

O/0636/26

TRADE MARKS ACT 1994

IN THE CONSOLIDATED MATTERS OF:

UK TRADE MARK APPLICATION NOs. 3578078 & 3578087

IN THE NAME OF CHIRON BEHRING VACCINES PVT. LTD.:

CHIRON
BEHRING

&

Chiron Behring

IN CLASSES 5, 35 AND 42

AND OPPOSITIONS THERETO UNDER NOs. 424684 & 424685

BY CSL BEHRING L.L.C.

AND

UK TRADE MARKS REGISTERED IN THE NAME OF CSL BEHRING L.L.C.



No. 1221256

(Class 1)

No. 1221257

(Class 5)

No. 1221258

(Class 9)

AND REVOCATION APPLICATIONS NOs. 506356, 506358 AND 506357

BY CHIRON BEHRING VACCINES PVT. LTD

BACKGROUND AND PLEADINGS

1. This Decision deals with Oppositions brought by CSL Behring L.L.C (“**the Opponent**”) against two trade mark applications by Chiron Behring Vaccines Pvt. Ltd. (“**the Applicant**”), and with applications by the Applicant to revoke, for non-use, three earlier trade mark registrations relied on in the Oppositions.
2. The standing of the three earlier marks cannot be determinative of the Oppositions, since even should they be revoked, the Opponent relies on an additional trade mark registration that is not subject to proof of use, as well as on a claim of unregistered rights.
3. The Applicant’s trade mark applications are these:

No. 3578078: 	Filing date: 12 January 2021 Goods and services: Class 5: <i>Pharmaceutical preparations; vaccine formulations.</i> Class 35: <i>Advertising; business management; business administration; office functions.</i>
No. 3578087: “Chiron Behring”	Class 42: <i>Scientific and technological services; research and development services.</i>

4. The Oppositions were filed on 26 May 2021, both based on grounds under **Sections 5(2)(b), 5(3) and 5(4)(a)** of the Trade Marks Act 1994 (“**the Act**”). Each ground is directed against all of the Applicant’s goods and services. The Opponent filed a Form TM7G on 3 May 2023, seeking to add, in support of its claims, a further registered trade mark and an unregistered sign. Following a case management conference, I allowed the requested additional reliance on UK Trade Mark Registration No. 3599672 for the section 5(2)(b) and 5(3) claims, and on the plain word sign CSL Behring in respect of “*Pharmaceutical and veterinary preparations and substances; Diagnostic*

preparations and substances, all for in vivo use.” Details of the Opposition claims are set out below.

5. Under **section 5(2)(b)**, the Opponent claims:

- (i) that the applied-for marks – being the plain words CHIRON BEHRING, and the same words where CHIRON (in RED) sits atop BEHRING (in green) - are similar to the Opponent’s earlier mark under registrations Nos. 1221256, 1221257 and 1221258 (“**the Figurative Mark(s)**”), which, in all three of those registrations, is this mark:



- (ii) that the applied-for marks are similar to the mark registered under No. 3599672 for the plain word mark “CSL BEHRING” (“**the CSL Word Mark**”). The CSL Word Mark was filed on 23 February 2021, but claims a priority date of 25 September 2019, based on EUTM No. 018128369. It became registered on 27 May 2022);
- (iii) that the goods and services applied-for (in Classes 5, 35 and 42 as shown in the table above) are identical or similar to goods and services variously specified under the four earlier marks;
- (iv) that the similarity of marks and of the goods and services gives rise to a likelihood of confusion on the part of the consumer as to the source of the goods or services, including a likelihood of association with the earlier marks.

6. The Opponent’s three Figurative Marks had been registered for more than five years at the filing date of the Applicant’s marks (12 January 2021 – “**the Relevant Date**”) and are therefore subject to the use provisions under Section 6(A) of the Act. In its Forms TM7 Notices of Opposition, the Opponent stated that the Figurative Marks had been used in the five-year period ending on the Relevant Date in respect of all of the registered goods or services relied on. The goods and services of the earlier marks relied on for the claims under Sections 5(2)(b) and 5(3) are set out later in this Decision.

7. Under **Section 5(3)**, the claims are that the Opponent's earlier trade marks had a reputation in the UK in respect of the goods and services relied on and that use of the Applicant's trade marks, without due cause, would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the Opponent's trade marks.
8. **Section 5(4)(a)** is based on the Opponent's claimed entitlement to unregistered trade mark rights, resulting from use in the course of trade throughout the UK, since 2007, of the plain word sign "CSL Behring" in respect of "*Pharmaceutical and veterinary preparations and substances; Diagnostic preparations and substances, all for in vivo use*", such that the Opponent acquired goodwill and that use of the Applications were liable to be prevented by virtue of the law of passing off.

Applicant's defence

9. Following a period of cooling off, the Applicant submitted notices of defence, including counterstatements denying all elements of all of the grounds of opposition. The Applicant requested proof of use of the three Figurative Marks.

The Revocation Applications

10. On 27 July 2024 the Applicant applied to revoke the registrations of the Figurative Marks, all three of which were filed and registered on 21 June 1984 in respect of goods as follows:
 - (i) No. 1221256:
Class 1: *Chemical products for use in science; chemical products for use in diagnosis and chemical test reagents for laboratory use, all for in vitro use*
 - (ii) No. 1221257
Class 5: *Pharmaceutical and veterinary preparations and substances; diagnostic preparations and substances, all for in vivo use*
 - (iii) No. 1221258
Class 9: *Scientific, measuring and electrical control apparatus; laboratory and analytical apparatus and instruments, all included in Class 9; parts and fittings included in Class 9 for all the aforesaid goods*

11. The Applicant contends that the Figurative Marks had not been put to genuine use in the UK in respect of any of the goods in those classes during the following five-year periods (“**the Relevant Periods**”).

(i) 22 June 1984 – 21 June 1989

(ii) 11 January 2016 – 10 January 2021

The Applicant claims that the registrations should accordingly be revoked on the grounds on non-use under Section 46(1)(a) and 46(1)(b) of the Act as from 22 June 1989 or 11 January 2021.

Defence and consolidation

12. The Opponent (as Proprietor of the three Figurative Mark Registrations) filed Forms TM8(N) defending the revocation actions, claiming genuine use of the Figurative Mark in respect of the goods under each of the Registrations. At the request of the Applicant, the opposition and revocation proceedings were consolidated.

Representation, papers filed and hearing

13. The Applicant is represented by Potter Clarkson; the Opponent by Baker McKenzie.

14. During the evidence rounds, the Opponent filed evidence in support of its opposition claims, and (as Proprietor) in defence of the non-use revocation attacks. The Applicant filed evidence in reply to the Proprietor’s revocation evidence. The evidence consisted of the following:

(i) The Opponent’s evidence in the opposition cases:

(First) Witness Statement of Frank Schöne-de la Nuez (“FSNWS1”), dated 13 March 2023, with **Exhibits FS1 – FS18**;

(ii) The Opponent/Proprietor evidence in the revocation cases:

Second Witness Statement of Frank Schöne-de la Nuez (“FSNWS2”), dated 8 February 2024 with **Exhibits FS1 – FS25**;

(iii) The Applicant’s evidence in reply to **FSNWS2** comprising a **Witness Statement of Sai Prasad Devarajulu**, dated 13 April 2024 **SPD1 – SPD8**.

15. The Opponent requested an oral hearing, which took place before me by video conference on 9 September 2024. Kerri Ann Hazzard (with Nadine Archer) of Baker McKenzie attended for the Opponent. Ms Hazzard filed a skeleton argument in advance of the oral hearing, and the Applicant, in lieu of attending the oral hearing, filed submissions. I found both contributions very helpful. This decision is taken based on my close reading of the papers filed and submissions made at the oral hearing.

RELEVANCE OF EU LAW

16. 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.

THE OPPOSITIONS - STATUTORY PROVISIONS

17. Sections of the Act applicable to the claimed opposition grounds are set out below:

Section 5 Relative grounds for refusal of registration.

(1) [...]

(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”.

(3) A trade mark which is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

(3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.]

(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented—

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

....

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.

(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.

5A Grounds for refusal relating to only some of the goods or services

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.

MY APPROACH IN THIS DECISION

18. Since all four of the Opponent’s trade marks were filed before the Relevant Date, each constitutes an “earlier trade mark” for the purposes of section 5.¹
19. With regard to the Opponent’s **CSL Word Mark**, since it had been registered for less than five years at the Relevant Date, the use conditions set out in section 6A of the Act are not engaged and the Opponent may rely on all of its claimed goods and services without having to show any use of the CSL Word Mark. Nonetheless, the Section 5(3) ground requires evidence of use to bear out the Opponent’s claimed reputation for

1 Section 6 of the Act.

those same goods and services. Additionally, the Section 5(4)(a) ground requires evidence of relevant actionable goodwill associated with the same unregistered sign in relation to *Pharmaceutical and veterinary preparations and substances; Diagnostic preparations and substances, all for in vivo use*.

20. With regard to the three Figurative Mark registrations, as noted previously, they are subject to proof of use in the five-year period ending on the Relevant Date (12 January 2021). The Figurative Marks also face applications for revocation on grounds of non-use in the five-year periods up to 22 June 1989 and 11 January 2021.
21. At the hearing, Ms Hazzard stated that the Opponent's strongest case rested on the CSL Word Mark, where the respective goods and services are claimed to be identical or similar or complementary. In the circumstances, I shall first consider the opposition based on the CSL Mark. I will then consider evidence of use in dealing with the applications for revocation of the Figurative Marks.

SECTION 5(2)(b)

22. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor* [2025] UKSC 25:
 - 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 they have kept in their 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, in certain circumstances, be dominated by one or more of its components;
- f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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; and
- 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 the goods and services

23. It is settled case law that I must make my comparison of the services on the basis of all relevant factors. These include the nature of the services, their purpose, their users

and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary;² services are complementary when “... 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.”³ It is also established case law that where goods or services in the specification of one party’s mark are included in a broader term from the other party’s specification, those goods or services are considered to be identical.⁴

24. The goods and services to be compared are these:

Applied-for goods
Class 5: <i>Pharmaceutical preparations; vaccine formulations</i>
Opponent’s CSL Word Mark goods relied on
Class 5: <u>Pharmaceutical preparations</u> and substances; none of the aforesaid goods being for the gut-brain-skin axis application, and / or alimentary tract wellbeing and/or prevention and treatment of digestive system diseases, and / or prevention and treatment of urogenital tract diseases, and / or skin nutrition, protection and treatment; blood plasma; blood products in this class; products derived from blood and products derived from recombinant DNA technology; <u>vaccines</u> ; serums; antibodies; monoclonal antibodies; reagent red blood cells; test kits in this class; diagnostic products in this class.
Applied-for services
Class 35: <u>Advertising</u> ; business management; business administration; office functions.

² See *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296].

³ Per the General Court in *Boston Scientific Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06 at paragraph 82.

⁴ See *Gérard Meric v OHIM*, Case T-133/05, paragraph 29.

CSL Word Mark services
Class 35: <u>Advertising</u>; marketing and promotion services; services in this class related to the manufacture, marketing and distribution of pharmaceutical products and medical products and supplies; retail and wholesale services including retail and wholesale services for pharmaceutical products and medical products and supplies, veterinary and sanitary preparations and medical supplies; design of marketing material; marketing advisory services; planning of marketing strategies; preparation of marketing plans; provision of information relating to advertising, marketing, and promotion services; provision of information relating to wholesale and retail services.
Applied-for services
Class 42: <i>Scientific and technological services; research and development services.</i>
Class 42: <u>Scientific and technological services; research and development services</u>, including scientific, medical, pharmaceutical and blood products research and development services; industrial analysis; clinical trials; conducting clinical trials; provision of testing facilities; rental of research facilities; laboratory analysis and research; management of scientific research projects; preparation of technical studies, technical reports, scientific reports; management of scientific research projects, preparation of scientific and medical research projects, preparation of statistics or reports relating to scientific and medical research; provision of research services and facilities, provision of research results, information and outcomes; provision of information relating to the aforementioned services; advisory and consultancy services relating to the aforementioned services; dissemination of information relating to the aforementioned services over a global computer network; medical laboratory services, namely, scientific testing and screening services, namely, testing of human blood plasma for safety and quality; medical laboratory services regarding human blood plasma.

25. The Opponent's goods and services underlined and in bold in the table above, are self-evidently **identical** to the applied-for goods and services; as such, only the following services remain for comparison:

business management; business administration; office functions.

26. The Opponent submitted that these applied-for services are “similar to at least a moderate to low degree with the Opponent’s Class 35 services in view of their complementarity.” It argued that “to the extent that the services were offered by different entities, such entities are likely to be in direct or closely aligned competition with one another.” It submitted that the same is true for the Class 42 services and Class 5 goods, which it submitted are also complementary. The Opponent concluded that if the Applicant were permitted to use the contested UK trade mark applications “the average consumer would likely encounter both the Applicant and the Opponent's use due to the overlap in trade channels and the identical industry in which they operate.” In the submission of the Applicant, however, “business management”; “business administration” and “office functions” are services that differ completely in their nature, intended purpose and end users and should therefore not be considered similar to the Opponent’s Class 35 services. It adds that “in any case, the differences between the distinctive elements in the marks at issue (i.e., “Chiron” and “CSL”) sufficiently mitigate any chance of confusion occurring in the marketplace.”

27. I consider first the question of similarity in respect of *business management* based on the Opponent's earlier mark's *advertising; marketing advisory services; planning of marketing strategies; preparation of marketing plans; provision of information relating to advertising, marketing, and promotion services*. The Opponent referred to first instance decisions of the EUIPO.⁵ While not binding case law by any means, as the Applicant notes, their reasoning and outcome may still be considered. In the present case, I happen to agree with the account considering similarity in respect of *business management* as follows.

28. The Decisions note that the marketing and advertising services specified under the CSL Word Mark consist essentially of “providing others with assistance in the sale of their goods and services by promoting their launch and/or sale, or of reinforcing the

5 Oppositions B 003147091 and B 003147092

client's position in the market and acquiring competitive advantage through publicity. In order to fulfil this target, many different means and products might be used. These services are provided by specialised companies which study their client's needs and provide all the necessary information and advice for the marketing of their products and services, and create a personalised strategy regarding the advertising of their goods and services through newspapers, web sites, videos, the internet, etc. These services have the same purpose, namely to facilitate running a successful business. They may also have the same providers and relevant public."

29. I bear in mind that registered trade mark specifications should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise;⁶ when assessing the similarity of services, it is important to focus on their core and not to give an overly broad construction. There are more facets to *business management* services than consideration of marketing approaches, but planning and advising on marketing and promotion of a business's goods or services may be considered to be a normal and important aspect of business management. I find there is at least a **low degree of similarity** between *business management* and the Opponent's Class 35 services.
30. I also note the EUIPO consideration of similarity in respect of *business administration* and *office functions*. The Decisions put it this way:

"... the contested *business administration* is a service intended to help companies with the performance of business operations and, therefore, the interpretation and implementation of the policy set by an organisation's board of directors. This kind of services consists of organising people and resources efficiently so as to direct activities toward common goals and objectives. They include activities such as personnel recruitment, payroll preparation, drawing up account statements and tax preparation, since these enable a business to perform its business functions and are usually carried out by an entity that is separate from the business in question. They are rendered by, inter alia, employment agencies, auditors and outsourcing companies. Moreover, the contested *office functions* are the internal day-to-day operations of an organisation, including the administration and support services in the 'back office'. They mainly cover activities that assist in the operation of a

6 *YouView Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J

commercial enterprise. They include activities typical of secretarial services, such as shorthand and typing, compilation of information in computer databases, invoicing, and administrative processing of purchase orders, as well as support services, such as the rental of office machines and equipment.

Therefore, *business administration* and *office functions* are dissimilar to the opponent's services in the same class, which are mainly advertising, marketing and promotional services and retail and wholesale of pharmaceutical and medical products, since they are provided by different undertakings to a different public through different distribution channels. Moreover, these services are not strictly complementary nor in competition. Their natures and purposes are not the same."

31. I agree with the above analysis and those conclusions and find that *business administration* and *office functions* are dissimilar to any of the Opponent's goods and services. The Opponent's goods in Class 5 and its science and technology services in Class 42 services offer no better points of comparison; they differ in nature, purposes and methods of use and do not target the same relevant public or share the same distribution channels; they are not complementary or in competition and are not usually produced or provided by the same undertakings.
32. **Outcome:** Since success under Section 5(2)(b) requires some similarity between the respective goods or services, the claim under Section 5(2)(b) fails insofar it relates to *business administration* and *office functions*.

Average consumer and the purchasing process

33. In *Iconix*, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

"16. First, the average consumer is both a legal construct and a normative benchmark. They are a legal construct in that consumers who are ill-informed or careless and consumers with specialised knowledge or who are excessively careful are excluded from consideration. They are a normative benchmark in that they provide a standard which enables the courts to strike a balance between the

various competing interests involved, including the interests of trade mark owners, their competitors and customers.

17. Secondly, the average consumer is neither a single hypothetical person nor some form of mathematical average, nor does assessment from the perspective of the average consumer involve a statistical test. They represent consumers who have a spectrum of attributes such as gender, age, ethnicity and social group. ... It follows that assessment from the perspective of the average consumer does not involve the imposition of a single meaning rule akin to that applied in defamation law (but not malicious falsehood). ... if having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, then a finding of infringement may properly be made.

18. Thirdly, assessing from the perspective of the average consumer is designed to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence. ...

19. Fourthly, the average consumer's level of attention varies according to the category of goods or services in question.

20. Fifthly, the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind."

34. The Applicant submitted that the average consumer differs markedly between each class of the contested goods and services and that the degree of attention by the relevant consumer will depend, *inter alia* on the nature of the relevant goods and services and the knowledge, experience and purchase involvement of the consumer. The Applicant's submissions are as follows:

- i. that the goods in Class 5 - *Pharmaceutical preparations; vaccine formulations* - are highly specialised goods and therefore, the relevant consumer for these goods are medical professionals and highly educated users. As such, the relevant consumer of the Class 5 goods is likely to have a higher degree of knowledge, experience and purchase involvement. Consequently, the relevant consumer, in this instance is likely to pay more attention when purchasing the goods and is more likely to notice differences in the names/signs of the commercial undertakings offering said goods.
 - ii. Similarly, the Class 42 services, being specialised scientific and technological and research and development means that the relevant consumer would likely be professionals within the scientific/medical industry, or industry as a whole. As such, again the relevant consumer of the Class 42 services is likely to pay a higher degree of attention when purchasing the services due to their higher level of knowledge experience and purchasing involvement.
 - iii. With regard to the Class 35 services - *Advertising; business management*; - these are not the kind of services which are highly specialised, and so there is likely to be a mixture of relevant consumers. Even so, it is settled case law that where there is a mixture of relevant consumers, it is the reasonably observant and circumspect general public that must be taken into account. Therefore, the 'reasonably observant and circumspect' general public would pay an average degree of attentiveness in relation to the contested services in Class 35.
35. I agree with the Applicant's submissions in respect of the Class 42 services – **a higher level of attention** applies to the typical (average) consumer of those specialised services. I also largely accept the submissions with regard to the Class 5 goods, though it seems to me that the average consumer for pharmaceutical preparations could include a member of the public where the goods may, for example, be non-prescription and inexpensive, such as an aspirin. In such cases, the level of attention may be **medium**. In my view, the Class 35 services for which I have found similarity - *Advertising; business management* – are quite specialist, where the average consumer will typically be a business user and that at least **a medium degree** of attentiveness will be paid in the selection of those services.

36. The purchasing process is likely to be visual as the consumer will choose a supplier after looking through printed promotional literature or websites or will see the mark on the packaging of the goods. The average consumer may also receive word-of-mouth recommendations, so the aural element of the mark may also be relevant.

Comparison of marks

37. It is established case law that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case law 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.⁷ The CJEU stated in *Bimbo SA v OHIM*, Case C-519/12 P, that: “34. ... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”
38. Artificial dissection of the marks would therefore be wrong, although it is necessary for me 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 created by the marks. The marks for comparison are these:

Applied-for Marks	Opponent’s CSL Word Mark
CHIRON BEHRING	CSL BEHRING
	

⁷ *SABEL BV v Puma AG*, Case C-251/95.

Overall impressions of the marks

39. The overall impression of the applied-for marks is that they comprise the words CHIRON and BEHRING. In the applied-for word mark, neither element dominates; in the figurative mark, although the top element will be read first, the font of BEHRING is slightly thicker and bigger, and, in my view, draws the eye more than the word CHIRON and is dominant to a marginal extent. In my view CHIRON and BEHRING are equally distinctive words. They do not fit together to make a unit, and the separation of the words is emphasised in the figurative mark by the stacking CHIRON on top of BEHRING and presenting the words in contrasting colours and different fonts.
40. The overall impression of the earlier CSL Word Mark is that it comprises the letters CSL and the word BEHRING. Although CSL is the opening part of the mark, it is less than half the length of the word BEHRING and I find the latter is the more dominant element of the CSL BEHRING word mark.

Distinctiveness of component parts of the marks

41. The parties made submissions regarding the distinctiveness of the component elements of the respective marks, including the biographical significance of Emil von Behring and the dictionary definition of CHIRON. I return to those submissions in my consideration of conceptual similarity, but for the purposes of presenting the overall impressions of the marks, I note at this point that I consider each of the three components (CSL, CHIRON and BEHRING) to have distinctive character. This position contrasts with the contention of the Applicant.
42. The Applicant refers to the Witness Statement of Sai Prasad Devarajulu and its Exhibits SPD1 – SPD8, showing that Emil von Behring was a German physiologist, who in 1901, received the first Nobel Prize in Medicine for his work in the field of serum-based treatments for infectious diseases, including diphtheria. The Applicant's submissions in lieu argued that Emil von Behring achieved significant notoriety within the field of immunology, and submits that "the shorthand "Behring" is well recognised" as referring to a pioneer in the field of immunology or diagnostics. It submitted that the average consumer of the Class 5 goods, principally comprises scientific experts and professionals, who are more likely to be aware of the work of Emil von Behring. Based on these assertions, the Applicant submits in conclusion that "the element "Behring"

must, therefore, play only a non-distinctive role within [the earlier trade marks], as it alludes simply to a pioneer in the development of the very goods being sold.”

43. I disagree with those submissions in several aspects. Firstly, the consumer of the goods and services is not composed exclusively of scientific experts and professionals; secondly it is not clear from the evidence that even “scientific experts and professionals” (who would include medical technicians, consultants and health board procurement departments) would inevitably be aware of Emil von Behring, given the passage of time since his Nobel Prize award; thirdly, even for those who do associate BEHRING with Emil von Behring and his work, I do not accept that the word is consequently non-distinctive, as the Applicant suggests. It is not uncommon for the names of scientists or inventors to become attached to the commercialisation of goods in their fields of interest – Nikola Tesla, Thomas Edison, Henry Ford, Werner von Siemens, James Dyson – but the related trade marks clearly remain distinctive. The word Behring would not be objectionable on absolute grounds of non-distinctiveness in respect of *vaccine formulations* (the field with which Emil von Behring is most closely associated), still less in respect of other Class 5 goods or the services in Classes 35 or 42.

44. The Applicant refers to its **Exhibit SPD7** which contains a screenshot from the Opponent’s Wikipedia page, showing the letters “CSL” are an acronym for the words “Commonwealth Serum Laboratories”. The Applicant admits that *“it is unclear whether the relevant consumer would immediately recognise the acronym as a reference to the words “Commonwealth Serum Laboratories”*. It goes on to submit as follows:

“However, even if the relevant consumer were to recognise this acronym, it is submitted that the mark in its totality is entirely non-distinctive as the words “Commonwealth Serum Laboratories” would merely be understood, when viewed in the context of the goods and services at issue, as a descriptive reference to goods/services produced or offered by a serum laboratory within the Commonwealth area. This, in combination with the non-distinctive word “Behring” creates a sign which the relevant consumer would not be able to attribute any accurate commercial origin to. In light of the above, [the Applicant] submits that, in the instance that the relevant consumer were to recognise the acronym “CSL” as a reference to “Commonwealth Serum Laboratories”, the sign as a whole should be considered non-distinctive and

should not be afforded any level of protection in relation to the goods and services at issue.”

45. Again, I disagree in several respects. The three letters in combination have a degree of distinctive character; it will be unclear to at least a significant portion of the average consumer group what the letters signify. Even for those who understand the letters to refer to “Commonwealth Serum Laboratories”, while “serum laboratories” may be considered descriptive and non-distinctive, at least in respect of some of the Class 5 goods, I do not accept that as a whole phrase Commonwealth Serum Laboratories, would be considered as devoid of distinctive character in the UK, still less the letters “CSL” in the earlier mark.

Visual comparison

46. The applied-for word mark – “Chiron Behring” - and the Opponent’s CSL Word Mark share the identical second element – “Behring” - which is distinctive and which is the longer element of the marks. There is a clear difference between the opening elements. They both share the opening letter C, but CSL is half the length of CHIRON, and there is no further overlap in their remaining letters. Visually, I find the applied-for word mark is similar to at least a medium degree.
47. The words in the applied-for figurative mark are rendered in red and green, in particular fonts and configured one over the other. The Opponent’s CSL Word Mark may be used in any ordinary font or colour. In my notional comparison of the marks from a visual perspective, the CSL Word Mark may be used in either of the fonts used in the Applicant’s figurative and in any colour, including red or green. It would not, however, be legitimate to conduct the notional comparison based on a combination of colours and fonts. I find that, visually, taking account of my previous distinctive and dominant considerations, the applied-for figurative mark is similar to a medium degree, or perhaps a little lower.

Aural comparison

48. The two syllables of the shared second words of the marks will be articulated identically. However, the first part of the Opponent’s CSL Word Mark will be spoken as three syllables – SEE – ESS – ELL; the word of the first part of the applied-for word

and figurative marks will be spoken as two syllables – either SHEE – RON or perhaps KY – RON. I find the parties' marks to be aurally similar to a medium degree, or perhaps a little lower.

Conceptual comparison

49. The Applicant refers to the Collins English dictionary definition of the word "Chiron" as figure from Greek mythology, being "a wise and kind centaur who taught many great heroes in their youth, including Achilles, Actaeon and Jason". The Applicant submits that therefore, the word "Chiron" has little meaning in relation to the Contested Goods and Services, and is thus highly distinctive. While not filed as evidence, I accept the submitted, readily verifiable, dictionary definition of the word "chiron", but in my view, the average consumer is unlikely to be aware of the Greek mythological significance of the word and will attribute no clear concept to the word. I accept that the word CHIRON is anyway highly distinctive, but in my view it is likely to convey to the average consumer no immediately graspable concept that would serve as an active hook to separate the marks conceptually. The word is more likely to be perceived as surname or company name without a readily identifiable meaning.
50. Those among the average consumers who are aware that the letters CSL stand for Commonwealth Serum Laboratories will have something immediately graspable that would enable them to conceptually separate the parties' marks, since there is a conceptual distance between "Chiron" and the initialism "CSL" as an abbreviation of Commonwealth Serum Laboratories.
51. For those who do not know what CSL stands for and who encounter the applied-for mark, it may not be fanciful that they misunderstand the letter C as standing for Chiron. The letters SL commonly stand for Sociedad Limitada, the Spanish and Latin American equivalent of a Private Limited Company (like "Ltd" in the UK). If that potential misconstruction overly strains the comparison exercise (which is likely), then I find that for those who do not know what CSL stands for, the assessment of conceptual similarity between the first element of the parties' marks produces a neutral outcome, neither "Chiron" nor "CSL" carrying an instantly understandable concept.

52. I have rejected the contention that “Behring” is non-distinctive, though it will likely be perceived as a name. Some among the average consumer group may know of Emil von Behring and thereby associate the word with a particular individual. In whatever way the average consumer perceives the word, it will be the same in respect of both marks. If Behring is perceived merely as a surname, with no association to a particular individual, there is no real concept beyond that of a surname, and the assessment of conceptual similarity between the parties’ marks produces a neutral outcome. If Behring is perceived as referring to Emil von Behring, then the concept in that aspect of both marks is the same.
53. Overall, the potential permutations of my above findings are: (i) conceptual neutrality between CSL Behring and Chiron Behring; (ii) a conceptual difference based on the first elements of the marks, or else (iii) at least a medium degree of conceptual similarity, based on the shared concept of Emil von Behring.

Distinctive character of the earlier mark

54. Distinctive character is a measure of how strongly a mark distinguishes the goods or services of one undertaking from those of others. The factors that 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-39/97:

“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).”

55. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of the mark can be enhanced by the use that has been made of it.
56. Neither of the two parts of the CSL word mark is a standard English word, nor, on their surfaces – and certainly at least for many consumers - are they obviously descriptive or allusive of the goods or services for which the earlier mark is registered. I find that in those circumstances, the mark as a whole is distinctive to a high degree – more than medium. Even for those who know both what the initialism stands for and of the work of Emil von Behring, the mark as whole is distinctive to at least a medium degree.
57. The Opponent has filed evidence of use of its trade marks, largely in defence of the revocation actions against the three registrations of the Figurative Mark. I comment further on that evidence when I deal the revocation applications below. For now, it is enough to note that the evidence includes, at Exhibits FS14 – FS18, numerous invoices, from 2016 – 2020, prominently bearing the mark “CSL Behring”, addressed to various hospitals and health trusts across the UK. The goods listed in the invoices are identified various names – such as Hizentra, Beriplex, Privigen, Alburex and Voncento. Many of the individual invoices are for substantial amounts – tens, even hundreds, of thousands of pounds. It is open to question whether the evidence establishes that the CSL Word Mark may be considered to function as a trade mark for the registered Class 5 goods, given that the products are clearly identified primarily by different distinctive brand names.⁸ However, I find that the evidence shows use, over years and across England, Wales, Scotland and Northern Ireland, at least in respect of services falling within the Class 35 specification of “*retail and wholesale services for pharmaceutical products and medical products and supplies.*” I find that the extent of use is enough to have enhanced the distinctive character of the CSL Word Mark in respect of those services in the UK. The Opponent’s CSL Word Mark is solidly distinctive to a high degree for the supply of medical pharmaceutical products.

Conclusions on likelihood of confusion

58. Making an assessment of the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer of the services at issue and determining whether they are likely to be confused. When doing this, I am required to bear in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely on the imperfect picture of them that they have in their mind. This means that the global assessment emulates what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark. The courts have not said what weight should be attached to each of the factors or provided a formula that can be applied to any set of circumstances. Because this is a global assessment, there is some interdependence between the factors and so a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services or vice versa.
59. There are two types of confusion that may occur. Direct confusion is where the average consumer mistakes one mark for the other, while indirect confusion is where the average consumer recognises that the marks are different but assumes that the later mark also identifies the goods or services of the owner of the earlier mark, or that the two undertakings are related.⁹
60. For ease of reference, I remind myself that earlier in my decision, I found:
- (i) **Identity** in respect of the applied-for *Pharmaceutical preparations; vaccine formulations* in Class 5, the applied-for *Scientific and technological services; research and development services* in Class 42, and the applied-for *Advertising services* in Class 35.
 - (ii) at least a **low degree of similarity** in respect of the applied-for *business management* services in Class 35.
 - (iii) the average consumer of the Class 5 goods will include both professionals, and members of the public, where the level of attention may be **medium or higher**;

9 L.A. Sugar Limited v Back Beat Inc, BL O/375/10, paragraph 16.

the average consumer of the Class 42 services comprises professionals within the scientific/medical industry who will pay **a higher level of attention**; the average consumer of the similar services in Class 35 will typically be a business user and that at least **a medium degree** of attentiveness will be paid in the selection of those services.

(iv) the purchasing process is largely visual, though aural considerations are also relevant;

(v) **visually**, the applied-for word mark is similar to **at least a medium degree**, and the applied-for figurative mark is **similar to a medium degree, or perhaps a little lower**. The marks are aurally similar to a medium degree, or perhaps a little lower. The marks may have some conceptual overlap, or difference, but perhaps the overall conceptual comparison produces a neutral position;

(vi) the word BEHRING is the more dominant element of the CSL BEHRING word, and may have marginal dominance in the applied-for figurative mark;

(vii) even for the average consumer who knows both of Emil von Behring and what the initialism stands for, the mark as whole is distinctive to at least a medium degree, and through use of the mark in the supply of medical pharmaceutical products in the UK, the **distinctive character** of the mark has been enhanced to **a solidly high degree**.

61. Taking all of the above factors into account and the principles from case law set out at paragraph 22 above, it is my view that even in respect of identical goods and services, and allowing for imperfect recollection of the marks by the average consumer, the average consumer, paying at least a medium degree of attention, will not directly confuse CSL BEHRING with even the word mark version of CHIRON BEHRING. They will notice the difference in the opening element of the marks and will not mistake one directly for the other. I turn therefore to consider whether there is a likelihood that the average consumer may be confused as to the origin of the goods or services on an indirect basis.

62. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Iain Purvis QC, sitting as the Appointed Person, 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.

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).”

63. These three categories are not exhaustive, but are intended to be illustrative of the general approach.¹⁰ However, indirect confusion has its limits; such a finding should not be made merely because the competing marks share a common element. It is not

¹⁰ As was confirmed by the Court of Appeal in *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, paragraph 12.

sufficient that a mark merely calls to mind another mark;¹¹ where there is no direct confusion, there must be a proper basis for finding indirect confusion.¹²

64. In the present case, I bear in mind in particular that (a) the parties' goods and services are identical (except for *business management*, to which I shall return) (b) the marks share the identical distinctive element "BEHRING", which is dominant in the earlier mark and contributes majorly to the overall impression of both applied-for marks (c) that the significance of the opening letter of the earlier CSL Word Mark will be unknown to at least a relevant proportion of the average consumer group. If such a consumer were to encounter the applied-for mark – CHIRON BEHRING – I do not consider it fanciful that they may conclude (wrongly) that the C may stand for CHIRON, whether or not they know that "SL" stands for "Serum Laboratories". CSL is less distinctive than the shared, identical element "BEHRING", and I find that the average consumer, even paying a high degree of attention, may mistakenly attribute identical goods and services marketed by reference to CHIRON BEHRING or CSL BEHRING to the responsible undertakings being the same or related. There is a likelihood of indirect confusion in respect of the identical goods and services.
65. With regard to the *business management* services that are merely similar to a lower than medium degree, I find that the similarity between the goods and services is not sufficient to give rise to a likelihood of indirect confusion. The enhanced distinctive character of the CSL Word Mark does not extend to *business management* services, and the shared identical element of the marks, is more readily attributable to two undertakings coincidentally using the same (even if uncommon) surname as part of their trade marks, without giving rise to a belief that they are related undertakings providing services that are merely similar.
66. **OUTCOME:** The Oppositions based on Section 5(2)(b) succeed in respect of the following applied-for goods and services:

Class 5: *Pharmaceutical preparations; vaccine formulations.*

Class 35: *Advertising.*

¹¹ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17.

¹² See the Court of Appeal's comments in *Liverpool Gin Distillery*, paragraph 13.

Class 42: *Scientific and technological services; research and development services.*

The Oppositions based on Section 5(2)(b) fail in respect of the following applied-for services:

Class 35: *business management; business administration; office functions.*

THE OTHER GROUNDS OF OPPOSITION

67. At the hearing Ms Hazzard agreed with my proposition that the Opponent's strongest case rested on its CSL Word Mark and the Section 5(2)(b) ground, which I have considered in detail above. In the event that the Section 5(2)(b) enjoyed convincing success, Ms Hazzard agreed it would be unnecessary to determine the Section 5(3) and 5(4)(a) grounds. Having undertaken the analysis and reached the conclusions that I have set out in this Decision in respect of the Section 5(2)(b) claims, I find that the other grounds offer no prospect of greater success for the Opponent. In the circumstances, I can deal briefly with the Section 5(3) and 5(4)(a) grounds (taking the latter ground first).

Section 5(4)(a) Applicable principles

68. As set out in the Background and Pleadings earlier in this Decision, Section 5(4)(a) of the Act prohibits registration of a trade mark to the extent that, its use in the United Kingdom is liable to be prevented by the law of passing off. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

"55. The elements necessary to reach a finding of passing off are the 'classical trinity' of that tort as described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely **goodwill** or reputation; **misrepresentation** leading to deception or a likelihood of deception; and **damage** resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether "*a substantial number*" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

69. Goodwill: The first element described in *Reckitt & Colman* refers to "goodwill or reputation", although case law has developed so as to distinguish between goodwill and "mere reputation" – the latter being insufficient alone to sustain a claim of passing off. To satisfy the first element of the tort, the Opponent is required to show that it has goodwill among UK consumers.

70. The best-known case as to the meaning of 'goodwill' is given in *IRC v Muller and Co's Margarine Limited* [1901] AC 217. At 223, Lord MacNaghten said:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom."

71. In *Hart v Relentless Records*, Jacob J. (as he then was) stated his view that "the law of passing off does not protect a goodwill of trivial extent. one is looking for more than a minimal reputation."¹³ This does not mean that a small business is incapable of establishing goodwill - even though its goodwill may be modest, a business can protect signs which are distinctive of that business under the law of passing off. Thus in *Lumos Skincare Ltd v Sweet Squared Ltd*,¹⁴ the Court of Appeal upheld a claim for passing off based on the claimant's use of the mark "LUMOS" for around three years before the defendant's use of the same mark, even though sales volumes and turnover were modest.

72. Halsbury's Laws of England Vol. 97A (2021 reissue) contains guidance on establishing the likelihood of misrepresentation or deception, in particular, paragraph 636, in which it is noted (with footnotes omitted) that:

¹³ *Hart & Anor v Relentless Records* [2002] EWHC 1984 (Ch) [62]

¹⁴ [2013] EWCA Civ 590

“Establishing a likelihood of deception generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

73. The Sign claimed under the Section 5(4)(a) ground identical to the registered CSL Word Mark. The goodwill, claimed to have been created by virtue of use of the Sign throughout the UK since 2007, is in respect of “*Pharmaceutical and veterinary preparations and substances; Diagnostic preparations and substances, all for in vivo use*”. Ms Hazzard conceded that the evidence shows no use in respect of *veterinary*

preparations and substances; and I note that the other goods claimed are no wider than those registered in Class 5 for the CSL Word Mark. I see no reason at all why the Section 5(4)(a) claim would lead to increased oppositional success in the present case.

74. It is unlikely that the difference between the legal test for likelihood of confusion under trade mark law and the test for misrepresentation under the law of passing off (deception of “a substantial number of the Claimant’s customers or potential customers”) will (all other factors being equal) produce different outcomes. This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.¹⁵ The goodwill that may attach to the Sign CSL Behring in respect of *Pharmaceutical or Diagnostic preparations*, even if substantial, does not extend protection to the services remaining in Class 35 in respect of which I have found no similarity or mere similarity and no likelihood of confusion. I find that no liability for passing off would arise from the use of the applied-for Chiron Behring marks in respect of *business management; business administration; office functions*, based on any rights the Opponent may enjoy at common law in respect of the Sign CSL Behring. The Section 5(4)(a) ground certainly takes the opposition no further than its Section 5(2)(b) claim.

The Section 5(3) Claim

75. The Section 5(3) ground is again directed against all of the applied-for goods and services. Under its three registrations of the Figurative Mark, the Opponent claimed a reputation in respect of the goods registered in Classes 1, 5 and 9 as specified. The Opponent also claimed a reputation in respect of the same goods and services registered under the CSL Word Mark in Classes 5, 35 and 42 as relied on for its Section 5(2)(b) claims.
76. With regard to the three registrations of the Figurative Marks, Ms Hazzard conceded at the hearing that the evidence did not address use in respect of the goods in Class 1 or Class 9. I have also noted my finding that there is no evidence in respect of veterinary preparations in Class 5. The only specifications remaining therefore under

¹⁵ See Kitchin LJ in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41. See too *Soulcycle Inc v Matalan Ltd*, [2017] EWHC 496 (Ch)

the Figurative Marks are *Pharmaceutical preparations and substances; diagnostic preparations and substances, all for in vivo use* in Class 5. I deal with the evidence in respect of the use of the Figurative Mark in the next part of this Decision in the context of the non-use revocation proceedings. I note, however, that goods of a similar nature in Class 5 are also registered under the CSL Word Mark (i.e. *Pharmaceutical preparations; vaccine formulations*). In the circumstances, I will deal with the claim of reputation for Class 5 goods in light of the evidence, which is indisputably greater in respect of the CSL Word Mark.

77. The relevant case law for section 5(3) can be found in the following judgments of the CJEU: *General Motors*, C-375/97, EU:C:1999:408; *Intel Corporation Inc. v CPM United Kingdom Ltd*, C252/07, EU:C:2008:655; *Adidas-Salomon & Anor v Fitnessworld Trading Ltd*, C-408/01, Page 34 of 61 EU:C:2003:582; *L'Oréal v Bellure*, C-487/07, EU:C:2009:378); and *Marks and Spencer v Interflora*, C-323/09, EU:C:2011:604.. The law appears to be as follows:

- (a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24*.
- (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26*.
- (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.
- (d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*.
- (e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*;

whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

- (f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77.
- (g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.
- (h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oréal v Bellure NV*, paragraph 40.
- (i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oréal v Bellure*).

78. The function and value of a trade mark are not confined to its being an indicator of origin of goods or services (which section 5(2)(b) safeguards); a trade mark can also convey messages, such as a promise or reassurance of quality or a certain image of,

for example, lifestyle or exclusivity ('advertising function').¹⁶ Section 5(3) aims at protecting this advertising function and the investment made in creating a certain brand image by granting protection to reputed trade marks, irrespective of the similarity of the goods or services or of a likelihood of confusion, provided that it can be demonstrated that the use of the contested application without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier mark.

Reputation

79. A trade mark has a reputation within the meaning of section 5(3) if it was known to a significant part of the relevant public at the relevant date; the relevant public are those concerned by the products or services covered by the trade mark. There is no fixed percentage threshold which can be used to assess what constitutes a significant part of the public; it is proportion rather than absolute numbers that matters. Reputation constitutes a knowledge threshold, to be assessed according to a combination of geographical and economic criteria. All relevant facts are to be taken into consideration when making the assessment, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by undertaking in promoting it.¹⁷
80. The evidence shows CSL Behring to be a producer of pharmaceutical goods, offered under various brand names. The name CSL Behring is clearly shown as the source of the invoices in evidence, though the actual goods invoiced are referenced by different brand names. Exhibit FS11 to FSNWS1 shows an image of the packaging design for a drug called "Berinert". The exhibit is dated 28 January 2009. The Second Witness - paragraph 26 of FSNWS2 - includes a table referring to its Exhibits FS14 – 18, which the witness states are "examples of packaging of various BEHRING branded pharmaceuticals and medical products". Paragraph 35 of the Applicant's submissions in lieu makes various criticisms of this evidence. It points out that the exhibits show computer-generated images of product packaging for products bearing product names such as "Fibrogammin", "Rhophylac", "Beriplex" and "Hizentra" and that the product

¹⁶ (judgment of 18/06/2009, C-487/07, L'Oréal, EU:C:2009:378)

¹⁷ See, for instance, ruling of Judge Hacon in *Burgerista Operations GmbH v Burgista Bros Limited* [2018] EWHC (IPEC)

leaflets are all dated outside the relevant periods (for the purposes of use of the Figurative Marks).

81. It also states that the Opponent “does not produce or market the goods using the [Figurative] mark as registered and instead uses the various sub-brand names outlined previously.” It also notes that documents reference parties other than the Opponent (CSL Behring L.L.C), including CSL Behring UK Limited and CSL Behring GmbH. The Applicant acknowledges that the exhibits show the Opponent’s company name (CSL Behring), “this cannot be considered as use of the [Figurative] mark as registered.”
82. Having noted the various criticisms of the timeframes and specificity of the evidence, it may be reasonable to find it inconclusive on the questions of use and reputation, in respect of the goods as such – and as distinct from the retail, wholesale or other supply of those goods. However, notwithstanding that the products may be primarily packaged under another, different brand, such as Fibrogammin or Rhophylac (which are emphasised as trade marks by the inclusion of a circled capital R), it is my view that the application of CSL Behring on the goods/packaging in the manner shown could properly be considered as genuine use of the registered trade mark. The name CSL Behring is visible in a prominent position on the packaging; even if the labelling of the goods and packaging is intended to refer to the company name, it also serves as a badge of origin. Perhaps a more significant concern is the clarity of the information connecting the sales in the UK with the CSL Behring mark. However, paragraph 24 of FSNWS2 presents a table stating that the Opponent/Proprietor enjoyed very significant market share for its products in the UK July 2021 – June 2022, including 84% market share for “coagulation” and 33% market share for “albumin”. These market share figures are after the Relevant Date, but paragraph 25 presents a table of the Proprietor’s “general sales” in the UK for the years 19/20 and 20/21, both of which indicate gross sales in excess of £225 million. Taken in the round, I am content to find that the Opponent may claim to have had a significant reputation in the UK in respect of the CSL Behring Word Mark for certain categories of pharmaceutical preparations in Class 5, which, so far as I can glean from the evidence would be described by medical professionals as blood plasma, blood protein, immunoglobins and coagulation therapies.

83. Exhibit FS1 is an extract from the “co.uk” version of the CSL Behring website. It refers to CSL Behring as a global biotechnology company, partnering “the broader medical community by investing in education, clinical research and scientific exchange” and is “committed to significantly investing in its future R&D portfolio and capabilities in the areas of immunoglobulins, specialty products, haemophilia products and breakthrough medicines.” However, I note that the website text is shown to be from February 2021 (page 7 of the Exhibit) and 2023 (according to the copyright symbol on page 8), which are after the Relevant Date (the date on which the Applicant filed its trade mark applications). The evidence is not sufficient to establish use and resultant reputation in the UK for the Class 42 services (*Scientific and technological services; research and development services*).¹⁸ In case I am wrong on that, I will factor in the possibility that the Word Mark enjoyed a reputation for R&D services among medical professionals.
84. There is clearly not good, explicit or clear evidence to support the reputation claimed in respect of the **Class 35 services** (*Advertising; business management; business administration; office functions*).
85. I proceed on the basis that the Opponent may rely on its claimed reputation for Class 5 goods (in the line of blood plasma, blood protein, immunoglobins and coagulants) and even allow (against my primary conclusion) that there may be some reputation attaching to the Class 42 research and development services behind the biopharmaceutical goods. Even on this basis, I find that the Section 5(3) claim takes the Opponent no further than its Section 5(2)(b) claim. Under the Section 5(2)(b) claim I found that there may be a likelihood of association in respect of the identical goods and services, but concluded that no indirect confusion arose in respect of the merely similar business management services in Class 35. I also inevitably found no likelihood of confusion in respect of the dissimilar services in Class 35.
86. Under the Section 5(2)(b) claim I accorded the CSL Word Mark a high degree of distinctive character, substantially enhanced through use, in respect of the supply of biopharmaceuticals. In respect of the Section 5(3) claim, I have found a reputation based on very substantial sales of biopharmaceutical goods. While the legal tests for enhancement of distinctive character and reputation differ, the applicable factors in

18 I note Exhibit SPD8 refers to a new \$157 million/150 million Euro Research and Development Center opening in Germany in September 2022. This is of course after the Relevant Date and not in the UK.

their assessment are the same, including market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by undertaking in promoting it. The evidence does not address promotion of the CSL Word Mark, but I find that the degree of reputation relating to the goods or their development, is comparable to the degree of enhancement of the distinctive character of the CSL Word Mark based on *retail and wholesale services for pharmaceutical products and medical products*.

87. I find that the reputation of the CSL Word Mark may lead to the relevant consumer, encountering the applied-for (Chiron Behring) trade marks, to make a mental link to the CSL Word Mark where the applied-for goods and services are identical. With regard to the applied-for *business management* services in Class 35, I previously found similarity (to a lower than medium degree) to the *advertising market planning services* in Class 35 under the Opponent's earlier CSL Word Mark. However, my findings with regard to reputation are based only on species of goods from Class 5 and, as a secondary position, on underpinning research and development services. These reputed goods (or services) are not at all similar to the applied-for *business management* services in Class 35, nor are they similar to the other applied-for *business administration; office functions* services. Given the distance between the fields of blood plasma-related Class 5 goods (or even underpinning research services) and the applied-for *business management, business administration and office functions*, I find that relevant consumers do not obviously overlap and will not call to mind the earlier reputed CSL Word Mark. There will be no mental link. Even if there were a link among a minority of consumers, any such link would not give rise to any of the types of damage required, as explained in the case law principles at paragraph 77 above.
88. **OUTCOME UNDER SECTION 5(3):** The claim under Section 5(3) succeeds no further than the Section 5(2)(b) or Section 5(4)(a) ground.
89. **OVERALL OPPOSITIONS OUTCOME:** The Oppositions succeed to the extent set out at paragraph 66 above.

REVOCATION ACTIONS

90. The relevant provisions of Section 46) of the Act are as follows:

46. Revocation of registration

(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

c) [...]

(d) [...]

(2) For the purpose of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five-year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five-year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or

resumption began before the proprietor became aware that the application might be made.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or (b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date.”

91. Section 100 of the Act is also relevant, which reads: “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.”
92. The Relevant Periods for which genuine use must be shown of the Figurative Mark are the five-year periods ending on 21 June 1989 and 10 January 2021.
93. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider 7 Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky* [2008] ECR I 9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm*

Clean Solutions GmbH & Co KG [EU:C:2013:592], Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised 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]; *Ferrari* at [32].

(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]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]; 8 *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]; *Ferrari* at [33].

(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].”

94. This is the Figurative Mark:



95. As the Proprietor noted in its skeleton argument, the provision under Section 46(2) “is intended to allow the proprietor of a registered trade mark, in the commercial exploitation of the sign, to make variations in the sign, which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned. The proprietor of a registered trade mark is not precluded from relying, in order to establish use of the trade mark for the

purposes of that provision, on the fact that it is used in a form which differs from the form in which it was registered, without the differences between the two forms altering the distinctive character of that trade mark, even though that different form is itself registered as a trade mark (*Berhard Rintisch v Klaus Eder*, C-553/11, paragraphs 21 and 30).”

96. The Applicant notes in its submissions in lieu, that the Figurative Mark as registered is found only once in the evidence,¹⁹ at the foot of an advertisement for a product called Haemaccel polygeline, which Mr Schöne-De La Nuez, states was published in the British Medical Journal in 1993. This is clearly not within either of the Relevant Periods. I also agree with the Applicant, based on the unclear and unusual appearance of the advertisement, that the use is also not obviously in the course of trade and does not show commercialisation of the relevant goods. At any rate, that single appearance of the Figurative Mark in the evidence clearly does not amount to genuine use. The remaining evidence must, therefore, show use of signs which do not differ in their distinctive character from the Figurative Mark, in order to overcome the non-use challenges.
97. I note at this stage that although the three registrations of the Figurative Mark remained defended for non-use even so far as the point of filing a Skeleton Argument, at the hearing, the Opponent’s representative conceded that there had been no use of the Figurative Mark in respect of the goods in Classes 1 and 9.
98. **OUTCOME:** The consequence of that concession is that trade mark registrations Nos. 1221256 and 1221258 are revoked, with an effective revocation date of 22 June 1989.
99. The only revocation application requiring determination in this Decision therefore turns on the question of whether there has been genuine use of the Figurative Mark for the goods in Class 5 (Trade Mark No. 1221257).
100. The Applicant’s submissions in lieu include critical analysis of each of the Exhibits FS1 – FS25 to FSNWS2. I agree with many of the criticisms made of the evidence, including that much of it relates to dates outside the Relevant Periods, to activities in territories outside the UK (Germany, USA etc) and often presents information (e.g. on

19 Page 79 of Exhibit FS10 to FSNWS2.

sales and revenue) relating to the global organisation, and not all products are licensed for use in the UK. The evidence also refers to the activities of other companies, that are not the Proprietor, though some are predecessors, having undergone name changes (Aventis Behring Limited, ZLB Behring UK Limited); other references appear to be to a parent company or a company in other jurisdictions.²⁰ However, the evidence, especially as supported by the invoices and indications of the appearance of the goods and their packaging, does show use of the plain word sign “CSL Behring”. It therefore seems to me that the two central remaining issues relating to non-use are firstly, which of the Class 5 goods under No. 1221257 are in evidence, and secondly whether CSL Behring is an acceptable variant form of the Figurative Mark.

101. The Class 5 goods are *Pharmaceutical and veterinary preparations and substances; diagnostic preparations and substances, all for in vivo use*. There is no evidence at all relating to *veterinary preparations and substances*. There is evidence relating to *Pharmaceutical preparations and substances*, though it is possible that a fair specification would be more focused and limited than that broadly expressed specification. It may also be that there has been use of CSL Behring in respect of *diagnostic preparations and substances, all for in vivo use*, perhaps as a sub-set of *Pharmaceutical preparations and substances*. However, I do not consider it warranted to parse the detail of the evidence, such as the medical journal articles at Exhibit FS10, to attempt to determine whether a fair specification is appropriate or to assess the extent to which the goods have diagnostic and in vivo applications. This is because, as I explain below, I do not accept that the plain word sign CSL Behring is an acceptable variant form of the Figurative Mark.

102. The Applicant notes in its submissions in lieu, where use is made of a mark in a form other than that in which is registered, consideration must be given to the distinctive character of the mark as used, compared with that registered. The first step must be to identify which characteristics contribute to the distinctive character of the sign, and the second is to identify the differences between the mark as used and registered, to identify whether the distinctive character of the registered mark is altered in the form used. If the distinctive character of the mark as registered is altered, it cannot be considered genuine use of the mark as registered.

20 Exhibit FS2 -Companies House records.

103. The Figurative Mark consists of the word “Behring”, in a particular font, placed above what appears to be the signature of Emil von Behring, separated by a horizontal line and all contained in a rectangular box. The font of the word Behring may have a certain distinctive character, but normal fair use of the plain word sign CSL Behring (which is also a registered trade mark) would permit use of the same font, though I noted no such use in the evidence. While the rectangle outline and the dividing horizontal line may contribute to the overall impression, I do not consider those elements to be distinctive. I find that the signature element is a distinctive component of the Figurative Mark. It appears to read E v Behring. There will be some consumers who will know of the Nobel laureate from the beginning of the last century, and will understand the signature to be that of Emil von Behring. Other consumers may be unaware of Emil von Behring, but will nonetheless perceive the signature to be that of an individual with the initials “E v” and with the surname “Behring”.
104. The initials CSL may be understood to stand for Commonwealth Serum Laboratories, but it is more likely that the meaning of the initialism will not be readily understood. However, the combined three letters have distinctive character. This additional element therefore represents a point of distinctive difference from the Figurative Mark. Moreover, the CSL Word Mark contains no signature, which absence represents a further point of distinctive difference from the Figurative Mark.
105. Since I find that the evidence does not show genuine use of the Figurative Mark or an acceptable variant use, the application for revocation of trade mark registration No. 1221257 succeeds.
106. **OUTCOME:** All three registrations of the Figurative Mark - Nos. 1221256, 1221257 and 1221258 are revoked for non-use, with an effective revocation date of 22 June 1989.

COSTS

107. The Opponent has been largely, but not wholly, successful in its opposition to the Applicant's trade mark applications. The Applicant has been wholly successful in its applications for the revocation of the Opponent's three Figurative Mark registrations. In the circumstances, I make no direction for the award of costs. Each party shall bear its own costs in the consolidated proceedings.

Dated this 22nd day of July 2026

Matthew Williams
For the Registrar
