

O-256-07

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO 1063708
IN THE NAME OF EMS MEDICAL LIMITED
OF THE TRADE MARK:**

KYLIE

IN CLASS 25

**AND THE APPLICATION FOR REVOCATION THERETO
UNDER NO 82565
BY
KBD PTY LTD**

Trade Marks Act 1994

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in the name of EMS Medical Limited
of the trade mark:
KYLIE
in class 25
and the application for revocation
thereto under no 82565
by KDB Pty Ltd**

INTRODUCTION

1) On 24 July 2006 KDB Pty Ltd, which I will refer to as KDB, filed an application for the revocation of trade mark registration no 1063708. The registration is for the trade mark **KYLIE** (the trade mark) and is registered for the following goods:

articles of underclothing, babies' napkins (textile), and linings (shaped) for use with all the aforesaid goods; but not including articles of underclothing adapted for sporting activities.

The above goods are in class 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended. The registration is in the name of EMS Medical Limited, which I will refer to as EMS. The registration process for the trade mark was completed on 14 June 1978, the date of the publication of the registration in journal no 5207¹.

2) KDB states that it wants to use and register the trade mark LOVE KYLIE. It applied for registration in the United Kingdom, no 2348994, and registration no 1063708 was cited against it. KDB states that it has made enquiries which show that the trade mark has never been put to genuine use by the proprietor or with the consent of the proprietor in the United Kingdom in relation to any of the goods of the application. KDB claims that there are no proper reasons for non-use. In its statement of grounds and the accompanying form TM26(N) KDB gave three alternative periods for which it claimed that there had not been use of the trade mark and three alternative dates from which it sought revocation. On 8 August 2007 the registrar wrote to KDB to draw its attention to Tribunal Practice Notice (TPN) 1/2007 and the decision of Mr Geoffrey Hobbs QC, sitting as the appointed person, in BL O/144/07. The TPN and the decision of Mr Hobbs relate to the appropriate dates from which revocation for non-use can take place. Subsequent to this letter KDB requested that the three periods and dates from which revocation should take place should be as follows:

16 May 1978 to 15 May 1983	– revocation sought from 16 May 1983
13 November 1998 to 12 November 2003	- revocation sought from 13 November 2003
24 July 2001 to 23 July 2006	- revocation sought from 24 July 2006

EMS has raised no objection to the amendment of the dates. The second revocation date would appear to be consequential to KDB's trade mark application, which was filed on 14 November 2003. The first date appears to have arisen from a misunderstanding about the date of registration. The file for the registration bears a stamp that shows "registered" and "certificate issued" with the date 15 May 1978 by each. The stamp also bears the journal no 5207. As the registration was made prior to June 1986, it is the date of the publication of the registration in the journal that is the date of registration, 14 June 1978. As of 15 May 1983 the trade mark had not been registered for five years, the claim in respect of the first date must fail.

3) EMS filed a counterstatement and evidence to show use of its trade mark. EMS denies that its trade mark has not been put to genuine use in the original later two periods of KDB's claim, 13 November 1998 to 13 November 2003 and 24 July 2001 to 24 July 2006. EMS states that the evidence which has been filed with its counterstatement shows genuine use of its trade mark by it or with its consent in respect of the goods of the registration during the two periods referred to above. EMS states that there was correspondence between it and KDB prior to the commencement of these proceedings which made it clear to KDB that the trade mark had been used by it or with its consent. EMS states that it is not in a position to show use of the trade mark in the five year period after the date of the completion of the registration process. It states that after this length of time it is difficult to identify from when and to when that five year period runs (the form TM26(N) did not identify a date but identified the period as being from a period of five years from after the date of the completion of the registration process – not identifying what that date was). EMS states that its best estimate is that the period runs between 1978 and 1983. EMS states that the trade mark has been owned by at least four different owners and no evidence is available as to what took place in those years. EMS states that it relies upon rule 31(4)(b) of the Trade Marks Rules 2000 (as amended) (the Rules) and section 46(3) of the Trade Marks Act 1994 (the Act), its evidence showing that use had commenced or resumed after the end of the period in 1983 and before the date of application for revocation. EMS requests that the application for revocation is refused.

4) Both sides seek an award of costs. Only EMS supplied evidence.

5) The sides were advised that they had a right to a hearing and that if neither side requested a hearing a decision would be made from the papers and any written submissions that were received. Neither side requested a hearing. Both sides furnished written submissions. In its submissions EMS accepts that no use has been shown in respect of *babies' napkins (textile)* and that the registration should be revoked in respect of these goods; leaving a specification that reads: *articles of underclothing, and linings (shaped) for use with all the aforesaid goods; but not including articles of underclothing adapted for sporting activities.*

EVIDENCE

Witness statement of Peter Brenikov

6) Mr Brenikov is a director of EMS. The registration was acquired by EMS from Hybrand Limited under an agreement dated 12 January 2005. Hybrand had acquired the registration from Sims Portex Limited by an assignment dated 30 March 2001. Mr Brenikov was a director of Hybrand Limited during the years 2001 – 2005. Since 1989 the registration had been owned by Nicend Ltd, Caitlin Financial Corporation NV, Franpharm AG, Eschmann Bros & Walsh Limited and Smiths Medical International Limited, prior to the ownership by Sims Portex Limited.

7) In March 2002 an application was made by Mackays Stores Limited for the revocation of the registration on grounds of non-use. The proceedings were resolved between the parties without a hearing, however, Mr Brekinov gave evidence in the proceedings. A copy of his witness statement dated 9 July 2002 is exhibited. In the witness statement Mr Brenikov states that Hybrand Limited had used the trade mark continuously from June 2001 to the date of his statement. He states that the trade mark was used continuously by Smiths Industries PLC between 1995 and 2001. Mr Brenikov states that the trade mark has been used in relation to underwear, including pants for men, women and children. He states that the trade mark has not been used in relation to napkins and linings sold separately from pants. The following turnover figures are given:

	Sales of KYLIE pants £000	Total KYLIE sales £000
1995/96	457	1,089
1997/98	295	702
1998/99	270	650
1999/00	230	549
2000/01	230	550 (estimate)

8) A leaflet is exhibited in relation to washable pants sold under the trade mark. The leaflet describes the products in the following terms:

“Coping with incontinence discreetly and confidently is what the Kylie Range of washable pants is all about. With an ingenious liner and patented stitching method to prevent leakage, Kylie pants offer maximum protection, absorbency and reliability. They’re soft and comfortable too. But the great thing is, they are fashionably styled to look like normal underwear.

A British product that has been at the forefront of incontinence care for many years. Kylie Pants represent super quality. They come fully lined and do not need any disposable pads, so they are kind to the environment and to your pocket.”

Copies of packaging for KYLIE child washable pants are also exhibited. The rubric on the packaging advises that they are “[e]asy to wear like normal pants”, that they prevent

leaks and are available at two absorbency levels – standard up to 85 ml and super up to 200ml.

9) Following the conclusion of proceedings between Hybrand Limited and Mackays Stores Limited a licence agreement was entered into between the parties on 30 March 2004 to permit Mackays to use the trade mark in respect of articles of underclothing and linings (shaped) for use with the aforesaid goods. Since that time Mackays has used the trade mark on the licensed goods.

10) Since EMS has owned the trade mark it has continued to use it. An undated leaflet for the product is exhibited. The products are advertised as giving “full leakage protection”. It is stated that they are:

“Fashionably styled to look like normal underwear, the Kylie range offers maximum protection, absorbency and reliability in the most discreet way. The ingenious liner and special stitching method to prevent leakage, means you can get on with your life in complete confidence.”

Sales are also made through a dedicated website, kyliekanga.com, which links to the EMS website. What are described as representative pages from the website are exhibited; one of the pages bears a copyright date of 2005, this page advises:

“The Kylie brand offers the widest range of washable products available today, from the lightest pants through to the heaviest high capacity bed sheets.”

A pair of underpants are exhibited. Packaging for KYLIE washable pants for women is exhibited, the packaging shows that it emanates from when Hybrand owned the registration. Copies of leaflets from the period when Sims Portex Limited owned the registration are exhibited. One leaflet advises that “this lingerie is a pharmacy line”. Another leaflet states that KYLIE washable, absorbent pants are becoming an “increasingly popular pharmacy line”.

Witness statement of Matthew Richard McKimmie

11) Mr McKimmie is commercial director of Mackays Stores Limited. A copy of the licence agreement between EMS and Hybrand is exhibited. Mr McKimmie states that Mackays has used the trade mark KYLIE in relation to underwear since 1989 and since 2004 the use on underwear has been with the licence of EMS. Turnover for sales of underwear sold under the trade mark are as follows:

Financial year	Sales (units)	Sales (£)
2003	235,698	753,096
2004	260,366	801,213
2005	328,638	976,375
2006	234,242	677,870

Pictures of labels attached to underwear are exhibited; only one specific garment can be identified, a bra (size 34A). Two of the labels indicate that the product is for 11/12 year olds.

DECISION

12) Section 46 of the Act reads as follows:

“(1) The registration of a trade mark may be revoked on any of the following grounds—

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purposes of subsection (1) 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 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made.

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that——

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from——

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

Consideration has to be taken, also, of section 100 of the Act which states:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

Consequent upon section 100 the onus is upon the registered proprietor to prove that it has made genuine use of the trade mark in suit, or that there are proper reasons for non-use.

13) Consideration of the case falls into two discrete areas: the use made by EMS or its predecessors in title and the use made under licence by Mackays.

Mackays’ use

14) Mackays’ use is only relevant as far as it has been with the consent of EMS or its predecessors in title. There is no indication that such consent existed prior to the signing of the licence agreement. The licence agreement was signed on 30 March 2004, any use from this date up to the date of the application for revocation is relevant. The sales figures show that there has been use in the financial years 2004, 2005 and 2006. The scale and nature of use leaves no doubt that the use is genuine use. No evidence has been put in by KDB to counter the claims of Mr McKimmie. He states that Mackays has used the trade mark for underwear since, and before, the signing of the licence agreement. Mr McKimmie does not indicate the exact nature of the underwear, whether for instance it has been for males or females, although the bra shows that it has been used for underwear

for females. KDB submits that Mr McKimmie's evidence does not prove use as it does not indicate where the trade mark has been used. It would have been helpful if Mr McKimmie had stated where the trade mark had been used but I note that three of the labels give the price of the garments in pounds sterling. The labels are all in English. There is no indication of the date from which the labels emanate but there is no indication that the labels are not indicative of the customary use by Mackays. The licence agreement states that it gives to Mackays non-exclusive use of the trade mark in the United Kingdom; so the agreement only relates to United Kingdom use. Although the evidence could be better presented it seems that taking as a whole that it can only be interpreted as relating to the use of the trade mark in the United Kingdom. KDB has not filed any evidence to suggest that the use has been outside of the United Kingdom, nor has it sought disclosure or cross-examination to elucidate the matter. Mr McKimmie's evidence shows that Mackays was using the trade mark KYLIE long before the consent of EMS was obtained and so the use was up and running at the date of the signing of the licence agreement. **I find that the trade mark has been used with the consent of it or its predecessor in title from 30 March 2004 and until at least 30 October 2006, the date of Mr McKimmie's statement.**

15) Having decided that there has been use of the trade mark I need to decide what a fair description of the use would be. Mr McKimmie refers only to underwear, he does not specify the exact nature of the underwear. Underwear seems to me to be a sub-category of clothing that does not require any further sub-divisionⁱⁱ. A further sub-division would appear to be over-preciseⁱⁱⁱ, it would not reflect the way that the relevant public would be likely to describe the goods^{iv}. There is no indication of use for linings for use with undergarments. **The evidence establishes use on *articles of underclothing*.**

16) The use disposes of the claim for revocation with effect from 24 July 2006 for the above goods. Under the provisions of section 46(3) the use also disposes of the second claimed date for revocation for the above goods; if the first period of non-use claimed used the correct date of registration, the provisions of section 46(3) would also dispose of this claim for the above goods.

Use by EMS and its predecessors in title

17) The evidence of Mr Brenikov has failings. He reproduces a previous witness statement giving sales figures up to 2001 but gives no figures in relation to sales since then in his witness statement for these particular proceedings. He does state that the trade mark has been used but it is not possible to establish the extent of the use; although genuine use is not dependent upon the scale of use. However, there is a more fundamental problem to the use of the trade mark by EMS and its predecessors in title; as to whether that use is use in relation to the goods of the specification. Incontinence wear is appropriate to class 5 rather than class 25; in considering a specification and the goods that it encompasses it is necessary to take into account the class in which goods have been placed^v. In its submissions EMS, responding to comments in a letter from KDB, states:

“Nevertheless, it is not accepted that the use displayed by the registered proprietor is use of goods in class 5 rather than use of goods in class 25. The registered proprietor’s evidence may relate to underwear which has an incontinence function and it may be underwear which has an *absorbency capability* but the goods are designed as discreet fashion wear to be worn as ordinary everyday underwear. Accordingly, such goods fall within class 25 as being *articles of clothing*.”

I would assume that most incontinence underwear is designed for ordinary, everyday wear; it would be very limiting to its potential sales if it were not. It seems likely that such garments will be designed to be as pleasing to the eye of the customer as possible. I have quoted from various parts of the literature of EMS and its predecessors in title:

“The Kylie brand offers the widest range of washable products available today, from the lightest pants through to the heaviest high capacity bed sheets.”

“Fashionably styled to look like normal underwear, the Kylie range offers maximum protection, absorbency and reliability in the most discreet way. The ingenious liner and special stitching method to prevent leakage, means you can get on with your life in complete confidence.”

“Coping with incontinence discreetly and confidently is what the Kylie Range of washable pants is all about. With an ingenious liner and patented stitching method to prevent leakage, Kylie pants offer maximum protection, absorbency and reliability. They’re soft and comfortable too. But the great thing is, they are fashionably styled to look like normal underwear.

A British product that has been at the forefront of incontinence care for many years. Kylie Pants represent super quality. They come fully lined and do not need any disposable pads, so they are kind to the environment and to your pocket.”

The undergarments are designed to deal with either 85ml or 200 ml leakage. The evidence of EMS is that these are pharmacy goods, this is not the usual place to find clothing other than that which is designed for specific medical or quasi-medical function. The literature compares the garments sold under the trade mark to normal underwear; the proprietor or its predecessors in title seems to distinguish between its underwear and “normal underwear”. The evidence clearly shows, in my view, that these goods are primarily defined by their function, as incontinence wear and as such the use shown by EMS does not relate to use of the goods of the specification but to use of goods that would be classified in class 5. **Consequently, I do not find that EMS has shown any genuine use in relation to either the periods 13 November 1998 to 12 November 1993 or 24 July 2001 to 23 July 2006.**

18) (It could be difficult to ascertain in which class articles of underclothing for incontinents were in in 1976; the Registry’s WIPO guides do not go this far back. Fortunately the matter is resolved by a copy of a letter dated 30 November 1976 in the application file which states, inter alia:

“However, insofar as the Class 25 application is concerned, it appears that the goods now proposed are in fact proper to Class 5, since articles of clothing for incontinents would be “sanitary clothing”.”

This letter was a response to a letter from the agents for applicant which requested that the specification be amended to read “articles of clothing for incontinents and linings for such clothing; babies’ napkins”.)

Conclusion

19) The use by Mackays partly saves the registration. The registration is to be revoked for all goods save for *articles of underclothing*. It is to be revoked in respect of all other goods with effect from 13 November 2003. The specification is, therefore, to read:

articles of underclothing; but not including articles of underclothing adapted for sporting activities

COSTS

20) Each side has achieved a measure of success and so each should bear its own costs.

Dated this 4th day of September 2007

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

ⁱ *Wi-Fi Alliance v Wilhelm Sihm Jr KG* BL O/251/05 Mr Hobbs QC, sitting as the appointed person :

“2. The trade mark was registered in the name of Wilhelm Sihm Jr. KG (‘the Proprietor’) with effect from 10 September 1960. In an Official Notice entitled ‘Date on which a mark is actually entered in the Register’ printed at pp. 1536, 1527 of Issue No. 5725 of the Trade Marks Journal published on 1 June 1988 it was confirmed that, prior to June 1986, the date of the Trade Marks Journal in which the fact of registration was recorded in the list of ‘Trade Marks Registered’ was the date of actual registration”

ⁱⁱ *Reckitt Benckiser (España), SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-126/03:

“42 The Court observes that the purpose of the requirement that the earlier mark must have been put to genuine use is to limit the likelihood of conflict between two marks by protecting only trade marks which have actually been used, in so far as there is no sound economic reason for them not having been used. That interpretation is borne out by the ninth recital in the preamble to Regulation No 40/94, which expressly refers to that objective (see, to that effect, *Silk Cocoon*, cited at paragraph 27 above, paragraph 38).

However, the purpose of Article 43(2) and (3) of Regulation No 40/94 is not to assess commercial success or to review the economic strategy of an undertaking, nor is it to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks (Case T-334/01 *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)* [2004] ECR II-0000, paragraph 32, and Case T-203/02 *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)* [2004] ECR II-0000, paragraph 38).

43 Therefore, the objective pursued by the requirement is not so much to determine precisely the extent of the protection afforded to the earlier trade mark by reference to the actual goods or services using the mark at a given time as to ensure more generally that the earlier mark was actually used for the goods or services in respect of which it was registered.

44 With that in mind, it is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established.

45 It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories relating to which the goods or services for which the trade mark has actually been used actually belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

53 First, although the last sentence of Article 43(2) of Regulation No 40/94 is indeed intended to prevent artificial conflicts between an earlier trade mark and a mark for which registration is sought, it must also be observed that the pursuit of that legitimate objective must not result in an unjustified limitation on the scope of the protection conferred by the earlier trade mark where the goods or services to which the registration relates represent, as in this instance, a sufficiently restricted category.”

ⁱⁱⁱ *Animal Trade Mark* [2004] FSR 19:

“20 The reason for bringing the public perception in this way is because it is the public which uses and relies upon trade marks. I do not think there is anything technical about this: the consumer is not expected to think in a picky 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, for instance, if there has only been use for three-holed razor blades imported from Venezuela (Mr T.A. Blanco White's brilliant and memorable

example of a narrow specification) "three-holed razor blades imported from Venezuela" is an accurate description of the goods. But it is not one which an average consumer would pick for trade mark purposes. He would surely say "razor blades" or just "razors". 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 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."

^{iv} *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32:

"29 I have no doubt that Pumfrey J. was correct to reject the approach advocated in the Premier Brands case. His reasoning in paras [22] and [24] of his judgment is correct. Because of s.10(2), fairness to the proprietor does not require a wide specification of goods or services nor the incentive to apply for a general description of goods and services. As Mr Bloch pointed out, to continue to allow a wide specification can impinge unfairly upon the rights of the public. Take, for instance, a registration for "motor vehicles" only used by the proprietor for motor cars. The registration would provide a right against a user of the trade mark for motor bikes under s.10(1). That might be understandable having regard to the similarity of goods. However, the vice of allowing such a wide specification becomes apparent when it is envisaged that the proprietor seeks to enforce his trade mark against use in relation to pedal cycles. His chances of success under s.10(2) would be considerably increased if the specification of goods included both motor cars and motor bicycles. That would be unfair when the only use was in relation to motor cars. In my view the court is required in the words of Jacob J. to "dig deeper". But the crucial question is--how deep?

30 Pumfrey J. was, I believe, correct that the starting point must be for the court to find as a fact what use has been made of the trade mark. The next task is to decide how the goods or services should be described. For example, if the trade mark has only been used in relation to a specific variety of apples, say Cox's Orange Pippins, should the registration be for fruit, apples, eating apples, or Cox's Orange Pippins?

31 Pumfrey J. in *Decon* suggested that the court's task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under s.10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use."

^v *Altecnic Ltd's Trade Mark Application* [2002] RPC 34.