

O/188/19

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION UK 3165307 IN THE NAME OF
NAUMAN R RAJA

FOR THE TRADE MARK



IN CLASS 9

AND

THE APPLICATION FOR A DECLARATION OF INVALIDITY THERETO UNDER
NUMBER 502091

BY

GIANI LIMITED

Background and Pleadings

1. NAUMAN R RAJA (the Proprietor) is the registered proprietor of a UK trade mark number 3165307, shown on the front cover page of this decision, which was filed on the 18 May 2016 and registered on the 30 September 2016 for the following goods in Class 9:

CLASS 9 : Adapter cables (electric-); adapter connectors (electric-); adapter plugs; adapters [electricity]; adaptors (electric-); cable junctions for electric cables; cables, electric; cables (fibre [fiber (am.)] optic -); cables for optical signal transmission; cables (junction sleeves for electric -); calculating apparatus; camcorders; camera cases; camera flashes; camera lenses; camera stands; camera straps; camera tripods; cameras; cameras (bags adapted or shaped to contain-); cameras (cinematographic -); cameras for monitoring and inspecting equipment in a nuclear power station; cameras [photography]; cameras shutters; car stereos; cases adapted for computers; cases adapted for glasses; cases for mobile phones; chargers for electric batteries; charging appliances for rechargeable equipment; computer docking station; computer hardware; computer keyboards; computer monitors; computer networks; computer stylus; computer tapes; computers; ear phones; earphones; electric adaptors; electric battery chargers; electric blanking plugs; electric boosters; electric cables; electric circuits; electric components; electric control panels; electric cords; electric light switches; electric plugs; headphone amplifiers; headphone consoles; headphone-microphone combinations; headphones; headsets for mobile telephones; headwear for sporting activities for protection against injury; Gloves for supports activities; Power banks; Memory cards; Data Cables; mp3 players; mp4 players; scales; screens; smart phones; tablet computer; tablet computers; tablet monitors; Tablet accessories; Tablet covers; Tablet bags; pouches; tablet and mobile phone sleeves.

2. Giani Limited (the Applicant) filed an application for invalidation of the Proprietor's registration on the 23 May 2018 under section 47(2)(b) of the Trade Marks Act (the Act). The ground for the application for invalidation is based on section 5(2)(b) of the Act and is restricted to the following goods in the Proprietor's specification in class 9:

CLASS 9: calculating apparatus; cases adapted for computers; cases for mobile phones; computer docking station; computer hardware; computer keyboards; computer monitors; computer networks; computer stylus; computer tapes; computers; ear phones; earphones; Memory cards; Data Cables; screens; tablet computer; tablet computers; tablet monitors; Tablet accessories*; Tablet covers; Tablet bags; pouches; tablet and mobile phone sleeves.

3. The Applicant relies on ownership of its earlier word only mark ENTITY; registration number UK 3044434, filed on the 27 February 2014 and registered on the 6 June 2014 for goods in class 9 namely:

CLASS 9: Personal computers; tablet PCs; computer peripherals; parts, fittings and accessories for all the aforesaid goods.

4. The Applicant relies on all its goods for which the earlier mark is registered claiming that there is a likelihood of confusion because the trade marks are similar and are registered for goods identical with or similar to those for which the earlier mark is registered.

5. The Proprietor filed a defence and counterstatement denying the claims made that there is any similarity between the goods for the respective marks. Although originally requested, the Applicant was not required to provide proof of use of its earlier mark

* pleaded as Table accessories – however as there is no specification of this type I will consider this to be a typographical error and proceed as it appears on the register.

because the earlier mark has been registered for less than five years at the date the application for invalidation was made, namely the 23 May 2018.¹ Consequently it can rely upon all of the goods claimed.

6. The Proprietor is unrepresented. The Applicant is represented by Wilson Gunn. Neither party filed evidence and neither requested a hearing, only the Applicant filed submissions in lieu of a hearing. The Proprietor did not file further submissions, relying on his counterstatement. The decision is therefore taken upon the careful perusal of the papers.

Preliminary issue

7. The Proprietor suggests that by registering the company that this has afforded him mark protection, as Companies House would not have allowed the company to be registered unless the name was “unique and available”. A trademark however is governed by separate rules and regulations as set out in the Act; its main function is to distinguish goods and services of one undertaking from another and to determine trade origin. The reference to Companies House is therefore immaterial to my assessment as to whether there is a likelihood of confusion between the marks.

Decision

8. The application for invalidation under section 47(2) of the Act is based on the provisions of section 5(2)(b) namely:

¹ Sections 47(2A) – 2(E) of the Act

“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”.

9. The Applicant's mark qualifies as an earlier mark in accordance with section 6 of the Act.

10. 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 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

11. When conducting a goods comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (CJEU) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* Case C-39/97, where 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”.

12. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (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.

13. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, Case T- 133/05, the General Court (GC) stated that:

“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 fur 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”.

14. In order to determine whether there is a likelihood of confusion, the parties' competing specifications must be compared. The parties' goods are set out in the following table:

Proprietor's Mark	Applicant's Earlier Mark
calculating apparatus; cases adapted for computers; cases for mobile phones; computer docking station; computer hardware; computer keyboards; computer monitors; computer networks; computer stylus; computer tapes; computers; ear phones; earphones; Memory cards; Data Cables; screens; tablet computer; tablet computers; tablet monitors; Tablet accessories; Tablet covers; Tablet bags; pouches; tablet and mobile phone sleeves.	Personal computers; tablet PCs; computer peripherals; parts, fittings and accessories for all the aforesaid goods.

15. The Applicant submits that the respective goods are either identical or very similar, sharing the same channels of trade and targeting the same consumers. The Proprietor is silent regarding any identity or otherwise of the goods.

16. In relation to understanding what terms used in specifications mean or cover, the case-law directs us to construe words used in a specification, with reference to how the products are regarded for the purposes of the trade² and that words should be given their natural meaning within the context in which they are used and not given an unnaturally narrow meaning³. Mr Justice Floyd stated in *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), 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

17. Taking into account the above case law I consider that the Proprietor's "computers; tablet computer; tablet computers;" are identical to the Applicant's "Personal computers; tablet PCs".

² *British Sugar PLC v James Robertson* 1996 R.P.C. 281

³ *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

18. The earlier mark covers “*computer peripherals*”. A computer peripheral is normally an ancillary device which attaches externally to a computer or something which is used in connection with a computer; “*computer docking station; computer hardware; computer keyboards; computer monitors; computer networks; computer stylus; computer tapes; Memory cards; Data Cables; screens; tablet monitors;*” can clearly all be construed as peripherals and as such are identical according to *Merit* and the inclusion principle.

19. Similarly, “*accessories forpersonal computers*” and “*accessories fortablet PCs*” in the earlier mark’s specification would include such things as “*cases adapted for computers; ear phones; earphones; Tablet accessories; Tablet covers; Tablet bags; pouches; tablet sleeves*”. They are all associated accessories connected to computers and tablets. They are therefore identical, as all the Proprietor’s aforementioned goods are encompassed in the Applicant’s specification.

20. This leaves “*cases for mobile phones: mobile phone sleeves*” and “*calculating apparatus*”.

21. Computers, tablets and mobile phones, technologically speaking, share identical functions. They are all devices that allow the user to make calls via a computer application or phone network. They also work in shared fields regarding the making and receiving of emails, creating documents and the storing of information. Modern mobile phones work in the same way as mini computers. It is not uncommon for there to be an overlap between those producers producing and supplying cases and sleeves for tablets and computers and those producing sleeves and cases for mobile phones. Both share a common purpose namely the production of a protective case for the device. Following the guidance in *Treat*, “*cases for mobile phones*” and “*mobile phone sleeves*” are highly similar to the earlier mark’s “*accessories for.... personal computers*” and “*accessories for.... tablet PCs*” for the reasons I have explained. They share in their nature, purpose, channels of trade and method of use.

22. A “*calculating apparatus*” is a single purpose device whose main function is to perform mathematical calculations, whereas computers have much broader capabilities. Whilst calculators are computers albeit on a much smaller scale it would be wrong to determine the matter of similarity on this point alone as most electronic devices rely on some degree of information technology in order to function. I would not consider “*calculating apparatus*” to be identical to “*personal computers*” but they would in my view be similar to a medium degree. Their distribution channels would be the same, they each have the same purpose and the same end user.

Average Consumer

23. When considering the opposing trade marks, it is necessary for me to determine who the average consumer is for the respective parties’ goods and the manner in which they are likely to be selected. The average consumer is deemed reasonably informed and reasonably observant and circumspect. I must bear in mind that the average consumer’s level of attention is likely to vary according to the category of goods in question.⁴

24. 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

⁴ Lloyd Schuhfabrik Meyer, case c- 342/97.

“average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

25. The Applicant’s only comment on the average consumer is to the effect that “the average consumer of the category of products concerned is deemed to be reasonably well informed and reasonably observant and circumspect”. The Proprietor has not made any representations regarding the average consumer or the purchasing act.


26. The goods at issue would strike me as those capable of being purchased by a business user, including an IT specialist or a member of the general public purchasing the goods for home use. Nowadays most households possess a computer in some format or other, be it a computer or tablet, or a smart telephone/television. It is not uncommon therefore for members of the general public to have a good degree of knowledge in this field.

27. As the goods in question vary considerably in price (from hi tech computers to accessories such as bags and earphones) so too will the level of attention to a lesser or greater extent. Even at the lower end of the market a reasonable degree of care will be taken in the purchasing decision because considerations such as suitability and performance will factor. Expensive high-end computers are likely to be purchased by those with specialist knowledge who require a particular functionality. The level of attention for these purchases will be reasonably high. Overall at least a reasonable level of attention will be undertaken.

28. I consider the purchasing process itself to be primarily visual involving searches on websites and brochures or through self-selection. I do not discount aural considerations however as this is the type of field which may involve discussions with sales assistants or recommendations by specialist sales representatives. The purchase is unlikely to be a casual purchase even for accessories.

Comparison of the marks

29. The respective trade marks are shown below:

Proprietor's mark	Applicant's earlier mark
	ENTITY

30. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a 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 marks must be assessed by reference to the overall impressions created by the 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.”

31. The Proprietor argues that his:

“logo is unique and no where near to opponent's logo[sic]”

“logo has complete company name “ENTITY TRADE PARK” in the image of the logo”

“logo/TM does not conflict anyones TM/logo in any way”

32. The Applicant submits that:

“Visually the Later Trade Mark consists of the dominant and distinctive word “ENTITY”. Although the Later Mark contains the words “TRADE PARK”, relative to the “ENTITY” word element, these additional word elements are hardly noticeable and are certainly not dominant. On this basis, the Later Trade Mark is an ENTITY trade mark. The stylisation of the ENTITY word within the Later Trade Mark does not detract from the fact that it is clearly the word ENTITY.”

“given the word element “TRADE PARK” is written in such miniscule writing comparatively to the rest of the mark, it is not beyond the bounds of possibility that the words TRADE PARK might even be misread as “TRADE MARK”.”

33. It would be wrong 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.

34. The Proprietor’s mark consists of the word “ENTITY” presented in an uneven arrangement in upper case, in a stylised emboldened font. The letters are red surrounded by a black outline. Underneath the letter T, offset to the right are the words Trade Park presented in considerably smaller font in black. The symbol “®”, which is often used to denote a registered mark, is presented above the letter Y in superscript. The overall impression of the Proprietor’s mark is dominated by the word ENTITY due

to its size. The other word elements are considerably smaller and therefore may well go unnoticed by the average consumer or may, as the Applicant submits, be mistaken for Trade Mark, owing to their content and position. It is the word ENTITY which is the distinctive and dominant element of the mark with the stylisation in lettering and colour playing a lesser role. The stylisation does not detract from the distinctive characteristic and the dominant element of the mark, which is the word ENTITY.

35. The Applicant's mark consists of the single word "ENTITY" presented in capitals in plain black type. There are no other elements to contribute to the overall impression and therefore it is the word itself which dominates and which gives the mark its distinctive character.

Visual comparison

36. The only point of visual similarity is the word "ENTITY" which is the most dominant element in the later mark and the only component in the earlier mark. The additional elements "Trade Park" and "®" are presented in such a small font that they may be overlooked. The common word ENTITY is presented differently in both marks; in the later mark the lettering is presented in a red stylised font whereas the earlier mark is the word only mark with no embellishment. A word trade mark registration, however, protects the word itself irrespective of font⁵ or colour.⁶ This was confirmed by the GC in *La Superquimica v EUIPO* EU T:2018:668 which held:

"It should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which

⁵ Bentley Motors Limited v Bentley 1962 Limited BL O/159/17

⁶ Specsavers International Healthcare Limited & Others v Asda Stores Limited [2014] C-252/12

the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type...”

37. Whilst in *Migros-Genossenschafts-Bund v EUIPO*, Case T-189/16, the GC held that use of a word mark in stylised form was not identical to a word only mark, the question arises as to what extent does the stylisation go beyond notional and fair use of a mark. In my view there is nothing remarkable about the graphic representation of the lettering of the word ENTITY in the later mark that detracts from the word itself. Since it is the word ENTITY which dominates the later mark, whether stylised or not, I consider that there is a reasonably high degree of visual similarity between the marks.

Aural comparison

38. The aural similarities lie in the common word ENTITY which will be pronounced identically in both marks. I agree with the Applicant that the average consumer is unlikely to articulate “Trade Park” and “®” when referring to the later mark due to the size and positioning of these elements and especially since marks are usually read from left to right. If these elements are overlooked the later mark is likely to be referred to as ENTITY and therefore the marks will be aurally identical. If all the verbal elements are articulated in the later mark, the marks will be aurally similar to a medium degree.

Conceptual Comparison

39. Neither party has filed evidence regarding the average consumer’s understanding of the marks. The later mark consists of a number of components where the word ENTITY will be recognised as an English word. The two words Trade Park combine to create a clear term that is likely to be readily understood by the average consumer as

reference to a retail park or trading estate, but has no apparent link to the goods in question. Consumers will see “®” as denoting some sort of registration mark. The Proprietor argues in his counterstatement that consumers will automatically link the words Entity and Trade Park with his company name Entity Trade Park Limited. For a conceptual message to be relevant it must be immediately grasped by the average consumer.⁷ I do not believe that the average consumer will automatically make the link between the mark and the company as I believe that most consumers will focus on the word ENTITY.

40. In both the earlier and later mark the word ENTITY is likely to be understood as an English word with a known meaning. The Oxford English dictionary defines the word “entity” as “a thing with distinct and independent existence”⁸. In the context of information technology however, the word ENTITY has no apparent association with the respective goods. Whilst the meanings of the additional elements cannot be ignored in the later mark, overall, I believe more notice will be taken of the element ENTITY and therefore on this basis the marks will share a high degree of conceptual similarity.

Distinctive character of the earlier mark

41. 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

⁷ Ruiz Picasso v OHIM [2006] e.c.r.I-643; [2006] E.T.M.R.29.

⁸ <https://en.oxforddictionaries.com/definition/entity>

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-0000, 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).”

42. 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. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion.

43. The Applicant has not filed any evidence regarding its use of the mark and therefore I must consider the matter based on inherent characteristics alone. The earlier mark consists of one word “ENTITY” with no additional elements. Whilst the word is considered to be a common English word it has no obvious link or any allusive association to the Applicant’s goods. As such, it will be regarded as possessing a medium degree of inherent distinctiveness.

Likelihood of confusion.

44. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or related source.

45. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“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 recognised 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, I conclude that it is another brand of the owner of the earlier mark.”

46. There are a number of factors to bear in mind when determining whether there is a likelihood of confusion. 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 or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Applicant’s trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must consider 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.

47. When comparing the two marks I take into account the obvious visual similarities between them as a result of the shared presence of the word “ENTITY” which I have found is highly similar. I take into account that the inherent distinctiveness of the earlier mark is medium with no further enhancement attributed to it through use. I note that the average consumer is reasonably well informed and circumspect and a member of the public or business user who will pay at least a reasonable degree of attention in the selection process. The marks have a high degree of conceptual similarity and are aurally similar to at least a medium degree (if not identical where only the word ENTITY is pronounced in the later mark). I have found the goods to be either identical or highly similar (with the exception of “*calculating apparatus*”, which I found to be similar to a medium degree).

48. Taking into account the principle of imperfect recollection and the fact that the consumer rarely has a chance to compare marks side by side I conclude that there is sufficient similarity between the common element ENTITY for the average consumer to mistake one for the other, despite the average consumer paying a reasonable to reasonably high degree of attention and notwithstanding a medium degree of similarity of goods at the lowest level with regards “*calculating apparatus*”. Consumers are unlikely to remember the difference in stylisation or the additional elements “Trade Park” and “®”. These differences are not sufficient to allow the average consumer to distinguish between the marks leading to a likelihood of confusion. Factoring in the identity and similarity of the goods even to a medium degree, the marks may be imperfectly recalled causing a likelihood of direct confusion.

49. In case I am wrong about direct confusion I will consider indirect confusion as explained in L.A. Sugar. Even if the average consumer does not directly mistake the marks there is sufficient similarity between them that the average consumer perhaps may notice the difference in stylisation and the inclusion of the other elements “Trade

Park” and “®” but conclude that it is a variant of the earlier mark and that the respective goods come from the same or economically linked undertakings. There is therefore a likelihood of indirect confusion.

50. The application for invalidation therefore succeeds under sections 47(2) and 5(2) (b) of the Act. Under section 47(6) of the Act, the registration for the trade mark number UK 3165307 in relation to the following goods in class 9 is deemed never to have been made and is to be removed from the register in relation to those goods. The application is cancelled for:

calculating apparatus; cases adapted for computers; cases for mobile phones; computer docking station; computer hardware; computer keyboards; computer monitors; computer networks; computer stylus; computer tapes; computers; ear phones; earphones; Memory cards; Data Cables; screens; tablet computer; tablet computers; tablet monitors; tablet accessories; tablet covers; tablet bags; pouches; tablet and mobile phone sleeves.

51. The Proprietor’s trade mark remains validly registered for the following goods in class 9, there being no objection raised for these goods by the Applicant:

CLASS 9 : Adapter cables (electric-); adapter connectors (electric-); adapter plugs; adapters [electricity]; adaptors (electric-); cable junctions for electric cables; cables, electric; cables (fibre [fiber (am.)] optic -); cables for optical signal transmission; cables (junction sleeves for electric -); camcorders; camera cases; camera flashes; camera lenses; camera stands; camera straps; camera tripods; cameras; cameras (bags adapted or shaped to contain-); cameras (cinematographic -); cameras for monitoring and inspecting equipment in a nuclear power station; cameras [photography]; cameras shutters; car stereos; cases adapted for glasses; chargers for electric batteries; charging appliances

for rechargeable equipment; electric adaptors; electric battery chargers; electric blanking plugs; electric boosters; electric cables; electric circuits; electric components; electric control panels; electric cords; electric light switches; electric plugs; headphone amplifiers; headphone consoles; headphone-microphone combinations; headphones; headsets for mobile telephones; headwear for sporting activities for protection against injury; Gloves for supports activities; Power banks; mp3 players; mp4 players; scales; smart phones.

52. The Applicant has been successful and is therefore entitled to a contribution towards its costs. Award of costs in proceedings are based upon the scale as out in the Tribunal Practice Notice 2/2016. Applying this guidance, I award costs to the Applicant on the following basis:

Preparing a statement of grounds and considering the counterstatement:	£200
Preparing submissions in lieu of a hearing:	£300
Official Fee:	£200
Total	£700

53. I order NAUMAN R RAJA to pay Giani Limited the sum of £700 as a contribution towards its costs. 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 9 April 2019

Leisa Davies
For the Registrar