

O-690-18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3252121
BY WCF LTD TO REGISTER:**



AS A TRADE MARK IN CLASS 31

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 411000 BY INSPIRED PET NUTRITION LIMITED**

Background & Pleadings

1. On 23 August 2017, WCF Ltd (“the applicant”) applied to register the above trade mark for the following goods:

Class 31: *Foodstuffs and beverages for animals; Beverages for dogs; Biscuits for dogs; Biscuits for puppies; Bones for dogs; Canned foodstuffs for dogs; Digestible chewing bones for dogs; Dog biscuits; Dog food; Dog treats [edible]; Edible bones and sticks for pets; Edible chewing products for domestic animals; Edible chews for dogs; Edible dog treats; Edible pet treats; Food for dogs; Food for racing dogs; Food preparations for dogs; Foods containing beef for feeding dogs; Foods containing chicken for feeding dogs; Foods containing liver for feeding dogs; Foods flavoured with beef for feeding dogs; Foods flavoured with chicken for feeding dogs; Foods flavoured with liver for feeding dogs; Foods in the form of rings for feeding to dogs; Foodstuff for dogs; Foodstuffs for dogs; Foodstuffs for pet animals; Foodstuffs for puppies; Litter for dogs; Litter for domestic animals; Pet animals; Pet food; Pet food for dogs; Pet treats in the nature of bully sticks.*

The application was published for opposition purposes on 8 September 2017.

2. On 8 December 2017, the application was opposed in full by Inspired Pet Nutrition Limited (“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 the following trade mark:

United Kingdom Trade Mark (“UKTM”) 1266150:

WAGG

Filing date: 30 April 1986

Registration date: 2 October 1989

The opponent indicates that it intends to rely upon all goods for which its mark is registered, namely:

Foodstuffs for dogs and foodstuffs for domestic pets; all included in Class 31, but not including fresh fruit or fresh vegetables or any goods of the same description as fresh fruit or fresh vegetables.

3. The opponent argues that the applied for mark is highly similar to its UKTM and that the competing goods are identical.

4. In its counterstatement, the applicant accepts that *some* of the competing goods are identical, but denies that the trade marks are highly similar.

5. The applicant in these proceedings is represented by Ancient Hume Limited and the opponent by Bailey Walsh & Co LLP. Both parties filed evidence during the evidence rounds. Neither party requested a hearing; only the applicant filed written submissions in lieu. This decision 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. 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.”

8. Given its filing date, the opponent’s trade mark qualifies as an earlier mark under the provisions outlined above. In accordance with section 6A of the Act, having completed its registration procedure more than five years prior to publication of the applicant’s mark, it is subject to the proof of use provisions. In its Notice of Opposition, the opponent indicated that it had used its earlier mark in respect of all goods relied upon. In its counterstatement, the applicant requested that the opponent provide evidence to support its use of foodstuffs for dogs and foodstuffs for domestic pets¹.

Preliminary issue

Applicant’s reliance on an absence of confusion

9. In its counterstatement, the applicant says the following of the applied for mark:

“5. ...the latter has been registered (UK0002124721B) in the United Kingdom since 1999 in classes 8, 20, 24 and 28 for goods including dog and pet products and is in use without confusion.”

10. In its evidence, the applicant alludes to the mark’s existing reputation, stating:

¹ Although the applicant did not refer to the limitation in the opponent’s specification (paragraph 2 refers), the opponent cannot be expected or required to show use in respect of a broader term if this is not reflective of its goods as registered or, indeed, relied upon.

“3. This is not a new trade mark. It has been used continuously for over 15 years at the filing date of our trade mark application in August 2017. The trade mark is recognised as a quality brand for dog beds and covers and it is a natural progression in trade to develop its use on to foodstuffs for animals and dogs. Trade marks are, after all, badges of origin and customers recognise and associate the distinctive WAGGERS logo with my company. There is, therefore, no scope for confusion...”²

11. On the issue of reliance on the absence of confusion, Tribunal Practice Notice (“TPN”) 4/2009 states:

“6. Parties are [also] reminded that claims as to a lack of confusion in the market place will seldom have an effect on the outcome of a case under section 5(2) of the Act.”

12. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“80. ...the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur.”

² See the witness statement of Ms Joanne L Ritzema.

13. In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283, Millett LJ stated:

“Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark.”

14. The applicant claims to have used the applied for mark in respect of a variety of goods which are not at issue in this case. In light of the above case law, without any indication of trading in respect of *the applied for* goods (class 31), a reliance on an absence of confusion is of no assistance to the applicant. Further, the applicant's existing reputation outside of this field is largely irrelevant to the matter before me.

Evidence summary

Opponent's evidence

15. The opponent filed evidence comprising a witness statement from Mr Philip Stephenson, an attorney at Bailey Walsh & Co LLP, which is dated 19 March 2018 and supported by exhibit PS1.

16. In his witness statement, Mr Stephenson explains that the opponent is the UK's largest independent producer of dry pet food³ and provides its annual turnover figures from 2012 to 2016, as follows:

2016	£69,573,237
2015	£64,466,932
2014	£58,232,658
2013	£56,432,705
2012	£49,443,828

³ See paragraph 1 of the witness statement of Mr Philip Stephenson.

17. Examples of the opponent's mark displayed on a variety of pet food products are provided within the statement. Though none are dated, the opponent explains that some examples pre-date a style update implemented in 2016 ('Sample A', below) and some are reflective of the current packaging style ('Sample B').

Sample A:



Sample B:



18. Distribution outlets for the opponent's goods include supermarkets Asda, Morrisons, Tesco, Sainsbury's and Ocado, online retailer Amazon, and independent stores Pets at Home and Petshop.co.uk. The opponent has not provided a breakdown of the respective revenue(s) generated through each retailer.

19. Enclosed as exhibit PS1 is an article from independent publication *Pet Business World* dated 13 December 2016. The following information can be gleaned from the article:

- 'Wagg' is the number one dry dog food in the UK⁴ and holds a market share of 34.5%.
- The opponent employs 130 people at its Dalton Airfield site and 30 at its treats factory in Wales. According to its sales and marketing director, the business is set to continually expand over the next five years, with the potential to create up to 50 jobs.
- The opponent exports goods to 16 countries, mostly in Europe, with plans to add Russia, Denmark and Norway to its portfolio. There is no clarification regarding the method or extent of exportation in each country.
- The opponent is a recipient of the Bronze Accreditation from Investors in the Environment (iIE); the only pet food manufacturer to have received such an accolade, at least at the time of publication. The date of recognition and scope of any associated publicity are unspecified.
- American equity group Catterton invested in the manufacturer in 2015 to support its 'growth ambition', though the amount of investment is undisclosed.
- Of the opponent's investment in its manufacturing facilities, the article states:

"This £7m injection is in addition to the £20m already spent over the last five years automating production in its two mills... [the opponent] says it intends to spend a further £3m on these mills in the next two years."

Applicant's evidence

20. The applicant's evidence comprises written submissions and a witness statement from its director, Ms Joanne Lesley Ritzema, which is dated 18 May 2018 and accompanied by exhibit JLR1. The evidence focuses on its use of the 'WAGGERS' mark in respect of what the applicant describes as "non-food products for dogs"⁵. Ms Ritzema states that its use as a direct mail and online retailer of dog beds, covers, leads, towels and ramps continued until February 2018.

21. None of the aforementioned goods were applied for in the subject application. Instead, the subject application is made in respect of a variety of goods in class 31,

⁴ According to Kantar data.

⁵ See paragraph 2 of the witness statement of Ms Joanne L Ritzema.

primarily food products for dogs, for which there is no demonstration of use within the applicant's evidence. Given that the applicant is not required to provide evidence of use and its reliance on an absence of confusion has already been dismissed, this evidence is consequently not relevant and I will give it no further consideration.

Opponent's evidence in reply

22. The opponent's evidence in reply addresses, and seeks to refute, the applicant's claim that a progression from products such as dog beds to foodstuffs for animals is natural in the course of trade⁶.

23. Parties are advised that the matter of whether the applicant's alleged progression is, indeed, a natural one, is not one which requires determination. The marks and goods must be assessed as they appear before me, and on a fair and notional basis (taking account of genuine use shown by the opponent). The applicant's business model is of no concern and has no bearing on the outcome of the decision. That being so, I do not find it necessary to summarise the content of the evidence any further.

Proof of use

24. The first issue is to establish whether, or to what extent, the opponent has shown genuine use of the goods relied upon. Under section 6A, the relevant period is the five-year period ending on the date that the opposed mark was published. For the purposes of the opposition, the relevant period is, consequently, from 9 September 2012 until 8 September 2017.

25. The relevant statutory provisions are as follows:

"Raising of relative grounds in opposition proceedings in case of non-use

6A- (1) This section applies where -

⁶ See paragraph 3 of the witness statement of Ms Joanne L Ritzema.

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

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

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

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

26. Section 100 of the Act also applies, which reads:

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

27. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He said:

“217. In *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch); [2013] F.S.R. 35 I set out at [51] a helpful summary by Anna Carboni sitting as the Appointed Person in *Pasticceria e Confetteria Sant Ambroeus Srl v G&D Restaurant Associates Ltd (SANT AMBROEUS Trade Mark)* [2010] R.P.C. 28 at [42] of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV (C-40/01)* [EU:C:2003:145]; [2003] E.T.M.R. 85 , *La Mer Technology Inc v Laboratories Goemar SA (C-259/02)* [EU:C:2004:50]; [2004] E.T.M.R. 47 and *Silberquelle GmbH v Maselli-Strickmode GmbH (C495/07)*[EU:C:2009:10]; [2009] E.T.M.R.28 (to which I added references to *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-416/04 P)* [EU:C:2006:310]). I also referred at [52] to the judgment of the CJEU in *Leno Merken BV v Hagelkruis Beheer BV(C149/11)* EU:C:2012:816; [2013] E.T.M.R. 16 on the question of the territorial extent of the use. Since then the CJEU has issued a reasoned Order in *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-141/13 P)* EU:C:2014:2089 and that Order has been persuasively analysed by Professor Ruth Annand sitting as the Appointed Person in *SdS InvestCorp AG v Memory Opticians Ltd (O/528/15)* [2016] E.T.M.R. 8.

218. [...]

219. I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky* Order v *Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, as follows:

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

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

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

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet

for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

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

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

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

28. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita*

Electric Industrial Co. v. Comptroller- General of Patents [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

29. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person, stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if,

notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

Genuine use / Proof of use conclusion

30. The applicant accepts that the opponent has shown use of its mark in respect of pet food for dogs, rabbits, guinea pigs, gerbils and mice⁷. Whilst the applicant’s comments are noted, given that this is not representative of the full breadth of the opponent’s specification, I will continue to make an assessment on the basis of all goods relied upon.

31. When making an assessment as to whether genuine use of the opponent’s mark has been shown, I begin by considering the way in which it has been used. Section 46(2) of the Act provides for use of trade marks in a form differing in elements which do not alter the distinctive character of the mark as registered. In *Nirvana Trade Mark*, Case BL O/262/06, Richard Arnold Q.C. (as he then was), as the Appointed Person, considered the law in relation to the use of marks in different forms and summarised the s.46(2) test as follows:

"33. ...The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-

⁷ See paragraph 3 of the applicant’s written submissions.

questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

32. In the article provided at PS1, the opponent's mark is referred to as registered, in the plain word. When it comes to its use on packaging, 'Wagg' is generally presented in a pale colour, with small accentuations to the letters creating what appears to be a 3-dimensional 'bubble-like' font. It is displayed in title case, with only the initial letter capitalised. Each letter is surrounded by a dark border, providing additional definition. In my view, the presentation falls within the parameters of fair and notional use of the mark as registered. Registration of a word mark protects the word itself, irrespective of the particular font or capitalisation shown on the register⁸. In some examples, 'Healthy from nose to tail' sits beneath 'Wagg'. This is likely to be viewed solely as a strapline and will not alter the mark's distinctive character. In the existing packaging, additional indicators as to the goods' suitability such as "puppy" and "senior" rest, where appropriate, just above 'Wagg'. Still, the registered mark is, in itself, unaltered throughout and I do not find its inherent distinctive character to be affected by the adopted font or occasional additional elements. On that basis, I conclude that its use is acceptable.

33. I will now consider the sufficiency of the opponent's evidence. The evidence shows that the opponent is the largest independent producer of dry pet food and claims a significant 34.5% market share in dry dog food⁹. Its products are distributed amongst a selection of leading retailers and its turnover builds in million-pound increments year on year, amounting to over £69m in 2016. Furthermore, it has invested in excess of £20m into its manufacturing facilities to support the continuation of its brand. The opponent has provided examples of its mark displayed on a variety of pet foods and pet treats suitable for domesticated animals including dogs, rabbits and guinea pigs. Whilst there is no definitive indication as to the availability of such goods, i.e.

⁸ *Groupement Des Cartes Bancaires v China Construction Bank Corporation, case BL O/281/14.*

⁹ *See Exhibit PS1; article from Pet Business World dated 13 December 2016.*

specifically where and when they were available, I am required to assess the evidence as a whole, taking all factors into account. In doing so, I am satisfied that the opponent has demonstrated genuine use of its earlier mark in respect of the goods relied upon, namely *foodstuffs for dogs and foodstuffs for domestic pets*.

Section 5(2)(b) - Case law

34. 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 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

35. The competing goods are as follows:

Opponent's goods	Applicant's goods
<u>Class 31</u> : Foodstuffs for dogs and foodstuffs for domestic pets; all included	<u>Class 31</u> : Foodstuffs and beverages for animals; Beverages for dogs; Biscuits

in Class 31, but not including fresh fruit or fresh vegetables or any goods of the same description as fresh fruit or fresh vegetables.

for dogs; Biscuits for puppies; Bones for dogs; Canned foodstuffs for dogs; Digestible chewing bones for dogs; Dog biscuits; Dog food; Dog treats [edible]; Edible bones and sticks for pets; Edible chewing products for domestic animals; Edible chews for dogs; Edible dog treats; Edible pet treats; Food for dogs; Food for racing dogs; Food preparations for dogs; Foods containing beef for feeding dogs; Foods containing chicken for feeding dogs; Foods containing liver for feeding dogs; Foods flavoured with beef for feeding dogs; Foods flavoured with chicken for feeding dogs; Foods flavoured with liver for feeding dogs; Foods in the form of rings for feeding to dogs; Foodstuff for dogs; Foodstuffs for dogs; Foodstuffs for pet animals; Foodstuffs for puppies; Litter for dogs; Litter for domestic animals; Pet animals; Pet food; Pet food for dogs; Pet treats in the nature of bully sticks.

36. In its written submissions, the opponent states:

“The contested goods are included in the broad category of the opponent’s foodstuffs for dogs and domestic pets. Therefore, the goods are identical.”¹⁰

37. In its counterstatement, the applicant admits that *canned foodstuffs for dogs; food for dogs; food for racing dogs; food preparations for dogs; foodstuff for dogs; foodstuffs for dogs; foodstuffs for pet animals and foodstuff for puppies* are identical to *foodstuffs*

¹⁰ See lines 15-16 of the opponent’s written submissions.

for dogs and foodstuffs for domestic goods. It denies that the same applies to *beverages for animals; beverages for dogs; litter for dogs; litter for domestic animals* and *pet animals*. In its written submissions, it states:

“3. ...The applicant [also] accepts that the goods of the earlier trade mark registration are the same or similar to the goods applied for with the exception of “litter for dogs; litter for domestic animals, pet animals”. It is submitted that those items are not similar goods to those for which the earlier trade mark is registered.”

38. For guidance on when goods can be considered identical, I turn to *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, in which the General Court (“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”.

39. In my view, the following goods from the applicant’s specification are encompassed by the opponent’s *foodstuffs for dogs and foodstuffs for domestic pets*; and, on the basis of *Meric*, are consequently identical:

Foodstuffs for animals¹¹; Biscuits for dogs; Biscuits for puppies; Bones for dogs; Canned foodstuffs for dogs; Digestible chewing bones for dogs; Dog biscuits; Dog food; Dog treats [edible]; Edible bones and sticks for pets; Edible chewing products for domestic animals; Edible chews for dogs; Edible dog treats; Edible pet treats; Food for dogs; Food for racing dogs; Food preparations for dogs; Foods containing beef for feeding dogs; Foods containing chicken for feeding dogs; Foods containing liver for feeding dogs;

¹¹ ‘Foodstuffs and beverages for animals’ has been divided into ‘foodstuffs for animals’ and ‘beverages for animals’ for the purpose of the goods comparison.

Foods flavoured with beef for feeding dogs; Foods flavoured with chicken for feeding dogs; Foods flavoured with liver for feeding dogs; Foods in the form of rings for feeding to dogs; Foodstuff for dogs; Foodstuffs for dogs; Foodstuffs for pet animals; Foodstuffs for puppies; Pet food; Pet food for dogs; Pet treats in the nature of bully sticks.

40. I will assess the remaining goods from the applicant's specification in turn, keeping in mind that 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]).

41. I am guided by the relevant factors for assessing similarity identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, which were as follows:

- (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.

42. In *Kurt Hesse v OHIM*, Case C-50/15 P, the Court of Justice of the European Union (“CJEU”) stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC 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”.

Beverages for animals; Beverages for dogs

43. I am unsure, and it is not clear from the parties’ submissions, whether “foodstuffs” is a term which, in the context of trade, encompasses all consumable goods, and is therefore inclusive of both food and beverage products. If it is, the above goods are identical to the opponent’s goods on the basis of the *Meric* principle. If this is incorrect, I make the following findings regarding the goods’ similarity. The use of the respective goods differs to the extent that one aims to satisfy hunger and the other to satisfy thirst, though the consumption process is likely to be similar and both goods are generally selected for nutritional purposes. The selection itself will often be made by the same consumer(s). There is generally little similarity in the goods’ physical nature, food often being sold in a (at least somewhat) solidified state and beverages often as liquid. The goods are likely to reach the market via the same channels of trade and are, in my experience, sold in relatively close proximity. With each meeting a different need, the goods are unlikely to be competitive; one could not replace the other. To my knowledge, it would not be unusual for the same undertaking to be responsible for the provision of both. On balance, I find the goods to be similar to a medium degree.

Litter for dogs; Litter for domestic animals

44. The use of the above goods is entirely dissimilar to that of the opponent’s goods; one providing sustenance and the other a means of promoting effective waste disposal. The consumers, on the other hand, are likely to be identical. Given the goods’ contrasting purposes, their physical make-up and respective ingredients are likely to differ significantly. In my experience, and without evidence to the contrary, it is not

common for a single entity to provide both goods, though I accept that there may be a degree of overlap in their trade channels. Whilst unlikely to be sold in *immediate* proximity, the goods often occupy the same aisle of a supermarket, for example. The goods are not competitive, nor are they complementary. Taking all factors into account, I find that there is no similarity between the goods.

Pet animals

45. It seems immediately apparent, when considering the above, that the respective goods share no similarity of use. There is, however, likely to be some similarity in their respective ‘users’. The goods’ physical nature is wholly dissimilar. Whilst I accept that the goods may, at times, be sold on the same premises (a specialist pet store, for example), there is no evidence to show that they routinely reach the market through the same trade channels. Moreover, the goods do not occupy competitive roles, nor are they complementary in accordance with the relevant case law. Despite what may be an intrinsic relationship between consumables and their consumers and, in this case, the potential for overlap between users and respective premises, all things considered, I have no hesitation in concluding that the goods are not similar.

46. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated:

“49. ...I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. **If there is no similarity at all, there is no likelihood of confusion to be considered.** If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.” [my emphasis]

47. It follows that the opposition fails in respect of *pet animals; litter for dogs and litter for domestic animals* and is dismissed accordingly.

The average consumer and the nature of the purchasing act

48. As the case law above indicates, 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.”

49. The average consumer for the goods at issue is likely to be a member of the general public, mostly pet owners, with the goods often subject to self-selection from the shelves of traditional bricks-and-mortar retail establishments such as supermarkets or specialist pet stores. Whilst visual factors are, consequently, likely to dominate the selection process, in my experience, it would not be unusual for sales advisors to provide dietary advice or recommendations orally, so aural considerations cannot be ignored. The goods are generally inexpensive items purchased on a fairly frequent basis. That said, consumers may be alive to factors such as ingredients and compatibility and, given the affection often bestowed upon pets by their owners, are likely to apply a certain level of care and thus maintain at least a normal degree of attention during the purchasing process to guarantee the suitability of the selected goods.

Comparison of trade marks

50. 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 at paragraph 34 of its judgment in *Bimbo SA v OHIM*, Case C-591/12P, 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.”

51. 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. The trade marks to be compared are:

Opponent's trade mark	Applicant's trade mark
WAGG	

52. The opponent's trade mark comprises only one element; the word 'WAGG', presented in block capital letters. Its overall impression rests in its totality.

53. The applicant's trade mark consists of a word and device element. Presented in white and in a traditional font, the word 'WAGGERS' occupies a central position within a green rectangle adorned by a red border. In the top right-hand corner, in a significantly smaller font, is 'TM'; a detail likely to go unnoticed by the average consumer. A dog lies atop the rectangle, its length expanding to just over half of the mark and its right legs overlapping the shape itself. The dog is largely yellow in colour, with its features distinguished in a pale brown and its outline surrounded by the same red border. Sitting beneath each letter of the word 'WAGGERS' is a replica displayed in dark green, creating a shadow-like effect. Whilst the mark's stylistic components will

certainly contribute to the overall impression, in my view, it is the word 'WAGGERS' that carries the greater weight. Although the dog has a presence within the mark and is unlikely to go unnoticed, given the majority of goods for which registration is sought, it is likely to be seen as a reference to the goods' end user(s) and, as a result, will be a weaker element in the eyes of the average consumer.

Visual comparison

54. The marks are visually similar only to the extent that each contains, or consists exclusively of, the letters 'WAGG'. Additional components in the applicant's mark, of which there are no counterpart(s) in the opponent's, include the remaining letters 'ERS' and 'TM', the rectangular backdrop and border, the letters' shadow effect and a depiction of a dog. On balance, I find there to be a low degree of visual similarity between the respective marks.

Aural comparison

55. The opponent's mark is likely to be articulated in one syllable; "WAG", whereas the applicant's mark is likely to be articulated in two; "WAG-URS". Given the nature, not to mention the size, of the 'TM' detail, I find it unlikely that this would be articulated at all, nor would consumers attempt to articulate the dog device. On this basis, I find the degree of aural similarity between the marks to be at a medium level.

Conceptual comparison

56. 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.

57. Of the conceptual comparison, the opponent submits:

“Conceptually the marks are similar, because tail wagging is the sign of a happy dog and both marks evoke this imagery in the use of WAGG in their dominant word elements.”¹²

58. The applicant responds to the opponent’s comments in its written submissions:

“The word “wag” (with one g) means to move or to be moved from side to side, or to shake to and fro. There is, however, no dictionary definition for the word “waggers” which is one of the two distinctive elements of the mark applied for. The marks are not conceptually similar.”¹³

59. In my view, the average consumer is likely to interpret the opponent’s mark as a deliberate misspelling of the well-known word, ‘WAG’. I agree with both parties insofar as the average consumer is likely to understand the word WAG to mean a to-and-fro movement, primarily associated with dogs and particularly the way they move their tails to express happiness or excitement. I am unaware, as the applicant suggests, and as I believe the average consumer would be, of a definition assigned to the word ‘WAGGERS’. In the absence of one, in my view, given the recognisability of WAG and their familiarity with words ending in ‘-ER’, consumers are likely to assume that it is a pluralised descriptor for something or someone that ‘WAGS’, just as a painter is understood to be someone who paints and a builder someone who builds. On that basis, the opponent’s mark is conceptually suggestive of the ‘wagging’ movement itself, whereas the applicant’s is suggestive of the *mover*. With this in mind, I conclude that the competing marks are conceptually similar to a medium degree.

Distinctive character of the earlier trade mark

60. 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:

¹² See page 3 of the opponent’s written submissions; lines 5-6.

¹³ See page 4 of the applicant’s written submissions; lines 15-18.

“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).”

61. Whilst the opponent has not claimed that the distinctive character of its earlier mark has been enhanced through use, it has filed evidence in support of its use. The opponent has a considerable market share with regard to dry dog food and has shown use of its mark in relation to a wider range of pet foods but, whilst the evidence as a whole is sufficient to support a finding of use for the goods I have identified, it falls short of enabling me to find that the opponent benefits from enhanced distinctive character. This is largely due to a paucity of evidence relating to marketing spend and geographic spread across the range of goods for which use is claimed, which prevents me from establishing the proportion of the relevant public who, because of the mark, will identify the goods as originating from the opponent. Consequently, an assessment must be made purely on the basis of the mark’s inherent distinctiveness. 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 and/or services relied upon generally possess the lowest.

62. I have already suggested that consumers are likely to interpret the opponent's mark as 'WAG', a word primarily associated with dogs. It may, therefore, be viewed as allusive or suggestive when considered in respect of some of the opponent's goods (specifically *foodstuffs for dogs*). That said, the opponent's mark is also registered for *foodstuffs for domestic pets* (at large, with the relevant limitation(s)) and, indeed, I note the use of it shown across a variety of pet foods. In my view, the degree of allusiveness attributable to the mark is likely to vary according to the animal the specific goods are targeting. Essentially, I find its distinctive character to be of a lower degree in respect of 'dog-specific' goods, but of a higher degree in respect of goods suitable for other animals (rabbits or gerbils, for example), for which 'WAG/WAGG' has less relevance and is consequently less allusive. On the whole, I find the mark to possess a normal degree of distinctiveness.

Likelihood of confusion

63. 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.

64. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*.

However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

65. 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.

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

- Some of the competing goods are identical, some are similar to a medium degree (if not identical), some to a very low degree and others not similar at all;
- The average consumer is a member of the general public. Visual considerations are likely to dominate the selection process, though aural considerations are also relevant;
- A normal degree of attention will be paid to the selection of goods;
- The competing trade marks are visually similar to a low degree, aurally similar to a medium degree and conceptually similar to a medium degree;
- The opponent’s trade mark possesses a normal degree of inherent distinctive character.

67. 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.””

68. To make the assessment, I must adopt the global approach advocated by the case law and take 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 must, instead, rely upon the imperfect picture of them retained in its mind.

69. Taking all relevant factors into account and, in particular, on the basis that I have found only a low degree of visual similarity between the respective marks, I do not consider it likely that consumers would be susceptible to direct confusion. In my view, there are too many visual components in the applicant’s mark of which there are no equivalents in the opponent’s mark for consumers to simply mistake one for the other.

70. That leaves indirect confusion to consider. I have found there to be a medium degree of similarity between the marks both aurally and conceptually. I have also found the opponent’s earlier mark to possess a normal degree of inherent distinctive character and, in the case of both marks, found the distinctive character to rest primarily (if not exclusively) in the word elements. Whilst consumers are likely to immediately recognise the visual differences between the marks, they are, in my view, just as likely to recognise the common feature; ‘WAGG’. I keep in mind that this shared

detail originates from the *beginning* of each mark's word element, which, as a rule of thumb, is considered more important than its ending¹⁴. Whilst the addition of 'ERS' shifts the conceptual connotation (from movement to movers), it is not materially altered to any great extent and consumers are likely, for the reasons already explained, to identify a connection between the words' meanings. Having acknowledged that both marks are associated (to varying degrees) with a 'wagging' movement, consumers may be minded to erroneously conclude that the marks originate from the same or a related undertaking, believing 'WAGGERS' to be an extension of the earlier 'WAGG' brand and the additional visual elements to stem from a design or marketing strategy. All things considered, I find a likelihood of confusion to exist in respect of all goods for which I have found there to be at least a medium degree of similarity. It is worth noting for clarification that, had I found even a low level of similarity in respect of *litter for dogs* and *litter for domestic animals*, I would have concluded that the wide discrepancy in the goods' nature was sufficient to preclude a likelihood of confusion, with consumers naturally inclined to assume that the undertakings originate from separate entities.

Conclusion

71. Subject to any successful appeal, the application **will proceed to registration** for: *Pet animals; Litter for dogs; Litter for domestic animals;*

and **will be refused** for: *Foodstuffs and beverages for animals; Beverages for dogs; Biscuits for dogs; Biscuits for puppies; Bones for dogs; Canned foodstuffs for dogs; Digestible chewing bones for dogs; Dog biscuits; Dog food; Dog treats [edible]; Edible bones and sticks for pets; Edible chewing products for domestic animals; Edible chews for dogs; Edible dog treats; Edible pet treats; Food for dogs; Food for racing dogs; Food preparations for dogs; Foods containing beef for feeding dogs; Foods containing chicken for feeding dogs; Foods containing liver for feeding dogs; Foods flavoured with beef for feeding dogs; Foods flavoured with chicken for feeding dogs; Foods flavoured with liver for feeding dogs; Foods in the form of rings for feeding to dogs;*

¹⁴ *El Corte Inglés, SA v OHIM.*

Foodstuff for dogs; Foodstuffs for dogs; Foodstuffs for pet animals; Foodstuffs for puppies; Pet food; Pet food for dogs; Pet treats in the nature of bully sticks.

Costs

72. Whilst both parties have achieved a measure of success, the opponent's success is proportionately greater and it is entitled to a contribution toward its costs. Awards of costs in proceedings are governed by Annex A of TPN 2 of 2016. Applying the guidance in that TPN, I award costs to the opponent on the following basis:

Official fee (form TM7):	£100
Preparing a Notice of Opposition:	£150
Preparing evidence:	£500
Written submissions:	£200
Total:	£950

73. I order WCF Ltd to pay Inspired Pet Nutrition Limited the sum of £950. 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 31st day of October 2018

**Laura Stephens
For the Registrar**