another related word to allude to health-related goods. I consider the addition of the "+" symbol in the opponent's mark, could be seen as indicating that their range of goods offer something extra from the standard range.

57. I acknowledge that the dominant element of each mark, "Revitalise" / "REVITALIZE", possesses between a low and medium of inherent distinctive character. In doing so, I remind myself of various relevant cases. The first is *Kurt Geiger v A-List Corporate Limited*,<sup>8</sup> in which Mr Iain Purvis QC said that "if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all". The second is *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*,<sup>9</sup> in which Arnold J (as he then was) said "if the only similarity between the respective marks is a common elements which has low distinctiveness, that points against there being a likelihood of confusion".<sup>10</sup> The third is *L'Oreal SA v OHIM*,<sup>11</sup> in which the CJEU considered the likelihood of confusion where marks have a low level of distinctiveness and stated that being low in distinctive character does not necessarily preclude a likelihood of confusion finding.<sup>12</sup> I also bear in mind *Face2FaceHR Partners Limited v Peninsula Business Services Limited*<sup>13</sup> in which Emma Himsworth KC, sitting as the Appointed Person, provided the following summary of the correct approach when assessing the likelihood of confusion where the only common element between the marks in issue has no or low distinctiveness:

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<sup>8</sup> BL O/075/13.

<sup>9</sup> [2015] EWHC 1271 (Ch).

<sup>10</sup> At paragraph [44].

<sup>11</sup> [2006] ECR I-57.

<sup>12</sup> The relevant paragraph being [45]

<sup>13</sup> BL O/0368/23.

“(1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.

(2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.

(3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.

(4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.

(5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.

(6) There may be a finding of a likelihood of confusion if (a) the non-coinciding elements of the mark are of lower (or equally low) degree of distinctiveness or are of insignificant visual impact and the overall impression is similar; or (b) the overall impression of the marks is highly similar or identical.”

58. Approaching the case before me in this manner, I have assessed the distinctiveness of the components of the marks and the marks as wholes and acknowledge between a low and medium degree of distinctiveness of each mark as a whole, with the words “Revitalise” and “REVITALIZE” having the same level of distinctiveness. The non-coinciding components are the “+” symbol in the opponent’s mark, and the second word of each mark being “HEALTH” and “Healthcare”. All of these elements are of low distinctiveness. The overall impression of the marks, and the concept conveyed by each, is highly similar. I therefore consider this case to fall within point (6) above. The low distinctiveness of the non-coinciding components persuades me that the average consumer could be confused despite the average consumer paying a medium or higher level of attention.

59. Taking all of this into consideration, I consider there to be a likelihood of indirect confusion, even in circumstances where the consumer pays a medium to higher degree of attention and where the goods are only similar to a medium degree.

## **CONCLUSION**

60. The opposition succeeds in full and, subject to any successful appeal, the applicant's mark is refused registration for all goods for which protection was sought.

## **COSTS**

61. As the opponent has been successful in opposing the applicant's mark, it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the opponent the sum of £350 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee:	£100
Preparing a statement and considering the other side's statement:	£250
<b>Total:</b>	<b>£350</b>

62. I therefore order Revitalize Health Group Limited to pay T.J. Morris Limited the sum of £350. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 30<sup>th</sup> day of January 2026**

**N Barratt  
For the Registrar**