

O-592-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 3078385
BY VDL CAR HIRE LIMITED
TO REGISTER THE TRADE MARK**



**IN CLASS 39
AND**

**IN THE MATTER OF OPPOSITION
THERE TO UNDER No. 403773 BY
VD LEEGTE BEHHER B.V.**

BACKGROUND


1) On 23 October 2014, VDL Car Hire Ltd (hereinafter the applicant) applied to register the mark shown on the previous page in respect of the following services:

In class 39 “Arrangement of transportation of passengers by cars; Arrangement of transportation of people; Arrangement of travel to and from hotels; Arrangement of vehicle recovery; Arrangement of vehicle rental; Arranging for the transportation of passengers; Arranging of car hire; Arranging the transportation of passengers; Automobile vehicle renting services; Rental and hire of vehicles; Rental car reservation; Rental of automobiles; Rental of car parking spaces; Rental of cars; Rental of land vehicles; Rental of motor cars; Rental of trucks; Rental of vehicles; Rental of vehicles for transport; Rental of vehicles, in particular automobiles and lorries; Vehicle hire; Vehicle hire and leasing services; Vehicle hire services; Vehicle hiring and leasing services; Vehicle parking; Vehicle parking services; Vehicle rental; Vehicle rental, leasing and chartering services; Vehicle storage; Vehicles (rental of-); Hire of boats; Hire of cars; Hire of motor vehicles; Hire of road transport; Hire of transport vehicles; Hire of vehicles; Hired car transport; Hiring of land vehicles; Hiring of motor vehicles; Hiring of transport vehicles”.

2) The application was examined and accepted, and subsequently published for opposition purposes on 14 November 2014 in Trade Marks Journal No.2014/047.

3) On 12 February 2015 VD Leegte Behher B.V. (hereinafter the opponent) filed a notice of opposition. The ground of opposition is in summary:

a) The opponent is the proprietor of the following trade mark:

Mark	Number	Date of application / registration	Class	Specification relied upon
	CTM 229351	01.04.96 20.10.98	12	Vehicles

b) The opponent relies upon the above mark to oppose the application. The opponent contends that the mark in suit is confusingly similar to its registered trade marks shown above. It states that the services applied for in the mark in suit are similar or identical to the goods shown above for which its mark is registered. The mark in suit would be confused with the opponent's marks and therefore it offends against section 5(2)(b) of the Act.

4) On 1 April 2015, the applicant filed a counterstatement which simply denied the grounds of opposition. It put the opponent to proof of use in respect of its mark.

5) Both sides filed evidence. Both parties seek an award of costs in their favour. The matter came to be heard on 7 December 2015 when the opponent was represented by Mr Bechem of Messrs Wynn – Jones LLP; the applicant was represented by Mr Ogden The Chief Financial Officer of the applicant.

OPPONENT'S EVIDENCE

6) The opponent filed a witness statement, dated 3 June 2015, by Toine Peters an in house lawyer employed by the opponent a position he has held for twenty-five years. He states that the opponent is part of the VDL Group which produces semi-finished products such as buses and coaches as well as finished product and also assembles cars. The groups operations are spread over nineteen countries with the EU arm dealing with the assembly of cars, buses, coaches and trailers. The company has produced the following cars for various companies, although he does not state where they were produced:

Mitsubishi Colt (2004-2012)
Mitsubishi Outlander (2008-2012)
Citroen C-Crosser (2009-2012)
Peugeot 4007 (2009-2012)
Mini (2014 to date)

7) Mr Peters also states that the group produces buses, chassis modules as well as buying and selling second hand buses and producing parts for buses. He states that the manufacturing takes place in the Netherlands and Belgium and includes suspension systems for the automotive industry, production automation systems and roof boxes. They also produce sunbeds and traffic signs. He states that the VDL logo has been used in the EU since 1980 on letterheads, websites and finished products (unspecified). He states that the UK operations of VDL Group in the UK are carried out by VDL Steelweld which uses the VDL logo on its website and in general communications. He states that this company has been trading for fifty years and its business is based upon mechanical parking systems and turn-key production lines to the automotive industry as well as to other sectors of industrial production. He provides the following exhibits:

1. This provides a list of cars said to have been assembled. It stops at 2011 and shows that between 2007 and 2011 the company assembled an average of approximately 53,000 Mitsubishi cars per annum. It does not show any figures for the Peugeot and Citroen cars said to have been produced in this period.
2. This consists of three pages from the website of VDL. These pages have the letters VDL across what appears to be the Dutch flag. Although undated it does refer to a name change occurring on 1 January 2013 and it has a 2013 copyright date. The pages reference that VDL Nedcar is the only independent car manufacturer in the Netherlands. The page also states that the group "As of 16 December the VDL Groep from Eindhoven (the Netherlands) took over the shares of Mitsubishi. As of 1 January 2013 the name changed into VDL Nedcar and the company will build the MINI for BMW Group".
3. This provides turnover figures for the whole group and although there are breakdowns for various countries it does not state what precisely was produced in each of the nineteen countries or where the group is said to have production facilities. Figures are provided for car production in 2012 and bus and coach production in 2011 and 2012 but does not state in which country this occurred. It also refers to the acquisition of Nedcar at the end of 2012.
4. Copies of annual reports for 2009-2014 the first 3 do not mention car assembly, although they do refer to the building of buses and coaches. On the front of each annual report is a device of the letters VDL across a Dutch flag. In the 2012 report car assembly is mentioned along with the activities connected with buses and coaches. There are no specifics as to precisely where

these activities are undertaken or the turnover of particular countries or plants in relation to vehicle based activity other than the following.

2012: The combined turnover rose by 2% from 1.719 billion Euro in 2011 to a record level of 1.756 billion euro in 2012. This includes the 70 million euro in turnover from VDL Nedcar.”

And:

“The number of employees rose from 7,135 at year end 2011 to 8,757 at year end 2012, largely due to the acquisition of VDL Nedcar”

2013: “At VDL Nedcar in Born (the Netherlands), we were hard at work converting the plant and installing new production lines. 2014 will be the real thing. All 1,500 employees will return to work, and we will even need additional people. The VDL Nedcar plant will be officially reopened in July 2014, and the first MINI will roll off the production line.”

2014: “The balance between international and domestic turnover clearly changed in 2014. The share of international turnover rose by 10% in 2014, as compared to 2013. This is mainly due to the start of production at VDL Nedcar for our client BMW Group in Germany.”

APPLICANT’S EVIDENCE

8) The applicant filed a witness statement, dated 31 August 2015, by Brian Ogden the Chief Financial Officer of the applicant. He points out that the applicant’s business is “car hire” whereas the opponent describes itself on its website as being “an international industrial company focussed on the development, production and sale of semi-finished products, buses & coaches and other finished products and the assembly of cars”. He therefore contends that the activities of the companies do not conflict in any way. He points out that his company operates in the Algarve and Portugal whilst the opponent has no presence in Portugal. He also comments that the cars that the opponent assembles are sold under trade marks of the companies for whom the service is undertaken e.g. Mini. Mr Ogden mentions Google searches he carried out, but these are not persuasive. He also provides comments on the similarity of the marks of the two parties which do not assist my decision.

9) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

10) The only ground of opposition is based on section 5(2)(b) which reads:

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

(a)

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

11) An “earlier trade mark” is defined in section 6, the relevant part of which states:

“6.-(1) In this Act an "earlier trade mark" means -

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

12) The opponent is relying upon its trade mark listed in paragraph 3 above which is clearly an earlier trade mark. The applicant requested that the opponent provide proof of use and, given the interplay between the dates that the opponent’s mark was registered (20 October 1998), and the date that the applicant’s mark was published (14 November 2014), the opponent’s mark is subject to proof of use. Section 6A of the Act states:

“6A Raising of relative grounds in opposition proceedings in cases of non-use.

(1) This section applies where-

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if-

- (a) within the period of five years ending with the date of publication of the application 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) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) 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.

(5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(5) 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.

(7) Nothing in this section affects –

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

13) I must first consider whether the opponent has fulfilled the requirement to show that genuine use of its mark has been made. In the instant case the publication date of the application was 14 November 2014, therefore the relevant period for the proof of use is 15 November 2009 – 14 November 2014. In *Stichting BDO v BDO Unibank, Inc.*, [2013] F.S.R. 35 (HC), Arnold J. stated as follows:

“51. Genuine use. In *Pasticceria e Confetteria Sant Ambroeus Srl v G & D Restaurant Associates Ltd* (SANT AMBROEUS Trade Mark) [2010] R.P.C. 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439; [2003] R.P.C. 40 ; *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159; [2004] F.S.R. 38 and *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759; [2009] E.T.M.R. 28 (to which I have added references to *Sunrider v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (C-416/04 P) [2006] E.C.R. I-4237):

(1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely token, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider* [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and

services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22] -[23]; *Sunrider*, [70]–[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]”.

14) Although minimal use may qualify as genuine use, the Court of Justice of the European Union (CJEU) stated in Case C-141/13 P, *Reber Holding GmbH & Co. KG v OHIM* (in paragraph 32 of its judgment), that “*not every proven commercial use may automatically be deemed to constitute genuine use of the trade mark in question*”. The factors identified in point (5) above must therefore be applied in order to assess whether minimal use of the mark qualifies as genuine use.

15) Also in *Laboratoire de la Mer Trade Mark* [2006] FSR 5, the Court of Appeal held that sales under the mark to the trade may qualify as genuine use. Mummery L.J. stated that:

“31. After some hesitation I have reached a different conclusion from Blackburne J. on the application of the Directive, as interpreted in *Ansul* and *La Mer*, to the rather slender facts found by Dr Trott.”

32. Blackburne J. interpreted and applied the rulings of the Court of Justice as placing considerably more importance on the market in which the mark comes to the attention of *consumers and end users* of the goods than I think they in fact do. I agree with Mr Tritton that the effect of Blackburne J.'s judgment was to erect a quantitative and qualitative test for market use and market share which was not set by the Court of Justice in its rulings. The Court of Justice did not rule that the retail or end user market is the only relevant market on which a mark is used for the purpose of determining whether use of the mark is genuine.

33. Trade marks are not only used on the market in which goods bearing the mark are sold to consumers and end users. A market exists in which goods bearing the mark are sold by foreign manufacturers to importers in the United Kingdom. The goods bearing the LA MER mark were sold by Goëmar and bought by Health Scope Direct on that market in arm's length transactions. The modest amount of the quantities involved and the more restricted nature of the import market did not prevent the use of the mark on the goods from being genuine use on the market. The Court of Justice made it clear that, provided the use was neither token nor internal, imports by a single importer could suffice for determining whether there was genuine use of the mark on the market.

34. There was some discussion at the hearing about the extent to which Goëmar was entitled to rely on its intention, purpose or motivation in the sales of the goods bearing the mark to Health Scope Direct. I do not find such factors of much assistance in deciding whether there has been genuine use. I do not understand the Court of Justice to hold that subjective factors of that kind are relevant to genuine use. What matters are the objective circumstances in which the goods bearing the mark came to be in the United Kingdom. The presence of the goods was explained, as Dr Trott found, by the UK importer buying and the French manufacturer selling quantities of the goods bearing the mark. The buying and selling of goods involving a foreign manufacturer and a UK importer is evidence of the existence of an economic market of some description for

the goods delivered to the importer. The mark registered for the goods was used on *that* market. That was sufficient use for it to be genuine use on the market and in *that* market the mark was being used in accordance with its essential function. The use was real, though modest, and did not cease to be real and genuine because the extinction of the importer as the single customer in the United Kingdom prevented the onward sale of the goods into, and the use of the mark further down, the supply chain in the retail market, in which the mark would come to the attention of consumers and end users.”

16) Whilst Neuberger L.J. (as he then was) stated:

“48. I turn to the suggestion, which appears to have found favour with the judge, that in order to be “genuine”, the use of the mark has to be such as to be communicated to the ultimate consumers of the goods to which it is used. Although it has some attraction, I can see no warrant for such a requirement, whether in the words of the directive, the jurisprudence of the European Court, or in principle. Of course, the more limited the use of the mark in terms of the person or persons to whom it is communicated, the more doubtful any tribunal may be as to whether the use is genuine as opposed to token. However, once the mark is communicated to a third party in such a way as can be said to be “consistent with the essential function of a trademark” as explained in [36] and [37] of the judgment in *Ansul*, it appears to me that genuine use for the purpose of the directive will be established.

49. A wholesale purchaser of goods bearing a particular trademark will, at least on the face of it, be relying upon the mark as a badge of origin just as much as a consumer who purchases such goods from a wholesaler. The fact that the wholesaler may be attracted by the mark because he believes that the consumer will be attracted by the mark does not call into question the fact that the mark is performing its essential function as between the producer and the wholesaler.”

17) When considering the evidence filed I take into account the comments in *Awareness Limited v Plymouth City Council*, Case BL O/230/13, where Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

and further at paragraph 28:

“28. I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a

broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

18) I also look to the case of *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, where Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

19) The evidence provided is contradictory. The annual accounts suggest that the company now known as VDL Nedcar was acquired in 2012. The annual account states that the turnover of this company in 2012 was 70 million Euros. It is not clear in which country /countries the plants that this figure refers to were located. It is also unclear whether VDL Nedcar was solely assembling cars or whether they undertook other activities. However, the evidence from the company website suggests that it purchased the company from Mitsubishi on 16 December 2012 and changed the name of the company to VDL Nedcar as of 1 January 2013.

20) There is no evidence that it acquired the goodwill in the company. Further, it would appear that all assembly of cars at the plant ceased in 2012 and that the plant was shut down whilst it was adjusted to prepare it for assembly of the Mini for BMW, which began at some point in 2014. There is no evidence of any car assembly during the period January 2013 to October 2014, indeed there is no clear statement that production of the Mini began prior to October 2014. There is an absence of figures of the number of cars assembled or the amount of money paid for the cars to be assembled. The evidence of the number of cars produced relates only to the time prior to the company being owned by the opponent. Therefore there is no evidence of any cars being assembled under the name VDL Nedcar, however, it could be construed that there were preparations for use.

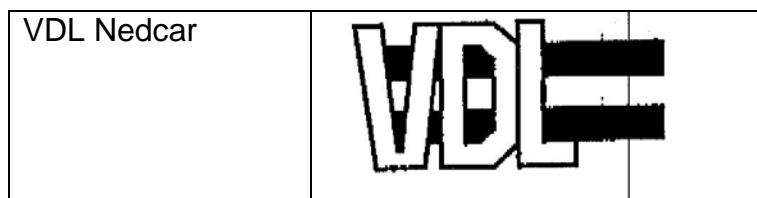
21) No evidence of the agreement between the opponent and BMW has been filed and the only references to the plant are as VDL Nedcar. I must therefore consider whether the use of VDL Nedcar would constitute use of the opponent's mark. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was) as the Appointed Person summarised the test under s.46(2) of the Act as follows:

"33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

22) I also take into account the decisions and comments in *Remus Trade Mark* – BL O/061/08 (Appointed Person) & *OAO Alfa-Bank v Alpha Bank A.E.* - 2011 EWHC 2021 (Ch) and *Orient Express Trade Mark* - BL O/299/08 (Appointed Person). Although these cases were decided before the judgment of the CJEU in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, they remain sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

23) The two marks are:



24) The registered mark has a device element of two bars running behind the letters, perhaps suggestive of a car grill upon which the letters are mounted. I also note that the letters are in a distinctive script and that the letters "D" and "L" overlap in an unusual manner. In contrast the mark used in relation to the car assembly plant has only the letters VDL in plain font with no overlapping, but includes the word "Nedcar" but does not have the device element. Ignoring the absence of the device element and stylisation the addition of the term "Nedcar", in my opinion alters the distinctive character of the registered mark. Taking all the authorities above into consideration, in my opinion, the sign used differs from the registered trade mark in elements which alter the latter's distinctive character. **This use does not constitute use of the registered mark.**

25) There are also vague references to the production of coaches and buses, but no actual evidence of such operations taking place. It is not clear whether these vehicles are assembled or sold in the EU. Given that the opponent was relying solely upon its registration for "Vehicles" in class 12 one would have thought that it would have been relatively simple for it to provide the number of cars that it has assembled for BMW prior to the relevant date and the amount paid to it for this work. Equally if it purchased the goodwill from Mitsubishi then this could easily have formed part of the evidence in

which case the number of cars produced during the tenure of Mitsubishi could have been taken into account, had Mitsubishi been using the mark VDL which I doubt. I would make similar comments relating to the claimed production of buses and coaches. At the hearing Mr Bechem referred me to the annual accounts which shows turnover in various countries which he stated related to vehicles and parts and services for vehicles. In particular he referred to the UK arm of the group which he said produces “parking systems”. He then tried to give evidence to explain what these were. However, it is not clearly stated in the evidence filed what these goods or services actually relate to or indeed what mark they are produced under. Mr Bechem then stated that the website print outs and the annual accounts both showed the mark relied upon. He claimed that this was proof that the mark had been used by all companies across the group on all the goods and services provided. I do not accept this contention as it does not necessarily follow that a mark used upon an annual report will have been used across the whole group on all goods and services provided. I return to the issue of how easy it would have been to provide information as to the number of Minis produced in the Netherlands for BMW, along with an agreement with BMW showing use of the mark. Alternatively, the opponent could have given details of the number of coaches produced/sold in the EU under the mark relied upon. Mr Bechem’s response was to point out the number of companies mentioned in the evidence which have the words “coach” and “bus” in their name. However, I note that this does not necessarily mean that they produce such goods as such words are commonly used in the names of coach hire companies. To my mind, the lack of specifics can only lead me to conclude that **the opponent has not shown that it has used its mark in relation to vehicles prior to the relevant date in the EU.**

26) As the opponent has failed the proof of use test, its opposition must also fail. Therefore, subject to appeal, the application shall proceed to registration for all of the applied for services.

COSTS

27) As the applicant has been successful it is entitled to a contribution towards its costs. I have made an adjustment downwards to the award of costs as the applicant has represented itself in these proceedings.

Preparing a statement and considering the other side’s statement	£300
Preparing evidence	£500
Attendance at a hearing	£500
TOTAL	£1300

28) I order VD LEEGTE BEHHER B.V. to pay VDL Car Hire Limited the sum of £1300. This sum to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 16th day of December 2015

**George W Salthouse
For the Registrar,
the Comptroller-General**