

O/0099/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003992349  
BY PROCAM UK LIMITED TO REGISTER:

The logo for FARM SENSE features the word "FARM" in a bold, green, sans-serif font. To its right is a circular icon containing a stylized green leaf or plant. To the right of the icon is the word "SENSE" in a bold, black, sans-serif font.

AS A TRADE MARK IN CLASS 35

AND

IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 447015 BY  
GIBRALTAR (UK) LIMITED

## BACKGROUND AND PLEADINGS

1. On 15 December 2023, ProCam UK Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK (“the applicant’s mark”). The applicant’s mark was published on 19 January 2024 and registration is sought for the following services:

Class 35: Business management assistance; business advice and consultancy; business advice and consultancy relating to the operation of farming businesses; business consulting services in the agriculture field.

2. On 19 April 2024, the applicant’s mark was opposed by Gibraltar (UK) Limited (“the opponent”). The opposition is based on sections 5(2)(a), 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). Under the section 5(2)(a), 5(2)(b) and 5(3) grounds of opposition, the opponent relies on the following trade mark:

FARMSENSE

UK registration no. 2305245

Filing date 13 July 2002; registration date 30 May 2003

Relying on all goods, namely:

Class 3: Veterinary preparations and substances; additives and supplements for foodstuffs for animals.

Class 31: Foodstuffs for animals; additives and supplements for animal foodstuffs.

(“the opponent’s mark”).

3. Under the section 5(2)(a) ground, the opponent claims that the marks at issue are identical and that the goods and services at issue are similar. As such, the

opponent contends that there exists a likelihood of confusion between the marks. Alternatively, the opponent argues that in the event that the marks at issue are not identical, they are still similar and, as such, the section 5(2)(b) ground applies meaning that there exists a likelihood of confusion due to the similarity of the marks and the goods and services at issue.

4. Turning to the section 5(3) ground, the opponent claims that its mark has acquired a reputation in the UK in respect of all of the goods relied upon. In light of the similarities of the marks, the opponent argues that use of the applicant's mark would, without due cause, take unfair advantage of the opponent's mark and be detrimental to the distinctive character and/or repute of the same.
5. It is noted that under both the section 5(2)(b) and 5(3) grounds of opposition, the opponent gave a statement of use in respect of its mark for all of the goods relied upon.
6. Lastly, under the section 5(4)(a) ground, the opponent relies on the unregistered sign 'FARMSENSE' (the opponent's first sign) which it claims to have used throughout the UK since as early as 1991. In addition, the opponent relies on the following unregistered sign:



("the opponent's second sign")

7. The opponent claims to have used its second sign throughout the UK since as early as 1998. In respect of both signs, the opponent claims to have used them in relation to goods and services set out in the **Annex** of this decision. As a result of this use, the opponent's position is that it has acquired significant goodwill in the UK and that the signs relied upon are associated with said goodwill. It is claimed that use of the applicant's mark would (or already has) given rise to a

misrepresentation in that the relevant public would believe that it, or the services offered under the applicant's mark, were associated with the opponent. As a result of the claimed misrepresentation, the opponent contends that it has or is likely to suffer damage.

8. The applicant filed a counterstatement wherein it denied the claims against it as well as requesting that the opponent proves that it has genuinely used its mark.
9. The applicant is represented by J A Kemp LLP and the opponent is represented by HGF Limited. Only the opponent filed evidence. No hearing was requested and both parties filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.
10. 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.

## **EVIDENCE**

11. The opponent's evidence came in the form of the witness statement of David Haythornthwaite dated 27 September 2024. Mr Haythornthwaite is the sole Director and Chairman of the opponent. He is also the Director and Secretary of Farmhouse Limited, positions he has held since April 1992 and July 1998, respectively. It is confirmed that Farmsense Limited is an authorised supplier of the opponent and, therefore, there is an implied licence between the parties regarding the use of the mark/signs at issue. Mr Haythornthwaite's evidence is accompanied by 11 exhibits, being DH1 to DH11, and was adduced in order to demonstrate

genuine use of the opponent's mark as well as the existence of a reputation and goodwill in the mark/signs relied upon.

12. I do not intend to summarise the opponent's evidence in full here (or the parties' submissions, for that matter). However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

## **DECISION**

### **Proof of use**

13. The applicant's written submissions expressly deny the existence of a reputation and a goodwill. However, the submissions are silent as to the issue of genuine use, with the applicant's primary position being that the section 5(2)(a) ground fails due to the lack of identity between the marks and the 5(2)(b) ground fails due to the lack of similarity between the goods and services at issue. In respect of the goods and services, the applicant submits that even if there is a degree of similarity, it is only to a very low degree and there exists no likelihood of confusion in any event.<sup>1</sup> As a result, it does not appear that the applicant is contesting that the opponent has put its mark to genuine use. I will, therefore, proceed on the basis that genuine use is conceded for all goods relied upon but that the applicant denies the existence of reputation and goodwill under the section 5(3) and 5(4)(a) grounds, respectively.<sup>2</sup>

---

<sup>1</sup> For the avoidance of doubt, the argument put forward by the applicant in respect of the section 5(2)(b) ground, namely the claimed dissimilarity of the goods and services at issue is the alternative argument raised in defence of the section 5(2)(a) ground.

<sup>2</sup> In the event that I am wrong to take the applicant's submissions in this way, I will proceed with such an approach for reasons which will become apparent later on in this decision.

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

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

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

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(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.”

15. 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.”

16. 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,

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.

[...]

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

17. Given its earlier filing date, the opponent’s mark qualifies as an earlier trade mark under the above provisions. Whilst the opponent’s mark is subject to the use provisions and the applicant initially requested proof of the same, I have explained above that the submissions of the applicant are to be taken as if the issue of genuine use is not contested.<sup>3</sup> As such, I have proceeded on the basis that the opponent is entitled to rely on all of the goods for which its mark is registered.

---

<sup>3</sup> As above, if this is not the case then I have proceeded on this basis in any event for reasons that will become apparent below.

18. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may

retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

(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**

19. The competing goods and services are as follows:

The opponent's goods	The applicant's services
<u>Class 3</u> Veterinary preparations and substances; additives and supplements for foodstuffs for animals.	<u>Class 35</u> Business management assistance; business advice and consultancy; business advice and consultancy relating to the operation of farming

<u>Class 31</u> Foodstuffs for animals; additives and supplements for animal foodstuffs.	businesses; business consulting services in the agriculture field.
---	--

20. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

“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”.

21. 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.

22. In considering the present comparison, I remind myself that as per section 60A of the Act, it is not a requirement that goods and services appear in the same class of the Nice Classification in order for them to be deemed similar.

23. I have submissions from both parties in respect of the comparison of the goods and services. These are noted and I can confirm that I have given them due consideration. However, I do not intend to discuss them any further at this point but will, where necessary, discuss them below.

*Business management assistance; business advice and consultancy; business advice and consultancy relating to the operation of farming businesses; business consulting services in the agriculture field.*

24. The above terms cover a range of business services whereas the opponent's terms are physical goods for use on animals. Clearly, these goods and services differ in nature and method of use. In respect of the purpose of the parties' goods and services, I appreciate that some of the applicant's terms expressly cover farming or agricultural businesses.<sup>4</sup> However, regardless of the type of business targeted by the services or the field in relation to which the business advice and consultancy is provided, the purpose of the services is to manage, advise or consult on the operation of a business. This is clearly different to the opponent's goods which are to provide veterinary preparations, supplements or foodstuffs to animals. As such, the purposes of these goods and services also differ. In respect of trade channels, I note that the opponent submits as follows:

---

<sup>4</sup> With those that are not expressly reserved for this purpose being sufficiently broad enough to cover the provision of services to these businesses.

“It is absolutely reasonable and feasible for a provider of veterinary preparations and foodstuffs to provide its expert advice to consumers in relation to the use of its products. It is therefore submitted that the trade channels for the goods and services offered under the respective marks are identical.”

25. I appreciate that a producer of veterinary preparations, supplements and foodstuffs for animals may provide advice in relation to its goods. However, this is not the same as the provision of business management services nor advice or consultancy for businesses. As such, I fail to see how the above submissions of the opponent are relevant to the present comparison – they appear to be based on a misconception by the opponent as to what the applied-for services cover (i.e. they do not cover the advice a manufacturer of goods provides to its customers about the goods it sells). In further support of an overlap in trade channels, the opponent has argued that the applicant and opponent would both attend agricultural trade shows. While the opponent has provided evidence of its own attendance at trade shows,<sup>5</sup> I have nothing before me to suggest that providers of business services would attend the same events.<sup>6</sup> Given the disparity between the nature and purpose of these goods and services, I am not willing to infer, without evidence, that this is common in the trade to the point that it would lead to a meaningful overlap in trade channels between the parties’ goods and services. Lastly in respect of this factor, I do not consider that the goods and services would be sought via the same distribution channels and, again, I have nothing before me to suggest otherwise.

26. Turning to user, the opponent submits that the user of the parties’ goods and services will be farmers. This is correct to some extent because, while farming or agricultural businesses will use the goods at issue and also seek the applicant’s services, it ignores the fact that some of the applicant’s services will be used by a

---

<sup>5</sup> DH9

<sup>6</sup> Even if proven, would not fall within any of the criteria which are relevant for assessing the similarity of the goods and services. Whilst the case law talks about trade channels, it does not mention attendance to the same trade shows as a relevant factor.

myriad of other types of businesses and the fact that the goods at issue are not limited to be solely those used by farmers (on the basis that the goods can be used on any animals, including domestic pets). That being said, I do not consider this to be much of an issue as clearly the farming or agricultural businesses seeking the applicant's services will undoubtedly seek the opponent's goods meaning that these goods and services will overlap in user. In considering the goods and services at issue, I do not consider that they are in any way complementary to one another, neither are they competitive.

27. Taking all of the above into account, I do not consider that a sole overlap in user is sufficient to give rise to a material degree of similarity between the parties' goods and services. As a result, I find that they are dissimilar.

28. For the sake of completeness and in further support of my finding of dissimilarity, I refer to the case of *Unicorn Studio Inc v Veronese* [2024] EWHC 1098 (Ch). At paragraph 24 of his judgment, Mr Iain Purvis K.C., sitting as deputy High Court judge, set out that a finding of similarity requires the exercise of common sense and that a Hearing Officer stand back and consider the overall question of similarity. Applying that approach here and taking a step back to consider the goods and services at issue, I consider that a finding of similarity based simply on the fact that the goods and services may be aimed at farmers would, in my view, be nonsensical. Further, it would offer far too broad a level of protection to the goods and services at issue.

#### Conclusion of the goods and services comparison.

29. Under the section 5(2)(a) and 5(2)(b) grounds, a likelihood of confusion can only exist where there is at least some similarity between the goods and services.<sup>7</sup> This means that as a result of my findings above, the present grounds fail in their

---

<sup>7</sup> *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

entirety. On this point, I will say that even though I have not assessed whether the marks at issue are identical (as required under section 5(2)(a) grounds), the dissimilarity of the goods and services at issue is such that the section 5(2)(a) ground would have failed regardless of any identity between the marks.

30. I will now proceed to consider the section 5(3) ground.

### **Section 5(3)**

31. Section 5(3) of the Act states:

“5(3) A trade mark which –

is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

32. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure*, Case C-323/09, *Marks and Spencer v Interflora*, Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Salomon*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77 and *Environmental Manufacturing*, paragraph 34.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the holder of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

33. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the marks at issue are similar. Secondly, the opponent must show that its mark has achieved a level of knowledge/reputation amongst a significant part of the public throughout the relevant territory. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods or services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

## Reputation

34. In order to consider whether there exists a reputation in the opponent's mark, I turn to the evidence filed. The evidence sets out that the opponent supplies farmers with nutritional alternatives to traditional antibiotics. A number of screenshots are provided of the opponent's website.<sup>8</sup> Some of these are undated and it is, therefore, not possible for me to determine whether they reflect the position as at the relevant date. That being said, a number of the screenshots are taken from the internet archive facility, the Wayback Machine, and are dated between 12 May 2012 and 6 May 2023. Of the screenshots taken from prior to the relevant date, it is noted that they show a number of different products. These products are as follows:

- a. 'NUTRI MAX', which is described as a complete, balanced high specification drench. This product is referred to as being something to assist a cow's balanced diet to prevent mineral deficiencies;
- b. 'ROTAPLUS PASTE', which is described as an aid for maintaining the immune system of newborn calves; and
- c. 'COPPAVIT COPPER BOLUS – COWS', which reduces the risk of a copper deficiency amongst cows.

35. I can confirm that despite being referred to under separate brandings ('NUTRI MAX, for example, appears to be its own brand), all of the products referred to above show the 'FARMSENSE' branding on their packaging. I note that the opponent has provided a range of screenshots of its product line 'at present'.<sup>9</sup> While noted, these are of no assistance as the reference to 'at present' can only be taken as a reference to the date of Mr Haythornthwaite's statement (which was some 18 months after the relevant date) so these images cannot be reflective of the position as at the relevant date.

---

<sup>8</sup> DH2 and DH3

<sup>9</sup> DH4

36. In terms of how the products are sold, the opponent has provided screenshots from third party websites such as Amazon, which show the goods listed for sale.<sup>10</sup> The majority of the screenshots showing these third party retailers are undated so it is not possible for me to determine whether the goods shown were offered for sale by these retailers as at the relevant date. However, some are dated from prior to the relevant date and these show sales via ViaVet and Amazon. The goods shown are all, as far as I can determine, types of nutritional supplements for animals.

37. It is noted that the evidence confirms the fact that the opponent undertakes its own research and development with regard to its own products.<sup>11</sup> While this may be the case, it is not relevant to these proceedings as such services are not relied upon under any ground. Further, even if they were, there is nothing to suggest that the opponent actually offers research and development services to customers. Put simply, undertaking its own research and development is not the same as offering services to customers that would potentially support the existence of a reputation so long as it was used at a sufficient level.

38. The evidence sets out that the opponent invests heavily in marketing and advertising the FARMSENSE branding. While this claim is noted, there is nothing to suggest how much advertising spend has been incurred by the opponent so it is not possible for me to determine whether the investment is 'heavy'. Instead, all the opponent has filed in support of this point is a range of flyers and posters bearing the FARMSENSE branding that were distributed between 2020 and 2024 as well as an advert that was published in a magazine called 'Farmer's Guardian'.<sup>12</sup> While the opponent confirms that 'Farmer's Guardian' attracts a readership of over 70,000 people each week, the advert shown is from after the relevant date so is of no assistance. In respect of this evidence generally, the bulk of it is undated and it is not, therefore, possible for me to determine which evidence stems from prior to

---

<sup>10</sup> DH6

<sup>11</sup> DH5

<sup>12</sup> DH7

the relevant date and which is from after it. Further, there is nothing to suggest the reach of these materials or how widely they were distributed.

39. There are a number of screenshots provided from the opponent's social media pages.<sup>13</sup> While the posts shown are from prior to the relevant date, their engagement is very limited, with the majority of posts attracting less than 10 likes each, peaking with a competition post which had just over 100 likes.

40. The evidence shows images of the opponent's attendance at a number of different UK trade shows.<sup>14</sup> The images show events that took place between 2022 and 2024. The 2024 events are not relevant due to the fact that the relevant date is in December 2023. However, of the events from prior to the relevant date, the images do show the opponent's stand as well as a number of products under the FARMSENSE branding. The products shown include those I have discussed above, such as NUTRIMAX (including NUTRIMAX SHEEP), as well as goods referred to as 'MAXIGRO' (which is described elsewhere in evidence as a product for supporting a strong immune system)<sup>15</sup>, 'VELORON' (which is described elsewhere in evidence as a complementary feed for lambs that contains probiotics)<sup>16</sup> and OVICOL (which is described elsewhere in evidence as a complementary feed for lambs deprived of colostrum).<sup>17</sup> In respect of this evidence, I note that there is nothing before me to suggest how many people attend the events and what the opponent's reach at the event actually is. For example, nothing has been provided to demonstrate how many people attend the opponent's booths or whether the opponent had seen an increased level of sales or exposure stemming from the opponent's attendance at these events.

---

<sup>13</sup> DH8

<sup>14</sup> DH9

<sup>15</sup> See page 88 at DH7

<sup>16</sup> See page 90 at DH7

<sup>17</sup> See page 100 at DH7

41. There are a number of articles provided in evidence regarding the opponent's products.<sup>18</sup> The first article shown is from 2013 and is taken from FARMERS WEEKLY. I have nothing to suggest the readership of this publication so I am unable to determine the reach of this article to the point that it gave rise to a level of knowledge of the opponent's mark at that time. As for the remaining articles, these are simply articles seemingly written by the opponent itself and published on its own website. As such, I do not consider that these articles can be said to be examples of the opponent actually achieving a level of press coverage.

42. Lastly, the evidence goes on to discuss turnover in the UK. A table showing the opponent's turnover between July 2018 and June 2024 is provided. The turnover is broken down on a month by month basis and is grouped as covering the July of one year to the June of the next. Rather than reproduce the evidence in the same way, I have calculated it so as to cover the calendar years of 2018 to 2023, though the latter year only includes the turnover up to and including November 2023 on the basis that the relevant date sits in December of that year. The turnover is as follows:

<b>Year</b>	<b>Turnover (£)</b>
2018	78,125
2019	250,406
2020	266,257
2021	353,709
2022	492,164
2023	466,472
<b>Total</b>	<b>1,907,133</b>

43. In support of the above turnover figures, the opponent has provided a range of invoices covering sales in the UK between 2018 and 2023.<sup>19</sup> It is noted that

---

<sup>18</sup> DH10

<sup>19</sup> DH11

invoices are provided for 2024 but these fall after the relevant date so are of no assistance here.

44. Having considered the invoices generally, I note that some of them include sales of products labelled 'DUNLOP PUROFORT SIZE 7' (seemingly a pair of shoes) and trousers.<sup>20</sup> These are not goods relied upon here and, as such, are of no assistance to these proceedings. The inclusion of these goods raises an issue in that if the opponent included them in the invoices, it is plausible to suggest that they were also included within the turnover figures provided. On this point, I note that the opponent provided no breakdown of the turnover and, as such, I am of the view that the presence of these invoices potentially suggests that the turnover may include other goods not relied upon here. This would mean that the turnover provided may not be entirely reliable and while I have no way to accurately determine this (and I note that it was not specifically challenged by the applicant), this is a point I will bear in mind going forward.

45. In order to determine whether the opponent's use satisfies the burden for demonstrating the existence of a reputation, I consider it necessary to discuss the relevant market for the opponent's products. While the opponent's specification covers veterinary preparations as well as supplements and food for animals at large, the only goods shown in the evidence from prior to the relevant date cover dietary supplements for farm animals only (being those goods discussed at paragraphs 34 and 40 above). As such, I find that this is the relevant market for the present assessment. I have no evidence before me as to the size of this market but, in my view, it is likely to be a large one with turnover in the hundreds of millions of pounds per annum. I say this because it is my understanding that a large proportion of farmers across the UK will wish to ensure that their livestock's diets are adequately supplemented in order to avoid malnutrition and illness. In the context of this market, I consider that the level of use before me is low, totalling just

---

<sup>20</sup> See pages 195 to 197 of DH11

under £2 million over a six year period.<sup>21</sup> While this alone does not necessarily mean that the opponent cannot enjoy a reputation in the UK, I am of the view that the remainder of the evidence leaves a lot to be desired and fails to compensate for the low level turnover. I say this because the marketing evidence provided is not particularly compelling on the basis that, as I have highlighted above, it is vague with some of it even stemming from after the relevant date. Even where the evidence on this point is specific, there is very little to assist me in determining its actual reach across the consumer base in the UK to the point that it can be said to give rise to a level of awareness of the opponent's mark amongst the relevant public.

46. Taking all of the above into account, I am of the view that the evidence before me is insufficient to give rise to a finding that the opponent's mark enjoys a level of reputation in the UK. Put simply, the use by the opponent is at too low a level in order to demonstrate that a significant part of the relevant public would know of the opponent's mark. The consequence of this is that the present ground fails at the first hurdle.

47. I will now proceed to consider the last ground of opposition, being the section 5(4)(a) ground.

### **Section 5(4)(a)**

48. Section 5(4)(a) of the Act states as follows:

“5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

---

<sup>21</sup> This comparison ignores the issue discussed above regarding the potential inclusion of clothing in the opponent's turnover figures. However, even on the opponent's best case of all of the turnover applying to relevant goods, it remains low in the context of the relevant market.

a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

aa)...

b) ...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark”.

49. Subsection (4A) of section 5 of the Act states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

50. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but

it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

51. Halsbury’s Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation<sup>1</sup> among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source<sup>2</sup> or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;

- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

#### Relevant Date

52. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander Q.C., as the Appointed Person, endorsed the registrar’s assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether

the position would have been any different at the later date when the application was made.’ ”

53. The applicant’s mark does not have a priority date. Further, there is no evidence filed to show any earlier use of the applicant’s mark and, as such, the relevant date for the purposes of the opponent’s claim under the section 5(4)(a) ground is the filing date of the applicant’s mark, being 15 December 2023.

### **Goodwill**

54. The first hurdle for the opponent is to show that it had the necessary goodwill in its signs at the relevant date and that the signs relied upon were distinctive of or associated with that goodwill. For ease of reference, the signs relied upon are:

FARMSENSE

(“the opponent’s first sign”); and



(“the opponent’s second sign”).

55. Further, I remind myself that the applicant claims that its business’s goodwill relates to the goods and services set out in the Annex of this decision.

56. Goodwill was described in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217 (HOL), in the following terms:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing

which distinguishes an old-established business from a new business at its first start.”

57. Goodwill results from trading activities in the UK. I have summarised the opponent’s evidence at paragraphs 34 to 46 above and while that summary was provided in relation to an assessment of a more limited specification than that relied upon here, it reflects the entirety of the opponent’s evidence so remains relevant to the present ground.

58. I do not intend to repeat the above summary again but remind myself that it covers, at best, a turnover of £1.9 million over a six year period.<sup>22</sup> While this may not have been sufficient to give rise to a finding of a reputation, the test for the existence of goodwill is such that small businesses can be found to have a protectable level of goodwill despite only demonstrating a low level of use.<sup>23</sup> In light of this, I am of the view that even though the level of use shown in the evidence is at a low level, it does cover six years of trading activity and is sufficient to give rise to a finding that the opponent enjoys a protectable goodwill in its business, albeit only at a low level. Further, I consider that both of the signs relied upon are associated with said goodwill. That being said, I do not consider that this extends to all of the goods and services relied upon under this ground. I say this because, as I have discussed above, the evidence covers a range of different supplements for aiding the diets of farm animals. As such, it is only in these goods that the goodwill vests, namely the term “additives and supplements for foodstuffs for farm animals”.

59. I reach the above finding whilst bearing in mind that the opponent, under the present ground, relies on a broader range of goods and services than it did under the above grounds. On this point, I consider it necessary to briefly discuss the fact that the opponent relies on a range of retail services relating to veterinary

---

<sup>22</sup> Again, I refer to the fact that it is plausible to suggest that some of the turnover relates to goods not relevant to these proceedings, namely clothing and footwear.

<sup>23</sup> See, for example, *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590

preparations and supplementary goods for animals as well as advisory, consultancy and information services relating to veterinary preparations and substances. In respect of the retail services, I appreciate that the opponent's goods appeared on its own website prior to the relevant date. However, there is nothing before me to suggest that website offered retail services for the same. Even if it did, selling one's own goods does not necessary equate to providing retail services for such goods. In any event, there is nothing to suggest what proportion of the opponent's sales are attributable to those sold through its own retail services. Further, the only evidence I have as to the actual retail of the opponent's goods prior to the relevant date comes via the third party retailers' websites and not direct from the opponent itself. Lastly, there is nothing to suggest that the opponent offers any advisory, consultancy or information services in respect of veterinary preparations and substances so I fail to see how it enjoys any goodwill in such services.<sup>24</sup>

60. To conclude the issue of goodwill, I find that the present ground may proceed to a consideration of misrepresentation but only in respect of the opponent's term of "additives and supplements for foodstuffs for farm animals".

### **Misrepresentation and damage**

61. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

"There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

---

<sup>24</sup> Even if there were evidence on this point, the provision of information or advice would be in relation to its own products as part and parcel of selling and promoting its own goods as opposed to being services offered to third parties.

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

And later in the same judgment:

“... for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993). It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

62. In considering the issue of a misrepresentation, I note that the applicant's mark and the opponent's signs are dominated by the words 'FARM SENSE'. It cannot, therefore, be denied that the mark and signs at issue are highly similar. That being said, I am of the view that the opponent's signs are relatively weak in distinctive character when considered in line with the goods for which it enjoys goodwill (being goods used on farm animals). On this point, I refer to the case of *Office Cleaning Services Limited v Westminster Window & General Cleaners Limited* [1946] 63 RPC 39, wherein Lord Simonds stated that:

“Where a trader adopts words in common use for his trade name, some risk of confusion is inevitable. But that risk must be run unless the first user is allowed unfairly to monopolise the words. The court will accept comparatively small differences as sufficient to avert confusion. A greater degree of discrimination may fairly be expected from the public where a trade name consists wholly or in part of words descriptive of the articles to be sold or the services to be rendered.”

63. Applying the above, it is possible to argue that even though the marks share the words ‘FARM’ and ‘SENSE’, the presence of the figurative element in the middle of the applicant’s mark may, despite being small, be sufficient to avert confusion. While this may be the case, I consider the bigger issue for the opponent under the present ground is that my misrepresentation assessment requires me to consider the fields of activity in which the parties operate. While both parties’ goods and services may relate to farming and agriculture, the applicant’s field of business is business management and advice and consultancy for businesses whereas the opponent’s is additives and supplementary goods for farm animals. Such fields of activity are plainly different.

64. I appreciate that misrepresentation can occur where the fields of activity are different. However, I remind myself of the case of *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA) which sets out that the burden for overcoming different fields of activity is a heavy one. In the present case, the opponent’s evidence makes no attempt to satisfy this burden. Further, the evidence is only sufficient to give rise to a low level of goodwill so it cannot be said that the opponent’s FARMSENSE business has become a household name to the point that the lack of overlap in the fields of activity becomes less important.<sup>25</sup> As a result of the failure to satisfy the heavy burden in order to overcome the different fields of activity, I find that there exists no misrepresentation between the applicant’s mark

---

<sup>25</sup> *Lego System Aktieselskab and Another v Lego M. Lemelstrich Ltd* [1983] FSR 155

and the opponent's signs. Without a misrepresentation, there can be no damage and, therefore, the present ground fails.

65. For the avoidance of doubt, even if there were to exist goodwill in the services relied upon by the opponent, it would still not result in a misrepresentation. This is on the basis that the opponent's retail services operate in different fields than the applicant's services. Further, despite some of the opponent's services being labelled as advice and consultancy, they relate specifically to advice and consultancy for veterinary preparations and substances so still cannot be said to be in the same field as business advice and business consultancy.

## **CONCLUSION**

66. The opposition fails in its entirety and the applicant's mark will, subject to any successful appeal of my decision, proceed to registration for all of the services applied for.

## **COSTS**

67. The applicant has succeeded in defending its application. It is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. While the applicant did not file evidence, it was required to consider the evidence of the opponent. Therefore, I consider it appropriate to make a costs award in respect of this task.

68. In the circumstances, I award the applicant the sum of £1,200 as a contribution towards its costs. The sum is calculated as follows:

Considering a notice of opposition and preparing a counterstatement:	£250
---	------

Considering the opponent's evidence:	£600
Filing submissions in lieu:	£350
<b>Total:</b>	<b>£1,200</b>

69. I hereby order Gibraltar (UK) Limited to pay ProCam UK Limited the sum of £1,200.

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 5<sup>th</sup> day of February 2026**

**A COOPER**

**For the Registrar**

## **ANNEX**

### Goods

Veterinary preparations and substances; additives and supplements for foodstuffs for animals, medicated and non-medicated food supplements for animals; medicated and non-medicated nutritional supplements for animals; medicated and non-medicated dietary supplements for animals; non medicated supplements and medicated and non-medicated additives for animal foodstuffs; non medicated food supplements; Foodstuffs for animals; additives and supplements for animal foodstuffs; Oils, creams, colostrum and salves for animals, drench for animals, calf feeders, clothing, hats, workwear for farmers and vets; veterinary preparations and substances in the form of oils, gels, tablets, liquid, waxes and powder, nutraceuticals for animals, nutraceuticals for animals in the form of oils, gels, tablets, liquid, waxes and powder, shampoos, cleansing, waxing and conditioning preparations for animals, animal washes and lotions and other grooming preparations, pet and animal care products, vitamin and mineral supplements for animals, repellents, repellents for animals, insect repellent, wipes impregnated with insect repellent.

### Services

Retail services relating to veterinary preparations and substances; additives and supplements for foodstuffs for animals, medicated and non-medicated food supplements for animals; medicated and non-medicated nutritional supplements for animals; medicated and non-medicated dietary supplements for animals; non medicated supplements and medicated and non-medicated additives for animal foodstuffs; non medicated food supplements; Retail services relating to foodstuffs for animals; additives and supplements for animal foodstuffs; Retail services relating to oils, creams, colostrum and salves for animals, drench for animals, calf feeders, clothing, hats, workwear for farmers and vets; Retail services relating to veterinary preparations and substances in the form of oils, gels, tablets, liquid, waxes and powder, nutraceuticals for animals, nutraceuticals for animals in the form of oils, gels, tablets, liquid, waxes and powder, shampoos, cleansing, waxing and conditioning preparations for animals, animal washes and lotions and other grooming preparations,

pet and animal care products, vitamin and mineral supplements for animals, repellents, repellents for animals, insect repellent, wipes impregnated with insect repellent; advisory, information and consultancy services in relation to veterinary preparations and substances.