

O-524-16

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3135281 BY
NUTZ ELECTRONICS LIMITED**

TO REGISTER:

Mobile Juice

AS A TRADE MARK IN CLASS 9

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 406080 BY GUSTO TELECOM SOLUTIONS LIMITED**

BACKGROUND & PLEADINGS

1. On 9 November 2015, Nutz Audio Ltd applied to register **Mobile Juice** as a trade marks for: “Power banks” in class 9. The application was published for opposition purposes on 20 November 2015. The application now stands in the name of Nutz Electronics Limited (“the applicant”). As nothing appears to turn on change I need say no more about it in this decision.

2. The application is opposed by Gusto Telecom Solutions Limited (“the opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent bases its opposition upon eight trade mark registrations (full details of which can be found in the annex to this decision). The opponent states:

“3. The sign applied for wholly contains the opponent’s earlier JUICE trade mark. The addition of the word “Mobile” to the sign applied for informs the consumer that the goods covered by the application are for mobile devices such as mobile phones. Therefore, particularly in the context of the goods at issue, the sign applied for is highly similar to the opponent’s earlier mark JUICE.

4. Furthermore, the opponent owns a family of JUICE marks...all of which cover goods relating to mobile devices. The sign applied for is likely to be seen as an extension of the opponent’s family of trade marks and consumers will believe that the goods of the applicant in fact originate with the opponent, or that the two undertakings are connected.

5. The application covers “power banks” in class 9 which are identical to the goods covered by the opponent’s registrations.”

3. The applicant filed a counterstatement in which the basis of the opposition is denied. I will return to comments contained therein later in this decision.

4. Both parties filed evidence, accompanied by written submissions. Although no hearing was sought, both parties filed written submissions in lieu of attendance at a hearing. I will bear all of these submissions in mind in reaching a decision, referring to them when I consider it appropriate to do so.

The opponent's evidence

5. This consists of a witness statement from Jolyon Bennett, the opponent's managing director and founder. Mr Bennett states that the opponent was incorporated in March 2012 and has been trading in the UK since August 2012. He explains that the opponent:

“4...designs and supplies high quality electronic accessories which can be used in particular to protect, charge and complement mobile devices.”

6. Having stated that the opponent's products “...generally retail at between £9.99 and £39.95” and that turnover in 2015 was approximately £6.6m, Mr Bennett provides a list of twenty two UK retailers that sell the opponent's goods together with the number of stores in which the opponent's goods are sold. While I do not propose to list all of these retailers here, some examples (with, where appropriate, the number of stores shown in brackets) are as follows: Amazon (on-line), Asda (300), Dixons Carphone (300), EE (450), O2 (450), Sainsburys (500), WH Smiths (350), Boots (615) and Tesco (600). Exhibit 1 indicates that the opponent was named the 2015 “Accessories Manufacturer” of the year at the Mobile News Awards.

7. Mr Bennett states that the opponent uses its JUICE, JUICE JACKET, JUICE WEEKENDER, JUICE ALLNIGHTER, JUICE CUBE and JUICE POWER trade marks in relation to “battery chargers and battery charge devices”, adding that its JUICE BOOSTER trade mark has also been used for these goods but is not currently in use. He further explains that JUICE is the opponent's “primary trade mark”, used for its “electronics accessories ranges, which includes battery charging devices, speakers and

cables.” Exhibit 2 consists of an undated printout of the opponent’s homepage at gustotelecom.com/juice; it looks like this:



8. Mr Bennett explains that JUICE JACKET “is the name of our re-chargeable battery smartphone case.” Exhibit 3 consists of pages obtained from the opponent’s website which, where they can be dated, were downloaded on 20 May 2016. The first page looks like this:

JUICE JACKET

Juice® Power

Juice® Sound

Juice® Cables

Juice® Accessories

Ultra-thin stylish looking protective cases for your smartphone that pack an extra punch: stored power that can nearly double the battery life of your device.

Search



Juice®
Juice Jacket
for Apple iPhone 5/5s
Black

£34.95

[More info](#)

Quantity

[Add To Cart](#)



Juice®
Juice Jacket
for Apple iPhone 5/5s
Blue

£34.95

[More info](#)

Quantity

[Add To Cart](#)



Juice®



Juice®

I note that page 15 contains the following text: “Double the juice of your mobile”. Mr Bennett states that the JUICE JACKET product has been on sale in the UK since August 2014 and approximately 5,600 units have been sold. JUICE BOOSTER was, explains Mr Bennett, the name of the opponent’s “lower-priced power bank product”. Between December 2014 and January 2015, the opponent sold approximately 3,900 such products, following which, the product was put into redevelopment. JUICE WEEKENDER is the opponent’s high-capacity charger which rapidly charges a range of electronic devices including tablets and smartphones. Exhibit 4 consist of further pages from the opponent’s website which, where they can be dated, were downloaded on 13 May 2016. The first page looks like this:

JUICE WEEKENDER



Mr Bennett points to page 24 in which the product is described in the following terms:

“Juice ® Weekender, Portable Powerbank Battery pack for Smartphones and Tablets.”

This product has been on sale in the UK since September 2014 and approximately 20,900 units have been sold.

9. Exhibit 5 relates to the opponent’s JUICE ALLNIGHTER product which Mr Bennett describes as “another of our portable external charger products...”. Where they can be dated, the pages provided were downloaded from the opponent’s website on 13 May 2016 and from the website of a third party retailer, www.justhype.co.uk, on 17 May 2016. The first page of the exhibit looks like this:

JUICE ALLNIGHTER



Juice® Power

Juice® Sound

Juice® Cables

Juice® Accessories

The following appears on the justhype website at page 33 of the exhibit:

“Juice All Nighter Portable Powerbank Battery Pack – Red”.

Mr Bennett states that this product has been on sale in the UK since September 2014 and approximately 12,800 units have been sold.

10. The opponent’s JUICE CUBE trade mark is, states Mr Bennett “our more compact external charger...” Exhibit 6 consists of further printouts obtained from the opponent’s website which, where they can be dated, were downloaded on 20 May 2016. The first page looks like this:

JUICE CUBE



Mr Bennett states the JUICE CUBE product has been on sale in the UK since November 2013 with approximately 84,900 units sold. Exhibit 7 consists of undated printouts from the opponent's website in which the words JUICE POWER appear in a range of formats. Mr Bennett states these words have been used since December 2012 as the "umbrella trade mark for our range of charging products."

11. Of the competing goods at issue, Mr Bennett states:

"16. Power banks are devices which store electrical power. They are commonly used for charging batteries. These can also be described as battery chargers, battery charge devices or power packs.

19. The purpose of the MOBILE JUICE product is identical to my company's JUICE WEEKENDER, JUICE ALLNIGHTER and JUICE CUBE products, being to charge the electronic batteries of electronic devices.

20. The MOBILE JUICE product is also identical in nature to my company's JUICE ALLNIGHTER product which, as illustrated...is also the same shape and design as the illustrated MOBILE JUICE products."

In support of the above statements, Mr Bennett refers to exhibit 8 which consists of a CD containing a video from YouTube (published in April 2016) in which the applicant's MOBILE JUICE power bank is demonstrated; I will return to this exhibit later in this decision.

The applicant's evidence

12. This consists of a witness statement from Declan Graham, the applicant's Managing Director and Vice President of Mobile Juice Limited. Mr Graham explains that the applicant owns a number of UK trade marks, these are as follows:

No. 3137603 for the trade mark "Mobile Juice By Nutz Electronics" applied for on 24 November 2015, entered in the register on 18 March 2016 and registered in relation to "Power banks" in class 9.

No. 3147943 for the trade mark shown below applied for on 4 February 2016, entered in the register on 29 April 2016 and registered in relation to "Power banks" in class 9.



No. 3139401 for the trade mark "may the juice be with you" applied for on 6 December 2015, entered in the register on 4 March 2016 and registered in relation to "Power banks" in class 9.

13. The applicant is also, explains Mr Graham, the owner of both a registered community design (no. 3151000) “for the product known as “mobile juice” (exhibit 5DTG) and a UK registered design (no. 5002875) which he states “protects the single head universal charging component of the product known as “mobile juice”. Mr Graham states:

“8. My research on the opponent’s website and google search indicates that the only product the opponent solely uses the “**common word**” exclusively on, is a product named “juice” of which there are three variants of, which are depicted and described on opponent’s website...”

14. Exhibits 7, 8 and 9DTG (all of which appear to bear dates in June 2016) and 16 and 17 DTG (which appear to be undated) respectively, consist of printouts obtained by Mr Graham as a result of his enquiries mentioned above. They show the word “juice” on the packaging of the following goods a “Mains Charger” (exhibit 7), a “Charge & Sync Cable” (exhibit 8) and a “Mini car charger” (exhibit 9). Mr Graham appears to state that exhibits 16 and 17DTG are also car chargers. The quality of the image provided as exhibit 16DTG is so poor I am unable to discern the actual product, whereas the image provided as 17DTG appears to show a plug of the type that would be inserted into a wall socket. Mr Graham states:

“8...My company does not manufacture, nor ever intends to manufacture any goods under “Mobile Juice” that are depicted above as my company is a “powerbank” manufacturer and not a mobile phone accessories manufacturer. Powerbanks can be used across a wide variety of categories such as “digital cameras”, “headphones”, “gaming controllers”, “laptops” which do not fall under the “mobile phone” or “mobile phone accessories” categories which is the reason a “powerbank” category exists.”

15. Exhibits 11, 12, 13, 14 and 15DTG consist of the results of searches conducted by Mr Graham of the UK Trade Mark Register in what appears to be June 2016. For

reasons which will become clear later in this decision, it is not necessary for me to record here the results of those searches in any great detail. Suffice to say that Mr Graham searches revealed (i) “92 registered trade marks in class 9 that contain the word “juice” as a singular mark or incorporate the word “juice” in their mark” and (ii) “more than 1000 registered trade marks that contain the word “juice” as a singular mark or incorporate the word “juice” in their mark.” Mr Graham refers to three trade marks in particular i.e. “Juice Jack”, “Juice Banks” and “Juice Pack” which he notes “were registered after opponent’s registration and one prior to opponent’s registrations of the common word “**juice**”.

16. That concludes my summary of the evidence filed to the extent I consider it necessary.

DECISION

17. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

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

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

18. An earlier trade mark is defined in section 6 of the Act, which states:

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

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) 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,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

19. In these proceedings, the opponent is relying upon the eight trade marks shown in the annex to this decision, all of which qualify as earlier trade marks under the above provisions. As none of these trade marks had been registered for more than five years at the date when the application was published, they are not subject to proof of use, as per section 6A of the Act; as a consequence, the opponent is entitled to rely upon them in respect of all of the goods shown.

Section 5(2)(b) – case law

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

The principles:

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

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

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

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

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

My approach to the comparison

21. Although in its submissions filed in lieu of a hearing the opponent makes it quite clear that it is maintaining its opposition on the basis of all the earlier trade marks upon which it relies, it states:

“...we would particularly direct the registrar to UK registration of 2620732 JUICE and to the EUTM registration of 11261781 JUICE, each of which is in relation to goods including “mobile phone accessories” and “battery chargers for mobile phones.”

In its counterstatement, the applicant states:

“Applicant hereby acknowledges and agrees that the trade marks shown [in the Notice of opposition] are duly registered to opponent. Applicant states that the opponent’s objection is irrevocably based on the use of the singular word “juice” contained in opponent’s trade mark number 262073 (sic).”

22. Thus it appears to me that the parties are, at least initially content (the opponent), or think that the comparison should be conducted on the basis of the opponent’s earlier JUICE trade mark (the applicant). As both the UK trade mark and EUTM mentioned

above are for the word JUICE presented in block capital letters and as they have identical specifications that is what I shall do. I will only return to the other trade marks upon which the opponent's rely if I consider it necessary to do so.

Comparison of goods

23. The competing goods are as follows:

The opponent's goods	The applicant's goods
Class 9 - Mobile phones; mobile phone accessories; battery chargers for mobile phones; cases for mobile phones; holders for mobile phones; straps for mobile phones.	Class 9 – Power banks

In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the Court stated at paragraph 23 of its judgment that:

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

In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks)* (IP

TRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations"... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context."

24. As this aspect of the case has attracted a good deal of the applicant's attention, it is necessary for me to deal with it in some detail. The applicant's position first emerged in its counterstatement when it stated:

"Applicant's application is for a powerbank under class 9 "powerbank" and registration has not been applied for in any class covered by the opponent's mark."

In its submissions accompanying its evidence, the opponent stated:

"Power banks are devices which store electrical power. They can be connected with electrical devices to recharge the battery of said device. They are portable battery chargers. They are, therefore, identical in nature and purpose to battery

chargers for mobile phones (since the electrical devices in connection with which the power bank can be used include mobile phones)...

[The applicant's goods] fall within the following broad terms contained in class 9 of the opponent's specifications: mobile phone accessories; battery chargers for mobile phones...and are therefore identical thereto.

Since power banks can be used to charge the batteries in mobile phones, they are also mobile phone accessories; being devices which can be connected to mobile phones to make the phones more useful and versatile."

As I mentioned earlier, in his witness statement, Mr Graham stated:

"8...My company does not manufacture, nor ever intends to manufacture any goods under "Mobile Juice" that are depicted above as my company is a "powerbank" manufacturer and not a mobile phone accessories manufacturer. Powerbanks can be used across a wide variety of categories such as "digital cameras", "headphones", "gaming controllers", "laptops" which do not fall under the "mobile phone" or "mobile phone accessories" categories which is the reason a "powerbank" category exists."

In its submissions accompanying its evidence, the applicant stated:

10...The applicant hereby states that "powerbanks" has its own category and does not sit under "mobile phone accessories"...

12. For the avoidance of doubt a "powerbank" is a device that can supply USB power using stored energy in its built-in batteries. It is not an adaptor or a plug. In a normal environment they usually recharge with a USB power supply. It comprises of rechargeable batteries, consisting of either Lithium-ion or Lithium-Polymer cells and comes under protective casing, guided by a sophisticated PCB

ensuring various protective and safety measures such as “smart charging systems”. “Powerbanks” are classified as “dangerous goods” and fall under the IATA Dangerous Goods Regulation.

13. For the avoidance of doubt a “portable battery charger” is a power “adaptor” that provides a power source. It does not contain Lithium-ion or Lithium-Polymer cells. “Portable battery chargers” are not classified as dangerous goods.

14. For the avoidance of doubt battery chargers for mobile phones do not and cannot store power but simply facilitate power from either AC or DC connectivity to charge which is the complete **opposite** to that of a powerbank and is the reason “a powerbank” category exists. They do not contain Lithium-ion or Lithium-Polymer cells. The very nature is different as is the method of use. “Battery chargers for mobile phones” are not classified as dangerous goods.”

25. Although both parties return to this issue in their submissions filed in lieu of a hearing, as the submissions do not depart, to any material extent, from the positions adopted above, there is no need for me to specifically comment upon them here.

26. In its evidence and submissions the applicant refers to the goods upon which it has found use of the opponent’s JUICE trade mark i.e. a mains charger, a charge and sync cable and a car charger. It then goes on to provide a detailed analysis of why, in its view, its power banks are not similar to either the opponent’s “mobile phone accessories” or its “battery chargers for mobile phones”. However, as the earlier trade mark is not subject to proof of use, what I am required to do is compare the words in the competing specifications giving them “their natural meanings” whilst ensuring I do not give them such a “liberal interpretation that their limits become fuzzy and imprecise” but reminding myself that “there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.” That assessment must be carried out from the perspective of the average

consumer of the goods in question (which, as a member of the general public and a consumer of the goods at issue, I am well placed to do).

27. In reaching a conclusion, I have checked my understanding of the word “accessory” by reference to the definition provided by collinsdictionary.com which defines “accessories” as “items of equipment that are not usually essential, but which can be used with or added to something else in order to make it more efficient, useful, or decorative.” That accords with my own understanding of the word and, I am satisfied, will also accord with the average consumer’s understanding.

28. The opponent’s specification includes the term “battery chargers for mobile phones”; battery chargers for mobile phones are, in my view, “mobile phone accessories” which also appears in the opponent’s specification. In its submissions, the applicant explains that its power bank is a “device that can supply USB power using stored energy in its built in batteries” and in his evidence Mr Graham states that “powerbanks can be used across a wide variety of categories” and he lists a number of examples such as cameras, headphones, laptops etc. Although mobile phones do not appear in that list, I see absolutely no reason why the “stored energy in [the powerbank’s] built-in batteries” could not be used to charge a mobile phone. Indeed, the YouTube video provided as exhibit 8 to Mr Bennett’s statement shows the applicant’s power bank product being used for that very purpose. It is irrelevant that the applicant’s powerbank product may also be used to charge other devices. Applying the guidance mentioned above, I have absolutely no doubt that the average consumer would regard the applicant’s powerbank product as both a “battery charger for mobile phones” and a “mobile phone accessory”. In my view, the competing goods I have identified are identical.

The average consumer and the nature of the purchasing act

29. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods; I must then determine the manner in which these goods are likely to be selected by the average consumer in the

course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

In its submissions, the opponent states:

“The goods covered by the application and the earlier registrations are general consumer products such that the average consumer is the general public. An average degree of attention will be paid by the consumer when purchasing these products.”

30. I agree that the average consumer of the goods at issue in these proceedings is a member of the general public. As the evidence filed shows, the goods at issue may be selected from the shelves of a retail outlet on the high street or from the pages of a website. As a consequence, visual considerations are likely to dominate the selection process. However, as the average consumer may wish to seek advice from, for example, a sales assistant prior to making a purchase and as word-of-mouth recommendations are also likely, aural considerations must also be kept in mind. As to the degree of care the average consumer will display when selecting such goods, the evidence shows that although the goods are not terribly expensive (Mr Bennett states that the opponent’s goods range in price from £9.99 to £39.95), when selecting such goods the average consumer is likely to be conscious of factors such as cost, compatibility with their device(s), capacity, the physical size of the charger and its

colour. These considerations combined with the fact that the goods at issue may only be purchased infrequently, suggests to me that the average consumer will pay an above average degree of attention during the selection process (rather than the average degree of attention suggested by the opponent).

Comparison of trade marks

31. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

32. It would be wrong, therefore, artificially to dissect the trade marks, although, it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are as follows:

Opponent's trade mark	Applicant's trade mark
JUICE	Mobile Juice

33. As the opponent's trade mark consists exclusively of the well-known English language word "JUICE" presented in block capital letters that is the overall impression it will convey and where its distinctiveness lies.

34. The applicant's trade mark consists of two words presented in title case; the word "Mobile" and its meaning will be very well-known to the average consumer. I have already commented upon the word "Juice" above. In its submissions, the opponent states:

"The word MOBILE...has a descriptive quality and lacks distinctive character in relation to the goods covered by the application which are mobile in terms of their portability and/or their purpose i.e. they are portable charging devices and they can be used with mobile phones and other mobile electronic devices.

Indeed, the applicant has submitted in its counterstatement..."that the word Mobile in our product refers to the mobility of the applicant's product, which fits into a consumer's wallet and/or purse..."

35. When considered in isolation, I agree with the opponent's submissions in relation to the word "Mobile". As to the word "Juice", I note that collinsdictionary.com defines this word as an informal reference to "electricity". As an average consumer of the goods at issue, that accords with my own understanding; I am satisfied that in relation to the goods at issue i.e. battery chargers for mobile phones the word "Juice" will be understood by the average consumer as an informal reference to, broadly speaking, "power". Approached on that basis and as the word "Mobile" qualifies the word "Juice", in my view, the words in the applicant's trade mark "hang-together" to form a unit (I will deal with the message it conveys shortly). The overall impression and distinctiveness of the applicant's trade mark lies in the totality it creates rather than the individual components of which it is made up.

36. I have described the competing trade marks above. Although the word “Mobile” qualifies the word “Juice” which accompanies it, the fact that the trade marks at issue consist either exclusively of the word “JUICE” or contain the word “Juice” as a separate and distinct component, results in at least a medium degree of visual similarity between them.

37. Given its descriptive qualities, it is possible that the word “Mobile” in the applicant’s trade mark will not be articulated by the average consumer. Much more likely, however, is that the applicant’s trade mark will be referred to in full. Although the word “Mobile” will be spoken first, like the visual similarity, the presence of an identical aural component (albeit one that will be spoken second) results, once again, in at least a medium degree of aural similarity between the trade marks at issue.

38. Finally, the conceptual comparison. I have already concluded that the word “JUICE” will be understood by the average consumer as an informal reference to, broadly speaking, power; that is the conceptual message the opponent’s trade mark will convey. As to the applicant’s trade mark, this is likely to convey two conceptual meanings i.e. portable power (the meaning the applicant intends) or power for one’s mobile devices. As both parties’ trade marks convey the informal concept of power and as the word “Mobile” does no more than qualify that power, it results in a high degree of conceptual similarity between the competing trade marks.

Distinctive character of the earlier “JUICE” trade mark

39. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those

goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

40. I shall first consider the inherent distinctiveness of the opponent's JUICE trade mark. Earlier in this decision, I commented upon how, in my view, the average consumer is likely to construe the word JUICE in relation to the goods at issue (battery chargers for mobile phones) i.e. as an informal reference to power.

41. In its counterstatement, the applicant refers to five trade marks registered in class 9 i.e. "Mophie Juice Pack", "Mophie Juice pack Helium", "Juice Pack", "Juice Jack" and "Fully Juiced". Although full details of these trade marks have not been provided, I assume they are registered in class 9 for goods the same as or similar to those at issue in these proceedings i.e. battery chargers for mobile phones. In his evidence, Mr Graham refers to searches he conducted of the trade marks register and he states that his search in relation to class 9 for trade marks that contained the word "juice" either alone or with other components, retrieved 92 hits. At exhibit 11DTG, he provides the results of this search. However, other than a screen print showing brief details of ten trade marks, no information of the actual goods and services for which these trade marks are registered is provided. At exhibits 13, 14 and 15DTG he provides full details of three trade marks in the names of different undertakings all of which are registered in, inter alia, class 9 in relation to, inter alia, "battery chargers" and all of which contain the word "juice"/"JUICE" as a separate component (one of which also appeared in the applicant's counterstatement). Of the three trade marks for which I have full details, one was, I note, filed before the JUICE trade mark upon which the opponent relies. In *Zero Industry Srl v OHIM*, Case T-400/06, the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of

Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

42. As in *Zero Industry*, there is no evidence that even the three trade marks in relation to which full details have been provided are actually in use. However, even if the applicant had provided full details of all the trade marks revealed in its search in class 9, absent evidence that a not insignificant number of these trade marks were actually being used in relation to the goods at issue, it would not have assisted the applicant. As a consequence, the applicant's “state-of-the-register” evidence is, to use the words in *Zero Industry*, “not enough to establish that the distinctive character of [JUICE] has been weakened...”.

43. Notwithstanding the above conclusion, I remind myself that in its evidence (exhibit 3), the opponent's own advertising refers to “Double the juice of your mobile.” The fact that the opponent uses the word in this context, confirms my own view that it assumes the average consumer will readily identify the highly allusive message conveyed by its JUICE trade mark. As a consequence, it is, absent use, in my view, a trade mark possessed of a low degree of inherent distinctive character. However, as the opponent has filed evidence of its use of its various JUICE trade marks, I must now go on and determine whether its JUICE trade mark alone has acquired an enhanced distinctive character by virtue of the use made of it.

44. The application was filed on 9 November 2015; it is at that date that the question of acquired distinctiveness must be assessed. In his evidence, Mr Bennett indicates that the opponent has been trading in the United Kingdom since August 2012. Having stated

that JUICE is the opponent's primary trade mark, he goes on to explain that it has used its various trade marks from: December 2012 (JUICE POWER "the opponent's umbrella trade mark"), November 2013 (JUICE CUBE - a charger for Apple devices – 84,900 units sold), August 2014 (JUICE JACKET - a charger for a mobile phone - 5,600 units sold), September 2014 (JUICE WEEKENDER - a charger for mobile phones and tablets) and (JUICE ALLNIGHTER - a charger for a mobile phone) – 20,900 and 12,800 units sold respectively and that between December 2014 and January 2015, 3,900 JUICE BOOSTER products were sold. With the exception of the JUICE BOOSTER product (which "is not currently in use"), I have assumed that these figures represent sales up to the date of Mr Bennett's statement i.e. 23 May 2016. I also note (i) that in 2015 the opponent's turnover amounted to some £6.6m, (ii) the nature and reach of the retail outlets in which the opponent's goods are sold and (iii) that in 2015 the opponent was named the 2015 "Accessories Manufacturer" of the year at the Mobile News Awards.

45. Although the opponent has, inter alia, used its JUICE trade mark together with a number of sub-brands (the totalities being registered as trade marks), in many of the exhibits provided the word "juice" alone appears at the top of the opponent's website albeit accompanied by the strap-line "a revolution for your mobile". Although the web pages provided were, it appears, downloaded after the material date in these proceedings, the applicant has not challenged this aspect of the opponent's evidence and there is nothing to suggest that its website was any different prior to the material date. In *Société des Produits Nestlé SA v Mars UK Ltd*, Case C-353/03, the CJEU held that:

"The distinctive character of a mark referred to in Article 3(3) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks may be acquired in consequence of the use of that mark as part of or in conjunction with a registered trade mark."

Although the word JUICE is also registered as, inter alia, part of a number of registered trade marks and is shown in use in this way in the evidence provided, I am satisfied that the use the opponent has made of, at the very least, its various JUICE + trade marks will have accrued to the benefit of the word JUICE alone. Having reached that conclusion, I note that Mr Bennett has not provided any turnover figures prior to 2015, not all of the 2015 turnover is admissible (the application having been filed in November 2015), nor has he provided any information in relation to the size of the market concerned (which must be considerable) or the opponent's position in it. However, the fact that opponent was able to sell the number of charging units mentioned (a significant proportion of which are more likely than not to have been sold prior to the material date) and by 2015 to have achieved an annual turnover of £6.6m (a significant proportion of which is likely to be attributable to the sales of such goods), combined with the number and type of retailers selling the opponent's goods and the award it received in 2015, speaks, in my view, to the likely success the opponent's JUICE products achieved in a relatively short space of time. All of these factors combine to suggest that by the date of the applicant's trade mark in November 2015, the use the opponent had made of, at least, its various JUICE + trade marks since at least as early as December 2012 in relation to goods, a significant proportion of which are more likely that not to have been battery chargers for mobile phones, is likely to have enhanced its inherent distinctiveness. In so doing, it is likely, in my view, to have elevated its JUICE trade mark to one possessed of a reasonable degree of distinctive character.

Likelihood of confusion

46. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing

process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision I concluded that:

- the competing goods are identical;
- the average consumer is a member of the general public who will select the goods at issue using a mixture of visual and aural considerations (with the visual aspect dominating) and will pay an above average degree of attention during that process;
- the overall impression both parties' trade marks convey and their distinctiveness lies in their totalities, rather, insofar as the applicant's trade mark is concerned, in the components of which it is made up;
- the competing trade marks are visually and aurally similar to at least a medium degree and conceptually similar to a high degree;
- although the opponent's JUICE trade mark is possessed of a low degree of inherent distinctive, the use the opponent has made of its earlier trade mark since at least December 2012 in relation to battery chargers for mobile phones, is likely to have enhanced it to a trade mark possessed of a reasonable degree of distinctive character.

47. In reaching a conclusion on the likelihood of confusion, I begin by reminding myself that identical goods are involved and that the average consumer will pay an above degree of attention to the selection of such goods (thus making them less prone to the effects of imperfect recollection). Absent use, I also concluded that the opponent's JUICE trade mark had only a low degree of inherent distinctive character. However, as the CJEU explained in *L'Oréal SA v OHIM*, Case C-235/05 P, the fact that the opponent's trade mark has only a low degree of inherent distinctive character does not preclude a likelihood of confusion. The Court found that:

“45. The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

48. Given the degree of visual, aural and conceptual similarity I have identified above, and even if the opponent’s JUICE trade mark is accorded only a low degree of inherent distinctive character, I am satisfied that although the applicant’s trade mark hangs together to form a unit, the fact that the word “Mobile” in it will be construed as a reference to either the portability of the product or the type of devices it is intended to be used with, is sufficient to lead to a likelihood of direct confusion i.e. the competing trade marks are likely to be mistaken for one another. That alone is sufficient for the opposition to succeed. However, as the case law indicates, the likelihood of confusion is likely to increase if the earlier trade mark has an enhanced distinctive character. If I am correct that the use the opponent has made of its earlier trade mark has been enhanced (from low to reasonable), this improves the opponent’s position still further, although as I hope is clear from the above, the opponent’s success in these proceedings is not dependant upon its use. Having reached that conclusion on the basis of the opponent’s JUICE trade mark, it is not necessary for me to consider either the other trade marks upon which it relies nor its argument based on a “family” of trade marks.

Other issues arising from the applicant's evidence/submissions

49. In reaching the above conclusion, I have not overlooked a number of issues raised in either the applicant's evidence or submissions. First, the applicant's evidence regarding its registration of the three trade marks (shown in paragraph 12), all of which contain the word "Juice/juice". As these registrations were filed on 24 November and 6 December 2015 and 4 February 2016, they all post-date the filing date of the opponent's earlier "JUICE" trade mark which was filed in May 2012. However, even if they had earlier filing dates than the opponent's "JUICE" trade mark, they would not have assisted the applicant for the reasons explained in Tribunal Practice Notice ("TPN") 4 of 2009 (the relevant parts of which appear below):

"Defences including a claim that the applicant for registration/registered proprietor has a registered trade mark that predates the trade mark upon which the attacker relies for grounds under sections 5(1) and 5(2) of the Act.

1. A number of counterstatements in opposition and invalidation actions have sought to introduce as a defence that the applicant for registration/registered proprietor has a registered trade mark (or trade mark application) for the same or a highly similar trade mark to that which is the subject of the proceedings that predates the earlier mark upon which the attacker relies.

2. Sections 5(1) and 5(2) of the Act turn upon whether the attacker has an earlier trade mark compared to the mark under attack, as defined by section 6 of the Act. Whether the applicant for registration/registered proprietor has another registered trade mark (or trade mark application) that predates the earlier mark upon which the attacker relies cannot affect the outcome of the case in relation to these grounds.

3. The position was explained by the Court of First Instance in *PepsiCo, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) T-269/02*:

"24 Nor did the applicant claim, and even less prove, that it had used its earlier German mark to obtain cancellation of the intervener's mark before the competent national authorities, or even that it had commenced proceedings for that purpose.

25 In those circumstances, the Court notes that, quite irrespective of the question whether the applicant had adduced evidence of the existence of its earlier German mark before OHIM, the existence of that mark alone would not in any event have been sufficient reason for rejecting the opposition. The applicant would still have had to prove that it had been successful in having the intervener's mark cancelled by the competent national authorities.

26 The validity of a national trade mark, in this case the intervener's, may not be called in question in proceedings for registration of a Community trade mark, but only in cancellation proceedings brought in the Member State concerned (*Case T 6/01 Matratzen Concord v OHIM - Hukla Germany (MATRATZEN) [2002] ECR II 4335, paragraph 55*). Moreover, although it is for OHIM to ascertain, on the basis of evidence which it is up to the opponent to produce, the existence of the national mark relied on in support of the opposition, it is not for it to rule on a conflict between that mark and another mark at national level, such a conflict falling within the competence of the national authorities."

50. Secondly, in its submissions filed in lieu of a hearing, the applicant states:

"The applicant has sold more product of "Mobile Juice" than the opponent has of its "Juice" product between December 2015 until September 2016. The opponent has had six months to submit into evidence any letters or claims of confusion..."

51. The applicant's comment regarding its use of its "Mobile Juice" trade mark above is, of course, assertion not evidence; as such, it carries no weight. However, even if the applicant had filed evidence in support of this claim, it would not have assisted it. This is because the period the applicant refers to begins in December 2015 which is after the material date in these proceedings i.e. 9 November 2015 the date the application was filed. However, even if the applicant had used its trade mark prior to the filing date of the opponent's earlier trade mark, once again it would not have assisted it for the reasons explained in TPN 4/2009 (the relevant part of which appears below):

"The position with regard to defences based on use of the trade mark under attack which precedes the date of use or registration of the attacker's mark

4. The viability of such a defence was considered by Ms Anna Carboni, sitting as the appointed person, in *Ion Associates Ltd v Philip Stainton and Another*, BL O-211-09. Ms Carboni rejected the defence as being wrong in law.

5. Users of the Intellectual Property Office are therefore reminded that defences to section 5(1) or (2) grounds based on the applicant for registration/registered proprietor owning another mark which is earlier still compared to the attacker's mark, or having used the trade mark before the attacker used or registered its mark are wrong in law. If the owner of the mark under attack has an earlier mark or right which could be used to oppose or invalidate the trade mark relied upon by the attacker, and the applicant for registration/registered proprietor wishes to invoke that earlier mark/right, the proper course is to oppose or apply to invalidate the attacker's mark."

52. Finally, the applicant comments on the lack of evidence from the opponent showing actual instances of confusion between the competing trade marks. For the reasons indicated below, this, once again, does not assist it. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“80.the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur.”

And:

In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett L.J. stated that:

"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

Conclusion

53. The opposition has succeeded and, subject to any successful appeal, the application will be refused.

Costs

54. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by TPN 4 of 2007. Using the TPN mentioned as a guide, I award costs to the opponent on the following basis:

Preparing a statement and considering the applicant's statement:	£400
Preparing evidence and considering the applicant's evidence:	£700
Filing of written submissions:	£300
Official fee:	£100
Total:	£1500

55. I order Nutz Electronics Limited to pay to Gusto Telecom Solutions Limited the sum of **£1500**. This sum is 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 9th day of November 2016

C J BOWEN
For the Registrar
The Comptroller-General

OPPOSITION No. 406080

The opponent's earlier trade marks

(1) UK no. 2620732 for the trade mark JUICE – applied for on 14 May 2012, entered in the register on 5 October 2012 and registered in relation to:

Class 9 - Mobile phones; mobile phone accessories; battery chargers for mobile phones; cases for mobile phones; holders for mobile phones; straps for mobile phones.

(2) EUTM no. 11261781 for the trade mark JUICE – applied for on 12 October 2012 (claiming a priority date of 14 May 2012 from an earlier filing in the UK), entered in the register on 21 February 2013 and registered in relation to:

Class 9 - Mobile phones; mobile phone accessories; battery chargers for mobile phones; cases for mobile phones; holders for mobile phones; straps for mobile phones.

(3) UK no. 3068144 for the trade mark JUICE JACKET – applied for on 12 August 2014, entered in the register on 9 January 2015 and registered in relation to:

Class 9 - Battery chargers; battery charge devices; rechargeable batteries; power pack [batteries]; power units [batteries]; battery cases; cases for mobile phones; covers for mobile phones; carriers adapted for mobile phones; holders adapted for mobile phones; electric cables and wires; power cables; electrical cables; battery cables; USB cables; connection cables; adapter cables (electric -); power adapters; adapters [electricity]; adapter connectors (electric -).

(4) UK no. 3068149 for the trade mark JUICE BOOSTER – applied for on 12 August 2014, entered in the register on 9 January 2015 and registered in relation to:

Class 9 - Battery chargers; battery charge devices; electric battery chargers; electric cables and wires; power cables; electrical cables; battery cables; USB cables; connection cables; adapter cables (electric -); power connectors; connections for electric cables; electrical connectors; plug connectors; cable connectors; electrical cable connectors; wire connectors [electricity]; plug-in connectors.

(5) UK no. 3068152 for the trade mark JUICE WEEKENDER – applied for on 12 August 2014, entered in the register on 9 January 2015 and registered in relation to:

Class 9 - Mobile phones; mobile phone accessories; battery chargers; battery charge devices; electric battery chargers; electric cables and wires; power cables; electrical cables; battery cables; USB cables; connection cables; adapter cables (electric -); materials for electricity mains [wires, cables]; power connectors; connections for electric cables; electrical connectors; plug connectors; cable connectors; electrical cable connectors; wire connectors [electricity]; plug-in connectors.

(6) UK no. 3068155 for the trade mark JUICE ALLNIGHTER – applied for on 12 August 2014, entered in the register on 9 January 2015 and registered in relation to:

Class 9 - Mobile phones; mobile phone accessories; battery chargers; battery charge devices; electric battery chargers; electric cables and wires; power cables; electrical cables; battery cables; USB cables; connection cables; adapter cables (electric -); materials for electricity mains [wires, cables]; power connectors; connections for electric cables; electrical connectors; plug connectors; cable connectors; electrical cable connectors; wire connectors [electricity]; plug-in connectors.

(7) UK no. 3068167 for the trade mark JUICE CUBE – applied for on 12 August 2014, entered in the register on 9 January 2015 and registered in relation to:

Class 9 - Battery chargers; battery charge devices; rechargeable batteries; power pack [batteries]; power units [batteries]; power connectors; connections for electric cables; electrical connectors; cable connectors; electrical cable connectors; wire connectors [electricity]; plug-in connectors.

(8) UK no. 3068172 for the trade mark JUICE POWER – applied for on 12 August 2014, entered in the register on 9 January 2015 and registered in relation to:

Class 9 - Battery chargers; battery charge devices; electric battery chargers; mains charger; battery chargers for use in vehicles; electric cables and wires; power cables; electrical cables; battery cables; USB cables; connection cables; adapter cables (electric -); materials for electricity mains [wires, cables]; power connectors; connections for electric cables; electrical connectors; plug connectors; cable connectors; electrical cable connectors; wire connectors [electricity]; plug-in connectors.