

O/640/18

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003261269 BY
PAUL GROSVENOR
TO REGISTER:



AS A TRADE MARK IN CLASS 7

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 410737 BY
SIMON LAWTHOR

BACKGROUND AND PLEADINGS

1. On 4 October 2017, Mr Paul Grosvenor (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 3 November 2017.

2. The application was opposed by Mr Simon Lawther (“the opponent”). The opposition is based on sections 5(1) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is based on the earlier UK Trade Mark registration no. 2553367 for the trade mark POWERMAX which has an application date of 19 July 2010 and registration date of 31 December 2010.

3. The following goods are relied upon in this opposition:

Class 7 Ignition devices for internal combustion engines.

4. The opponent argues that the respective goods are identical or similar and that the marks are identical or similar.

5. The applicant filed a counterstatement dated 15 December 2017 denying the claims made.

6. The opponent filed written submissions dated 15 February 2018 and the applicant filed written submissions dated 12 April 2018. Both parties filed a TM8 with their written submissions. Both parties were informed that the TM8 is a defence document which should not be filed during the evidence stage and neither form would therefore be considered in proceedings. However, the accompanying submissions were accepted.

7. When the applicant filed his TM8 dated 12 April 2018, he asked the opponent to provide proof of use of his earlier trade mark relied upon. Proof of use had not been requested in the applicant’s counterstatement dated 15 December 2017. The applicant was informed by letter dated 10 May 2018 that the time for requesting proof of use had passed and in order for this request to be considered he should submit this request

to the tribunal in writing, providing reasons for not having requested it previously. No such written request was received from the applicant.

8. The applicant also filed a document headed 'PISTONS LINERS AND KIT SETS CATALOGUE 1978' with its TM8 dated 12 April 2018. The applicant was informed, by letter dated 10 May 2018, that this was not filed in the correct format and should have been exhibited to a Witness Statement, Statutory Declaration or Affidavit if it was to be considered as evidence of fact. The applicant was informed that if he wanted to rely on that document then a request for an extension of time should be submitted. No such request was received from the applicant. This document will not, therefore, be considered as evidence of fact in these proceedings.

9. Neither party has been represented in these proceedings. No hearing was requested by either party and so this decision is taken following a careful perusal of the papers.

PRELIMINARY ISSUES

10. The applicant seeks to rely on his use of the applied for mark which he states commenced prior to the registration date of the opponent's mark. The applicant states in his written submissions that the applied for mark was in use from 1971. However, in Tribunal Practice Note ("TPN") 4/2009¹ it states:

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

This argument will not, therefore, assist the applicant.

11. In his counterstatement, the applicant states that there are various other trade marks already on the register which use the words 'POWERMAX'. He also states:

¹ <http://webarchive.nationalarchives.gov.uk/20140714074320/http://www.ipo.gov.uk/pro-types/pro-tm/t-law/t-tpn/t-tpn-2009/t-tpn-42009.htm>

“It is stated that the existing trade mark is used on all goods and services for class 7. It appears to have been used for product “POWERMAX Red Rotor Arm” only, which appears to use trademark number UK00002565258. This is in line with the trade mark for “ignition devices”. We have no intention to utilise this trademark on any “ignition Devices” or indeed any electronic components”.

12. The opponent stated in his written submissions:

“I believe the opponent’s application is for a trademark for components within and related to the ignition side of combustion engines. Our trademark UK00003261269 would easily be confused with the oppositions application as the application is requesting to use POWERMAX for components within a combustion engine related to the ignition – ignition happens within cylinders using piston rings, rotor arms, valves, bearings, bushes, spring return rings (sir clips), ignition coils, cam shafts, HT leads, distributors, points and condensers and as such is related to the ignition system for combustion engines as is our trademark.”

13. In *O2 Holdings Limited, O2 (UK) Limited v Hutchinson 3G UK Limited* (Case C-533/06), the Court of Justice of the European Union (“CJEU”) stated at paragraph 66 of its judgment that when assessing likelihood of confusion in the context of registering a new trade mark, it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. As a result, my assessment must take into account only the applied-for mark (and its specification) and any potential conflict with the earlier trade mark. Any difference between the goods actually provided by the parties or their trading styles are irrelevant unless those differences are apparent from the applied-for and earlier marks, and their respective specifications. The existence of other trade marks on the register is also not relevant to the decision I must make².

14. Various references have also been made by the applicant to the extent of the opponent’s actual use of the mark. As noted above, the applicant did not ask the

² *Zero Industry Srl v OHIM*, Case T-400/06

opponent to demonstrate proof of use of its earlier mark at the appropriate time. No reasons for not having done so were provided by the applicant in order for him to be able to seek that retrospectively. The opponent is therefore entitled to rely on all goods for which his earlier trade mark is registered and is not required to demonstrate his use of the mark for the purpose of these proceedings.

DECISION

15. Section 5(1) of the Act reads as follows:

“5(1) A trade mark shall not be registered if it is identical with an earlier trademark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.”

16. Section 5(2)(b) of the Act reads as follows:

“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.”

17. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK) or 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.”

18. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As noted above, the applicant has not requested proof of use of the earlier mark and so the opponent can, as a consequence, rely upon all of the goods in the earlier mark’s specification.

Section 5(1)

19. It is a prerequisite of section 5(1) of the Act that the trade marks are identical. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the CJEU held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by the average consumer.”

20. In my view, the addition of the racing flag to the applicant’s mark is sufficient to prevent these marks from being considered identical. I do not think that this can be considered so insignificant that it would go unnoticed by the average consumer. The opposition under section 5(1) must, therefore, fail.

Section 5(2)(b)

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

The principles:

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

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

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

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

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

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

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

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

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, 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.

Comparison of goods

22. The competing goods are as follows:

Opponent's goods	Applicant's goods
<u>Class 7</u> Ignition devices for internal combustion engines.	<u>Class 7</u> Parts and fittings included in Class 7 for vehicles for internal combustion engines; pistons; piston rings; piston pins; connecting rods; camshafts; gaskets;

	valves; valve guides; bearings; bushes; thrust washers; rocker arms; spring retaining rings (circlips); all being parts of engines.
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23. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the 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.”

24. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance,

whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

25. The General Court confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

26. 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.”

27. 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.”

28. In his Notice of Opposition, the opponent stated: “as both are listed in class 7 category it makes them completely identical + is bound to cause confusion”.

29. In his counterstatement, the applicant stated:

“Application UK00003261269 is for Class 7 goods and services: Parts and fittings included in Class 7 for vehicles and internal combustion engines; pistons; piston rings; piston pins; connecting rods; camshafts; gaskets; valves; valve guides; bearings; bushes; thrust washers; rocker arms; spring retaining rings (circlips); all being parts of engines. These are completely different products to the existing trademark UK00002553367 and are in no way related or similar.”

30. The applicant also provided lengthy written submissions on the similarity of the goods which I do not propose to reproduce in full. However, I have taken them into consideration in reaching my decision.

31. “Ignition devices for internal combustion engines” in the opponent’s specification falls within the broader category of “Parts and fittings included in Class 7 for vehicles for internal combustion engines” in the applicant’s specification. Such goods can, therefore, be considered identical on the principle outlined in *Meric*. Even if I am wrong in this finding, the goods would be considered highly similar.

32. The other goods listed in the applicant’s specification are described as “all being parts of engines”. “Ignition devices for internal combustion engines” in the opponent’s specification is a category of parts for use in engines. Consequently, I consider that the uses, users and trade channels of these goods are all likely to be the same. The users will be manufacturers of car engines or businesses undertaking maintenance or repair work to engines. The uses of these parts overlap in that they can all be used to

create a functioning engine for vehicles. I consider that they are likely to be available through specialist suppliers for engine or vehicle parts. I therefore consider these goods to be highly similar.

The average consumer and the nature of the purchasing act

33. 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 *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.”

34. The parties have made no submissions on the average consumer or on the purchasing process for the goods at issue. The average consumer for the goods is likely to be a business user involved in the manufacture of car engines or involved in the maintenance and repair of car parts. Purchases of the goods are likely to be fairly frequent for someone specialising in the field and of reasonable cost. The average consumer is likely to give consideration to the purchase to ensure that the part is suitable for its specific needs. However, as the average consumer is a specialist business user they are likely to be fairly familiar with purchases of this nature. I would, therefore, expect the average consumer to pay a medium degree of attention during the selection process for the goods in issue.

35. The goods are most likely to be obtained by self-selection from the shelves of a specialist retail outlet or from a website or catalogue equivalent. Consequently, visual

considerations are likely to dominate the selection process. However, I do not discount that there may be an aural component to the purchase of the goods given that advice may be sought from sales assistants or representatives and purchases may be made via the telephone.


Comparison of the marks

36. 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.”

37. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

38. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
POWERMAX	

39. I have no submissions from the applicant on the similarity of the marks in issue. I have no submission from the opponent on the similarity of the marks in issue other than to state that they are “identical”.

40. The opponent’s mark consists of the ordinary dictionary word “POWER” combined with the abbreviation “MAX”. I consider that the overall impression of the mark will be as a unit (as opposed to two separate and unrelated words), with neither the word or abbreviation dominating. The applicant’s mark also consists of the word “POWER” combined with the abbreviation “MAX” (which appear in a stylised font with the first and sixth letters coloured red), with the addition of an image of a car racing flag. I consider that the words “POWERMAX” play a greater role in the overall impression of the mark, with the racing flag playing a lesser role in the overall impression of the mark.

41. Visually, the marks both contain the words “POWERMAX”. The difference between the marks lies in the use of the stylised font, red colouring and the addition of the racing flag in the applicant’s mark. As notional and fair use means that the opponent’s mark could be used in any standard typeface, the difference created by the stylised font is not relevant. I consider there to be a high degree of visual similarity between the marks.

42. Aurally, both marks will be broken down into the dictionary word “POWER” and the abbreviation “MAX”. Both marks will, therefore, be aurally identical.

43. The word “POWER” in both marks will be understood according to its ordinary dictionary meaning (that is, strength or might³). I consider that the three letters “MAX” will be understood by the average consumer to be an abbreviation for the word “MAXIMUM”. The word “MAXIMUM” will be understood according to its ordinary dictionary meaning (that is, the highest value or extreme limit⁴). Conceptually, the marks will therefore convey the same meaning of being the highest possible power or strength. If it is recognised as being a racing flag, the use of the flag in the applicant’s

³ <http://www.oed.com/view/Entry/149167?rskey=W7Ovfv&result=1#eid>

⁴ <http://www.oed.com/view/Entry/115275?redirectedFrom=maximum#eid>

mark will give some indication that the mark may relate to cars in some way. If it is not recognised as a racing flag, no particular meaning will be attributed to the use of the flag in the applicant's mark. I therefore consider there to be a high degree of conceptual similarity.

Distinctive character of the earlier trade mark

44. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

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

45. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

46. As the opponent has not filed any evidence to show that his mark has enhanced its distinctiveness through use, I have only the inherent position to consider. Neither the opponent, nor the applicant have made any submissions about the distinctiveness of the earlier mark.

47. I must make an assessment of the inherent distinctiveness of the earlier mark as a whole. The word "POWER" is a common dictionary word with a recognisable meaning. Although "MAX" is an abbreviation, it will be easily identifiable as being a shortened version of the word "MAXIMUM". The inherent distinctiveness of the mark lies in its combination of the word "POWER" and the abbreviation "MAX". When used in combination, the words allude to the goods offering the highest level of strength. I consider that the earlier mark has a medium degree of inherent distinctiveness.

Likelihood of confusion

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to 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 that he has retained in his mind.

49. I have found the parties' marks to be visually and conceptually similar to a high degree and aurally identical. I have found the earlier mark to have a medium degree

of inherent distinctive character. I have identified the average consumer to be a specialist user, who will select the goods primarily by visual means (although I do not discount an aural component), and I have concluded that the degree of attention paid will be medium. I have found the parties' goods to be identical or highly similar. Bearing in mind the visual, conceptual and aural similarities between the marks, and the principle of imperfect recollection, I am satisfied that there will be a likelihood of direct confusion between them i.e. the average consumer will mistake one mark for another.

50. In the event that I am wrong in this finding, I will now consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

51. Bearing in mind my conclusions listed at paragraph 49 above, I consider that even if the average consumer recalls the differences between the marks, he or she is likely to perceive the applied for mark as a variant brand originating from the opponent, leading to indirect confusion.

CONCLUSION

52. The opposition is successful.

COSTS

53. Awards of costs are governed by TPN 2/2016. The opponent has been successful and would normally be entitled to a contribution towards his costs. However, as the opponent is unrepresented, at the conclusion of the evidence rounds the tribunal wrote to the opponent and invited him to indicate whether he intended to make a request for an award of costs. The opponent was informed that, if so, he should complete a pro-forma, providing details of his actual costs and accurate estimates of the amount of time spent on various activities in the prosecution of the opposition. He was informed that “no costs, other than official fees arising from the action... will be awarded” if the pro-forma was not completed. The opponent did not file a completed pro-forma. That being the case, I award the opponent the sum of £100 in respect of the opposition fee only.

54. I therefore order Mr Peter Grosvenor to pay Mr Simon Lawther the sum of **£100**. This sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 11th day of October 2018

S WILSON

For the Registrar