BLO/442/22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3491817

BY ADVANCED HYDROCARBON FUELS LTD

TO REGISTER THE FOLLOWING MARK IN CLASS 4:

KEROCLEAN

AND IN THE MATTER OF OPPOSITION THERETO UNDER NO. 421435

BY BASF SE

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY THE OPPONENT

AGAINST A DECISION OF HEATHER HARRISON

DATED 5 AUGUST 2021

DECISION

Introduction

1. This is an appeal from a decision of Heather Harrison, acting for the Registrar, dated 5 August 2021, in which she allowed UK trade mark registration number 3491817 ("the Trade Mark") to proceed to registration for all of the goods included in Class 4 of the application, as follows:

> *"Fuels and illuminants; hydrocarbon compositions; hydrocarbon fuels; synthetic fuels; fuel mixtures; liquid fuels; aviation fuel; motor fuel; automotive fuel; domestic fuel; domestic heating fuel; kerosene; kerosene for domestic heating; diesel fuel; diesel oil; gasoline; fuel oil; engine oils; fuel gas; compressed fuel gas; hydrocarbon fuels derived from waste material; hydrocarbon fuels derived from waste plastic; lubricants and industrial greases, waxes and fluids; synthetic lubricants; synthetic oils; industrial lubricants; lubricants for machines."*

2. BASF SE ("the Opponent") opposed the application directed at all of the goods in the contested specification based on s.5(2)(b) of the Trade Marks Act 1994 ("the Act"), relying on the following marks:

Trade mark details	**Representation of mark**	**Specification relied upon**
European Union ("EU") trade mark number 58487 Filing date: 1 April 1996 Registration date: 18 May 1999	KEROFLUID	Class 1: Chemical auxiliary agents for the petroleum industry, namely preparations for improving odour, anti-knock resistance, stability and viscosity, for preventing the formation of sedimentation and for ignition acceleration; chemical additives and improvers for solid and liquid motor fuels, and for solid and liquid lubricants.
EU trade mark number 58537 Filing date: 1 April 1996 Registration date: 18 May 1999	KEROPUR	Class 1: Chemical auxiliary agents for the petroleum industry, namely preparations for improving odour, anti-knock resistance, stability and viscosity, for preventing the formation of sedimentation and for ignition acceleration; chemical additives to and preparations for improving solid and liquid motor fuels, and for solid and liquid lubricants.
EU trade mark number 61762 Filing date: 1 April 1996 Registration date: 14 October 1998	KEROCOM	Class 1: Chemicals used in industry being auxiliary agents for the petroleum and mineral oil industry and additives for mineral oil products.
EU trade mark number 58784 Filing date: 1 April 1996	KEROFLUX	Class 1: Chemical agents for the mineral oil industry, namely agents for improving odour, knock resistance,

Registration date: 4 June 1998		resistance and viscosity, to prevent the formation of deposits as well as to accelerate ignition; chemical additives and enhancing agents for solid and liquid fuels and for solid and liquid lubricants.

The Hearing Officer's Decision

3. A hearing was held on 8 June 2021 at which the Opponent was represented by Chris McLeod of Elkington & Fife LLP, and Advanced Hydrocarbon Fuels Limited ("the Applicant or the Respondent") by David Gwilliam of Adamson Jones.

4. The Opponent claimed that the marks at issue were visually, aurally and phonetically similar, because they shared the prefix "KERO" and had a descriptive suffix. The contested goods were said to be "either similar or complementary" to those of the earlier marks, so that there was therefore a likelihood of confusion. The Opponent also claimed that its earlier trade marks constituted a "family" of marks and the relevant public will believe that the Trade Mark is another member of the Opponent's family of marks.

5. As all of the earlier trade marks had been registered for more than five years at the date of application for the Trade Mark, the Applicant requested evidence of use. Having assessed the evidence of use submitted by the Opponent, and having taken into account certain concessions made at the hearing, the Hearing Officer concluded that the following amounted to fair specifications for each of the earlier marks:

KEROFLUID	*"additives for aviation fuel"*
KEROPUR	*"chemical additives for motor vehicle fuel"*
KEROCOM	*"chemicals used in industry being additives for fuel for motor vehicles"*
KEROFLUX	*"chemical additives for the fuel refining industry".*

6. The Hearing Officer made the following findings in respect of the average consumer and the purchasing act:

- The average consumer of the respective goods would be the general public and industry professionals, such as mechanics or purchasing specialists for refineries. For some of the goods, such as *"fuels and illuminants"*, both groups were relevant consumers. For others, such as aviation fuel and associated additives, the average consumer would be a business purchaser only (paragraph 28 of the Decision).

- For all of the goods, exposure to the trade marks was likely to be mainly visual, although for goods bought by industry professionals the aural component was likely to be more significant than for the purchaser of consumer goods, and even as significant as the visual element (paragraph 29).

- The general public would pay a medium degree of attention, and the business or professional purchaser would pay at least a reasonably high degree of attention (paragraph 30).

7. The Hearing Officer reached the following conclusions in respect of the respective similarities of the goods covered by each of the earlier trade marks:

KEROFLUID (*"additives for aviation fuel"*)

Fuels and illuminants; hydrocarbon compositions; hydrocarbon fuels; synthetic fuels; fuel mixtures; liquid fuels; aviation fuel; motor fuel; kerosene; gasoline; hydrocarbon fuels derived from waste material; hydrocarbon fuels derived from waste plastic

With no evidence to assist her, the Hearing Officer stated that all of the relevant goods listed above appeared to be or to include aviation fuel, kerosene, or at least a particular type of kerosene, being aviation fuel. She concluded that they would be sold through the same channels of trade, and that they were complementary. They were similar to a reasonably high degree. The remaining goods covered by the earlier trade mark were either found to be not similar, or only similar to a low degree, or a *"fairly low degree"* (paragraphs 37 to 42).

KEROPUR *("chemical additives for motor vehicle fuel"*) and "KEROCOM" *("chemicals used in industry being additives motor vehicle fuel"*)

Fuels and illuminants; hydrocarbon compositions; hydrocarbon fuels; synthetic fuels; fuel mixtures; liquid fuels; motor fuel; automotive fuel; diesel fuel; diesel oil; gasoline; fuel oil; hydrocarbon fuels derived from waste material; hydrocarbon fuels derived from waste plastic

The respective goods were not in competition, but were complementary, fuel being essential for a fuel additive and the consumer being likely to believe that the goods were the responsibility of the same undertaking. They were similar to a reasonably high degree. The remaining goods covered by the earlier trade mark were either found to be not similar, or only similar to a low degree, or a *"fairly low degree"* (paragraphs 43 to 48).

KEROFLUX *("chemical additives for the fuel refining industry"*)

The goods covered by the earlier trade mark were either found to be not similar, or only similar to a low degree. They were not complementary (paragraphs 49 to 51).

8. The Hearing Officer found KEROFLUID to be *"weakly distinctive"*, KEROPUR and KEROFLUX to be low in inherent distinctiveness, and KEROCOM to be distinctive to no more than a medium degree. The evidence was insufficient to establish that any of the earlier marks had acquired distinctiveness in the UK (paragraphs 54 to 58).

9. The respective marks were found to be visually and aurally similar to a medium degree (paragraphs 62 to 64). KEROFLUID and KEROFLUX were found to be conceptually similar to a medium degree, and KEROPUR to a *"reasonably high degree"*, while stating that *"the conceptual similarity arising from the shared element "KERO" is not a distinctive similarity".* KEROCOM was found not to be conceptually similar to KEROCLEAN (the decision actually refers to KEROFLUID rather than KEROCLEAN, but I assume this was a typographical error) (paragraphs 65 to 68).

10. The Hearing Officer concluded that there was no likelihood of direct or direct confusion between the Trade Mark and any of the earlier trade marks.

The Appeal

11. On 2 September 2021 the Opponent filed a Notice of Appeal to the Appointed Person under s.76 of the Trade Marks Act 1994 ("the Act").

12. At the hearing before me, which was held remotely on 22 February 2022, Chris McLeod of Elkington & Fife LLP appeared on behalf of the Appellant, and David Gwilliam and Natasha Walker of Adamson Jones appeared on behalf of the Respondent.

Standard of review

13. It is well established that in order to interfere with the decision of the Hearing Officer I must be satisfied that there was a distinct and material error of principle in the decision or that the

Hearing Officer was wrong. The relevant principles were set out in particular in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 by Daniel Alexander QC and by the Supreme Court in *Actavis Group PTC EHF v ICOS Corporation* [2019] UKSC 15. An appeal is by way of review, not a rehearing. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. In the absence of an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group* at [81]). In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education v Pie Corbett Consultancy* [2017] RPC 17 at [52(iv)], *REEF Trade Mark* [2003] RPC 5 at [28] and *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11 at [50]-[51]). I have borne those principles firmly in mind.

Grounds of Appeal

14. In its Grounds of Appeal, the Appellant argued that the Hearing Officer made material errors of principle or was clearly wrong in reaching her conclusion that there was no likelihood of confusion, relying on the following alleged errors:

    a. Erring in the assessment of the distinctive character of the KERO prefix;

    b. Erring in failing to apply the global appreciation test correctly when assessing the likelihood of confusion;

    c. Erring in the *"illogical finding"* that there was no likelihood of confusion on the basis that there would be no indirect confusion;

    d. Erring in overlooking and/or incorrectly applying the established principle of imperfect recollection; and

    e. Erring in overlooking the impact of and/or incorrectly applying the principle of interdependence.

The distinctive character of the KERO prefix

15. In paragraph 52 of her Decision, the Hearing Officer set out the following passage from the judgment of the Court of Justice of the European Union ("CJEU") in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* Case C-342/97, EU:C:1999:323:

> *"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)".*

16. The Hearing Officer went on to summarise the parties' submissions on the "KERO" element and her own conclusions, as follows:

> *"53. The opponent submits that its trade marks have an above average level of distinctive character. It says that the "KERO-" element of its marks is distinctive and dominant and that the suffixes are non-distinctive. Mr McLeod's submissions were that there is "clearly a natural division between the prefix that the marks have in common and the suffix" and (albeit in relation to the conceptual comparison) that the marks all allude to kerosene. It appears to accept that "KERO-" is allusive of kerosene but denies it is descriptive. For its part, the applicant's position appeared to have shifted by the hearing and Mr Gwilliam submitted that "KERO-" is weakly distinctive and at least allusive of kerosene. It further submits that the suffixes "-*

PUR", "-FLUX" and "-COM" have no meaning, or no descriptive meaning, in relation to the goods.

54. The goods covered by the earlier marks are all fuel additives of various types. The parties appear to agree that the average consumer will identify "KERO" within the marks as an element alluding to kerosene. Although "kero" may not be a common abbreviation, my view is that, given the goods at issue, it will be perceived as descriptive or non-distinctive, indicating that the goods are for use in connection with kerosene or, by extension, fuel.

55. The distinctive character of the "KEROFLUID" trade mark derives from the combination of the element "KERO" and the known word "FLUID". It is likely to be perceived as indicating goods which are fluids to be used in conjunction with fuel, or which make fuel more fluid. Given the goods, that is a non-distinctive meaning. The mark as a whole is weakly distinctive. "KEROPUR does not have quite so clear a meaning. However, "PUR" is likely to be perceived as a misspelling of or reference to "pure". The mark is likely to be perceived as allusive of goods which purify fuel. The distinctiveness lies in the whole, which has a low degree of distinctive character.

56. Similarly, the distinctiveness of "KEROFLUX" is due to the combination of elements. It is likely to be perceived as indicative of goods concerned with the flow of fuel (for example, making fuel flow better). That is particularly the case given that the goods are directed at industry professionals whose exposure to concepts such as flux/flow is likely to be more frequent than among the general public. It is low in inherent distinctiveness.

57. As for the "KEROCOM" mark, this strikes me as less obviously divisible into prefix/suffix than the other marks because "COM" does not have a clear meaning in this context. Having said that, the parties appear to agree that "KERO" will be identified as an element in the mark. The mark as a whole does not have a clear meaning, nor is it obviously allusive as a whole, other than having an unspecified connection with fuel. It is distinctive to no more than a medium degree."

17. In its Grounds of Appeal the Appellant submitted that its earlier marks all have *"an above average"* degree of distinctive character because they do not have a single, immediate and obvious meaning in relation to the relevant goods, and any alleged allusion to kerosene will require *"a considerable measure of interpretation by the average consumer, bearing in mind*

that consumers do not habitually conduct a rigorous analysis of a trade mark when they are confronted with it".

18. At the hearing before me, Mr McCloud submitted that the Hearing Officer erred by concluding that the "KERO" prefix was descriptive or non-distinctive just because it will indicate that the goods are for use in connection with kerosene or fuel. He submitted that in fact the "KERO" element performs the essential trade mark function by alluding to the goods and being at *"a sufficient distance from the dictionary word 'kerosene'".*

19. Mr Gwilliam on behalf of the Respondent submitted before me that the Appellant cannot seek to argue that the "KERO" element does not have *"a single, immediate and obvious meaning in relation to the relevant goods"* when it had submitted in its written submissions and skeleton argument for the hearing before the Hearing Officer that the "KERO" prefix would be understood by the average consumer to be an allusion to kerosene.

20. In paragraph 25 of her Decision, the Hearing Officer said the following:

> *"The following principles are gleaned from the decisions of the EU courts in Sabel BV v Puma AG, Case C-251/95, EU:C:1997:528, Canon Kabushiki Kaisha v Metro-GoldwynMayer Inc, Case C-39/97, EU:C:1998:442, Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V. Case C-342/97, EU:C:1999:323, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, EU:C:2000:339, Matratzen Concord GmbH v OHIM, Case C-3/03, EU:C:2004:233, Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, EU:C:2005:594, Shaker di L. Laudato & C. Sas v OHIM, Case C334/05P, EU:C:2007:333, and Bimbo SA v OHIM, Case C-591/12P, EU:C:2016:591:*
>
> *(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."

21. It is therefore important to remember that the correct approach is to perceive the mark as a whole, that a less distinctive mark will enjoy narrower protection than a highly distinctive mark, and that the distinctiveness of the mark is just one of the relevant factors to be considered when assessing the likelihood of confusion.

22. The Hearing Officer made it clear that she was considering the whole of each of the respective marks in the following paragraphs of her Decision:

59. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details: Sabel (particularly paragraph 23). Sabel 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 Bimbo, 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".*

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

23. There was no evidence before the Hearing Officer regarding the nature of kerosene, but both parties agreed that the prefix "KERO" alluded to kerosene. In my opinion, the Hearing Officer was entitled to form the opinion that the "KERO" prefix would be perceived as descriptive or non-distinctive because it would indicate that the goods are for use in connection with kerosene or, by extension, fuel. I do not agree with the Appellant's suggestion that to do so would require a "*considerable measure of interpretation by the average consumer*".

24. The Appellant also submitted in its Grounds of Appeal that it was illogical for the Hearing Officer to conclude that the marks, when viewed in their entirety and used in relation to the relevant goods, have either a low or medium degree of distinctive character in light of her statement in paragraph 54 of her Decision that the "KERO" prefix *"is not a common abbreviation"*. What the Hearing Officer in fact said in paragraph 54 was:

> "*Although "kero" **may not be** a common abbreviation, my view is that, given the goods at issue, it will be perceived as descriptive or non-distinctive, indicating that the goods are for use in connection with kerosene or, by extension, fuel*" (emphasis added).

The fact that a prefix may or may not be a common abbreviation does not mean that it cannot be descriptive or non-distinctive. It is possible to imagine that a purely descriptive abbreviation could be used for the first time and be perceived by the average consumer as descriptive or non-distinctive of the relevant goods.

25. In any event, the Hearing Officer clearly went on in paragraphs 55 to 58 of her Decision to explain that it was the ***combination*** of the "KERO" prefix with the "FLUID", "PUR", "FLUX" and "COM" elements which gave the earlier marks their low or medium distinctive characters when the marks were considered as a whole.

26. Mr McCloud also submitted that the Hearing Officer must have been wrong to say that the "KERO" prefix was descriptive or non-distinctive because that would render each of the earlier trade marks devoid of any distinctive character as being entirely descriptive, which cannot be correct because they are all registered trade marks. He based this assertion on the Appellant's view that each of the suffixes are wholly descriptive, such that it was only the "KERO" element of the earlier marks, being the dominant element, which gave them their distinctiveness. His argument, which is an argument based on absolute grounds rather than relative grounds, falls down because there is no way of knowing why the earlier marks were accepted for registration. It is quite possible that the examiner did not share the Appellant's belief that the suffixes were wholly descriptive and that it was only the "KERO" element which gave the earlier marks their distinctive character.

27. As I explained above, the correct assessment is to consider the distinctiveness of the trade marks as a whole, taking into account all of the relevant factors. This is what the Hearing Officer did in paragraphs 54 to 57 of her Decision. Despite considering that the KEROFLUID mark was likely to have a non-distinctive meaning as a whole in light of the nature of the goods, she still concluded that the mark was weakly distinctive. For KEROPUR she said that the meaning of PUR was less clear but was likely to be *"allusive"* of goods which purify fuel, and concluded that the distinctiveness lies in the whole, which had a low degree of distinctive character. Similarly, for KEROFLUX she said that it was *"likely to be perceived as indicative of goods concerned with the flow of fuel"*, but that the mark's distinctiveness was due to the combination of elements which gave it a low inherent distinctiveness. For KEROCOM, she said that the "COM" element did not have a clear meaning in the context of the mark, and that the whole mark did not have a clear meaning, so that it was distinctive to no more than a medium degree.

28. In any event, even if the Hearing Officer had found that the "KERO" prefix was allusive of kerosene, rather than being descriptive or non-distinctive, as the Appellant suggested that she should have done, in my opinion it would not have changed the Hearing Officer's conclusion that there was no likelihood of confusion. I consider it to be perfectly reasonable to conclude that a mark which consists of a prefix which alludes to the goods in respect of

which it is registered together with a descriptive suffix only has a low or medium distinctiveness, which is the level of distinctiveness attributed to the earlier marks by the Hearing Officer. It is clear from the Hearing Officer's assessment of the marks in paragraphs 54 to 57 of her Decision that the effect of the "KERO" prefix being allusive of kerosene coupled with the suffixes and the nature of the goods would still have led her to reach the same conclusions regarding the level of distinctiveness of the whole marks, and therefore the same subsequent conclusions relating to the likelihood of confusion.

29. In respect of the KEROFLUX mark, she did in fact expressly consider the likelihood of confusion if the "KERO" element did have a degree of distinctiveness, saying in paragraph 79:

> *"**The at best limited distinctiveness of the common "KERO" element** is unlikely to give rise to a perception that the marks are used by the same undertaking, whilst the different endings are both too different to result in consumers mistaking the marks for one another"* (emphasis added).

30. The Appellant has therefore not identified any error of principle by the Hearing Officer in her assessment of the distinctive character of the "KERO" prefix which led to a decision that there was no likelihood of confusion which no reasonable tribunal could have reached on the facts, nor persuaded me that it was wrong.

Global appreciation test and likelihood of confusion

31. On the assessment of likelihood of confusion the Hearing Officer said the following:

> *EU 58487 "KEROFLUID"*
>
> *72. I found, above, that the contested "automotive fuel; domestic fuel; domestic heating fuel; kerosene for domestic heating; diesel fuel; diesel oil; fuel oil; fuel gas; compressed fuel gas" are not similar to the goods for which the earlier mark be relied upon. Without similarity between the goods, there can be no confusion. The opposition against these goods is dismissed accordingly.*
>
> *73. Turning to the remaining goods, there are varying degrees of similarity, from only a low degree to a reasonably high level of similarity. The average consumer who is common to both parties' goods is a business purchaser who will pay at least a reasonably high level of attention to the purchase. The earlier mark is weakly distinctive. Whilst I accept that there is a medium degree of visual, aural and conceptual similarity between the marks, the common element "KERO" is not*

distinctive for fuels and connected goods. The differences between the words "FLUID" and "CLEAN" will prevent direct confusion. As to indirect confusion, whilst I acknowledge that the marks have the same construction, "KERO" has an obvious meaning for fuels and related goods which, even if not already in use, will be not in the least surprising to the consumer. I do not consider that the relevant consumer would conclude that the use of "KERO" was anything more than a coincidence for such goods. Nor is it likely that the use of a different non-distinctive suffix would point the consumer towards an economic connection rather than chance. Some of the goods in the contested specification are not fuels and, therefore, "KERO" is not strictly descriptive of them. Nonetheless, I see no reason why a consumer would assume that a word used descriptively or non-distinctively in the earlier mark indicated a trade connection when used allusively or distinctively in a later mark, notwithstanding the similarities between the marks themselves and a reasonably high degree of similarity between the goods. As Mr Purvis, sitting as the Appointed Person, pointed out in Terence Patrick O'Halloran v Volkswagen Aktiengesellschaft, BL O/001/21 at [18], the average consumer is not just attentive but circumspect and "[c]ircumspection includes not leaping to conclusions which are not justified by the known facts and taking reasonable precautions (bearing in mind the nature of the goods and the importance of the purchase) to resolve uncertainties". For the record, I would have drawn the same conclusion even if the consumer were a member of the general public paying a medium degree of attention. The opposition based on this mark fails.

<u>EU 58537 "KEROPUR"</u>

74. I have found that "aviation fuel; domestic fuel; domestic heating fuel; kerosene; kerosene for domestic heating" are not similar to the goods of the earlier mark. The opposition against these goods is dismissed.

75. The average consumer for the remaining goods includes the general public who will pay a medium degree of attention. As the least attentive consumers, that is the relevant group for the assessment of confusion. There is a reasonably high degree of conceptual similarity between the "KEROPUR" mark and the contested mark. However, the shared element is non-distinctive. The different endings of the marks are sufficient to avoid direct confusion. Whilst I acknowledge the similarities between the marks, I am not persuaded that the average consumer would attribute the

shared presence of "KERO" to an economic connection between the parties. It is also my view that the evolution of a brand from "PUR", a misspelling, to "CLEAN" is not an obvious or expected one likely to result in the consumer supposing that the entities offering the goods are connected. The opposition based upon this mark is rejected.

EU 61762 "KEROCOM"

76. The opposition against "aviation fuel; domestic fuel; domestic heating fuel; kerosene; kerosene for domestic heating" is dismissed, these goods having no similarity to the goods of the earlier mark.

77. I draw similar conclusions in respect of this mark as for the "KEROPUR" mark. The common consumer will pay a reasonably high degree of attention. Despite a medium degree of visual and aural similarity, the marks as wholes are not conceptually similar. The common element "KERO" conveys a descriptive or non-distinctive message. The marks will not be mistaken for one another, the different endings sufficing to distinguish them. The descriptive or non-distinctive nature of the common element will not lead the consumer to believe that the respective marks are used by the same trader, even where the goods are similar to a reasonably high degree.

EU 58784 "KEROFLUX"

78. My primary conclusion is that "fuels and illuminants; hydrocarbon compositions; hydrocarbon fuels; synthetic fuels; fuel mixtures; liquid fuels; aviation fuel; motor fuel; automotive fuel; domestic fuel; domestic heating fuel; kerosene; kerosene for domestic heating; diesel fuel; diesel oil; gasoline; fuel oil; fuel gas; compressed fuel gas; hydrocarbon fuels derived from waste material; hydrocarbon fuels derived from waste plastic" are not similar to the goods of the earlier mark and that the opposition insofar as it is directed against these goods is dismissed.

79. If it is not right that the above goods are dissimilar, they are only similar to a low degree, as are the remaining goods ("engine oils; lubricants and industrial greases, waxes and fluids; synthetic lubricants; synthetic oils; industrial lubricants; lubricants for machines"). For much the same reasons as given previously, I do not consider that there is a likelihood of confusion, whether direct or indirect. The at best limited distinctiveness of the common "KERO" element is unlikely to give rise to a perception

that the marks are used by the same undertaking, whilst the different endings are both too different to result in consumers mistaking the marks for one another and not likely to be perceived as logical steps in a brand extension where there is only limited similarity between the goods. The opposition based upon this mark fails.

32. The Appellant argued in its Grounds of Appeal that it was *"flawed and illogical"* for the Hearing Officer to conclude that there was no likelihood of confusion when she had found the marks to be visually and phonetically similar to a medium degree and that some of the goods were similar or highly similar. However, as I have already explained, the Hearing Officer was required to undertake a global assessment of the likelihood of confusion, taking into account all factors relevant to the circumstances of the case. I have found that she did so in the paragraphs of her Decision that I have referred to, and that she was entitled to reach the conclusions that she did.

Indirect confusion

33. The Appellant submitted in its Grounds of Appeal that it was illogical for the Hearing Officer to dismiss the possibility that the average consumer may assume that there was an economic connection between the parties because she stated that the "KERO" prefix was not a common abbreviation (as pointed out above, she in fact said that it may not be common). I do not agree that this was illogical – an abbreviation may be obviously descriptive even if it is not common.

34. Nor do I agree with the Appellant's submission that it was illogical for the Hearing Officer to conclude that a consumer would conclude that the use of "KERO" at the beginning of each of the relevant marks was a coincidence. Having decided that the "KERO" prefix had an obvious meaning for fuels and related goods which would not be the least surprising to the consumer, it was logical for the Hearing Officer to conclude that the consumer would not assume an economic connection between the various marks because they shared the "KERO" prefix.

Imperfect recollection

35. The Appellant submitted that the Hearing Officer gave insufficient weight to the principle of imperfect recollection when evaluating the likelihood of confusion, given that she had said that the purchasing process for the relevant goods would typically be visual in nature, when imperfect recollection plays a vital role. As can be seen from paragraph 20 above, the Hearing Officer expressly referred to this principle in her summary of the relevant factors which she had to take into account in paragraph 25 of her Decision, and referred to it again in

paragraph 69. However, for the same reason as given in the previous paragraph in relation to indirect confusion, imperfect recollection was unlikely to have had a material bearing on the Hearing Officer's decision once she had concluded that the "KERO" prefix would be perceived by the average consumer, paying at least a medium degree of attention, as being descriptive of the nature of the relevant goods rather than as a prefix acting as a badge of origin.

The principle of interdependence

36. The Appellant's assertion that the Hearing Officer failed to apply correctly the principle of interdependence when evaluating the likelihood of confusion also fails for the same reason given in paragraph 32 above. She expressly referred to the principle in paragraphs 25 and 69 of her Decision and just because she found the marks to be visually and phonetically similar to a medium degree does not mean that she failed to apply the principle of interdependence correctly.

Conclusion

37. The Appellant has not identified any material errors in the Hearing Officer's Decision, and the appeal therefore fails and is dismissed.

Costs

38. Since the appeal has been dismissed, the Respondent is entitled to a contribution towards its costs of the appeal. I will therefore make an order that the Appellant pay to the Respondent a contribution of £1,000 towards the costs of the appeal, in addition to the payment of £1,500 ordered by the Hearing Officer, to be paid within 21 days of the date of this decision.

Simon Clark

The Appointed Person

23 May 2022

Representation:

Appellant: Chris McLeod of Elkington & Fife LLP

Respondent: David Gwilliam and Natasha Walker of Adamson Jones