

O-485-13

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION 2567538
BY UNIVERSITY HOSPITALS BIRMINGHAM NHS FOUNDATION TRUST
TO REGISTER THE FOLLOWING SERIES OF TRADE MARKS IN CLASSES
9, 10, 35, 38, 42, 44 & 45:**




AND

**OPPOSITION THERETO (NO 102107) BY PARTNERSHIPS IN CARE
MANAGEMENT LIMITED**

The background and the pleadings

1) University Hospitals Birmingham NHS Foundation Trust (“Trust”) applied for the above trade mark on 20 December 2010 and it was published in the Trade Marks Journal on 25 March 2011. Partnerships In Care Management Limited (“Care”) opposes the registration of the mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) relying on a single trade mark registration (a series of two marks) which it owns. Care only opposes the registration of Trust’s application in so far as it covers class 10 goods and class 44 services. There is no dispute that Care’s marks constitute earlier marks, neither is it in dispute that the earlier marks are not subject to the requirement to prove that they have been genuinely used. The following table sets out the conflict:

Trust’s marks and specifications	Care’s marks and specifications
 <p>Class 10: Surgical, medical and dental apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles; suture materials; massage apparatus; supportive bandages; furniture adapted for medical use</p> <p>Class 44: Medical services; hygienic and beauty care for human beings or animals; dentistry services; medical analysis for the diagnosis and treatment of persons; pharmacy advice</p>	<p>pic</p> <p>PIC</p> <p>Class 44: Psychiatric hospital services; psychiatric rehabilitation services; psychiatric care services; services for the treatment of mental illness personality disorders, learning disabilities and acquired brain injuries; telephone counselling and employee assistance programmes in the nature of health consultancy services and psychological and medical counselling; arranging of accommodation, being supported living in the community, all for those with personality disorders, learning disabilities or acquired brain injuries</p>

Nothing turns on the differences between the respective marks in each of the series. I will therefore not differentiate between them.

2) Trust filed a counterstatement denying that the marks were the same/similar, denying that the goods/services were the same/similar and denying that there was a likelihood of confusion. Only Care filed evidence. A hearing then took place before me at which Trust was represented by Mr Ryan Pixton of Kilburn &

Strode LLP and at which Care was represented by Mr Stephen Kinsey of Wildbore & Gibbons.

Care's evidence

3) The evidence comes from Steven Woolgar, Care's director of Policy and Regulation. He explains that Care decided to use the acronym PIC "several years ago". He states that people within Care and its major customers pronounce it as P-I-C, although sometimes it is referred to by other persons as "pick". Mr Woolgar exhibits a half year report (from 2012) and website prints relating to Care's business. The front page of the report depicts the name "Partnerships in Care", but there are a number of uses throughout the report of the acronym PiC, and also a number of uses throughout the website material. He states that Care intends to continue to use the acronym in such a way and to generally use it as a sign to denote the services it provides. To illustrate what business activity Care operates, I note the following from one of the prints:

"Partnerships in Care (PiC) offers the largest independent network of secure mental health hospitals and facilities in the UK"

4) The above is noted in order to give a feel for the business. However, I must bear in mind that the earlier mark is registered for a particular specification and it is this that will be compared against the goods/services applied for.

5) Mr Woolgar states that Trust's mark is, as he understands, to be used in relation to an electronic system providing prescription and medicine administration and related management facilities. Mr Woolgar notes, however, that the specification it has applied for is very broad, and covers (in class 44) services for which Care's mark is registered.

6) Mr Woolgar states that verbal references to Trust's mark will be understood as denoting Care's activities and, in so far as the medical apparatus is concerned, it could be thought to denote a connection with medical apparatus or electronic information recording systems having a particular suitability for use in psychiatric care or for the treatment or diagnosis of mental disorders, etc. He adds that further confusion could arise if Care were to introduce an electronic database to record clinical outcomes in relation to specialist care of patients; this, however, is not pertinent because the opposed specifications do not include databases.

Section 5(2)(b) – the legislation and the leading case-law

7) Section 5(2)(b) of the Act reads:

"5.-(2) A trade mark shall not be registered if because –

(a)

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

8) The Court of Justice of the European Union (“CJEU”) has issued a number of judgments¹ which provide guiding principles relevant to this ground. In *La Chemise Lacoste SA v Baker Street Clothing Ltd* (O/330/10), Mr Geoffrey Hobbs QC, sitting as the Appointed Person, quoted with approval the following summary of the principles which are established by these cases:

"(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier

¹ The leading judgments are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77, *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, Case C-3/03 *Matrazen Concord GmbH v GmbGv Office for Harmonisation in the Internal Market* [2004] ECR I-3657 *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05)

trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

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

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

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

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

The average consumer

9) The average consumer is deemed to be reasonably observant and circumspect. However, the degree of care and attention the average consumer uses when selecting goods and services can vary, depending on what is involved (see, for example, the judgment of the General Court ("GC") in *Inter-Ikea Systems BV v OHIM* (Case T-112/06)).

10) In the medical field, many goods and services will have average consumers made up of both healthcare professionals on the one hand and members of the general public on the other; members of the general public are relevant on the basis of them being end users, and also as consumers in their own right purchasing medical goods (although I accept that they will not, and sometimes cannot, directly purchase all medical goods) and selecting service providers, particularly in the private health care field. A similar finding was made by the GC in *Mundipharma AG v OHIM*, Case T-256/04, albeit in relation to certain pharmaceutical products. There are, though, exceptions to this. For example, the average consumer of suture materials in the applied for goods will only be a healthcare professional as a member of the general public will not ordinarily buy such things and by the time they become an end user (because they are being stitched up) the relevant trade mark will not be apparent to them. Whilst the marks used in this field will often be encountered visually (for example, whilst product brochures and websites are perused), aural use will also be made when matters are discussed with healthcare practitioners and others in the field. Both visual and aural similarity is thus important. In general, decisions about medical

goods and services, given their likely importance to a person’s health, are likely to be carefully considered purchases. There may be some exceptions to this, for example, bandages are unlikely to be purchased with anything other than a reasonable degree of care.

11) Some of the applied for terms are not medical related. In relation to “hygienic and beauty care for human beings or animals” the average consumer is a member of the general public who will deploy a reasonable (but no higher than that) degree of care and attention. The average consumer for dentistry services will, again, be a member of the general public; the choice of a dentist will be a more considered decision. In both instances I think that visual similarity will take on slightly more significance than aural similarity, but both are still important.



The distinctiveness of the earlier mark

12) The more distinctive the earlier mark, the greater the likelihood of confusion. Distinctiveness can come from a mark’s inherent characteristics or from the use that has been made of it.

13) In relation to the use of the earlier marks, whilst Mr Woolgar has given some evidence as to the nature of the use, there is little evidence of the degree or extent of such use before the relevant date. The evidence does not support a conclusion that the use has enhanced the distinctive character of the marks. From an inherent perspective, the letters PIC make no allusive or suggestive nods to the services of the earlier mark. The mark may be seen as an acronym and average consumers will be aware of the use of acronyms (and letters generally) across a number of fields. This does not mean that the mark is low in distinctiveness, but I consider that the level of distinctiveness should be pitched at an average or reasonably distinctive (but not high) degree.

Comparison of the marks

14) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to their overall impressions, bearing in mind their distinctive and dominant components. The marks to be compared are:

Trust’s marks	Care’s marks
	

15) Trust's marks are both made up of two elements, both of which play an independent and distinctive role. The PICS element is likely to be the dominant element, but there is not much in it. Care's marks have only one element to consider. From a visual perspective, the marks all contain a short letter combination (three letters v four) the first three of which are shared. The differences are that Trust's marks have an additional letter S and they have a distinctive device element to the left of PICS. I believe the eye will easily be drawn to the similarities and, although the differences are borne in mind, they do not outweigh these similarities. I consider there to be a reasonable degree of visual similarity. From an aural perspective, the marks could be articulated as either PICKS/PICK or P-I-C/P-I-C-S. There will be no attempt to articulate the device element in Trust's marks. I consider the average consumer will be consistent in approach, so if they were to articulate Trust's marks as PICKS then they will articulate Care's mark as PICK, similarly, if they were to articulate Trust's mark as letters then the same would be true of Care's marks. Obviously the marks are not aurally identical, but I still consider there to be a reasonable level of aural similarity from the letter articulation and a reasonably high degree of similarity from the word articulation.

16) I do not consider that the average consumer will approximate the marks to the word pick and its various meanings – I consider, from a conceptual point of view, that the average consumer will see no concept, consequently, the degrees of visual and aural similarity I have assessed is neither counteracted nor increased.

Comparison of the goods/services

17) When making the comparison, all relevant factors relating to the services in the specifications should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of its judgment:

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

18) Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

- “(a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

19) In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T- 325/06 it was stated:

“It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 *P Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

20) In relation to complementarity, I also bear in mind the recent guidance given by Mr Daniel Alexander QC, sitting as the Appointed Person, in case B/L O/255/13 *LOVE* where he warned against applying to rigid a test:

“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in *Boston* is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to *Boston*.”

21) In relation to understanding what terms used in specifications mean/cover, the case-law informs me that “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 the trade”² and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning³. However, I must also be conscious not to give a listed service too broad an interpretation; in *Avnet Incorporated v Isoact Limited* [1998] F.S.R. 16 (“*Avnet*”) Jacob J stated:

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

22) I also note the judgment of Mr Justice Floyd in *YouView TV Limited v Total Limited* where he stated:

“..... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IPTRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of "dessert sauce" did not include jam, or because the ordinary and natural description of jam was not "a dessert sauce". Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

23) The earlier mark is registered for the following services:

Class 44: Psychiatric hospital services; psychiatric rehabilitation services; psychiatric care services; services for the treatment of mental illness personality disorders, learning disabilities and acquired brain injuries; telephone counselling and employee assistance programmes in the nature of health consultancy services and psychological and medical counselling; arranging of accommodation, being supported living in the community, all for those with personality disorders, learning disabilities or acquired brain injuries

² See *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281

³ See *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

24) I will make the assessment with reference to the applied for goods and services, breaking them down and grouping them when it is necessary and reasonable to do so. I will begin with the class 44 services:

Class 44

Medical services

25) “Medical services” is a broad term covering general services in the sense of, for example, a hospital offering a range of different health care functions, but the term will also cover specific types of health care functions. Mr Pixton highlighted the very specific nature of the services of the earlier mark, contrasting this with the more general nature of the applied for services. However, the fact remains that the services of the earlier mark are clearly medical in nature (I struggle to see how one could argue that they are not) and are, thus, medical services. Consequently, medical services (in the applied for mark) includes the type of medical services of the earlier mark, **so meaning that identical services are considered to be in play.** It does not matter that the services of the earlier mark include other services (arranging of accommodation was highlighted) as the applied for term need only be identical or similar to one thing in the specification of the earlier mark.

26) The term “medical services” will, though, also include medical services which are not identical because they may be, for example, in a different field of specialism. However, even then, such services may be provided in the same hospital or other health care premises so meaning that the trade channels align. Even though the exact purpose is not particularly similar, all the services are concerned with the health care of persons, will be provided by doctors or nurses and will be accessed in the same way. **Therefore, in so far as other types of medical services are concerned, there is still in my view a moderate degree of similarity with the services of the earlier mark.**

27) I should also highlight that the earlier mark also includes the following term:

“telephone counselling and employee assistance programmes in the nature of health consultancy services and psychological and medical counselling”

28) The “telephone counselling...in the nature of health consultancy services..” aspect of this term is not limited to psychological and mental illness etc as per the other services of the earlier mark. Therefore, what is, essentially, a telephone health consultancy service could be in any field and, as such, **is also similar to medical services (which could be in any field) to a least a reasonable level** as all are related to health care (without specific limits to field) and could be provided by the same organisations.

Hygienic and beauty care for human beings or animals

29) To the extent that the above services are for animals then there is, for quite obvious reasons, no similarity. In relation to the above services for human beings, hygienic and beauty care services are not ordinarily classed as medical services and are most often provided in spas and salons. Mr Kinsey argued that such services could be provided as part of the services of the opponent as part of the care of people with mental disabilities. For example, beauty care services may be provided as the person being treated may not be able to look after and clean themselves, cut toe nails etc. This, to my mind, is stretching the meaning of the terms too far and takes a wholly unrealistic view of the matter. The earlier mark covers particular types of services for the treatment of mental illness etc. The term does not cover hygienic and beauty care services within its ambit. The purpose of the services differs as do the methods of use. The services are normally provided in different places. There is no element of competition nor are the services complementary. **The services are not similar.**

Dentistry services

30) The purpose of dentistry services and those for treating mental illness etc is quite different, as are the methods of use of the service. The channels of trade differ with dentistry services ordinarily being provided in dentist practices. The type of people performing the services differ, dentists on the one hand as opposed to doctors and support staff on the other. There is no element of competition nor are the services complementary. Even against the non-specific "telephone counselling...in the nature of health consultancy services", such a service, on its natural reading, would not cover advice about dentistry. **The services are not similar.**

Medical analysis for the diagnosis and treatment of persons

31) The above services could relate to the analysis of information and material for diagnostic/treatment of mental illness. To that extent, there is a similarity of purpose. Even though the methods of use are likely to differ, the channels of trade may coincide with such services being provided by hospitals, both generalist and specialist. The relationship between analysis on the one hand and treatment on the other gives rise to a complementary relationship. To the extent that the applied for term covers medical analysis in relation to mental illness then **I consider there to be a reasonable degree of similarity between the services.**

32) The applied for services also cover those outside of the mental illness field. However, as with my comments earlier regarding medical services, there is still something of an overlap even against the specific services of the earlier mark **creating a moderate degree of similarity.** However, there is less a degree of similarity with the "telephone counselling...in the nature of health consultancy

services..” as the services seem a further step away from each other, although, as stated earlier, these services are not specifically listed as being for mental illness etc. **There is a low to moderate degree of similarity.**

Pharmacy advice

33) It is unlikely that pharmacy advice will relate to mental illness per se so the service will always be more general. Although hospitals may have pharmacies, pharmacy advice is normally dispensed by pharmacists in a self-standing pharmacy. The purpose, whilst having some superficial aspects of being health related, are not that close. It is not likely that one will make a competitive choice between a mental illness treatment service and pharmacy advice. In terms of complementarity, it is quite superficial and consumers will, in event, normally regard the competing service providers as different with the consequence that the complementary test outlined by the case-law requiring the relationship to be in “such a way that customers may think that the responsibility for those goods lies with the same undertaking” is not met. **The services are not similar.** This is so even between the non-specific “telephone counselling...in the nature of health consultancy services” as the nature, methods of use, trade channels etc are so different.

Class 10

34) Before coming to the specific assessment, I should highlight a few issues relating to the submissions made at the hearing. Part of Mr Kinsey’s argument was that the applied for goods could be used in, for example, hospitals (including those that treat mental illness) and that a hospital may label (with the hospital’s name) the goods used in it. This may be so, but in my view this does little to establish that the goods are similar to the services. A great many things can be used in hospitals and to find similarity on this basis is in my view untenable without a greater link. Furthermore, and as Mr Pixton argued, the manufacturers of the applied for goods would unlikely also be service providers. Neither party addressed this point in evidence, but it seems a logical conclusion to reach. Medical services providers would not normally be involved in the manufacture and sale of medical goods. I now turn to the specific goods.

Dental apparatus and instruments

35) There is nothing to link dental apparatus with services for the treatment and care of people with mental illness etc. **The goods are not similar to the services of the earlier mark.** I can see no better prospect from the perspective of the non-specific “telephone counselling...in the nature of health consultancy services”.

Artificial limbs, eyes and teeth

36) Similarly, I can see no link between the above goods with the services for the treatment and care of people with mental illness etc. **The goods are not similar to the services of the earlier mark.** I can see no better prospect from the perspective of the non-specific “telephone counselling...in the nature of health consultancy services”.

Orthopaedic articles

37) Orthopaedic articles will be used for the treatment of conditions of the muscular-skeletal structure. I see no meaningful link between the above goods with the services for the treatment and care of people with mental illness etc. **The goods are not similar to the services of the earlier mark.** I can see no better prospect from the perspective of the non-specific “telephone counselling...in the nature of health consultancy services”.

Supportive bandages, suture materials and massage apparatus

38) The above goods have no specific link with the services for the treatment and care of people with mental illness etc. **The goods are not similar to the services of the earlier mark.** I can see no better prospect from the perspective of the non-specific “telephone counselling...in the nature of health consultancy services”.

Furniture adapted for medical use

39) As stated earlier, no evidence has been filed to establish whether the goods are similar or not. This is important here because I have no idea whether furniture adapted for medical use can have a specific adaptation for treatment of mental illness etc. It is not obvious to me that there is. Therefore, without such evidence I cannot hold that there is any greater link than that I have assessed with the other applied for goods. With no specific link with the services for the treatment and care of people with mental illness, I hold that **the goods are not similar to the services of the earlier mark.** I can see no better prospect from the perspective of the non-specific “telephone counselling...in the nature of health consultancy services”.

Surgical and medical apparatus and instruments

40) This is the widest term covered by the applied for goods in class 10 and will cover a whole variety of surgical and medical apparatus and instruments which may be used either generally across multiple fields (e.g. a stethoscope) or in particular fields (e.g. a pace maker). As in the preceding paragraph, I am left in an uninformed position as to whether there are specific types of apparatus and instruments used to treat mental illness etc. It is not obvious to me that there is.

Whilst Mr Kinsey referred to scanners, there is no evidence that these are used in the treatment of mental illness or psychiatry. Most mental illnesses seem to be treated with medication and/or counseling. Therefore, without such evidence, I cannot hold that there is any greater link than that I have assessed with the other applied for goods. With no specific link with the services for the treatment and care of people with mental illness etc, I hold that **the goods are not similar to the services of the earlier mark**. I should add that even if there was a greater link then I may not have found the goods were similar with the services on account of the points I made in paragraph 34 regarding the differentiation between medical service providers on the one hand and the manufacturers of surgical and medical apparatus on the other. I can see no better prospect from the perspective of the non-specific “telephone counselling...in the nature of health consultancy services”.

Likelihood of confusion

41) The factors assessed so far have a degree of interdependency. A global assessment of them must be made when determining whether there exists a likelihood of confusion. There is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. In relation to the class 10 goods then there can be no likelihood of confusion given that I have found no similarity between those goods applied for and the services of the earlier mark⁴. This also extends to the applied for services which I found not to be similar to the services of the earlier mark, namely: *hygienic and beauty care for human beings or animals; dentistry services; pharmacy advice*. That leaves the following applied for services to determine:

Medical services; medical analysis for the diagnosis and treatment of person

42) To the extent that the above services may relate to the treatment/diagnosis of mental illness then the degree of similarity between the respective services (as assessed earlier) together with the degree of similarity between the marks **leads me to conclude that there is a likelihood of confusion**. Even if the average consumer recalled that one mark carried a device element whereas the other did not, then the remaining similarity between the marks will still be put down to the respective undertakings being the same or being economically linked. The additional S in Trust’s marks is something which could be overlooked when imperfect recollection is borne in mind, notwithstanding the considered nature of the selection process (which I have fully borne in mind).

43) As I have already observed, the above terms will also include within their ambit services other than those for the treatment/diagnosis of mental illness etc.

⁴ See, for example, *Waterford Wedgwood Plc v OHIM* case C-398/07.

However, I still considered that such services were similar to those of the earlier marks (to the degree assessed earlier). I come to the view, despite the lower degree of similarity between the services, that there will still be a likelihood of confusion. All the services could be provided in a general hospital under one roof. Even for discrete and specific outlets focusing on one condition, the similarity between the marks will likely inform the average consumer that the services being offered are part of the same medical service group, albeit specializing in different fields.

Outcome

44) The opposition succeeds against:

Class 44: Medical services; medical analysis for the diagnosis and treatment of persons

45) The opposition fails against:

Class 10: Surgical, medical and dental apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles; suture materials; massage apparatus; supportive bandages; furniture adapted for medical use

Class 44: Hygienic and beauty care for human beings or animals; dentistry services; pharmacy advice

The unopposed services remain, of course, unaffected by these findings.

46) Care's opposition has succeeded in part. However, it is only a partial success. In the circumstances, I consider that both sides should bear their own costs.

Dated this 2nd day of December 2013

**Oliver Morris
For the Registrar,
The Comptroller-General**