

O-270-19

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003300750 BY CARE XY LIMITED
TO REGISTER THE FOLLOWING TRADE MARK**

carexy

IN CLASSES 5, 10, 25, 44 AND 45

**AND IN THE MATTER OF OPPOSITION THERETO UNDER NO. 413820
BY DR. KURT WOLFF GMBH & CO. KG**

Background and pleadings

1) Care XY Limited (“the applicant”) applied to register the trade mark “carexy” in the UK on 30 March 2018. It was accepted and published in the Trade Marks Journal on 22 June 2018 in respect of various goods and services in classes 5, 10, 25, 44 and 45, including:

Class 5: *Pharmaceutical and veterinary preparations, none being disinfectant, sanitary and antiseptic preparations; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; preparations for destroying vermin; fungicides, herbicides; foods and beverages adapted for medical purposes.*

2) Dr. Kurt Wolff GmbH & Co. KG (“the opponent”) partially opposes the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The ground is based on its earlier European Union (formerly Community) Trade Mark (“EUTM”) no. 014289573 and earlier International Registration designating the EU (“IR(EU)”) no. 1316178. The relevant details of these earlier marks are provided below:

EUTM no. 014289573

Karex

Filing Date: 24 June 2015

Date of entry in register: 28 October 2015

Goods relied upon:

Class 5: *Pharmaceutical preparations, other than analgesics, anti-inflammatory preparations, antipyretics and narcotics; Sanitary preparations for medical purposes; Material for stopping teeth, dental wax; Disinfectants; Medicated oral care preparations; Medicated mouth washes; Medicated chewing gum and lozenges for dental hygiene; Medicated preparations for oral hygiene; Medicated tooth polishing preparations.*

IR(EU) no. 1316178

Karex

Date designated the EU: 27 February 2016

Date protection granted in the EU: 29 March 2017

Goods relied upon:

Class 5: *Medical preparations, other than analgesics, anti-inflammatory preparations, antipyretics and narcotics; sanitary preparations for medical purposes; material for stopping teeth, dental wax; disinfectants; medicated oral care preparations; medicated mouth washes; medicated chewing gum and lozenges for dental hygiene; medicated preparations for oral hygiene; medicated tooth polishing preparations.*

3) The opponent's marks are both earlier marks by virtue of having an earlier filing date/earlier date of designation of the EU, respectively. Further, as neither of these earlier marks had been registered for more than five years prior to the publication of the applicant's mark, they are not subject to the proof of use provisions in section 6A of the Act. The consequence of this is that the opponent is entitled to rely on any of the goods listed in its earlier registrations. However, it relies only upon its Class 5 goods.

4) The opposition is against all the applicant's Class 5 goods and the opponent argues that the following of the respective goods are identical:

<u>UKTMA3300750</u>	<u>EUTMR14289573</u>	<u>ITMR1316178</u>
<i>Pharmaceutical and veterinary preparations, none being disinfectant, sanitary and antiseptic preparations</i>	<i>Pharmaceutical preparations, other than analgesics, anti-inflammatory preparations, antipyretics and narcotics</i>	<i>Medical preparations, other than analgesics, anti-inflammatory preparations, antipyretics and narcotics</i>
<i>material for stopping teeth, dental wax</i>	<i>Material for stopping teeth, dental wax</i>	<i>material for stopping teeth, dental wax</i>

5) It further argues that the following of the respective goods are similar:

<u>UKTMA3300750</u>	<u>EUTMR14289573</u>	<u>ITMR1316178</u>
<i>dietetic substances adapted for medical use, food for babies</i>	<i>Medicated oral care preparations; Medicated mouth washes; Medicated chewing gum and lozenges for dental hygiene; Medicated preparations for oral hygiene;</i>	<i>medicated oral care preparations; medicated mouth washes; medicated chewing gum and lozenges for dental hygiene; medicated preparations for oral hygiene</i>
<i>plasters, materials for dressings</i>	<i>Sanitary preparations for medical purposes</i>	<i>sanitary preparations for medical purposes</i>
<i>preparations for destroying vermin; fungicides, herbicides</i>	<i>Disinfectants</i>	<i>disinfectants</i>
<i>foods and beverages adapted for medical purposes</i>	<i>Medicated oral care preparations; Medicated mouth washes; Medicated chewing gum and lozenges for dental hygiene; Medicated preparations for oral hygiene;</i>	<i>medicated oral care preparations; medicated mouth washes; medicated chewing gum and lozenges for dental hygiene; medicated preparations for oral hygiene</i>

6) It submits that the respective marks are conceptually identical because they both recall the concept of “care”, they are phonetically “very close” with the only difference being that created by the letter “y” at the end of the applicant’s mark, and that they are visually closely similar. It asserts that because of the similarity of the respective goods and of the marks, together with the respective goods having the same target consumers, a likelihood of confusion arises.

7) The applicant filed a counterstatement denying the claims made.

8) Both sides filed written submissions that will not be summarised but will be taken into account and referred to, as and where appropriate, during this decision. No hearing was requested and so this decision is taken following a careful consideration of the papers.

9) The opponent was represented in these proceedings by Sandersons and the applicant by Wilson Gunn.

DECISION

Section 5(2)(b)

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

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

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

Comparison of goods

11) 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 of its judgment that:

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

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

- (a) The respective 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.

13) I also keep in mind the following guidance provided by the General Court (“the GC”) in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T- 325/06 where it explained when goods were to be considered complementary:

“82 It is true that goods are complementary if 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 (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

14) In its written submissions, the applicant accepted that some of its goods are identical or similar to the opponent’s goods but denied that its *veterinary preparations* are identical to any of the opponent’s goods because they have different end users, purposes and channels of trade. The opponent has claimed that they are identical to its *pharmaceutical preparations* covered by its earlier EU mark and *medical preparations* covered by its earlier IR(EU). As an adjective, the word “pharmaceutical” means “relating to medicinal drugs, or their preparation, use or, sale”¹. Therefore, when used in the term *pharmaceutical preparations*, it will be understood as describing medicinal preparations or medical preparations. On the other hand, the adjective “veterinary” means “relating to the diseases, injuries and treatment of farm and domestic animals”² and, therefore, when used in the term *veterinary preparations*, the term will be understood as describing medical preparations for the treatment of animals. Taking note of these meanings, it is likely that the opponent’s term will include *veterinary preparations* and, therefore, the respective terms are identical, as the opponent submits. However, if I am wrong and the term *pharmaceutical preparations* does not include *veterinary preparations* they will, nonetheless, include goods that are identical in nature and method of use, but one for use on animals and the other for use on humans. Their purpose is similar in that for any given preparation it will be to treat the same ailment and in the same way. However, they will not be in competition nor complementary. Finally, whilst the final purchasers of the products will differ the products may originate from the same

¹ <https://en.oxforddictionaries.com/definition/pharmaceutical>

² <https://en.oxforddictionaries.com/definition/veterinary>

source so there may be some overlap of trade channels. Therefore, they will share a good deal of similarity even if they are not identical.

15) The applicant also denies that its *preparations for destroying vermin* are similar to the opponent's goods for the same reasons. The opponent submits that because these goods and its *disinfectants* are both chemical products designed to destroy microorganisms that they have an identical purpose and are, therefore, similar to a high degree. "Vermin" are "wild animals that are believed to be harmful to crops, farm animals, or game, or which carry disease, e.g. rodents"³. Whilst the dictionary goes on to extend the meaning to "parasitic worms or insects", it does not appear to extend to microorganisms and this concurs with my own impressions. On the other hand, "disinfectant" is "a chemical liquid that destroys bacteria"⁴. Therefore, I find that *disinfectants*, whilst they may be similar in nature, they differ in method of use, intended purpose and will not be in competition nor complementary. Further, they are generally provided through different trade channels. Consequently, whilst there may be some similarity, it is no more than low.

16) In respect of the applicant's *fungicides, herbicides*, the former would cover medications used to treat human infections and, consequently, I find that the purpose, nature, methods of use, users and trade channels have some overlap and I conclude that, as a result, they are reasonably highly similar to the opponent's *pharmaceutical preparations*. In respect of the latter, *herbicides* are toxic substances "used to destroy unwanted vegetation"⁵. Consequently, it is not obvious to me that they are of the same nature as *pharmaceutical preparations*, and they certainly differ in terms of methods of use, intended purpose and trade channels. Further, they are not in competition with, or complementary to *pharmaceutical preparations* and I conclude that they share no similarity.

17) In light of the applicant's concessions that, with the exception of *veterinary preparations*, it accepted the opponent's claims of identity between respective goods (as shown in its table reproduced in paragraph 4, above), I do not intend to

³ <https://en.oxforddictionaries.com/definition/vermin>

⁴ <https://en.oxforddictionaries.com/definition/disinfectant>

⁵ <https://en.oxforddictionaries.com/definition/herbicide>

undertake a full analysis of a comparison of these. It is self-evident that the goods, as set out in the opponent's table reproduced earlier in paragraph 4 are, indeed, identical.

18) Whilst the applicant has conceded that its remaining goods are similar to the applicant's goods, it is necessary that I conduct an analysis to determining what level of similarity there is. I deal with each of the applicant's terms in turn:

Dietetic substances adapted for medical use, food for babies

19) The opponent submits that these are substances prepared for special dietary requirements with the purpose of treating or preventing disease and, therefore, they are of a similar purpose to its *pharmaceutical preparations* in that they both improve health. It is claimed that they also share the relevant public. In respect of *dietetic substances adapted for medical use*, such goods are intended to be ingested to supplement the nutritional value of the normal diet of individuals or to redress imbalances of vital constituents that may be caused by certain health conditions. Therefore, on a general level, there is a similarity of purpose. The goods can have some therapeutic impacts and although not competitive, they could potentially be used in conjunction with *pharmaceutical preparations*. This would create a degree of complementarity, in the sense that the relevant public may believe that the responsibility for the respective goods lies with the same undertaking. Many *pharmaceutical preparations* are administered orally and, consequently, the methods of use are similar. It is also likely that the respective goods can be purchased via the same channels, such as pharmacies. In summary, I find that these goods share a moderate level of similarity to the opponent's *pharmaceutical preparations*.

20) In respect of *food for babies*, it is not obvious to me that these have any specific application for curing illness or improving health beyond delivering an optimally balanced diet for babies. Consequently, other than the fact that the respective goods are or can be taken orally, there is no similarity of nature, purpose or trade channels and they are not in competition nor complementary in the sense expressed in *Boston Scientific*. Taking all of this together I conclude that there is no similarity, or if I am wrong, then no more than a very low level of similarity.

Plasters, materials for dressing

21) The opponent has submitted that these goods are similar to its *sanitary preparations for medical purposes*. The applicant's goods are used for the treatment of wounds and the opponent submits that they have a high degree of similarity because the purpose is the same as its *sanitary preparations* because they are both essentially to maintain cleanliness of a wound. Whilst I accept that, at that general level, they are similar, the applicant's goods maintain cleanliness of a wound by covering and protecting it whereas the opponent's goods are applied to the wound. Therefore, their nature and method of use is different. Whilst both may be available from a pharmacy, they will be displayed on different shelves and they are not in competition; however, I accept that both goods maybe aimed at the same public, namely healthcare professionals and the general public who wish to treat a person's wound(s). Finally, their respective uses may be complementary in a medical sense because both goods may be employed to treat a wound, they are not complementary in the sense expressed in *Boston Scientific* because one is not important or essential to the use of the other and the consumer would not normally expect the same, or linked, economic undertaking to be responsible for both. Taking all of this into account, I conclude that these goods share only a moderate level of similarity.

22) The opponent also submitted that the goods are similar to its *pharmaceutical preparations*. Similar issues are involved to those discussed in the previous paragraph. They are different in nature and method of use. Intended purpose is only the same at a general level. The goods are aimed at the same public, but they are not in competition nor complementary. They are similar to the same moderate level.

Food and beverages adapted for medical purposes

23) The opponent submits that these goods are similar to *pharmaceutical preparations* because they are both designed to improve health and because they share the same relevant public and distribution channels. The applicant's goods are not intended to serve as ordinary food preparations but, instead, are consumed to assist in the management of the dietary aspects of a medical condition. I agree with the opponent that the purpose of these goods is similar to that of the *pharmaceutical*

preparations. The end user for these goods is likely to be the same, e.g. someone seeking treatment for a health problem, and both categories of goods are ingestible medical products. The goods can be used together to treat or manage the same medical condition, albeit probably with different expectations as to the benefits of the respective products. Users may choose one type of goods over the other for their treatment or may use them in combination and, consequently, they may be in competition. Where the respective goods are both adapted/developed for the treatment of the same condition they may be complementary with the relevant public believing that the responsibility for the goods lies with the same or linked undertaking. They may also be available through the same trade channels, namely pharmacies. These goods are similar to a moderate level to the opponent's *pharmaceutical preparations*.

24) The opponent also claims that the applicant's goods are identical to its *medicated lozenges for dental hygiene and medical preparations for oral hygiene* because *food and beverages adapted for medical purposes* is a broad term that includes the opponent's goods. I agree and find that the respective goods are identical.

25) Finally, I add that some of the goods of the opponent identified as being similar to the applicant's goods (as set out in its statement of case), are different to those later relied upon in its written submissions. However, none of the goods relied upon in its statement place the opponent in a better position than those I have considered in the preceding paragraphs.

Comparison of marks

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

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

28) The respective marks are shown below:

Opponent's mark	Applicant's mark
Karex	carexy

29) The respective marks both consist of single words and, self-evidently, the distinctive character of each resides in these.

30) The opponent points out that, visually, both marks share the letter sequence “AREX” and that they only differ in their first and last letters and the marks are of similar length. The applicant submits that because both marks bring to mind the concept of “care” then the focus for considering similarity must be the additional elements. In this respect, it submits that the only similarity is that both marks contain the letter “x” and further, it submits that the initial letter “K” of the opponent’s mark allows the applicant’s mark to be easily distinguished. Finally, it claims that the letter “y” present in the applicant’s mark is an additional element that results in the marks being distinguishable from one another. I am not convinced by the applicant’s

forensic approach to similarity. Firstly, it is well established that the marks must be considered as their wholes and it is not permissible to dissect the marks. I must therefore consider the entirety of each mark, including the letters that allude to the concept of “care”. With this in mind and noting both the differences and similarities, I find that the respective marks share a medium level of visual similarity.

31) The opponent submits that, aurally, the respective marks share the same first two syllables. I agree, both will be expressed as either CAR-EX or CAIR-EX. Of course, the applicant’s mark also contains an additional syllable at the end of the mark. It is likely to be expressed as “EE”. It is the only aural difference between the marks and, therefore, I agree with the opponent’s conclusion that the respective marks share a high degree of aural similarity.

32) It is common ground that both parties’ marks contain the concept of “care”, but the parties differ in their view of the impact of this upon the likelihood of confusion. I will consider this difference of opinion later, but here, I record that I agree with the parties in that, insofar that whilst both marks consist of invented words they, nevertheless, evoke the idea of “care”. This evocation is slightly stronger in the applicant’s mark because the word “care” is subsumed in its mark with the correct spelling. I conclude that where a conceptual identity will be perceived, it will be the same in both marks.

Average consumer and the purchasing act

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

34) In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

35) In *Bayer AG v EUIPO*, Case T-261/17, the GC held that the average consumer pays a heightened level of attention when selecting pharmaceutical products, including such products available without a prescription (see paragraph 33 of the judgment). I find that this will generally be the case with the parties’ goods in the current case, but nonetheless, recognise that there are exceptions to this e.g. plasters, where such goods are bought without any more than an average level of care and attention. The purchasing process for pharmaceutical products may be visual in nature, where they are self-selected from a shelf (or online equivalent), but equally, they may be requested aurally at a counter. Therefore, I find that both visual and aural considerations are relevant.

36) In *Mundipharma AG v OHIM*, Case T-256/04, the GC accepted that there were two groups of relevant consumers for a pharmaceutical product, professional users and the general public. The opponent’s submission to the same effect is noted and I find that the average consumer for such goods may be a specialised consumer within the medical field or ordinary members of the public seeking such goods for treatment of an ailment or for a specifically controlled diet.

Distinctive character of the earlier trade mark

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

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

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

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

38) The opponent has not provided evidence and therefore, I only have the inherent distinctive character of the opponent’s mark to consider. Whilst it is common ground between the parties that it evokes the idea of “care”, I consider this to be no more than a vague allusion with the first letter “K” and the addition of the letter “x” at the end creating a mark of reasonable distinctive character.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

39) 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;

(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.

40) In *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, the CJEU stated at paragraph 66 of its judgment that when assessing the likelihood of confusion under Section 5(2) it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. I have found that the goods at issue may be purchased not just by medical professionals but also ordinary members of the public. The latter are likely to have less knowledge of the field and this may result in a greater likelihood of confusion.

41) In addition, I have found that:

- Some of the respective goods are identical, others share a moderate level of similarity whilst others share low or no similarity;
- The distinctive character of both marks, being single words, resides in those words;
- The respective marks share a medium level of visual similarity, a high degree of aural similarity, and where a concept will be perceived, it will be the same in both marks;
- Both aural and visual considerations may play a part in the purchasing process;
- The opponent's mark is endowed with a reasonable level of inherent distinctive character. There is no evidence that this has been enhanced through use.

42) The applicant submits that because the concept of “care” is created by both marks and that because neither can claim exclusive rights to the word “care”, then the focus of my considerations should be on the additional elements of each mark. I reject this approach. I must consider the issue by considering each mark as a whole and not discount any particular element unless it is “negligible”. The “Care”/“Kare” parts of the respective marks are not negligible. Rather, they contribute significantly to the impact of the marks as a whole. I note that where marks may be considered similar in circumstances where both evoke the same idea, a likelihood of confusion may still be found (see *Usinor SA v OHIM*, Case T-189/05 and others, as referred to by the opponent in its submissions).

43) In addition, the respective marks contain the letters “Karex”/“Carex” respectively. The addition of the letter “x” added to the allusive part of the marks has the same impact in both marks. Whilst I note the applicant’s mark has the additional letter “y” at the end, it is a difference that is somewhat overwhelmed by the similarities.

44) In bringing all the factors of my global analysis together, I keep in mind that a closer similarity between the marks can offset a lesser degree of similarity of the goods and vice versa. It is my view that where the respective goods are identical, highly similar or moderately similar, the similarities between the marks are such that, when factoring in imperfect recollection, there is a likelihood of confusion in respect of the average consumers (at least where they are members of the general public). The position is less clear regarding average consumers that are medical professionals, where the level of care and attention is elevated but, on balance, I find that a likelihood of confusion exists.

45) Where I have found a low or no level of similarity between the goods, I find that the similarity between the marks is likely to be insufficient to result in confusion, even if one mark is brought to mind by the other.

Summary

46) The opposition succeeds in respect of the following of the applicant’s goods:

Pharmaceutical and veterinary preparations, none being disinfectant, sanitary and antiseptic preparations; dietetic substances adapted for medical use, plasters, materials for dressings; material for stopping teeth, dental wax; fungicides, foods and beverages adapted for medical purposes.

47) The opposition fails in respect of the remaining goods, namely:

Food for babies; preparations for destroying vermin; herbicides

COSTS

48) The opponent has been largely successful and is entitled to a contribution towards its costs. In the circumstances I award the opponent costs on the following basis:

Preparing statement and considering counterstatement	£300
Official filing fees	£100
Preparation written submissions in lieu of attending hearing	£400
TOTAL	£800

49) I therefore order Care XY Limited to pay Dr Kurt Wolff GmbH & Co. KG the sum of £800. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated 21 May 2019

Mark Bryant
Principal Hearing Officer
For the Registrar