

O-322-20

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3419005 BY BOSTON HEALTHCARE
LIMITED TO REGISTER:**

EMOLITE

AS A TRADE MARK IN CLASS 5

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 418104
BY NOVARTIS AG**

Background & Pleadings

1. On 5 August 2019, Boston Healthcare Limited (“the applicant”) applied to register the above trade mark for *emollients for medical purposes; skin care lotions for medical purposes* and *topical preparations for treatment of dry skin conditions* in Class 5. The application was published for opposition purposes on 16 August 2019.

2. On 16 October 2019, the application was opposed in full by Novartis AG (“the opponent”). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon international registration 1266017 for the mark EDOMIGE, and the goods for which it is registered, namely *pharmaceutical preparations*. The mark designated the UK on 11 July 2019 and was granted protection in the UK on 14 November 2019.

3. In its Notice of Opposition, the opponent submits that a likelihood of confusion exists on account of the visual and phonetic similarity between the competing marks and what it considers an identity between the respective goods.

4. The applicant filed a counterstatement in which it denies the basis of the opposition, specifically that the marks’ similarities would automatically lead to a likelihood of confusion and that the goods are identical.

5. The applicant is represented by Wilson Gunn and the opponent by Abel & Imray. Neither party requested a hearing, nor did they file evidence. Both parties did, however, elect to file written submissions. I note that the applicant has cited several decisions from both the United Kingdom Intellectual Property Office (UKIPO) and the European Union Intellectual Property Office (EUIPO) but I would remind both parties that those decisions are not binding on me. This decision will be based on the merits of the case at hand and is taken following a careful reading of all the papers which I will refer to, as necessary.

Decision

6. The opposition is based upon section 5(2)(b) of the Act which reads 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.”

7. 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.”

8. An earlier trade mark is defined in section 6 of the Act, which states:

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

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) 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,

(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.”

9. Under the provisions outlined above, the opponent’s trade mark clearly qualifies as an earlier mark. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the filing date of the applicant’s mark, it is not subject to the proof of use provisions. Consequently, the opponent can rely upon its mark and all goods it has identified without providing evidence of use.

Section 5(2)(b) - Case law

10. The following principles are gleaned from the decisions of the courts of the European Union 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.

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 greater degree of similarity between the marks, and vice versa;

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

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

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

(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

11. The competing goods, all proper to class 5, are laid out below:

Opponent's goods	Applicant's goods
Pharmaceutical preparations	Emollients for medical purposes; skin care lotions for medical purposes; topical preparations for treatment of dry skin conditions.

12. When making the comparison, I am guided by the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, in which the Court stated at paragraph 23:

“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”.

13. 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.

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

"... 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."

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

"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."

16. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the GC stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

17. For the purpose of comparison, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* BL O/399/10 and

BVBA Management, Training en Consultancy v. Benelux-Merkenbureau [2007] ETMR 35 at paragraphs [30] to [38]).

18. The opponent's mark is registered for *pharmaceutical preparations*. In its counterstatement, the applicant defines the term as "drugs intended for human or veterinary use, presented in their finished dosage form" and, on that basis, it submits that the respective goods are not identical. The opponent, however, whilst it does not dispute the definition provided by the applicant, claims that each of the applicant's goods fall within the scope of the earlier mark's *pharmaceutical preparations*, meaning the goods are, therefore, identical.

19. The applicant's definition of *pharmaceutical preparations* generally marries with my own understanding. The drugs to which the term refers will inevitably be used to treat a wide range of conditions or ailments. That being so, the formats in which they are presented are tailored appropriately ahead of use. Such formats will include, for example, medicine and tablets for oral consumption and creams which are applied to the body externally. The applicant's goods are, by definition, intended to address an ailment or medical requirement, either broadly ("for medical purposes") or specifically so ("for treatment of dry skin conditions"). To my mind, they are consequently encompassed by the remit of the opponent's goods, rendering the goods identical according to *Meric*. If I am incorrect in that conclusion, I would maintain that the goods are highly similar given the overlap in (at least) users, trade channels and physical nature, and the opportunity for competitiveness, with end consumers pondering over which of the goods would best resolve their specific condition or medical requirement.

The average consumer and the nature of the purchasing act

20. As indicated in the above case law, it is necessary for me to determine who the average consumer is for the goods at issue. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

21. In *Mundipharma AG v OHIM*, Case T-256/04, the GC stated:

“44. Second, it has not been disputed in the present case that the relevant public for the goods covered by the mark applied for, namely therapeutic preparations for respiratory illnesses, is made up of patients in their capacity as end consumers, on the one hand, and health care professionals, on the other.

45. As to the goods for which the earlier mark is deemed to have been registered, it is apparent from the parties’ written submissions and from their answers to the questions put at the hearing that some therapeutic preparations for respiratory illnesses are available only on prescription whilst others are available over the counter. Since some of those goods may be purchased by patients without a medical prescription, the Court finds that the relevant public for those goods includes, in addition to health care professionals, the end consumers.”

22. Similarly, the goods at issue in these proceedings will either require a formal prescription issued by a health care professional such as a doctor or nurse or they will be available for purchase by the public at large. On that basis, two primary consumer groups are likely to emerge; professional users and the general public. Where applicable, the public are likely to either self-select the goods from the shelves of a traditional retail establishment such as a pharmacy or supermarket or they will select the goods having sought advice from a pharmacist, for example. Professional consumers are likely to be exposed to the goods in publications such as medical journals or catalogues and in discussions with their peers. That being so, for all consumers, both visual and aural considerations play an important role in the goods’ selection.

23. As regards the level of attention that is likely to be paid, in *The Procter & Gamble Company v OHIM*, Case T-240/08, it was explained in the following terms:

“First, medical professionals display a high degree of attention when prescribing medicinal products. Second, with regard to end-consumers, it can be assumed, where pharmaceutical products are sold without prescription, that the consumers interested in those products are reasonably well informed, observant and circumspect, since those products affect their state of health, and that they are less likely to confuse different versions of such products. Furthermore, even supposing a medical prescription to be mandatory, consumers are likely to display a high degree of attention when the products in question are prescribed, having regard to the fact that they are pharmaceutical products (see judgment of 21 October 2008 in Case T-95/07 *Aventis Pharma v OHIM – Nycomed (PRAZOL)*, not published in the ECR, paragraph 29 and the case-law cited).”

24. As per the above, regardless of whether or not they are prescribed, the goods in play will have a direct impact on the health and wellbeing of the end consumer. From both a professional and personal perspective, the goods’ selection is therefore likely to command a considerable amount of diligence, with consumers’ health of utmost importance. I appreciate that, as the severity of medical conditions can vary fairly widely, the level of attention paid to the selection of the goods intended to treat them may follow suit, to a degree. Even so, I would expect the level of attention to be at least above medium, ranging to very high.

Comparison of trade marks

25. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. ...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.”

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

27. The trade marks to be compared are displayed in the table below:

Opponent's trade mark	Applicant's trade mark
EDOMIGE	EMOLITE

28. The opponent's mark comprises one word of seven letters, presented in upper case. With no stylisation or figurative elements, the overall impression of the mark lies solely within the word itself.

29. The applicant's mark comprises one word of seven letters, presented in upper case. The latter four letters (L-I-T-E) are likely to be recognised as a common variant of the word 'light', which may prompt the average consumer to instinctively dissect the mark into two elements; EMO and LITE. Still, the mark's overall impression will likely reside in its entirety.

Visual comparison

30. Each of the marks is comprised solely of one seven letter word. Four of the seven letters, namely the first, third, fifth and seventh, are identical (E, O, I and E). There is further coincidence in the letter M, which represents the fourth letter in the opponent's

mark and the second in the applicant's. Both marks are displayed in upper case, though fair and notional use would allow the parties to present the marks in any standard typeface or casing. On balance, I find the visual similarity to be fairly high.

Aural comparison

31. Given that the opponent's mark is not a dictionary word, there are, in my view, a number of ways in which it may be articulated by consumers. It will, in any variant, comprise three syllables; the first either ED or EED, the second, OH, and the third either MIDGE or MYJE. The applicant's mark will also be articulated in three syllables; the first either EM or EEM, and the second and third, OH and LITE. As regards the beginning of the marks, it seems likely that consumers would be consistent in their approach to the articulation of the first syllable, that is those who would be minded to articulate the first syllable of the opponent's marks as ED would articulate the first syllable of the applicant's as EM, and vice versa. The highest point of aural similarity will reside where consumers either articulate the opponent's mark as ED-OH-MYJE and the applicant's as EM-OH-LITE or the opponent's mark as EED-OH-MYJE and the applicant's as EEM-OH-LITE. The lowest will reside where the earlier mark is articulated as ED-OH-MIDGE and the applicant's as EEM-OH-LITE or the earlier mark as EED-OH-MIDGE and the applicant's as EM-OH-LITE. Regardless of the various combinations the marks invite, on account of the identity in their second syllable and syllabic structure, coupled with the potential for some phonetic similarity in the first syllable (and, to a degree, the third), the marks' aural similarity will likely range from medium to fairly high.

Conceptual comparison

32. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

33. The opponent submits that both marks consist of invented words with no meaning. The applicant agrees that the opponent's mark holds no meaning but states that the

applied for mark clearly refers to a product which is a 'light emollient', combining 'EMO' or 'EMOL' (the first 3/4 letters of emollient) and 'LITE' or '(L)ITE'.

34. I agree that the average consumer will be unable to attribute a concept to the opponent's mark and, instead, will view it purely as an invented word with no immediate meaning. In my view, the applicant's mark, in its entirety, will also be viewed as an invented word. However, on the basis that consumers will attempt to find a recognisable or tangible concept which they could recall, it seems likely to me that they will turn to EMO and LITE. Whilst this is reminiscent of the applicant's above interpretation, insofar as separating the mark into two elements is concerned, I do not agree that the average consumer will understand the mark to mean a light emollient. To my knowledge, neither EMO or EMOL is used as a common shortening or abbreviation of emollient, nor do I have sight of any evidence to that effect. I am aware that EMO can refer to a specific style of music but, again, I am not of the view that this will be recognised by the average consumer in this context. I am not, in fact, confident that the average consumer will attribute any concept at all to this element. The mark's latter element, LITE, on the other hand, is likely to be identified as a phonetic equivalent to the dictionary word 'LIGHT', which, in my experience, is used in various courses of trade to indicate a 'lighter' or more condensed or simplified version of an existing product. This introduces some conceptual clarity absent to the opponent's mark and, as such, the marks are conceptually dissimilar.

35. I am mindful, however, that there may be a significant number of consumers who do not identify LITE as a tangible, or indeed separate, element within the applicant's mark. For those consumers, neither mark is likely to convey a specific meaning. Both will be viewed as invented words and the conceptual position will therefore be neutral.

Distinctive character of the earlier trade mark

36. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public. 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. Given that the opponent has not made a pleading of enhanced distinctiveness, and in the absence of evidence of use, I have only the inherent distinctiveness of the earlier mark to consider. It is widely accepted, though only a guideline, that words which are invented often possess the highest degree of distinctive character, whilst words which are suggestive or allusive of the goods or services relied upon generally possess the lowest. The opponent’s mark is comprised of an invented word, which has neither a clear definition, nor an apparent relationship or link with the goods for which it is registered. Consequently, I find the mark to possess a fairly high degree of distinctiveness on account of its originality.

Likelihood of confusion

38. In determining whether there is a likelihood of confusion, 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 also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion.

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

40. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.””

41. As regards to marks' conceptual differences, in *The Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic

similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

42. However, in *Nokia Oyj v OHIM*, Case T 460/07, the GC stated that:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98).”

43. Earlier in this decision I reached the following conclusions:

- The competing goods are highly similar, if not identical;
- The average consumer is a member of the general public or professional user. Visual and aural considerations are both likely to play a key role in the selection process;
- Consumers are likely to pay at least an above medium degree of attention to the selection of goods, ranging to very high;
- There is a fairly high degree of visual similarity between the marks and the aural similarity will be of at least a medium degree;
- The marks are conceptually dissimilar or, for some, conceptually neutral;
- The opponent’s trade mark possesses a fairly high degree of inherent distinctive character.

44. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of each of the above conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

45. I begin with indirect confusion. Despite the marks’ visual and aural similarity being (at least potentially) fairly high, the differences introduced in the later mark are not

consistent with an evolutionary brand extension or change in marketing strategy. There is not what I would consider a common element present in both marks, simply a coincidence in alternating letters. Consequently, if consumers recognise the differences between the marks, they are unlikely to erroneously conclude that they originate from the same undertaking. The matter at hand, to my mind, is just that; whether consumers *will* recognise the differences or simply mistake one for the other.

46. I keep in mind when making my assessment that the earlier mark possesses a fairly high degree of inherent distinctiveness. I have identified two groups of consumers; those who will take account of the LITE element within the applicant's mark (for whom the marks are conceptually dissimilar), and those who will see no meaning in either mark (for whom the marks are conceptually neutral). For the goods at issue here, for all consumers, regardless of how they interpret the marks conceptually, the level of attention applied during the selection process is likely to be elevated, even if only mildly. With this in mind, whilst the conceptual distinction, if seen, gives consumers an additional tool for differentiation between the marks, the visual and aural differences are, in my view, likely to be sufficient in and of themselves to move consumers away from mistaking one mark for the other. In other words, the level of care adopted by consumers will steer them from the effects of direct confusion.

Conclusion

47. The opposition has failed and, subject to any successful appeal, the application will proceed to registration.

Costs

48. As the applicant has been successful, it is entitled to a contribution toward its costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice ("TPN") 2 of 2016. Applying the guidance in that TPN, I award costs to the applicant on the following basis:

Reviewing the Notice of Opposition
and preparing a counterstatement:

£150

Preparing written submissions and considering the other side's submissions:	£250
Total:	£400

49. I order Novartis AG to pay Boston Healthcare Limited the sum of £400. This sum is to be paid within two months of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 12th day of June 2020

**Laura Stephens
For the Registrar**