

IN THE MATTER OF APPLICATION NO. 2315408 BY PROFESSIONAL CYCLE
MANUFACTURING LIMITED

AND IN THE MATTER OF OPPOSITION NO. 92249 THERETO BY HALFORDS
LIMITED

Introduction

1. On 9 November 2002 Professional Cycle Manufacturing Ltd applied to register the trade mark EXCEL in respect of “bicycles” in Class 12. During examination UK registered trade mark No. 2277155 APOLLO EXCEL registered as of 3 August 2001 in respect of “bicycles, tricycles; parts and fittings for all of the aforesaid goods” in Class 12 was cited against the application. After the applicant had filed evidence of its use of the mark applied for, the application was accepted by the Registrar on the basis of honest concurrent use under section 7(1) of the Trade Marks Act 1994.
2. The application was opposed by Halfords Ltd on grounds raised under section 5(2)(b) of the Trade Marks Act 1994. The opposition was based upon two earlier registrations:
 - (1) UK trade mark No. 2277155, which is owned by the opponent.
 - (2) Community trade mark No. 1056407 EXEL registered as of 25 November 1998 in respect of various goods in classes 7, 8 and 12 including “land vehicles”. The proprietor of this registration is Exel SA, a French company unconnected with the opponent.

3. Both parties filed evidence and attended a hearing. In a written decision dated 4 February 2005 (O/034/05) Mr George Salthouse acting for the Registrar upheld the ground of opposition based on the opponent's own registration. The applicant appeals against this decision. The opponent cross-appeals with respect to the ground of opposition based on Exel SA's registration.

Relevant provisions of the 1994 Act

4. Section 5(2)(b) provides:

A trade mark shall not be registered if because ... it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier 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.

This provision implements Article 4(1)(b) of Council Directive 89/104/EC of 21 December 1988 to approximate the laws of Member States relating to trade marks ("the Directive").

5. Section 7 provides in relevant part:

- (1) This section applies where on an application for the registration of a trade mark it appears to the registrar ... that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain ... but the applicant shows to the satisfaction of the registrar that there has been honest concurrent use of the trade mark for which registration is sought.
- (2) In that case the registrar shall not refuse the application by reason of the earlier trade mark ... unless objection on that ground is raised in opposition proceedings by the proprietor of that earlier trade mark or other earlier right.
- (3) For the purposes of this section "honest concurrent use" means such use in the United Kingdom, by the applicant or with his consent, as would formerly have amounted to honest concurrent use for the purposes of section 12(2) of the Trade Marks Act 1938.

These provisions do not derive from the Directive but are of purely domestic origin.

The application

6. As noted above, the applicant's mark was accepted after the opponent's registration had been cited against it on the basis of honest concurrent use. The evidence submitted by the applicant during examination to support its claim to honest concurrent use consisted of a witness statement of Sharon Kelly, a director of the applicant. In paragraph 3 of her statement, Ms Kelly stated that "The trade mark EXCEL (the 'Trade Mark') has been used by my Company in the United Kingdom in relation to bicycles therefore since at least as early as 1996." She went on to say that bicycles bearing the Trade Mark had been "provided" throughout the United Kingdom; that turnover in bicycles bearing the Trade Mark amounted to over £12.5 million with annual turnover in the five years from 1998 to 2002 ranging from over £1.2 million to over £3.3 million; that the number of bicycles bearing the Trade Mark sold in each of those years ranged from nearly 19,000 to nearly 44,000; and that a total of nearly £300,000 had been spent on advertising and promotion of bicycles bearing the Trade Mark. She also referred to and relied upon documentary evidence of use that had previously been provided to the Registrar under the cover of a letter from the applicant's solicitors. She concluded by saying that there had been no instances of confusion even though "the product is advertised widely and is available through many channels in the marketplace to the general public and trade".
7. The letter referred to by Ms Kelly enclosed copies of advertisements in a number of issues of a publication entitled *Makro Mail*, copies of invoices from the applicant to Makro Stores Ltd and photographs of bicycles. In the letter the applicant's solicitors stated, "Many thousands of bicycles have been sold bearing EXCEL and they are sold in High Street shops, wholesale outlets and home shopping catalogues to the general public".
8. Exel SA's registration was not cited against the application by the Registrar.

The statements of case

9. In its statement of case the opponent set out the two earlier registrations relied upon as founding its objections under section 5(2)(b), and pleaded *inter alia*:

The former [i.e. No. 2277155] was cited against the application and the Examiner maintained the position that a customer would expect goods bearing the cited mark and EXCEL to emanate from the same source. In response the Applicants filed evidence alleging honest concurrent use since 1998 and this was accepted by the Examiner under the provision of Section 7. The benefit of Section 7 is not available to the Applicants in these proceedings.

10. In its counterstatement the applicant pleaded *inter alia*:

Contrary to the allegations made, continuous use of the mark applied for has not, during the past 8 years, led to any likelihood of confusion on behalf of the public and/or a likelihood of association with the Opponent's earlier mark.

11. The applicant did not plead specifically to the opponent's case based on Exel SA's registration.

The evidence

12. The opponent's evidence in chief consisted of a witness statement of Paul Joynor, a manager employed by the opponent. Mr Joynor exhibited a copy of Ms Kelly's statement and commented on it. The main points made by Mr Joynor were as follows. First, he suggested that substantial use of the mark by the opponent had commenced in 1998 rather than 1996. Secondly, he suggested that the turnover figures quoted represented "well under 0.1%" of the total market. Thirdly, he said that "it would appear that most, at least, of the cycles are sold by a single retailer – Macro [sic]". Fourthly, he observed that while the application was in respect of the plain word EXCEL alone, there was no such use. Instead what was used was the word in stylised form or as part of logos or with another word. Fifthly, he observed that EXCEL was not

particularly distinctive and therefore the advertising and promotion figures quoted were not sufficient to make it stand out in the marketplace.

13. The applicant's evidence in answer consisted of a witness statement of Hazel Bradbury, a trade mark assistant employed by its solicitors. In her statement Ms Bradbury took issue with the relevance of Mr Joynor's evidence but nevertheless responded to it. So far as the first point was concerned, she said that figures were available for the period before 1998 but the applicant did not feel the need to rely upon them. As to the second, she pointed out that Mr Joynor's arithmetic was in error and the correct figure was just under 1%. As to the third point, she said that, while Makro was the applicant's main customer, "the delivery address[es] for the bicycles – and hence the ultimate retail outlet in which they are to be resold – cover many parts of the United Kingdom". With regard to the fourth point, she exhibited photographs and advertisements which she said showed use of EXCEL alone as well as with various model names. So far as I have noticed, the materials exhibited by Ms Bradbury were identical to those which had been previously been submitted with the applicant's solicitors' letter. Ms Bradbury did not comment on Mr Joynor's fifth point.
14. In addition to responding to Mr Joynor, Ms Bradbury exhibited a print-out from the opponent's website showing that it sold a range of bicycles under the brand name APOLLO including one under the mark APOLLO EXCEL. She argued that this showed that the opponent used APOLLO in the same way as the applicant used EXCEL. She also noted that the opponent had not produced any evidence of confusion and argued that, as the largest cycle retailer in the UK, the opponent would be likely to be aware of any confusion that had been caused.
15. The opponent did not serve any evidence in reply.

The hearing before the hearing officer

16. Both parties lodged skeleton arguments in advance of the hearing.

17. The opponent's skeleton argument argued that the mark applied for was confusingly similar both to the opponent's own mark and to Exel SA's mark. It also argued that the absence of evidence of actual confusion was immaterial since that the test was one of normal and fair use and since the use of EXCEL relied on was through a single source, very low and in special form.
18. The applicant's skeleton argument contended that "No evidence has been filed by the Opponent to justify its entitlement to base its Opposition on Community Trade mark Registration EXEL" and therefore that ground of opposition should be discounted. As for the ground of opposition based on the opponent's own registration, the applicant contended that there was no likelihood of confusion. In support of this contention, the applicant cited *CODAS Trade Mark* [2001] RPC 14 and argued that, as in that case, the absence of evidence of confusion despite a lengthy period of honest concurrent use by the applicant showed that there was no likelihood of confusion.
19. At the hearing, after the opponent's trade mark attorney had made some preliminary submissions, the hearing officer asked him "whether or not we really have a case under the CTM registration" and drew to his attention the commentary on section 7(2) contained in paragraph 8-115 of *Kerly's Law of Trade Marks* (13th ed), which points out that it refers only to opposition by the proprietor of the earlier trade mark or other earlier right. The opponent's attorney replied that he had not realised that and would therefore concentrate on APOLLO EXCEL. The hearing officer then asked: "Are you withdrawing the opposition under the other one?" The attorney replied: "In those circumstances, it would appear necessary to do so." Thereafter the parties made submissions on the other ground of opposition in accordance with their respective skeleton arguments.
20. On the day after the hearing, the opponent's attorney wrote to the hearing officer as follows:

... I was troubled by your comment that the opponent could not rely upon Community trade mark registration number 1056407 in these

proceedings. I went away worrying about this point because, although you seemed very sure about it, it seemed to me intuitively wrong that a mark that is not raised at the examination stage cannot be raised at the opposition stage other than by the proprietor.

Having now had a chance to consider the issue more carefully, I believe the opponent is entitled to rely upon this registration in the opposition. This is because the examiner did not raise this mark as a citation against the application. Consequently, the applicant did not overcome the citation of this mark on the grounds of honest concurrent use and section 7(2) does not apply in respect of this mark.

...

I should like to ask you to reconsider this matter accordingly and, if you agree with my reasoning, that an opportunity be provided for the parties to address you further, perhaps by means of a telephone conference, or written submissions.

The hearing officer's decision

21. In the first section of his decision the hearing officer outlined the issues. In paragraph 3 he noted the plea in the applicant's counterstatement that it had been using the mark for eight years with no instances of confusion.
22. In the second section of his decision the hearing officer summarised the evidence. In paragraph 9 he said that Mr Joynor had commented that "the evidence does not show use of the mark EXCEL alone, it is always in combination with another word". (In fact this is not quite what Mr Joynor said, but this was the thrust of the opponent's argument at the hearing.) In paragraphs 8 and 10 he referred to the evidence of Ms Kelly and Ms Bradbury as showing use of bicycle names such as EXCEL STARBURST, EXCEL REVOLUTION, EXCEL BLACK BULLET and so on.
23. In the third section of his decision, the hearing officer considered the two grounds of opposition. In paragraph 13 he stated that the opponent had withdrawn the opposition in relation to CTM No. 1056407 at the hearing. He did not refer to the letter the following day.

24. The hearing officer began his consideration of the other ground of opposition by setting out the Registrar's standard summary of the jurisprudence of the Court of Justice of the European Communities in Case C-251/95 *SABEL BV v Puma AG* [1997] ECR I-6191, Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc* [1998] ECR I-5507, Case C-342/97 *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [1999] ECR I-3819 and Case C-425/98 *Marca Mode CV v Adidas AG* [2000] ECR I-4881. This summary is very well known and it is unnecessary to repeat it here.
25. The hearing officer recorded that it was common ground that the marks were registered in respect of identical goods.
26. So far as the distinctiveness of the opponent's mark was concerned, the hearing officer held that the mark was inherently distinctive. The hearing officer held that it did not have any enhanced distinctiveness acquired through use since the opponent had not filed any evidence of use of the mark.
27. As to the comparison between the respective marks, the hearing officer held as follows:
 20. ... Clearly the second part of the opponent's mark is identical to the mark in suit. However, the word APOLLO which prefixes the word EXCEL in the opponent's mark cannot be ignored. It is not laudatory or descriptive and for the goods concerned seems quite distinctive. While there are visual and phonetic similarities between the two marks there are also differences.
 21. Conceptually, the marks convey little. The word EXCEL alludes to a superior ability or quality, whilst APOLLO is well known as the God of Light and also the name used on numerous spacecraft. The two words do not hang together to form a coherent image. Neither mark conjures up a vivid image which is applicable to the goods in question. Given the allusive nature of the word EXCEL it is the image associated with the word APOLLO which is the dominant feature. This is emphasised by its position as the first word.
28. The hearing officer expressed his overall conclusion as follows:

23. Whilst it is accepted that the beginnings of trade marks are important, the dictum of imperfect recollection must also be taken into account. To my mind the similarities in the marks far outweigh the differences. Had the applicant sought registration of the marks actually used in the market place as shown in the evidence then the outcome might have been different.
24. Taking account of all of the above when considering the marks globally, I believe that there is a likelihood of consumers being confused into believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them...

Standard of review

29. *Prima facie*, these appeals are reviews of the hearing officer's decision. Both counsel accepted that on such a review the hearing officer's decision with regard to section 5(2)(b) involved a multi-factorial assessment of the kind to which the approach set out by Robert Walker LJ in *REEF TM* [2002] EWCA Civ 763, [2003] RPC 5 at [28] applied:

In such circumstances an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle.

Applicant's appeal

30. The applicant contends that the hearing officer erred in principle in failing to give effect to the principle which it submits was established in *CODAS*, namely that, where two marks have been used concurrently without causing actual confusion, that militates against a finding of a likelihood of confusion within section 5(2)(b). The applicant submits that the evidence demonstrates concurrent use of the mark applied for and of the opponent's mark over a period of 8 years without any evidence of confusion, and that in those circumstances the hearing officer ought to have concluded that there was no likelihood of confusion.
31. The opponent contends that it is inconceivable that the hearing officer did not have the relevant principle well in mind, since it formed the central plank of

the applicant's case at the hearing before him, and that it is clear from the hearing officer's decision that the opponent's case failed on the facts. In support of this contention the opponent relies on paragraphs 3, 8-10 and 23. The opponent argues that it is clear from these paragraphs, and in particular the last sentence of paragraph 23, that the hearing officer found that there had been no use by the applicant of EXCEL on its own, as opposed to use of EXCEL in combination with other marks, and accordingly concluded that the applicant's case of honest concurrent use of the mark applied for was not made out.

33. The hearing officer did not refer to *CODAS* in his decision. Nor did he explicitly state why he rejected the applicant's case based on *CODAS*. Counsel for the applicant argued that the opponent's analysis of the decision went beyond reading between the lines and that the last sentence of paragraph 23 was not enough to constitute a reasoned rejection of the applicant's case.

34. In my judgment there is force in this criticism. The Court of Appeal has made it clear in *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [2002] 1 WLR 2409 and other cases that the giving of reasons is a fundamental part of the judicial process. It is not incumbent upon a judge or other person exercising a judicial function to give elaborate reasons or to deal with every single point made by each party, but it is important that the tribunal should explain, even if briefly, the essential reasons which have led it to the decision made. In the present case, honest concurrent use of the mark applied for was the central plank of the applicant's case that there was no likelihood of confusion with the opponent's mark. That being so, I consider that the hearing officer should have explained why he rejected that contention. In my view, the last sentence of paragraph 23 was not adequate for this purpose. I should emphasise that I am not saying that a lengthy explanation was required. A short paragraph would have sufficed. But what was needed, and was not given, was a statement of the hearing officer's reason or reasons for concluding that the evidence relied upon did not contradict the existence of a likelihood of confusion.

35. In these circumstances, I have come to the conclusion that I must consider the merits of the applicant's case based on honest concurrent use myself since the hearing officer's decision does not contain a sufficient account of his reasoning to enable the correctness of that reasoning to be reviewed. In other words, I shall treat the appeal as a re-hearing. Before doing so, I should note that counsel for the opponent did not take issue with the correctness of *CODAS* as a matter of law. In particular, no argument was advanced before me based on *Road Tech Computer Systems Ltd v Unison Software (UK) Ltd* [1996] FSR 805. Given the position concerning that case adopted in the Registrar's Practice Direction on Honest Concurrent Use and given that the case was considered in *CODAS*, I decided that it would be inappropriate for me to raise the matter of my own motion.
36. In my judgment, the evidence relied upon by the applicant does not demonstrate that there is no likelihood of confusion, for the following reasons.
37. The starting point is that, as the hearing officer rightly observed in paragraph 18 of his decision, the assessment of likelihood of confusion is based on a comparison between the mark sought to be registered (here EXCEL) and the earlier trade mark (here APOLLO EXCEL) "assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications". As has often been pointed out, this is a hypothetical test which does not necessarily correspond to the use that the parties have actually made of the respective marks (see also the comments made in the context of infringement by Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] EWHC 520 (Ch), [2004] RPC 41 at [22]-[23]).
38. In *CODAS* the respective marks were CODAS and CODA, both for computer software. The hearing officer found as a fact that the applicant and the opponent had been concurrently using their marks for upwards of 14 years. Both parties had made substantial use of their respective marks. Despite this, there was no evidence of confusion. Furthermore, it appeared that the explanation for this was that the parties traded in different markets. The hearing officer's conclusion at [35] was as follows:

Taking all of the above into account, I come to the view that on a comparison basely solely upon the similarity and scope of the opponents earlier trade marks there is every likelihood of confusion arising should be application be allowed to proceed as applied for. However, the evidence shows that the respective marks have been able to work as trade marks for their respective owners for a considerable period of time without apparent confusion, and it seems to me that if the application were limited to the goods for which there has been clear concurrent use, then that would continue to be the position.

39. The reasoning which underpins this decision is that concurrent use of two marks may demonstrate that the public do not in fact confuse two marks even if they would otherwise appear to be confusingly similar. As is clear from *CODAS*, however, this reasoning can only apply where the use actually made of the respective marks corresponds to the notional use upon which the comparison under section 5(2) is predicated, or least will correspond if the specification of the mark applied for is suitably limited.
40. In the present case, however, the evidence of use relied upon by the applicant does not correspond to the notional use upon which the section 5(2) test is based even assuming (without deciding) that the evidence demonstrates use of the mark applied for (and not combinations of marks which include the mark applied for, as the opponent argues). This is because there is no evidence that the opponent was using its mark during most of the period in which the applicant claims to have been using its mark (whether one treats this as having commenced in 1996 or 1998). The only evidence of use of the opponent's mark is the print-out from the opponent's website exhibited by Ms Bradbury. This shows use of the opponent's mark on 20 May 2004. The use in question consists of a single advertisement for a bicycle referred to as APOLLO EXCEL 2002. While this suggests that the mark was in use from 2002, there is no hard evidence of this. In any event, there is no evidence at all that the opponent was using its mark prior to 2002. Nor is it necessary to suppose that it was used prior to that date given that the opponent only applied to register its mark on 3 August 2001. Furthermore, there is no evidence at all of the scale of the opponent's use.

41. Thus, there is no evidence that the applicant's mark and the opponent's mark have been used concurrently before at best an uncertain date in 2002 and no evidence that the opponent's mark had been used on a substantial scale even as late as 20 May 2004. In these circumstances, it is impossible to conclude that the use of the two marks that has been made shows that there would be no likelihood of confusion if the opponent's mark were to be used normally and fairly in respect of the full range of goods for which it is registered. Suppose, for example, the opponent had scarcely used its mark down to 20 May 2004. What if it were now to start using its mark on a substantial scale?
42. It is not suggested that the hearing officer made any error of principle in his assessment of the likelihood of confusion based on the hypothetical comparison of the two marks. The applicant's argument is that the evidence shows that there has been no confusion in fact and therefore the hearing officer should have concluded there was no likelihood of confusion. For the reasons I have explained, however, there is no evidence of concurrent use of the two marks for a substantial period let alone on a substantial scale. Thus there is no evidence which establishes that there has been no actual confusion in circumstances corresponding to the hypothetical comparison. Accordingly the opponent's appeal must be dismissed.
43. It is therefore unnecessary for me to express any view on the question whether the applicant's evidence demonstrates use of the mark applied for as opposed to use of combinations marks including that mark or even whether there is a real dichotomy between these two positions.
44. Finally, I would like to emphasise that in reaching this decision I have not had to consider two matters. First, it has not been necessary for me to consider whether the Registrar can allow an application to proceed under section 7 on the basis of evidence of use by the applicant of its marks concurrent with the cited registration as opposed to use concurrent with use of the cited mark: see *L'Amy* [1983] RPC 83 and *Kerly's Law of Trade Marks* (12th ed) paragraph 10-16. Secondly, it has not been necessary for me to consider whether the opponent's mark is validly registered since its validity has not been attacked.

Opponent's appeal

45. The first issue in connection with the opponent's appeal is as to the correct analysis of what happened below. The applicant contends that, as stated by the hearing officer, the opponent withdrew the ground of opposition based on Exel SA's registration at the hearing. On this basis it submits that, although I have a discretion to permit the opponent to revive the point, I should exercise that discretion so as to refuse to permit the opponent to do so alternatively so as to permit it only upon conditions. The opponent contends that, in substance, its withdrawal was consequential upon an adverse ruling by the hearing officer on a preliminary point of law and that it is entitled to appeal against that adverse ruling.
46. In my judgment the opponent's analysis is the correct one. I say that for two reasons. First, it is clear that from the transcript of the hearing that the opponent's attorney withdrew the Exel SA registration in the light of what the hearing officer had said about section 7(2). Secondly, the hearing officer did not refer in his decision to the opponent's attorney's letter the day after the hearing. The only explanation for this is that the hearing officer disagreed with the opponent's analysis of section 7 and maintained the view he had expressed at the hearing. It is clear from the letter that the opponent only sought a further opportunity to address the hearing officer if the hearing officer was persuaded that he was wrong. If the hearing officer had been persuaded that his interpretation of section 7 was wrong, he would surely have permitted further submissions to be made or at least made some reference to the matter in his decision. I believe that the hearing officer's decision proceeded on the understanding that, if he stood by his interpretation of section 7, the opponent's withdrawal was still effective. In short, the opponent's position is analogous to that of a defendant in a criminal case who enters a guilty plea after an adverse ruling by the judge on a point of law. In those circumstances the defendant can appeal against the judge's ruling. In my view the opponent is equally entitled to appeal against the hearing officer's interpretation of section 7.

47. Counsel for the applicant argued that his client would be unfairly prejudiced if the opponent were permitted to rely upon Exel SA's registration at this stage since it would be deprived of the opportunity of adducing evidence, seeking Exel SA's consent or attacking the validity of the registration. As counsel for the opponent pointed out, however, the applicant had the opportunity to do these things, if it so wished, prior to the hearing before the hearing officer.
48. The second issue on the opponent's appeal is whether the hearing officer was right in his interpretation of section 7. Counsel for the opponent submitted that he was wrong, because Exel SA's registration had not been cited by the examiner and accordingly the applicant had not overcome that citation by relying upon honest concurrent use of its mark. Although honest concurrent use was relied upon, that was to overcome the citation of the opponent's mark. Thus he submitted that, so far as Exel SA's registration was concerned, the application was not accepted pursuant to section 7(1), and accordingly section 7(2) did not apply. Counsel for the applicant did not in the end dispute this analysis.
49. It follows that the hearing officer was wrong to rule that the opponent could not rely upon Exel SA's registration by virtue of section 7(2), as he effectively did. Instead, the opponent was in the normal position of being entitled to rely upon Exel SA's registration even though it was not the proprietor of that registration: *BALMORAL Trade Mark* [1999] RPC 297 and cf. *WILD CHILD Trade Mark* [1998] RPC 455.
50. It also follows that it is unnecessary for me to consider whether section 7(2) is inconsistent with the Directive as suggested in *Kerly's Law of Trade Marks* (13th ed) paragraph 8-115.
51. Since the hearing officer did not do so, I shall proceed to consider the merits of this ground of opposition myself.
52. Counsel for the applicant did not dispute that the respective marks are visually, phonetically and conceptually very similar. He submitted, however, that the

goods were different, and accordingly there was no likelihood of confusion. The basis for this submission was that “land vehicles” in Exel SA’s registration should be construed in context as being restricted to agricultural vehicles and hence as not covering bicycles. I am unable to accept this submission. There is no warrant for construing the words “land vehicles” otherwise than according to their ordinary meaning in commerce: see *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 280, *Avnet Inc v Isoact Ltd* [1998] FSR 16 and *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159, [2004] RPC 40. A bicycle is clearly a “land vehicle” since it is a vehicle for use on land.

53. Given that Exel SA’s mark is very similar to that applied for and registered in respect of identical goods, there is clearly a likelihood of confusion.

Conclusion

54. The appeal is dismissed. The cross-appeal is allowed.

Costs

55. The hearing officer ordered the applicant to pay the opponent the sum of £1500 as a contribution to its costs. I shall order the applicant to pay the additional sum of £1000 as a contribution to its costs of the appeal.

31 August 2005

RICHARD ARNOLD QC

Giles Fernando, instructed by Addleshaw Goddard, appeared for the applicant.

Richard Meade, instructed by Wynne-Jones Lainé & James, appeared for the opponent.