

**O-819-18**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NOS. 3252092 AND 3261142 BY CARL  
JENKINS TO REGISTER THE FOLLOWING TRADE MARKS:**

The logo for 'TIME HEALTH' features the word 'TIME' in a large, red, sans-serif font. A small, green clock icon is positioned above the letter 'M'. Below 'TIME', the word 'HEALTH' is written in a smaller, grey, sans-serif font.

**AND**

**Time Health/TIME HEALTH  
(SERIES OF TWO)**

**IN CLASS 5**

**AND IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO UNDER  
NOS. 410962 AND 410968  
BY BIOSTIME HONG KONG LIMITED**

## BACKGROUND AND PLEADINGS

1) Carl Jenkins (hereafter “the applicant”) applied to register the following two trade marks the relevant details of which are:

(i) 3252092



Filing date: 23 August 2017

Publication date: 8 September 2017

**Class 5:** *Vitamin and mineral supplements; Herbs (Medicinal -).*

(ii) 3261142

Time Health/TIME HEALTH (series of 2 marks)

Filing date: 4 October 2017

Publication date: 20 October 2017

**Class 5:** *Vitamin and mineral supplements; Herbs (Medicinal -).*

2) Biostime Hong Kong Limited (hereafter “the opponent”) opposes the application on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The oppositions are directed against all the goods set out above and are on the basis of the following earlier trade mark:

3249707



Filing date: 11 August 2017

Registration date: 3 November 2017

Goods relied upon:

**Class 3:** [...]

**Class 5:** *Vitamin preparations; cod liver oil; mineral food supplements; nutritional supplements; [...]*

Class 29: [...]

Class 30: [...]

3) The opponent asserts that:

- the dominant features of the applicant's marks are the words "TIME" and "HEALTH"
- the other visual elements such as the small clock do not add any distinctiveness to the mark;
- the words "Healthy" and "Times" are the dominant features of the opponent's mark;
- the applicant's mark contains the same words as the opponent's mark but merely with the final letter removed from each word and with their order rearranged. It asserts that, consequently, this is not a significant visual modification;
- aurally, the only notable difference is the reversal of the words and the addition of the "y" syllable in the word "healthy" in the opponent's mark;

- the opponent's mark brings to minds the concept of "time to be healthy" or similar as does the applicant's mark. Consequently, it is asserted that there is no conceptual difference between the marks;
- the respective goods are identical;
- the goods are sold on the high street to the same general public and having regard for imperfect recollection there "is a high risk of a likelihood of confusion".

4) The applicant filed counterstatements denying the claims made and, in particular, it asserts that the respective marks do not have the same meanings and the fact that the marks share similar elements is not automatically enough to find that the marks, as a whole, are similar. It concludes that given the visual, aural and conceptual differences between the marks, the likelihood of confusion is exceptionally low.

5) The two oppositions were subsequently consolidated. Only the applicant filed evidence and both sides filed written submissions. I will refer to these to the extent that it is considered necessary. A hearing took place on 18 December 2018 with the applicant represented by Max Stacey of Baron Warren Redfern, and the opponent by Lewis Hands of Handsome I.P. Ltd.

## **Evidence**

6) The applicant's evidence is in the form of a witness statement by the applicant, the sole director of Time Health Limited, together with a number of exhibits. The applicant does not explain the link between his marks and Time Health Limited but it appears that he consents to Time Health Limited's use of his marks.

7) His evidence relates to illustrating his marks' presence on the health supplement market since early 2016 and that goods sold under the marks enjoy a high level of customer satisfaction. Such evidence is only relevant when considering grounds based upon section 5(2)(b) where there is a claim of concurrent use. There was no such claim in these proceedings and it will become obvious that, even if there was, this evidence would not have influenced the outcome of the proceedings. As Mr

Hands submitted at the hearing, in the absence of evidence of both parties concurrently using their marks without confusion, it cannot be concluded that confusion arises (see, for example, the decision of Anna Carboni, sitting as the Appointed Person in *MUDDIES Trade Mark* (Case no. BL O-211-09, para. 52).

8) There is also evidence going to the limited amount of use made by the opponent of its mark in the UK. However, because the registration procedure of its mark was not completed more than five years before the publication of the applicant's marks, it is not subject to the proof of use provisions set out in section 6A of the Act and, as a consequence, the opponent is entitled to rely upon the full list of goods in its earlier mark. Since the opponent is not restricted to the goods for which it has used the mark, This evidence does not assist and I will not refer to it further.

9) Evidence is provided of searches for "TIME HEALTH" and "HEALTHY TIMES" conducted on both the *Google* search engine and on the *Amazon* online market place, and neither search found the other party's mark(s). This is held indicative of no likelihood of confusion. It is not clear to me what the size is of each party's online business/footprint, therefore, it is reasonable to conclude that the lack of appearance in search results is because neither side has an online presence that is such as to influence these search results. This does not impact upon the issue of likelihood of confusion and I need not consider this evidence further.

10) The opponent provides numerous dictionary references<sup>1</sup> for "Health", "Healthy" and "Time". Insofar as these are relevant, they identify the following meanings that will be readily understood by the UK consumer:

**Health:** "the state of being bodily and mentally vigorous and free from disease/the general condition of the body";

**Healthy:** "*adjective*. Enjoying good health";

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<sup>1</sup> Exhibit TH08: extracts from Collins English Dictionary, Third Edition Updated

**Time:** “the continuous passage of existence.../a specific point on this continuum

[...]

(often pl.) a period or point marked by specific attributes or events: the *Victorian times...*”

11) The applicant also makes a number of submissions that I will not detail here, but I will keep in mind.

## **DECISION**

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

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

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

13) The opponent’s mark is registered and has an earlier filing date than the contested applications and is, therefore, an “earlier mark” within the meaning of section 6(1) of the Act.

14) The following principles are gleaned from the decisions of the Court of Justice of the European Union (“the CJEU”) 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:

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

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

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

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

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

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

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

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

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

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

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

### ***Comparison of goods and services***

15) In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

16) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

a) The respective users of the respective goods or services;

b) The physical nature of the goods or acts of services;

- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) 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.

17) The respective goods are set out below:

Opponent's goods	Applicant's goods
<i>Vitamin preparations; cod liver oil; mineral food supplements; nutritional supplements</i>	<i>Vitamin and mineral supplements; Herbs (Medicinal -).</i>

18) It was confirmed at the hearing that it is common ground between the parties that the respective goods are identical.

**Comparison of marks**

19) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23), Case C-251/95, that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

21) The respective marks are:

Opponent’s earlier mark	Applicant’s marks
	

22) The opponent submits that the dominant elements of its mark are the words “Healthy” and “Times”. It is my view that the two words form a unit by creating the phrase “healthy times” that will be readily understood by the consumer and it is this phrase that is the dominant and distinctive element and not the individual words. I also recognise that the distinctiveness of the mark is influenced by the hand-written style of the text, the reversed final letter “s” and the rectangular shaped border.

23) In respect of the applicant’s marks, the dominant features are the words “TIME” and “HEALTH”. This is self-evidently so in respect of the applicant’s series of word marks. In respect of its word and device mark, Mr Hands submitted that the other

visual elements such as the small clock do not add any distinctiveness to the mark. I do not agree. The presence of the clock sitting in the middle depression of the letter “M”, the contrast in colour between the two words and the fact that the word “TIME” appears larger and above the word “HEALTH” all contribute to the distinctive character of the mark. Further, the larger appearance of the word “TIME” and the fact that it appears above the smaller word “HEALTH” further enhances its role as the dominant and distinctive element of the mark. That said, I recognise that the word “HEALTH” contributes to the impression created by the mark despite it being a word of low distinctive character in respect of health supplements.

24) Visually, Mr Hands submitted that the applicant’s word marks contain the same words as the opponent’s mark, merely with their order rearranged and with the final letter removed from each word. Mr Hands argued that this is not a significant visual modification. Whilst the differences identified are indisputable, I do not agree with the conclusion regarding the impact of the differences. Firstly, the opponent’s mark has stylisation and a border that creates an additional visual difference between the marks. Further, the reversal of the words has a notable visual impact. It is my view that taking account of all the similarities and differences, I find that the respective marks share a medium level of visual similarity.

25) In respect of the level of visual similarity with the applicant’s word and device mark, there are additional elements or characteristics present in the applicant’s mark that are absent in the opponent’s mark. These additional elements/characteristics are the position of the word elements, appearing one above the other, the larger appearance of the word “TIME” and its different colour together with the presence of the clock device. Mr Hands submitted that these differences are insignificant. Once again, I do not agree. The position and size of the word TIME increases the visual dominance in the mark over and above the level of dominance it has in the applicant’s word marks. I find that these additional differences further lower the level of visual similarity that I would put at low to medium.

26) Aurally, the applicant’s marks are all the same, being expressed as the two syllables “TIME-HEALTH”. The opponent’s mark will be expressed as the three syllables “HEALTH-E-TIMES”. Mr Hands claimed that these differences have little

impact. I do not agree. Firstly, the comparison is between two syllable marks and a three syllable mark. Secondly, the respective first syllables are different, the opponent's second syllable is absent from applicant's mark and the respective last syllables are different. I acknowledge that the first syllable of the opponent's mark occurs as the last syllable of the applicants mark and vice-versa. Factoring all of this into my considerations, I conclude that they share a medium level of similarity.

27) Mr Hands submitted that the opponent's mark brings to mind the concept of "time to be healthy" or similar as does the applicant's marks and asserts that there is no conceptual difference. Whilst I agree that the concept created by the opponent's mark is something akin to a time to be healthy, I do not agree that the concept conveyed by the applicant's marks is the same. The concept of all three of its marks is less clear and, as Mr Stacey submitted, certainly not the same as the concept present in the opponent's mark. Mr Stacey asserted that the opponent's mark gave a meaningful marketing message (namely, a time to be healthy) whereas all of the applicant's marks will be perceived as TIME marks with the "Health" element indicating that the goods are "health products". I agree with this analysis. It is a natural construction of a phrase for the first word to qualify the second, therefore, in the opponent's mark, the word "Healthy" qualifies the second word "Times" so that the phrase, as a whole, is likely to be perceived as a phrase that will be understood as "a time that is healthy" or, as the opponent submits "a time to be healthy". By reversing the natural position of the words and removing the last letter "s" from the word "Times" and the "y" from the word "healthy", this has the effect of making the phrase present in the applicant's mark more impenetrable. The consumer is unlikely to see any direct meaning in the phrase "Time Health". Therefore, these two words do not form a unit, unlike the words in the opponent's mark. Each word retains a separate identity and meaning within the marks. In respect of the applicant's word and device mark, this perception would not be offset by the get-up of the mark that includes the small clock device. Rather, with the word "TIME" being the dominant element, will reinforce such a perception and, as Mr Stacey submitted, it will also be perceived as a "TIME" mark.

28) Taking all of this into account, I conclude that the applicant's marks are conceptually different from the opponent's mark.

### ***Average consumer and the purchasing act***

29) The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

30) 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.”

31) As Mr Stacey submitted at the hearing, the average consumer of both parties' goods is likely to be those among the general public who purchase nutritional supplement or business individuals purchasing such goods for retailers or wholesales. Mr Hands agreed, but pointed out that the likely lower level of care and attention of the general public is the relevant level of care and attention. I agree. The goods are likely to be selected from shop shelves or the online equivalent and, as a consequence, the purchasing process is likely to be visual in nature. However, I do not ignore that aural considerations may play a part, where for example, the consumer traces the desired product by engaging with a shop assistant.

32) Mr Hands submitted that little care will be taken in purchasing the goods, and where care is taken it will be to ensure that the correct supplement is chosen, with little notice paid to the source. I disagree because the source of the product will be an important factor during the purchasing process. An argument to the contrary

would relegate the role of a trade mark to being irrelevant. I do not accept this. I find that there will be a desire to select the correct and preferred nutritional supplement that is perceived to match the required benefit and, consequently, as Mr Stacey submitted, the level of care and attention is likely to be slightly more considered than normal.

***Distinctive character of the earlier trade mark***

33) In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

34) The opponent does not rely upon an enhanced distinctive character and it has not filed any evidence. Therefore, I need only consider the inherent qualities of its mark. As I have already noted, its mark consists of the words “Healthy Times”

presented in a handwritten-type script and contained in a rectangular shaped border. The words communicate a concept that will confer the message to the consumer that use of the goods sold under the mark will lead to healthy times and consequently the level of distinctive character in these words is not high. The stylisation adds some distinctive character, but when considering the mark as a whole, I would not put its distinctive character any more than low to medium.

### **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion**

35) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/services down to the responsible undertakings being the same or related).

36) Further, I keep in mind that a lesser degree of similarity between the goods may be offset by a great degree of similarity between the marks, and vice versa;

37) In the current case, I have found that:

- The dominant element of the opponent's mark is the words "Healthy Times", but I recognised that the stylisation also plays a role;
- The dominant element of all the applicant's word and device mark is the word "TIME";
- In respect of the applicant's word and device mark, I also recognised that the presence of the clock sitting in the middle depression of the letter "M", the contrast in colour between the two words and the fact that the word "TIME"

appears larger and above the word “HEALTH” all contribute to the distinctive character of the mark;

- The opponent’s mark and the applicant’s word and device mark share a low to medium level of visual similarity, a medium level of aural similarity and are conceptually different;
- The opponent’s mark and the applicant’s word marks share a medium level of visual and aural similarity and are conceptually different;
- The respective goods are identical;
- The purchasing process is likely to be visual in nature and slightly more considered than normal;
- The opponent’s mark possesses no more than a low to medium level of inherent distinctive character and that this is not enhanced through use.

38) I dismiss Mr Hands’ submission that the removal of the last letters from each of the words present in the opponent’s mark and reversing the order of the words amounts to an insignificant difference. Rather, I find that the differences in the opponent’s mark and the applicant’s series of word marks their different concepts, are sufficient to overcome the fact that the respective goods are identical and that the purchasing act will have a slightly more considered purchasing act than normal. It is insufficient that the respective marks will be perceived as all relating to health. The common occurrence of the HEALTH and TIME elements in both marks may result in one mark bringing the other to mind, but I remain unconvinced of even this. Nevertheless, even if one mark did bring the other to mind, it is insufficient for a finding of a likelihood of confusion. Therefore, when taking account of all the relevant factors, I find that it is not likely that the parties’ marks will be confused (so called “direct confusion”), nor that it is likely that the average consumer will expect goods sold under the respective marks to originate from the same or linked undertaking (so called “indirect confusion”). I find there is no likelihood of confusion.

39) The applicant’s word and device mark has its own visual impact that it markedly different from the opponent’s mark, and such a visual impact makes this mark even less likely to be confused with the opponent’s mark. I find that there is no likelihood of confusion in respect of this mark too.

40) The opposition fails in its entirety.

41) In light of this finding, even if a claim of concurrent use had been made and the evidence were found to support such a claim, it would not be necessary to consider the issue because it would not improve the outcome of the proceedings for the applicant.

### **Costs**

42) The applicant has been successful and is entitled to an award of costs. I take account that both sides filed written submissions and that a hearing took place. I note that the applicant submitted evidence, but as this did not assist my considerations, I make no award for this. I award costs, as a contribution to its costs in these proceeding, as follows:

Considering statements of case and filing the counterstatements: £400

Attending the hearing - £600

43) I therefore order Biostime Hong Kong Limited to pay Carl Jenkins the sum of £1000. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

**Dated this 20<sup>th</sup> day of December 2018**

*Mark Bryant*

**Mark Bryant  
For the Registrar  
The Comptroller-General**