

O-293-18

**TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO 3190698
BY APOLLO GENERICS LIMITED
TO REGISTER**

ZANAMOL

Zanamol

(SERIES OF TWO)

**AS A TRADE MARK
IN CLASS 5
AND OPPOSITION THERETO (UNDER NO. 408386)
BY
GLAXOSMITHKLINE CONSUMER HEALTHCARE (UK) IP LIMITED**

Background & pleadings

1. Apollo Generics Limited ('the applicant') applied for a series of two marks, **ZANAMOL & Zanamol** on 12 October 2016 for *Medicine; analgesics; analgesic preparations; pharmaceutical preparations; pharmaceutical preparations with analgesic properties; vitamin and mineral preparations; nutritional supplements; vitamin and mineral nutritional supplements; medicines for treating pain; painkillers; medicines for treating common ailments* in class 5. The marks were published on 28 October 2016.

2. GlaxoSmithKline Consumer Healthcare (UK) IP Limited ('the opponent') opposes the mark under the ground of Section 5(2)(b) of the Trade Marks Act 1994 ('the Act') on the basis of its earlier European trade mark set out below:

EU TM 940072	Goods relied on:
PANADOL Filing date: 24 September 1998 Date of entry in register: 14 September 2000	Class 5: Pharmaceutical and medicinal preparations and substances for human use.

3. The applicant filed a counterstatement in which it denied the marks were similar but accepted that *medicine; analgesics; analgesic preparations; pharmaceutical preparations; pharmaceutical preparations with analgesic properties; medicines for treating pain; painkillers; medicines for treating common ailments* in its specification were identical and similar to goods in the opponent's specification. However it denied that *vitamin and mineral preparations; nutritional supplements; vitamin and mineral nutritional supplements* were similar goods.

4. The opponent's trade mark is an earlier mark, in accordance with Section 6 of the Act. As it completed its registration procedure more than 5 years prior to the publication

date of the applicant's mark, it is subject to the proof of use conditions, as per section 6A of the Act. The opponent made a statement of use in respect of all the goods it relies on but the applicant did not put the opponent to proof of use. Consequently, the opponent is entitled to rely on the full breadth of the goods for which it made a statement of use.

5. Both parties filed evidence and written submissions in lieu of a hearing. The evidence will be summarised to the extent that is considered necessary and the submissions borne in mind.

6. In these proceedings, the applicant is represented by Brabners LLP and the opponent by GlaxoSmithKline Services Unlimited.

Opponent's evidence

7. The opponent's evidence in chief comprises a witness statement made by Mr Stephen Davies, a Brand Manager for the opponent, and seven exhibits. I have read the witness statement, in addition to considering the exhibits and will bear these in mind, referring to them as and when necessary.

Applicant's evidence

8. The applicant's evidence comprises a witness statement from Hayley Morgan, who is an attorney at Brabners LLP, the applicant's representative. In addition to the witness statement, Ms Morgan appended eight exhibits. The declarant also provided useful summary of the exhibits filed:

- **Exhibit HM1** – Companies House print out for Apollo Generics Limited and Zanza Specials International Limited
- **Exhibit HM2** – Examples of use of house marks in pharmaceuticals
- **Exhibit HM3** – Applicant's UK trade marks containing house mark ZANA
- **Exhibit HM4** – Wikipedia entry for definition of international non-proprietary names and US Stem Book extract
- **Exhibit HM5** – Wikipedia entry for frequency of letters in English language
- **Exhibit HM6** – Wikipedia entry for Paracetamol brand names
- **Exhibit HM7** – Other analgesics and paracetamol-containing medications coexisting in Boots, Tesco, Waitrose, Superdrug and Sainsbury's
- **Exhibit HM8** – Wikipedia entry for the definition of the prefix 'PAN'

9. Given the comprehensive summary given above, I do not need to summarise the evidence any further suffice to say that I have read the witness statement and considered the exhibits and will bear them in mind.

Opponent's evidence in reply

10. The opponent's evidence in reply consists of a witness statement made by Trine Lausen, a marketing manager for PANADOL at GlaxoSmithKline Consumer Healthcare Denmark, one of the opponent's group of companies. In addition to the witness statement there are two appended exhibits. I have read the witness statement and considered the exhibits and will bear them in mind.

Decision

11. Section 5(2)(b) of the Act is as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

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

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

13. With regard to the comparison of goods and services, in the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

14. 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.

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

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

16. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations"... anything other than their natural meaning, subject, of course,

to the normal and necessary principle that the words must be construed by reference to their context.”

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

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

18. In its counterstatement, the applicant had already accepted that *medicine; analgesics; analgesic preparations; pharmaceutical preparations; pharmaceutical preparations with analgesic properties; medicines for treating pain; painkillers; medicines for treating common ailments* in its specification were identical and similar to goods in the opponent’s specification. The remaining goods to be compared are:

Opponent’s goods	Applicant’s remaining goods
<i>pharmaceuticals and medicinal preparations and substances for human use.</i>	<i>vitamin and mineral preparations; nutritional supplements; vitamin and mineral nutritional supplements</i>

19. The opponent contends in its written submission of 2 August 2017 that,

“...*vitamin and mineral preparations; nutritional supplements; vitamin and mineral nutritional supplements* are highly similar to the goods *Pharmaceuticals and medicinal preparations and substances for human use*, as covered by the Earlier Mark. Vitamin and mineral preparations and supplements and nutritional supplements are often sold in close proximity (i.e. on the same shelves within pharmacies and supermarkets) and have a

similar purpose to pharmaceutical and medicinal preparations (i.e. to treat and relieve medical conditions). They are often complementary to these goods i.e. they are used alongside pharmaceutical and medicinal preparations to treat the same conditions and are used by the same users. There is a consumer expectation that such goods are often manufactured by the same undertakings. Consequently, these products are highly similar.”

20. The applicant contends in its written submission of 6 October 2017 that

“...Exhibit SD01 of the Opponent’s own submissions provides that Panadol is a pain relieving product which contains paracetamol. The Opponent has provided no evidence that the mark Panadol has ever been used in relation to anything other than paracetamol containing products since the 1950s and considers that “its success stems from its ability to fulfil consumer expectations vis-à-vis effective pain relief”. Accordingly, as per the Opponent’s own submissions the relevant consumer will identify Panadol solely as a pain relief product and would not consider that any “*vitamin and mineral preparations; nutritional supplements; vitamin and mineral nutritional supplements*” would be supplied under the Panadol mark. “*Vitamin and mineral preparations; nutritional supplements; vitamin and mineral nutritional supplements*” are therefore **dissimilar** to “*Pharmaceuticals and medicinal preparations and substances for human use*”.”

21. With regard to the applicant’s points above, the goods for which the mark is registered sets some limits to the claim, although since marks can be protected against the use of the same or similar marks in relation to goods which are only similar to those for which the earlier mark is registered, the limits of the claim are not precise. Every registered mark is therefore entitled to legal protection against the use, or registration, of the same or similar trade marks for the same or similar goods, if there is a likelihood of confusion. The opponent’s earlier mark is therefore entitled to protection against a likelihood of confusion with the applicant’s mark based on the ‘notional’ use of the earlier mark for the goods registered. The concept of notional use is set out in *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, where Kitchen L.J. stated that:

“78.the court must.... consider a notional and fair use of that mark in relation to all of the goods or services in respect of which it is registered. Of course it may have become more distinctive as a result of the use which has been made of it. If so, that is a matter to be taken into account for, as the Court of Justice reiterated in *Canon* at paragraph [18], the more distinctive the earlier mark, the greater the risk of confusion. But it may not have been used at all, or it may only have been used in relation to some of the goods or services falling within the specification, and such use may have been on a small scale. In such a case the proprietor is still entitled to protection against the use of a similar sign in relation to similar goods if the use is such as to give rise to a likelihood of confusion.”

22. In the comparison of goods I must make in relation to the goods set out in paragraph 18, the opponent’s submissions are closer to the mark as they include the consideration of the *Treat* factors. When applying these factors, I note that the uses of the respective goods are the same, which is to improve or treat a health condition. The users will be the same, i.e. pharmaceutical professionals and general purchasers of pain relief products. The nature of the goods is the same in that they are both products manufactured with ingredients to improve or alleviate a health issue. The trade channels in which both sets of goods reach the consumer will be the same whether in a pharmacy or wider retail setting. Finally as these goods are self-serve consumer items, they will be found in close proximity in the case of a pharmacy and in the same aisle of say a supermarket environment. Taking all this into account, I find that the respective goods are similar.

Average Consumer and the purchasing process

23. I must next consider who the average consumers are for the goods I have found to be similar and how those goods are purchased. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

24. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

25. The average consumers for the contested goods are pharmaceutical/health professionals as well as members of the general public. The goods at issue are generally an inexpensive, regular type of purchase. However given that pharmaceutical products can be detrimental if taken incorrectly, in my view non-professional consumers will pay a reasonable to high degree of attention when purchasing such goods. Pharmacists and other health professionals are likely to pay a reasonable degree of attention as they will be more familiar with such products. The act of purchasing will be mainly visual as consumers will likely make a selection of goods from a bricks and mortar retail outlet or website. However, I do not discount aural considerations such as word of mouth recommendations or advice sought from a pharmacist or other health professional which may also play a part.

Comparison of the marks

26. The marks to be compared are:

Opponent's mark	Applicant's marks
PANADOL	ZANAMOL Zanamol

27. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

28. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

29. The opponent’s mark consists of a single word, **PANADOL**. The overall impression of this mark is based solely on this word.

30. The applicant’s marks are a series of two word marks, **ZANAMOL** and **Zanamol**, the only difference being the upper and title case presentation. For ease of reference I shall refer to the applicant’s mark as **ZANAMOL**. The overall impression of the marks are based solely on this word.

31. In its counterstatement, evidence and written submissions, the applicant has provided details of pharmaceutical nomenclature, in particular the suffixes ending in –OL, such as –DOL, -ADOL, -MOL, which are used specifically for analgesics and pain relieving preparations. In addition, the applicant has drawn my attention to a particular Decision of the First Board of Appeal, Case No. R501/1999-1, *Teva Pharmaceutical Industries Limited v Godecke AG* in which it was said that the ‘-OL’

suffix element of a pharmaceutical product marks should be given less weight as they are relatively non-distinctive for analgesics and pain relieving preparations. I note the decision but would say that the *Sabel* guidance directs me to consider the visual, aural and conceptual similarities of the marks by reference to the overall impression created by the marks.

32. In a visual comparison, both marks are the same length at seven letters and both share five of the same letters namely A-N-A-O-L which occur in the same order, reading from left to right. The first letter of each mark is different as is the fifth letter. The opponent states, in its submissions dated 2 August 2017, the letter Z is 'uncommon' but that,

"...this point of difference does not override the strong similarity created by 5 of the 7 letters in the mark being identical and being identically placed. The differences caused by the letters 'M' and 'D' appearing as the 5th letter in the respective marks is a minor one as neither of these letters is visually striking and the difference is buried in the middle of the word".

The applicant states, in its submissions of 5 April 2017, that the marks are visually different,

"...not least because the initial letters (Z and P) and the final syllable (MOL and DOL) are different. In particular, taking into account, as set out above, the fact that the "-OL" suffix is non-distinctive, the distinctive elements ZANAM and PANAD are visually very different".

33. I find that the difference in the initial letter is visually striking and that the difference of the fifth letter whilst not striking in the same way as the initial letter is at least noticeable, coming as it does in the middle of a single word with no other elements to it. With regard to the beginnings of marks, in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the General Court noted that the beginnings of words tend to have more visual and aural impact than the ends. The court stated:

“81. It is clear that visually the similarities between the word marks MUNDICOLOR and the mark applied for, MUNDICOR, are very pronounced. As was pointed out by the Board of Appeal, the only visual difference between the signs is in the additional letters ‘lo’ which characterise the earlier marks and which are, however, preceded in those marks by six letters placed in the same position as in the mark MUNDICOR and followed by the letter ‘r’, which is also the final letter of the mark applied for. Given that, as the Opposition Division and the Board of Appeal rightly held, the consumer normally attaches more importance to the first part of words, the presence of the same root ‘mundico’ in the opposing signs gives rise to a strong visual similarity, which is, moreover, reinforced by the presence of the letter ‘r’ at the end of the two signs. Given those similarities, the applicant’s argument based on the difference in length of the opposing signs is insufficient to dispel the existence of a strong visual similarity.

82. As regards aural characteristics, it should be noted first that all eight letters of the mark MUNDICOR are included in the MUNDICOLOR marks.

83. Second, the first two syllables of the opposing signs forming the prefix ‘mundi’ are the same. In that respect, it should again be emphasised that the attention of the consumer is usually directed to the beginning of the word. Those features make the sound very similar.

Taking these factors into account, I find there is only a low degree of visual similarity.

34. With regard to the aural similarity, the points of similarity are as previously outlined, namely both marks are the same length at seven letters and both share five of the same letters namely A-N-A-O-L which occur in the same order. However given the different first and fifth letters, the marks will be pronounced differently. I keep in mind the *El Corte Inglés* case law given above, about the attention paid to the beginnings of words and find that there is a low degree of aural similarity.

35. In a conceptual comparison, I would say that whilst a pharmaceutical or healthcare professional may know that the nomenclature for analgesic products ends

in '-OL', I believe it is unlikely that an average consumer purchasing over the counter products will know this and will simply see the contested marks as invented words which do not bring to mind any concept. In which case the marks are conceptually dissimilar. If an average consumer does know that analgesic products end in '-OL', then the concept of a pharmaceutical product for pain relief is the same for both marks and they are conceptually neutral.

Distinctive character of the earlier mark

36. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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).”

37. The opponent filed evidence showing use of the earlier mark for the goods relied on. Particular points to note from Stephen Davies's witness statement and exhibits are that the earlier mark was first used in the UK in the 1950s, it is the biggest selling brand of paracetamol-based pain relief products and the recent sales and advertising expenditure figures are outlined below:

Sales

2012	£9,827,000
2013	£11,962,000
2014	£6,106,000
2015	£13,555,000
2016	£12,063,000

Advertising expenditure

2012	£936,000
2013	£18,000
2014	£86,000
2015	£130,000
2016	£7,000

Having considered the evidence I find that the earlier mark does enjoy a level of enhanced distinctiveness due to the use made of it.

Likelihood of confusion

38. I now draw together my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors and those outlined in paragraph 12:

- a) The interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon*).

- b) The principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*).
- c) Imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer*).

39. Confusion can be direct, when the average consumer mistakes one mark for the other or indirect, where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and goods down to the responsible undertakings being the same or related.

40. So far I have found that the goods conceded by the applicant were identical and the remainder I found to be similar and that the average consumer will pay a reasonable to high degree of attention during a primarily visual purchasing process. In addition I have found that the earlier mark has an enhanced level of distinctiveness through use but that the contested marks are visually and aurally similar only to a low degree, and are conceptually neutral if pharmaceutical nomenclature is known but conceptually dissimilar if it is not. Because the purchase of the goods at issue is likely to be mainly visual, the level of visual similarity is of particular importance¹. Non –professional consumers are more likely to read packaging information carefully given the importance placed on safe consumption of pharmaceutical products, even for a commonly purchased item.

41. Although I have found that there are some similarities between the marks, these are far outweighed by the differences. Taking these factors into account, notwithstanding the enhanced distinctiveness of the earlier mark, I do not consider

¹ In *New Look Ltd v OHIM* Joined cases T-117/03 to T-119/03 and T-171/03, the GC stated: “49 However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

there to be a likelihood of direct confusion between the applicant's mark and the opponent's mark, on the part of an average consumer paying a reasonable to high level of attention. I also do not consider that the average consumer is likely to believe that the respective goods come from the same or linked undertakings and I cannot see any reason why the marks are likely to be indirectly confused. Pharmacists and other health professionals are used to differentiating between many similar words, such as 'hyper' and 'hypo' to give one example. In this case where the beginnings of the marks are different, there is no likelihood of a professional being confused between the two marks.

Conclusion

42. The opposition fails under section 5(2)(b). The application can proceed to registration.

Costs

43. As the applicant has been successful, it is entitled to a contribution of the costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2/2016. I note that the applicant, in its submissions dated 27 February 2018, has asked for off the scale costs to be applied on the basis of the outcome of separate proceedings involving the opponents at the EUIPO and the quality of the evidence provided in this case. Whilst the Registrar does have the discretion to award off the scale costs, I do not see any grounds in the case before me that would warrant such consideration. The separate proceedings at EUIPO involved other parties and are not germane here as this case has been decided on its own merits. Furthermore the opponent is entitled to file whatever evidence it thinks relevant to the matters at issue. In this case the key evidential factors concerned the length of use, turnover and advertising expenditure. None of these factors were disputed by the applicant.

44. Bearing in mind the guidance given in TPN 2/2016, I award costs to the applicant as follows:

£500 Considering the Notice of Opposition and filing a counterstatement & written submissions

£700 Preparing evidence and commenting on other side's evidence

£1200 Total

45. I order GlaxoSmithKline Consumer Healthcare (UK) IP Limited to pay Apollo Generics Limited the sum of £1200. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 15th day of May 2018

June Ralph

For the Registrar

The Comptroller-General