

O-300-19

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3247404 IN THE NAME
OF GOLDEN CALA TRADING EST. FOR THE FOLLOWING TRADE MARK:**



IN CLASS 9

**AND IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 411195 BY FLORIAN MACK**

Background and pleadings

1) Golden Cala Trading Est. ('the applicant') applied to register the trade mark shown on the first page of this decision in the UK on 1 August 2017. It was accepted and published in the Trade Marks Journal on 3 November 2017 in respect of the following Class 9 goods:

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; optical lenses; ophthalmic lenses; correcting lenses (optics); contact lenses and cases for contact lenses; glasses and sunglasses; optical goods.

2) Florian Mack ('the opponent') opposes the trade mark on the basis of sections 5(2)(b), 5(3), 5(4)(a) and 3(6) of the Trade Marks Act 1994 ('the Act'). In respect of the section 5(2)(b) and 5(3) claims, they are based on the opponent's two earlier European Union trade mark ('EUTM') registrations, neither of which are old enough to be the subject of proof of use. Pertinent details of these registrations are below:

EUTM 16547267



Mark¹:

Goods and services relied upon:

Class 9: Contact lenses; Glasses, sunglasses and contact lenses; Optical goods.

¹ The mark includes the following colour claim "Blue; White".

Class 35: Online retail store services relating to cosmetic and beauty products.

Class 44: Optical services.

Filing date: 2 April 2017

Registration date: 17 July 2017

International Trade Mark Registration (designating the UK) 1371582



Mark²:

Goods and services relied upon:

Class 9: Contact lenses; glasses, sunglasses and contact lenses; optical goods.

Class 35: Online retail store services relating to cosmetic and beauty products.

Class 44: Optical services.

Priority date: 2 April 2017

Designation date: 4 September 2017

Date of protection in UK: 2 February 2018

In relation to the section 5(2)(b) claim the opponent argues that that the respective goods/services are identical or similar and that the marks are 'closely similar'.

3) With regard to the section 5(3) claim the opponent relies upon both of its earlier EUTMs listed above. The opponent argues that the "applicant's mark will create a connection in the mind of the consumer that the goods are either connected to or originate from the same undertaking" and it "would create the impression that the respective parties are commercially connected or associated, giving rise to consumer confusion". Therefore, the applicant will "free-ride" upon the opponent's power of attraction, prestige and reputation. The opponent also claims that the later use will be out of its control and that poor quality or offensive goods will cause

² The mark contains the colours blue and white

detriment to its valuable reputation and business. It claims that use of the later mark will dilute the distinctive character and reputation of its marks.

4) Under section 5(4)(a), the opponent opposes the application on the basis of its



alleged earlier rights in lens.ME and . It claims to have been selling contact lenses, optical goods and associated services under these signs since at least 26 August 2015 and to have acquired goodwill under the signs. It claims that use of the trade mark applied for would therefore be a misrepresentation to the public and result in damage to the aforementioned goodwill.

5) For reasons which shall become self-evident I will not summarise the section 3(6) claim here (paragraphs 9 to 12 refer).

6) The applicant filed a counterstatement denying all of the claims made. The counterstatement also includes a number of submissions on why the opponent's claims should be dismissed. I have read these submissions and shall bear them in mind throughout.

7) Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. The applicant also filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision.

8) A hearing took place via video-link on 22 March 2019, with the opponent represented by Mr Jamie Muir Wood of counsel, instructed by Albright IP Limited. The applicant did not attend but filed further written submissions in lieu. During the hearing Mr Muir Wood pointed out that these submissions contained evidence which was not presented in the correct evidential format. I bear this in mind and disregard the statements of fact in the submissions which have not been filed as evidence.

PRELIMINARY ISSUE

9) The application was also initially opposed under section 3(6) of the Act. This was on the basis that the applicant had gained confidential information which led to the application being filed in bad faith. However, the opponent's skeleton argument argued that the applicant had no intention to use the mark in the UK and it was therefore applied for in bad faith. This claim was manifestly different to the claim initially pleaded. During the hearing I asked Mr Muir Wood whether he was requesting to officially amend his pleadings since the contrasting claim being made at the hearing was completely different and would require an amendment. He initially sought to rely upon the judgment of *Demon Ale* Trade Mark [2000] RPC 345 whereby the Appointed Person found that even though the pleadings were deficient on the claim made, he was willing to allow the claim to proceed. The circumstances here differ. In *Demon Ale* there was a claim to amend the statement of claim earlier in proceedings, rather than during the hearing (after being prompted). Further, in that case the applicant admitted that there was no intention to use in its evidence and had ample opportunity to submit further evidence. Whereas in these circumstances the first the applicant would have known about this claim would be upon reading the skeleton argument.

10) Requests for amendments of pleadings are set out in the Trade Marks Work Manual at 4.1 (Amendment of pleadings). In essence the guidance states that if an amendment becomes necessary the requestor should 1) seek leave to make the amendment at the earliest opportunity and 2) provide details of the amendment together with the reasons for the amendment. Each request is then considered on its merits taking into account that the Registrar would prefer to avoid multiplicity of proceedings but also whether the other side would be prejudiced, save for recompense through costs.

11) There was no request to amend the pleadings until the hearing and it is clear that the request could have been made far sooner. Moreover, if the pleadings were amended as requested then this would be prejudicial to the applicant since they had not had an opportunity to respond by filing evidence or submissions detailing its intention to use.

12) Having discussed the requirements for amendments to pleadings as set out above, Mr Muir Wood maintained his request. However, his request was refused and Mr Muir Wood subsequently withdrew the opponent's section 3(6) claim.

EVIDENCE

Opponent's evidence

13) The opponent's evidence consists of a witness statement and supporting exhibits from the applicant, Florian Mack. Large portions of the evidence were filed in support of its section 3(6) claim. Since this has been subsequently withdrawn I shall focus my assessment of the evidence on the areas which the opponent seeks to rely upon, i.e. its section 5(2)(b), 5(3) and 5(4)(a) claims plus enhanced distinctive character.

14) Mr Mack is a shareholder, Chairman and director of Sky Optical LLC, a company to which he licences his trade marks.

15) Mr Mack states that the first sales anywhere in the world under the LENS.ME brand took place on 28 June 2015 which was a consignment of contact lenses to a customer based in Dubai³. Also in 2015 the opponent set up social media accounts for 'lensdotme' on Facebook, Instagram, YouTube, Pinterest and Twitter⁴.

16) He goes on to state that the first "sales made under the LENS.ME business and the Len.ME logo registered trade mark since at least as early as 26 August 2015, and sales have continued in the UK since that date."⁵ Since the first order in August 2015 Mr Mack claims that the level of sales under the Lens.Me mark in the UK have been at least £1.5m.⁶

17) With regard to marketing, Mr Mack states that the opponent's practice is to use online marketing initiatives through Google and other such service providers and since August 2015 it has spent at least £40,000.

³ Paragraph 2 of the witness statement

⁴ Exhibit FM4 are various print outs showing the dates that the accounts were created.

⁵ Paragraph 8 of the witness statement

⁶ The witness statement is dated 6 June 2018.

18) Mr Mack states that he has been aware of marketplace confusion. For example, a vlogger who specialises in paid partnerships has been confused. Her Facebook post, dated 9 May 2018⁷, states that she is “wearing lens.me” contact lenses and links to the opponent’s goods and Facebook page rather than the applicant who presumably paid her to advertise the goods. Mr Mack argues that this is clear marketplace confusion. A further example is an email to the opponent from a company based in Pakistan who visited the applicant’s stand at the BeautyWorld event in Dubai.⁸

Applicant’s evidence

19) The applicant’s evidence consists of a witness statement and supporting exhibits from Ghazi Ashwi Mater Al Anzi who is the owner of the applicant and is based in Saudi Arabia.

20) Mr Anzi states that the applicant first used the trade mark LENS ME in 2013 and has been using the mark since then, mainly in the GCC region⁹. Exhibit GAA1 is in Arabic with an English translation provided. The translation consists of two invoices dated 2 April 2014 and the other 7 May 2015. They are “Billed to: Golden Cala Trading Establishment” without an address and the amounts are in Saudi Arabian riyals. They do include the mark Lens.me and are for various promotional material such as business cards, banners, and branded bags. Therefore, they are not invoices for the sale of the goods themselves but for marketing material. Moreover, they do not appear to relate to the UK.

21) I briefly summarise the remaining evidence as follows but note that none of it relates to the UK:

⁷ Facebook screenshots of the confusion have been filed under Exhibit FM15.

⁸ The email is dated 14 May 2018 and is filed under exhibit FM16.

⁹ The Gulf Cooperation Council consists of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE.

- Trade mark registration certificates for the mark LENS ME in France, Hong Kong, Bahrain, Germany and Saudi Arabia¹⁰;
- A distribution agreement with a Kuwaiti based company¹¹;
- A statement from a Korean company confirming that the applicant has been working on the LENS ME product¹²;
- Order confirmations for customers around the world, but not the UK¹³;
- Certificates from two companies confirming that they sell the applicant's goods. The companies are based in Saudi Arabia¹⁴;

DECISION

The law

22) Section 5(2)(b) of the Act is 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”.

The case law

23) 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.

¹⁰ Exhibit GAA2

¹¹ Exhibit GAA3

¹² Exhibit GAA4

¹³ Exhibit GAA5

¹⁴ Exhibit GAA6

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 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

24) In the judgment of the Court of Justice of the European Union 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”.

25) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(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.

26) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court 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 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”.

27) In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

28) In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services

is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

29) Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.

30) The respective goods and services are as follows:

Applied for goods	Earlier goods and services
<p><i>Class 9: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment, computers; computer software; fire-extinguishing apparatus; optical lenses; ophthalmic lenses; correcting lenses (optics); contact lenses and cases for contact lenses; glasses and</i></p>	<p><i>Class 9: Contact lenses; glasses, sunglasses and contact lenses; optical goods.</i></p> <p><i>Class 35: Online retail store services relating to cosmetic and beauty products.</i></p> <p><i>Class 44: Optical services.</i></p>

<i>sunglasses; optical goods.</i>	
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31) The applicant has not provided any comments relating to the comparison of goods and services. Mr Muir Wood helpfully listed the applied for goods which he considers to be ‘optical goods’ and therefore identical (or at least highly similar) to the opponent’s goods and the remaining goods he describes as being “less closely aligned”. He considers the optical goods to be as follows:

“Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; optical lenses; ophthalmic lenses; correcting lenses (optics); contact lenses and cases for contact lenses; glasses and sunglasses; optical goods”

32) I broadly agree with Mr Muir Woods assessment. For example, both lists of goods include the identical terms *contact lenses; glasses and sunglasses; optical goods* and are therefore identical.

33) Applying the principle set out in *Meric*, the applied for *optical lenses; ophthalmic lenses; correcting lenses (optics)* to be included in the broader earlier term *optical goods*. Therefore, they are identical.

34) Also applying the *Meric* principle I find that the applied for *“photographic, cinematographic, optical, and teaching apparatus and instruments; apparatus for recording, transmission or reproduction of images”* to be sufficiently broad to include the earlier *optical goods*. This is because they would all include goods such as lenses, for example photographic and cinematographic goods would include cameras which have lenses, etc. Further, teaching apparatus would include items such as microscopes which are used in teaching environments such as biology classes, etc. Therefore, they are identical.

35) Turning to the applied for *“Scientific, nautical, measuring, surveying, signalling apparatus and instruments”* they are all broad terms which would include specific

items such as microscopes (within scientific and teaching), telescopes (within nautical), apparatus used to measure distance (within surveying and measuring) and lenses used for signals (within signalling). Therefore, applying the principle set out in *Meric*, I find the goods to be identical.

36) The applied for *cases for contact lenses* are not optical goods *per se*. They differ in nature since contact lenses are used to improve one's sight and the cases are used to carry and store them. They will be purchased by the same end user, sold in close proximity to one another and sold via the same distribution channels. The respective goods are not in competition with one another, though they are complementary since cases are important for the use of the other¹⁵. They are highly similar.

37) I am less inclined to agree with Mr Muir Wood in respect of "*magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media*". He argues that optical goods are required to read the aforementioned goods and, therefore, there is a complementary relationship. Whilst it may be the case that optical goods are used to read compact discs and therefore there may be a complementary relationship, I do not consider the goods to be similar. The goods would be sold in different outlets, via different distribution channels and they are not in competition. Accordingly, I find that none of the following goods to be similar to any of the goods and services covered by the earlier mark: "*magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media*". They are dissimilar.

38) I also do not see any points of similarity between the earlier goods and the following "*weighing, checking (supervision), life-saving apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; mechanisms for coin-operated apparatus; cash registers, calculating machines; fire-extinguishing apparatus; data processing equipment, computers; computer software; apparatus for recording, transmission or reproduction of sound*". They are dissimilar.

¹⁵ *Kurt Hesse v OHIM*, Case C-50/15 P



Comparison of marks

39) 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 Court of Justice of the European Union 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.”

40) 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.

41) The respective trade marks are shown below:

Application	Earlier marks
	

42) In terms of overall impression, the application consists of the words Lens and me. The word Lens is in a mildly stylised script with the letter ‘e’ placed on the leg of

the letter L. The word 'me' is also in italic script but within in a darker shade of grey circle. Whilst the stylisation does contribute to the distinctive character in the mark, the overall impression undoubtedly lies in the perception of the expression of "Lens me".

43) With regard to the earlier mark, it also includes the words 'lens' and 'ME' in a standard font with the words being separated by a full stop or dot. The latter word ('ME') is in upper case within a blue circle. I consider the overall impression of the mark to reside in the perception of the expression "Lens.ME".

44) From a visual perspective the applicant argues that the "marks are visually different". This is based on the respective marks being stylised differently, the inclusion of the 'L' in the application being in upper case and the opponent's mark appearing as one word since the letters are next to one another. The opponent argues that they are visually highly similar.

45) In my view both marks will be viewed as containing two separate words, namely lens and me. Further, the word 'me' is within a circle in each mark. Therefore, whilst I take into consideration the differing stylisation, I agree with the opponent that the marks are visually similar to a high degree.

46) Aurally, despite the various stylisation and the inclusion of a full stop between lens and me in the earlier mark, both will be pronounced as "lens-me". They are aurally identical.

47) Conceptually, the opponent argues that both marks contain the unusual but comprehensive phrase 'lens me' which alludes to the provision of services to provide lenses to the average consumer. The applicant argues that whilst the words 'Lens' and 'me' have individual meanings, when combines they have no particular relevance.

48) The ordinary and natural meaning of the word 'lens' is of something transparent (usually glass or plastic) used to capture or magnify and image, images or recordings. For example, you would associate the word lens with cameras. They are

also well known for being short for contact lenses. Therefore, its meaning may differ depending on the goods that they are used for. Of course, in relation to goods not associated with either of the well-known definitions then they will have no meaning. When the word is used in conjunction with 'me', this forms an unusual grammatically incorrect term.

49) For goods which lens has a meaning the combination of lens and me gives a meaning that the user is stating that they want lenses, i.e. lens me. Where the goods have nothing to do with lenses, the combination becomes more striking but the fact that the consumer would not perceive the marks as allusive in the context of the goods, does not mean that they would not perceive the two concepts conveyed by the words lens and me. The marks are conceptually identical to those that perceive the words in this manner. For those that do not attribute any meaning, the position is neutral.

Average consumer and the purchasing act

50) The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

51) 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.”

52) The average consumer is a member of the general public and businesses. In respect of the general public, the goods found to be identical or similar are not everyday items and a reasonable degree of care will go into their selection, although not of the highest possible degree. The goods are likely to be purchased via self-selection in shops such as opticians or from perusal of websites, brochures and catalogues. This suggests a visual process, but I do not ignore aural recommendations.

53) With regard to the goods which are more likely to be purchased by businesses, the level of attention is typically higher. However, the goods will still be selected following a visual inspection of the goods on websites, brochures, etc. but I do not disregard aural recommendations.

Distinctive character of the earlier trade mark

54) 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-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).”

55) The level of distinctive character of a trade mark can vary, depending on the particular goods at issue: a mark may be more distinctive for some goods than it is for others. Distinctiveness can also be enhanced through use of the mark. There has been no explicit claim of enhanced distinctiveness, but evidence of use has been filed in support of the opponent’s section 5(3) of the Act claim. This evidence has been summarised above and I am required to assess whether, at the relevant date of 1 August 2017, the opponent has demonstrated that it has an enhanced degree of distinctive character.

56) The opponent states that the UK turnover is at least £1.5m and an advertising spend of at least £40,000 from August 2015 up until 6 June 2018. It is not stated how much of this turnover or advertising spend is before the relevant date. The opponent’s evidence also shows that the opponent uses social media to promote its goods.

57) Whilst the turnover is not prima facie low, it is not clear how much of this turnover was generated prior to the relevant date. Further, the opponent has not clearly demonstrated the exposure of the mark, provided any context regarding market share plus the mark has only been used for two years prior to the relevant date. Therefore, I find that the opponent has not demonstrated an enhanced degree of distinctive character by virtue of the use made of it.

58) From an inherent perspective, the mark is stylised but not to a particularly fanciful degree. The words within the mark are “lens.ME”. For optical goods the word lens is not particularly distinctive but combined with “.ME” it is unusual. However, I only consider the inherent distinctive character to be below medium but not low.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

59) Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. 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 marks, 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.

60) Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking.

61) To determine whether there is a likelihood of direct or indirect confusion I now draw together my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the factors I have set out above.

62) Since similarity between goods and services is essential for finding a likelihood of confusion, where no similarity is found the section 5(2)(b) claim fails. Therefore, the opposition fails against the following applied for goods:

Weighing, checking (supervision) and life-saving apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines; data

processing equipment, computers; computer software; fire-extinguishing apparatus.

63) With regard to the remaining goods I have found them to be either identical or highly similar. I have also found that the respective marks to be aurally identical and visually highly similar. Any conceptual similarity would be based on an allusive meaning which would be the same for each mark. If no meaning is attributed to the respective marks, then the position is neutral.

64) I have found that the goods will be purchased following a visual inspection of the goods, and there may be closer attention paid when the goods are purchased by businesses. Further, the inherent distinctive character of the earlier mark is below medium but no low.

65) Taking all of the above factors into account, I find that there is a likelihood of direct confusion. The marks are so similar that it is inevitable that confusion will arise, particularly since the goods are either identical or highly similar. For the avoidance of doubt, I find that there is a likelihood of confusion even for those that do not perceive the respective marks as having a meaning and the conceptual position is neutral.

66) To summarise, the section 5(2)(b) claim succeeds against the following goods:

Scientific, nautical, surveying, photographic, cinematographic, optical, measuring, signalling, teaching apparatus and instruments; apparatus for recording, transmission or reproduction of images; optical lenses; ophthalmic lenses; correcting lenses (optics); contact lenses and cases for contact lenses; glasses and sunglasses; optical goods.

67) Since the section 5(2)(b) claim has only succeeded in part, I shall consider the section 5(3) and 5(4)(a) claims against the remaining goods.

Section 5(3)

The law

68) Section 5(3) of the Act states:

- “(3) A trade mark which-
- (a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

The case law

69) The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Addidas-Salomon*, Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

- a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.
- (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.
- (c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.
- (d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the

relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of

the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

REPUTATION

70) The conditions of section 5(3) are cumulative. The first task, though, is to consider whether the earlier mark has achieved a level of knowledge amongst a significant part of the relevant public. The relevant case was set out in *General Motors*, Case C-375/97, whereby the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

71) I have already found that the opponent's use of its sign was not enough to enhance its distinctive character from the perspective of the average consumer. For

the same reasons I find that the opponent does not have the requisite reputation for it to have a sustainable basis under section 5(3).

72) As previously stated, whilst the turnover is not prima facie low it is not clear how much of this was prior to the relevant date. Further, apart from references to social media accounts, there is no real indication of the exposure of the mark. For these reasons, together with the reasons listed against there being an enhanced degree of distinctive character, the opponent falls at the first hurdle.

73) Even if I were wrong on this assessment, I still consider that the claim would have failed. The reputation would have been weak and the distinctiveness of the mark modest. This coupled with the respective goods and services not being considered similar, would not be enough to bring the earlier mark to mind. There would be no link in the average consumers mind.

74) The claim under section 5(3) fails.

Section 5(4)(a)

75) I shall now assess the opponent's section 5(4)(a) claim against the goods for which the section 5(2)(b) and 5(3) claims have failed.

The law

76) Section 5(4)(a) of the Act states:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) [.....]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

77) In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale

and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

78) It is settled law that for a successful finding under the tort of passing-off, three factors must be present: 1) goodwill, 2) misrepresentation and, 3) damage.

79) Whether there has been passing off must be judged at a particular point (or points) in time. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11, Mr Daniel Alexander QC, sitting as the Appointed Person, considered the matter of the relevant date in a passing off case. He said:

“43. In *SWORDERS* TM O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”.

80) Whilst the applicant claims to have used its mark, there is no evidence to show that the mark has been used in the UK. Therefore, the date that the opponent must establish that it had a protectable goodwill is the date when the contested trade mark application was filed, namely 1 August 2017.

81) The opponent claims goodwill in respect of the signs lens.ME and



. It claims to have been selling contact lenses, optical goods and associated services under these signs since at least 26 August 2015 and has acquired goodwill under the signs.

Goodwill

82) Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL):

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

83) I accept that the opponent has goodwill in its earlier signs for contact lenses and optical goods. There is no evidence to support that they provide “associated services”.

MISREPRESENTATION

84) In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

“There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148 . The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175 ; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

And later in the same judgment:

“.... for my part, I think that references, in this context, to “more than *de minimis* ” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

85) In *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA), Millet L.J. made the following findings about the lack of a requirement for the parties to operate in a common field of activity, and about the additional burden of establishing misrepresentation and damage when they do not:

“There is no requirement that the defendant should be carrying on a business which competes with that of the plaintiff or which would compete with any natural extension of the plaintiff’s business. The expression “common field of activity” was coined by *Wynn-Parry J. in McCulloch v. May* (1948) 65 R.P.C. 58, when he dismissed the plaintiff’s claim for want of this factor. This was contrary to numerous previous authorities (see, for example, *Eastman Photographic Materials Co. Ltd. v. John Griffiths Cycle Corporation Ltd.* (1898) 15 R.P.C. 105 (cameras and bicycles); *Walter v. Ashton* [1902] 2 Ch. 282 (The Times newspaper and bicycles) and is now discredited. In the *Advocaat* case Lord Diplock expressly recognised that an action for passing off would lie although “the plaintiff and the defendant were not competing traders in the same line of business”. In the *Lego case Falconer J.* acted on evidence that the public had been deceived into thinking that the plaintiffs, who were manufacturers of plastic toy construction kits, had diversified into the manufacture of plastic irrigation equipment for the domestic garden. What the plaintiff in an action for passing off must prove is not the existence of a common field of activity but likely confusion among the common customers of the parties.

The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration

‘...whether there is any kind of association, or could be in the minds of the public any kind of association, between the field of activities of the plaintiff and the field of activities of the defendant’:

Annabel’s (Berkeley Square) Ltd. v. G. Schock (trading as Annabel’s Escort Agency) [1972] R.P.C. 838 at page 844 per Russell L.J.

In the *Lego case Falconer J.* likewise held that the proximity of the defendant's field of activity to that of the plaintiff was a factor to be taken into account when deciding whether the defendant's conduct would cause the necessary confusion.

Where the plaintiff's business name is a household name the degree of overlap between the fields of activity of the parties' respective businesses may often be a less important consideration in assessing whether there is likely to be confusion, but in my opinion it is always a relevant factor to be taken into account.

Where there is no or only a tenuous degree of overlap between the parties' respective fields of activity the burden of proving the likelihood of confusion and resulting damage is a heavy one. In *Stringfellow v. McCain Foods (G.B.) Ltd.* [1984] R.P.C. 501 Slade L.J. said (at page 535) that the further removed from one another the respective fields of activities, the less likely was it that any member of the public could reasonably be confused into thinking that the one business was connected with the other; and he added (at page 545) that

‘even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than minimal loss is in my opinion a heavy one.’

In the same case Stephenson L.J. said at page 547:

‘...in a case such as the present the burden of satisfying Lord Diplock's requirements in the *Advocaat* case, in particular the fourth and fifth requirements, is a heavy burden; how heavy I am not sure the judge fully appreciated. If he had, he might not have granted the respondents relief. When the alleged “passer off” seeks and gets no benefit from using another trader's name and trades in a field far removed from

competing with him, there must, in my judgment, be clear and cogent proof of actual or possible confusion or connection, and of actual damage or real likelihood of damage to the respondents' property in their goodwill, which must, as Lord Fraser said in the *Advocaat* case, be substantial.' ”

86) In *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, Kitchin LJ considered the role of the average consumer in the assessment of a likelihood of confusion. Kitchen L.J. concluded:

“... if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement.”

87) Although this was an infringement case, the principles apply equally under 5(2): see *Soulcycle Inc v Matalan Ltd*, [2017] EWHC 496 (Ch). In *Marks and Spencer PLC v Interflora*, [2012] EWCA (Civ) 1501, Lewinson L.J. had previously cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that “a *substantial number*” of the relevant public are deceived, which might not mean that the average consumer is confused. However, in the light of the Court of Appeal’s later judgment in *Comic Enterprises*, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.

88) Whilst I accept that opponent has demonstrated that it has the requisite goodwill for contact lenses and optical goods, I do not consider that for the goods which the section 5(2)(b) claim failed, the section 5(4)(a) would succeed. In other words, I do not consider that a substantial number of members of the public will be misled into purchasing the applicant’s goods in the belief that it is the opponent’s, or that there is an economic association.

89) The section 5(4)(a) claim fails.

OVERALL OUTCOME

90) The opposition has succeeded against the following goods. Therefore, subject to appeal, the registration shall be refused registration for:

Scientific, nautical, surveying, photographic, cinematographic, optical, measuring, signalling, teaching apparatus and instruments; apparatus for recording, transmission or reproduction of images; optical lenses; ophthalmic lenses; correcting lenses (optics); contact lenses and cases for contact lenses; glasses and sunglasses; optical goods.

91) The opposition has failed in respect of the following goods. Therefore, subject to appeal, they will be registered for:

Weighing, checking (supervision) and life-saving apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound; magnetic data carriers, recording discs; compact discs, DVDs and other digital recording media; mechanisms for coin-operated apparatus; cash registers, calculating machines; data processing equipment, computers; computer software; fire-extinguishing apparatus.

COSTS

92) Both parties have shared a measure of success and so I decline to make an award of costs.

Dated 31 May 2019

MARK KING

For the Registrar,

The Comptroller-General