

O-377-17

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3200736 BY
SUNSHINE HOLDINGS LIMITED**

TO REGISTER:

SUNSHINE

AS A TRADE MARK IN CLASSES 14, 26 & 38

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 60000618 BY
HALO MOBILE LTD**

Background & pleadings

1. On 6 December 2016, Sunshine Holdings Limited (“the applicant”) applied to register the trade mark: **SUNSHINE** for the goods and services shown in paragraph 12 below.

The application was published for opposition purposes on 24 February 2017.

2. On 16 March 2017, the application was opposed in full under the fast track opposition procedure by Halo Mobile Ltd (“the opponent”). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) .The opponent relies upon United Kingdom registration no. 3199004 of the trade mark **sunshine mobile** which has an application date of 27 November 2016, a registration date of 24 February 2017 and which stands registered for the services shown in paragraph 12 below. The opponent states:

“The trade mark “SUNSHINE” is far too similar to our registered mark “sunshine mobile” and also requesting the same class 38 telecommunications which is totally unacceptable for us.”

3. The applicant filed a counterstatement in which the basis of the opposition is denied.

4. In these proceedings, the opponent is represented by Appleyard Lees IP LLP; the applicant represents itself.

5. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

6. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. No leave was sought in respect of these proceedings.

7. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary; only the opponent filed written submissions which I will refer to, as necessary, below.

DECISION

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

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

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

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

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

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

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

10. The registration upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As this earlier trade mark is not subject to proof of use, the opponent is entitled to rely upon all of the services it has identified.

Section 5(2)(b) – case law

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

The principles:

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

12. The competing goods and services are as follows:

The opponent's services	The applicant's goods and services
<p>Class 38 - Communications by means of mobile phones; Mobile telephone communications; Telephone and mobile telephone services; Mobile telephone messaging services; Video telephone services; Leasing of mobile telephone lines; Mobile telephone telecommunications services provided via prepaid telephone calling cards; Transmission of messages by mobile telephone; Mobile telephony services; Provision of an electronic mobile telephone top-up system; Communication network consultancy; Mobile telecommunication network services; Providing access to mobile telecommunication networks; Wireless communications services; Provision of wireless application protocol services including those utilising a secure communications channel; Electronic network communications; Providing access to electronic communications networks; Transmission of information by electronic communications networks; Communications via a global computer network or the internet; Transmission of messages, data and content via the</p>	<p>Class 14 - Precious metals; jewellery; precious stones; chronometric instruments.</p> <p>Class 26 - Lace; embroidery; ribbons; braid; buttons; hooks and eyes; pins; needles; artificial flowers.</p> <p>Class 38 - Telecommunication services; communication services for the electronic transmission of voices; transmission of data; electronic transmission of images, photographs, graphic images and illustrations over a global computer network; transmission of data, audio, video and multimedia files; simulcasting broadcast television over global communication networks, the Internet and wireless networks; provision of telecommunication access to video and audio content provided via an online video-on-demand service; satellite communication services; telecommunications gateway services.</p>

<p>Internet and other communications networks; Hire, leasing or rental of telecommunication apparatus, instruments, installations or components for use in the provision of all the aforementioned services; Information, advice and consultancy in relation to all the aforesaid services.</p>	
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13. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the Court stated at paragraph 23 of its judgment that:

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

14. 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 users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) The extent to which the respective goods or services are competitive. This enquiry 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.

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

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

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

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

17. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criteria 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 (“GC”) 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”.

In *Sanco SA v OHIM*, Case T-249/11, the GC 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-O-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.”

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.”

18. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the GC stated:

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03

Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

19. In its submission, the opponent states:

“9. As noted, above, we submit that all class 38 services of [the application] have a counterpart in [the earlier trade mark] but if that is not accepted then we submit that it is beyond doubt that all class 38 services of [the application] are similar to the services covered by [the earlier trade mark].

11...We would however like to address the point regarding similarity of the class 14 and 26 goods that are covered by the application and the class 38 services [of the earlier trade mark]. It is submitted there is a likelihood of confusion, including a likelihood of association in relation to those goods. For example, wearable “smart” devices which are capable of telecommunication are increasingly common and frequently provided by the same undertakings that provide telecommunications services. Chronometric instruments such as watches fall within this category of telecommunication device. Consequently, the goods of [the application for registration] are sufficiently similar to the services of the [the earlier trade mark] for there to be a likelihood of confusion.”

And:

“12...Furthermore, whilst the similarities are lower in relation to the class 14 and 26 goods there remains a likelihood of confusion including a likelihood of association.”

20. In its Notice of opposition (filed prior to it appointing a professional representative), the opponent stated:

“The trade mark “SUNSHINE” is far too similar to our registered mark “sunshine mobile” and also requesting the same class 38 telecommunications which is totally unacceptable for us.”

The applicant's goods in classes 14 and 26

21. Notwithstanding that the opponent indicated that it was opposing “all goods and services” in the application, in my view, its statement in paragraph 20 clearly speaks to an intention to only oppose the services in class 38 of the application. Although the tension between those positions was not picked up and queried by the tribunal at the outset and whilst the opponent maintains that there are similarities between its services and the applicant's goods in classes 14 and 26, in its submissions, it only specifically refers to “chronometric instruments” in class 14. I suspect that the reason for that is that having applied the relevant case law, like me, it was unable to identify any similarity between the remaining goods in class 14 i.e. “precious metals”, “jewellery” and “precious stones” and any of the goods in class 26. Absent an explanation of why its services in class 38 clash with the goods I have identified above, I find there is no similarity between the competing goods and services.

22. That leaves the applicant's “chronometric instruments” to consider. As I mentioned above, the opponent states:

“11...For example, wearable “smart” devices which are capable of telecommunication are increasingly common and frequently provided by the same undertakings that provide telecommunications services. Chronometric instruments such as watches fall within this category of telecommunication device.”

23. Basing my assessment on the goods specifically identified by the opponent i.e. watches, I accept that, for example, a smart watch is capable of telecommunication; such goods are, however, proper to class 9. That said, I further accept that watches in class 14 are not limited to traditional watches. Goods which are primarily time pieces fall in class 14, but such goods may also serve other purposes, for example, counting steps or tracking the user's position using GPS technology.

24. While the users of the competing goods and services may be the same and although there may be some superficial similarities in the intended purpose i.e. to allow something to be communicated, that level of generality tells one little. In my

view, the high point of the opponent's case lies in the complementary nature of the goods and services it has identified. However, even if a watch in class 14 had a secondary telecommunication function, making the respective goods and services "indispensable or important for the use of the other" (thus passing the first leg of the test), I am not aware, and the opponent has provided no evidence in support of its submission that such goods "are...frequently provided by the same undertakings that provide telecommunications services." Absent evidence to make good the opponent's submission, I find there is no meaningful similarity between the opponent's services and the applicant's "chronometric instruments".

25. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

"49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity."

26. Where there is no similarity in the competing goods and services, the test for likelihood of confusion is not engaged. As I have concluded that there is either no or no meaningful similarity between the opponent services in class 38 and the applicant's goods in classes 14 and 26, the opposition against these goods fails and is dismissed accordingly.

Class 38

27. The opponent's specification includes a number of broad terms, for example, "Telephone and mobile telephone services", "Mobile telecommunication network services", "Wireless communications services", "Electronic network communications", "Providing access to electronic communications networks", "Transmission of information by electronic communications networks",

“Communications via a global computer network or the internet” and “Transmission of messages, data and content via the Internet and other communications networks”. The applicant has applied for “telecommunication services” which would include, inter alia, all of the above services in the opponent’s specification; these services are identical on the *Meric* principle. Beyond that, however, it is clear that the remaining services in the applicant’s specification (all of which relate to either communication or transmission), are either encompassed by one or more terms appearing in the opponent’s specification or are alternative ways of describing the same services. As a consequence, these services are also identical.

The average consumer and the nature of the purchasing act

28. As the case law above indicates, it is necessary for me to determine who the average consumer is for the services I have found to be identical; I must then determine the manner in which these services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

29. Although I have no evidence or submissions to assist me, my own experience informs me that the average consumer of the, broadly speaking, telecommunication services at issue is either a member of the general public buying for personal use or a business user buying on behalf of a commercial undertaking. My experience as a member of the general public tells me that the names of those providing such services will be encountered on, for example, signage on the high street, the pages

of websites and in advertisements in magazines and on television, all of which suggests that visual considerations will have an important part to play in the selection process. However, as such services may also, in my experience, be the subject of word-of-mouth recommendations and requests to sales assistants in a bricks and mortar retail outlet or by telephone, aural considerations will also play their part, albeit, in my view, to a lesser extent. Absent evidence or submissions to the contrary, I see no reason why similar considerations would not also apply to a business user selecting such services.

30. As to the degree of care the average consumer will pay when selecting the services at issue, my own experience informs that when selecting communications services, one will be alive to factors such as network coverage, breadth of services offered, contract periods, cost etc. all of which suggest to me that the average consumer will pay at least a reasonable degree of attention to the selection of the services at issue. As a businesses' telecommunications requirements are likely to be of critical importance to its success and as not insignificant sums may well be in play, I would expect a business user to pay a relatively high degree of attention when selecting the services at issue.

Comparison of trade marks

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

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

that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

The opponent’s trade mark	The applicant’s trade mark
sunshine mobile	SUNSHINE

33. The applicant’s trade mark consists solely of the English language word “SUNSHINE” presented in block capital letters; it, together with its meaning, will be very well-known to the average consumer. The overall impression conveyed by and the distinctiveness of the applicant’s trade mark lies in the single word of which it is composed.

34. The opponent’s trade mark also contains this word, albeit presented in lower case, as the first word in its trade mark. The second word in the opponent’s trade mark i.e. “mobile” is also presented in lower case; it and its meaning will also be very well-known to the average consumer. Although the word “mobile” will contribute to the overall impression the opponent’s trade mark conveys, when considered in the context of the services for which it is registered, it has no distinctive character and will have very little weight in the overall impression conveyed. The overall impression conveyed by the opponent’s trade mark will, as a consequence, be dominated by the word “sunshine” and it is in that word the distinctiveness of the opponent’s trade mark resides.

The visual, aural and conceptual comparison

35. The applicant’s trade mark consists solely of the seven letter word “SUNSHINE”. This word, albeit presented in lower case, is the first word in the opponent’s trade

mark and is also its distinctive and dominant component. Although the word “mobile” will make a small contribution to the overall impression the opponent’s trade mark conveys, the competing trade marks are still visually similar to at least a high degree.

36. The applicant’s trade mark and the first word in the opponent’s trade mark will be articulated in an identical manner. Given the nature of the services at issue, it is, in my view, doubtful if the word “mobile” will be articulated at all. If it is not articulated, the competing trade marks are aurally identical. However, even if it is articulated, as the word “sunshine” would be articulated first, the competing trade marks would still be aurally similar to a high degree.

37. Finally, the conceptual comparison. As I mentioned earlier, the words of which the competing trade marks are composed and their meanings will be very well-known to the average consumer. For the avoidance of doubt, however, collinsdictionary.com records that “sunshine” and “mobile” mean, inter alia, “the light and heat that comes from the sun” and “a mobile is the same as a mobile phone”, respectively; I have no doubt that those are the meanings that the average consumer will accord to the words. As the word “mobile” is not distinctive and does not in any case do anything to modify the meaning that will be conveyed to the average consumer by the word “sunshine”, the competing trade marks are, in my view, conceptually identical.

Distinctive character of the earlier trade mark

38. The distinctive character of a trade mark can be appraised only, first, by reference to the services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the services for which it has been registered as coming from a particular undertaking and thus to distinguish those services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

39. These are fast track opposition proceedings in which it was not necessary for the opponent to provide evidence of the use it may have made of its earlier trade mark. As it did not, I have only the inherent characteristics of its trade mark to consider. Having already concluded that the word “mobile” has no distinctive character, it is the distinctiveness of the word “sunshine” that is crucial. Although a very well-known word, there is no evidence or submissions to suggest that this word is anything other than distinctive. Absent use, the “sunshine” component of the opponent’s trade mark is, in my view, possessed of at least an average degree of inherent distinctive character.

Likelihood of confusion

40. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision I concluded that:

- the competing services in class 38 are identical;
- the average consumer is either a member of the general public or a business user;
- although visual considerations will have an important part to play in the selection process, aural considerations will also play their part, albeit to a lesser extent;

- the average consumer groups identified above will, respectively, pay at least a reasonable and relatively high degree of attention to the selection of the services at issue;
- the overall impression conveyed by the applicant's trade mark and its distinctiveness lie in the single word of which it is composed;
- although the word "mobile" will make a small contribution to the overall impression the opponent's trade mark conveys, the overall impression conveyed will be dominated by the word "sunshine" and it is in that word the distinctiveness of the opponent's trade mark resides;
- the competing trade marks are visually similar to a high degree, aurally similar to at least a high degree and conceptually identical;
- the opponent's earlier trade mark is possessed of at least an average degree of inherent distinctive character.

41. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He stated:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."

42. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask 'in what does the distinctive character of the earlier mark lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

43. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and services down to the responsible undertakings being the same or related.

44. Earlier I concluded that the average consumers of the identical services at issue in these proceedings will pay at least a reasonable degree of attention during the selection process; this will, of course, make them less prone to the effects of imperfect recollection. However, even a high degree of circumspection during the selection process would, in my view, do nothing to offset the (at least) high degree of visual and aural similarity and conceptual identity between the competing trade marks which will, in my view, inevitably lead to direct confusion.

Overall conclusion

45. The opposition has succeeded in relation to the services in class 38 and failed in relation to the goods in classes 14 and 26. Subject to any successful appeal, the application will be refused for the services in class 38 and will proceed to registration in respect of the goods in classes 14 and 26.

Costs

46. Although both parties have achieved a measure of success, the applicant has been more successful than the opponent. Awards of costs in fast track opposition proceedings filed after 1 October 2015 are governed by Tribunal Practice Notice ("TPN") 2 of 2015. Using that TPN as a guide, but making a "rough and ready" reduction to reflect (i) the measure of the opponent's success, (ii) the shortness of the Notice of Opposition and (iii) the content of the counterstatement which

contained, inter alia, a number of errors (including, for example, referring to completely the wrong goods in class 14), I award costs to the applicant on the following basis:

Preparing a statement and considering £80
the opponent's statement:

47. I order Halo Mobile Ltd to pay to Sunshine Holdings Limited the sum of £80. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 10th day of August 2017

C J BOWEN
For the Registrar