

O-405-15

TRADE MARKS ACT 1994

TRADE MARK REGISTRATION No. 3029335

FOR THE WORD 'WARTIE'

IN THE NAME OF YOUMEDICAL B.V.

AND

APPLICATION 500431 BY WARTNER EUROPE B.V.

FOR A DECLARATION THAT THE REGISTRATION IS INVALID

Background and pleadings

1. This is an application by Wartner Europe B.V. (“the applicant”) to invalidate the UK trade mark WARTIE, which is registered in the name of YouMedical B.V. (“the proprietor”) in relation to:

Class 3

Cosmetic preparations for body and skin care; disinfectant soaps.

Class 5

Pharmaceutical preparations for body and skin care; including pharmaceutical products for dermatological use, also intended for treatment of external swelling of the skin, including warts, disinfectants for hygienic use.

2. The application to register the trade mark was filed on 5 November 2013 and the mark was registered on 7 February 2014.

3. The application to invalidate the trade mark was filed on 27 May 2014.

4. The grounds for invalidation are, in summary, that:

- The trade mark is identical in sound to the word ‘Warty’, meaning for the treatment of warts, and is therefore descriptive of a characteristic of the registered goods and/or devoid of any distinctive character for those goods.
- The trade mark is similar to the applicant’s earlier UK trade mark 2168134 and CTM 6380661, both of which are for the word WARTNER, and are registered for identical or similar goods. These similarities give rise to a likelihood of confusion on the part of the public.
- The applicant has established goodwill and reputation in the UK under the marks shown below¹ as a result of the use of these mark in the UK since 1999 in relation to pharmaceutical preparations for the treatment of warts.

WARTNER



¹ The quality of the representation of the second earlier right used in the application for invalidation is too poor to be re-produced here. I have used a picture of the sign from the applicant’s evidence.

- Use of the proprietor's mark in the UK "*including in a visual representation reminiscent of that of the applicant for invalidation*" would constitute a misrepresentation to the public that the proprietor's goods are those of the applicant, or that there is a commercial connection between them. This would damage the applicant's goodwill and be contrary to the law of passing off.

5. The trade mark was therefore registered contrary to s.3(1)(b),(c), 5(2)(b) and/or s.5(4)(a) of the Trade Marks Act 1994 ("the Act").

6. The applicant's earlier trade marks had been registered for more than 5 years at the date of the application for invalidation. Consequently, the applicant made the required statements of use of the earlier marks.

7. The proprietor filed a counterstatement denying the grounds for invalidation. I note in particular that:

- The applicant was put to proof of use of the earlier registered marks in relation to the goods relied upon for the purposes of this application, i.e. '*pharmaceutical preparations for the treatment of warts*' (in the case of UK 2168134) and '*pharmaceutical preparations*' (in the case of CTM 6380661).
- The proprietor denied that all the goods covered by its registered mark are similar to the applicant's goods.
- The proprietor denied that the respective marks are similar, except from a conceptual perspective as a result of them including the word 'Wart', and denied that the co-incidental use of this descriptive word increased the likelihood of confusion.
- The proprietor relied on the registration of other marks in the names of third parties which start with WART.
- The proprietor claimed that the registered mark and the earlier marks have co-existed in the marketplace without confusion since 7 February 2014.
- The proprietor admitted that WARTIE was phonetically equivalent to WARTY, but denied that WARTY means '*for the treatment of warts*'.

8. Both sides seek an award of costs.

The applicant's evidence

9. The applicant's evidence takes the form of:

- Three witness statements by Ruth Vermeire, who is the Global Head of Intellectual Property at Omega Pharma B.V., of which the applicant is a subsidiary.
- Two witness statements by Peter Cornford, who is a trade mark attorney and partner in the firm of Stevens, Hewlett & Perkins which represents the applicant in these proceedings.

10. Mr Cornford's evidence is nearly all submissions which I will take into account, so far as it is necessary to do so, in making my decision. The only points worth recording under the heading of 'facts' are that:

- Exhibit PWC2 consist of an extract from the Oxford English Dictionary showing that 'Warty' is an adjective meaning, inter alia, 'afflicted with warts on the skin', and that 'Wartie' is listed as alternative spelling of 'Warty'.
- Exhibit PWC5 shows that gourds with protrusions are described as 'wartie(s)' on a couple of US websites.

11. Mr Cornford says that such gourds are commonly available as decorations for purchase from florists in the UK during the autumn, but it is not clear what basis he has for giving such evidence².

12. Ms Vermeire's evidence is that the applicant has used the mark WARTNER in the UK since it was acquired from the previous owner in 2004 in relation to pharmaceutical preparations for the treatment of warts, verrucas, corns and calluses. The previous owner had used it in the UK and throughout the EU since the 1990s. She exhibits historical pages from the applicant's website wartner.eu showing use of the mark between 2009 and 2012 on a blue and white package used for a treatment for warts and verrucas.

13. An example of the mark in use on packaging dating from 2012 with the text in German, for use in the German speaking countries of the EU, is also in evidence³.

14. Exhibit RV6 contains a letter dated 23 February 2011 from IMS Health which gives the applicant permission to use the words '*No1 anti-wart brand in the world*' on

² He does not claim to have firsthand knowledge about the matter. However, for the reasons given below, nothing turns on this evidence anyway.

³ See exhibit RV4

the packaging of the WARTNER product. Ms Vermeire describes IMS as an information and technology company which works with the health industry.

15. In her second statement she claims that in 2012 the applicant enjoyed “almost 20%” of the UK market for wart removal products. She refines this claim in her third statement in which she says that the applicant had around 17% of the UK market in 2012. This data was supplied by a market research company called IRI. Exhibit RV9 consists of pages from IMS’s website and a copy of an entry in Wikipedia, which Ms Vermeire claims show the company’s credentials to make such statements.

16. Sales of WARTNER products in the UK between 2009 and 2014 varied between “in excess of £1.1m” to “in excess of £1.5m” at wholesale prices. The retail cost of the product is between £9 and £13.

17. Ms Vermeire also provides copies of invoices showing sales of WARTNER products to wholesale customers in the UK between 2009 and 2014⁴. Ms Vermeire says that the goods are sold on to retailers such as Alliance Boots, who stocked the product during the period in question.

The proprietor’s evidence

18. The proprietor’s evidence consists of witness statements by:

- Claire Elizabeth Lehr, who is Special Counsel with the law firm Colley(UK) LLP, which represents the proprietor in these proceedings.
- Jennifer Eddis, who is an Intellectual Property Investigator at Cerberus Investigations Ltd.
- Hayley Langdon, who is a Director of LS Brands Ltd. Ms Langdon is the Business Development Director of the proprietor and as such is responsible for the sales and marketing in the UK and Eire of a number of the proprietor’s products, including the WARTIE product.
- Boudewijn Meyer, who is the Managing Director of YouMedical B.V. (the parent company of the proprietor).

19. Ms Lehr’s evidence is mostly submissions. I come to the arguments of the parties below. However, I record two points here. Firstly, in answer to one of the applicant’s submissions (to the effect that the letter T will be dropped or not clearly pronounced in the marks at issue), Ms Lehr provides a link to the applicant’s own website and a video promoting one of its WARTNER products. Ms Lehr notes that the applicant does not drop the letter T in its verbalisation of WARTNER. Secondly,

⁴ See exhibit RV7

she admits that the word 'Warty' has the meanings contended for by the applicant, but she denies that WARTIE is an alternative spelling of 'Warty', or that the meanings of 'Warty' have a sufficiently direct and specific association with the registered goods for the public concerned to perceive the proprietor's mark as a description of a characteristic of the goods.

20. Ms Eddis conducted an online investigation into "*the availability of WART-prefixed wart remover products in the UK*". The research included looking at internet search trend databases. Ms Eddis states that she found "*search interest*" in WARTNER from 2004 when such records began. She also found search interest in WARTICON from 2007. Ms Eddis notes that others, such as WARTEX (see below) were not revealed in this search because the search volume was too low to show any data.

21. Current searches on major online retail websites in the UK (such as eBay and Amazon) revealed a number of uses of the word WART. Some of these are plainly just descriptive uses (such as Dr Scholl's Clear Away Wart Remover) and are therefore manifestly irrelevant. Others (such as ENDWART) use the word Wart as a suffix and are therefore also of little or no relevance. Others, such as WARTEX and WARTSTICK, are potentially relevant subject to evidence that they were present on the market at the date of filing the application to register the proprietor's trade mark. In this connection, I note that Ms Eddis went through the reviews of the products on Amazon and found that the earliest reviews of WARTEX and WARTSTICK were from 22 February 2013 and 29 June 2013, respectively. This indicates that the products were fairly new to the market at the date of the application to register the proprietor's trade mark, i.e. 5 November 2013. I note that a further search Ms Eddis conducted on eBay indicated that the proprietor's WARTIE product was first sold on eBay on 27 July 2014.

22. Ms Langdon says that LS Brands Ltd make all commercial introductions with customers and suppliers for the brands for which they represent the proprietor in the UK/Eire as well as dealing with after sales support, marketing and PR. Ms Langdon has worked in the pharmaceutical industry for 10 years. She has responsibility for customer relationship management. Ms Langdon says that she is therefore very familiar with the sales and marketing practices of the industry.

23. Ms Langdon states that she "*recently*" visited a number of pharmacies in the South East of England and saw "*many products that are prefixed with the relating condition or body part*", including WART prefixed products. She says that she is aware of other WART prefixed products available in the UK, including WARTEX/WARTIX and BYE WART. According to Ms Langdon, wart removers are over-the-counter products and a reference in the brand name to the relevant ailment therefore helps the customer to select the right type of product.

24. Mr Meyer has worked in the pharmaceutical and personal care products industry for 20 years. He is involved in the promotion and marketing of a number of the proprietor's products, including WARTIE, FOOTNER, NAILNER and SPOTNER. Mr Meyer notes that the brand names for these products refer to the ailment to which the products relate and that this helps consumers to select the right type of product. He refers to similar uses in the brand names of third parties for other types of products, such as brands beginning with EAR or AUDI for ear pain products, SLIM for slimming products, WIND for stomach/bowel products and CLEAR for acne products. He provides examples of different third parties using brand names with these prefixes in relation to the same type of products. According to Mr Meyer, such brands co-exist without confusion. Finally, he says that he would be aware of customer complaints, but he is not aware of any instances of customer complaints as a result of confusion between the WARTIE and WARTNER products.

Decision from papers

25. Neither side asked to be heard. I have, however, had the benefit of further written submissions filed on behalf of the proprietor and I have taken these into account (as well as all the other arguments of the parties).

The section 3(1) grounds

26. Section 47(1) and section 3(1) of the Act are as follows:

“47 (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration). Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.”

“3(1) The following shall not be registered –

- (a) signs which do not satisfy the requirements of section 1(1),
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) -

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

27. The case law under section 3(1)(c) was summarised by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc*⁵ like this:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia , *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44 , paragraph 45, and *Lego Juris v OHIM* (C-48/09 P) , paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley* , paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94 , it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie* , paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).”

And

⁵ [2012] EWHC 3074 (Ch)

“49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a ‘characteristic’ of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms ‘the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service’, the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word ‘characteristic’ highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56).”

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].”

28. It is common ground that WARTIE is phonetically the same as WARTY and that WARTY means, inter alia, ‘afflicted with warts on the skin’. It is therefore a reference to a person or thing afflicted by warts. It is not a word which describes warts as such. The proprietor submits that the applicant has not adequately explained how a word which describes a person or thing afflicted by warts corresponds to a description of a characteristic of a wart removing product. I agree. The word does not describe the kind of product: that would be a ‘wart’ product or a ‘wart removing product’ or similar. It does not describe the intended purpose of the product, which is plainly not to make one ‘warty’. It is not obvious to me that the word ‘warty’ describes any characteristic of a wart removing product. The phonetic equivalence of WARTIE to WARTY is therefore irrelevant and I reject the ground for invalidation based on s.3(1)(c).

29. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were

conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG*⁶ as follows:

“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67).”

30. The applicant has not explained why WARTIE is devoid of any distinctive character, except that it is phonetically equivalent to, and possibly an alternative spelling of, WARTY. The evidence does not establish that consumers of the goods at issue would recognise WARTIE as an alternative spelling of WARTY. The appearance of WARTIE in the Oxford Dictionary as an alternative spelling of WARTY does not establish that consumers would recognise it as such⁷. Therefore, without further evidence, I do not accept that the public will recognise WARTIE as either a misspelling, or as an alternative spelling, of ‘warty’. Further, the evidence points to the goods being self selected over-the-counter products. If so, the visual impression created by the mark is likely to be of most importance. In these circumstances the phonetic equivalence between WARTIE and ‘Warty’ may not be sufficient to deny WARTIE a distinctive character, even if WARTY itself is not distinctive.

31. It is not necessary to decide that point because even the word ‘Warty’ does no more than to allude to the character of wart removing products. This does not mean that it is devoid of any distinctive character for such products. I see no reason why WARTIE is incapable of distinguishing the proprietor’s goods, even where these are

⁶ C-265/09 P

⁷ See the decision of Mr Iain Purvis QC as the Appointed Person in *Harlequin Shellac TM* BL O/500/14 at paragraph 25

want removing products. I therefore also reject the ground for invalidation based on s.3(1)(b).

The section 5 grounds

32. Section 47 of the Act (so far as relevant) is as follows:

“47(2) The registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2A) But the registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless -

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if -

(a) within the period of five years ending with the date of the application for the declaration the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(2D) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Community.

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(3) -

(4) -

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

33. The first issue is whether the applicant has shown genuine use of the earlier marks. The application to invalidate the proprietor’s mark was filed on 27 May 2014. The relevant period for the purpose of establishing genuine use of the earlier marks is therefore 28 May 2009 to 27 May 2014.

34. Earlier UK mark 2168134 is registered for ‘Pharmaceutical preparations for the removal of warts’. The evidence unequivocally shows genuine use of WARTNER in the UK in relation to these goods with the proprietor’s consent.

35. Earlier CTM 6380661 is registered and relied upon for ‘Pharmaceutical preparations’. The evidence unequivocally shows genuine use of WARTNER in the EU, with the proprietor’s consent, in relation to pharmaceutical preparations of a particular type; namely, those for the treatment of warts, verrucas, corns and calluses.

36. In *Roger Maier and Another v ASOS*⁸, Kitchen L.J. (with whom Underhill L.J. agreed) set out the correct approach for devising a fair specification where the mark has not been used for all the goods/services for which it is registered. He said:

“63. The task of the court is to arrive, in the end, at a fair specification and this in turn involves ascertaining how the average consumer would describe the goods or services in relation to which the mark has been used, and considering the purpose and intended use of those goods or services. This I understand to be the approach adopted by this court in the earlier cases of *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2002] EWCA Civ 1828, [2003] RPC 32; and in *West v Fuller Smith & Turner plc* [2003] EWCA Civ 48, [2003] FSR 44. To my mind a very helpful exposition was provided by Jacob J (as he then was) in *ANIMAL Trade Mark* [2003] EWHC 1589 (Ch); [2004] FSR 19. He said at paragraph [20]:

“... I do not think there is anything technical about this: the consumer is not expected to think in a pernicky way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. ... Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the

⁸ [2015] EWCA Civ 220

umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods – are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made."

64. Importantly, Jacob J there explained and I would respectfully agree that the court must form a value judgment as to the appropriate specification having regard to the use which has been made. But I would add that, in doing so, regard must also be had to the guidance given by the General Court in the later cases to which I have referred. Accordingly I believe the approach to be adopted is, in essence, a relatively simple one. The court must identify the goods or services in relation to which the mark has been used in the relevant period and consider how the average consumer would fairly describe them. In carrying out that exercise the court must have regard to the categories of goods or services for which the mark is registered and the extent to which those categories are described in general terms. If those categories are described in terms which are sufficiently broad so as to allow the identification within them of various sub-categories which are capable of being viewed independently then proof of use in relation to only one or more of those sub-categories will not constitute use of the mark in relation to all the other sub-categories.

37. I find that a fair specification for the earlier CTM for the purposes of s.47(2E) is 'pharmaceutical preparations for the treatment of warts, verrucas, corns and calluses'. I believe that this would accord with the average consumer's perception of the use shown. It is a coherent sub-category of pharmaceutical preparations and it avoids granting protection of the earlier CTM in relation to other sub-categories of pharmaceutical preparations for which no use has been shown.

38. Section 5(2)(b) of the Act is as follows:

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

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

Comparison of goods and services

39. The proprietor's mark is registered for, inter alia:

'Pharmaceutical preparations for body and skin care; including pharmaceutical products for dermatological use, also intended for treatment of external swelling of the skin, including warts'.

40. It is self-evident (and not apparently in dispute) that these descriptions cover the goods for which the applicant's earlier marks are protected. Consequently, these descriptions must be considered as covering identical goods for the purposes of s.5(2)(b).

41. There is a dispute as to whether the other goods for which the proprietor's mark is registered (particularly those in class 3) are similar to 'pharmaceutical preparations for the treatment of warts, verrucas, corns and calluses'. However, for the reasons given below there is no need for me to determine that matter.

Comparison of marks

42. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*, that:

".....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

The respective trade marks are shown below:

WARTNER	WARTIE
Earlier trade mark	Contested trade mark

43. The applicant points out that the first four letters of both marks are the same and that the letter E is present in the suffixes of the marks. The beginnings of the marks are plainly the same and it cannot be denied that this creates a degree of visual similarity between the marks. However, despite the fact that they both contain a letter E, the endings of the marks look quite different. Further, although it is only one letter longer than the contested mark, the earlier mark appears noticeably longer to my eye, perhaps because the letter 'l' in WARTIE occupies little space. Overall, I find that there is a moderate degree of visual similarity between the marks.

44. The applicant argues that the beginnings of marks are more important than the ends when it comes to assessing aural similarity because the consumer has a tendency to 'swallow' or not clearly articulate the ends of words, relying on an old English judgment in the case of *London Lubricants (1920) Limited's Application*⁹. A similar point was made in the more recent judgment of the General Court in *El Corte*

⁹ [1925] 42 RPC 64

*Inglés, SA v OHIM*¹⁰. However, this cannot be elevated into a strict rule that the beginnings of marks always matter more than the ends, particularly where the beginnings are descriptive. The General Court recognised this in *CureVac GmbH v OHIM*¹¹. Ultimately, the marks must be compared as wholes. I find that the different intonation and sound created by the endings of the marks - IE (EE) versus NER - means that the overall level of aural similarity between the marks is only moderate, despite the identical sounding prefixes.

45. As I mentioned earlier, the applicant also argues that it is common in colloquial English to ‘drop’ the letter T, including in the middle of a word just preceding a vowel, and to replace it with a glottal stop. Hence the verbalisation of the contested mark will create the sound WAR-EE, which the applicant contends sounds very similar to WARTNER in which the T is silent. In support of the latter point, the applicant draws attention to words like FITNESS, SOFTNESS and PARTNER where the letter T is “ghosted”.

46. The parties made quite extensive written arguments about this matter, but I see little in it. Firstly, I see no evidence that it is common to drop or not fully articulate the letter T when it appears between two consonants, as in the earlier mark WARTNER. The example given – the word ‘partner’ – does not support the argument in my experience. Secondly, where the letter appears as a part of a recognisable word – in this case WART – I see no reason why the T should sound differently when followed by a short suffix like –IE. Thirdly, even if the marks will be verbalised as WAR-EE and WAR-NER, respectively, I fail to understand how this makes them sound any more similar. If the argument is more subtle than I have understood – and it matters as much as the applicant appears to think it does – it might have benefitted from discussion at a hearing, but the applicant did not ask to be heard.

47. I doubt very much whether the point is very important. As I have noted above, the goods appear to be over-the-counter self selected products. Although such products may sometimes be requested orally, or be the subject of recommendation, they will generally be selected by eye from display shelves in pharmacies and like retail outlets, or from websites, or at least the initial oral selection will be confirmed by a visual appraisal of the product prior to purchase. If that is right, the degree of visual similarity is likely to carry more weight in my assessment of the likelihood of confusion than the degree of aural similarity¹².

48. I accept that there is a medium degree of conceptual similarity between the marks because they both evoke the meaning of WART (when used for wart and

¹⁰ Cases T-183/02 and T-184/02, at paragraph 83

¹¹ Case T-80/08

¹² See *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03

verruca removers). However, this is not a particularly distinctive similarity in the context of a trade in wart and verruca removers.

49. Overall, I find that there is a moderate level of similarity between the marks.

Average consumer and the purchasing act

50. It appears to be common ground that the relevant consumers are, at least for the most part, the general public.

51. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*¹³, Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

51. Some of the applicant’s written submissions appeared to rely on the potential for confusion amongst consumers who are not average because they are less than reasonably observant. However, as the proprietor pointed out, that is not the correct approach. As the above passage from Birss J.’s judgment in *Hearst Holdings* makes clear, it is only the likely reaction of typical consumers which counts for this purpose.

52. It is true that the average consumer's level of attention is likely to vary according to the category of goods or services in question¹⁴. In this connection, the applicant contends that the goods at issue are relatively inexpensive and points to the potentially dangerous consequences of choosing the wrong pharmaceutical product. The proprietor counters that because of this danger, consumers can be assumed to reasonably attentive when selecting such over-the-counter pharmaceutical products.

53. I do not agree that an average consumer would regard a product costing £9 - £13 as relatively inexpensive. This and the need to ensure the selection of a product suitable for the consumer’s ailment will ensure that a normal level of attentiveness is displayed during the selection process.

¹³ [2014] EWHC 439 (Ch)

¹⁴ *Lloyd Schuhfabrik Meyer, Case C-342/97*

Distinctive character of the earlier trade mark

54. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

55. The earlier mark consists of a made up word consisting of the descriptive word WART combined with the suffix NER. It alludes to, but does not describe, the principal product for which it is used – wart and verruca removers. I find that it has an average level of inherent distinctiveness for such products and an above average level of inherent distinctiveness for treatments for corns and calluses, for which the mark is nothing but distinctive.

56. The applicant has not provided any significant evidence of promotion of WARTNER in the UK. Nevertheless, the earlier mark is clearly well established in the UK market for wart and verruca removers. I accept the applicant’s evidence that WARTNER had around 17% of the relevant UK market in late 2012. It is likely that the position was similar about a year later when the application to register WARTIE was filed.

57. I find that the distinctiveness of WARTNER has been enhanced because of the use made of it. I am not prepared to find that it is highly distinctive in the absence of evidence of extensive promotion and/or very high market share. However, I find that the applicant’s evidence is sufficient to establish that the mark had an above average level of distinctiveness in November 2013 for wart and verruca removers.

58. The extension of use of the mark in relation to treatments for corns and calluses appears to have happened in around 2011. The evidence does not show an enhanced level of distinctiveness through use for these secondary goods.

59. These findings mean that the earlier mark had an above average level of distinctiveness in November 2013 for all the goods for which it is entitled to protection.

Likelihood of confusion

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

The principles

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

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

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

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

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive

role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

61. The relevant date for this purpose is 5 November 2013: the date of the application to register WARTIE.

62. The parties rely on various decisions of the registrar, OHIM and the General Court of the EU to show, by analogy, that there is or is not a likelihood of confusion between WARTIE and WARTNER. I reject this approach. I am required to assess the likelihood of confusion between the marks and goods at issue on the basis of the law and the facts before me. It is wrong, in principle, to attempt to establish whether there is a likelihood of confusion in this case by attempting to liken it to various decisions on other cases, each of which inevitably turned on their own facts.

63. As I have already noted, the following goods must be considered as being identical to the goods for which the earlier mark is protected.

‘Pharmaceutical preparations for body and skin care; including pharmaceutical products for dermatological use, also intended for treatment of external swelling of the skin, including warts’.

64. The identity between the goods is a factor which increases the likelihood of confusion.

65. I have found that the average consumer in this case pays a normal degree of attention when selecting the goods. This is therefore a neutral factor neither increasing nor decreasing the likelihood of confusion.

66. The marks are similar to only a moderate degree. This means that a finding that there is a likelihood of confusion will depend on other supporting factors, such as the identity of the goods.

67. The earlier mark has an above average level of distinctiveness. On the face of it this is a further factor which supports the conclusion that there is a likelihood of confusion. However, In *Kurt Geiger v A-List Corporate Limited*¹⁵, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar¹⁶. He said:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.'

40. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask 'in what does the distinctive character of the earlier mark lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out".

68. The common element between these marks – the word WART – is manifestly descriptive and therefore non-distinctive for the principal goods of interest to the parties. The proprietor has sought to buttress this point by drawing attention to various third party marks also containing the word WART, which it claims already co-exist with WARTNER on the UK market. WARTEX and WARTSTICK appear to have been on the UK market at the relevant date, but the evidence only establishes such use since the beginning or middle of 2013, and there is no evidence as to the scale of use of these marks. In fact, it appears from Ms Eddis's evidence that WARTEX has only been used on a low scale. There is evidence from Ms Eddis that WARTICON is a longer established mark for similar products, although curiously Ms Langdon (the witness from the proprietor's UK distributor) does not claim to be familiar with that product despite her experience of the market. In my judgment, this evidence of concurrent use of WART- prefixed marks does not establish that there was a well established pattern of the use of such marks in the UK at the relevant date. However, that conclusion does detract from the fact that WART is inherently

¹⁵ BL O-075-13

¹⁶ The General Court made a similar point in *Madaus AG v OHIM* (Echinaid v Echinacin), Case T-202/04

highly descriptive of a wart and verruca remover and the relevant public can be expected to recognise this. I accept the proprietor's evidence that this is what makes WART derivative marks attractive to traders in such goods because it conveys descriptive information about the purpose of the goods which makes it easier to buy them (and therefore to sell them).

69. Consequently, even though the earlier mark has an above average level of distinctiveness as a whole, I do not find that the distinctiveness of WARTNER means that there is an enhanced likelihood of confusion as the result a third party using a mark with WART as its prefix (or suffix) in relation to wart and verruca removers.

70. This does not exclude a likelihood of confusion as a result of the use of WART as a prefix for WARTIE and WARTNER in combination with other (distinctive) similarities between the marks. The applicant points to the marks being similar in length and that the respective suffixes contain a letter E. However, for the reasons given above I do not find that these points add materially to the overall level of similarity between the marks.

71. Even allowing for imperfect recollection, I see no likelihood that a reasonably observant average consumer paying a normal degree of attention is likely to visually or aurally confuse WARTNER with WARTIE for wart and verruca removers.

72. Admittedly, the argument is more finely balanced when it comes to pharmaceutical products for use in treating conditions other than warts and similar problems. This is because WART is not descriptive of such products and is therefore more distinctive. However, with some hesitation, I find that the differences between the marks are sufficient to avoid a likelihood of confusion if WARTIE is used in relation to any of the goods listed at paragraph 63 above.

73. It follows that the application for invalidation of WARTIE for the goods in class 3 must also be rejected. This is because these goods are only similar (at best) to the goods in class 5 for which the applicant's mark is entitled to protection. Consequently, the applicant's case based on the registration of WARTNER for these goods is weaker than its case based on the registration of its mark for identical goods.

74. The applicant has not specifically advanced its case based on the likelihood of indirect confusion, or 'association' to use the word from the Act, but for the avoidance of doubt I record that I have considered such a likelihood and rejected it. This is because I do not consider that the commonality of the prefixes of WARTIE and WARTNER is sufficient by itself to create a risk that the public will believe that the users of the respective marks are the same, or are economically connected, and I have rejected the applicant's arguments that there are other material similarities between the marks.

75. Consequently, I reject the ground of invalidation based on s.5(2)(b) of the Act.

The Section 5(4)(a) ground

76. The relevant statutory provision is as follows:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

77. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*¹⁷ Mr Daniel Alexander QC as the Appointed Person endorsed the way that I explained the relevant date in an action of this kind in *SWORDERS TM*¹⁸ where I said:

“Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.”

78. The proprietor has not established any use of WARTIE prior to the date of the application for registration, so the relevant date is again 5 November 2013.

79. The relevant principles are well established and not in dispute. They are conveniently set out in Halsbury’s Laws of England (4th Edition) Vol. 48 (1995 reissue). The following analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731.

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

¹⁷ BL O-410-11

¹⁸ BL O-212-06

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation."

80. It is clear that the applicant had established a protectable goodwill in the UK under the mark WARTNER by the relevant date. This was as a result of the established use of that mark in relation to 'pharmaceutical preparations for the treatment of warts, verrucas, corns and calluses'. These are the same goods I considered when rejecting the applicant's case under s.5(2)(b). The first earlier right is also substantially the same as the earlier mark – the word WARTNER¹⁹. The second earlier right also includes the blue and white packaging on which the word WARTNER appears in typical use.

81. In both cases the applicant asks the registrar to consider the effect of use of the proprietor's WARTIE mark "*including in a visual representation reminiscent of that of the applicant for invalidation*". The contested mark is just the word WARTIE. The suggestion that the effect of the use of this mark should be considered in combination with similar visual representation – which I understand to mean on blue and white coloured packaging – is therefore a submission that matter extraneous to the registered mark should be included in this assessment. This is plainly wrong. The section itself states that:

"a trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented....."

82. It is well established that the correct comparison is 'mark v earlier sign'. The contested mark does not include anything other than the word WARTIE. Although it may be relevant in an actual passing off action brought by the applicant against the proprietor's branding of its WARTIE product, the effect of the use of the word WARTIE in combination with extraneous matter is irrelevant to the enquiry under s.5(4)(a). I will therefore limit my enquiry to the effect of the use of the contested mark – the word WARTIE. This means that there is no need for me to consider any further the applicant's earlier right based on the word WARTNER on blue and white packaging. This is because that composite sign cannot provide the applicant with a stronger case for attacking the proprietor's registration of just the word WARTIE than the applicant's case based on the word WARTNER alone.

¹⁹ I do not think that the slightly elongated upright section of the letter T in the earlier right makes any difference. It remains substantially the word WARTNER.

83. In *Marks and Spencer PLC v Interflora*²⁰, Lewinson L.J. cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that “a substantial number” of the relevant public are deceived, which might not mean that the average consumer is confused. In particular, he found it hard to see how there could be a likelihood of confusion amongst the public where the majority of the public would not be confused. However, in a subsequent appeal in the same case²¹ and after an extensive review of the authorities, a differently constituted Court of Appeal found as follows:

“129. As we have seen, the average consumer does not stand alone for it is from the perspective of this person that the court must consider the particular issue it is called upon to determine. In deciding a question of infringement of a trade mark, and determining whether a sign has affected or is liable to affect one of the functions of the mark in a claim under Article 5(1)(a) of the Directive (or Article 9(1)(a) of the Regulation), whether there is a likelihood of confusion or association under Article 5(1)(b) (or Article 9(1)(b)), or whether there is a link between the mark and the sign under Article 5(2) (or Article 9(1)(c)), the national court is required to make a qualitative assessment. It follows that it must make that assessment from the perspective of the average consumer and in accordance with the guidance given by the Court of Justice. Of course the court must ultimately give a binary answer to the question before it, that is to say, in the case of Article 5(1)(b) of the Directive, whether or not, as a result of the accused use, there exists a likelihood of confusion on the part of the public. But in light of the foregoing discussion we do not accept that a finding of infringement is precluded by a finding that many consumers, of whom the average consumer is representative, would not be confused. To the contrary, if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then we believe it may properly find infringement.

130. In the circumstances of this case we are, of course, concerned with a claim under Article 5(1)(a) (and Article 9(1)(a)) in the context of internet advertising and the question to be answered was whether the advertisements in issue did not enable reasonably well-informed and observant internet users, or enabled them only with difficulty, to ascertain whether the goods and services so advertised originated from Interflora or an undertaking economically linked to Interflora or, on the contrary, originated from M & S, a third party. In answering this question we consider the judge was entitled to have regard to the effect of the advertisements upon a significant section of the relevant class of consumers, and he was not barred from finding infringement by a determination that the majority of consumers were not confused.”

²⁰ [2012] EWCA (Civ) 1501

²¹ [2014] EWCA (Civ) 1403

84. It is well established under the law of passing off that the likelihood of deception should not be measured against the likely behaviours of the types of consumer who are either particularly careless and therefore unusually prone to confusion, or particularly attentive and therefore unusually resistant to deception²². So there may not be much difference in practice between, on the one hand, the average consumer with his or her presumed characteristics for the purposes of trade mark law, and on the other hand, consumers without the sorts of characteristics that would disqualify them from consideration for the purposes of assessing the likelihood of deception under the law of passing off. The requirement for a likelihood of confusion amongst “a significant section of the relevant class of consumers” under trade mark law might be capable of producing a different result to the test for deception “amongst a substantial number of persons” under the law of passing off, although it is difficult to think of examples of real cases that would have passed the latter test, but not the former. It is in fact easier to think of examples of cases that passed the test for confusion under trade mark law, but failed the test for deception under the law of passing off law²³. However, for the avoidance of doubt, I have kept the appropriate test for passing off firmly in mind when making this decision.

85. Applying the correct test, and for similar reasons to the ones I gave for rejecting the applicant’s s.5(2)(b) case, I find that use of the proprietor’s mark in relation to any of the goods covered by the contested registration would not deceive a substantial number of persons. Consequently, use of the mark WARTIE would not constitute a misrepresentation to the public. This means that the s.5(4)(a) case based on the applicant’s earlier rights to WARTNER (and WARTNER on blue and white packaging) must be rejected.

Outcome

86. The application for invalidation of the trade mark WARTIE is rejected.

Costs

87. The proprietor has been successful and is entitled to a contribution towards its costs. In the circumstances I will award the proprietor the sum of £2250 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

£500 for reviewing the application for invalidation and filing a counterstatement

£1500 for filing evidence and reviewing the applicant’s evidence

£250 for filing written submissions in lieu of a hearing.

²² See, for example, Jacob L.J. in *Reed Executive Plc v Reed Business Information Ltd* [2004] EWCA Civ 159

²³ For example, *BP Amoco Plc v John Kelly Ltd* [2002] FSR 5

88. Subject to appeal, I therefore order Wartner Europe B.V. to pay YouMedical B.V. the sum of £2250. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 25th day of August 2015

**Allan James
For the registrar**