

O-310-15

TRADE MARKS ACT 1994

APPLICATION No. 3035493 BY ALTACOR LTD

TO REGISTER:

BLEPHACARE & BLEPHA CARE

AS A SERIES OF 2 TRADE MARKS

AND

OPPOSITION NO. 402415

BY LABORATOIRES THÉA (SOCIÉTÉ PAR ACTIONS SIMPLIFIÉE)

Background and pleadings

1. On 18 December 2013, Altacor Ltd (“the applicant”) applied to register BLEPHACARE and BLEPHA CARE as a series of two trade marks for the following goods:

Class 3 - Non-medicated eye lotions; preparations for cleaning the eyes and eyelids.

Class 5 - Pharmaceutical preparations; pharmaceutical preparations for the eye; ophthalmic preparations and substances; ophthalmic formulations; eye care preparations for medical use; eye drops; eye lotions for medical use; eye gels for medical use; eye washes; non-medicated eye drops, non-medicated eye washes; ophthalmic preparations and substances for the provision of optimum eye function.

Class 10 - Medical and veterinary apparatus and instruments; apparatus for use in relation to the eye region for eye conditions; apparatus for use in relation to the prevention and treatment of eye conditions; apparatus for ophthalmic use for eye conditions; medical masks; surgical masks; eye masks for medical purposes; thermal masks for medical purposes; cooling masks for medical purposes; re-heatable pads and masks for medical purposes; temperature gauges for medical purposes.

2. The application was accepted and published in the Trade Marks Journal on 28 March 2014.

3. Laboratoires Théa (société par actions simplifiée) (“the opponent”) opposed the application on the basis of sections 5(2)(b), 5(3) and 5(4)(a) of the 1994 Trade Marks Act (“the Act”); the objections based upon sections 5(3) and 5(4)(a) were, however, subsequently withdrawn, leaving the matter to be decided under section 5(2)(b). The opposition under this ground is directed against all of the goods in the application, and is based upon all of the goods (shown below) in the following Community Trade Marks (“CTM”) and International Registrations (“IR”):

(i) CTM no. 6945943 for the trade mark: BLEPHASTEAM which was applied for on 29 May 2008 and which completed its registration process on 9 February 2009:

Class 10 - Hot air therapeutic apparatus, surgical and medical instruments and devices.

(ii) CTM no. 9430836 for the trade mark: BLEPHACLEAN which was applied for on 7 October 2010 and which completed its registration process on 18 March 2011:

Class 3 - Cosmetic preparations for making up, removing make-up, cleaning, care for the eyes and eyelids; wipes and lotions for cosmetic purposes for the cleaning and care of the eyes and eyelids; wipes impregnated with lotions for making up, removing make-up, cleaning, care for the eyes and eyelids; essential oils.

Class 5 - Ophthalmic and ophthalmological preparations; sanitary preparations for ophthalmological purposes; food or nutritional supplements for ophthalmological purposes; disinfectants for ophthalmological or sanitary purposes (except soap); eye washes; ophthalmological ointments; preparations for cleaning contact lenses; lotions; Creams; gels for ophthalmological purposes; antiseptics; analgesics; tranquillizers; antibiotics; tranquillizers; vitamin preparations; all the aforesaid goods being for ophthalmological purposes.

Class 10 - Surgical and medical devices and instruments.

(iii) CTM no. 1622067 for the trade mark: BLEPHASOL which was applied for on 21 April 2000 (claiming an International Convention priority date of 7 March 2000 from an earlier filing in France) and which completed its registration process on 3 December 2001:

Class 5 - Sanitary preparations for medical purposes, namely sanitary solutions for the washing of the eyelids.

(iv) IR no. 625525 for the trade mark:

BLEPHAGEL

- which designated the United Kingdom on 15 April 2008 and which was protected on 18 December 2008:

Class 3 - Perfumery, essential oils, cosmetics, hair lotions, dentifrices.

Class 5 - Pharmaceutical, veterinary and sanitary products, dietetic substances adapted for medical use, food for babies, plasters, materials for dressings, material for stopping teeth and dental wax, disinfectants.

All of the opponent's trade marks are earlier trade marks for the purposes of section 6 of the Act. As trade marks (i), (iii) and (iv) above had all been registered for more than five

years at the date the application was published for opposition purposes, they are, in principle, subject to the proof of use provisions contained in section 6A of the Act. The opponent states that these trade marks have been used in relation to all the goods claimed. As trade mark (ii) above had not been registered for five years when the application was published, it is not subject to the proof of use provisions.

4. The applicant filed a counterstatement in which it denies the grounds of opposition and put the opponent to proof of use in relation to its trade marks (i), (iii) and (iv) above. The main points arising from the counterstatement are:

- A search for trade marks starting with the prefix BLEPHA- on the “UK and EM” registers reveals 20 applications and registrations. Nine of these registrations are said to be in the name of the opponent, four are in the name of the applicant, with the remainder in the names of five other undertakings;
- The above results indicate that the public is used to being presented with a range of trade marks which start with the prefix BLEPHA-, but which are distinguished by different suffixes and/or “*other branding indicators which are visible on the product packaging*”;
- No one undertaking should be granted a monopoly in the prefix BLEPHA- because BLEPHA- “*is a known abbreviation for the eye condition blepharitis*”;
- If the opponent does not admit the above statement, further evidence in support of the meaning of the prefix BLEPHA- and the “*range of eye products on the market including the word blepha...*” will be provided;
- In view of its position on the prefix BLEPHA-, the applicant argues that the differences in the suffixes of the competing trade marks at issue, create “*novel marks, each with its own separate conceptual identity*”;
- The applicant admits “*there is similarity*” between its goods and the goods in the opponent’s BLEPHACLEAN trade mark;
- Even if the opponent establishes use in relation to the goods in its BLEPHASTEAM and BLEPHASOL trade marks, the applicant denies there is any similarity with its goods;
- The applicant reserves its position in relation to the goods in the opponent’s BLEPHAGEL trade mark which, it doubts, will survive its request for proof of use.

Representation

5. A Hearing took place on 11 June 2015 at which the opponent was represented by Mr Dominic Hughes of Counsel instructed by Taylor Wessing LLP. The applicant, who is represented by Stratagem IPM Limited, advised the Tribunal that it would not be attending the hearing and nor would it be filing written submissions in lieu of attendance. I do, however, have the benefit of the written submissions filed on behalf of the applicant during the written stage of the procedures.

The opponent's evidence

6. This consists of a witness statement from François Marie Phillippe Lontrade, the opponent's Chief Corporate Officer Director. Mr Lontrade states that the opponent's earlier trade marks are used in relation to eyelid hygiene products and he provides details relating to each of the trade marks upon which the opponent relies. He states that the BLEPHASOL, BLEPHAGEL and BLEPHACLEAN trade marks were launched in the United Kingdom in 2009 and the BLEPHASTEAM trade mark was launched in the United Kingdom in 2010.

7. Exhibit FL1 comprises two sets of invoices. The first set, consists of fifteen invoices dated between 22 January 2010 and 7 November 2014. All of the invoices are on the letter headed paper of LABORATOIRES Théa at an address in Clermont-Ferrand, France and the recipient is shown as Spectrum Thea Pharmaceuticals at (in all but one case) an address in Macclesfield; the value of the invoices is shown in either Euros or £ Sterling. The second set, consists of five invoices on the letter headed paper of Spectrum Thea Pharmaceuticals Ltd in Macclesfield and are dated between 25 November 2010 and 15 November 2011. The recipients of the invoices are in Hay-on-Wye (Jackson & Gill Opticians), Elstree (Masters Direct Ltd), Basingstoke (Sightcare Group) and Whitehaven (Victor Martin Opticians); one invoice is described as a "cash only account" and bears no address. All of the opponent's earlier trade marks can be seen in one or more of the invoices provided.

8. Exhibit FL2 contains details of sales volumes under the various trade marks. These are as follows:

Product	UK sales volume 2013 (packs)	UK sales volume (packs) Between 1 January 2014 and 21 November 2014)
Blephaclean	161,184	261,084
Blephasol and Blephasol Duo	146,676	181,049

Blephagel	35,246	34,411
Blephasteam	422	381

9. Mr Lontrade states that the opponent's BLEPHA products are "*currently on sale*" in the United Kingdom in all Boots pharmacy stores (approximately 2,500 stores) and in all Boots optometrists (approximately 400 stores). He goes on to explain that its BLEPHA products are listed in up to 5,000 independent optometrists' stores and are promoted and sold to independent pharmacists via a sales team; its products are also, he states, prescribed by doctors in the United Kingdom. In 2013, the opponent spent £90k advertising its BLEPHA products in the United Kingdom with a further £95k spent in the United Kingdom in the period up to the date of his statement i.e. 19 December 2014. He adds that the opponent's BLEPHA products have been advertised throughout the United Kingdom in magazines and newspapers with the opponent carrying out "an extensive PR campaign" in 2013/14, which included coverage in the national press.

The applicant's written submissions

10. The main points emerging from the applicant's submissions are as follows:

- For the purposes of proof of use, only the sales up to the end of March 2014 [the date of publication of the applicant's mark] can be taken into account. When considered on that basis "*the number of sales are rather low for what are consumer products*".
- A number of the invoices provided as exhibit FL1 are between Laboratoires Théa and Spectrum Thea Pharmaceuticals, which the applicant assumes is a company within the same group. This "*causes the applicant to doubt whether these constitute real sales to the public*".
- The value of the invoices issued by Spectrum Thea Pharmaceuticals provided in exhibit FL1 do not, in the applicant's view, "*show commercial level of sales of products under the marks BLEPHASTEAM, BLEPHASOL or BLEPHAGEL in the UK*".
- The opponent has filed no evidence to illustrate (i) the retail outlets through which it claims the goods have been sold, (ii) advertisements showing use of its marks prior to the date of publication of the applicant's mark and (iii) the PR campaign the opponent claims to have undertaken in 2013/2014.
- The online version of the Oxford English Dictionary defines "blepharo-" in the following terms:

“blepharo-,comb.form

Greek eyelid; used in numerous terms of Pathol., etc. as **blepha ritis** n. inflammation of the eyelids. **blepharo plasty** n. the operation of supplying any deficiency caused by wound or lesion of the eyelid. **blepharo plastic** adj. **blepharospasm** n. spasm of the orbicular muscle of the eyelids. **blepharostat** n. an instrument for fixing the eyelid during operations in the eye. (New Sydenham Soc. Lexicon);

- The applicant submits that the above extract “*illustrates where the prefix blepha- originates and its relevance to the products of both [parties]*”.

Decision

11. The opposition is now based solely upon section 5(2)(b) of the Act which reads as follows:

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

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

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

The opposition based upon the BLEPHACLEAN trade mark

12. Mr Hughes submitted that the closest of the opponent’s earlier trade marks to the applicant’s mark is BLEPHACLEAN. I agree. As the opponent’s BLEPHACLEAN trade mark is not subject to proof of use, the opponent is entitled to rely upon all of the goods for which it stands registered.

Section 5(2)(b) – case law

13. 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.

The principles

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

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

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

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

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

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

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

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

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

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

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

The average consumer and the purchasing act

14. 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*¹, Birss J. described the average consumer in these terms:

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

15. With the exception of some goods proper to class 10 (for which the average consumer will be a professional user), the average consumer of all of the goods in classes 3 and 5 and some of the goods in class 10 will be either a professional user such as a doctor or optometrist or a member of the general public .

16. Insofar as the general public is concerned, the goods at issue are, with the possible exception of some of the goods in class 10, low cost consumable items which are self selected from the shelves of, for example, a chemist or opticians or from the pages of a website. Although visual considerations are likely to dominate the selection process, the goods may also be ordered orally in a pharmacy or purchased on advice from, for example, a professional user such as an optometrist. Therefore the level of aural similarity between the marks is also important. Although the cost of most of the goods is low, the fact that they may be purchased to treat a particular eye condition and/or be used in proximity to the eye suggests that, in relation to the goods in classes 3 and 5, a normal level of attention will be paid during the selection process. Although the goods in class 10 are likely to be selected in much the same way, given their potentially higher cost, an above average degree of attention is likely.

17. As a professional user is likely to acquire the goods at issue from, for example, the pages of a catalogue, website, or direct from the shelves of a bricks and mortar wholesaler, visual considerations are, once again, likely to be the most important part of the selection process. However, as orders for the goods may also be placed by telephone, the level of aural similarity between the marks is also important. Although the unit cost of many of the goods at issue will be low, for a range of goods proper to class 10, the cost of the goods may be fairly significant. Although a professional user is likely to have a greater degree of familiarity with the goods than a member of the general public, they may be buying on a commercial scale. Even if they are not, the

professional's duty of care to the public will demand that they pay at least a normal level of attention during the selection process.

Comparison of goods

18. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p>Class 3 - Cosmetic preparations for making up, removing make-up, cleaning, care for the eyes and eyelids; wipes and lotions for cosmetic purposes for the cleaning and care of the eyes and eyelids; wipes impregnated with lotions for making up, removing make-up, cleaning, care for the eyes and eyelids; essential oils.</p> <p>Class 5 - Ophthalmic and ophthalmological preparations; sanitary preparations for ophthalmological purposes; food or nutritional supplements for ophthalmological purposes; disinfectants for ophthalmological or sanitary purposes (except soap); eye washes; ophthalmological ointments; preparations for cleaning contact lenses; lotions; Creams; gels for ophthalmological purposes; antiseptics; analgesics; tranquillizers; antibiotics; tranquillizers; vitamin preparations; all the aforesaid goods being for ophthalmological purposes.</p> <p>Class 10 - Surgical and medical devices and instruments.</p>	<p>Class 3 - Non-medicated eye lotions; preparations for cleaning the eyes and eyelids.</p> <p>Class 5 - Pharmaceutical preparations; pharmaceutical preparations for the eye; ophthalmic preparations and substances; ophthalmic formulations; eye care preparations for medical use; eye drops; eye lotions for medical use; eye gels for medical use; eye washes; non-medicated eye drops, non-medicated eye washes; ophthalmic preparations and substances for the provision of optimum eye function.</p> <p>Class 10 - Medical and veterinary apparatus and instruments; apparatus for use in relation to the eye region for eye conditions; apparatus for use in relation to the prevention and treatment of eye conditions; apparatus for ophthalmic use for eye conditions; medical masks; surgical masks; eye masks for medical purposes; thermal masks for medical purposes; cooling masks for medical purposes; re-heatable pads and masks for medical purposes; temperature gauges for medical purposes.</p>

19. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*² the General Court (GC) stated:

“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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more

¹ [2014] EWHC 439 (Ch)

² Case T-133/05

general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedral v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

20. As I mentioned above, in its counterstatement the applicant admitted:

“11...there is similarity between the goods registered in the earlier mark...and the goods applied for in classes 3, 5 and 10 of the application...”

21. Although that is a helpful concession, a brief analysis (see below) indicates that all of the applicant’s goods are either literally identical to the opponent’s goods in the same class or are to be regarded as identical on the principles outlined in *Merix*. In support of those conclusions, a brief review of the competing specifications reveals:

Class 3

The applicant’s ‘non-medicated eye lotions; preparations for cleaning the eyes and eyelids’ would include (at least) ‘wipes and lotions for cosmetic purposes for the cleaning and care of the eyes and eyelids’ in the opponent’s specification in this class, therefore the competing goods are identical on the *Merix* principle.

Class 5

‘Pharmaceutical preparations’ in the applicant’s specification would include, for example, ‘ophthalmic and ophthalmological preparations’ in the opponent’s specification, the competing goods are therefore identical on the *Merix* principle. All of the remaining goods in the applicant’s specification i.e. ‘pharmaceutical preparations for the eye; ophthalmic preparations and substances; ophthalmic formulations; eye care preparations for medical use; eye drops; eye lotions for medical use; eye gels for medical use; eye washes; non-medicated eye drops, non-medicated eye washes; ophthalmic preparations and substances for the provision of optimum eye function’ are also identical to the opponent’s goods identified above on the principles outlined In *Merix*.

Class 10

The applicant’s ‘medical and veterinary apparatus and instruments’ encompasses the opponent’s ‘surgical and medical devices and instruments’ The competing goods are therefore, once again, identical on the *Merix* principle. The same applies to all of the remaining goods in the applicant’s specification.

Comparison of trade marks

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

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

23. It would be wrong, therefore, to artificially to dissect the trade marks, although it is necessary to take into account the distinctive and dominant element of the trade marks. The trade marks to be compared are as follows:

BLEPHA CARE v BLEPHACLEAN BLEPHACARE

24. The overall impression created by BLEPHACARE and BLEPHACLEAN is of a single word. Consequently, there is no dominant or distinctive element of these marks. BLEPHA CARE is composed of two words, but neither is dominant. The distinctive character of this mark resides in the combination of the two elements. Each of the trade marks consist of ten and eleven letters respectively; the first seven letters are identical i.e. B-L-E-P-H-A-C. Further, the letters A and E appear in the final three letters of both marks (albeit not in the same order). In my view, this results in a medium to high degree of visual similarity between the applicant’s marks and the opponent’s mark when compared as wholes.

25. The common prefix BLEPHA is likely to be pronounced BLEF-AR. The sound of CARE and CLEAN is obvious. In my view, the suffixes of the marks, CARE and CLEAN, sound more different compared to how they look. This means that the marks as wholes sound similar to a medium (as opposed to a medium to high degree).

26. So far as conceptual similarity is concerned, in its counterstatement, the applicant states:

“Although the overall impression that both trade marks convey is of a single word, it is unlikely to go unnoticed that both contain, as elements, readily identifiable English language words i.e. CARE and CLEAN, both of which have obvious descriptive qualities in relation to the goods at issue...”

“[CARE and CLEAN] are words which have their own identity and meaning in the English language and this will be recognised by the public. The word “care” implies a nurturing activity, whereas the word “clean” obviously implies a cleaning activity, which is not generally associated with providing nurturing care.”

27. Although the marks BLEPHACLEAN and BLEPHACARE consist of a single word, I accept that it will be apparent to average consumers that the marks contain the well known words CARE and CLEAN. This is obviously the case for the second mark in the applicant’s series of two; BLEPHA CARE. I also accept that the precise meanings of CARE and CLEAN are different. However, as Mr Hughes pointed out at the hearing, both parties’ specifications in class 3 contain a reference to “cleaning” and that the applicant’s specification in class 5 also includes a reference to “eye washes”. He submitted that this showed the conceptual difference between caring for and cleaning the eye may be insignificant. I agree. In the context in which they appear in the competing trade marks the words CARE and CLEAN will evoke highly similar conceptual imagery.

28. Insofar as the first part/word of the other element of the competing trade marks is concerned i.e. BLEPHA, the applicant’s counterstatement pointed to a range of trade marks in the name of seven undertakings which contain this prefix and asserted that this element *“is a known abbreviation for the eye condition blepharitis.”* However, Mr Hughes pointed out to me at the hearing that of the 19 marks relied on by the applicant, 9 were owned by the opponent and 4 by the applicant. Further, as Mr Hughes also pointed out, as the applicant has not provided any evidence to show whether any of these trade marks are in use. The relevant average consumer cannot therefore be taken to be familiar with the use of such marks by different undertakings. Consequently, the applicant’s reliance on other registered marks does not assist it.

29. The applicant stated that it would provide evidence to support its allegation that BLEPHA is a well known abbreviation for blepharitis. This may have been significant because the goods are issue can be used to treat this condition. Although the applicant has not filed any evidence in these proceedings, it did provide an extract from the Oxford English Dictionary showing that ‘blepharo’ is a combining term used to indicate blepharitis. Blepharo is not, of course, BLEPHA. To that extent, the applicant has not made good the claim contained in its counterstatement. However, as all of the

opponent's evidence indicates that its goods are used for, inter alia, the treatment of blepharitis it would be unrealistic to exclude the possibility that consumers will recognise BLEPHA as the beginning of the word blepharitis, and therefore allusive of the intended purpose of the goods.

30. I therefore conclude that consumers will see the marks at issue as alluding in similar ways to treatments for blepharitis. In my view, the applicant's marks are therefore highly similar to the opponent's mark from a conceptual perspective.

31. Overall, I consider that the applicant's marks are similar to the opponent's mark to a medium to high degree.

Distinctive character of the opponent's BLEPHACLEAN trade mark

32. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings³. It follows from my earlier findings that considered as a totality, BLEPHACLEAN is possessed of a low degree of inherent distinctive character. The applicant has, however, provided evidence of the use it has made of its BLEPHACLEAN trade mark. The evidence indicates that the first sales of goods under the trade mark occurred in 2010. The sales in 2013 amounted to over 160k units. These sales have not been placed in the context of market share, but they appear to be quite significant given the very specific market for the products. However, given that the length of use is quite short and the amount spent promoting the mark in the UK appears quite modest, I do not find that the earlier trade mark benefits from any significant enhanced level of distinctive character acquired through use.

Likelihood of confusion

33. I find that the factors pointing towards confusion, particularly the identity of the goods and the medium to high degree of similarity between the marks, outweighs the factors pointing the other way, i.e. the relatively low degree of distinctive character of the earlier mark and the at least normal level of attention likely to be paid by relevant average consumers during the selection process⁴.

³ *Windsurfing Chiemsee v Huber and Attenberger*, CJEU, Joined Cases C-108/97 and C-109/97

⁴ The fact that the opponent's earlier trade mark has only a weak inherent distinctive character does not preclude a likelihood of confusion. See *L'Oréal SA v OHIM*, CJEU, Case C-235/05 P

34. Specifically, I find that there is a high likelihood of direct confusion as a result of imperfect recollection. The medium to high level of visual similarity, and the high level of conceptual similarity, between the marks, in combination with the identity of the goods, is highly relevant to this finding. The risk of confusion through imperfect recollection is heightened even further by the fact that members of the general public are likely to buy these goods as and when affected by blepharitis. Therefore there is a likely to be a gap in time between such purchases.

Outcome in relation to the opponent's BLEPHACLEAN trade mark

35. The opposition based upon the above trade mark succeeds in relation to both of the applicant's trade marks and in relation to all of the goods in the application.

The opposition based upon the opponent's other trade marks

36. Having concluded that the opponent has been wholly successful based upon its BLEPHACLEAN trade mark, it is not necessary for me to consider the matter any further.

Costs

37. The opponent has been successful and is entitled to a contribution towards its costs. I will award costs to the opponent on the following basis:

Preparing a statement and considering the applicant's statement:	£300
Preparing evidence:	£500
Preparation for and attending a hearing:	£700
Expenses:	£100
Total:	£1600

38. I order Altacor Limited to pay to Laboratoires Théa (société par actions simplifiée) the sum of £1400. This sum is to be paid within fourteen days of the expiry of the appeal period or, if there is an appeal, within fourteen days of the final outcome of the appeal.

Dated this 6th day of July 2015

**Allan James
For the Registrar**