O/0681/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003704220
IN THE NAME OF ALTHEA COMPANY PTY LTD
TO REGISTER THE FOLLOWING TRADE MARK:

ALTHEA

IN CLASSES 1, 5, 9, 31, 35, 42 & 44

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. OP000433913
BY ALTHEA GROUP SPA

Background and pleadings

1. On 29 September 2021, Althea Company Pty Ltd ("the Applicant") applied to register the trade mark shown on the cover page of this decision in the UK. The trade mark application was filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union, based on its European Union Trade Mark ("EUTM") No. 018250122. Consequently, the applicant can rely upon the earlier EU filing date, being the 5 June 2020.[1] The application was accepted and published in the Trade Marks Journal on 01 April 2022 in respect of goods and services in classes 1, 5, 9, 31, 35, 42 and 44.

2. On 31 May 2022, Althea Group SPA ("the Opponent") opposed the application under Sections 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the goods and services in the application, as shown in the table under paragraph 14 of this decision. The Opponent relies upon the following two comparable marks:

ALTHEA

UK Registration no. UK00916670853 ("the '853 mark")[2]
Filing date: 02 May 2017
Date of registration: 11 October 2017
Relying upon the following services:

> Class 35: Hospital management, administrative and business management of hospitals; Retail and wholesale services in relation to refurbished equipment, spare parts, accessories and consumables; Retail and wholesale services in relation to medical apparatus, medical machines, medical equipment; Management and administration consulting services relating to medical equipment, medical apparatus and medical machines; Business management services related to installation, repair and maintenance of medical equipment and gas systems for hospitals.

[1] I note that on filing the EUTM, priority was claimed from Australian trade mark number 2058068 which had a filing date of 18 December 2019.
[2] As relied upon under Section 5(2)(a) of the Act.

Class 36: Financing services; Financial services provided to partnerships and to public-private partnerships (PPP).

Class 37: Installation, repair and maintenance services for medical apparatus, medical machines, medical equipment and gas systems for hospitals; Equipment commissioning services; Providing information relating to the installation, repair and maintenance of medical apparatus, medical machines, medical equipment and gas systems for hospitals.

Class 41: Training services in respect of medical equipment, medical apparatus, medical machines and gas systems for hospitals.

Class 42: Biomedical engineering services; Engineering services relating to medical apparatus, medical machines, medical equipment and gas systems for hospitals; Design and development of medical technology.

UK Registration no. UK00917241977 ("the '977 mark")[3]
Filing date: 22 September 2017
Date of registration: 06 June 2018
Relying upon the following services:

Class 35: Hospital management, administrative and business management of hospitals; Retail and wholesale services in relation to medical apparatus,

[3] As relied upon under Section 5(2)(b) of the Act.

medical machines, medical equipment; Management and administration consulting services relating to medical equipment, medical apparatus and medical machines; Business management services related to installation, repair and maintenance of medical equipment and gas systems for hospitals.

Class 36: Financing services; Financial services provided to partnerships and to public-private partnerships (PPP).

Class 37: Installation, repair and maintenance services for medical apparatus, medical machines, medical equipment and gas systems for hospitals; Providing information relating to the installation, repair and maintenance of medical apparatus, medical machines, medical equipment and gas systems for hospitals.

Class 41: Training services in respect of medical equipment, medical apparatus, medical machines and gas systems for hospitals.

Class 42: Biomedical engineering services; Engineering services relating to medical apparatus, medical machines, medical equipment and gas systems for hospitals; Design and development of medical technology.

3. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Registration designating the EU. As a result, each of the opponent's marks were converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.[4]

4. The Opponent submits that the '853 mark is identical to the Applicant's mark and that the '977 mark is very similar to the Applicant's mark. For both earlier rights,

[4] See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

the Opponent submits that the goods and services at issue are identical or similar as they are all biological, pharmaceutical, medical and/or healthcare related.

5. The Applicant filed a counterstatement admitting that its mark is identical to the Opponent's '853 mark but denying that the mark is highly similar to the Opponent's '977 mark. The Applicant denies that the services covered by the Opponent's two earlier rights are identical or highly similar to the goods and services covered by its application.

6. Neither party filed evidence. Neither party requested a hearing, nor filed submissions in lieu. This decision is taken following a careful consideration of the papers.

7. The Applicant is represented by DLA Piper UK LLP; the Opponent is represented by Stevens, Hewlett & Perkins.

8. 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.

DECISION

Section 5(2)

9. The opposition is based upon Sections 5(2)(a) and 5(2)(b) of the Act, which read as follows:

> "5(2) A trade mark shall not be registered if because -
>
> (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the trade mark is protected, or

(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".

10. Section 5A states:

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

11. By virtue of their earlier filing dates, the Opponent's above registrations constitute earlier marks within the meaning of section 6 of the Act. As the earlier marks had not completed the registration process more than five years before the filing date of the application in issue, they are not subject to proof of use pursuant to section 6A of the Act. The Opponent can, therefore, rely upon all of the services it has identified without having to demonstrate use.

12. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed

and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa; Page 8 of 20

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

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

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

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

Comparison of goods and services

13. While the specifications of the earlier rights are slightly different, I note that the specification of the '977 mark is entirely encompassed within the specification of the '853 mark (with the '853 mark containing the additional class 35 term "retail and wholesale services in relation to refurbished equipment, spare parts, accessories and consumables" and additional class 37 term "equipment commissioning services"). In view of this, the table below sets out the Opponent's services from both earlier rights simultaneously, with terms in bold being those only present in the '853 mark.

14. The goods and services for comparison are as follows:

Opponent's services	Applicant's goods and services
Class 35: Hospital management, administrative and business management of hospitals; **Retail and wholesale services in relation to refurbished equipment, spare parts, accessories and consumables**; Retail and wholesale services in relation to medical apparatus, medical machines, medical equipment; Management and administration consulting services relating to medical equipment, medical apparatus and medical machines; Business management services related to installation, repair and maintenance of medical equipment and gas systems for hospitals.	Class 1: Biological tissue cultures for scientific, research or industrial purposes; biological products for use in industry, science, medical science, agriculture, horticulture, forestry and research; Tissue cultures being live plant material; the aforementioned products other than those of botanical genera Dianthus, Hordeum and Solanum; Chemical, biochemical and biological products for making pharmaceuticals; Chemical and biochemical products for use in industry, science, medical science, agriculture, horticulture, forestry and research.

Class 36: Financing services; Financial services provided to partnerships and to public-private partnerships (PPP). Class 37: Installation, repair and maintenance services for medical apparatus, medical machines, medical equipment and gas systems for hospitals; **Equipment commissioning services**; Providing information relating to the installation, repair and maintenance of medical apparatus, medical machines, medical equipment and gas systems for hospitals. Class 41: Training services in respect of medical equipment, medical apparatus, medical machines and gas systems for hospitals. Class 42: Biomedical engineering services; Engineering services relating to medical apparatus, medical machines, medical equipment and gas systems for hospitals; Design and development of medical technology.	Class 5: Pharmaceutical products; Pharmaceutical and veterinary preparations and substances; Biological tissue cultures for medical purposes; Chemical, biochemical and biological products for medical and pharmaceutical use; Dietetic food and substances adapted for medical use; Dietary and nutritional supplements; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields. Class 9: Software applications for medical and healthcare directory information; Software applications for medical and healthcare services; Downloadable electronic publications in the field of medical and healthcare services; all of the aforementioned relating solely to the field of medicinal cannabis. Class 31: Agricultural crops; Horticulture and forestry products; Raw and unprocessed plants and seeds; Raw and unprocessed agricultural, horticultural and forestry products; Seedlings and seed for planting; the aforementioned products other than those of botanical genera Dianthus, Hordeum and Solanum.

	Class 35: Distribution of promotional materials in the fields of medicine and healthcare; Public campaigns and promotion relating to the field of medicine and health; Retail and wholesale services in the field of medicine, pharmaceuticals and health, namely, of medicinal cannabis, medical devices, doctor directories, pharmacist directories, healthcare software applications and platforms via computer software, software applications and website portals; Retail and wholesale services in relation to tissue cultures being live plant materials, plant materials (processed and/or unprocessed), horticultural products, medical preparations, pharmaceutical preparations and pharmaceutical products; the bringing together, for the benefit of others, of pharmaceutical services enabling consumers to conveniently compare and purchase those services; Patient advocacy services; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis. Class 42: Scientific and technological services, namely chemical research, biological and pharmaceutical research,

	design and development of software and databases, all in the fields of medicine and healthcare; Medical and scientific research and development, including conducting clinical trials; Provision of scientific information via website portals; Provision of scientific services via website portals; all of the aforementioned relating solely to the field of medicinal cannabis. Class 44: Medical and healthcare services; Medical clinic and treatment services; Information services relating to pharmaceutical products; Provision of information, including online, about medical care and healthcare; Provision of information, including online, about medical care and healthcare services; Provision of information, including online, about healthcare providers and pharmacies; Consultancy and advisory services relating to medical and healthcare services; Consultancy and advisory services relating to assisting consumers in communicating with doctors and health professionals and to assist in accessing medical care and healthcare services; provision of medical and healthcare and medical and healthcare information via website portals; provision of medical and healthcare services via website portals;

	none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis.

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

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM - Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

16. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon,* Case C-39/97, the court stated at paragraph 23 that:

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

17. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

> "(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."

18. In Kurt Hesse v OHIM, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In Boston Scientific Ltd v OHIM, Case T-325/06, the |General Court ("GC") stated that "complementary" means:

"82. ...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".

19. For the purposes of considering the issue of similarity of the goods and services, it is permissible to consider groups of terms collectively where appropriate: *Separode* Trade Mark, BL O-399-10.

20. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in YouView TV Ltd v Total Ltd [2012] EWHC 3158 (Ch):

"12. … Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. … Nevertheless the principle should not be taken too far. ... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

21. In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms: *SkyKick UK Ltd & Anor v Sky Ltd & Ors* (*Rev1*) [2024] UKSC 36, at [365].

22. The Opponent has not identified which of its own services it considers similar to the goods and services of the Applicant. On this point, I refer to the case of *SmartX TM* (BL O/0911/24) wherein Mr Iain Purvis K.C., sitting as the Appointed Person, addressed the issue of an Opponent's failure to identify similarity in respect of long specifications. Mr Purvis K.C. said:

"28. […] it is for the Opponent to put forward the combinations of goods on which it relies for similarity (or identicality). If it fails to identify a particular combination, it cannot expect the Hearing Officer to do the job for it. The approach […] would place an intolerable burden on Hearing Officers in cases of this nature in which there will be thousands of potential combinations of goods which could be relied on, and for each combination a slightly different argument for similarity could be made. Furthermore, such an approach would be unfair on the Applicant for the mark, since they will have had no opportunity to address points on similarity taken by the Hearing Officer if those points are not first raised by the Opponent."

23. Further on in this decision, Mr Purvis K.C. stated:

"31(v). In fact (as I have pointed out) the Hearing Officer went beyond the written submissions in making findings of similarity in respect of a number of groups of goods on the basis of arguments which had not been raised by the Opponent. If the Applicant had complained about this by way of an Appeal,

there would probably have been a good argument that he had been the victim of procedural unfairness. But this has of course not happened and to this extent the Opponent has benefited from the Hearing Officer's generosity. However, it would obviously be perverse to say that the Hearing Officer ought therefore to have taken every other unpleaded and unargued point in the Opponent's favour."

24. The Opponent's services cover classes 35, 36, 37, 41 and 42, while the Applicant's goods and services cover classes 1, 5, 9, 31, 35, 42 and 44. There are goods within the specifications which do not appear to have any prospect of success under either 5(2)(a) or (b). As outlined in paragraphs 7 – 11 of Tribunal Practice Notice ("TPN") 1/2018, under Rule 62 of the Trade Mark Rules 2008, the obligation falls upon the Opponent to identify which of its goods are similar/identical to those of the Applicant, and to explain why. The Opponent made no submissions to explain how it considers the goods and services are similar.

25. Accordingly, in a letter dated 05 March 2025, the Opponent was invited to identify which particular part of its specification it considered to be its best case in relation to each particular part of the Applicant's specification. The Opponent was informed that should it not provide (or adequately provide) the requested information, then I would proceed on the basis that the goods were dissimilar unless it was obvious as to where the similarities lie. As no response has been received by the given deadline I proceed on this basis.

Class 1:

"Biological tissue cultures for scientific, research or industrial purposes; biological products for use in industry, science, medical science, agriculture, horticulture, forestry and research; Tissue cultures being live plant material; the aforementioned products other than those of botanical genera Dianthus, Hordeum and Solanum; Chemical, biochemical and biological products for making pharmaceuticals; Chemical and biochemical products for use in industry, science, medical science, agriculture, horticulture, forestry and research."

26. In the absence of evidence to the contrary, I see nothing in the Applicant's above class 1 goods which strikes me as being obviously similar to the Opponent's services. While many of the Applicant's goods are biological and chemical products which may be used in the course of the provision of the Opponent's class 44 "biomedical engineering services", that in itself does not make them similar in nature. In *Commercy AG v OHIM* Case T-316/07, the Board of Appeal ("BOA") found that just because goods are used by an undertaking in order to provide its services, the respective goods and services are targeted at different consumers, and as such, there can be no complementary connection between them.[5] I do not consider that the average consumer would expect an undertaking that provides chemical and biological products to also provide biomedical engineering services. The goods and services are different in nature, purpose and method of use and they are not complementary in a trade mark sense. I do not consider that the goods and services are in competition. Overall, I consider the goods listed above to be dissimilar to the Opponent's services.

Class 5:

"Pharmaceutical products; Pharmaceutical and veterinary preparations and substances; Biological tissue cultures for medical purposes; Chemical, biochemical and biological products for medical and pharmaceutical use; Dietetic food and substances adapted for medical use; Dietary and nutritional supplements; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields."

27. The above terms are all biological and pharmaceutical products, while the opponent's services all seem to relate to medical equipment. Following the same logic as set out in the preceding paragraph, I am of the view that the above goods do not share any obvious overlap in natures, method of use, purpose or trade channels with the Opponent's "biomedical engineering services" (or any other of the services relied upon). The user may overlap where this is medical professionals, but this is not sufficient in itself to give rise to an overlap in similarity. These goods and services are, therefore, dissimilar.

[5] At [49-62].

Class 9:

"Software applications for medical and healthcare directory information; Software applications for medical and healthcare services; Downloadable electronic publications in the field of medical and healthcare services; all of the aforementioned relating solely to the field of medicinal cannabis."

28. The Applicant's above goods are types of software or electronic publications for use in the healthcare sector, limited solely to the field of medicinal cannabis. I can see no obvious similarity to any of the Opponent's services, which as previously mentioned are in connection with medical equipment. Even where software applications or electronic publications are utilised in the provision of the Opponent's services, the essential nature of such goods would not be in the same field as the Applicant's very specific goods. As such, this is not sufficient by itself to give rise to an overlap in similarity. In the absence of any submissions from the Opponent as to where the similarity lies, I find that the opposing goods and services are dissimilar.

Class 31:

"Agricultural crops; Horticulture and forestry products; Raw and unprocessed plants and seeds; Raw and unprocessed agricultural, horticultural and forestry products; Seedlings and seed for planting; the aforementioned products other than those of botanical genera Dianthus, Hordeum and Solanum."

29. I can see no obvious similarity between the above contested goods and any of the Opponent's services. In the absence of any submissions from the Opponent as to where the similarity lies, I find that the goods and services are dissimilar.

Class 35:

30. In making my assessment, I note that the class 35 services are limited to "none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis". I bear this in mind when considering the similarity of services in this class.

"Retail and wholesale services in the field of […] medical devices, […]; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis."

31. I consider medical devices to be apparatus or machines for use in the diagnosis, treatment or prevention of disease or ill health. I consider that the Applicant's above services fall within the Opponent's wider category "retail and wholesale services in relation to medical apparatus, medical machines, medical equipment". They are therefore identical on the principle outlined in *Meric*.

"Retail and wholesale services in the field of medicine, pharmaceuticals and health, namely, of medicinal cannabis, […]; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis."

32. Without any indication as to what represents the Opponent's best case in respect of these services, I have been left to determine this myself. In my view, the Opponent's best case lies in the term "retail and wholesale services in relation to medical apparatus, medical machines, medical equipment". As the services are both retail and wholesale of goods, there is an overlap in nature and method of use. However, the purpose and end user may differ as the Opponent's services relate to the sale of apparatus and equipment, which will be targeted at medical professionals such as hospitals or clinics. Medicinal cannabis in the Applicant's specification will be prescribed by a medical professional, however the end user for the goods will be members of the general public with an underlying condition for which the goods are prescribed. I do not consider the services would come from the same undertaking, nor reach the market through the same trade channels. The services are not in competition, nor are they complementary. Overall, I find that if there is any similarity between the parties' respective retail/wholesale services, then they are only similar to a low degree.

"Retail and wholesale services in the field of medicine, pharmaceuticals and health, namely, of […], doctor directories, pharmacist directories, healthcare software applications and platforms via computer software, software applications and website

portals; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis."

33. Without any indication as to what represents the Opponent's best case in respect of these services, I have been left to determine this myself. In my view, the Opponent's best case lies in the term "retail and wholesale services in relation to medical apparatus, medical machines, medical equipment". As the services are both retail and wholesale of goods, there is an overlap in nature and method of use. There is an overlap in user, being medical professionals, although I do not discount that the general public may also use healthcare software. I do not consider the services would come from the same undertaking, however, there may be an overlap in trade channels. I consider the services differ in purpose, I say this because the Opponent's services relate to the sale of apparatus and equipment, whereas the Applicant's services focus on directories and software. The services are not in competition, nor are they complementary. Overall, I find that the services are similar to a low degree.

"Distribution of promotional materials in the fields of medicine and healthcare; Public campaigns and promotion relating to the field of medicine and health; The bringing together, for the benefit of others, of pharmaceutical services enabling consumers to conveniently compare and purchase those services; Patient advocacy services; Retail and wholesale services in relation to tissue cultures being […] medical preparations, pharmaceutical preparations and pharmaceutical products; Retail and wholesale services in relation to tissue cultures being live plant materials, plant materials (processed and/or unprocessed), horticultural products […]; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis."

34. As set out in paragraph 21 of this decision, the Opponent was directed to file submissions to identify which services it considered to be similar and was further advised that if this information was not provided, then the Hearing Officer would proceed on the basis that the goods and services are dissimilar unless it is obvious to the Hearing Officer where the similarity lies. In respect of the Applicant's above class 35 services, I can see no obvious similarity between the contested services

and any of the Opponent's services. In the absence of any submissions from the Opponent as to where the similarity lies, I find that the services are dissimilar.

Class 42:

35. In making my assessment, I note that the class 42 services are limited to "all of the aforementioned relating solely to the field of medicinal cannabis". I bear this in mind when considering the similarity of services in this class.

"Scientific and technological services, namely […] design and development of software and databases, all in the fields of medicine and healthcare; all of the aforementioned relating solely to the field of medicinal cannabis."

36. I consider the Applicant's above services overlap with the Opponent's class 42 "design and development of medical technology". The services at issue are both design and development services in the field of medicine and as such, while the exact purpose of these services may differ, I consider they will overlap in nature and user, being medical professionals. I bear in mind the guidance of *SkyKick* not to apply too liberal an interpretation to the natural meaning of the services at issue and note that the Applicant's services relate solely to the field of medicinal cannabis. I consider the average consumer would not reasonably expect an undertaking responsible for the design and development of medical technology at large to also be responsible for the design and development of medical software relating solely to medicinal cannabis. I do not consider that the services will be in competition, nor complementarity. Overall, I consider the services are similar to a medium degree.

"Scientific and technological services, namely chemical research, biological and pharmaceutical research, […], all in the fields of medicine and healthcare; Medical and scientific research and development, including conducting clinical trials; all of the aforementioned relating solely to the field of medicinal cannabis."

37. The Applicant's above services relate to medical and scientific research and development. Although the exact purpose of the services may differ, I consider there will be a degree of overlap in nature with the Opponent's class 42 "design

and development of medical technology". The user will also likely overlap, being medical professionals. I bear in mind the guidance of *SkyKick* not to apply too liberal an interpretation to the natural meaning of the services at issue and note that the Applicant's services relate solely to the field of medicinal cannabis. Due to the specialist nature of the services at issue, I do not consider that an undertaking which designs and develops medical technology would reasonable be expected to also provide medical and scientific research and development in the field of medicinal cannabis. I do not consider that the services will be in competition, nor complementary. Overall, I consider the services are similar to a medium degree.

"Provision of scientific information via website portals; Provision of scientific services via website portals all of the aforementioned relating solely to the field of medicinal cannabis."

38. In respect of the Applicant's remaining class 42 services (as set out above), I can see no obvious similarity between the contested services and any of the Opponent's services. In the absence of any submissions from the Opponent as to where the similarity lies, I find that the services are dissimilar.

Class 44:

39. *"Medical and healthcare services; Medical clinic and treatment services; Information services relating to pharmaceutical products; Provision of information, including online, about medical care and healthcare; Provision of information, including online, about medical care and healthcare services; Provision of information, including online, about healthcare providers and pharmacies; Consultancy and advisory services relating to medical and healthcare services; Consultancy and advisory services relating to assisting consumers in communicating with doctors and health professionals and to assist in accessing medical care and healthcare services; provision of medical and healthcare and medical and healthcare information via website portals; provision of medical and healthcare services via website portals; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis."*

40. In respect of the Applicant's remaining class 44 services (as set out above), I can see no obvious similarity between the contested services and any of the Opponent's services. While many of services at issue are aimed at the medical or healthcare fields, that in itself does not make the Applicant's services similar to the Opponent's services. As set out in paragraph 21 of this decision, the Opponent was directed to file submissions to identify which services it considered to be similar and was further advised that if this information was not provided, then the Hearing Officer would proceed on the basis that the goods and services are dissimilar unless it is obvious to the Hearing Officer where the similarity lies. In the absence of any submissions from the Opponent as to where the similarity lies, I find that the services are dissimilar.

41. It is a prerequisite of section 5(2)(a) and 5(2)(b) that the goods be identical or at least similar. As per *eSure*,[6] in relation to the goods which I have found to be dissimilar, as there can be no likelihood of confusion under section 5(2), I will take no further account of such goods and services, with the opposition failing to that extent.

My approach

42. I consider it appropriate to approach the rest of this decision by comparing only the Opponent's '853 mark against the Applicant's mark. This is because I have already found the same degree of similarity between the contested goods and services for each of the earlier marks. As the Opponent's '853 mark is a word only mark which represents the Opponent's strongest case, in the event that I find there to be a likelihood of confusion between these marks, I do not consider that assessing the remaining mark would improve the Opponent's position. If, however, I find no likelihood of confusion between the marks, it follows that the same finding will apply to the earlier '977 mark on the basis that as a figurative mark, it shares a lesser degree of similarity with the contested word mark than the '853 mark. If required, I will address this point further when considering any final remarks at the conclusion

[6] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

of this decision. From this point onwards, for the purposes of the remaining assessments, I will refer to the '853 mark as "the earlier mark".

Comparison of the marks

43. It is a prerequisite of section 5(2)(a) that the respective marks are identical, while the marks must be considered similar under 5(2)(b).

44. The respective trade marks pleaded under 5(2)(a) are shown below:

Earlier trade mark	Contested trade mark
ALTHEA (the '853 mark)	**ALTHEA**

45. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the CJEU held that:

> "54… a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by the average consumer."

46. The contested mark and the earlier mark are both word only marks consisting of the single word "ALTHEA" and are self-evidently identical. This has been admitted by the applicant in its counterstatement. Accordingly, the first requirement of section 5(2)(a) is formally met.

Average consumer and the purchasing act

47. It is necessary for me to determine who the average consumer is for the goods and services in question; I must then determine the manner in which the goods and services are likely to be selected by the average consumer in the course of trade.

48. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97.* In *Hearst Holdings Inc, Fleischer Studios Inc v A. V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,* [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

> "The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

49. The average consumer for the overlapping class 35 services may be a professional or a member of the general public. The selection process is likely to predominantly involve a visual aspect when looking for services in a retail or wholesale setting, such as viewing signage on physical premises, or perusing a specialist catalogue or website, or viewing advertisements online or in print. I do not however, discount that there may also be an aural component to the purchase through word-of-mouth recommendations. The average consumer will consider factors such as reliability, suitability for particular requirements and customer service standards. Taking into consideration the nature of the services at issue, I conclude that a higher than average level of attention would be paid in the purchasing process.

50. Due to the status of medicinal cannabis as a controlled drug which is only available on prescription, I consider the Applicant's class 35 services related to medicinal cannabis will be directed at pharmacies and/or medical professionals authorised to prescribe those pharmaceuticals. However, the end user of the goods would be members of the general public with a medical condition for which medicinal cannabis is used as a treatment. In this instance I consider the average consumer

would pay a higher than average level of attention during the purchasing process due to the impact on their health/the health of their patients.

51. I consider the average consumer for the class 35 directories and software applications will be both medical professionals and individuals seeking information on their own health or looking for healthcare services. The selection process is likely to predominantly involve a visual aspect when looking for services online or in a specialist retailer. I do not however, discount that there may also be an aural component to the purchase through word-of-mouth recommendations. The average consumer will consider factors such as reliability, suitability for particular requirements and customer service standards. Taking into consideration the nature of the services at issue, I conclude that for medical professionals a higher than average level of attention would be paid in the purchasing process. Where the average consumer is a member of the general public, a medium level of attention will be paid.

52. The average consumer of the overlapping class 42 services will be a professional in the relevant field. The cost of the services will vary depending on their exact nature; however it may be considerable. The average consumer will consider factors such as reliability, suitability for particular requirements and customer service standards. The services are likely to be selected by predominantly visual means, although I do not discount an aural component. Overall, due to the nature of these specialised services, the selection of the services at issue is likely to be made when applying a higher than average degree of attention

Distinctive character of the earlier trade mark

53. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In *Lloyd Schuhfabrik*, the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to

identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

54. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are suggestive or allusive of 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 a mark can be enhanced by virtue of the use that has been made of it.

55. As the Opponent has not filed any evidence to show that the distinctiveness of its mark has been enhanced through use, I only have the inherent position to consider.

56. I consider that "Althea" would be seen as an invented word with no apparent meaning, which is neither allusive nor descriptive in relation to the services for which the mark is registered. The Opponent's mark will therefore be inherently distinctive to a high degree.

Likelihood of confusion

57. I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods or services may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V*).

58. 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 for some reason 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: see *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, paragraph 16.

59. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be identical.
- I have found the Opponent's mark to be inherently distinctive to a high degree.
- I have identified the average consumer to be healthcare or medical professionals or members of the general public, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a higher-than-average degree of attention will be paid during the purchasing process.
- I have found the parties' goods to be between identical and similar to a low degree.

60. Taking all of the factors listed above into account, I am satisfied that the average consumer would likely mistake one mark for the other, this is particularly the case given the identity of the marks. Bearing in mind the interdependency principle, I am, satisfied that there will still be a likelihood of direct confusion for the services which are similar to at least a low degree.

CONCLUSION

61. The opposition based upon 5(2)(a) has succeeded in relation to the following services:

Class 35: Retail and wholesale services in the field of medicine, pharmaceuticals and health, namely, of medicinal cannabis, medical devices, doctor directories, pharmacist directories, healthcare software applications and platforms via computer software, software applications and website portals.

Class 42: Scientific and technological services, namely chemical research, biological and pharmaceutical research, design and development of software and databases, all in the fields of medicine and healthcare; Medical and scientific research and development, including conducting clinical trials.

62. The opposition fails for the remaining goods and services. The application may therefore proceed to registration for the following goods and services:

Class 1: Biological tissue cultures for scientific, research or industrial purposes; biological products for use in industry, science, medical science, agriculture, horticulture, forestry and research; Tissue cultures being live plant material; the aforementioned products other than those of botanical genera Dianthus, Hordeum and Solanum; Chemical, biochemical and biological products for making pharmaceuticals; Chemical and biochemical products for use in industry, science, medical science, agriculture, horticulture, forestry and research.

Class 5: Pharmaceutical products; Pharmaceutical and veterinary preparations and substances; Biological tissue cultures for medical purposes; Chemical, biochemical and biological products for medical and pharmaceutical use; Dietetic food and substances adapted for medical use; Dietary and nutritional supplements; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields.

Class 9: Software applications for medical and healthcare directory information; Software applications for medical and healthcare services; Downloadable electronic publications in the field of medical and healthcare services; all of the aforementioned relating solely to the field of medicinal cannabis.

Class 31: Agricultural crops; Horticulture and forestry products; Raw and unprocessed plants and seeds; Raw and unprocessed agricultural, horticultural and forestry products; Seedlings and seed for planting; the aforementioned products other than those of botanical genera Dianthus, Hordeum and Solanum.

Class 35: Distribution of promotional materials in the fields of medicine and healthcare; Public campaigns and promotion relating to the field of medicine and health; Retail and wholesale services in relation to tissue cultures being live plant materials, plant materials (processed and/or unprocessed), horticultural products, medical preparations, pharmaceutical preparations and pharmaceutical products; the bringing together, for the benefit of others, of pharmaceutical services enabling consumers to conveniently compare and purchase those services; Patient advocacy services; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis.

Class 42: Provision of scientific information via website portals; Provision of scientific services via website portals; all of the aforementioned relating solely to the field of medicinal cannabis.

Class 44: Medical and healthcare services; Medical clinic and treatment services; Information services relating to pharmaceutical products; Provision of information, including online, about medical care and healthcare; Provision of information, including online, about medical care and healthcare services; Provision of information, including online, about healthcare providers and pharmacies; Consultancy and advisory services relating to medical and healthcare services; Consultancy and advisory services relating to assisting consumers in communicating with doctors and health professionals and to assist in accessing medical care and healthcare services; provision of medical and healthcare and medical and healthcare information via website portals; provision of medical and healthcare services via website portals; none of the aforementioned for use in relation with ocular, peri-ocular and sight fields and all of the aforementioned relating solely to the field of medicinal cannabis

COSTS

63. Both parties have enjoyed a share of success, with the greater degree of success on the part of the Applicant who is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice ("TPN") 1/2023. Applying the guidance in the TPN, I consider the following to be fair:

Considering the Notice of opposition and preparing a counterstatement	£250
Total:	**£250**

64. I therefore order Althea Group SPA to pay Althea Company Pty Ltd the sum of £250. The above sum should be paid within twenty-one days of the expiry of the

appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 23rd day of July 2025

Emma Rees
For the Registrar