

O-317-07

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2407395  
BY INFLUCARE LIMITED  
TO REGISTER THE TRADE MARKS (A SERIES OF TWO):**

**Flusenza**

**FLUSENZA**

**IN CLASSES 5, 29, 30 AND 32**

**AND**

**THE OPPOSITION THERETO  
UNDER NO 94654  
BY MEDIMMUNE VACCINES, INC**

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### INTRODUCTION

1) On 24 November 2005 Influcare Limited, which I will refer to as Influcare, applied to register a series nine of trade marks; following an objection at examination stage that the trade marks did not all form a series, seven of the trade marks were struck out. The application proceeded in relation to a series of two trade marks: **Flusenza** and **FLUSENZA**. The application was published for opposition purposes in the *Trade Marks Journal* on 23 June 2006 with the following specification:

*pharmaceutical, medical and veterinary preparations and substances; compositions included in this class for medical and veterinary purposes; foodstuffs, foodstuff supplements and beverages all adapted for medical or veterinary purposes; nasal sprays, gels and creams; antiviral preparations; compositions and other preparations included in this class for making any of the aforesaid goods;*

*mineral or nutrient containing supplements; mineral or nutrient containing preparations;*

*mineral or nutrient containing supplements; mineral or nutrient containing preparations;*

*mineral or nutrient containing supplements; mineral or nutrient containing preparations.*

The above goods are in classes 5, 29, 30 and 32 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 20 September 2006 MedImmune Vaccines, Inc, which I will refer to as MedImmune, filed a notice of opposition to the application. MedImmune is the owner of United Kingdom trade mark registration no 2333976 for the trade mark **FLUZEND**. The application for registration was made on 4 June 2003, with an international priority date from Australia of 29 April 2003. The trade mark was registered on 8 October 2004. It is registered for the following goods:

*pharmaceutical preparations and substances; vaccines, including influenza vaccines.*

The above goods are in class 5 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

3) MedImmune claims that the respective trade marks are similar and that the respective goods are identical or similar. Consequently, registration of the trade mark would be contrary to section 5(2)(b) of the Trade Marks Act 1994 (the Act).

4) Influcare filed a counterstatement. It denies that the respective trade marks are similar. It is not clear from the counterstatement if Influcare considers that the respective goods are identical and/or similar. Influcare claims that there is a wealth of FLU prefixed trade marks on the Register for goods in class 5, these registrations are not in the names of either side in this case. Influcare states that FLU is a well accepted abbreviation for influenza. It states that any comparison for similarity must concentrate upon the “terminal portions” of the respective trade marks. Influcare claims that SENZA and ZEND are not at all similar.

5) Only MedImmune filed evidence. This consisted of a very brief witness statement from a solicitor acting for it. He exhibited a copy of the details upon which MedImmune relies and commented upon the similarity between the respective trade marks. He also stated that the respective goods are either identical or similar.

6) A hearing was held on 26 October 2007. MedImmune was represented by Mr Guy Tritton of counsel, instructed by Taylor Wessing. Influcare was not represented at the hearing but furnished written submissions.

## **DECISION**

### **Likelihood of confusion – section 5(2)(b) of the Act**

7) According to section 5(2)(b) of the Act a trade mark shall not be registered if because:

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

The trade mark the subject of registration no 2333976 is an earlier trade mark as per section 6(1)(a) of the Act<sup>1</sup>.

### **Average consumer, nature of purchasing decision and standard for likelihood of confusion**

8) Mr Tritton submitted that the test for likelihood of confusion in relation to pharmaceutical products was different to that for other products owing to the potential effects of taking the wrong product. He referred to the decision of the First Board of

Appeal of the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) in *Choay SA v Boehringer Ingelheim International GmbH* [2001] ETMR 64 in support of this position. In that decision the First Board of Appeal stated:

“19 As to whether special considerations should prevail in relation to pharmaceutical products, it is clear from the above-mentioned AIPPI report that two contrasting positions exist. In some Member States the view is taken that a likelihood of confusion should be accepted more readily in the case of medicines on account of the serious consequences that can ensue if the patient takes the wrong product. In other countries the view is taken that pharmaceutical trade marks will not be confused so easily because the consumer has the assistance of qualified professionals and is particularly attentive to differences between marks for pharmaceutical products because of the importance of taking the right product.

20 In the Board's view, the conflicting considerations which underlie these opposing views are likely to cancel each other out in many cases, with the result that no special criteria need be applied to trade marks for pharmaceutical products. It may be that there are certain cases in which it is possible to envisage a patient suffering serious consequences as a result of trade mark confusion. In such cases there would be a strong argument for requiring clear differentiation between trade marks. This does not appear to be such a case since it seems unlikely that a person whose doctor has prescribed EXACYL, a prescription-only drug for haemorrhagic disorders, would then go and buy EVASIL over the counter at a pharmacy or drug store. This is clearly the type of case in which the intervention of qualified professionals reduces the likelihood of mistakes.”

I am not aware of any authority that supports the position of the First Board of Appeal. Professor Ruth Annand, sitting as the appointed person, in BL O/293/02 approved the following statement of the hearing officer:

“16. It seems to me that the role of the Registrar is to apply the Trade Marks Act 1994 and its subordinate legislation to the proceedings brought before her. Other provisions and authorities exist for the licensing of pharmaceuticals and in my view, it is not the role of the Trade Marks Registry to stray into these areas. Under the provisions of the Act and acting on behalf of the Registrar I must consider whether there exists a likelihood of confusion if the applicants' and opponents' trade marks are used in respect of the goods for which they are respectively applied for and registered. I must find a likelihood of confusion not merely a possibility of confusion; *Reactor* at page 290.”

The Act requires there to be a likelihood of confusion, that is the test that has to be applied. Effectively Mr Tritton is asking for a different test to be applied, something that is not supported by the legislation. As has been stated above there are specific agencies which have the task, and the requisite expertise, to decide that trade marks can be used in relation to pharmaceutical products. I do not consider that pharmaceuticals are subject to a different standard of test in relation to likelihood of confusion. In *Armour*

*Pharmaceutical Co v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-483/04 the CFI stated:

“79 The Court finds that the level of attention of the average consumer of pharmaceutical preparations must be determined on a case-by-case basis, according to the facts in the case-file, especially the therapeutic indications of the goods in question. Likewise, the Court finds that, in the case of medicinal products subject to medical prescription such as those being considered in the present case, that level of attention will generally be higher, given that they are prescribed by a physician and subsequently checked by a pharmacist who delivers them to the consumers.”

I will look at the particulars of this case.

9) There is no indication that the pharmaceutical and veterinary products of the application are prescription only and so I must take into account that they could be purchased over the counter or from the supermarket shelf. The *pharmaceutical preparations and substances* of the earlier registration are not limited in any way and so will include non-prescription products. The relevant consumer for the goods of the application and *pharmaceutical preparations and substances* of the earlier registration is the public at large. The goods of the application and *pharmaceutical preparations and substances* of the earlier registration could all be of low cost. The *foodstuffs* of the application will include medicated foodstuffs, foodstuffs for diabetics and foodstuffs for babies; the purchasing decision for these last goods will not necessarily be particularly careful and educated. In relation to the other goods of the application, as they all relate to the health and well-being of a person or animal, it is reasonable to expect a greater degree of care to be taken in the purchasing; although as they could be of low cost, not the greatest deal of care. The decision to purchase these latter goods could also be taken on the spur of the moment, to deal with symptoms that had developed. It is, of course necessary to take into account that the average consumer “is deemed to be reasonably well informed and reasonably circumspect and observant<sup>ii</sup>”. The nature of the respective goods and the purchasing process is not such that small differences in the trade marks will mitigate against confusion or make the consumer less subject of the effects of imperfect recollection.

### **Comparison of goods**

10) In “construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade<sup>iii</sup>”. Words should be given their natural meaning within the context in which they are used, they cannot be given an unnaturally narrow meaning<sup>iv</sup>. The class of the goods in which they are placed is relevant in determining the nature of the goods<sup>v</sup>. Consideration should be given as to how the average consumer would view the goods<sup>vi</sup>. In considering the similarity of the goods I have to consider the individual goods specified, unless the same ground of refusal is given for a category or group of goods, then I can use a general reasoning for all of the goods or services concerned<sup>vii</sup>.

11) *Pharmaceutical preparations and substances* are the same as the main goods of the earlier registration, the goods are, therefore, identical. Goods can be considered to be identical when the goods of an earlier trade mark are included in a more general category in the specification of a later application<sup>viii</sup>. In this case *medical and veterinary preparations and substances, compositions included in this class for medical and veterinary purposes, nasal sprays, gels and creams; antiviral preparations; compositions and other preparations included in this class for making any of the aforesaid goods* could all include *pharmaceutical, preparations and substances* and so the goods must be considered to be identical.

12) In assessing the similarity of goods it is necessary to take into account, inter alia, their nature, their intended purpose<sup>ix</sup>, their method of use and whether they are in competition with each other or are complementary<sup>x</sup>. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J also gave guidance as to how similarity should be assessed<sup>xi</sup>.

13) The only goods in class 5 that now require consideration are: *foodstuffs, foodstuff supplements and beverages all adapted for medical or veterinary purposes*. All of the *foodstuffs* at large could be adapted for medical or veterinary purposes. The aforesaid goods like the goods of the earlier registration could all be for the maintenance of good health or to help cure or alleviate an ailment (in man or beast). The respective goods could be taken in relation to the same condition in order to effect a cure or act as a preventative, consequently, they are complementary to some extent. A consumer might have the choice of taking or giving a *foodstuff* adapted for medical purposes as an alternative to a pharmaceutical product, consequently, the respective goods could be in competition. *Supplements* could be in tablet form and so have the same nature as the goods of the earlier registration. All of the goods could be found in a pharmacy, although they are likely to be in different areas of it; so there is, to some extent, a common channel of trade.

**14) I find that *foodstuffs, foodstuff supplements and beverages all adapted for medical or veterinary purposes* are similar to the goods of the earlier registration.**

15) The remaining goods of the application are: *mineral or nutrient containing supplements; mineral or nutrient containing preparations* in three different classes. The class 29 and 30 goods will be distinguished by the nature of the predominant constituents in them and the class 32 goods by being in liquid form. I consider that I can deal with all three classes of goods together. Like the goods of the earlier registration, all of the goods will be used to maintain or improve the health or to cure an ailment. Consequently, they could have the same use and be in competition. The goods could be in tablet form or liquid form, as could the goods of the earlier registration, they could have the same nature. The goods of the application could be used together with the goods of the earlier registration in treating or preventing a malady, so, to some extent, they are complementary. All of the goods could be found in a pharmacy, although they are likely to be in different areas of it; so there is, to some extent, a common channel of trade.

16) I find that *mineral or nutrient containing supplements; mineral or nutrient containing preparations* in classes 29, 30 and 32 are similar to the goods of the earlier registration.

### Comparison of trade marks

17) The trade marks to be compared are:

| Trade mark of MedImmune: | Trade marks of Influcare: |
|--------------------------|---------------------------|
| FLUZEND                  | Flusenza<br>FLUSENZA      |

18) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details<sup>xii</sup>. The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components<sup>xiii</sup>. Consequently, I must not indulge in an artificial dissection of the trade marks, although I need to take into account any distinctive and dominant components. The average consumer 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 he/she is deemed to be reasonably well informed and reasonably circumspect and observant<sup>xiv</sup>. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public<sup>xv</sup>.

19) I do not consider that anything turns upon one trade mark of the series being in capitals and one in title case.

20) The respective trade marks are invented words. For certain goods FLU might describe their purpose, however, I do not consider that this will lead the average consumer to divide the words up and effectively discard the FLU element. The trade marks have to be considered in their entirety and the relevant consumer will consider them in their entirety. Consequently, I do not consider that one can dissect the trade marks, in this case, into specific distinctive and dominant components. This does not mean that the relevant consumer might not be conscious of the FLU element.

21) All of the trade marks start with the same sound, FLU. This is followed by a sibilant sound, there will be some difference in the sound of this sibilant. All of the trade marks then have the same EN sound. The sounds of the ends of the trade marks are different. MedImmune's trade marks has two syllables, whilst Influcare's trade mark has three syllables. **Taking into account the similarities and dissimilarities, I consider that there is a good deal of phonetic similarity between the trade marks.**

22) The first three letters and the fifth and sixth letters are identical. The letter S and the letter Z have a similar shape; although, it must be born in mind that the public are used to distinguishing between the letters. The last two letters of Influcare's trade mark and the final letter of MedImmune's trade mark are different. The issue of similarity is one of

perception and of memory, the public do not normally directly compare one trade mark with another. Taking into account the perception and memory of the trade marks I cannot see that one of Influcare's trade marks being in title case will have any bearing upon the issue of visual similarity. Normal and fair use of MedImmune's trade mark must also include, in my view, use in title case. (See the judgment of the CFI in *Ontex NV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-353/04*<sup>xvi</sup> re how a word mark should be dealt with.) **Taking into account the similarities and differences between the trade marks I consider that the trade marks are visually similar.**

23) It is possible that the relevant consumer will be conscious of the FLU elements of the trade marks, whilst not dividing them up. If he or she is, then this element will give a conceptual similarity between the trade marks. I do not consider that the relevant consumer will analyse MedImmune's trade mark to the extent that he or she will separate the word END from the rest of it and consider the conceptual association of this word. **I am agnostic as to the position of the relevant consumer in relation to the FLU element. The most definite view that I can take in relation to the conceptual associations of the trade marks is that there is no conceptual dissonance or dissimilarity.**

**24) I consider that the phonetic and visual similarities of the trade marks are such that there is a good deal of similarity between them.**

### **Conclusion**

25) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa<sup>xvii</sup>. In this case the goods are either identical or, in my view, enjoy a good deal of similarity. I have found that the trade marks have a good deal of similarity. So MedImmune's case benefits from both the similarity of the goods and the similarity of the trade marks.

26) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark (either by nature or nurture) the greater the likelihood of confusion<sup>xviii</sup>. The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public<sup>xix</sup>. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods 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<sup>xx</sup>. In its submissions Influcare stated that there are many FLU prefixed trade marks already on the Register in class 5. No evidence has been submitted to substantiate this claim; even if this were the case it would not tell me what is happening in the market place, whether the public has been educated to distinguish between various



FLU prefixed trade marks<sup>xxi</sup>. Consequently, this submission has had no effect upon my decision. Influcare submits that the FLU element is entirely non-distinctive. The goods of the application are not limited to being for use in relation to flu and so I cannot see how this argument can help Influcare; the goods of the earlier registration include *influenza vaccines* but are not limited to them. Influcare is inviting me to ignore the FLU prefix as in relation to certain goods it is descriptiveness, this confuses descriptiveness with similarity. A very similar argument was put to the CFI in *Mundipharma AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-256/04*, before whom it did not find favour<sup>xxii</sup>. A constant thread of the case law of the European Court of Justice and the CFI is that the trade marks must be considered in their entirety, one element cannot simply be discarded, although it may have little weight given to it. There are cases where a non-distinctive element will have an effect upon the likelihood of confusion<sup>xxiii</sup>. In this case, despite the submissions of Influcare, I do not consider that the relevant consumer is likely to discard the FLU element, even for products for the treatment or prevention of flu. The relevant consumer will remember the trade marks in their entirety and in their entirety they are, in my view, very similar. MedImmune's trade mark is an invented word, it might have an allusion to some goods, but no more. I consider that MedImmune's trade mark enjoys a reasonable degree of inherent distinctiveness.

27) The average consumer will seldom have the opportunity to directly compare the trade marks, he or she will rely upon his or her recollection. As both trade marks are invented words he or she will have no conceptual hook upon which to hang his or her memory. Taking into account the nature of the purchasing process and the goods also, as discussed above, I consider that this is a case where the effects of imperfect recollection could have a great effect; a possibility further increased by the degree of similarity of the trade marks.

28) Influcare in its submissions referred to the preliminary indication in this case. I am obliged to take no cognisance of the preliminary indication<sup>xxiv</sup>.

**29) I find that there is a likelihood of confusion in respect of all of the goods of the application and that the application is to be refused in its entirety.**

## **COSTS**

30) MedImmune has been successful and is entitled to a contribution towards its costs. I award costs on the following basis:

|                                       |              |
|---------------------------------------|--------------|
| Opposition fee                        | £200         |
| Notice of opposition                  | £300         |
| Considering the counterstatement      | £200         |
| Preparation and attendance at hearing | £500         |
| <b>TOTAL</b>                          | <b>£1200</b> |

31) I order Influcare Limited to pay MedImmune Vaccines, Inc the sum of £1200. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 31<sup>st</sup> day of October 2007**

**David Landau**  
**For the Registrar**  
**the Comptroller-General**

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<sup>i</sup> Section 6(1)(a) of the Act defines an earlier trade mark as:

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

<sup>ii</sup> *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77.

<sup>iii</sup> *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281.

<sup>iv</sup> *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267.

<sup>v</sup> *Altecnic Ltd's Trade Mark Application* [2002] RPC 34.

<sup>vi</sup> *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 dealt with a non-use issue but are still pertinent to the consideration of the meaning and effect of specifications:

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“In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use”

<sup>vii</sup> *BVBA Management, Training en Consultancy v Benelux-Merkenbureau C- 239/05.*

<sup>viii</sup> *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-133/05.*

<sup>ix</sup> The earlier incorrect translation of ‘Verwendungszweck’ in the English version of the judgment has now been corrected.

<sup>x</sup> *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

<sup>xi</sup> He considered that the following should be taken into account when assessing the similarity of goods and/or services:

- “(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.”

<sup>xii</sup> *Sabel BV v Puma AG* [1998] RPC 199

<sup>xiii</sup> *Sabel BV v Puma AG* [1998] RPC 199

<sup>xiv</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* [2000] FSR 77

<sup>xv</sup> *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02

<sup>xvi</sup> 74 First of all, as regards the applicant’s claim that the Board of Appeal should have taken into consideration the fact that the marks at issue are very similar when written by hand in small letters and/or presented in cursive script, it must be noted that the two marks at issue are Community word marks. A word mark is a mark consisting entirely of letters, of words or of associations of words, written in printed characters in normal font, without any specific graphic element (*Faber*, cited in paragraph 60 above, paragraph 33). The protection which results from registration of a word mark concerns the word mentioned in the application for registration and not the specific graphic or stylistic elements accompanying that mark. The applicant’s assertion is for that reason unfounded.

<sup>xvii</sup> *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

<sup>xviii</sup> *Sabel BV v Puma AG.*

<sup>xix</sup> *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91

<sup>xx</sup> *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

<sup>xxi</sup> See *GfK AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-135/04* and *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 re state of the register evidence.

<sup>xxii</sup> “59 As to the end consumers, it has been noted above that their level of attention and knowledge is higher than average because of the serious nature of the illnesses from which they suffer. They will thus be

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able to distinguish the component ‘respi’ in the two marks in question and to understand its conceptual content, which refers generally to the nature of their health problems. However, their limited knowledge of medical terminology will prevent them from being able to discern the conceptual references of the components ‘cur’ and ‘cort’. The opposing marks will thus be conceptually similar for them because of the identical component ‘respi’, the only component with a clear and definite conceptual content.

60 The above conclusions on the perception of the opposing marks are not affected by OHIM’s argument that the component ‘respi’ cannot contribute to any similarity between the signs because of its descriptive character. In fact, in spite of that character, that component, which is placed at the beginning of the two marks, takes up two of their three syllables and is longer than the respective second components, makes a significant contribution to the overall impression produced by the two signs in question. Moreover, with respect to the professional public, it was stated above that that public would perceive all the components of the opposing marks as being descriptive of the intended use of or active ingredient in the goods in question. Consequently, that public will not tend to accord any particular importance to a given component, but will perceive the two marks in their respective overall conceptual impressions.”

<sup>xxiii</sup> See for instance *Grupo El Prado Cervera, SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-117/02* and *José Alejandro SL v Office for Harmonization in the Internal Market (Trade Marks and Designs), Anheuser-Busch Inc Intervening (Case T-129/01)[2004] ETMR 15*.

<sup>xxiv</sup> *Lindsay J in esure Insurance Limited v Direct Line Insurance plc [2007] EWHC 1557 (Ch)*:

“17. As a subsidiary argument, esure argues before me that the Hearing Officer was wrong to reject the Registrar’s preliminary view in the way that he did. Mr Hobbs, drawing attention to the Rules to which I have referred and also to Article 6 ECHR, argues that the Hearing Officer was right in doing as he did. I have no doubt but that the Hearing Officer was right to do as he did. The Registrar’s view was arrived at before there was any evidence on either side, before there was any argument on either side and in a context in which it could not be regarded as a decision against the interests of either side without the prospective loser being given an opportunity to be heard, an opportunity which was not given. So far from it being an error of principle to fail to take the Registrar’s preliminary view into account, it would, in my judgment, have been a serious error of principle for it to have been taken into account.”