

**O/451/19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003315573**

**BY GET FITT LIMITED**

**TO REGISTER THE FOLLOWING TRADE MARK:**

**LIGHT RELIEF**

**IN CLASSES 5, 10, 35, 41 AND 44**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 414266 BY**

**VITATEC MEDIZINTECHNIK GMBH**

## BACKGROUND AND PLEADINGS

1. On 5 June 2018, Get Fitt Limited (“the applicant”) applied to register the trade mark **LIGHT RELIEF** in the UK. The application was published for opposition purposes on 3 August 2018. Registration is sought for the following goods and services:

Class 5        Nutritional supplements; dietary supplements; powdered nutritional supplement drink mix; mineral supplements; vitamin supplements; protein supplements; medicinal tea.

Class 10       Infrared lamps for curative purposes; infrared apparatus for medical purposes; infrared lamps for surgical purposes; infrared apparatus for surgical purposes; medical apparatus for the relief of pain; physical therapy equipment; spine seats (medical apparatus); medical apparatus; physiotherapy and rehabilitation equipment; apparatus for use in toning muscles for medical rehabilitation.

Class 35       Retail services via shops, mail order and the internet in relation to infrared lamps for curative purposes, infrared apparatus for medical purposes, infrared lamps for surgical purposes, infrared apparatus for surgical purposes, medical apparatus for the relief of pain, physical therapy equipment, spine seats (medical apparatus), medical apparatus, physiotherapy and rehabilitation equipment, apparatus for use in toning muscles for medical rehabilitation, nutritional supplements, dietary supplements, powdered nutritional supplement drink mix, mineral supplements, vitamin supplements, protein supplements and medicinal tea.

Class 41       Coaching; providing of training; education services relating to health; health education; physical health education; medical education services; education services relating to physical fitness; training related to nutrition; providing of training in the field of health care and nutrition; health education; physical health education; health and wellness training.

Class 44 Health consultancy; physical rehabilitation; occupational therapy and rehabilitation; providing physical rehabilitation facilities; health centres; consultancy relating to health care; nutritional guidance; advisory services relating to medical apparatus and instruments; rental of medical apparatus; medical equipment rental; rental of medical and health care equipment; advisory relating to health; physical therapy; treatment of pain; medical equipment and apparatus rental; providing information relating to the rental of medical machines and apparatus; medical information; medical services; spas; spa services; medical treatment services provided by a health spa; medical spa services.

2. The application is opposed by Vitatec Medizintechnik GmbH (“the opponent”) based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against the applicant’s goods in class 10 and services in class 44 only. The opponent relies on EUTM no. 17477662 for the trade mark **e-Relief** which was filed on 14 November 2017 and registered on 9 March 2018. The opponent’s mark is registered for the following goods:

Class 9 Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; Physics (Apparatus and instruments for -); Apparatus for harmonisation and/or alleviation of artificially generated electromagnetic fields and of natural earth radiation.

Class 10 Medical apparatus and instruments; Rehabilitation apparatus (Body -) for medical purposes; Apparatus for harmonisation of the water molecules in the body for medical purposes; Medical apparatus for preventing the adverse effects of electromagnetic radiation; Apparatus for supporting biological therapies; Electromagnetic wave therapeutic instruments; Electrodes for medical use.

3. The opponent also, originally, sought to rely on EUTM no. 17837121 for the trade mark **deepRelief** which was filed on 20 February 2018. However, that mark had not

completed its registration process at the date of filing of the opposition and has since been refused registration. This no longer forms a basis for this opposition.

4. The opponent submits that the respective goods and services are identical or similar and that the marks are similar.

5. The applicant filed a counterstatement denying the claims made.

6. The applicant is represented by Dolleymores and the opponent is represented by Forrester's IP LLP. The opponent filed written submissions during the evidence rounds dated 21 March 2019. The applicant filed written submissions during the evidence rounds dated 16 May 2019. No evidence or submissions were filed in reply by the opponent. Neither party requested a hearing and only the opponent filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

## **DECISION**

7. Section 5(2)(b) of the Act states as follows:

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

(a)...

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

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

8. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b) subject to its being so registered.”

9. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As the opponent’s trade mark had not completed its registration process more than 5 years before the publication date of the application in issue in these proceedings, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods it has identified.

### **Section 5(2)(b) – case law**

10. 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 greater degree of similarity between the marks, and vice versa;

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

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

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

(k) if the association between the marks creates a risk that the public will wrongly 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

11. The competing goods and services are as follows:

Opponent's goods	Applicant's goods and services
<p><u>Class 9</u> Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; Physics (Apparatus and instruments for -); Apparatus for harmonisation and/or alleviation of artificially generated electromagnetic fields and of natural earth radiation.</p> <p><u>Class 10</u> Medical apparatus and instruments; Rehabilitation apparatus (Body -) for medical purposes; Apparatus for harmonisation of the water molecules in the body for medical purposes; Medical apparatus for preventing the adverse effects of electromagnetic radiation; Apparatus for supporting biological therapies; Electromagnetic wave therapeutic instruments; Electrodes for medical use.</p>	<p><u>Class 10</u> Infrared lamps for curative purposes; infrared apparatus for medical purposes; infrared lamps for surgical purposes; infrared apparatus for surgical purposes; medical apparatus for the relief of pain; physical therapy equipment; spine seats (medical apparatus); medical apparatus; physiotherapy and rehabilitation equipment; apparatus for use in toning muscles for medical rehabilitation.</p> <p><u>Class 44</u> Health consultancy; physical rehabilitation; occupational therapy and rehabilitation; providing physical rehabilitation facilities; health centres; consultancy relating to health care; nutritional guidance; advisory services relating to medical apparatus and instruments; rental of medical apparatus; medical equipment rental; rental of medical and health care equipment; advisory relating to health; physical</p>

	therapy; treatment of pain; medical equipment and apparatus rental; providing information relating to the rental of medical machines and apparatus; medical information; medical services; spas; spa services; medical treatment services provided by a health spa; medical spa services.
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12. When making the comparison, all relevant factors relating to the goods 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 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.”

13. Guidance on this issue has also 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.

14. In *Gérard Meric v Office for Harmonisation in the Internal Market*, 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 for 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.”

15. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. 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.”

16. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

17. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“... 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 the responsibility for those goods lies with the same undertaking.”

19. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected

undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

20. All of the applicant’s class 10 goods will fall within the broader category of “medical apparatus and instruments” in the opponent’s specification. These goods can be considered identical on the principle outlined in *Meric*.

21. “Health consultancy”, “physical rehabilitation”, “occupational therapy and rehabilitation”, “providing physical rehabilitation facilities”, “health centres”, “consultancy relating to health care”, “nutritional guidance”, “advisory relating to health”, “physical therapy”, “treatment of pain”, “medical information”, “medical services”, “spas”, “spa services”, “medical treatment services provided by a health spa” and “medical spa services” in the applicant’s specification are all services that would be provided to members of the general public. I recognise that some medical apparatus which would fall within the opponent’s class 10 goods may also be sold to members of the public (such as blood pressure testing kits), although most will be purchased by medical professionals. The goods and services will be different in nature and method of use. The trade channels will differ as the goods are likely to be sold through specialist medical apparatus retailers or more general high street retailers whereas the services will be sold through health care or spa services providers. Although the providers of the services may use the goods in the course of the provision of those services, this does not mean that they are complementary within the meaning of the case law cited above. There will also be no competition between the goods and services. I consider the goods and services to be dissimilar. If I am wrong in this finding, then they will be similar to only a low degree.

22. “Advisory services relating to medical apparatus and instruments”, “rental of medical apparatus”, “medical equipment rental”, “rental of medical and health care equipment”, “medical equipment and apparatus rental” and “providing information relating to the rental of medical machines and apparatus” in the applicant’s specification are all services that would be directed predominantly at medical professionals. However, I recognise that there will also be some services of this nature that are directed at the general public (such as mobility related aids). There will, therefore, be overlap in user with the opponent’s class 10 goods. There may also be overlap in trade channels because specialist retailers may both sell and offer medical equipment for hire and may provide advice and information about the use of such equipment. The nature of the goods and services will differ. There will be a degree of complementarity. The goods and services may, in some circumstances, be in competition because medical professionals may either choose to buy the goods or rent them from a service provider. I consider the goods and services to be similar to at least a medium degree.

### **The average consumer and the nature of the purchasing act**

23. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods and services. I must then determine the manner in which these goods and services are likely to be selected by the average consumer. 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”.

24. The opponent notes that goods such as infrared lamps can be purchased online by the general public as well as by medical professionals. As noted above, I agree that some of the goods in issue may be directed at both medical professionals and members of the general public. These will, therefore, both be average consumers for the goods. Whilst the purchase of the goods may vary significantly in cost and frequency, medical professionals using the goods during the course of medical treatment and therapy will take various factors will be taken into account during the purchasing process (suitability for purpose, quality and safety for patients). Members of the general public who purchase the goods are also likely to take various factors into account given that the goods will be related to their health and wellbeing. Indeed, in some cases members of the general public may take advice from medical professionals before purchasing the goods. Consequently, I consider that at least a medium degree of attention will be paid during the purchasing process for the goods, although I recognise that in some cases a high degree of attention may be paid.

25. The goods are likely to be purchased from specialist or high street retail outlets or their online or catalogue equivalents. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there may be an aural component to the purchase of the goods given that advice may be sought from specialist representatives and/or orders may be placed by telephone.

26. The average consumer for the services in issue will be either a member of the general public or medical professionals. The purchase of the services is likely to vary in cost and frequency. However, the average consumer is likely to take a number of factors into account when purchasing the services such as qualifications/certifications of the service provider, suitability for the patient's (or person's own) specific needs and specific facilities offered by the service provider. Even in respect of the applicant's spa services, which could cover recreational services, a degree of research is likely to be undertaken to determine the exact facilities on offer. Consequently, I consider that at least a medium degree of attention will be paid during the purchasing process. Again, I recognise that in some cases a high degree of attention may be paid.

27. The services are likely to be purchased from specialist facilities or outlets or their online equivalents. Visual considerations are, therefore, likely to dominate the

selection process for the services. However, I do not discount that there will also be an aural component to the purchase of the services given that aural referrals or recommendations may be made.

### **Comparison of the trade marks**

28. 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 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.”

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

30. The respective trade marks are shown below:

<b>Opponent's trade mark</b>	<b>Applicant's trade mark</b>
e-Relief	LIGHT RELIEF

31. I have lengthy submissions from both parties on the similarity of the marks. Whilst I do not propose to summarise those here, I have taken them into consideration in reaching my decision.

32. The opponent's mark consists of the hyphenated word e-Relief. There are no other elements to contribute to the overall impression which lies in the word itself. The applicant's mark consists of the words LIGHT RELIEF. The overall impression of the mark lies in the combination of those words.

33. Visually, registration of a word only mark covers use in any standard typeface and so use of capitalisation or title case is irrelevant for the purposes of my comparison. The marks coincide in the presence of the word RELIEF in both marks. However, they differ in the presence of the hyphenated "e-" in the opponent's mark and the presence of the word "LIGHT" in the applicant's mark. As a general rule, the beginnings of marks tend to make more impact than the ends<sup>1</sup>. I note the opponent's submission that because RELIEF is the longer word in both marks that this general rule should be departed from, however, I do not consider this to be the case. The differing beginnings of the marks do have a degree of visual impact. I consider the marks to be visually similar to no more than a medium degree.

34. Aurally, the applicant's mark will be pronounced LITE-REE-LEEF. The opponent's mark will be pronounced EEE-REE-LEEF. The marks coincide in the pronunciation of the last two syllables. The marks differ in the pronunciation of the first syllable. I consider the marks to be aurally similar to no more than a medium degree.

35. Conceptually, the word RELIEF is likely to be given its ordinary dictionary meaning in both marks i.e. a feeling of happiness that something unpleasant has come to an end or has not happened<sup>2</sup>. The presence of the hyphenated letter "e-" in the opponent's mark is likely to be seen as identifying something that is electronic in nature (in the same way, for example, as e-mail). The presence of the word "LIGHT" in the applicant's mark will be seen as qualifying the type of relief and/or a reference to the

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<sup>1</sup> *El Corte Ingles, SA v OHIM*, Cases T-183/02 and T-184/02

<sup>2</sup> <https://dictionary.cambridge.org/dictionary/english/relief>

saying “providing a bit of light relief”. This is normally a reference to light entertainment which is provided during or after something which might be considered serious or boring. This play on words is not present in the opponent’s mark. I consider the marks to be conceptually similar to a low to medium degree.

### **Distinctive character of the earlier trade mark**

36. 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-2779, 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).”

37. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because 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.



38. The opponent has not claimed that the distinctiveness of its mark has been enhanced through use and has filed no evidence to support such a claim. Consequently, I have only the inherent position to consider. The hyphenated letter “e-” is likely to be seen as a reference to goods which are electronic in nature. The word “RELIEF” in the context of medical goods will be allusive to something which is intended to relieve the patient of pain or some other type of condition or illness. Taking the opponent’s mark as a whole, I consider it to be inherently distinctive to a low to medium degree.

### **Likelihood of confusion**

39. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent’s trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

40. I have found the marks to be visually and aurally similar to no more than a medium degree and conceptually similar to a low to medium degree. I have found the earlier mark to have a low to medium degree of inherent distinctive character. I have identified the average consumer to be both members of the general public and medical professionals who will select the goods and services primarily by visual means, although I do not discount an aural component. I have concluded that at least a

medium degree of attention will be paid during the purchasing process, although for some of the goods and services a high degree of attention will be paid. I have found the parties' goods and services to range from similar to a low degree to identical.

41. I consider that the visual, aural and conceptual differences between the marks are sufficient to ensure that they will not be misremembered or mistakenly recalled as each other. The different conceptual meaning of each mark will act as a hook to assist the consumer in distinguishing between them. This is particularly the case given that the opponent's mark is inherently distinctive to only a low to medium degree and at least a medium degree of attention will be paid during the purchasing process. I consider this to be the case even in respect of those goods and services that I have found to be identical. I do not consider there to be a likelihood of direct confusion.

42. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

43. In my view, the conceptual differences between the marks will prevent the consumer from considering that the marks come from the same or economically linked undertakings. The average consumer is likely to view the common element “RELIEF” as a word that has been used in both marks due to their links with medical goods and

services rather than because they come from the same or linked undertakings. Neither the addition of the word LIGHT or the hyphenated letter “e-“ would be a natural variant of the other. I do not consider that there is a likelihood of indirect confusion.

## **CONCLUSION**

44. The opposition has been unsuccessful, and the application will proceed to registration.

## **COSTS**

45. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scaled published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of £700 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the opponent’s statement	£200
Preparing written submissions during the evidence rounds and considering the opponent’s written submissions	£500
<b>Total</b>	<b>£700</b>

46. I therefore order Vitatec Medizintechnik GmbH to pay Get Fitt Limited the sum of £700. The 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 2 August 2019**

**S WILSON**

**For the Registrar**