



Neutral Citation Number: [2022] EWHC 95 (Ch)

Case No: CH-2021-000099

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

On appeal from Decision No. BL O/196/21 of Ms L Fayter,
A Hearing Officer of the United Kingdom Intellectual Property Office
(on behalf of HM Comptroller-General of Patents, Designs and Trade Marks)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/01/2022

Before :

THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

Between :

AXOGEN CORPORATION

**Appellant/
Opponent**

- and -

AVIV SCIENTIFIC LIMITED

**Respondent/
Applicant for
Registration**

Stuart Baran (instructed by **Mishcon de Reya LLP**) for the **Appellant**
Ashton Chantrielle (instructed by **HGF Law LLP**) for the **Respondent**

Hearing date: 10 December 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment has been handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 18 January 2022.

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THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

Mrs Justice Joanna Smith:

1. This is a statutory appeal under section 76 of the Trade Marks Act 1994 (“**the TMA**”) from a decision of the Hearing Officer acting for the Registrar of Trade Marks (“**the Decision**”) in respect of an opposition (“**the Opposition**”) to application No. 3446275 for the word mark **AVIV** (“**the Trade Mark**”).

Background to the Appeal

2. On 22 November 2019, Xtend Scientific Limited (now known as Aviv Scientific Ltd (“**the Respondent**”)) applied to register the Trade Mark in the UK for goods and services in Classes 9, 10, 35, 41, 42 and 44 of the Nice Classification (“**the Application**”). The Application was published for opposition purposes on 17 January 2020.
3. By the Opposition dated 12 May 2020, Axogen Corporation (“**the Appellant**”) opposed the registration pursuant to sections 5(2)(b) and 5(3) of the TMA. The opposition under section 5(3) of the TMA was subsequently withdrawn.
4. Section 5(2)(b) of the TMA provides as follows:

“5.— **Relative grounds for refusal of registration.**

...

(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 of the part of the public, which includes the likelihood of association with the earlier trade mark.”

5. The Opposition relied upon three existing trade marks registered in favour of the Appellant: (i) UK trade mark no. 3359705 (“**the First Earlier Mark**”); (ii) EU trade mark no. 017997776 (“**the Second Earlier Mark**”) and (iii) International trade mark no. 1297103 (“**the Third Earlier Mark**”), all registered for the word **AVIVE** (“**the Earlier Marks**”). The Appellant relied upon all of the goods for which the Earlier Marks were each registered falling within Classes 5 and 10 (the First and Second Earlier Marks) and Class 5 (the Third Earlier Mark). It is common ground that it was entitled to do so and that, on account of their recent filing, none of the Earlier Marks was subject to any proof of use requirement (sections 6 and 6A of the TMA).
6. Attached to this judgment at Annex 1 are the goods and services relied upon in each of the Earlier Marks. Taken together these are, in summary, surgical implants comprised of biological tissues, namely, human and animal tissues for medical use, drug therapies, pharmaceutical, veterinary and sanitary preparations.
7. Essentially, as the Hearing Officer recorded at paragraph 4 of the Decision, the Appellant claimed “that there is a likelihood of confusion because the marks are highly similar, and the goods and services are identical or highly similar”.
8. The Respondent filed its Notice of Defence and Counterstatement on 27 July 2020 denying that the Trade Mark was confusingly similar to the Earlier Marks.
9. The Opposition was dealt with on the papers by the Hearing Officer, Ms Fayter, on 25 March 2021 in circumstances where, as she recorded in paragraph [6] of the Decision, neither party filed evidence nor requested a hearing. However, the Hearing Officer had two sets of submissions from the Respondent in support of its Application together with a skeleton argument from the Appellant. In her Decision at paragraph [6], the Hearing Officer recorded that she had taken these submissions into consideration and that “This decision is taken following a careful perusal of the papers”.
10. The Opposition was partially successful. The Hearing Officer found that there was a likelihood of confusion in respect of all of the goods falling within Class 10, but she dismissed the Opposition and allowed the Application to proceed to registration in relation to all other classes.

The Decision

11. Having set out the relevant facts, the Hearing Officer summarised the case law on section 5(2)(b) of the TMA at paragraph [11] and then went on to set out the case law in relation to the comparison of goods and services at paragraphs [12]-[19] of the Decision (including making reference in particular to the principle of ‘complementarity’ and the authorities dealing with that principle in paragraphs [17]-[18]). The Appellant does not criticise these paragraphs.
12. In paragraph [19], the Hearing Officer referred to *Raleigh International trade mark* [2001] RPC 11, including the following passage on the need for evidence:

“If the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered, the objection should be supported by evidence as to their “similarity” (whether or not the objection is directed to the use of an identical mark)”.

13. In paragraph [21], the Hearing Officer said this “It also needs to be noted that the First Earlier Mark and the Second Earlier Mark’s specifications are identical, however, the Third Earlier Mark’s specification differs”. It is common ground that she was in error in stating that the First Earlier Mark and the Second Earlier Mark had “identical” specifications; in fact many of the goods in Class 5 of the First Earlier Mark extend to ‘veterinary preparations’, whereas those in the Second Earlier Mark do not. Although this error formed the first ground of the Amended Grounds of Appeal, the Appellant does not contend that any point turns on it in this appeal and so I shall not consider it further.
14. The Hearing Officer set out her findings in respect of similarity between the goods and services at paragraphs [22]-[33] of the Decision. I shall return to these in more detail in a moment, but for present purposes I note that notwithstanding the absence of evidence from the Appellant to demonstrate similarity (which the Hearing Officer expressly remarked upon several times in the Decision), she nevertheless carried out a comparison of the goods falling within the specifications for the Earlier Marks with the goods and services in the Classes covered by the Application for the Trade Mark. I shall have to return to her finding that there was no complementarity (which is challenged), however in brief summary, and ignoring for present purposes the Hearing Officer’s findings in respect of Class 10, the Hearing Officer found that the goods and services applied for in Classes 9, 35, 41, 42 and 44 were either dissimilar to those falling within the specifications for the Earlier Marks or, if she was wrong, similar to “a very low degree” (paragraphs [22]-[24] and [29]-[33]).
15. In paragraphs [34]-[35] the Hearing Officer identified that it was necessary for her to determine who the average consumer is for the respective parties’ goods and services. She again referred to relevant case law (which is not in dispute) and identified that in this case “the average consumer will be predominantly scientific, medical and healthcare professionals, although it may also include members of the general public”. No challenge is made to these paragraphs.
16. As regards the purchasing act, the Hearing Officer pointed out that she had no evidence of the cost of the goods and services, but found that “the cost of purchase is likely to vary, as will the frequency”. Nonetheless, various factors will be taken into consideration such as suitability for the user’s particular needs, ease of use and reliability”. In light of this she considered that “at least a medium degree of attention is likely to be paid during the purchasing process for the goods and services”, however “where goods and services have a particular impact upon the health of the end user, the attention paid will be high” (paragraph [36]). In paragraph [37] the Hearing Officer found that visual considerations were likely to dominate the selection process, but she did not discount that “there may also be an aural component to the purchase through word of mouth recommendations or orders which may be placed by telephone”. Again, no challenge is made to these paragraphs.

17. At paragraphs [38]-[39], the Hearing Officer addressed the legal test for the comparison of trade marks, which the Appellant accepts is an accurate reflection of the law.
18. Having identified the respective trade marks in paragraph [40] and having observed that (i) where all of the Earlier Marks consisted of the word **AVIVE**, she would need to make the same comparison in respect of all of the marks and (ii) there were no other elements to contribute to the overall impression of the marks “which lies in the word itself” (paragraph [41]), the Hearing Officer went on to consider the visual, aural and conceptual similarities between the Earlier Marks and the Trade Mark. I shall return to the Hearing Officer’s findings as to visual and aural similarity which form part of this appeal, but for present purposes I note that she held that the marks were conceptually neutral (paragraph [45]).
19. In paragraphs [46]-[49], the Hearing Officer dealt with the question of the distinctive character of the Earlier Marks, finding that they were “inherently distinctive to a high degree”.
20. Finally, having regard to the findings already made, the Hearing Officer turned at paragraphs [50]-[53] to address the likelihood of confusion. She found that there was a likelihood of confusion in respect of goods in Class 10 but that there was no likelihood of confusion in respect of the remaining Classes for which registration of the Trade Mark was sought.
21. The Appellant issued its notice of appeal on 22 April 2021 challenging the Hearing Officer’s decision to allow the Trade Mark to proceed to registration in Classes 9, 35, 41, 42 and 44.
22. Pursuant to an Order of Mellor J dated 1 December 2021, the Appellant was granted permission to amend its Grounds of Appeal, amongst other things so as to amend the scope of the appeal to cover only those goods and services appearing in Classes 9, 35, 41, 42 and 44 identified in Annex A to the Amended Grounds of Appeal (Attached to this judgment at Annex 2). The effect of this amendment was to limit the appeal to goods and services in the medical field. The Appellant’s overarching submission is that the average consumer might reasonably assume that the goods and services identified in Annex A would be offered by a provider of other medical goods such as those protected by the Appellant’s Earlier Marks.

Grounds of Appeal

23. Although the Amended Grounds of Appeal comprise eight paragraphs, Mr Baran, acting on behalf of the Appellant, submits that there are in essence three heads of appeal:
 - i) Errors in relation to comparison of goods/services (paragraph 2 of the Amended Statement of Grounds (“**Ground 1**”). Although this complaint involves three sub-paragraphs, I understood it to focus on the Hearing Officer’s finding that the goods and services in the Trade Mark and the Earlier Marks were not complementary, when it is alleged that she should have found that they were. It is the Appellant’s case that although the Hearing Officer set out the principle of complementarity in [17]-[18] of the Decision, she failed, alternatively failed properly to apply this criterion in her assessment of the similarity of goods and

services in paragraphs [22]-[33] of the Decision, alternatively she failed to give any or any proper reasons for any conclusion on complementarity that she may have reached. The Appellant says that if the Hearing Officer had applied the correct standard, she would have found that the Annex A goods and services were complementary and thus similar, or highly similar to the goods in the Earlier Marks, due to their shared use and application in medical and clinical treatment.

- ii) Errors in relation to comparison of marks (paragraph 3 of the Amended Statement of Grounds (“**Ground 2**”). The Appellant contends that the Hearing officer erred in principle in her assessment of both the visual and the aural degree of similarity between **AVIVE** and **AVIV** and that had she taken account of appropriate facts and matters she should have determined that the overall similarity of the Earlier Marks and the Trade Mark was “very high”. During submissions, Ms Chantrielle, acting on behalf of the Respondent, submitted that the Appellant was wrong to criticise the assessment of aural similarity in the Amended Statement of Grounds, but that, instead, the real criticism appeared to concern the manner in which the Hearing Officer’s assessment of aural similarity had been factored into the assessment of likelihood of confusion. I am inclined to agree with this analysis (which Mr Baran did not suggest was erroneous) but made it clear to Mr Baran, acting on behalf of the Appellant, that his appeal would not stand or fall on a “pleading point” about the drafting of the Amended Statement of Grounds, and I did not understand Ms Chantrielle to seek to dissuade me from this approach.
- iii) Errors in approach to assessing likelihood of confusion (paragraph 4 of the Amended Statement of Grounds (“**Ground 3**”). The Appellant contends that when carrying out her assessment of the likelihood of confusion, the Hearing Officer applied too high a standard to the degree of similarity of goods and services required if a likelihood of confusion is to be established. Therefore, she erred in finding that there was no likelihood of confusion in respect of the Annex A goods and services. Had the Hearing Officer applied the correct standard, says the Appellant, she would have found that there was a likelihood of confusion such that the Trade Mark should not proceed to registration for the Annex A goods and services. During submissions, Mr Baran accepted that this ground of appeal was dependent upon success in relation to Grounds 1 and 2: i.e. it would only be if the Hearing officer had made an error of principle in respect of Grounds 1 and 2 that the Appellant would be able to succeed on this third ground. (As an aside, I observe that I am not so sure that this remains the case in circumstances where the Appellant’s complaint about aural similarity may really be a complaint as to how the Hearing Officer’s conclusions on aural similarity were taken into account in the global assessment of likelihood of confusion, but I shall in any event return to this in due course.) In the event that this court were to find in the Appellant’s favour in respect of Grounds 1 and/or 2, then it is the Appellant’s case that this court would be required to undertake the global assessment of likelihood of confusion again.

Appellate Function

24. Although I was referred to numerous cases on the subject (including *English v Emery Demibold & Struck Ltd* [2002] 1 WLR 2409, *REEF Trade Mark* [2003] RPC 5, *Fine &*

Country Ltd v Okotoks Ltd [2014] FSR 11, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, *Shanks v Unilever Plc* [2014] RPC 29, *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17, *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), *Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 and *NINEPLUS O/039/21*, the approach of the appeal court to a statutory appeal under section 76(1) of the TMA is uncontroversial. I bear the following principles, relevant to the issues before me, firmly in mind:

- i) The appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [52(i)]);
- ii) The appeal court will allow an appeal where the decision of the lower court was “wrong” (see CPR 52.11). Neither surprise at a Hearing Officer’s conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS O/039/21* at [14]);
- iii) The decision of the lower court will be “wrong” if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge’s conclusion was “outside the bounds within which reasonable disagreement is possible” (*Actavis Group* at [81]);
- iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mark* [2003] RPC per at [26]). There is a “spectrum of appropriate respect for the Registrar’s determination depending on the nature of the decision” (*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.
- v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country* at [50]-[51]).
- vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible (*Actavis Group* at [80]).
- vii) Another variable to be taken into account will be “the standing and experience of the fact-finding judge or tribunal” (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such

misdirections simply because they might have reached a different conclusion on the facts (*Shanks* at [28] citing the warning given by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49).

- viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; “The duty to give reasons must not be turned into an intolerable burden” (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English* at [17], *Fage* at [115]). The issues the resolution of which were vital to the judge’s conclusions should be identified and the manner in which she resolved them explained (*English* at [19]).
 - ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*TT Education* at [52(vi)]).
25. In the context of appeals relating to the likelihood of confusion, an evaluative issue described by Mr Iain Purvis QC sitting as an Appointed Person in *ROCHESTER Trade Mark* BL O/049/17 at [31] as “indeterminate and open to debate”, Mr Purvis QC went on to say this at [33]:

“...the reluctance of the Appointed Person to interfere with a decision of a Hearing Officer on likelihood of confusion is quite high for at least the following reasons:

(i) The decision involves the consideration of a large number of factors, whose relative weight is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case

(ii) The legal test ‘likely to cause confusion amongst the average consumer’ is inherently imprecise, not least because the average consumer is not a real person

(iii) The Hearing Officer is an experienced and well-trained tribunal, who deals with far more cases on a day-to-day basis than the Appellate tribunal

(iv) The legal test involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade. Any wise person who has practised in this field will have come to recognize that it is often very difficult to make such a prediction with confidence. Jacob J (as he then was) made this point in the passing off case *Neutrogena v Golden* [1996] RPC 473 at 482:

‘It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew

more experienced I said more and more “it depends on the evidence.”

Any sensible Appellate tribunal will therefore apply a healthy degree of self-doubt to its own opinion on the result of the legal test in any particular case.

34. I shall therefore approach this appeal on the basis that in the absence of a distinct and material error of principle, I ought not to interfere with the decision of the Hearing Officer unless I consider that his view on the issue of likelihood of confusion was clearly wrong in the sense that it was outside the range of views which could have been reasonably taken on the established facts.”

Evidence

26. Before turning to the individual grounds of appeal, I observe that in a number of key paragraphs of the Decision, the Hearing Officer expressly pointed to the absence of evidence. I have little doubt that in so doing, she had in mind the extract from *Raleigh* to which she had referred in paragraph [19].
27. Whilst accepting that the burden of establishing an opposition lies with the opponent to an application, Mr Baran nevertheless submits that evidence as to complementarity and in particular as to “pairwise interactions” between sets of goods and services would be unwieldy and administratively undesirable and that in any event it was not formally necessary to produce evidence of specific procedures where the real question is whether consumers “may think” that the responsibility for the goods/services lies with the same undertaking. Mr Baran informed me that lawyers and trade mark attorneys are actively encouraged by the UK IPO not to file evidence unless absolutely necessary.
28. I have no intention of prescribing the circumstances in which evidence should be filed in support of Oppositions of this sort (although I note that evidence was filed in various of the cases to which I was referred including *Sandra Amelia Mary Elliot v LRC Holdings Ltd* O/255/13-135), but I make the following, I hope helpful, observations:
 - i) I would expect a specialist Hearing Officer to have a very good understanding of the circumstances in which evidence is likely to be necessary in order to assist her in making a multi-factorial evaluation.
 - ii) Where, as here, the Hearing Officer has made clear that her Decision is made “in the absence of evidence to assist me” or in circumstances where she is lacking in evidence to demonstrate a particular factor that might otherwise be relevant to her analysis, the clear inference must be that the Hearing Officer considers that evidence would or might have been of assistance. This court would be very cautious before determining that she was wrong about that.
 - iii) Whilst I accept Mr Baran’s point that it is difficult to give evidence of the, somewhat esoteric, question of what the average consumer “may think”, evidence of factors relevant to the question of similarity (such as overlapping nature, method of use or purpose) may, on the facts of the particular case, be

necessary to support the proposition that the average consumer may think responsibility for the goods and services lies with the same undertaking. What the average consumer “may think” can only be informed by a proper understanding of the goods and services themselves (on a slightly different point but to similar effect see *Bionecs* ECLI:EU:T:2015:888 at [29]: “...the common purpose of the goods covered by the signs at issue, which are intended to improve health, and their similar ingredients are sufficient for the relevant public to perceive them as having the same nature and purpose”).

Ground 1: The assessment of Complementarity

29. It is the Appellant’s case that the Hearing Officer erred in her approach to the assessment of whether the goods and services in the Trade Mark were complementary to those in the Earlier Marks as part of her multi-factorial evaluation of similarity. Mr Baran submits that this is not a criticism that goes merely to the weight attached by the Hearing Officer to differing factors in her assessment (as the Respondent suggested in its skeleton argument), but that it involves an allegation of error of principle. However, Mr Baran does not suggest that the Hearing Officer’s evaluation of similarity of goods and services was so far outside what is reasonable that that alone would justify this appeal.

30. Before looking at the Appellant’s specific concerns, I should remind myself, just as Mr Daniel Alexander QC, acting as an Appointed Person, did in *Sandra Amelia Mary Elliot v LRC Holdings Limited* O/255/13 at [17], that the starting point for any analysis of similarity is the wording of the Act and the Directive:

“These require the tribunal to determine whether or not the respective goods are “identical or similar” but they do not specify the criteria by reference to which similarity is to be assessed. In the well-established guidance from the Court of Justice on this issue originating in *Canon*, to which the Hearing Officer referred, the Court has not suggested that every case requires assessment of whether the respective goods or services are complementary. To the contrary, the Court has regularly made it clear that all relevant factors relating to the goods or services themselves should be taken into account, of which complementarity is but one (see e.g. in *Boston*)”.

31. Having set out the law on the comparison of goods and services, the Hearing Officer then identified in turn various categories of goods and services within the Classes, setting out her conclusions as to each category in the paragraph immediately below. Excluding Class 10 for these purposes, the relevant paragraphs of the Decision are [22]-[24] and [29]-[33] and I was addressed on these paragraphs largely in general terms. However, I shall begin by looking at paragraph [22] as an example of the exercise that the Hearing Officer undertook.

32. Thus, under the sub-heading, Class 9 (“**Computer software, computer hardware, application software, recorded computer software for database management, computer hardware** and downloadable computer software for collecting, detecting, analysis and viewing data associated with (defending) cybersecurity systems” – the items in bold denoting items that remain in Annex A), she said this at [22]:

“These terms are dissimilar to the opponent’s specification. The above goods would be sold by specialists who work in the field of computing and software. The trade channels will, therefore differ. The user, nature, method of use and purpose of the goods also clearly differ. The goods are neither in competition nor complementary within the meaning of the above case law. I consider the goods to be dissimilar to all of the opponent’s goods”.

33. In common with other paragraphs of the Decision which are criticised by the Appellant, this paragraph is extremely brief. Beyond the statement that the goods are not complementary within the meaning of the case law, the Hearing Officer provides no other explanation for her decision on complementarity. The Appellant accepts that the findings that “the trade channels will...differ” and that “the user, nature, method of use and purpose of the goods also clearly differ” are relevant findings in the context of determining similarity (see paragraph [13] of the Decision) and that such findings also encompass elements which are relevant in the context of considering complementarity, but it says that the mere reference to these elements does not go far enough in carrying out the analysis of complementarity; the case law requires something more.
34. In support of this submission, Mr Baran took me to paragraphs [81]-[87] of the decision of the General Court in *Boston Scientific Ltd v European Union Intellectual Property Office* T-325/06, a case which he accepts was correctly cited by the Hearing Officer in paragraph [17] of the Decision.
35. In *Boston*, the General Court found that apparatus for placing a suture was “to some extent complementary” with hollow fiber oxygenators with detachable hard-shell reservoir. It held that:
 - i) 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” (**emphasis added**) (at [82]);
 - ii) Whilst apparatus for placing a suture “cannot be considered to be indispensable or important for the use of hollow fiber oxygenators with detachable hard shell reservoir, nevertheless these goods “can be considered to be complementary” where “in the course of a very specific procedure, namely a surgical operation” both pieces of apparatus might be used” (paras [83] and [84]);
 - iii) In the circumstances, the goods were not similar solely because they were both used in the field of medicine, “but because they could be used in the same, very specific surgical operation, namely open-heart surgery” (para [85]).
 - iv) The Board of Appeal had therefore been right to find that the goods were similar because of “the close link between the products in question as regards their end users, the fact that they are to some extent complementary and the fact that they may be distributed via the same distribution channels...” (para [87]).
36. By analogy, Mr Baran submits that while the Annex A goods are not indispensable or important for the use of the goods contained in the specification for the Earlier Marks

(and certainly there is no evidence to this effect), the Hearing Officer should have carried out the following assessment:

- i) They are all medical goods and services that could be used in conjunction with the provision of a medical procedure;
- ii) They could each plausibly be used alongside the tissue implants and products that are to be found in the specifications for the Earlier Marks; and accordingly
- iii) The average consumer may think that they would be used together in this way, such that the standard for complementarity is met.

37. Had the Hearing Officer carried out such an assessment, Mr Baran maintains that she would have found a complementary relationship because, in the context of “a medical procedure”, it is clear that the different types of goods and services in the Earlier Mark specifications and in Annex A will frequently be employed together (notwithstanding that they plainly perform independent tasks) such that the appropriate legal standard, namely that the average consumer may think that they *may* be used together, is met.

38. As persuasive as Mr Baran’s submissions were, in my judgment they are far too broad. The fact that goods and services may plausibly be used alongside each other in the medical context, or in an unspecified medical procedure, is not, to my mind, sufficient to establish the standard of complementarity and, given its very particular facts, I do not consider that *Boston* stands for such a broad principle. Indeed, the General Court in that case specifically rejected the submission that mere use in the field of medicine was, on its own, sufficient. Furthermore, contrary to Mr Baran’s oral submissions, the General Court was not concerned with whether the average consumer may think that goods and services could be employed together in the general context of a medical procedure or treatment – such a test could give rise to a wide variety of (potentially) highly speculative possibilities in any given case. On the contrary, it was concerned with whether the average consumer may think that the responsibility for the goods and services lies with the same undertaking – to my mind a more restrictive proposition.

39. Such a situation will arise where the goods and services are indispensable or important to each other “**in such a way**” that the average consumer may think this, or where, as in *Boston*, the goods and services could be used together in a specific, identified, context. The point was put in this way in *Biofarma* at [20]:

“The reference point is whether the relevant public will perceive the goods or services concerned as having a common commercial origin (04/11/2003, T-85/02, Castillo EU:T:2003:288, § 38) and whether consumers consider it normal that the goods or services are marketed under the same trade mark, which normally implies that a large number of producers or providers are the same (11/07/2007, T-150/04, Tosca Blu, EU:T:2007:214, § 37)”.

40. Returning to *Elliot*, I observe that Mr Alexander QC identified the purpose of the similarity test (of which complementarity may be just one element) as being “to determine similarity of the respective goods in the specific context of trade mark law”. As he went on to say at [18] “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.”

41. On Mr Baran’s argument, wine and glassware used in the field of hospitality would satisfy the test that the average consumer may think that they would be used together. However, it is clear that mere use in the same context, and for the same purpose (drinking wine), is not enough. There must be something more in that context from which the average consumer may deduce that the wine and the glasses may originate from the same commercial undertaking. Indeed when pushed on this point, Mr Baran himself acknowledged that “complementarity must be put in context of the assessment of which it forms a part”.
42. To my mind, that is sufficient for me to reject the suggestion that the Hearing Officer erred in her approach to complementarity in the Decision. However, in his skeleton argument provided to the Hearing Officer and his submissions before this court, Mr Baran has placed considerable reliance upon three decisions which he says illustrate “the shape of the proper analysis” and which he contends should have led to the Hearing Officer reaching a different conclusion on complementarity by reference to the broad proposition I have identified in paragraph 36 above. These are *Bionecs* ECLI:EU:T:2015:888, *Citracal* ECLI:EU:T:2009:433 and *Biofarma SAS* R-1637/2020-4.
43. I do not agree that these cases, on their facts, stand for the broad proposition relied upon by Mr Baran and nor do I agree that the Hearing Officer erred in failing to assess the goods and services by reference to that broad proposition. However, because of the focus by Mr Baran on these cases, I need to explain my reasoning in a little more detail.
44. In *Bionecs* the particular dispute with which the General Court was concerned was whether “dietic food and substances adapted for medical or veterinary use” and “dietary supplements for humans and animals” covered by the mark applied for and the “pharmaceutical preparations used in tissular repair” covered by the earlier mark, were similar. The Board of Appeal held that these goods were similar “insofar as they were used to treat or prevent diseases”. The end consumers coincided and the goods were fairly often used in combination. Furthermore, the goods shared the same distribution channels, namely pharmacies – thus the Board found the goods to be similar.
45. Before the General Court it was argued that dietic food for medical use is also used as a supplement to normal food, unlike pharmaceutical preparations. The General Court rejected this argument, observing that dietic food adapted for medical use is intended to treat certain health problems and that nutritional supplements are not intended to serve as ordinary food, “but are consumed to prevent or cure medical problems in the broadest sense” (para [26]). Against that background, the General Court held that the Board of Appeal was right to find that the nature and purpose of the goods was the same, saying (at paragraph [27]):

“It follows that the foods covered by the mark applied for, as well as the ‘pharmaceutical preparations used in tissular repair’ covered by the earlier mark, fall within the field of health, being in general intended to improve health. Moreover, it should also be noted that the ingredients of all those goods are chemical materials and plant extracts”.

46. The Board of Appeal went on in paragraph [28] to say that its finding was not compromised by the argument that no dietary supplements are intended for the treatment of tissue:

“The similarity of goods must be assessed from the point of view of the reasonable and circumspect consumer, who is used to the fact that the manufacturers of pharmaceutical preparations generally offer a range of goods, in order to treat several health problems. Therefore, the common purpose of the goods covered by the signs at issue, which are intended to improve health, and their similar ingredients are sufficient for the general public to perceive them as having the same nature and purpose”.

47. The General Court summarised its findings that the goods in issue were similar in paragraph [33] “in light of the same nature and purpose of those goods and partial identity of their distribution channels”. In the circumstances, there was no need to consider “whether those goods are complementary”.

48. In my judgment, *Bionecs* is concerned with goods which were regarded as similar by reason of their use and purpose (pharmaceutical preparations), their similar distribution channels, and the fact they had similar ingredients. The facts of *Bionecs* are very far removed from the facts in the current case and I can see no reason to think that it should in any way have shaped the analysis of the Hearing Officer on the issue of complementarity: the General Court did not even address that issue in its decision. Insofar as Mr Baran seeks to rely on this case for a very general proposition about goods which are all within the field of health, I do not regard it as supportive of his case. The General Court did not say that just because goods fall within the field of health they will necessarily be similar – the analysis needs then to go on to look at their nature, use and purpose.

49. The same point may be made on the facts of *Citracal*. In that case, the marks again concerned pharmaceutical products falling within Class 5. The General Court held at [43] that

“the goods at issue, pharmaceutical products supplied without prescription, are of the same nature and have the same function or intended purpose, namely the treatment of intended health problems. They can be intended for the same ultimate consumers, are likely to be produced by the same manufacturers and use the same distribution channels, namely pharmacies”.

It was uncontroversial that they were also “complementary in some cancer therapies”. I note the specific focus here on some cancer therapies, in rather similar way to the specific focus in *Boston* on open-heart surgery. There was no suggestion whatever from the General Court that merely because the products fell within the medical field, complementarity would be a given in the context of any medical treatment or procedure.

50. *Biofarma* was also concerned with pharmaceutical products falling within Class 5, broadly, both substances used to treat or prevent medical problems. The Fourth Board of Appeal set out the familiar test for complementarity in [21] and then went on in [23] to make specific findings on the facts of the case that “the conflicting goods are all

within the field of health, being in general intended to improve health, and have similar nature and purpose of use. They target the same consumers and are likely to be produced by the same manufacturers and distributed through the same distribution channels, for example pharmacies (...*Citracal* EU:T:2009:433, [43]). Moreover, there is a certain degree of complementarity, as the conflicting goods may be taken together, in combination, within the same medical therapy". The focus here was not on use in some broad and unspecified medical context, but rather "within the same medical therapy". Furthermore, it was against the background of a finding that the goods in this case "are likely to be produced by the same manufacturers and distributed through the same distribution channels".

51. The particular considerations which arose on the facts of the three authorities on which Mr Baran relies do not apply to the much broader facts of the present case, which is concerned with comparisons between goods and services falling within different classes, whose nature, method of use and purpose the Hearing Officer found to differ. The possibility of an overlap in user (i.e. that all the goods may be used in a medical context by medical professionals and patients, as the Hearing Officer found "may" be the case in relation to Classes 35, 41, 42 and 44) does not, without more, establish complementarity. While the average consumer may think that pharmaceutical goods of a similar nature and purpose sold in pharmacies and used in the context of the same medical therapy have a common commercial origin, it is difficult to see how the average consumer would arrive at the conclusion, without something more, that, say, (i) computer hardware or software for collecting, understanding, analysing and viewing data associated with the medical record of a patient, or (ii) conducting educational support programmes for patients or (iii) technology research in the field of medical instruments, has a common commercial origin with surgical implants comprised of biological tissues where there is (as the Hearing Officer found) no overlap of nature, method of use or purpose.
52. In my judgment, in circumstances where the Hearing Officer has expressly set out in the Decision the law on complementarity in terms which are not challenged (including relevant passages from *Boston* and from *Elliot*), it is clearly to be inferred that when she said that the goods are "not complementary within the meaning of the above case law" in paragraph [22], she had applied the relevant test set out in the case law and found the goods in this case wanting – i.e. they were not goods and services which the average consumer may think had come from the same undertaking. At paragraph [18] of the Decision she expressly recorded that "[t]he 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/service lies with the same undertaking or with economically connected undertakings". In this case, her answer to that question, albeit unfortunately expressed in the briefest of terms, was plainly in the negative.
53. In all the circumstances, I reject the suggestion that the Hearing Officer failed to apply a proper assessment in her approach to complementarity. The Hearing Officer is experienced in the area of trade mark law and she had accurately set out the case law. Her findings of fact (made in the absence of evidence) are not challenged and Mr Baran does not suggest that the Decision was obviously wrong such that I could properly find that the Hearing Officer must have failed to apply the correct legal test. In the circumstances, whilst no doubt her reasoning could have been more detailed,

nonetheless, I also reject the suggestion (not pursued with any real vigour at the hearing) that the Hearing Officer failed to give any reasons.

54. Finally, I make the following additional points about individual paragraphs dealing with complementarity in respect of different classes.
55. At paragraph [22] in dealing with a specific category of Class 9 goods, the Hearing Officer made clear that the goods were not even specifically *medical* goods (an observation which applies to the goods in Annex A which fell within the goods with which she was dealing in this paragraph). This class of goods would not even fall within Mr Baran's broad proposition. In my judgment, the Hearing Officer's reasoning is clear.
56. In paragraph [23], the Hearing Officer considered a significant chunk of the remaining Class 9 goods, which, very broadly, concern computer software and computer hardware designed for use in the medical context. Many of the items she considered have been removed for the purposes of the appeal and I must concentrate only on those items in Annex A (excluding the items I have already considered in the context of paragraph [22] of the Decision). These include, by way of example, "downloadable computer software applications for use with mobile devices for monitoring and managing patient medical information", "computer hardware and downloadable computer software for collecting, analysis and viewing data associated with the use of cognitive and neurocognitive assessment, diagnostic and training of patients" and "computer hardware and downloadable computer software for collecting, monitoring, analysing and viewing data of wearables and Internet of Medical Things (IoMT) devices for medical and healthcare usage".
57. The Hearing Officer said this:

"23. These terms are dissimilar to the opponent's First, Second and Third Earlier specifications. Although these goods may be used in the medical context, they are not used for the same or overlapping purposes as the opponent's goods. I have no evidence from the opponent to demonstrate any overlap in the trade channels. The nature, method of use and purpose of the goods also clearly differ. They are not in competition, nor complementary. However, the users may overlap. Taking the above into account, I consider the goods to be dissimilar to all of the opponent's goods. If I am wrong in this finding, then they will be similar to only a very low degree."
58. It is clear from this paragraph that the Hearing Officer had the *Boston* test firmly in mind; she expressly acknowledged that the goods identified in the Trade Mark Application "may be used in a medical context" but that they were not used for the same or overlapping purposes. In other words, they were not "indispensable or important" for the use of the other.
59. The Hearing Officer's finding that she had no evidence from the Appellant to demonstrate any overlap in trade channels is important – she plainly took the view that this was a matter in respect of which evidence might have assisted in her determination (see paragraph [19] of the Decision). It is also, to my mind, a factor which will be of

relevance in determining whether the average consumer may think that responsibility for the goods lies with the same undertaking.

60. Again, the Hearing Officer expressly found that the nature, method of use and purpose of the goods clearly differed, but in this case she held that the users “may overlap”. However, as I have already identified, this alone is insufficient to give rise to a finding of complementarity. In the circumstances, I fail to see that the Hearing Officer erred in her assessment. Her brief reasons indicate an awareness of the case law and it is to be inferred that she applied it. Furthermore, her reasoning in paragraphs 29, 30, 32 and 33 to the effect that whilst there may be an overlap in user “that is not sufficient on its own for a finding of similarity” makes it clear that she had in mind the possibility that use in the medical field might give rise to complementarity if there was something more, i.e. to use Mr Baran’s language, if there was something in the context which permitted such a conclusion. It is plain, however, that she took the view that there was nothing to tip the balance in favour of such a finding. In determining the question of similarity in paragraph [23] she therefore determined that the goods were dissimilar, but allowed for the possibility that she might be wrong about this by making the alternative finding that the goods were “similar to only a very low degree”.
61. In paragraph [24], the Hearing Officer dealt with one final category falling within Class 9 (“Advice, information and consultancy in relation to all above goods”). I can see no reference to this service in Annex A. Similarly paragraph [30] of the Decision deals with a category of services falling within Class 35 which are also not present in Annex A. In the circumstances, I do not consider these paragraphs further.
62. Class 35 (“Compiling, collecting of data for research purposes in the field of medical science, digital health and medical consultancy; compiling data for research purposes in the field of medical science and medical consultancy” – all included in Annex A) was addressed by the Hearing Officer at paragraph [29]:
- “29. In the absence of any evidence to assist me, I find that there is no obvious point of similarity between these terms and the opponent’s specification. I have no evidence that there would be any overlap in trade channels, and I can see no obvious point of overlap. I do not consider there to be any overlap in terms of nature, method of use or purpose. Whilst there may be overlap in user, that is not sufficient on its own for a finding of similarity. They are neither in competition nor complementary. Even where the research services cover the same field as the opponent’s goods, I still find that there is no obvious point of similarity for the same reasoning as above. I consider the goods and services to be dissimilar. If I am wrong in this finding, then they will be similar to only a very low degree.”
63. The Hearing Officer plainly considered here that evidence was wanting on all aspects of similarity and I have no reason to suppose that she was wrong on this score. Absent evidence, and on the reasonable assumption that she again applied the case law she had earlier referred to in paragraphs [17] and [18], I can see no error of assessment. Reading between the lines, the Hearing Officer was plainly saying that she had no evidence from which she could conclude, amongst other things, that the average consumer may think that the responsibility for those goods lies with the same undertaking. As I have already

alluded to, she expressly said, correctly in my judgment, that overlap in user “is not sufficient on its own for a finding of similarity”. Again she took the cautious approach of allowing for the possibility that she had got her finding of dissimilarity wrong.

64. Classes 41 and 42 concern educational services and research and development services. Class 44 concerns medical treatment services. The view taken by the Hearing Officer in relation to each was very similar (see paragraphs [31]-[33] of the Decision). Each paragraph points out the “absence of any evidence to assist me” (in the case of paragraph [31] adding “as highlighted in the above case law”), together with the lack of overlap in terms of nature, method of use or purpose. In each case the Hearing Officer expresses the view that there “may be an overlap in user” but goes on to say that the goods and services are neither in competition nor complementary. In paragraphs [32] and [33] she again makes the express point that overlap in user “is not sufficient on its own for a finding of similarity”. She finds that the goods and services are dissimilar, or, if she is wrong, then they are similar to “only a very low degree”.
65. In his skeleton argument for the hearing, Mr Baran focused on Class 44 goods beginning with “medical services; medical treatment services” in support of his argument that a tissue implant can only be used as part of a medical treatment and that accordingly complementarity must be made out. However, the Hearing Officer made it abundantly clear in paragraph [33] that “In the absence of evidence to assist me, I find that there is no obvious point of similarity” and (again) that “whilst there may be an overlap in user, that is not sufficient on its own for a finding of similarity”. In my judgment, this finding cannot properly be impugned. It is consistent with the case law and the Hearing Officer was entitled to take the view that, in order to make a finding of similarity (including complementarity) she required further evidence – I agree with Ms Chantrille that, absent something more in the way of evidence, the Hearing Officer could do no more than speculate as to the circumstances in which a consumer may think that particular services would be provided by the same commercial undertaking that was manufacturing goods pursuant to the Earlier Marks.
66. Accordingly, I reject Mr Baran’s submission that the Hearing Officer was wrong to say she needed evidence on the facts of this case together with his submission that reading the words in the specification alone “makes the unity of purpose clear”. As I have already said, as an experienced tribunal with a day-to-day familiarity with trade mark applications, the specialist tribunal is in the best position to assess whether it needs further evidence. Certainly, the Hearing Officer had no evidence of any specific relationship between the goods and services of the type identified in *Boston*, *Citracal* and *Biofarma* and I see no reason to suppose that she was required to speculate as to what that relationship might be. Insofar as Mr Baran had sought to provide “pairwise examples” in his skeleton argument, it is to be inferred that the Hearing Officer had seen those examples and rejected them, in the absence of supportive evidence.

67. Ground 1 of the appeal is therefore dismissed.

Ground 2: Comparison of Marks

68. I can deal with this ground quite shortly.

69. Mr Baran does not criticise paragraphs [38] and [39] of the Decision in which the Hearing Officer sets out excerpts from the law on comparison of marks. However, he says that the Hearing Officer erred in carrying out her visual and aural comparison.
70. As to the visual comparison, the Hearing Officer said this at paragraph [43]:
- “43. Visually, the marks coincide in the fact that both marks start with the same first four letters in the same order; A, V, I and V. However, the earlier marks have an additional E at the end which acts as a visual point of difference. I agree with the opponent who submits that generally, greater attention is paid to the beginning of the marks. Taking the above into account, I consider the marks to be visually similar to between a medium and high degree.”
71. Mr Baran accepts that the Hearing Officer was correct to feed into her assessment that (i) the marks start with the same four letters in the same order, namely AVIV; and (ii) the average customer will generally pay greater attention to the beginnings of words and word marks (see the General Court’s judgment in T-78/13 *Red Bull GmbH v OHIM* at [31]). However, he contends that she nevertheless made an error of principle because:
- i) The existence of only one letter difference, at the end of the word, necessarily results in a very high degree of similarity in the visual sense.
 - ii) As a matter of principle there is no room for marks to be more similar than differing only by a single letter at the “less interesting” end of the word, particularly where the absence of said single letter does not impact the aural pronunciation of the mark.
 - iii) Accordingly, the Hearing Officer could only have found that the visual similarity was at the highest possible end of the scale without being identical.
80. I reject this submission for the following reasons:
- (i) I agree with Ms Chantrielle that this ground is in reality concerned with the weight attached by the Hearing Officer to the visual impact of the additional letter at the end of the mark AVIVE.
 - (ii) Mr Baran very properly accepted during his oral submissions in response to a question from me that he could not properly rely in this context on the fact that the addition of the letter E, or its removal, has no effect on the aural pronunciation of the mark in circumstances where at least 3 different aural pronunciations were identified in court and the Hearing Officer herself identified two. In any event, the Hearing Officer was here concerned with visual and not aural similarity.
 - (iii) Ms Chantrielle submitted that it was entirely possible for the Hearing Officer to take the view that other formulations would be even more similar – she gave as an example AVIIV – which involves the addition of a letter earlier on in the word, which letter is in fact the same as the next. It did not appear to me that Mr Baran was able satisfactorily to answer this point.

- (iv) In the circumstances, I agree with the observations of Mr Iain Purvis QC in *Greybox* at [23] and [25]-[26], which to my mind apply to the debate in this case over whether the visual similarity should have been “medium to high” as the Hearing Officer found or “very high” as Mr Baran contends, as follows:

“23. This takes issue with the Hearing Officer’s view that the conceptual similarities between the marks were at a ‘fairly low level’. It is said that the conceptual similarity should have been found to be at least at a ‘medium’ level. I do not consider there is any great value in debating differences between ‘fairly low’ and ‘medium’ degrees of similarity in the context of the overall assessment of likelihood of confusion. Certainly, I do not consider that such fine distinctions can properly be characterized as errors of principle. They are at best simply disagreements about the precise ‘weight’ to be given to a factor in the overall assessment, something which the Courts have consistently rejected as a proper ground of Appeal. Furthermore, given the lack of clarity and subjectivity of the terms in question, it is impossible to have any sensible debate on Appeal about whether the Hearing Officer was right.

...

“25. This is another disagreement about ‘weight’ based on the precise words used by the Hearing Officer. She found that the distinctive character of the mark GREY had been enhanced to a ‘fairly high degree’. The Opponent contends that this should have been a ‘very high degree’. The Opponent takes the same point on the Hearing Officer’s finding about the reputation of the mark GREY for the purpose of the s5(4)(a) case, suggesting that it has a ‘very strong’ not simply a ‘fairly strong’ reputation.

26. For the same reasons given above under Ground 5 in relation to the extent of the similarities between the marks, I do not consider that points like this can amount to an error of principle, even if it was considered sensible to debate them on Appeal. Nor do I see anything to suggest that the Hearing Officer’s assessment of distinctive character or reputation was in any way flawed. The use of hyperbolic descriptions such as ‘very high’ and ‘very strong’ is to my mind not justified on the basis of the limited evidence filed by the Opponent.”

72. As to the aural comparison, the Hearing Officer said this at paragraph [44]:

“44. Aurally, the applicant submits that the opponent’s mark will be pronounced as AH-VEE-VEE, and that the applicant’s mark will be pronounced as AH-VEEV. I disagree. I recognise that, as invented words, the marks could be pronounced in a number of different ways. However, I consider it most likely that the opponent’s marks will be pronounced as AH-VEEV and that the applicant’s mark will be pronounced as either AH-VEEV or AH-

VIV. In the former case, I consider the marks to be aurally identical and, in the latter, they will be similar to between a medium and high degree.”

73. I agree with Ms Chantrielle, that the Appellant cannot sensibly criticise the findings in this paragraph. Her finding that there were two possible pronunciations of the Trade Mark cannot be faulted. However, the Appellant says that in carrying forward into her global assessment the proposition that there were two possible pronunciations and the second of them (AH-VIV) gave rise only to a medium to high degree of aural similarity, the Hearing Officer made an error. She should instead have carried forward the fact that, on at least one pronunciation, the marks were aurally identical. This alleged error can conveniently be considered in the context of the third Ground of Appeal.

Ground 3: the Likelihood of Confusion

74. The Hearing Officer dealt with her global assessment of the likelihood of confusion in paragraphs [50]-[53]. No criticism is made of paragraph [50] which addresses the approach to be adopted to the assessment. Paragraph [51] then expressly identifies that “the following factors must be considered to determine if a likelihood of confusion can be established”:

“ • I have found the marks to be visually similar to between a medium and high degree.

• I have found the marks to be aurally similar to between a medium and high degree or identical, depending on how the marks are pronounced.

• I have found the marks to be conceptually neutral.

• I have found the earlier marks to be inherently distinctive to a high degree.

• I have identified the average consumer to be scientific, medical and healthcare professionals or a member of the general public, who will select the goods primarily by visual means, although I do not discount an aural component.

• I have concluded that at least medium degree of attention will be paid during the purchasing process, however, where the goods and services have a particular impact upon the health of the end user, the attention paid will be high.

• I have found the parties goods and services to vary from being dissimilar to identical.”

75. Pausing there, it is clear from paragraph [51] that the Hearing Officer continued to have in mind when carrying out her global assessment that on one of the possible pronunciations of the Trade Mark, the marks were aurally identical and that this needed to be factored into her assessment of likelihood of confusion. In this context I consider that Mr Baran is correct to infer that the Hearing Officer found that each of the possible

pronunciations she had identified might be adopted by a significant proportion of the public.

76. In paragraph [52], the Hearing Officer considered the position in relation to goods and services which she had found to be similar to at least a low to medium degree, i.e. the Class 10 goods. The Hearing Officer determined that there was a likelihood of direct confusion.
77. In paragraph [53], the Hearing Officer said this about the remaining goods and services:
- “53. For those goods and services that I have found to be dissimilar, there can be no likelihood of confusion. Further, where the goods and services are similar to only a very low degree, I consider that this will offset the similarity between the marks in accordance with the interdependency principle and will prevent there from being a likelihood of confusion.”
78. Essentially, Mr Baran contends that in carrying out this global assessment, and notwithstanding the content of paragraph [51], the Hearing Officer failed to take into account her finding that, on one pronunciation of the Trade Mark, it was aurally identical with the Earlier Marks such that a significant proportion of the population would be confused (see *Interflora Inc v Marks and Spencer plc* [2014] EWCA Civ 1403 at [129]).
79. I reject this submission for the following reasons:
- i) The Hearing Officer plainly had regard in paragraph [51] to the alternative findings she had made as to the marks being aurally similar “to between a medium and high degree or identical”, just as she took into account the other alternative findings she had made. Mr Baran was wrong in his skeleton argument at paragraph 73 to contend that the Hearing Officer proceeded in her assessment on the basis that there may be only “a medium to high degree of aural similarity” and wrong to suggest in paragraph 74 that the comparison of the marks that fed into the global assessment of the likelihood of confusion did not proceed on the basis that, on one pronunciation, the marks were aurally identical.
 - ii) I reject the suggestion by Mr Baran that in identifying her alternative findings as to aural similarity, the Hearing Officer was thereby feeding some form of “average” conclusion into her overall assessment (essentially because she included the “less confused” significant proportion of average consumers together with the “more confused” significant proportion, thereby effectively “averaging out” her two findings). On the contrary, in my judgment she was merely recording the parameters she needed to consider in the context of her global assessment; there is no evidence whatever that she conducted some illegitimate form of “averaging” exercise.
 - iii) The outcome of her global assessment, insofar as is relevant, is recorded in paragraph 53, where the Hearing Officer records her primary conclusion that “For those goods and services that I have found to be dissimilar, there can be no likelihood of confusion”. On the Hearing Officer’s primary finding that there

was no similarity between the Annex A goods and services and the specification for the Earlier Marks (a decision which I have found, contrary to Mr Baran's case, is not wrong in principle), this conclusion is unimpeachable. Mr Baran did not appear to me to seek to suggest otherwise. The question of aural similarity, or indeed aural identity, is irrelevant and this Ground of Appeal must be dismissed on this basis.

- iv) Insofar as the Hearing Officer then went on to apply the interdependency principle to offset the "similarity between the marks" (a reference back to the first four bullet points of paragraph [51]), against her alternative finding (in the event that she was wrong as to her primary finding) that the goods and services are "similar to only a very low degree", I fail to see how she can be criticised. There is, in my judgment, no reason why her conclusion cannot encompass the alternative degrees of similarity between the marks identified in paragraph [51] – her conclusion being equally applicable whichever of those alternatives is applied. This involves no impermissible averaging exercise and is in any event (as I have said) a "belt and braces" *obiter* analysis in circumstances where her primary finding is that the goods and services are dissimilar and so there is no likelihood of confusion.
- v) Insofar as Mr Baran's submission in his skeleton proceeded on the assumption that the Hearing Officer should have found the overall similarity of the marks to be "very high" and "at the very highest degree", relying both upon his contention that there was "very high" visual similarity (a submission I have rejected) and aural identity, I reject such submission. In any event, whilst the Hearing Officer had not discounted that there would be an aural component to the purchase of the goods and services, she had also found that "visual considerations are...likely to dominate the selection process". Mr Baran's submissions as to the operation of the interdependency principle were premised upon the "very high similarity" of the marks, an incorrect premise in my judgment which is not borne out by the Hearing Officer's Decision.

80. Having disposed of this point, I can see no other basis for the complaint made in Ground 3 of the Appeal, and indeed, Mr Baran accepted that (with the exception of the point I have just addressed as to aural similarity) it has no life of its own. Accordingly, there is no need for me to consider the further submissions made by Mr Baran in his skeleton argument (and briefly in his oral submissions) as to the other elements of the assessment exercise conducted by the Hearing Officer. In my judgment, the Hearing Officer did not err in carrying out that assessment and there is no basis on which I can disturb her decision. There is certainly no basis on which I can "redo" her decision, as Mr Baran contended.

Conclusion

81. The appeal is dismissed.

ANNEX 1

The First Earlier Mark

Class 5

Implants comprising living tissue; Surgical implants comprised of biological tissue, namely, human tissue for medical and veterinary use; Pharmaceutical and veterinary preparations, and delivery systems therefor, for use in regenerative medicine; pharmaceutical and veterinary preparations, and delivery systems therefor, for wounds; pharmaceutical and veterinary preparations, and delivery systems therefor, for surgical repair; pharmaceutical and veterinary preparations, and delivery systems therefor, acting on the central or peripheral nervous system; medical and veterinary instruments and devices, namely, nerve and tissue grafts and implants comprising living tissue for use in regenerative medicine, wound repair, surgical repair, neurotizing breast reconstruction, and nerve repair and regeneration.

Class 10

Nervous tissue products for use in regenerative medicine, wound repair, surgical repair, neurotizing breast reconstruction, and nerve repair and regeneration; surgical implants comprised of synthetic materials; medical devices, namely, nerve and tissue grafts and implants comprising natural, non-living materials, for use in regenerative medicine, wound repair, surgical repair, neurotizing breast reconstruction, and nerve repair and regeneration; implants comprising synthetic material.

The Second Earlier Mark

Class 5

Implants comprising living tissue; surgical implants comprised of biological tissue, namely, human tissue for medical use; pharmaceutical preparations, and delivery systems therefor, for use in regenerative medicine; pharmaceutical preparations, and delivery systems therefor, for wounds; pharmaceutical preparations, and delivery systems therefor, for surgical repair; pharmaceutical preparations, and delivery systems therefor, acting on the central or peripheral nervous system; medical instruments and devices, namely, nerve and tissue grafts and implants comprising living tissue for use in regenerative medicine, wound repair, surgical repair, neurotizing breast reconstruction, and nerve repair and regeneration.

Class 10

Nervous tissue products for use in regenerative medicine, wound repair, surgical repair, neurotizing breast reconstruction, and nerve repair and regeneration; surgical implants comprised of synthetic materials; medical devices, namely, nerve and tissue grafts and implants

comprising natural, non-living materials, for use in regenerative medicine, wound repair, surgical repair, neurotizing breast reconstruction, and nerve repair and regeneration; implants comprising synthetic material.

The Third Earlier Mark

Class 5

Surgical implants comprised of biological tissues, namely, human and animal tissues for medical use, drug therapies, pharmaceutical, veterinary and sanitary preparations.

ANNEX 2

Class 9

Computer software; computer hardware; application software; recorded computer software for database management; computer hardware and downloadable computer software for collecting, understanding, analysing and viewing data associated with the medical record of a patient; computer hardware and downloadable computer software for collecting, analysis and viewing data associated with the use of cognitive and neurocognitive assessment, diagnostic and training of patients; computer hardware and downloadable computer software for mobile application for screening, monitoring, analysis, and viewing of healthcare data for patients; downloadable computer software applications for use with mobile devices for monitoring and managing patient medical information; computer hardware and downloadable computer software for screening, monitoring, analysis, and viewing of healthcare data for patients using wearables, Internet of Medical Things (IoMT)-based and Internet of Things (IoT)-based devices; computer hardware and downloadable computer software for big data and analytics of healthcare, medical records, across all medical disciplines; computer hardware and downloadable computer software for collecting, monitoring, analysing and viewing data of wearables and Internet of Medical Things (IoMT) devices for medical and healthcare usage; downloadable computer software for interpretation of neuro and brain scans provided via diagnostic imaging equipment.

Class 35

Compiling, collecting of data for research purposes in the field of medical science, digital health and medical consultancy; compiling data for research purposes in the field of medical science and medical consultancy.

Class 41

Education; providing of training; educational services, namely, aging, stroke, TBI (traumatic brain injury), fibromyalgia assessments and rehabilitation courses; education services, namely, providing online cognitive assessments and training programs that help identify cognitive

strengths and weaknesses of an individual; providing medical technology training services; computer-based simulation training services in the field of medical technology; publishing and issuing of scientific papers in relation to medical technology; publishing and issuing scientific papers in relation to medical technology, digital health and the mix between technology and medicine; providing educational classes, training, conferences, non-downloadable webinars and workshops to medical professionals in the field of Neurocognitive assessment, diagnostic and training; providing educational classes, training, conferences, non-downloadable webinars and workshops to medical professionals in the field of physiological assessment, diagnostic and training; providing educational classes, training, conferences, non-downloadable webinars and workshops to medical professionals in the field of medical usage of wearables, Internet of Medical Things (IoMT) devices and Internet of Things (IoT) devices; conducting educational support programmes for patients.

Class 42

Research and development services; scientific research and development; scientific and technological services and research and design relating thereto; design and development of computer hardware and software; chemical, biochemical, biological and bacteriological research and analysis; medical and scientific research, namely, conducting clinical trials for others; providing medical and scientific research information in the field of clinical trials; medical laboratory services; electronic monitoring of physiological parameters, including pulse, saturation, sleeping habits, steps, exercise, mention level using computers and sensors [electronic data collection]; technology research in the field of medical instruments; providing an interactive website featuring technology that enables users to enter, access, track, monitor and generate health and medical information and reports; providing technological information regarding medical devices.

Class 44

Medical services; medical treatment services; medical clinic services; medical services, namely, hyperbaric oxygen therapy services; behavioural health services; internet-based medical diagnosis pertaining to cognitive and physical aging processes, including information regarding treatment, prevention and cure; provision of mental rehabilitation facilities; rehabilitation patient care services; physical rehabilitation services; rehabilitation services for patients with traumatic brain injury (TBI), or other cognitive or physical brain impairment including strokes; physical therapy services; medical, physical rehabilitation and physical therapy services; physical therapy evaluation, identification, and management of movement dysfunction to restore, maintain, and promote optimum physical function prevent the onset, symptoms and progression of impairments, functional limitations and disabilities resulting from disease, disorders, conditions or injuries; bio marker services, Stem cells, Generation of new blood vessels, Neurogenesis and angiogenesis creation and renewal; medical evaluation services, namely, functional assessment program for patients receiving medical rehabilitation services for the purposes of guiding treatment and assessing program effectiveness; exercise facilities for the provision of health rehabilitation purposes; Medical diagnosis and treatment of an individual or group of individuals via remote data monitoring; providing medical testing of fitness and medical consultations to individuals to help them make health, wellness and nutritional changes in their daily living to improve health; providing healthy lifestyle and nutrition services, namely, personal assessments, personalised routines, maintenance schedules

and counselling; food nutrition consultation; consulting services in the fields of diagnostic medical testing and nutrition; dietary and nutritional guidance; counselling services in the fields of health, nutrition and lifestyle wellness; consulting services in the field of mental fitness; medical testing services, namely, cognitive evaluation, training and therapy; medical testing services, namely, nutrition evaluation; medical testing services, namely, fitness evaluation; medical services in the field of hyperbaric oxygen treatment; providing information in the field of medical treatments; providing information relation to dietary and nutritional guidance and lifestyle wellness; medical assistance services provided via telecommunication and global computer networks for individuals with health problems through the use of wearable medical devices with automated alert and monitoring capacity; medical testing for diagnostic or treatment purposes; cognitive therapy services; advice, information and consultancy in relation to all above services.