O/0246/23

IN THE MATTER OF:

TRADE MARK APPLICATION NO. 3625600
In the name of KADENA INDUSTRIES LIMITED

Powersheer

AND IN THE MATTER OF:

OPPOSITION NO. 426789

BY POSITEC GROUP LIMITED

APPEAL TO THE APPOINTED PERSON BY THE OPPONENT FROM DECISION O-617-22
BY THE HEARING OFFICER MS L FAYTER ON BEHALF OF THE REGISTRAR OF TRADE MARKS

DECISION OF THE APPOINTED PERSON

1. The trade mark applied for ('the Trade Mark') is the mark

Powersheer

in respect of the following goods in class 9:

'Chargers for electric batteries; galvanic cells; battery chargers; galvanic batteries; batteries, electric; rechargeable electric batteries; Universal serial bus [USB] cables; USB cables; power controllers'

Although the mark is written in a standard font, it is said by the Opponent to be a figurative mark, so I have reproduced it as it appears on the Register, though nothing ultimately turns on this distinction.

2. The Opposition is brought by Positec Group Limited under s5(2)(b) of the Trade Marks Act 1994 on the basis of 3 registered marks. Their best case was based on the word series mark 3623411 registered as of 8 April 2021 ('the Earlier Mark')

POWER SHARE

POWERSHARE

3. The Earlier Mark covers a vast range of goods, including goods in class 9 which are identical or effectively identical to the goods of the Trade Mark.

4. The Hearing Officer found that there was no likelihood of confusion on the part of the average consumer, either direct or indirect, between the Earlier Mark and the Trade Mark. I can summarise her reasoning as follows:

   (i) The Earlier Mark only has a 'low to medium' degree of distinctive character in respect of the goods covered by the Trade Mark because of its highly allusive nature. The Earlier Mark conveys the idea of the sharing of power. When used in relation to batteries, chargers and cables, this would be understood as alluding to a beneficial characteristic which such goods may have. There was no claim of enhancement of distinctive character through use.

   (ii) Whilst the Trade Mark is visually and aurally very similar to the Earlier Mark, it conveys a concept which differs, save that it also refers to 'power'. The overall concept of the Trade Mark conveys the idea of a large amount of power, rather than the sharing of power.

   (iii) Given that the similarities between the marks lie in words which are highly descriptive of the goods, and the fact that the concepts

conveyed by each Mark are different, the visual and aural similarities between the Earlier Mark and the Trade Mark are not of the kind which would be likely to cause direct confusion between them.

(iv) A consumer who had recognised that the Trade Mark was not the same as the Earlier Mark would not think that there was an economic link between them. Rather they would see the similarities are merely coincidental given that it was reasonable to expect more than one trader to use the word POWER in respect of the goods in question. Even if the Earlier Mark had been 'brought to mind' by the later mark, there would therefore be no indirect confusion.

5. The Opponent was represented before me by Ms Georgina Messenger of Counsel who fairly recognised the particular difficulties in seeking to appeal a decision of a Hearing Officer on the question of likelihood of confusion. I explained the reasons for this in my decision in Rochester Trade Mark O-049-17 as follows:

> *33. I fear that far too much ink has been already spilled by Appellate Courts on these issues with diminishing returns, and I therefore do not propose to say a great deal more. So far as the particular context of this appeal is concerned, I would simply add that the reluctance of the Appointed Person to interfere with a decision of a Hearing Officer on likelihood of confusion is quite high for at least the following reasons:*

(i) The decision involves the consideration of a large number of factors, whose relative weight is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case

(ii) The legal test 'likely to cause confusion amongst the average consumer' is inherently imprecise, not least because the average consumer is not a real person

(iii) The Hearing Officer is an experienced and well-trained tribunal, who deals with far more cases on a day-to-day basis than the Appellate tribunal

(iv) The legal test involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade. Any wise person who has practised in this field will have come to recognize that it is often very difficult to make such a prediction with confidence. Jacob J (as he then was) made this point in the passing off case Neutrogena v Golden [1996] RPC 473 at 482:

'It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced I said more and more "it depends on the evidence."'

Any sensible Appellate tribunal will therefore apply a healthy degree of self-doubt to its own opinion on the result of the legal test in any particular case.

34. I shall therefore approach this appeal on the basis that in the absence of a distinct and material error of principle, I ought not to interfere with the decision of the Hearing Officer unless I consider that his view on the issue of likelihood of confusion was clearly wrong in the sense that it was outside the range of

views which could have been reasonably taken on the established facts.

6. The Opponent put forward a number of Grounds of Appeal agains the findings of the Hearing Officer on both direct and indirect confusion.

Direct confusion

(a) The Hearing Officer is said to have been wrong to conclude that the visual similarity between the marks was ‘medium to high’, and should have concluded that it was ‘high’.

7. I find it hard to see how this can be said to be an ‘error of principle’ or a matter on which the Hearing Officer’s view was outside the spectrum of reasonably held views.

8. First, the concepts of ‘high’ and ‘medium to high’ are so inherently vague that I am not sure on what basis one can even debate the question of whether a Hearing Officer was correct to place the similarity in one category rather than another. I also strongly doubt whether there is any point in making an attack on such a finding. I am aware that Hearing Officers often use these categories to characterise the level of ‘visual’ ‘aural’ and ‘conceptual’ similarities between marks, but the answers do little more than give a general indication of a process of reasoning. It is not as if there is an equation (‘two highs and a medium = likelihood of confusion’) which is applied to these findings. I would

encourage Appellants not to make challenges of this kind, or to characterise them as 'points of principle'.

9. Second, the conclusion seems to me (subject to the point made above) to be reasonable enough.

10. Third, the reasons given for attacking it are not well-founded. The first reason is the suggestion that the Hearing Officer did not recognise that the public would break the respective marks down to 'POWER SHARE' and 'POWER SHEER' respectively. This is clearly not correct, as indicated by the Hearing Officer's reasoning in paragraph 47 of her Decision where she notes that the word POWER is the common beginning element of both marks, but that it is of low distinctive character. The second reason is that the Hearing Officer is said to have 'failed to consider' that although the last 3 letters of SHARE and SHEER are different in pattern they differ only in a single letter (A as opposed to E). It seems to me very unlikely that the Hearing Officer did not consider this since she specifically points out in paragraph 34 that one mark ends in the letters A, R, E and the other in the letters E, E, R. The Hearing Officer, however, rightly did not engage in a game of letter counting. Rather she pointed out at paragraph 47 that the effect of the different endings, which create different words with different concepts, is to provide a clear differentiation between the marks.

(b) The Hearing Officer is said to have been wrong to conclude that the aural similarity between the marks was 'medium to high' and should have concluded that it was 'high'.

11. The general points made in paragraph 8 above apply here as well. The objection taken by the Opponent to the Hearing Officer's approach is that she characterised both marks as comprising 4 syllables, POW-ER-SH-ARE and POW-ER-SH-EER, the first three of which were the same and the last different. The Opponent pointed out that, strictly, SHARE and SHEER are single syllables. This is not only a trivial objection, it does not even help the Opponent. Had the Hearing Officer identified the words as having 3 syllables, she would have concluded that 2/3 of the syllables were the same. In fact she concluded that 3/4 of the syllables were the same (a higher proportion, thus presumably in the Opponent's favour).

(c) The Hearing Officer is said to have been wrong to differentiate between the goods that were identical and the single category of goods of the Application ('galvanic cells') which was only similar to a medium-high degree.

12. This point was not pursued before me.

(d) The Hearing Officer is said to have been inconsistent in her approach. She is said to have assessed similarity with no consideration of the fact that the marks comprised two recognisable words, but to have approached likelihood of confusion by discounting the word POWER. It is said that neither approach was in fact correct.

13. This point was argued before me although it is not discernible in the Grounds of Appeal. I consider that it has no merit. It is quite plain that

the Hearing Officer did consider the fact that the marks comprised two recognisable words, both when considering similarity and when considering likelihood of confusion. This is plainly the right approach, because it reflects the reality of what the average consumer would see in the marks. The Hearing Officer was also plainly right to discount the significance of the word POWER itself, since it is entirely descriptive of the goods in question.

14. I cannot see any error of principle in the Hearing Officer's approach to likelihood of direct confusion.

Indirect confusion

15. The Hearing Officer is said to have erred in principle by not considering whether POWERSHEER would be considered by the average consumer to be a ‘brand extension’ of POWERSHARE, or at least by not doing so on the correct basis. The argument is that if the owners of POWERSHARE as a brand for batteries had wished to bring out a ‘high power’ range, POWERSHEER would have been a logical name to adopt, and therefore that the average consumer would conclude that this is what had happened.

16. The argument before me was founded on my Decision in LA Sugar v Back Beat BL-O/375/10 in which at paragraph 17 I gave some examples of categories of brand extension which might be expected to be recognised as such by the average consumer. The third example I gave was as follows:

‘(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (‘FAT FACE’ to ‘BRAT FACE’ for example).’

17. Ms Messenger contended that the Hearing Officer had erred by not citing paragraph 17 of my Decision in LA Sugar (although she did cite the general guidance I gave in paragraph 16).

18. It is hard to see how the Hearing Officer can be criticised for not citing this paragraph. LA Sugar was not relied on in the Opponent's submissions before her. The argument on indirect confusion was put very shortly and in entirely general terms, citing a paragraph from the decision of the ECJ in Fifties T 104/01 ('Miss Fifties' device v 'Fifties' for clothing).

19. As I have mentioned, the Hearing Officer dismissed the indirect confusion case on the basis that the common element between the marks was so descriptive that the average consumer would not think there was any connection (as opposed to a coincidental use of the same word). This is a perfectly valid basis for concluding that the average consumer would not assume that this was the type of brand extension I mentioned in paragraph 17(c) of LA Sugar. The instance I gave there ('FAT FACE' to 'BRAT FACE') was of course an actual example of a clothing brand bringing out a brand extension for children's wear. It may be noted that (a) the two elements of the original mark FAT FACE were both inherently distinctive and the mark also benefited from acquired distinctive character (b) the extension used one distinctive element of the original mark, rhymed with the other one, and did not use any descriptive element itself. The connection between the marks was therefore striking and obvious. That is not the case here. POWERSHARE is not particularly distinctive and the word in common, POWER, is entirely descriptive.

20. In my view the Hearing Officer did not err in principle. Furthermore I believe she was clearly right to reject the argument of indirect

confusion. The fact that one could imagine how the owner of POWERSHARE might choose to adopt POWERSHEER for a new range does not mean that the average consumer would conclude, simply on the basis of seeing the marks themselves, that this had actually happened. With FAT FACE and BRAT FACE, there is no likely alternative explanation for the similarity, so the conclusion is highly likely to be drawn. But in the present case, there is another reasonable (perhaps even more likely) explanation, namely that the similarity is down to coincidence, given the descriptive nature of the marks. Thus even if a consumer idly wondered whether there might be a connection between the marks, they would have insufficient basis for concluding that there actually was one.

Conclusion

21. I dismiss the appeal, and direct that the mark proceeds to grant. Since the Applicant took no part in the appeal, I will not make any order for costs.

IAIN PURVIS KC

The Appointed Person

5 March 2023