

**O/997/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3597098  
IN THE NAME OF ARC DEVICES LTD.  
IN RESPECT OF THE TRADE MARK**

**Wellvii**

**IN CLASSES 9 & 10**

**AND**

**THE OPPOSITION THERETO UNDER NO. 426344  
BY BESTWAY PANACEA HOLDINGS LIMITED**

## **Background and pleadings**

1. ARC Devices Ltd. (“the applicant”) applied to register the trade mark application number 3597098 for the mark Wellvii in the UK on 18 February 2021. The mark was filed pursuant to Article 59 of Withdrawal Agreement between the United Kingdom and the European Union, meaning it retains the filing and priority dates claimed on the original EU application. The application therefore claims a priority date of 9 April 2020 from US trade mark no. 88866539, as per the original application filed in the EU. The EU application itself was filed on 9 October 2020, and the UK application therefore also holds this second later priority date. It was accepted and published in the UK Trade Marks Journal on 21 May 2021 in respect of goods in classes 9 and 10 as set out at Annex A to this decision.

2. Bestway Panacea Holdings Limited (“the opponent”) oppose the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).<sup>1</sup> This is on the basis of its earlier registration number 3372432 for the series of 6 UK Trade Marks below relying on goods in classes 9 & 10, which are set out at Annex B to this decision:



3. The above registration holds a filing date of 4 February 2019 and a registration date of 21 June 2019. By virtue of its earlier filing date, it constitutes an earlier mark in accordance with section 6 of the Act.

4. The opponent argues that the respective goods are identical, similar and ‘associated’ to those covered by the earlier mark and that the marks are highly similar. The opponent submits that the opposed mark would be seen as an extension product or subsidiary business of the opponent’s, thus leading to a likelihood of confusion including a likelihood of association.

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

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<sup>1</sup> The opponent originally opposed the mark under both 5(2)(b) and 5(4)(a), but the 5(4)(a) ground was deemed withdrawn when no evidence was filed.

6. Neither party filed evidence in these proceedings. Only the opponent filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

7. Both parties are represented within these proceedings. The opponent is represented by Murgitroyd & Company. The applicant is represented by Keltie LLP.

8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

### **Proof of use**

9. The earlier registration holds a registration date of 21 June 2019. As it had not been registered for a period of five years or more at the date on which the application was filed, it is not yet subject to proof of use provisions in accordance with section 6A of the Act. The opponent may therefore rely upon all of the pleaded goods within the opposition.

### **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”.

11. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

### **The principles**

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

#### *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 might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

## Comparison of goods

13. Where goods are included identically within a specification it is clear they should be considered identical. Additionally, where the wording differs but shares an identical meaning, the goods will be self-evidently identical. Finally, goods may be considered identical where they fall within a term covered by another application or registration. 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 fur 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”.

14. The opponent covers the goods *downloadable computer software applications; recorded computer software; computers, computer peripheral devices, computer terminals, computer hardware and software for mobile phones, computers and devices; application software for mobile phones, computers and devices* in class 9. It is my view the following goods within the applicant’s specification are identical to these earlier goods, either self-evidently or in line with the principles set out in *Meric*:

*Class 9: Computer hardware and recorded software sold as a unit for use with medical patient monitoring equipment, for receiving, processing, transmitting and displaying data; Computer peripheral devices; Computer hardware and computer peripheral devices; Computer hardware and peripheral devices; Computer hardware and peripheral devices and recorded computer software for data communication and translating and transmitting data sold therewith; Computers and computer peripheral devices; Downloadable medical software for measuring vital signs, blood properties and respiratory event; Downloadable medical software for monitoring blood oxygen*

*saturation, blood gas concentrations, and vital signs; Downloadable medical software for measuring blood sugar for medical purposes; Downloadable medical software for medical use; Downloadable medical software for medical purposes and blood pressure measuring; Downloadable medical software for recording, processing and transmitting medical data; Downloadable medical software for monitoring blood properties and respiratory events; Downloadable medical software for transmitting monitored data through the Internet; Downloadable medical software for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG); Downloadable medical software for monitoring brain, heart and metabolic functions; Downloadable computer software for controlling and managing patient medical information; Interfaces and peripheral devices for computers; Recorded computer software and hardware for vital signs, blood properties and respiratory event sold as a unit; Recorded computer software and hardware for monitoring blood oxygen saturation, blood gas concentrations, and vital signs sold as a unit; Recorded computer software and hardware for medical use sold as a unit; Recorded computer software and hardware for medical purposes and blood pressure measuring sold as a unit; Recorded computer software and hardware for recording, processing and transmitting medical data sold as a unit; Recorded computer software and hardware for monitoring blood properties and respiratory events sold as a unit; Recorded computer software and hardware for transmitting monitored data through the Internet sold as a unit; Recorded computer software and hardware for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG) sold as a unit; Recorded computer software and hardware for monitoring brain, heart and metabolic functions; sold as a unit; Recorded computer software and*

*hardware for measuring blood sugar for medical purposes sold as a unit; Recorded medical software for medical purposes and blood pressure measuring; Recorded medical software for recording, processing and transmitting medical data; Recorded medical software for monitoring blood properties and respiratory events; Recorded medical software for transmitting monitored data through the Internet; Recorded medical software for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG); Recorded medical software for monitoring brain, heart and metabolic functions; Recorded medical software for medical use; Recorded medical software for measuring blood sugar for medical purposes; Recorded medical software for monitoring blood oxygen saturation, blood gas concentrations, and vital signs; Recorded medical software for measuring vital signs, blood properties and respiratory event.*

15. The opponent also covers the goods *electrical and electronic apparatus, appliances and instruments* in class 9. It is my view the following goods included within the applicant's specification are covered by this broad category of goods, and are therefore identical in line with the principles as set out in Meric:

*Class 9: Computer-controlled apparatus for testing and measuring vital signs, blood properties and respiratory event; Computer-controlled apparatus for testing and measuring monitoring blood oxygen saturation, blood gas concentrations, and vital signs; Computer-controlled apparatus for testing and measuring blood sugar for medical purposes; Computer-controlled apparatus for testing and measuring recording, processing and transmitting medical data; Computer-controlled apparatus for testing and measuring blood properties and respiratory events; Computer-controlled apparatus for testing and measuring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature,*



*weight and electrocardiogram (ECG); Computer-controlled apparatus for testing and measuring brain, heart and metabolic functions.*

16. In addition, I note that the applicant's following goods will include both electronic and non-electronic versions of the same, and they are therefore also identical to the opponent's *electrical and electronic apparatus, appliances and instruments* in line with the principles set out in *Meric*:

*Class 9: Medical weighing scales; Lasers for non-medical purposes; Lasers not for medical use; Lasers, not for medical purposes; Thermometers other than for medical use; Thermometers, not for medical purposes.*

17. The remaining term within the applicant's specification in class 9 is *Downloadable scientific and medical data via the internet*. I consider this to cover scientific and medical data that may be downloaded via the internet by consumers wishing to purchase that data. The data will likely be provided in the form of an electronic publication. It is my view that the opponent's goods *electronic publications (downloadable)* encompass downloadable electronic publications providing scientific and medical data to consumers wishing to purchase these. I therefore consider these goods to be identical in line with the principles set out in *Meric*.

18. However, if I am wrong in finding identity between these goods, I nonetheless consider that the opponent's *electronic publications (downloadable)* will include those for the provision of scientific and medical information, and I consider the level of similarity between these and the applicant's goods. 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.

19. In the judgment of the Court of Justice of European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

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

20. I find entities providing the opponent’s *electronic publications (downloadable)* including the type I have identified above, are also often likely to provide the raw data used to create these publications, and that the users of the goods, including professionals in medical and scientific fields will be shared. I also find the goods to share a nature on the basis they will both be downloadable documents, and they will share a purpose, that being for the provision of information to consumers including information concerning the scientific and medical field. Overall, if there is no identity between the goods, I nonetheless find them to be similar to a high degree.

21. The opponent’s goods in class 10 include *Medical, surgical and dental apparatus and instruments*. This is a fairly broad term covering all types of medical apparatus

and instruments as included within this class. It is my view these goods are identical to all of the applicant's class 10 goods, in accordance with the principles set out in *Meric*.

### **Comparison of marks**

22. 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 Court of Justice of the European Union 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 dissect the trade marks artificially, 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.

24. The earlier registration consists of a series of six very similar marks all comprising the element +WELL. These are displayed in a variety of colour combinations, with one shown on a rectangular background. It is my view that the simple black +WELL mark offers the opponent either equal or broader protection than the other marks shown in the series in this instance. When considering this mark, I must take into account the notional use of the mark in a range of colours. As the contested mark is a simple word mark applied for in black and white, I must also consider that this mark may be used

in a range of standard typefaces and colours. As it will not put the opponent at any disadvantage to do so, I will therefore proceed with my analysis based on the opponent's black +WELL mark only. If the opposition fails on the basis of this earlier mark, it follows it will fail on the basis of all six earlier marks within the series.

25. With this in mind, the respective trade marks are shown below:

Earlier trade mark	Contested trade mark
	Wellvii

26. The earlier mark comprises a small cross device in addition to slightly stylised word 'well'. The overall impression resides in the mark as a whole, but it is dominated by the 'well' element due both to its size and the fact it is a word.<sup>2</sup> The cross plays a secondary role in the overall impression, whereas the role of the stylisation is at best minimal within the same.

27. The contested mark is the single word 'Wellvii'. The overall impression resides in the mark in its entirety.

### Visual comparison

28. Visually, the marks share the four letters 'well'. This is the dominant element in the earlier mark and comprises the initial four letters of the contested mark. The marks vary visually firstly due to the addition of the three extra letters 'vii' in the contested mark which are not present in the earlier mark, and which make the contested mark appear longer. They also differ visually by way of the cross device at the beginning of the earlier mark which is not present in the contested mark. I note that the contested mark is filed as a word mark and may therefore be used in a range of standard fonts,

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<sup>2</sup> See *Migros-Genossenschafts-Bund v EUIPO – Luigi Lavazza (CReMESPRESSO)*, Case T-189/16, paragraph 52 which refers to the judgment of 6 December 2013, *Premiere Polish v OHIM — Donau Kanol (ECOFORCE)*, T-361/12, not published, EU:T:2013:630, paragraph 32 and the case-law cited, and explains it is well established in the case law that word elements are generally regarded as more distinctive than figurative elements.

and as such I do not consider the slight stylisation of the earlier mark to create a point of visual difference between the same. Overall, with consideration to the similarities and the differences, I find the marks to be visually similar to a medium degree.

### **Aural comparison**

29. It is my view that the earlier mark will simply be pronounced as the known English word 'well'. I do not believe consumers will attempt to verbalise the cross device. It is my view that the contested mark will be pronounced as the two syllables 'well-vee'. On the basis that both marks share the aural element 'well' but differ in length and by virtue of the second syllable in the contested mark, I find the marks to be aurally similar to a medium degree.

### **Conceptual comparison**

30. Within its written submissions, the opponent argues:

“As both marks share the dictionary defined and easily recognisable word WELL it is submitted that the signs are conceptually highly similar.”

31. The dominant element of the earlier mark is the word 'well'. I consider that particularly in the context of the goods but also generally, the consumer will take this to convey the concept of good health, namely the opposite to 'unwell'. In the context of the medical goods, but also generally due to its use with the word 'well', the small cross is likely to convey the concept of medical care to the consumer, with a cross often being used to indicate goods or services are of a medical nature within the UK.

32. The contested mark 'Wellvii' appears to be a made-up word. However, I consider that the consumer may find meaning in made up mark, where part of the same evokes a concept to the consumer. In *Usinor SA v OHIM*, Case T-189/05, the GC found that:

“62. In the third place, as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph

25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him (Case T-356/02 *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 51, and Case T-256/04 *Mundipharma v OHIM – Altana Pharma (RESPICUR)* [2007] ECR II-0000, paragraph 57).

63. In the present case, the Board of Appeal correctly found that the signs at issue have a common prefix, 'galva', which evokes the technique of galvanisation, that is, the act of fixing an electrolytic layer to a metal to protect it from oxidation.

64. By contrast, the Board of Appeal incorrectly took the view that a conceptual comparison of the second part of the signs was not possible, because the suffixes 'llia' and 'lloy' were meaningless.

65. That conclusion is based on an artificial division of the signs at issue, which fails to have regard to the overall perception of those signs. As stated in paragraph 59 above, the relevant public, which is French-speaking but has knowledge of the English language, will recognise in the mark applied for the presence of the English word 'alloy', corresponding to 'alliage' in French, even if the first letter of that word ('a') has merged with the last letter of the prefix 'galva', according to the usual process of haplology. That mark will therefore be perceived as referring to the concepts of galvanisation and alloy.

66. As far as the earlier mark is concerned, the suffix 'allia' is combined with the prefix 'galva' in the same way. The evocative force of the suffix 'allia' will enable the relevant public – on account of its knowledge and experience – to understand that that is a reference to the word 'alliage'. That process of identification is facilitated still further by the association of the idea of 'alliage' (alloy) with that of galvanisation, the suffix 'allia' being attached to the prefix 'galva'.

67. By breaking down the signs at issue, the relevant public will therefore interpret both signs as referring to the concepts of galvanisation and alloy.

68. Consequently, the conclusion to be drawn is, as the applicant correctly maintains, that the signs at issue are conceptually very similar, inasmuch as they both evoke the idea of galvanisation and of an alloy of metals, although that idea is conveyed more directly by the mark applied for than by the earlier mark”.

69. In this instance, it is my view that the consumer will find that the ‘well’ element in the contested mark also evokes the concept of good health. I do not consider that the ‘vii’ suffix will convey a concept to the consumer in this instance. Whilst I note the opponent’s argument that this may be considered as roman numerals for the number 7, I consider that a concept must be immediately graspable, and I find it exceptionally unlikely this meaning will be conveyed to the consumer. I therefore accept the opponent’s submission that the marks are conceptually similar to a high degree.

#### **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. The majority of the goods comprise medical or scientific software, hardware and apparatus. These are likely to be purchased primarily by the professional consumer in the field of science or medicine. I note that the purchase of the correct goods in this instance may make the difference between adequately treating a patient's health condition or failing to do so, and that there will be a high liability associated with the same. I therefore find that a high degree of attention will be paid by the professional consumer in respect of the goods. In addition, even where the general public purchase these types of goods for use at home, I find the fact that these primarily concern the treatment of health conditions means that at least an above medium degree of attention will still be paid when making a purchase.

36. There are some goods however, such as the more general electronic apparatus and the applicant's goods such as thermometers other than for medical use for example, for which the general public will be a primary consumer group. Whilst I consider that the consumer will not pay as much attention to these goods as they would to medical goods, I still consider that they will consider the quality and functionality of the goods, and I find at least a medium level of attention will be paid in respect of all of the goods concerned.

37. The goods are likely to be purchased visually, either in pharmacies or via specialist medical wholesalers, or online. However, I consider that aural aspects will play a part in the purchasing process, with verbal recommendations being sought from medical professionals, in addition to verbal sales pitches being provided to professionals. I also note verbal assistance may be sought during the purchasing process, including where orders may be placed over the phone. I cannot therefore completely ignore the aural aspect of the comparison.

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

38. 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).”

39. The earlier mark comprises a small cross and the word ‘well’. Whilst neither element is directly descriptive of the goods, I find that both the word ‘well’ and the cross with its medical appearance at least allude to the fact that the goods offered under the mark are likely to have a positive impact on one’s health. Overall, I consider the inherent distinctiveness of the earlier mark to be fairly low.

40. The opponent has not provided any evidence showing the use it has made of its mark, and as such I am unable to consider if the distinctive character of the mark has been enhanced through use of the same.

### **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion**

41. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 12 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, who is deemed to be reasonably well informed and reasonably circumspect

and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion. I must remember that the distinctive character of the earlier mark may be inherent, but that it may also be increased through use, and that the distinctiveness of the common elements is key.<sup>3</sup> I must keep in mind that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the goods are obtained will have a bearing on how likely the consumer is to be confused.

42. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.<sup>4</sup>

43. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

44. Whilst I note the opponent has directed its submissions towards a likelihood of indirect confusion, I will nonetheless firstly consider the likelihood of direct confusion

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<sup>3</sup> See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

<sup>4</sup> *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

between the marks. I consider that there is identity between the goods, or if I am wrong then at least in respect of the vast majority of the goods filed. I consider this to be a factor in the opponent's favour. I found the marks to be both aurally and visually similar to a medium degree. Whilst I note I found the marks to be conceptually similar to a high degree, I consider at this stage that the concept of good health that is evoked by the mark is not particularly strong in the context of the goods, and I find it unlikely the consumer will therefore put much weight on this shared concept in this instance. I also note I found the consumer to pay a high or at least an above medium degree of attention in respect of most of the goods, and a medium degree of attention to the rest. In addition, I found the earlier mark to hold a fairly low degree of distinctive character. Considering all of these factors, it is my view that the differences between the marks are such that the consumer will not fail to notice or recall these and as such they will not be directly confused between the marks.

45. I therefore move on to consider if I find there to be a likelihood of indirect confusion between the marks. In *L.A. Sugar* Mr Iain Purvis Q.C. (as he then was), as the Appointed Person set out three examples of when indirect confusion may occur as below:

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as "LITE", "EXPRESS", "WORLDWIDE", "MINI" etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

46. I note that the examples above were intended to be illustrative and are not exhaustive. I note at this point the opponent’s submissions on the likelihood of indirect confusion, and whilst I do not find the opponent’s arguments fall directly into one of the categories set out above, I find the premise of the argument to be most similar to that set out in category b.

47. The opponent argues as follows:

“In the present case with the opposed mark the relevant public is likely to break down the trade mark into the dictionary defined and instantly recognisable element WELL and the suffix vii. Vii could be seen as the Roman numerals for 7 meaning that the mark would be seen as WELL7 which could be seen as part of a product range of the client, i.e. +welli, +wellii, +welliii, +welliv, +wellv, +wellvi and +wellvii.”

48. As I have already noted within the conceptual comparison of the marks, it is my view that the suffix ‘vii’ in the contested mark is unlikely to convey the number 7 to any consumer, let alone to a significant portion of the same. I consider that if, perhaps, the opponent had evidenced that it owned and made good use of a family of marks using roman numerals after the word WELL it is possible that this argument would hold more weight. However, in the circumstances of this case and I find it too much of a leap to find that the consumer will conclude that the later mark is made up of the two elements ‘well’ and the roman numerals for ‘7’, and that as such it must be linked to the opponent’s earlier mark. Instead, I find the consumer will consider this mark hangs together as the made-up word ‘Wellvii’, albeit acknowledging the inclusion of the word well and the concept this will convey. I therefore do not find a likelihood of confusion on the basis set out by the opponent.

49. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was),

sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion. Having dismissed the opponent’s line of reasoning, I have considered whether I find there to be any other proper basis for a finding of a likelihood of indirect confusion in this case. However, with consideration to all of the factors, it is my view that even if the earlier mark were to be brought to mind by the inclusion of the element ‘well’ in the contested mark, which I note here I find unlikely particularly in relation to medical goods, this would nonetheless be put down to coincidence and not to an economic connection between the marks. I therefore find no likelihood of indirect confusion between the marks in this instance.

50. As I have found no likelihood of direct or indirect confusion between the marks, the opposition based on section 5(2)(b) of the Act has failed.

### **Final Remarks**

51. The opposition has failed in its entirety, and subject to any successful appeal, the application will proceed to registration in respect of all of the goods as filed.

### **COSTS**

52. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant scale costs in accordance with Tribunal Practice Notice 2/2016 to the sum of £300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the TM7 and preparing and filing the TM8:           £300

53. I therefore order Bestway Panacea Holdings Limited to pay ARC Devices Ltd. the sum of £300. The above sum should be paid within twenty-one days of the expiry of

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

**Dated this 14<sup>th</sup> day of November 2022**

**Rosie Le Breton  
For the Registrar**

## **Annex A – goods applied for under application number 3597098**

Class 9: Computer hardware and recorded software sold as a unit for use with medical patient monitoring equipment, for receiving, processing, transmitting and displaying data; Computer peripheral devices; Computer hardware and computer peripheral devices; Computer hardware and peripheral devices; Computer hardware and peripheral devices and recorded computer software for data communication and translating and transmitting data sold therewith; Computers and computer peripheral devices; Medical weighing scales; Computer-controlled apparatus for testing and measuring vital signs, blood properties and respiratory event; Computer-controlled apparatus for testing and measuring monitoring blood oxygen saturation, blood gas concentrations, and vital signs; Computer-controlled apparatus for testing and measuring blood sugar for medical purposes; Computer-controlled apparatus for testing and measuring recording, processing and transmitting medical data; Computer-controlled apparatus for testing and measuring blood properties and respiratory events; Computer-controlled apparatus for testing and measuring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG); Computer-controlled apparatus for testing and measuring brain, heart and metabolic functions; Downloadable medical software for measuring vital signs, blood properties and respiratory event; Downloadable medical software for monitoring blood oxygen saturation, blood gas concentrations, and vital signs; Downloadable medical software for measuring blood sugar for medical purposes; Downloadable medical software for medical use; Downloadable medical software for medical purposes and blood pressure measuring; Downloadable medical software for recording, processing and transmitting medical data; Downloadable medical software for monitoring blood properties and respiratory events; Downloadable medical software for transmitting

monitored data through the Internet; Downloadable medical software for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG); Downloadable medical software for monitoring brain, heart and metabolic functions; Downloadable computer software for controlling and managing patient medical information; Downloadable scientific and medical data via the internet; Interfaces and peripheral devices for computers; Lasers for non-medical purposes; Lasers not for medical use; Lasers, not for medical purposes; Recorded computer software and hardware for vital signs, blood properties and respiratory event sold as a unit; Recorded computer software and hardware for monitoring blood oxygen saturation, blood gas concentrations, and vital signs sold as a unit; Recorded computer software and hardware for medical use sold as a unit; Recorded computer software and hardware for medical purposes and blood pressure measuring sold as a unit; Recorded computer software and hardware for recording, processing and transmitting medical data sold as a unit; Recorded computer software and hardware for monitoring blood properties and respiratory events sold as a unit; Recorded computer software and hardware for transmitting monitored data through the Internet sold as a unit; Recorded computer software and hardware for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG) sold as a unit; Recorded computer software and hardware for monitoring brain, heart and metabolic functions; sold as a unit; Recorded computer software and hardware for measuring blood sugar for medical purposes sold as a unit; Recorded medical software for medical purposes and blood pressure measuring; Recorded medical software for recording, processing and transmitting medical data; Recorded medical software for monitoring blood properties and respiratory events; Recorded medical software for transmitting monitored data through the Internet; Recorded medical software for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO2), heart rate variability, respiration rate,



core body temperature, weight and electrocardiogram (ECG); Recorded medical software for monitoring brain, heart and metabolic functions; Recorded medical software for medical use; Recorded medical software for measuring blood sugar for medical purposes; Recorded medical software for monitoring blood oxygen saturation, blood gas concentrations, and vital signs; Recorded medical software for measuring vital signs, blood properties and respiratory event; Thermometers other than for medical use; Thermometers, not for medical purposes.

Class 10: Apparatus for blood analysis; Blood glucose meter; Blood oxygen monitors; Blood pressure measuring apparatus; Blood pressure monitors; Blood pressure transducers; Blood pressure and diabetic diagnostic medical devices; Blood pretreatment apparatus and instruments; Devices for measuring blood sugar; Devices for measuring blood sugar for medical purposes; Devices for monitoring blood glucose for medical purposes; Electronic temperature monitors for medical use; Medical apparatus and instruments for monitoring blood oxygen saturation, blood gas concentrations, and vital signs; Medical apparatus and instruments for monitoring blood oxygen saturation, blood gas concentrations, vital signs and respiratory events; Medical apparatus and instruments for monitoring blood oxygen saturation, blood gas concentrations, vital signs and respiratory events, and downloadable software for recording, processing and transmitting medical data, for use therewith, sold as a unit; Medical apparatus and instruments for monitoring blood oxygen saturation, blood gas concentrations, vital signs and respiratory events, and recorded software for recording, processing and transmitting medical data, for use therewith, sold as a unit; Medical apparatus and instruments for monitoring blood properties and respiratory events; Medical apparatus and instruments for monitoring vital signs, blood properties and respiratory events; Medical apparatus and instruments for monitoring vital signs, blood properties and respiratory event; Medical apparatus and instruments for use in positron emission tomography (PET) imaging used to monitor brain, heart and metabolic functions; Medical devices for monitoring blood oxygen saturation, blood gas concentrations, respiratory events, and vital signs, and also featuring a system consisting of electronics for transmitting monitored data through the Internet, as

a component of the medical devices; Medical instruments for measuring and displaying vital signs, blood properties and respiratory events; Medical apparatus for monitoring vital signs of patients; Medical devices, namely, patient monitors and patient sensors for monitoring and measuring blood properties and respiratory events; Patient medical monitors for monitoring systolic blood pressure, diastolic blood pressure, blood glucose levels, blood perfusion, pulse rate, heart rate, blood oxygenation saturation (SPO<sub>2</sub>), heart rate variability, respiration rate, core body temperature, weight and electrocardiogram (ECG); Portable medical devices with sensors to monitor the physical movements of a patient wearing or carrying the device; Arterial blood pressure measuring apparatus; Health monitoring devices consisting of blood pressure monitors, thermometers and pedometers; Medical devices for monitoring blood oxygen saturation, blood gas concentrations and vital signs; Medical devices for monitoring blood oxygen saturation, blood gas concentrations, vital signs and respiratory events; Medical devices for monitoring blood oxygen saturation, blood gas concentrations, vital signs and respiratory events, and downloadable software for recording, processing and transmitting medical data, for use therewith, sold as a unit; Medical devices for monitoring blood oxygen saturation, blood gas concentrations, vital signs and respiratory events, and recorded software for recording, processing and transmitting medical data, for use therewith, sold as a unit; Medical devices for monitoring blood properties and respiratory events; Medical diagnostic apparatus, analytical apparatus for medical purposes and blood pressure measuring apparatus; Medical instruments to measure blood pressure, cardiac output and other physiological and cardiovascular parameters.

## **Annex B – goods relied upon under registration number 3372432**

Class 9: Electrical and electronic apparatus, appliances and instruments; downloadable mobile applications; mobile phone applications; downloadable applications; downloadable applications in the field of pharmacy services, pharmaceuticals, healthcare, prescription and medical services; electrical and electronic apparatus, appliances and instruments; data processing equipment; telecommunication equipment, apparatus and instruments; personal digital assistants; electronic organisers; electronic devices, portable electronic devices and software related thereto; computers, computer peripheral devices, computer terminals, computer hardware; computer networks; computer software and computer hardware apparatus with multimedia and interactive functions; handheld computers, tablet computers, electronic notepads, mobile digital electronic devices, mobile telephones; mobile, portable and handheld digital electronic devices for data processing, storing, displaying, transmitting and receiving data and enabling the transmission of data between computers and the software related thereto; mobile, portable and handheld electronic devices for data processing, storing, displaying, transmitting and receiving data and enabling the transmission of data between computers and the software related thereto; handheld computers, tablet computers, electronic devices, electronic digital devices, electronic notepads and mobile digital electronic devices used to order and dispense medicines and pharmaceuticals and to input patient data; apparatus for dispensing medicines; data processing equipment; CD-ROMS, electronic data storage devices, magnetic data carriers; covers, bags and cases adapted to, or shaped to contain the aforesaid goods; downloadable computer software applications; recorded computer software; pre-recorded computer programs for personal information management, including storage, retrieval and editing of personal data and pharmaceutical and

medical data; user manuals in electronically readable, machine readable or computer readable form for use with, and sold as a unit with, all the aforementioned goods; chargers; parts and accessories for all the aforesaid goods; electrical and electronic apparatus, appliances and instruments; data processing equipment; telecommunication equipment, apparatus and instruments; personal digital assistants; electronic organisers; electronic devices, portable electronic devices and software related thereto; computers, computer peripheral devices, computer terminals, computer hardware; computer networks; computer software and computer hardware apparatus with multimedia and interactive functions; handheld computers, tablet computers, electronic notepads, mobile digital electronic devices, mobile telephones; mobile, portable and handheld digital electronic devices for data processing, storing, displaying, transmitting and receiving data and enabling the transmission of data between computers and the software related thereto; mobile, portable and handheld electronic devices for data processing, storing, displaying, transmitting and receiving data and enabling the transmission of data between computers and the software related thereto; handheld computers, tablet computers, electronic devices, electronic digital devices, electronic notepads and mobile digital electronic devices used to order and dispense medicines and pharmaceuticals and to input patient data; apparatus for dispensing medicines; data processing equipment; CD-ROMS, electronic data storage devices, magnetic data carriers; covers, bags and cases adapted to, or shaped to contain the aforesaid goods; downloadable computer software applications; recorded computer software; pre-recorded computer programs for personal information management, including storage, retrieval and editing of personal data and pharmaceutical and medical data; user manuals in electronically readable, machine readable or computer readable form for use with, and sold as a unit with, all the aforementioned goods; chargers; parts and accessories for all the aforesaid goods; publications in electronic form supplied on-line from databases or from facilities provided on the Internet (including websites); electronic publications (downloadable); animated cartoons; screensavers; video games; digital music (downloadable) from global computer networks; digital music (downloadable) from MP3 global computer network sites; multimedia recordings; media content; media software; multimedia

software; interactive entertainment software; technology for use on mobile phones, computers and devices; ring tones and screen savers for mobile phones, computers and devices; software for mobile phones, computers and devices; application software for mobile phones, computers and devices.

Class 10: Medical, surgical and dental apparatus and instruments; apparatus for administering pharmaceuticals.