

O/0398/24

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3792336
IN THE NAME OF CASHFLOW CORPORATION LTD
TO REGISTER AS A TRADE MARK**

ENERJO

**IN CLASSES 1, 4, 7, 8, 9,
11, 12, 35, 36, 37, 39, 40 &
42**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 436797
BY COMPAGNIE FINANCIERE ET DE PARTICIPATIONS
ROULLIER**

BACKGROUND AND PLEADINGS

1. On 26 May 2022, Cashflow Corporation Ltd (“the applicant”) applied to register the trade mark “**ENERJO**” in the United Kingdom. The application was accepted and published for opposition purposes on 8 July 2022, in respect of goods and services in classes 1, 4, 7, 8, 9, 11, 12, 35, 36, 37, 39, 40 and 42.

2. The application is opposed by Compagnie Financiere et de Participations Roullier (“the opponent”). The opposition was filed on 10 October 2022 and is based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against some of the goods and services in the application in classes 1, 11 and 42 only, as listed in the table under paragraph 15 of this decision. The opponent relies upon the following marks:

ENERGEO

UK trade mark registration number 3691631

UK Filing date: 8 September 2021, filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union, with an EU filing date of 28 December 2020

Registration date: 31 December 2021

Registered in Class 1

Relying on all goods, namely:

Chemicals for agricultural uses, Preparation for fertilising, Fertilizers, Phosphatic fertilizers, Potassium fertilisers, granular fertilisers, Water-soluble manures.

(Mark 1); and

ENERGEO

International Registration No. WO1578137

International Registration date: 29 December 2020

UK Date of Designation: 29 December 2020

Priority date claimed: 2 October 2020¹

Date Protection Granted in the UK: 1 July 2021

¹ From French trade mark No. 4687945.

Protected for goods in the UK in Class 1

Relying on all goods, namely:

Chemical products for agricultural use, fertilizing preparations, fertilizers for agriculture, phosphate fertilizers, potassium fertilizers, granular fertilizers, water-soluble fertilizers.

(Mark 2).

3. The opponent's marks each qualify as an earlier mark under section 6(1) of the Act. As neither mark had been registered/protected for more than five years at the date the application was filed, they are not subject to the use provisions contained in section 6A of the Act.

4. The opponent submits that the marks are visually and phonetically highly similar, and that the opposed goods and services are identical or at least highly similar to the goods covered by the earlier marks. As such, it submits that there exists a likelihood of confusion on the part of the public, which includes a likelihood of association.

5. The applicant filed a counterstatement denying the claims.

6. Only the opponent filed written submissions in lieu of a hearing, which will be referred to as and where appropriate during this decision; only the opponent elected to file evidence. Neither party requested a hearing, therefore this decision is taken following careful consideration of the papers.

7. In these proceedings, the opponent is represented by Boulton Wade Tennant LLP and the applicant is unrepresented.

EVIDENCE

8. The opponent filed evidence in support of the opposition in the form of the witness statement of Salisha Baptiste, a Trade Mark Assistant at Boulton Wade Tennant LLP, being the appointed representatives of the opponent. The witness statement is dated 8 June 2023 and is accompanied by two exhibits, labelled SSB01 and SSB02. I note the exhibits each consist of an extract from the UKIPO Trade Mark Register showing

the registration/protection conferred details of the respective earlier marks relied upon by the opponent.

9. As the evidence contains no other relevant material and has been adduced merely to show that the earlier marks have been validly registered/protected in the UK, which is not in question, I consider it unnecessary to make any further reference to the evidence in my decision.

DECISION

10. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Section 5(2)(b)

11. Section 5(2)(b) is relied on and reads as follows:

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

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

12. Section 5A states:

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

13. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“OHIM”)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(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 to mind the earlier mark, 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

14. Pursuant to section 60A of the Act, goods and services are not to be automatically regarded as being similar to each other on the ground that they appear in the same class, nor automatically regarded as dissimilar from each other on the ground that they appear in different classes.

15. The goods and services to be compared are:

Opponent's goods
Mark 1 <u>Class 1</u> <i>Chemicals for agricultural uses, Preparation for fertilising, Fertilizers, Phosphatic fertilizers, Potassium fertilisers, granular fertilisers, Water-soluble manures.</i>
Mark 2 <u>Class 1</u> <i>Chemical products for agricultural use, fertilizing preparations, fertilizers for agriculture, phosphate fertilizers, potassium fertilizers, granular fertilizers, water-soluble fertilizers.</i>
Applicant's goods and services
<u>Class 1</u> <i>Acetate of cellulose, unprocessed; acetates [chemicals]*; acetic anhydride; acetone; acetylene; acetylene tetrachloride; acid proof chemical compositions; acids*; acidulated water for recharging batteries / acidulated water for recharging accumulators; acrylic resins, unprocessed; actinium; activated carbon / activated charcoal; active chemical ingredients; additives, chemical, to drilling muds / chemical additives to drilling muds; additives, chemical, to fungicides / chemical additives to fungicides; additives, chemical, to insecticides / chemical additives to insecticides; additives, chemical, to motor fuel / chemical additives to motor fuel; adhesive preparations for surgical bandages; adhesives for billposting; adhesives for industrial purposes; adhesives for paperhanging / adhesives for wallpaper; adhesives for wall tiles; adjuvants, other than for medical or veterinary purposes; agar-agar for industrial purposes; agglutinants for concrete; agricultural chemicals, except fungicides, herbicides, insecticides and parasitocides; albumenized paper; albumin [animal or vegetable, raw material]; alcohol*; aldehydes*; alginates for industrial purposes; alginates for the food industry; alkalies; alkaline iodides for industrial purposes; alkaline metals; alkaline-earth metals; alkaloids*; alum; alumina; aluminium acetate*; aluminium alum; aluminium chloride; aluminium hydrate; aluminium iodide; aluminium silicate; americium; ammonia [volatile alkali] for industrial purposes / volatile alkali [ammonia] for industrial purposes; ammonia alum; ammonia*; ammoniacal salts; ammonium aldehyde; ammonium nitrate; ammonium salts; amyl acetate; amyl alcohol; anhydrides; anhydrous ammonia; animal albumen [raw material]; animal carbon; animal</i>

carbon preparations; animal charcoal; animal manure; anthranilic acid; anti-boil preparations for engine coolants; antifreeze; anti-frothing solutions for batteries / anti-frothing solutions for accumulators; anti-incrustants; anti-knock substances for internal combustion engines; antimony; antimony oxide; antimony sulfide; antioxidants for use in manufacture; antioxidants for use in the manufacture of cosmetics; antioxidants for use in the manufacture of food supplements; antioxidants for use in the manufacture of pharmaceuticals; anti-sprouting preparations for vegetables; antistatic preparations, other than for household purposes; anti-tarnishing chemicals for windows; argon; arsenic; arsenious acid; artificial sweeteners [chemical preparations]; astatine; auxiliary fluids for use with abrasives; bacterial preparations, other than for medical and veterinary use; bacteriological preparations for acetification; bacteriological preparations, other than for medical and veterinary use; barium; barium compounds; barium sulfate; baryta; baryta paper; barytes; bases [chemical preparations]; basic gallate of bismuth; bate for dressing skins / dressing, except oils, for skins; bauxite; beer preserving agents; beer-clarifying and preserving agents; bentonite; benzene; benzene derivatives; benzene-based acids; benzoic acid; benzoic sulfimide; benzol; berkelium; bicarbonate of soda for chemical purposes; bichloride of tin; bichromate of potassium; bichromate of soda; biochemical catalysts; biological preparations, other than for medical or veterinary purposes; biological tissue cultures, other than for medical or veterinary purposes; biostimulants for plants; birdlime; bismuth; bismuth subnitrate for chemical purposes; blood charcoal; blue vitriol / copper sulfate [blue vitriol]; blueprint cloth; blueprint paper; bone charcoal; borax; boric acid for industrial purposes; brake fluid; brazing fluxes; brazing preparations; brickwork preservatives, except paints and oils; bromine for chemical purposes; by-products of the processing of cereals for industrial purposes; caesium; calcined soda; calcium carbide; calcium cyanamide [fertilizer] / calcium cyanamide [fertiliser]; calcium salts; californium; calomel [mercurous chloride]; camphor, for industrial purposes; carbide; carbolineum for the protection of plants; carbon; carbon black for industrial purposes; carbon disulfide; carbon for filters; carbon tetrachloride; carbonates; carbonic acid; carbonic hydrates; casein for industrial purposes; casein for the food industry; cassiopium [lutetium] / lutetium [cassiopium]; catalysts; catechu; caustic alkali; caustic soda for industrial purposes; caustics for industrial purposes; cellulose; cellulose derivatives [chemicals]; cellulose esters for industrial purposes; cellulose ethers for industrial purposes; cement [metallurgy]; cement for footwear; cement for mending broken articles; cement preservatives, except paints and oils; cement-waterproofing chemicals, except paints; ceramic compositions for sintering [granules and powders]; ceramic glazings; ceramic materials in particulate form, for use as filtering media; cerium; chemical additives for oils;

chemical coatings for ophthalmic lenses; chemical condensation preparations; chemical intensifiers for paper; chemical intensifiers for rubber; chemical preparations for facilitating the alloying of metals; chemical preparations for scientific purposes, other than for medical or veterinary use; chemical preparations for smoking meat; chemical preparations for use in photography; chemical preparations to prevent diseases affecting cereal plants; chemical preparations to prevent diseases affecting vine plants; chemical preparations to prevent mildew; chemical preparations to prevent wheat blight / chemical preparations to prevent wheat smut; chemical reagents, other than for medical or veterinary purposes; chemical substances for analyses in laboratories, other than for medical or veterinary purposes / chemical preparations for analyses in laboratories, other than for medical or veterinary purposes; chemical substances for preserving foodstuffs; chemicals for the manufacture of paints; chemicals for the manufacture of pigments; chemicals for use in forestry, except fungicides, herbicides, insecticides and parasiticides; chemicals, except pigments, for the manufacture of enamel; chimney cleaners, chemical; chlorates; chlorides; chlorine; cholic acid; chromates; chrome alum; chrome salts; chromic acid; chromic salts; chromium oxide; cinematographic film, sensitized but not exposed / cinematographic films, sensitized but not exposed; citric acid for industrial purposes; clarification preparations / purification preparations; coal saving preparations; cobalt oxide for industrial purposes; collagen for industrial purposes; collodion; colour-brightening chemicals for industrial purposes / color-brightening chemicals for industrial purposes; combusting preparations [chemical additives to motor fuel]; compositions for repairing inner tubes of tyres / compositions for repairing inner tubes of tires; compositions for repairing tyres / compositions for repairing tires; compositions for the manufacture of phonograph records; compositions for the manufacture of technical ceramics; compositions for threading; compost; concrete preservatives, except paints and oils; concrete-aeration chemicals; condensation-preventing chemicals; conductive adhesives; conductive resins, unprocessed; coolants for vehicle engines; corrosive preparations; cream of tartar for chemical purposes; cream of tartar for industrial purposes; cream of tartar for the food industry; creosote for chemical purposes; crotonic aldehyde; cryogenic preparations; cultures of microorganisms, other than for medical and veterinary use; curium; currying preparations for leather; currying preparations for skins; cyanides [prussiates] / prussiates; cymene; damp-proofing chemicals, except paints, for masonry; decolorants for industrial purposes / bleaching preparations [decolorants] for industrial purposes; defoliants; degreasing preparations for use in manufacturing processes / grease-removing preparations for use in manufacturing processes; dehydrating preparations for industrial purposes; dendrimer-based polymers for use in the*

manufacture of capsules for pharmaceuticals; descaling preparations, other than for household purposes; detergent additives to petrol / detergent additives to gasoline; detergents for use in manufacturing processes; dextrin [size]; diagnostic preparations, other than for medical or veterinary purposes; diagnostic strips for testing breast milk, other than for medical or veterinary use; diastase for industrial purposes; diatomaceous earth; diazo paper; disincrustants; dispersions of plastics; distilled water; dolomite for industrial purposes; drilling muds; dry ice [carbon dioxide]; dysprosium; electrophoresis gels; emollients for industrial purposes; emulsifiers; enamel-staining chemicals; engine-decarbonising chemicals / chemical preparations for decarbonising engines; enzyme preparations for industrial purposes; enzyme preparations for the food industry; enzymes for industrial purposes; enzymes for the food industry; epoxy resins, unprocessed; erbium; esters; ethane; ethers*; ethyl alcohol; ethyl ether; europium; expanded clay for hydroponic plant growing [substrate]; fat-bleaching chemicals; fatty acids; ferments for chemical purposes; fermium; ferrocyanides; ferrotype plates [photography]; fertilizers / fertilisers; fertilizing preparations / fertilising preparations; filtering materials of chemical substances; filtering materials of mineral substances; filtering materials of unprocessed plastics; filtering materials of vegetable substances; filtering preparations for the beverages industry; finishing preparations for use in the manufacture of steel; fire extinguishing compositions; fireproofing preparations; fish meal fertilizers / fish meal fertilisers; fissionable chemical elements; fissionable material for nuclear energy; fixing baths [photography]; fixing solutions [photography]; flashlight preparations; flavonoids [phenolic compounds] for industrial purposes; flocculants; flour for industrial purposes; flower preservatives; flowers of sulfur for chemical purposes; fluids for hydraulic circuits / liquids for hydraulic circuits; fluorine; fluorspar compounds; formic acid; formic aldehyde for chemical purposes; foundry binding substances; foundry moulding preparations / foundry molding preparations; foundry sand; francium; fuel for nuclear reactors; fuel-saving preparations; fuller's earth for use in the textile industry; fulling preparations; fulling preparations for use in the textile industry; gadolinium; gallic acid for the manufacture of ink; gallium; gallnuts; gallotannic acid; galvanizing baths / baths for galvanizing; galvanizing preparations; gambier; gas purifying preparations / preparations for the purification of gas; gelatine for industrial purposes; gelatine for photographic purposes; genes of seeds for agricultural production; getters [chemically active substances]; glass-frosting chemicals; glass-staining chemicals; glaziers' putty; glucose for industrial purposes; glucose for the food industry; glucosides; glue for industrial purposes; glutamic acid for industrial purposes; gluten [glue], other than for stationery or household purposes; gluten for industrial purposes; gluten for the food industry; glutinous tree-grafting*

preparations / glutinous preparations for tree-banding / glutinous preparations for tree-grafting / glutinous tree-banding preparations; glycerides; glycerine for industrial purposes; glycol; glycol ether; gold salts; grafting mastic for trees; grafting wax for trees; graphene; graphite for industrial purposes; guano; gum arabic for industrial purposes; gum solvents / degumming preparations; gum tragacanth for industrial purposes; gums [adhesives] for industrial purposes; gurjun balsam for use in the manufacture of varnish; gypsum for use as a fertilizer; heavy water; helium; holmium; hormones for hastening the ripening of fruit; horticultural chemicals, except fungicides, herbicides, insecticides and parasiticides; humus; humus top dressing; hydrates; hydrazine; hydrochlorates; hydrochloric acid; hydrofluoric acid; hydrogen; hydrogen peroxide for industrial purposes; hypochlorite of soda; hyposulfites; industrial chemicals; iodic acid; iodine for chemical purposes; iodine for industrial purposes; iodised albumen; iodised salts; ion exchangers [chemicals]; iron salts; isinglass, other than for stationery, household or alimentary purposes; isotopes for industrial purposes; kainite; kaolin / china clay / china slip; ketones; kieselgur; krypton; lactic acid; lactose [raw material]; lactose for industrial purposes; lactose for the food industry; lamp black for industrial purposes; lanthanum; lead acetate; lead arsenate; lead oxide; leather glues; leather-dressing chemicals; leather-impregnating chemicals; leather-renovating chemicals; leather-waterproofing chemicals; lecithin [raw material]; lecithin for industrial purposes; lecithin for the food industry; lime acetate; lime carbonate; lime chloride; limestone hardening substances; liquids for removing sulfates from batteries / liquids for removing sulfates from accumulators; lithia [lithium oxide]; lithium; litmus paper; loam; lye water for the food industry; magnesite; magnesium carbonate; magnesium chloride; magnetic fluid for industrial purposes; malt albumen; manganate; manganese dioxide; mangrove bark for industrial purposes; masonry preservatives, except paints and oils; mastic for leather; mastic for tyres / mastic for tires; meat tenderizers for industrial purposes; mercuric oxide; mercury; mercury salts; metal annealing preparations; metal hardening preparations; metal tempering preparations; metalloids; methane; methyl benzene; methyl benzol; methyl ether; milk ferments for chemical purposes; milk ferments for industrial purposes; milk ferments for the food industry; mineral acids; moderating materials for nuclear reactors; moistening [wetting] preparations for use in bleaching / wetting preparations for use in bleaching; moistening [wetting] preparations for use in dyeing / wetting preparations for use in dyeing; moistening [wetting] preparations for use in the textile industry / wetting preparations for use in the textile industry; mordants for metals; mould-release preparations / mold-release preparations; must-fining preparations; nanopowders for industrial purposes; naphthalene; neodymium; neon; neptunium; nitrate paper; nitrates; nitric acid; nitrogen;

nitrogenous fertilizers / nitrogenous fertilisers; nitrous oxide; oenological bactericides [chemical preparations for use in wine making]; oil cement [putty]; oil dispersants; oil-bleaching chemicals; oil-purifying chemicals; oils for currying leather; oils for preparing leather in the course of manufacture; oils for tanning leather; oils for the preservation of food; oil-separating chemicals; oleic acid; olivine [silicate mineral]; opacifiers for enamel; opacifiers for glass; organic digestate [fertilizer] / organic digestate [fertiliser]; oxalates; oxalic acid; oxygen for industrial purposes; palladium chloride; paper pulp; paste fillers for automobile body repair / paste fillers for car body repair; peat [fertilizer] / peat [fertiliser]; peat pots for horticulture; pectin [photography]; pectin for industrial purposes; pectin for the food industry; perborate of soda; percarbonates; perchlorates; persulfates; persulfuric acid; petroleum dispersants; phenol for industrial purposes; phosphates [fertilizers] / phosphates [fertilisers]; phosphatides; phosphoric acid; phosphorus; photographic developers; photographic emulsions; photographic paper; photographic sensitizers; photometric paper; photosensitive plates; picric acid; plant extracts for use in the manufacture of cosmetics; plant extracts for use in the manufacture of food / plant extracts for the food industry; plant extracts for use in the manufacture of pharmaceuticals; plant growth regulating preparations; plasticizers; plastics, unprocessed; plastisols; plutonium; polish removing substances / substances for removing polish; polonium; polymer resins, unprocessed; potash; potash water; potassium; potassium dioxalate; potato flour for industrial purposes; potting soil; power steering fluid; praseodymium; preparations for preventing the tarnishing of glass; preparations for preventing the tarnishing of lenses; preparations for stimulating cooking for industrial purposes; preparations for the separation of greases; preparations of microorganisms, other than for medical and veterinary use; preparations of the distillation of wood alcohol; preparations of trace elements for plants; preservatives for tiles, except paints and oils; preservatives for use in the pharmaceutical industry; promethium; propellant gases for aerosols; protactinium; protective gases for welding; protein [raw material]; proteins for the food industry; proteins for use in manufacture; proteins for use in the manufacture of food supplements; pyrogalllic acid; quebracho for industrial purposes; radiator flushing chemicals; radioactive elements for scientific purposes; radium for scientific purposes; radon; rare earths; reagent paper, other than for medical or veterinary purposes; reducing agents for use in photography; refrigerants; renovating preparations for phonograph records; rhenium; rock salt; rubber preservatives; rubidium; saccharin; sal ammoniac; sal ammoniac spirits; salicylic acid; salt for preserving, other than for foodstuffs; salt, raw; saltpeter / salpetre; salts [chemical preparations]; salts [fertilizers] / salts [fertilisers]; salts for colouring metal / salts for coloring metal; salts for galvanic cells / salts for galvanic batteries; salts for

industrial purposes; salts from rare earth metals; salts of alkaline metals; salts of precious metals for industrial purposes; samarium; sauce for preparing tobacco; scandium; seawater for industrial purposes; seaweeds [fertilizers] / seaweeds [fertilisers]; sebacic acid; seed preserving substances; selenium; self-toning paper [photography]; sensitized cloth for photography; sensitized films, unexposed; sensitized paper; sensitized photographic plates; sensitized plates for offset printing; separating and unsticking [ungluing] preparations / ungluing preparations / unsticking and separating preparations; silicates; silicon; silicon carbide [raw material]; silicones; silver nitrate; silver salt solutions for silvering; size for finishing and priming; size for use in the textile industry; sizing preparations; slag [fertilizers] / slag [fertilisers]; soap [metallic] for industrial purposes; soda ash; sodium; sodium salts [chemical compounds]; soil conditioning preparations; soil for growing; soldering chemicals / welding chemicals; soldering fluxes; solidified gases for industrial purposes; solutions for cyanotyping; solvents for varnishes; soot for industrial or agricultural purposes; sorrel salt; spinel [oxide mineral]; spirits of salt; spirits of vinegar [dilute acetic acid]; stain-preventing chemicals for use on fabrics; starch for industrial purposes; starch paste [adhesive], other than for stationery or household purposes; starch-liquifying chemicals [ungluing agents] / ungluing agents [chemical preparations for liquifying starch]; stearic acid; stem cells, other than for medical or veterinary purposes; strontium; substances for preventing runs in stockings; substrates for soil-free growing [agriculture]; sulfates; sulfides; sulfonic acids; sulfur; sulfuric acid; sulfuric ether; sulfurous acid; sumac for use in tanning; superphosphates [fertilizers] / superphosphates [fertilisers]; synthetic materials for absorbing oil; synthetic resins, unprocessed / artificial resins, unprocessed; talc [magnesium silicate]; tan; tannic acid; tannin; tanning substances; tan-wood; tapioca flour for industrial purposes; tartar, other than for pharmaceutical purposes; tartaric acid; tea extracts for the food industry; tea extracts for use in the manufacture of cosmetics; tea extracts for use in the manufacture of pharmaceuticals; technetium; tellurium; tensio-active agents / surface-active chemical agents; terbium; test paper, chemical; tetrachlorides; textile-brightening chemicals; textile-impregnating chemicals; textile-waterproofing chemicals; thallium; thermal paste; thiocarbanilide; thorium; thulium; thymol for industrial purposes; titanite; titanium dioxide for industrial purposes; toluol / toluene; toning baths [photography]; toning salts [photography]; topsoil; toxic gas neutralizers; transmission fluid; transmission oil; tree cavity fillers [forestry]; tungstic acid; uranium; uranium nitrate; uranium oxide; vinic alcohol; viscose; vitamins for the food industry; vitamins for use in the manufacture of cosmetics; vitamins for use in the manufacture of food supplements; vitamins for use in the manufacture of pharmaceuticals; vulcanization accelerators; vulcanizing preparations;

wallpaper removing preparations; water glass [soluble glass]; water-purifying chemicals; water-softening preparations; wax-bleaching chemicals; wine finings; witherite; wood alcohol; wood pulp; wood vinegar [pyroligneous acid] / pyroligneous acid [wood vinegar]; xenon; X-ray films, sensitized but not exposed; xylene; xylol; yeast for scientific purposes; yeast for use in biofuel production; ytterbium; yttrium; zirconia. (sic.)

Class 11

Water treatment equipment, namely, devices connected to a water distribution line, which automatically injects a predetermined proportion of fertilizer into an irrigation system used by a greenhouse complex; Water treatment equipment, namely, fertilizer injection devices which connect to a water distribution line, which automatically injects a predetermined proportion of fertilizer into an irrigation system used by a greenhouse complex; Water treatment equipment, namely, fertilizer injection units, namely, devices connected to a water distribution line, which automatically injects a predetermined proportion of fertilizer into an irrigation system used by a greenhouse complex.

Class 42

Chemical analysis; chemical research.

16. In *Gérard Meric v OHIM*, Case T-133/05, the General Court (“GC”) stated that:

“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 für 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”.²

My approach

17. The specification of contested goods as applied for in Class 1 is particularly unwieldy. The opponent has opposed all of the class 1 goods, and it has provided a

² Paragraph 29

table comparing some of the terms at issue, being those it considers to be either identical or highly similar to the goods relied upon. However, it has not made a full comparison of every term and it seems clear to me that not all the terms will be considered similar. That being said, I note that the applicant's specification includes "*fertilizers / fertilisers*" which are self-evidently identical to the opponent's "*Fertilizers*" (Mark 1) and "*fertilizing preparations*" (Mark 2). There are other terms within the contested specification, for example "*chemical preparations to prevent diseases affecting cereal plants*", which would be encompassed by the opponent's broad term "*Chemicals for agricultural uses*" (Mark 1) and "*Chemical products for agricultural use*" (Mark 2), and as such are identical as per the principle outlined in *Meric*.

18. I do not intend to undertake a full comparison of the competing goods and services at this stage of the decision, but I will instead proceed on the basis that at least some of the contested goods are identical to those covered by the earlier marks. If the opposition fails even where the goods are identical, it follows that the opposition will also fail where the goods and services are only similar. However, if a likelihood of confusion is found, I will proceed to assess the goods and services at issue in full.

19. The opponent's earlier marks are each registered/protected for the identical word mark "ENERGEO". From here on in I will refer to "the opponent's mark" in the singular, however my subsequent findings will be the same for both the UK registration and the UK designation.

The average consumer and the nature of the purchasing act

20. The average consumer is a legal construct, deemed to be reasonably well informed and reasonably circumspect: see *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), paragraph 60. 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, at [26].

21. The goods relied upon by the opponent under the earlier mark are chemicals for agriculture, various fertilising preparations and manure.

22. I agree with the opponent's submissions that the average consumer for the overlapping goods in class 1 will most likely be both the general public and a specialist public. I further consider that the opposed goods and services in classes 11 and 42 are likely to be targeted towards a professional user, which will include consumers within the industries of agriculture and horticulture.

23. In my view, the goods at issue are likely to be provided through garden centres, via general DIY/garden stores, and through specialist suppliers, which may be procured online, through tele-sales, or in bricks and mortar stores. I consider the selection of the goods will be a predominantly visual one, although aural considerations will play a part. Considerations during selection of the goods will include the suitability of the product for the consumers' individual requirements, i.e. the type of chemical or fertilizer most befitting the consumer's particular needs, as well as cost. I would expect the degree of attention paid by the general public to the selection of the goods to be medium. The requirements of the professional consumer are likely to be more specific and they will want to ensure that they select the most appropriate product as the consequences of not doing so could be costly, having an adverse effect on their yield and their business reputation as a whole. They will therefore pay a high degree of attention to the selection of the overlapping goods and services.

Comparison of marks

24. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated 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.”³

25. 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.

26. I note the opponent’s submissions on the degree of similarity between the marks and its reference to an earlier decision of this Tribunal, being the *GATTACA* trade mark case which it considers analogous to the case before me.⁴ I acknowledge the submissions made, however, I am not bound by previous findings of the Tribunal, and I draw my own conclusions on the similarity of the marks before me, as rationalised in the following paragraphs.

27. The respective trade marks each consist of a single word: “**ENERGEO**” vs “**ENERJO**”. Both marks are presented in capital letters in a standard black typeface, with no other elements to contribute to the overall impression. The overall impression of each of the marks therefore rests in the word itself.

28. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginning of words tend to have more visual and aural impact than the ends, however, I accept that this is not always the case. Meanwhile, in *dm-drogerie markt GmbH & Co. KG v OHIM*, Case T-304/10, the GC noted that in the case of word signs which are relatively short, the differences between marks of different lengths will be more easily grasped by the average consumer.⁵

29. Visually, the competing marks are both single words of seven and six letters in length, respectively. They share in common five of those letters, with the first four letters E N E R placed in the same position within each word, and both having the

³ Paragraph 34

⁴ Points 17-31 of the opponent’s written submissions dated 5 October 2023.

⁵ At [42].

letter O as the last letter. However, the words are disrupted by the letters “GE” which follow the first four letters in the opponent’s mark, and the letter “J” which follows the first four letters in the applicant’s mark. The words are relatively short, and while the variance between the marks is subsumed in the body of the words, it creates a notable visual difference between the marks as a whole. Overall, I find there to be a medium degree of visual similarity between them.

30. Aurally, the opponent’s mark would be articulated as four syllables, EN-UH-GEE-OH, while the applicant’s mark will be articulated as three syllables, EN-UH-JOH, meaning aural commonality between the first two syllables only of the competing marks. Overall, I consider the marks to be aurally similar to a medium degree.

31. With regard to conceptual comparison, in *Luciano Sandrone v European Union Intellectual Property Office (EUIPO)*, Case T-268/18, the GC held:

“... In that regard, it must be borne in mind that the purpose of the conceptual comparison is to compare the ‘concepts’ that the signs at issue convey. The term ‘concept’ means, according to the definition given, for example, by the Larousse dictionary, a ‘general and abstract idea used to denote a specific or abstract thought which enables a person to associate with that thought the various perceptions which that person has of it and to organise knowledge about it.”⁶

32. In *Usinor SA v OHIM*, Case T-189/05, the GC found that:

“62. ... it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Lloyd Schuhfabrik Meyer, paragraph 25), **he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him** (Case T-356/02 Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT) [2004] ECR II-3445,

⁶ Paragraph 8.

paragraph 51, and Case T-256/04 Mundipharma v OHIM – Altana Pharma (RESPICUR) [2007] ECR II-0000, paragraph 57).” **(My emphasis)**

33. Both marks are invented words. I note the opponent’s submissions that as such, the conceptual comparison is neutral. In my view, the consumer is likely to see the opponent’s mark “ENERGEO” as a play on the dictionary defined word “ENERGY”, particularly as they share the first five letters, “ENERG”, and further, the first three syllables of “ENERGEO” would be articulated in the same way as the common word energy as a whole. I also take into account the applicant’s submission that the “GEO” element of the opponent’s mark denotes “of or relating to earth”.⁷ I acknowledge the opponent’s submissions that this requires a level of analysis that the average consumer will not undertake, however, in this particular instance, I disagree with the opponent.

34. Therefore, bearing in mind the findings of *Usinor* and *Luciano Sandrone*, each cited above, it is the concepts of ‘energy’ and “earth” which will be conveyed by the opponent’s mark. I consider that the contested mark will be seen as an invented word with no such recognisable conceptual content. The competing marks are therefore conceptually dissimilar. If I am wrong in this, and the consumer would also perceive the letters “ENER” in the word “ENERJO” as alluding to energy, the marks as a whole are conceptually similar to a medium degree.

Distinctive character of the earlier mark

35. 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 – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. The factors I must take into account in assessing the level of distinctive character were set out by the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97:

⁷ As submitted in the applicant’s counterstatement.

“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).”

36. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. The opponent has not claimed that its mark has enhanced distinctiveness and no evidence of use has been filed. Therefore, I only have the inherent characteristics of the mark to consider.

37. The opponent submits that as a whole, the sign “ENERGEO” does not have any meaning and is highly distinctive as regards to the goods at issue. Although the opponent’s mark is an invented word, as I found earlier in this decision, I consider that the average consumer will see the mark as alluding to the word “ENERGY”. I also agree with the applicant that the “GEO” element is likely to be recognised as indicating earth. I therefore find the mark “ENERGEO” to be evocative of the goods, being chemicals for agriculture, fertilisers and manure, which ‘feed’ energy to the land or earth on which they are used. Overall, I consider the earlier mark to be inherently distinctive to a medium degree.

Likelihood of confusion

38. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 services and vice versa (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

39. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings. The distinction between these was explained by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

“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.”

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even

where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

40. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

41. As explained earlier in this decision, I have proceeded on the basis that at least some of the competing goods were identical. I found the level of attention of the general public as the average consumer to be medium, while the professional consumer would pay a high degree of attention to the selection of the overlapping goods and services during the purchasing process. I considered that the goods and services would be selected by predominantly visual means, although aural considerations would play a part.

42. I found the competing marks to be visually and aurally similar to a medium degree, and to be conceptually dissimilar (with the proviso that if I were wrong in my analysis of the conceptual considerations, the marks were similar conceptually to a medium degree). I found the earlier mark to be inherently distinctive to a medium degree.

43. I have weighed up each of the competing factors in my decision, not least the differences as well as the similarities between the competing marks, as identified above. While allowing that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind, I consider it unlikely that they would mistake the applicant’s mark for the earlier marks. I bear in mind that in relation to the assessment of the likelihood of confusion, it is the section of the public with the lowest level of attention which must

be taken into consideration.⁸ In my view, the average consumer will notice and recall the visual, aural and conceptual differences between the marks, particularly taking into account the highly allusive elements of the earlier marks. I find this even though the differences between the opposing marks are found in the middle of the respective words. To my mind, given the length of the words, the differences stand out and will not be overlooked. Even if I am wrong in my assessment of the conceptual difference between the marks, I do not consider that this would affect the overall perception of the average consumer who would still recognise that the later mark is different from the earlier mark. Overall, I do not consider there to be any likelihood of direct confusion. I find this even where there is identity between the goods at issue.

44. Taking into account the previously outlined guidance of Mr Iain Purvis Q.C. (as he then was), in *L.A. Sugar*, I will now consider whether there might be a likelihood of indirect confusion. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

45. In *Liverpool Gin Distillery Ltd and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, Lord Justice Arnold referred to the comments of James Mellor QC (as he then was) sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said (at [16]) that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Lord Justice Arnold added that there must be "a proper basis" for concluding that there is a likelihood of indirect confusion when there is no likelihood of direct confusion.

46. I acknowledge that the categories listed by Mr Iain Purvis Q.C. (as he then was) are not exhaustive. I have made a multi-factorial assessment of the various considerations in play. The common element "ENER" at the beginning of the respective marks is not so strikingly distinctive that the consumer would assume that

⁸ Case T-247/12, *Argo Group International Holdings Ltd. v OHIM*.

only the opponent would be using it as part of its trade mark. While sight of one mark may bring to mind the other mark, and consumers may consider that the marks coincidentally begin with the same letters, it would be highly unusual for a company to rebrand its mark or launch a sub-brand by adopting a different name to the original, other than some overlap in letters. In my view, there would be no logical reason for consumers (either members of the public or those in the trade) to believe that there is an economic connection between the undertakings. I therefore find no likelihood of indirect confusion.

FINAL REMARKS

47. Earlier in this decision, I explained that I did not intend to undertake a full comparison of the competing goods and services, but I would instead proceed on the basis that at least some of the opposing goods were identical. In light of my findings of no likelihood of confusion, it is unnecessary for me to return to undertake a comparison for the remaining goods and services as this would not improve the Opponent's position.

CONCLUSION

48. The applicant has been successful. Subject to any successful appeal, the application by Cashflow Corporation Ltd may proceed to registration in respect of all goods and services.

COSTS

49. As the applicant has been successful, it is, in principle, entitled to a contribution towards its costs. For parties without professional representation, such costs would be based on £19 per hour,⁹ reflecting the number of hours spent on the different stages of the opposition. In a letter to the parties dated 7 September 2023, the Tribunal invited the unrepresented applicant to indicate whether it wished to make a request for an award of costs and, if so, to complete and return the attached costs pro-forma by **5**

⁹ As set out in The Litigants in Person (Costs and Expenses) Act 1975 (as amended).

October 2023. The letter stated that “If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded. You must include a breakdown of the actual costs, including accurate estimates of the number of hours spent on each of the activities listed and any travel costs”. As the pro-forma was not returned, and as no official fees have been incurred in defence of the application, I make no order as to costs in this case.

Dated this 3rd day of May 2024

Suzanne Hitchings
For the Registrar,
the Comptroller-General