

O/0601/25

CONSOLIDATED PROCEEDINGS

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION
NO. UK00003564102 IN THE NAME OF APACARE GROUP LIMITED
FOR THE FOLLOWING TRADE MARK:**

ApaCare

IN CLASS 21

AND

**AN APPLICATION FOR A DECLARATION
OF INVALIDITY UNDER NO. 506147 BY
CUMDENTE GMBH**

AND

**IN THE MATTER OF APPLICATION NO. UK00003909541
BY CUMDENTE GMBH
TO REGISTER:**

Apa Care

AS A TRADE MARK IN CLASSES 3, 5, 10 & 21

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 443040 BY
APACARE GROUP LIMITED**

BACKGROUND AND PLEADINGS

1. These proceedings involve cross opposition and cancellation actions between Cumdente GmbH (“Cumdente”) and APACARE GROUP LIMITED (“AGL”). I will summarise the different proceedings below.

Cumdente’s cancellation application

2. AGL is the owner of the first trade mark shown on the cover page of this decision. That mark stands registered in the UK under number 3564102 (“AGL’s mark”). It was filed on 4 December 2020 and was registered on 16 April 2021. It stands registered for the following goods:

Class 21: Toothbrushes; toothbrushes, electric; water apparatus for cleaning teeth and gums; heads for electric toothbrushes; toothbrush cases; toothpick holders; floss for dental purposes; cups; straws for drinking; drinking straws; brushes; perfume vaporizers; perfume sprayers; toothpaste tube squeezers; enamel and plastic ware for everyday use, including basins, bowls, plates, kettles, and cups; isothermic bags; carpet sweepers; rug sweepers.

3. On 30 May 2023, Cumdente made an application for a declaration of invalidity against AGL’s mark under section 47 of the Trade Marks Act 1994 (“the Act”). In pursuit of the invalidation, Cumdente relies upon sections 5(2)(a), 5(2)(b), 5(3), 5(4)(a) and 3(6) of the Act. The invalidation is targeted at AGL’s mark in full.
4. Under the section 5(2)(a) ground, Cumdente relies on the following mark:

Apa Care

UK registration no. 811220975

Filing date 19 June 2017; registration date 12 January 2018

Relying on all goods, namely:

Class 3: Dentifrices; toothpastes, tooth polishing pastes.
("Cumdente's first mark").

5. Under the section 5(2)(a) ground, Cumdente argues that the marks at issue are identical and that the goods at issue are similar. As such, Cumdente claims that there is a likelihood of confusion between the marks.
6. In respect of the section 5(2)(b) ground, Cumdente not only relies on the above mark (on the basis that if it is not identical, it is similar) but the following marks also:

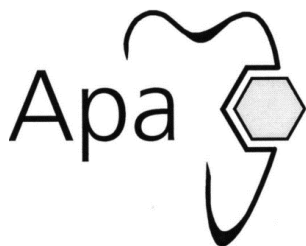
APA

UK registration no. 914098206

Filing date 20 May 2015; registration date 7 September 2015

Relying on all goods, namely:

Class 5: Dental preparations and articles.
("Cumdente's second mark"); and



UK registration no. 801362883

Filing date 20 June 2017; registration date 2 February 2018

Relying on all goods, namely:

Class 3: Dentifrices.

Class 5: Teeth filling material.

("Cumdente's third mark").

7. Under the section 5(2)(b) ground, Cumdente claims that its marks are similar to AGL's mark and that the goods at issue are identical or similar. As a result, Cumdente claims that there is a likelihood of confusion between the marks.
8. In respect of its section 5(3) ground, Cumdente relies on all three of its marks. It claims that each mark enjoys a reputation for the goods relied upon and given the similarity between them and AGL's mark, consumers will believe them to be linked. As a result, Cumdente claims that use of AGL's mark would result in AGL benefitting from an unfair advantage. In addition, Cumdente claims that there is also a risk that the use would result in damage being caused to the distinctiveness and repute of its own marks.
9. All three of Cumdente's marks are comparable marks based on either earlier EUTMs or International Registrations designating the EU owned by Cumdente. On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing EUTMs and IRs designating the EU. These comparable marks enjoy the same filing and registration dates as their European counterparts.
10. Under the section 5(4)(a) ground, Cumdente relies on the unregistered signs "APA CARE" and "APA", which it claims to have used throughout the UK since before December 2020 in respect of 'dental products'. In respect of this ground, Cumdente claims that it owns a goodwill in its business under the signs relied upon and, as a result, use of AGL's mark would cause a misrepresentation between it and Cumdente's signs. It is claimed that such a misrepresentation would result in damage being caused to Cumdente.

11. Lastly, under the section 3(6) ground, Cumdente claims that AGL had full knowledge of Cumdente's business and in applying for its mark, AGL sought to misrepresent a connection to Cumdente, to give rise to confusion between the marks, wrongfully divert business from Cumdente, wrongfully trade off Cumdente's reputation, wrongfully prevent Cumdente from protecting its marks and, finally, wrongfully damage Cumdente's reputation, goodwill and business.

12. AGL filed a counterstatement wherein it, for the most part, denied the claims against it. That being said, it did make a concession as to the goods at issue and I will explore this further below. Lastly, I note that AGL made a request that Cumdente provide proof of use for the marks relied upon.

AGL's opposition

13. On 9 May 2023, Cumdente applied to register the second trade mark shown on the cover page of this decision in the UK, being the mark under number 3909541 ("Cumdente's opposed mark"). This mark was published for opposition purpose on 21 July 2023 and registration is sought for the following goods:

Class 3: Cosmetic preparations for the care of mouth and teeth; tooth care preparations and oral care preparations [non-medicated]; Dentifrices; chewable dentifrices; tooth cleaning preparations; toothpaste; Tooth care preparations; tooth care preparations for sucking or chewing; Mouthwashes; mouthwashes, not for medical purposes; mouth sprays, not for medical use; breath fresheners; Tooth polishes; tooth care preparations, namely tooth polishing paste.

Class 5: Dental preparations and articles; dental preparations and articles, namely pastes for repairing teeth, tooth polishing paste, blasting

powder for medical teeth cleaning; Tooth prophylactics; materials for oral prophylaxis; Medical dentifrices; medicated toothpaste; Medicated mouthwashes; mouthwashes for medical purposes; medicated mouth spray; Chewing gum for medical purposes, namely dental purposes; Bone cement for medical and orthopaedic purposes, namely for dental use; teeth filling material; Material for dental prosthesis; material for dental crowns; material for dental bridges; material for artificial teeth; materials for repairing teeth; bonding and primer materials for dental purposes; dental impression materials; Dental lacquer; Nutritional supplements; vitamins and vitamin preparations; probiotic bacterial formulations for medical use; probiotic supplements; prebiotic supplements; nutritional supplements, namely postbiotic supplements; trace element preparations for human use; Pharmaceutical preparations for dental use.

Class 10: Surgical and medical apparatus and instruments, for dental use; Dental implants; dental bridges; dental crowns; dental prostheses; surgical implants comprised of artificial materials, for dental use; artificial jaws; Teeth aligners.

Class 21: Dental cleaning articles; Toothbrushes; toothbrushes, electric; heads for electric toothbrushes; Floss for dental purposes; Periodontal irrigators for personal use.

14. On 14 September 2023, AGL sought to oppose this mark under sections 5(1) and 5(2)(a) of the Act. In bringing this opposition, AGL relies on the same mark that is subject to Cumdente's cancellation application above, being that under registration number 3564102. In respect of the section 5(1) ground, AGL claims that the marks at issue are identical, so too are the goods at issue. As a result, AGL claims that Cumdente's opposed mark should be refused. In respect of the section 5(2)(a)

ground, AGL claims that the marks at issue are identical and that the goods at issue are similar and, as such, there exists a likelihood of confusion between them.

15. Cumdente filed a counterstatement wherein it accepted that the marks at issue were identical and that the goods at issue were also identical or, if not, similar. However, Cumdente's position is that the mark AGL has relied upon is, by virtue of the above invalidity proceedings, not valid or enforceable.

16. Upon the filing of the counterstatements in both sets of proceedings, they were consolidated in accordance with Rule 62(1)(g) of the Trade Marks Rules 2008. This was communicated to the parties by way of correspondence from the Tribunal dated 7 December 2023.

17. Only Cumdente filed evidence in these proceedings. A hearing took place before me on 16 April 2025, by video conference. Cumdente was represented by Mr Ian Bartlett of Beck Greener LLP, who have represented Cumdente throughout these proceedings. AGL elected not to attend the hearing but I note that it has been represented throughout these proceedings by IBE Avocats. I also note that AGL did not elect to file written submissions in lieu of its attendance at the hearing.

18. 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

19. Cumdente's evidence in chief came in the form of two witness statements, the first being that of Dr Frank Schynowski dated 2 February 2024 and the second being

that of Mr Ian Bartlett dated 6 February 2024. Dealing with these in turn, I note that Mr Schynowski is a co-Director of Cumdente. His statement is accompanied by 14 exhibits, being FS1 to FS14, and was adduced to provide evidence of use and in support of a claim of reputation and goodwill

20. As for Mr Bartlett's evidence, I note that he is a registered Trade Mark agent and a licensed Higher Courts litigator. As above, he is the legal representative of Cumdente and is, therefore, entitled to file evidence on its behalf. Mr Bartlett's statement is accompanied by ten exhibits, being IB1 to IB10, and was adduced in order to demonstrate the similarity of goods and that AGL has acted in bad faith.

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

MY APPROACH

22. Given that AGL's opposition is reliant upon the mark subject to the cancellation application, it follows that if the cancellation application succeeds in full, AGL's mark will be declared invalid and deemed as if it was never filed. The consequence of this is that it would no longer remain as a valid earlier mark. Therefore, AGL will not be able to rely on it for the purpose of the opposition meaning that the opposition will fall away. As a result, I consider it necessary to consider the cancellation application first. If that fails, or is only partially successful, the opposition will require consideration. On this point, I note the concessions made by Cumdente in that it accepts identity between the marks and identity/similarity between the goods. As such, it follows that the opposition will succeed in full in the event that AGL's mark survives the cancellation application to any degree.

DECISION

Cumdente's cancellation application

23. Sections 5(2), 5(3), 5(4)(a) and 3(6) of the Act all have application in invalidation proceedings because of the provisions of section 47 of the Act, which states as follows:

“47. –

(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 5(6).

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered-

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(2D)-(2DA) [Repealed]

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet

acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c) that the application for a declaration of invalidity is based on section 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of section 5(3).

(3) [...]

(4) [...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

Proof of use

24. 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.”

25. Section 100 of the Act is also relevant. It reads:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

26. Given their earlier filing dates, Cumdente’s marks qualify as earlier trade marks under the above provisions. All of Cumdente’s marks completed their registration processes over five years prior to the date on which Cumdente sought to invalidate AGL’s mark. As for the second mark, this also completed its registration process more than five years prior to the filing date of AGL’s mark. As set out above, AGL requested that Cumdente provide proof of use in respect of its marks. As a result, and in accordance with the legislation set out above, Cumdente’s marks are subject to the proof of use assessment.

27. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal*

Market (Trade Marks and Designs) [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the

sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

28. Section 47(2B) of the Act (cited above) confirms that the relevant period for the present assessment is the five-year period ending with the date of the invalidity application and the five-year period ending with the filing date of AGL’s mark. All three of Cumdente’s marks were registered more than five years prior to the date of the cancellation application, being 30 May 2023. Therefore, one of the relevant periods at issue here is 31 May 2018 to 30 May 2023. This is the only applicable relevant period for Cumdente’s first and third marks as they were registered within five years of the date on which AGL filed its mark. However, Cumdente’s second mark completed its registration process more than five-years prior to the filing date of AGL’s mark, being 4 December 2020. Therefore, an additional relevant period is applicable to that mark, being 5 December 2015 to 4 December 2020. In terms of reference going forward, I will refer to the period of 5 December 2015 to 4 December 2020 as the first relevant period and the period of 31 May 2018 to 30 May 2023 as the second relevant period.

29. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real”¹ because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark” is, therefore, not genuine use.

Evidence of use

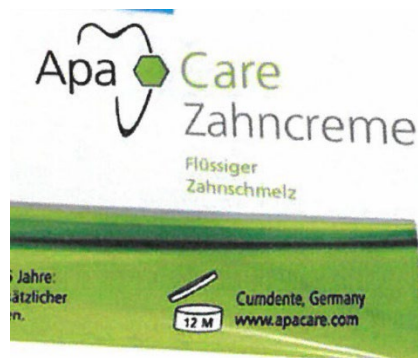
30. Cumdente has been trading under the name ‘AGL’ since 2007. A printout taken from its website at that time is provided in evidence.² Additional printouts are provided that were obtained from the internet archive facility, the Wayback

¹ *Jumpman* BL O/222/16

² FS4

Machine, which shows the website as it stood at various dates between 2008 and 2022.³ It is noted that Cumdente's marks appear on these printouts. In addition, the printouts show various goods that can be said to fall within the range of dental care products. Of those that were introduced prior to the expiration of the relevant periods, the goods include toothpastes, tooth polish, tooth repair gels, a tooth repair liquid, chewing gum and pastilles to prevent cavities and a powder for tooth and mouth care. In addition, I note that a sonic toothbrush was introduced in 2020.

31. The evidence states that the products have not changed substantially in how they have been labelled and packaged during the time. On this point, I note that images are shown that are confirmed as being taken between 2016 and 2020 that show the labelling.⁴ It is noted that the mark primarily shown is Cumdente's third mark followed by the word 'Care'. For illustrative purposes, this appears as follows:



32. As also shown above, the wording 'apacare' appears by way of a reference to Cumdente's website for this branding.

33. In respect of channels of trade, Cumdente confirms that its primary markets are Germany and Austria and that this was the case throughout the relevant period. In addition, the evidence confirms that the goods were also sold in Poland and in the UK. The evidence also confirms that it not only sells its goods via its online websites

³ FS5

⁴ FS6

(being apacare.com and apacare.de), but it sells products via third party retailers such as pharmacies and drugstores. In making this point, it refers to a German drugstore called Müller which is confirmed as being the third largest drugstore chain in Germany. Printouts showing Cumdente's goods on this company's website during the relevant period are shown in evidence.⁵ Having considered these websites, I note that that they are in German but it is clear that the goods are displayed as 'ApaCare' goods and while I cannot make out the packaging completely, it appears in line with the evidence I have discussed above. In addition, I note that the listings show the wording 'ApaCare' in their description of the goods.

34. In addition to Müller, there is discussion surrounding a third-party Austrian retailer, being 'DM Drogerie', which operates in Austria via more than 300 retail outlets. A printout showing goods for sale via its website is provided but I note that this is not via the Wayback Machine.⁶ That being said, the unchallenged evidence does confirm that the products have been listed on this website throughout the relevant period.

35. Moving on to sales figures, the evidence includes a table showing a breakdown of the total sales in the EU between 2015 and 2022. The figures shown include those '*in excess of*' and are provided in both euros and pounds. While I have nothing to suggest the accuracy of the conversions provided, I have nothing to the contrary to suggest that they are not accurate. Further, the figures are provided as an approximation so are not purported to be entirely accurate to the pound. In reproducing the table below, I will refer to the figures provided in pounds only.

Year	Toothpaste (£)	Tooth Repair Gel/Liquid (£)	Tooth Polish (£)
2015	175,000	87,000	130,000
2016	175,000	87,000	130,000
2017	345,000	87,000	130,000

⁵ FS7

⁶ FS8

2018	345,000	174,000	130,000
2019	520,000	260,000	130,000
2020	520,000	260,000	130,000
2021	700,000	260,000	175,000
2022	700,000	260,000	175,000
Total	3,480,000	1,475,000	1,130,000

36. Alongside the above table, Cumdente has provided a selection of invoices showing sales during the relevant period to its retail customers in Germany, Austria and Poland.⁷ These are noted, though I see no real need in discussing them further here as the above figures are not subject to any challenge so I have no reason not to believe that they are true and represent an accurate reflection of Cumdente's EU use.

37. The evidence confirms that the above figures include sales to the UK. In addition, however, Cumdente confirms the following additional sales to customers in the UK:

Year	UK Sales (£)
2018	1,355
2019	1,247
2020	2,417
2021	3,087
2022	1,834
2023	2,965
Total	12,905

38. The evidence sets out that Cumdente is not able to provide figures for the years prior to 2018. The above figures provided are confirmed as being those made

⁷ FS9

directly by Cumdente itself. In support of the same, two invoices to UK customers from 2018 and 2021 are provided in evidence.⁸

39. In respect of UK use, the evidence goes on to state that additional sales to the UK were made via third party platforms and retailers such as Amazon, eBay, KlipShop, Makeup.uk and Pharmasana. At the hearing, Mr Bartlett confirmed that any sales by these third parties was in addition to those discussed above. While that may be the case, Cumdente has not provided any breakdown of additional sales but has instead, simply stated that “we know there is a considerable volume of sales of our products aimed at the UK market via other platforms and re-sellers”.⁹ This has presented some difficulties in the present case as without any breakdown whatsoever, it is not possible to determine how many actual sales were made via these third parties during the relevant period. Despite the reference to a considerable volume of sales, I consider that it would be inappropriate (and unfair to AGL) if I were to simply infer that the volume of additional sales was large. To me, this would fly in the face of the evidence as a whole which clearly only shows a very low level of use in the UK.

40. The evidence goes on to discuss advertising and promotion of the ‘APA CARE’ brand. Promotional materials are provided in evidence that cover promotions run between 2015 and February 2023.¹⁰ The evidence provided is in German but the narrative evidence of Mr Schynowski seeks to explain what the evidence shows at paragraph 27 of his statement. I do not intend to discuss this evidence in any great detail save to say that they cover a number of advertising efforts in Germany and Austria. That being said, they appear to have a primary focus on professionals in the dentistry industry such as publications in the Germany Federal Association of Dental Professionals in Prevention¹¹ and leaflets sent to 42,000 dental practices in

⁸ FS10

⁹ See the end section of paragraph 20 of Mr Schynowski’s statement.

¹⁰ FS11

¹¹ See page 10 on FS11

Germany.¹² Therefore, this evidence does not appear to be targeted at the end consumer for the goods that Cumdente sells.

41. In 2019, Cumdente was featured in the German based consumer magazine ‘OKO-Test’ wherein it was awarded a Grade A quality award by the magazine. This was confirmed in the German dental journal ZM, which is provided in the evidence.¹³ In addition, Cumdente was granted an award under the title of ‘Dental Champion’ in 2019. This was awarded by the German magazine ‘Dental Marketing’ in 2019.¹⁴ Lastly, there is evidence of a study undertaken by the British Medical Journal in August 2021. The study concluded that ‘APA CARE’ toothpaste was shown to be superior to toothpaste that contained sodium fluoride.¹⁵

Form of the mark

42. Before proceeding to assess whether the use before me is sufficient to be deemed genuine, I consider it necessary to touch upon the form of the mark. In doing so, I refer to the case of *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, wherein Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2).¹⁶ He said:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

¹² See page 18 of FS11

¹³ FS12

¹⁴ FS13

¹⁵ FS14

¹⁶ While relating to section 46 of the Act, the principle applies equally to proof of use assessments under section 5 of the Act.

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

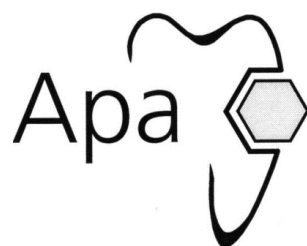
16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA

were in combination weakly distinctive, and the word MOOD alone was less distinctive still.”

43. I note that the words ‘apacare’ appear throughout the evidence in website addresses and product listings and by way of appearances on the products by reference to websites such as ‘apacare.com’. While Cumdente’s first mark is presented as two words, I do not consider that the conjoining of ‘ApaCare’ is such that it alters the distinctive character of the mark. As such, the use shown is acceptable use of Cumdente’s first mark in accordance with the case law cited above.

44. As for the second and third marks, I consider that these warrant additional discussion. Firstly, Cumdente’s second mark is the word only ‘APA’. In the context of the use shown, I am of the view that the addition of ‘Care’ will clearly be viewed as a non-distinctive addition to the mark, in that it will be immediately understood as a reference to the fact that the goods offer ‘care’ to the user. As such, I consider ‘ApaCare’ as an acceptable variant of ‘APA’ in accordance with the case law cited above. As for the third mark, this is as follows:



45. The distinctiveness of this mark lies in the word ‘Apa’ on the basis that the figurative element will clearly be recognised as a tooth and is, therefore, allusive to the goods at issue. Therefore, I do not consider the removal of the tooth device and the addition of the word ‘Care’ will alter the distinctive character of the same. Therefore, use of ‘ApaCare’ in word only format is also an acceptable variant of Cumdente’s third mark in accordance with the case law cited above.

46. Moving on, I remind myself that the majority of the evidence shows products bearing the following mark:



47. Given everything I have said above, it should come as no surprise that the addition of 'Care' is non-distinctive and, therefore, the above is an acceptable variant of Cumdente's third mark in accordance with the case law cited above.

48. As for the remaining two marks, these are word only marks so are, therefore, protected for use of their words in any typeface and in any case. As a result, I consider that they may be both presented identical to how the words in the above example are provided. As for the different elements, I do not consider that the addition of the tooth device between 'Apa' and 'Care' will alter the distinctive character of Cumdente's first mark. Further, I do not consider that the addition of the tooth device and the word 'Care' will alter the distinctive character of Cumdente's second mark. Therefore, I find that the above use is an acceptable variant of Cumdente's second and third marks in accordance with the case law cited above.

Assessment of the evidence

49. In considering the evidence as a whole, I remind myself that it confirms sales across the entirety of the EU of just over €6 million over an eight-year period. Looking at this in the context of the two different relevant periods, I note that it covers £3.8 million for 2015 to 2020 and, for 2018 to 2023, it covers £4.7 million

(though I note that the figures conclude in 2022, however, I have nothing from 2023).

50. In respect of the second relevant period, however, I note that the EU wide figures from 2021 and 2022 fall after IP Completion Day so are not automatically relevant to the issue of genuine use. On this point, I have no breakdown as to how much of the turnover for 2021 and 2022 relates to the UK. All I do have in respect of this issue is a vague reference in the narrative evidence that confirms that the figures do also cover the UK. Without any breakdown, it is impossible for me to determine the precise level of use in the UK after IP Completion Day. In the present case, I note that evidence as to additional sales in respect of the UK have been provided. However, these are so low (being almost £13,000 between 2018 and 2023) that they do not support a compelling argument that the use in the UK after IP Completion Day would have been at a reasonable level. As such, I consider that it would be unreasonable for me to infer that the turnover for 2021 and 2022 covers a sufficient level of UK use. In support of this point, I not only refer to the very low level of UK specific use but remind myself of Cumdente's clear focus on Germany and Austria throughout the entirety of the evidence. As a result, I am not willing to make any inference in respect of the UK level of use outside of the actual turnover figures provided, being £13,000. For the avoidance of doubt, this also applies to the vague reference to third party sales.¹⁷ As a result, I am of the view that the applicable turnover for the second relevant period is likely to be closer to £2.4 million (being the figures for 2018 to 2020 as provided in the table of use reproduced above, with the £13,000 unlikely to have any great deal of impact on top of that).

51. In considering the level of use, it is necessary to consider it in light of the overall market within which Cumdente operates. The turnover is spread over three main

¹⁷ On this point, I refer to the cases of *Awareness Limited v Plymouth City Council*, Case BL O/236/13 and *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13 which set out that the burden to prove use is on the owner of the mark. Further, they set out that a Tribunal is entitled to be sceptical of use if the material provided is inconclusive.

categories, being toothpaste, tooth repair gel/liquid and tooth polish. These are every day consumer goods and the markets for which are likely to be enormous across the relevant territories as wholes. In comparing the use before me to the size of the markets at issue, it is clear that the level of use is at a very low level. That being said, I remind myself that as per the case law cited above, use need not be quantitatively significant in order for it to be deemed genuine. In the present case, I remind myself of Cumdente's clear attempts to penetrate the German and Austrian markets by way of its appearances in a number of Dental journals/publications across those countries.

52. Taking the evidence as a whole, I appreciate that it may reflect a very low level of use. However, I am of the view that it still represents a genuine attempt by Cumdente to create and preserve a market share in its marks across two Member States in the EU. That being said, I am of the view that because the turnover relates to only three types of goods, and those goods are capable of their own categorisation by the average consumer,¹⁸ I consider that Cumdente may only proceed in reliance upon the following goods:

Cumdente's first mark

Class 3: Toothpastes, tooth polishing pastes.

Cumdente's second mark

Class 5: Tooth repair gels and liquids.

Cumdente's third mark

Class 3: Toothpastes, tooth polishing pastes.

¹⁸ See paragraph 47 of *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch)

Class 5: Tooth repair gels and liquids.

Section 5(2): legislation and case law

53. In considering the section 5(2) grounds, I consider it necessary to set out the legislation and case law that governs both sections 5(2)(a) and 5(2)(b). After this, however, I will proceed to consider the section 5(2)(a) ground first before proceeding to consider section 5(2)(b), if necessary.

54. 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 or association with the earlier trade mark.”

55. 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.”

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

Section 5(2)(a)

Identity of the marks

57. It is a pre-requisite of section 5(2)(a) that the marks be identical. In the present case, AGL has set out that the marks at issue are “somewhat similar, only to the extent that they use the same common letters albeit used with typography different

for the marks in comparison.”¹⁹ Therefore, it follows that AGL denies that the marks are identical.

58. Cumdente’s mark at issue here is ‘Apa Care’ whereas AGL’s mark is:

ApaCare

59. While AGL’s mark is figurative in nature, it is simply a plain presentation of the word ‘ApaCare’ in title case. I do not consider it controversial to suggest that Cumdente’s mark is capable of being presented in the exact same way. As such, the figurative representation of AGL’s mark is not a point of visual distinction between the marks. This leaves the only point of different being the space between ‘Apa’ and ‘Care’ in Cumdente’s mark, which is not present in AGL’s mark. On this point, I refer to the case of *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, wherein the Court of Justice of the European Union (“CJEU”) held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

60. In adapting this principle to the present case, I am of the view that the space between the elements ‘Apa’ and ‘Care’ (or lack thereof) is so insignificant that it will go unnoticed by the average consumer. As such, I find that the marks at issue here are identical. As a result, the present ground may proceed and I now turn to consider the comparison of the goods at issue.

¹⁹ See page 5 of the continuation sheet of APACARE’s TM8

Comparison of goods

61. The competing goods and services are as follows:

Cumdente's goods	AGL's goods
<u>Class 3</u> Toothpastes, tooth polishing pastes.	<u>Class 21</u> Toothbrushes; toothbrushes, electric; water apparatus for cleaning teeth and gums; heads for electric toothbrushes; toothbrush cases; toothpick holders; floss for dental purposes; cups; straws for drinking; drinking straws; brushes; perfume vaporizers; perfume sprayers; toothpaste tube squeezers; enamel and plastic ware for everyday use, including basins, bowls, plates, kettles, and cups; isothermic bags; carpet sweepers; rug sweepers.

62. In considering the comparison of the goods at issue, I note that AGL's counterstatement sets out the following:

"The Applicant cannot deny that the goods belong to the dental domain. However, they do not correspond to the same good as the ones covered by the earlier trademarks.

But this similarity between the above goods is not sufficient to offset the differences between the signs (or vice-versa) and to establish a likelihood of confusion in the present case."

63. Preceding this concession is a reproduction of *all* of AGL's goods in class 21. No such distinction has been made between AGL's dental goods and its other goods such as 'perfume sprayers' for example. Further, when commenting on a likelihood of confusion, AGL fails to make any clarification on this point and, instead, puts the lack of confusion on the fact that the marks are not similar enough. Therefore, it can be taken that AGL concedes that regardless of what goods are at issue, they are similar to at least some degree. I appreciate that these comments came prior to the limitation of Cumdente's mark after a proof of use assessment. However, I do not consider that this takes away from the nature of the concession as the goods that remain in Cumdente's mark are plainly in the same vein as those broader terms initially relied upon,

64. In the present case, AGL has not sought to resile from its pleaded position and neither has it offered any further explanation regarding the same, by way of written submissions. On this point, aside from filing a counterstatement, AGL has not filed any further documentation whatsoever and neither did it elect to attend the hearing (or file written submissions in lieu of its attendance at the same) in order to clarify its position. Lastly, I note that no application has been made to amend AGL's pleadings in the ordinary way and neither has it made an application via Civil Procedure Rules 14.2(11) to amend or withdraw its admission.

65. As a result of the above, and despite my reservations of similarity between some of AGL's class 21 goods and Cumdente's goods, I have no alternative but to proceed on the basis that all of the goods at issue are at least similar to some degree. As to the level of similarity, however, this remains something that I must now consider.

66. 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 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”.

67. 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.

Toothbrushes; toothbrushes, electric; heads for electric toothbrushes.

68. The above goods are all for use in cleaning the user's teeth. The same goes for Cumdente's "toothpaste" goods. While they differ in nature, I consider that the end purpose of both goods is the same. On this point though, I do acknowledge that their core purposes differ. In addition, such goods are closely associated and will

plainly be important to one another. Further, the close association is such that consumers will believe that they are the responsibility of the same undertaking.²⁰ As such, the goods are complementary. Further, I do not consider it controversial to suggest that these goods are those that will be used by the same users and provided by the same undertakings. Taking all of this into account, I find that these goods are similar to between a medium and high degree.

Water apparatus for cleaning teeth and gums; floss for dental purposes.

69. Similarly to the above comparison, the end purpose of these goods is similar to that of Cumdente's goods, namely "toothpastes". That purpose is to clean the user's teeth though, again, I appreciate that their actual core purposes differ (one cleans between the teeth with water propulsion or floss string whereas the other is applied to a toothbrush and brushed onto the teeth). As was also the case above, I am of the view that the providers of AGL's goods are likely to be dental care companies that will also produce and sell toothpastes. As such, the goods overlap in trade channels. In addition, the users will be the same. While I found that goods in the preceding paragraph to be complementary, the same does not apply here as toothpaste is unlikely to be used on the above goods. Therefore, they are not important to one another. Taking all of this into account, I find that these goods are similar to a medium degree.

Toothpick holders; toothbrush cases; toothpaste tube squeezers.

70. The above goods are those that are likely to be produced and sold by those undertakings that specialise in dental care who are likely to also sell toothpaste. As a result, I find that the above goods overlap in trade channels with Cumdente's "toothpastes". In addition, the goods will be selected by the same user. So while

²⁰ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

the natures, methods of use and purposes of these goods differ, the aforementioned overlaps are sufficient to give rise to a low degree of similarity.

Cups; straws for drinking; drinking straws; brushes; perfume vaporizers; perfume sprayers; enamel and plastic ware for everyday use, including basins, bowls, plates, kettles, and cups; isothermic bags; carpet sweepers; rug sweepers.

71. The above goods are ordinary consumer goods that will be selected by the same consumer as Cumdente's "toothpastes". That being said, the goods differ in nature, method of use and purpose. Further, I see no reason why the goods will be provided by the same undertakings though I do appreciate that large undertakings such as supermarket brands may offer both parties' goods, albeit in different locations in their stores. On this point, I do not consider that this would ordinarily result in a degree of similarity between such goods. However, as set out above, AGL has conceded to some similarity and, as such, I hereby find that these goods are similar to only a very low degree.

The average consumer and the nature of the purchasing act

72. 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. (as he then was) 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.”

73. The goods at issue are ordinary consumer goods that will be selected by the general public at large. They will be available via ordinary retailers and their online equivalents. In stores, they will be selected from shelves whereas online, they will be selected after having viewed an image of the same on a webpage. The visual component will clearly dominate the selection process, though I do not discount an aural component by way of word-of-mouth recommendations or advice from sales assistants or dentists (for the teeth related goods only).

74. The goods at issue are not expensive items and, as far I understand it, they will be selected on a relatively frequent basis. In respect of the level of attention paid, I consider that the selection process will be relatively straight forward with the consumer giving consideration to a range of ordinary factors that will vary depending on the goods. For example, the selection of toothpaste will differ from the selection of a toothbrush, which will then differ from cups and rug sweepers. I see no merit in going over these factors here and will, instead, simply state that the goods at issue will attract a medium degree of attention.

Distinctive character of the Cumdente’s first mark

75. 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)."

76. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of marks can be enhanced through use, and I note that Cumdente has filed evidence to that effect. I will, therefore, consider whether this evidence is sufficient to give rise to a finding that the distinctiveness of Cumdente's first mark has been enhanced through use. Before doing so, I will consider the inherent position.

77. Cumdente's first mark is a word only mark consisting of the words 'Apa Care'. 'Apa' has no meaning whereas 'Care' will allude to the fact that the goods relied upon will aim to care for the user. In the context of the goods relied upon, this will clearly be understood as a reference to caring for the user's teeth. In light of this, 'Apa' will be the distinctive element of the mark, with 'Care' contributing to only a minimal degree. As above, 'Apa' has no known meaning but will, instead, be viewed as a

made-up word. It, therefore, has no connection to the goods at issue and, as a result, I find that the distinctiveness of this word sits at a high degree. Given that 'Care' only contributes to a minimal degree, I do not consider it sufficient to increase the level of distinctiveness of the mark as a whole beyond that created by 'Apa'. As a result, I find that Cumdente's first mark possesses a high degree of inherent distinctiveness.

78. I turn now to consider whether there exists an enhanced degree of distinctiveness.

In doing so, I rely on the summary of the evidence that I have prepared at paragraphs 30 to 41 above. While I appreciate that I found the evidence to be sufficient for genuine use, this was a result of the EU use of Cumdente's marks. The present assessment, however, is based on the knowledge of the UK consumer. I have explained above that the use in the UK is only at a very low level with the only level of use I can accurately attribute to Cumdente is a turnover of almost £13,000 between 2018 and 2023. While a lower level of turnover may be assisted by supporting evidence such as wider advertising evidence, I note that the only UK specific supporting evidence comes from one study involving APA CARE toothpaste in the British Medical Journal. This is noted; however, it is just one example and, further, it stems from a publication aimed at medical professionals that is unlikely to be considered by the wider consumer base in the UK. While I appreciate that there is reference to additional sales via third party retailers, I have already set out above that the complete lack of precision in respect of this claim is such that I am unable to attribute it any real weight. As a result, I find that there exists no enhanced distinctive character and, therefore, the inherent position applies.

Likelihood of confusion

79. 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 earlier registrations, 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.

80. In respect of the goods at issue, I have found them to range from being similar to a medium degree to a very low degree. The average consumer base is formed of members of the general public who will select the goods by primarily visual means (although I do not discount an aural component) after having paid a medium degree of attention. I have found the marks to be identical and that Cumdente's first mark possesses a high degree of inherent distinctive character.

81. Taking all of the above factors into account, I am satisfied that the average consumer would likely mistake the parties' marks for each other, even on goods that are similar to a very low degree. This is particularly the case given the identity of the marks at issue and on the basis that all of the parties' goods are ordinary consumer goods that will be selected by the same set of users. Those consumers will, in my view, notice the identity of the marks²¹ and, given that the shared element of 'Apa Care' is not low in distinctive character,²² they would have no reason to believe that they are a result of coincidental use. I am, therefore, satisfied

²¹ As above, I have found that the marks are identical despite the use of a space in Cumdente's mark but not in AGL's.

²² On the contrary, it is high.

that there will be a likelihood of direct confusion between Cumdente's first mark and AGL's mark.

Final remarks in respect of the section 5(2) grounds

82. Given my above finding, the outcomes of the remaining section 5(2) grounds do not advance Cumdente's position. So while I see no merit in going over the grounds in detail, I consider it appropriate to set out, briefly, that even if I were to consider them in full, there would exist a likelihood of confusion between all of the marks at issue. I say this firstly in reliance upon the concession of there being some similarity between the goods at issue. Secondly, Cumdente's remaining marks under its section 5(2)(b) grounds both feature the distinctive word 'APA'. Regardless of the lack of the word 'Care' and the addition of a figurative element in Cumdente's third mark, I consider that the marks represent an example of an instance wherein the consumer would consider the differences between them to be logical indicators of a brand extension. For example, the addition of the word 'Care' will only be viewed as implying a sub-brand that is formulated to give extra care to the user meaning that AGL's mark will be viewed as a sub-brand of Cumdente's second and third marks which both consist of the sole verbal element of 'APA'. In addition, the figurative element in Cumdente's third mark will be seen as indicating an alternative mark used by the same undertaking, albeit in different contexts. As a result, I find that not only does the section 5(2)(a) ground succeed in full, but the section 5(2)(b) ground in reliance upon Cumdente's second and third marks also succeed in full.

83. In light of the above, regardless of the outcome of the remaining grounds raised, the application for invalidation succeeds in its entirety. However, for the sake of completeness, I will proceed to consider the remaining grounds of the application.

Section 5(3)

84. 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.”

85. 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).

86. I can deal with this ground briefly. I say this because I consider the evidence before me (being that I have summarised at paragraphs 30 to 41 above) is just too low in order to warrant a finding that Cumdente's marks enjoy a reputation in the EU at large. I say this because, as I have summarised above, the totality of Cumdente's evidence is that it has a turnover of just over €6 million over an eight-year period. In a territory as large as the EU and in a market at large as the toothcare market, this figure is just too insignificant in order to justify a finding that a section of the relevant public has become aware of Cumdente's marks. Even considering the appearance of 'APA CARE' in various dental publications across the EU, I do not consider the evidence crosses the threshold for the finding of a reputation. As a result, I find that the section 5(3) ground of the present application fails at the first hurdle.

87. Even if there were to be a reputation in Cumdente's marks, this would be amongst the EU consumer only. I say this because the main focus of Cumdente throughout the evidence is in Germany and Austria. As explained above, the evidence in respect of the UK is far too low and vague in order to warrant a reputation in the UK. In this scenario, I do not consider that an EU reputation is of any assistance to Cumdente. I say this because the assessment for considering whether there exists a link or not is to be based on the UK consumer. On this point, I refer to the case of *China Construction Bank Corporation v Groupement Des Cartes Bancaires*, BL O/281/14, wherein Mr Iain Purvis QC, sitting as the Appointed Person, stated:

“40. [...] I believe that the ultimate decision under s5(3) was nonetheless correct. In order to succeed under s5(3), the opponent has to show either that the distinctive character or repute of its earlier mark would be damaged by reasonable and fair use of the mark applied for, or that such reasonable and fair use would take unfair advantage of the reputation of its earlier mark. The reasonable and fair use of the mark applied for can only be use in the United Kingdom, since this is the entire territorial scope of the application.

41. If the reputation of the earlier mark does not extend to the United Kingdom, it is difficult to see how (at least in the usual case) it could be damaged by use of a mark in the United Kingdom, or that such use could be said to take unfair advantage of the earlier mark. For one thing, the necessary ‘link’ between the marks in the mind of the average consumer which must be established in any case which relies on the extended protection (see *Adidas-Saloman v Fitnessworld* [2004] ETMR 10) would not exist. There is certainly no evidence in the present case which explains how any ‘link’ could be made in the UK absent of a reputation here.”

88. The circumstances in the present case mirror the one cited above in that there is no evidence provided by Cumdente which can be said to explain how any link could be made in the UK in light of the fact that the majority of the use before me relates to the EU. As a result, I fail to see how the relevant public in the UK would make the necessary link between the marks as there exists no reputation in the UK.

89. As a result, even if Cumdente did enjoy a level of reputation in its marks, I am of the view that the present ground fails for the reasons set out above.

Section 5(4)(a)

90. Section 5(4)(a) of the Act reads as follows:

“(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-

(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.”

91. Subsection (4A) of Section 5 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.”

92. As was the case with the section 5(3) ground above, I am of the view that I can deal with this ground briefly. I say this because the assessment in respect of goodwill (being that which is relevant here) is to be based on UK use. As discussed above, the UK use in the present case is just too low in volume and, further, lacks any real precision or clarity that enables me to accurately determine the levels of actual use in the UK. So while I appreciate that companies with low levels of use may be able to sustain claims for passing off,²³ I do not consider that to be the case

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

here as the use before me is vanishingly low. As a result, I am not willing to find that Cumdente's business has a protectable level of goodwill in the signs relied upon. Therefore, the present ground fails.

Section 3(6): legislation and case law

93. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith”

94. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin summarised the general principles applicable to bad faith at [240] as follows:

“(i) [...]

(ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).

(iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation [...], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 ([*Malaysia Dairy Industries Pte Ltd v Ankenaevenet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 (“*Malaysia Dairy*”), para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 (“*Sky CJEU*”), para 73).

(iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have

regard to the objectives of the [...] law of trade marks, namely the establishment and functioning of [...] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45; [*Koton Mağazacılık Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 (“*Koton*”)], para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case ([*Hasbro Inc v EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 (“*Hasbro*”)], paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; [*AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the

application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to the goods or services in relation to which it is sought to register the mark, or that the applicant has a *bona fide* intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87)."

95. An allegation of bad faith is a serious one which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch).

96. I remind myself that Cumdente's case under the present ground is that AGL had full knowledge of Cumdente's business and in applying for its mark, it sought to misrepresent a connection to Cumdente, to give rise to confusion between the marks, wrongfully divert business from Cumdente, wrongfully trade off Cumdente's reputation, wrongfully prevent Cumdente from protecting its marks and, finally, wrongfully damage Cumdente's reputation, goodwill and business.

97. In response to the claim, the only comments I have from AGL come in the counterstatement to the application which, firstly, sets out the consequence of offending section 3(6) of the Act. In respect of the actual claim brought, AGL simply states as follows:

“The registered Proprietor denies this allegation and considers that the Cancellation Applicant must provide this alleged statement which is supported by no evidence.”

98. Again, this represents the entirety of AGL’s comments on the bad faith claim and while it was true that Cumdente did not file evidence before the filing of the counterstatement, this is ordinary in proceedings before the Tribunal which (save for certain circumstances) does not permit the filing of evidence with a cancellation application. In any event, Cumdente did proceed to file evidence during the evidence rounds

99. The relevant date for the present assessment is 4 December 2020, being the filing date of AGL’s mark in the UK. As such, evidence is ordinarily expected to be targeted at the activities prior to that date. That being said, evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited* and others, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

100. Cumdente’s evidence in respect of bad faith begins by discussing AGL’s activities, including an application by AGL on 17 March 2023 for the mark ‘APACARE’ in Germany,²⁴ which was opposed by Cumdente. It is set out that as the opposition was not defended, AGL’s German application was refused. In

²⁴ IB3

respect of UK activity, the evidence sets out that AGL, on 16 July 2023, applied for a separate UK mark under number 3934687 for goods in class 21.²⁵ This was opposed and AGL was set a deadline of 18 December 2023 to defend the same. Mr Bartlett confirms that, as at the date of his witness statement, no defence was received. While noted, I am not convinced that simply applying for other trade marks in the UK and Germany is sufficient, by itself, to demonstrate a dishonest intention of AGL's part. Further, these events took place long after the relevant date for the present proceedings.

101. The evidence then moves to discuss activities in China and it explains that, as a result of the above applications being made, Cumdente focused on AGL and its connections to companies in China. On this point, I note that the narrative evidence explains that several Chinese trade marks were uncovered and that these were owned by a company called 'Shenzhen Yi Bai Jia Industrial Co., Ltd' ("Shenzhen"). The evidence sets out that in correspondence between Cumdente's German representatives and the Chinese associates of Shenzhen in January 2023, it was confirmed that this company was renamed 'ApaCare Brand Management Shenzhen Co. Ltd'.

102. In addition, I note reference to an additional Chinese trade mark applied for under the name Apcom Brand Management (Shenzhen) Co. Ltd. Mr Bartlett sets out that, while it is not clear, it is possible that this should have been rendered as 'ApaCare Brand Management (Shenzhen) Co. Ltd. While noted, I have nothing to suggest that this was actually what the company was meant to be called and, as such, I do not consider that this claim has any merit.

103. In respect of the ownership of these Chinese trade marks, evidence has been provided by way of printouts of different registrations.²⁶ These printouts appear to be results stemming from a search undertaken by Mr Bartlett in November 2023.

²⁵ IB4

²⁶ IB5

The owner of these marks is shown wholly in Chinese characters. This name was translated via Google translate by Mr Bartlett himself and the result shows the name 'Apaka Group Ltd'. It is claimed that this is clearly intended to read as 'Apacare Group Limited', being AGL. The address of this company is also shown in wholly Chinese characters and these were, again, run through Google translate by Mr Bartlett, with the resulting translation showing the address of "Unit G25, Waterfront Cinemas, 1 Quay Road, London, UK". In the present case, I note that AGL's address is "Unit G25, Waterfront Studios, 1 Dock Road, London." While not an exact match, it does raise some questions as to the connection between these companies. In considering this evidence and, without anything from AGL disputing the same, I am willing to accept that there is at least a connection between these two entities, being AGL and 'Apaka Group Ltd'. While that may be the case, I do not consider that this necessarily gets Cumdente anywhere in respect of the present ground. My reasons for this follow.

104. The main evidence in respect of bad faith comes via a printout taken from a website under the domain 'apacare.cn'.²⁷ The printout was obtained by Mr Bartlett in November 2023 and was machine translated into English, presumably by Google. This website makes no reference to AGL, or Apaka for that matter. Instead, in providing information under a 'contact us' section, the website refers to the company Apcon Brand Management (Shenzen) Co., Ltd ("Apcon").²⁸ Further, under the 'brand introduction' section of the website, it states that "ApaCare is Shenzen".²⁹

105. In respect of the above point, I have nothing to suggest that there was, at any time (be that in January or November 2023 or prior to the relevant date), a relationship between Shenzen or Apcon and AGL. All I have on this point is an assumption at paragraph 13 of Mr Bartlett's statement that the website was

²⁷ IB6

²⁸ See page 3 of IB6

²⁹ See page 10 of IB6

established by AGL or those connected with it. There is no actual proof of this. The only thing I can take from the evidence before me is that Shenzen was the previous owner of the Chinese marks and that, in January 2023, it renamed itself 'Apacare Brand Management Shenzhen Co. Ltd'. I appreciate that the name of the latter company is strikingly similar to AGL but this, by itself, is simply not sufficient for me to categorically conclude that they are connected to the point that the actions of Shenzen of Apcon can be said to equate to the actions of AGL. On this point, I note that I have no evidence actually pointing to the activities of any undertaking as at, or prior to, the relevant date.

106. While I appreciate that AGL has not sought to file any evidence or submissions in these proceedings, I remind myself that an allegation of bad faith is a serious one that must be proven on the balance of probabilities. As a result, and given everything I have said above, I do not consider that Cumdente has provided sufficient evidence that point to there being a *prima facie* case that AGL acted in bad faith in applying for the mark at issue in the UK. Therefore, the present ground fails.

Conclusion respect of Cumdente's application

107. The application for invalidity succeeds in its entirety and, subject to any successful appeal of my decision, AGL's mark is deemed invalid and is hereby treated as if an application for the same was never made.

AGL's opposition

108. Given that Cumdente's application for invalidity succeeded in full, AGL's mark is declared invalid. Therefore, AGL is unable to rely on the same for the purpose of its opposition. As a result, the opposition falls away meaning that Cumdente's opposed mark may proceed to registration for all of the goods applied.

CONCLUSION

109. AGL's mark is declared invalid and Cumdente's opposed mark may proceed to registration for all of the goods applied for.

COSTS

110. Cumdente has succeeded in full and is, therefore, entitled to a contribution towards its costs. I note that at the hearing, Mr Bartlett claimed that Cumdente should be awarded costs off scale. The claim is made on the basis that AGL's mark was a dishonest registration. At the hearing, I directed Cumdente to file its bill of costs on the basis that if I were to consider it necessary to make an off-scale costs award, I would be in a position to assess the position in my substantive decision as opposed to requesting additional submissions necessitating the need for a supplementary costs decision. I note that Cumdente filed its bill of costs on 14 May 2025.

111. Given the outcome of the section 3(6) ground, I am of the view that it cannot be said that AGL's mark was a dishonest registration. Even if it were, it does not automatically follow that AGL has acted unreasonably in the course of these proceedings to the point that it would warrant an off-scale costs award. In the present case, aside from filing its counterstatement in the invalidation application and notice of opposition in its own opposition, AGL has remained entirely silent. As such, even if the bad faith ground was proven, I would not be willing to conclude that AGL had acted unreasonably. As a result, I only consider that costs be awarded in Cumdente's favour based upon the scale published in Tribunal Practice Notice 1/2023.

112. In the circumstances, I award Cumdente the sum of £2,800 as a contribution towards its costs. The sum is calculated as follows:

Filing an application of invalidity	£300
Considering a notice of opposition and preparing the counterstatement:	£300
Filing evidence:	£1,000
Preparation for and attendance at a hearing:	£1,000
Official fees:	£200
Total:	£2,800

113. I hereby order APACARE GROUP LIMITED to pay Cumdente GmbH the sum of £2,800. 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 1st day of July 2025

A COOPER
For the Registrar