

O-478-17

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS INVOLVING:

**1) CAPALLINI LLP'S OPPOSITION (NO. 406683) AGAINST THE
REGISTRATION OF TRADE MARK NO. 3149189 APPLIED FOR BY
ARLEC AUSTRALIA PTY LTD**

AND

**2) ARLEC AUSTRALIA PTY LTD'S APPLICATION (NO. 501210) TO REVOKE
ON THE GROUNDS OF NON-USE REGISTRATION NO. 2526097 OWNED
(AND RELIED UPON IN THE ABOVE OPPOSITION PROCEEDINGS) BY
CAPALLINI LLP**

BACKGROUND AND PLEADINGS

1. The two trade marks which are the subject of these consolidated proceedings are as follows:

- i) UK trade mark application 3149189 for the mark  which was filed by Arlec Australia Pty Ltd (“Arlec”) on 11 February 2016 and published for opposition purposes on 26 February 2016 in respect of the following class 11 goods.

Lighting products, including Christmas lights (other than candles), cord pendants (light fittings), decorative lights, table lights, floor lights, downlights, electric light bulbs, electric light fittings, electric lights, electric lights for festive decorations, fittings for wall lights (other than switches), flange light fittings, fluorescent light bulbs, fluorescent lights, garden lights, light assemblies, light fittings, light hanging apparatus, light reflectors, light shades, light-emitting diode (LED) lighting apparatus, lighting apparatus utilising light emitting diodes (LEDs), lights for wall mounting, night lights (other than candles), opaque casings for lights, plastic louvres being light fittings, shades for light sources, spotlights, strings of coloured lights, strobe lights, torches, under cabinet lights, wall lights; parts and accessories for the aforesaid goods included in this class.

- ii) UK trade mark registration 2526097 for the mark  which was filed on 16 September 2009 and subsequently registered on 26 February 2010. The proprietor of the mark is Capallini LLP (“Capallini”) and the mark is registered for the following class 11 and 20 goods:

Domestic lighting apparatus; parts and fittings for the aforesaid goods; but not including reception furniture, boardroom furniture, meeting room furniture, seating, office furniture, educational furniture and business furniture.

Domestic furniture; cabinets, doors, plinths, cornices, pelmets, work surfaces, drawers, shelves, pilasters, wine racks, integrated storage systems, wirework, wicker baskets, handles, hinges, mirrors, picture frames, chairs, stools, stands, appliance housings, all for domestic use; parts and fittings for the aforesaid goods; but not including reception furniture, boardroom furniture, meeting room furniture, seating, office furniture, educational and business furniture.

2. Capallini oppose the registration of Arlec's mark under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). The first two grounds are based on its earlier trade mark registration (no. 2526097), the third ground on the basis of its claimed use of a sign corresponding to the earlier mark since January 2010. I note that the earlier mark relied upon is subject to the proof of use provisions contained in section 6A of the Act given that it had been registered for more than five years at the time when Arlec's mark was published for opposition purposes. To that extent, Capallini made a statement of use that its earlier mark had been used for all of the goods for which it is registered.

3. Arlec defended the opposition on a number of basis:

- i) By putting Capallini to proof of use of the earlier mark.
- ii) By questioning the locus of Capallini to make its opposition.
- iii) By highlighting differences between the marks and the goods and that, in its view, no likelihood of confusion would arise.
- iv) By denying that Capallini has a reputation or that the section 5(3) heads of damage would arise.
- v) By putting Capallini to proof in relation to its passing-off claim and denying that the ground would arise.
- vi) By highlighting that it has also filed a revocation claim against the earlier mark.

4. As stated above, Arlec also made an application to revoke Capallini's mark on the grounds of non-use. It relies on section 46(1)(a) of the Act which means that the relevant period for the assessment is 27 February 2010 to the 26 February 2015. Capallini defended the claim on the basis that it had used its mark for "lighting apparatus" in class 11 and "furniture" in class 20.

5. Both parties filed evidence. Neither party asked to be heard, both opting to file written submissions in lieu. Arlec has been represented by D Young & Co, Capallini has represented itself.

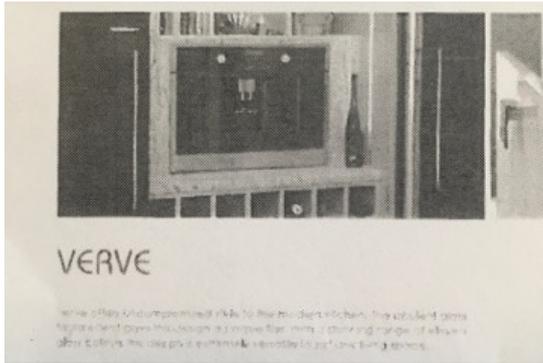
6. I will first determine the proof of use and revocation issues, as this may have an impact on the scope of the opposition case. I begin, though, with a summary of the evidence.

THE EVIDENCE

Capallini's evidence dated 31 January 2017

7. This comes from Mr Paul Slater, a partner in Capallini. He begins by stating that the trade mark VERVE was first used in the UK in 2012 by Kessler UK Ltd ("Kessler") "under agreement" by Capallini. Various documents are provided which are intended to show the goods on which the mark has been used and the first date of use, as follows:

- DOC 1- What is described as a catalogue excerpt from 2013. It shows a kitchen interior and close-ups of some appliances and cupboards. The word VERVE is depicted in slightly cursive script, as follows:



- DOC 2 – An invoice for the production of the catalogue dated 31 August 2012. 25000 copies were produced.
- DOC 3 – An order acknowledgement dated 8 November 2012. It is headed Kessler (with the E in Kessler being similar to the E in the word VERVE as registered). The plain word Verve is used a number of times, namely: alongside the word “address”, alongside the words “door colour” and written as “Verve-Cream”, under the heading furniture there is reference to “Door Verve” and another reference to “Verve – Cream” as a door colour. Despite what Mr Slater says in his witness statement, there is no specific mention of lighting products.
- DOC 4 – Information in an email about promotional costs which Mr Salter says relates to VERVE “and other products”. Between 2011 and 2015 this has ranged between £13k at its lowest and £35k at its highest.
- DOC 5 - Some photographs of Kessler’s stands (taken from Kessler’s website) at an exhibition which took place at the NEC in 2014. Text has been added to the print indicating that the photographs show the “Verve Island” incorporating “verve lighting”. No branding can be seen on any of the photographs.
- DOC 6 – An email from a Scott Salter to Mr Slater which contains the text “Sensio spends for every trading year with them”, with figures reading 2014 (£2910), 2015 (£4804) and 2016 (£9435). Mr Slater states in his witness statement that this relates to lighting products purchased for integration into Kessler furniture.

Arlec's evidence dated 12 April 2017

8. This comes from Ms Natasha O'Shea, a trade mark assistant at D Young & Co. Her evidence is to introduce some facts that Arlec wishes to rely on, as follows:

- A press release from KBB Daily posted on 6 August 2014 reporting that the UK fitted kitchen market is worth in excess of £3 billion, with installation numbers (in 2015) exceeding 1.1 million.
- An article from Lux Review, a lighting magazine, which states that the UK lighting market is worth around £2 billion (as of 2015).
- A print from Collins English Dictionary defining furniture as consisting of "large objects such as tables, chairs, or beds that are used in a room for sitting or lying on or for putting things on or in".

9. The evidence was accompanied by a set of written submissions. Submissions were made about what it considers to be impermissible time periods given to Capallini to refile a counterstatement and evidence, submissions about the names provided on the Form TM7A (threatened opposition) and subsequent TM7 (notice of opposition) filed in the opposition proceedings, that no evidence had been provided showing the relationship between Kessler and Capallini and, finally, a number of submissions about the evidence of use provided by Capallini and whether it shows genuine use, including a submission highlighting that the mark as registered has not been used at all.

Capallini's reply evidence dated 19 June 2017

10. This consists of a covering witness statement from Mr Slater, the purpose of which is to respond to the criticisms made by Arlec in its submissions. Beyond some exhibits (which I come on to) Mr Slater's commentary is brief. He explains that Kessler and Capallini "are a single entity in these proceedings and that [Kessler] have unfettered use of [the trade mark]". He adds that he is a 50% partner in Capallini and a 37.5% shareholder in Kessler. In terms of accompanying exhibits, six of them are actually

short witness statements from other people. I summarise the contents of all of the exhibits below:

- Exhibit 1 is a copy of Arlec's submissions with added annotated cross-referencing to show what is being responded to.
- Exhibit 2 is a witness statement from David Middleton, director of a company called Double Dutch Interiors Ltd, a sales company which represents Kessler. He includes a copy of the same brochure excerpt that was filed earlier (depicting a kitchen) which Mr Middleton states was contained in a 2013 catalogue that he personally distributed at a trade show in the NEC in 2014. He states that substantial volumes had been previously distributed during the latter part of 2012 and throughout 2013 and 2014 to, for example, high street studios (approximately 10 to each retailer visited, to be further distributed to the public). He adds that 1000s were distributed. The catalogue was superseded in 2015. He says the VERVE product was physically displayed at the NEC and the VERVE product can be seen on the rear island in the image. On the brochure are hand written notes indicating where VERVE lights would have been installed. There is also a copy of the NEC photograph (also provided earlier) again with a handwritten note highlighting what is said to be VERVE lighting in a pull out draw.
- Exhibit 3 is a witness statement from Caroline Slater, also a 50% partner in Capallini and 37.5% shareholder in Kessler. Her evidence is much the same as Mr Middleton in terms of the production and distribution of the brochure. She states that the VERVE product was physically displayed at the NEC in the rear island of the kitchen.
- Exhibit 4 is a witness statement from Scott Slater, a 12.5% shareholder in Kessler. His evidence is also much the same.
- Exhibit 5 is a definition (from Collins English Dictionary) of the word INVOICE which reads "...a document that lists goods that have been supplied or services that have been done and says how much money you owe for them".

- Exhibit 6 is a definition from the same source for the word “cupboard” reading “..a piece of furniture that has one or two doors, usually contains shelves, and is used to store things....” Reference is also specifically made to a kitchen cupboard.
- Exhibit 7 is a definition for the word “cabinet” reading “..a cupboard used for storing things such as medicine or alcoholic drinks or for displaying decorative things in”.
- Exhibit 8 is a definition for the word “panel” reading “.. a flat rectangular piece of wood or other material that forms part of a larger object such as a door”.
- Exhibit 9 is a witness statement from Dean Stone, a CAD/CAM designer and technician at Kessler. He is responsible for ensuring that cut-outs in cabinets where integrated lighting is to be fitted are of the correct size. He also explains that cut outs were designed into the VERVE range from 2011. He refers to the order acknowledgement/invoice provided in Mr Slater’s initial evidence (dated 29/11/2012) and states that it was a VERVE kitchen with VERVE lighting underboards. He also provides a number of “works orders” on Kessler headed paper for what are, essentially, VERVE kitchens. There are seven in total, each one dating from 2014. On each is some form of reference, amongst other things, to lighting e.g. “HD Over-cabinet light..”, “Fit recessed light strip to recessed gable..”, “recessed HD cool strip light”.
- Exhibit 9 is a witness statement from Suzy Moore, director of a company called “The New Fat” that produced the brochure (referred to earlier) for Kessler in 2012. She states that the brochures were delivered to Kessler in August 2012 and that that was the only catalogue supplied to Kessler.
- Exhibit 11 is a witness statement from Daniel Melbourne, a supervisor in the “accessorisation” department of Kessler. His job is to fit accessories to kitchen cabinets, such as hinges, lift plates, wire works and lighting products. He states that he was trained by Dean Stone on how to fit the various “Verve lighting products” in to cabinets and accessories. He states that he has fitted hundreds

of lighting products in to “Kesseler Verve kitchens” since 2012 and that other operatives would also have fitted them.

- Exhibit 12 consists of what are, essentially, written submissions. I will bear them in mind but will not summarise them separately here.

DECISIONS

Procedural issues

The TM7A/TM7

11. A notice of threatened opposition was filed against Arlec’s mark on 29 March 2016 by Mr Paul Slater. The impact of a TM7A is to extend the time period in which an opposition may be lodged from two months to three months, but such an extension can only be utilised by the person filing the TM7A (or in the case of a company, a subsidiary or holding company¹). The trade mark was published on 26 February 2016. Whilst the TM7 Notice of opposition was filed within the extended period, on 25 May 2016, it was filed in the name “Paul Slater Capallini LLP”. This apparent inconsistency was highlighted to Mr Slater, as well as the fact that the earlier mark relied upon by the opponent was held in the name of “Capallini LLP”. Mr Slater responded stating that the name given on the TM7 was a mistake and that the opponent should be Capallini LLP and that he was a partner in that entity.

12. Arlec noted this in its counterstatement and requested that the opposition be struck out because it was received outside of the standard two month period to oppose. It was argued that Capallini was unable to avail itself of the extended period because it did not file the TM7A, nor can it be a subsidiary/holding company of the person that did (Mr Slater) because that person was not a company, and, thus, the rule is not applicable. The case-worker responded (in September 2016) stating that the mistakes in the names had been corrected to the satisfaction of the tribunal. Arlec

¹ See rule 17(3) of the Trade Mark Rules 2017 (“the rules”)

did not respond to the case-worker's acceptance of the name correction, although, it did raise the issue again in its written submissions dated 12 April 2017.

13. I consider that if Arlec wished to have the opposition struck out on the basis of the above then it ought to have challenged the view expressed by the tribunal in September 2016 by requesting a procedural hearing. It did not do so and, instead, matters progressed to the filing of evidence. Irrespective of this, whilst I agree that the effect of the rules is that only Mr Slater ought to have been able to avail himself of the extended period of time in which to file a notice of opposition, the Act also permits irregularities in procedure to be corrected on any terms the registrar thinks fit. It is clear that mistakes arose, the mistake in this case being the not uncommon conflation of an individual with the business he/she operates/directs. Although the case-worker gave little by way of detail in his letter to explain all this, I consider that the TM7A ought to be treated as de facto amended, on account of this irregularity in procedure, so as to record Capallini as the filer. The proceedings will not be struck out on account of this issue.

Late filed TM8N

14. Following Arlec's application to revoke Capallini's mark, Capallini was given a date to file a defence. A defence was received (on time) on Form TM8(N) but the box on the second page of the form (which is meant to include a counterstatement) was left blank. The tribunal gave Capallini an opportunity to put this right (which it duly did) and the TM8(N) was admitted into the proceedings.

15. Arlec did not object to this straight away, it only did so in its submissions filed in April 2017. Whilst I accept that the rules (specifically rule 38(3)) require that the TM8(N) "shall" include a counterstatement, I consider it disproportionate, particularly now, to revoke the registration due to a non-compliance of this nature, a non-compliance that was quickly put right. This is particularly so given that revocation of a mark on the basis of a non-compliance of this type includes a discretion to direct otherwise. Effectively, the tribunal has directed otherwise (and I confirm that here).

EOTs

16. I note that the tribunal took a further case-management decision allowing Capallini a retrospective extension of time to file evidence (in the proper form). Arlec was given a period of time to object to this (at that time preliminary) decision, but did not do so. The claimed improper granting of the extension was only mentioned later in its written submissions. I do not intend to re-open this matter now as the extension was requested, granted and not challenged in the time permitted to do so. I will, though, bear in mind the general points made by Arlec about what it says is the leeway that has been given to Capallini on a number of procedural issues, which Arlec says has increased the time and cost of these proceedings.

The relationship between Capallini and Kessler - consent

17. Arlec have stressed a number of times that the evidence does not show the relationship between Capallini and Kessler. This issue is particularly relevant in revocation and proof of use issues because the proprietor of a mark may only rely on the use it has made, or, alternatively, use that has been made with its consent.

18. Whilst it is true that no formal evidence of any license agreement has been filed in evidence, all the Act requires is consent. Further, consent may be inferred. Mr Slater has stated a number of times that the use by Kessler in the UK is with the agreement of Capallini. He has explained that he has a 50% partnership in Capallini and a 37.5% shareholding in Kessler which re-enforces that a consensual relationship as to use was in play. Whilst it would have been better to have seen express written agreements, this is not a pre-requisite. I accept that Kessler's use in the UK is with the consent of Capallini.

Substantive decisions - revocation and proof of use

Legislation and leading case-law

19. I will begin with the revocation and proof of use issues. In terms of revocation, section 46(1) of the Act is relevant, which reads:

“The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c).....

(d).....

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made: Provided that, any such

commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4)

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

20. For the opposition proof of use, section 6A is relevant:

“(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered [.....]”

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered [.....]

(5)

21. Section 100 is relevant to both matters; it reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

22. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Anor*, [2016] EWHC 52, Arnold J. summarised the case-law on genuine use of trade marks:

“217. In *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch), [2013] FSR 35 I set out at [51] a helpful summary by Anna Carboni sitting as the Appointed Person in *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] of the jurisprudence of the CJEU in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I added references to Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237). I also referred at [52] to the judgment of the CJEU in Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16 on the question of the territorial extent of the use. Since then the CJEU has issued a reasoned Order in 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 that Order has been persuasively analysed by Professor Ruth Annand sitting as the Appointed Person in *SdS InvestCorp AG v Memory Opticians Ltd* (O/528/15).

[218] ...

219. I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky-Order v*

Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky' [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, 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]; *Centrotherm* at [71]; *Leno* 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]; *Centrotherm* at [71]; *Leno* at [29].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56].

(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]; *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].”

23. In *Reber Holding GmbH & Co. KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM), Case T-355/09, the General Court found that the sale of 40-60Kg per annum of specialist chocolate under a mark was insufficient to constitute genuine use of a national trade mark, which was registered in Germany. On further appeal in Case C-141/13 P, the CJEU stated, at paragraph 32 of its judgment, that:

“not every proven commercial use may automatically be deemed to constitute genuine use of the trade mark in question”. (paragraph of the judgment).

24. The CJEU found that:

“the General Court conducted an overall assessment of that trade mark, taking into account the volume of sales of the goods protected by the trade mark, the nature and characteristics of those goods, the geographical coverage of the use of the trade mark, the advertising on the website of Paul Reber GmbH & Co. KG and the continuity of the trade mark’s use. It thus established a certain degree of interdependence between the factors capable of proving genuine use. The General Court therefore correctly applied the concept of ‘genuine use’ and did not err in law in its assessment of that use” (paragraph 34 of the judgment CJEU).

25. Proven use of a mark which fails to establish that “*the commercial exploitation of the mark is real*” because the use would not be “*viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark*” is, therefore, not genuine use.

The relevant periods

26. The relevant periods for the assessments are:

- i) For the opposition proof of use, the relevant period is: 27 February 2011 to 26 February 2016.
- ii) For the revocation proceedings, which are based on section 46(1)(a) of the Act only, the relevant period is: 27 February 2010 to the 26 February 2015.

The mark as registered v the mark as used

27. It is written submissions dated 12 April 2017, Arlec highlighted that none of the evidence that had been filed by Capallini, up until that point, depicted the mark in the form in which it was registered. Despite Capallini filing reply evidence, it still filed no evidence showing the mark in the registered form. Arlec’s accompanying submission was that that the first letter e in the registered mark had an independent and distinctive

effect and that the mark as used differed from the registered mark and could not be relied upon. Although it could be said that this submission at least foreshadowed the relevance of section 46(1)(2) of the Act, which permits the use of a mark to be relied upon in a different form, so long as that form does not alter the distinctive character from the form in which it is registered, I did not consider that the issue had been fully ventilated. I therefore sought submissions from both sides about the applicability, or otherwise, of section 46(2) of the Act. Submissions were duly received, of which I take full account.

28. There is no dispute that the mark has not been used in the form in which it is registered. In terms of understanding how to apply what is often referred to as the variant mark test, it is useful to note the decision of Mr Richard Arnold Q.C. (as he then was), sitting as the Appointed Person in *Nirvana Trade Mark*, BL O/262/06, where he summarised the test as follows:

"33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

29. Although *Nirvana* was decided prior to the judgment of the CJEU in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, it remains good law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered.

30. I set out below, first, the mark as registered, second, the variant form shown in the catalogue excerpt and, third, the plain word form, used on order forms:



Verve

31. Having identified the marks as registered/used, the first part of the second question in *Nirvana* is to consider “what is the distinctive character of the registered trade mark”. Capallini’s submissions focus on the word *verve* being the dominant and distinctive element of the mark and that the stylised letter *e*, a letter which it says is a common abbreviation for “electric” or “electricity”, is still clearly and obviously a letter *e*. Capallini does not agree with Arlec’s submission that the *e* is an independent and distinctive element in the registered mark.

32. The question is what is the distinctive character of the mark? In my view, it is undoubtedly true that the word *verve* per se is a key contributor to the distinctive character of the mark. I agree that it is the most important contributor. I agree that it is the dominant part of the mark. However, it would be wrong in an assessment of this type to ignore the contribution towards a mark’s distinctive character that may be made by other aspects of the mark. The letters *v*, *r*, *v* and the final letter *e* are presented in a particular form of presentation. However, the font is in my view relatively unremarkable and any distinctive character this stylisation adds is extremely minor. The point of conflict on which the parties are divided relates to the contribution made by the stylised (first) letter *e*. In my view, it is certainly notable, significantly more than the stylisation of the rest of the letters. Further, it is presented in a contrast form of shading compared to the other letters in the mark, which makes it stand out even more.

Its stylisation is far from insignificant. Whilst it can still be read, particularly in context, as a letter e, it strikes me as an unusual a form of presentation, with its longer swoosh like stem intersecting the left hand curve, together with a dot on its left hand tip. The fact that the letter may be an abbreviation for certain words is in my view neither here nor there. I come to the view that the stylised letter e makes a reasonable contribution to the distinctive character of the mark as registered.

33. The next step is to enquire “what are the differences between the mark used and the registered trade mark”. As far as I can see, and considering firstly the first variant depicted above, the differences are:

- i) The mark as registered is in lower case, the mark as used is in upper case.
- ii) Both marks are presented in a particular, but different, font, albeit, the fonts themselves (with the exception of the first letter e in the mark as registered) are fairly unremarkable.
- iii) The stylised first letter e.
- iv) The mark as used is apparently (according to Capallini’s submissions) used in colour (red) whereas the mark is registered is in black and white.

34. In terms of the second variant mark depicted above, the differences are:

- i) The mark as registered is in lower case, the mark as used is in title case.
- ii) The mark as registered is presented in a particular, albeit unremarkable font (with the exception of the first letter e in the mark as registered which has a greater degree of stylisation).
- iii) The stylised first letter e.

35. That then leaves the question as to whether the “differences identified in (b) [the second question] alter the distinctive character identified in (a) [the first question, regarding the mark as registered]. Arlec highlight that in *Nirvana* the decision goes on to say:

“There is interdependence between the strength of the distinctive character of a mark and the effect of alterations. Marks of strong distinctive character may

be less influenced by changes than marks of limited distinctiveness. On the other hand, additional or omitted elements in the mark are more likely to affect the distinctive character of marks of limited distinctiveness.

...

Where a mark is composed of several elements only one or some of which are distinctive and have rendered the mark as a whole registrable, an alteration of that element or its omission or exchange by another element will generally mean that the distinctive character is altered.”

36. However, the above appears to be taken from the OHIM (as it was then called) Guidelines on how to deal with variant marks as opposed to an addition to the test put forward by Mr Arnold. Alrlec’s main submissions are based upon the registered mark consisting, essentially, of two distinctive elements one of which is missing from the mark as used. It submits that the stylised e would be registrable on its own (and provides examples of other registered stylised e marks); that consumers are used to seeing businesses use stylised elements within marks to signify origin (the M in McDonalds for example) and that consumers identify the companies from that part of the mark. It is also highlighted that the stylised e is in fact present in the word Kessler on one of the invoices which further illustrates that the stylised e is intended to denote origin. It also refers to a decision of this tribunal in *Travel Fox* (BL O-095-16) where the absence in that case of a figurative component (even though it had less weight than the word component of that mark) in the mark as used meant that the distinctive character of the mark was altered; that decision was upheld on appeal, although I note that the Appointed Person (Mr Alexander Q.C.) dealt not with the absence of the figurative component (because the appellant accepted the Hearing Officer’s decision on that point) but an issue to do with the spatial separation of the elements of the mark.

37. In its written submissions, Capallini highlighted a particular case of the “court” but did not say which case or which court it was referring to. However, from the extract provided, the case in question appears to be *Hypen GmbH v EU IPO*, Case T-146/15 where the General Court (“GC”) held that the use of the mark shown below left was an acceptable variant of the mark as registered (below right), on the basis that the addition of a banal circle did not alter the distinctive character of the mark in the form in which it was registered.



The GC stated:

“28. ..a finding of distinctive character in the registered mark calls for an assessment of the distinctive or dominant character of the components added, on the basis of the intrinsic qualities of each of those components, as well as on the relative position of the different components within the arrangement of the trade mark (see judgment of 10 June 2010, *ATLAS TRANSPORT*, T-482/08, not published, EU:T:2010:229, paragraph 31 and the case-law cited; judgments of 5 December 2013, *Maestro de Oliva*, T-4/12, not published, EU:T:2013:628, paragraph 24, and 12 March 2014, *Borrajo Canelo v OHIM — Tecnoazúcar (PALMA MULATA)*, T-381/12, not published, EU:T:2014:119, paragraph 30).

29 For the purposes of that finding, account must be taken of the intrinsic qualities and, in particular, the greater or lesser degree of distinctive character of the [registered] mark used solely as part of a complex trade mark or jointly with another mark. The weaker the distinctive character, the easier it will be to alter it by adding a component that is itself distinctive, and the more the mark will lose its ability to be perceived as an indication of the origin of the good. The reverse is also true (judgment of 24 September 2015, *Klement v OHIM — Bullerjan (Form of an oven)*, T-317/14, not published, EU:T:2015:689, paragraph 33).

30 It has also been held that where a mark is constituted or composed of a number of elements and one or more of them is not distinctive, the alteration of those elements or their omission is not such as to alter the distinctive character of that trade mark as a whole (judgment of 21 January 2015, *Sabores de Navarra v OHIM — Frutas Solano (KIT, EL SABOR DE NAVARRA)*, T-46/13, not published, EU:T:2015:39, paragraph 37 and the case-law cited).

31 It must also be remembered that, in order for the second subparagraph of Article 15(1)(a) of Regulation No 207/2009 to apply, the additions to the registered mark must not alter the distinctive character of the mark in the form in which it was registered, in particular because of their ancillary position in the sign and their weak distinctive character (judgment of 21 June 2012, *Fruit of the Loom v OHIM — Blueshore Management (FRUIT)*, T-514/10, not published, EU:T:2012:316, paragraph 38).

32 It is in the light of those considerations that it must be determined whether the Board of Appeal was correct in finding, in paragraph 9 of the contested decision, that it had not been proven that the European Union trade mark rights had been used in a manner so as to preserve them either in the form registered or in any other form that constituted an allowable difference in accordance with the second subparagraph of Article 15(1)(a) of Regulation No 207/2009.”

38. Capallini submit (the essence of the text in the submission appears to have been taken for an earlier decision of this tribunal) that these findings indicate that the relative distinctiveness of the registered mark and the components added to (or omitted from) it in use are relevant factors to take into account in the required assessment. It submits that “verve” is clearly the dominant and distinctive element and the omission of the stylised e does not alter its distinctive character - as noted earlier, reference is made to the stylised element clearly being an e and, further, that it is a common abbreviation for electric or electricity.

39. Capallini also refer to the decision of the GC in *Menelaus BV v EUIPO*, Case T-361/13. It was held that despite the mark being registered in the form depicted on the right below, the use shown on the left and middle nevertheless constituted use of the registered mark:



40. Capallini state (again the core of the text appears to have been taken for an earlier decision of this tribunal) that the court held that the word VIGAR was the dominant and distinctive element of all the marks, and as regards the other features, the GC held that:

“73 [The first sign] sign differs from the earlier mark as registered only in the ascending orientation of its oval background, the use of standard lower-case instead of standard capital letters and the replacement of the crown element by a sequence of three dots. As the Board of Appeal rightly found, a different orientation of the same background, the use of upper-case or lower-case letters when they are standard letters which reproduce the same term, or the substitution of an ornamental element (the sequence of dots) for a laudatory element when both of those elements serve to reinforce the term ‘vigar’, are minor differences that do not alter the distinctive character of the earlier Community trade mark as it was registered.

74 That finding is not called into question if the second form of use, reproduced in paragraph 63 above, is taken into account inasmuch as, even though, in that case, the basic background disappears and the word ‘spain’ is present, the latter will be understood as a merely descriptive addition.”

41. I agree that the relative distinctiveness of the components that make up the mark, and the element which in this case has been removed in use, is a factor in the assessment. However, this brings me back to my finding about the distinctive character of the mark as registered and, as I have already indicated, I consider, even though the word “verve” may be the dominant element, that the stylised letter e (which in context is unlikely to be seen as an abbreviation for “electric” or “electricity”) makes a reasonable contribution towards its distinctive character and, in my view, its omission in the form as used creates a meaningful alteration to the distinctive character of the registered mark.

42. In view of the above findings, neither variant mark may be relied upon. With no use of the registered mark being made, Capallini fails to establish genuine use of its registered mark, with the consequence that:

i) Capallini's mark is revoked with effect from 27 February 2015.

ii) Capallini is unable to rely on its earlier mark in its opposition to Arlec's application, so meaning that the grounds under sections 5(2)(b) and 5(3) are untenable.

Substantive decision – section 5(4)(a) – passing-off

43. Section 5(4)(a) of the Act reads:

“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.”

44. Halsbury's Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing-off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House."

45. Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

"To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot

be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

46. In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), the Court stated:

“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.”

47. In *Hart v Relentless Records* [2003] FSR 36, Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in *BALI Trade Mark* [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used ‘but had not acquired any significant reputation’ (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.”

48. However, a small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing-off even though its reputation may be small. In *Stacey v 2020 Communications* [1991] FSR 49, Millett J. stated that:

“There is also evidence that Mr. Stacey has an established reputation, although it may be on a small scale, in the name, and that that reputation preceded that of the defendant. There is, therefore, a serious question to be tried, and I have to dispose of this motion on the basis of the balance of convenience.”

See also: *Stannard v Reay* [1967] FSR 140 (HC); *Teleworks v Telework Group* [2002] RPC 27 (HC); *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590 (COA)

49. In terms of what is required to establish goodwill, I note that in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

50. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the

application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

51. 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 Q.C., sitting as the Appointed Person, discussed the matter of the relevant date in a passing-off case:

“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.’ ”

52. The application the subject of the opposition was filed on 11 February 2016. Arlec have neither claimed nor evidenced any use prior to the date of filing. As such, this is the only date at which an assessment is to be made.

Goodwill

53. The sense I get from Capallini’s evidence as a whole is that its business activities in the UK (or, more accurately, Kessler’s activities) will have created a goodwill in connection with the sale of fitted kitchens. However, there are nevertheless a number of problems with Capallini’s case.

54. First, for a successful claim under section 5(4)(a), the opponent, Capallini, must be the owner of the goodwill in the UK, as per article 2 of The Trade Marks (Relative Grounds) Order 2007. Whilst I have accepted that Kessler’s use in the UK is with the

consent of Capallini, it does not follow that all forms of consensual use will result in any goodwill generated in the UK being owned, or partially owned, by the consenting party. Without understanding the nature of what was agreed, it cannot be assumed that Capallini owned, or partially owned, any goodwill.

55. Second, it is noted that in its pleaded case, Capallini relies on the use of a sign which corresponds to the registered mark, which, as I have already discussed, has not been used at all.

56. For both of the above reasons, Capallini's claim would fail. However, in case of appeal on those points, I will go on to consider whether the claim would, in any event, be made out.

57. In terms of goodwill, whilst I have accepted that the business may have generated a goodwill in the UK, it is important to note that no sales figures have been provided for the business at all. Thus, it is very difficult to work out the strength of any goodwill. There are some figures relating to promotional expenditure (£13k – £35k per annum) which, on the face of it, do not suggest anything other than a relatively small business. The only other evidence is that catalogues have been distributed (in the 1000s); that an exhibition has been attended at the NEC; and figures provided about the amount (in cost) of lighting products incorporated into Kessler kitchens. However, none of this evidence signifies to me any stronger degree of goodwill. Whilst Kessler may not be tiny in size, any goodwill, given the paucity of the evidence, and making the best of what has been provided, is to be assessed as relatively modest in size.

58. It is noteworthy, though, that what I have said above relates to the business as a whole. What is material in this case is the contribution that VERVE has made to the goodwill. There is evidence of some orders (around 7) for verve kitchens. There is also evidence showing that the VERVE kitchen appeared in one of Kessler's catalogues. However, what is not clear is the impact that this would have had on Kessler's customers or potential customers. It is not clear how many other kitchen ranges Kessler were offering. For example, was it just one of a few, or one of many? Evidence was also provided of the verve kitchen being on a trade stand in the NEC, however, there is nothing to indicate whether the verve name was even on show, let alone how

prominent it was. Whilst I do not doubt that some consumers will have purchased a verve kitchen (although how many is not clear) this is the type of product (irrespective of the fact that such things are reasonably expensive) where the name of the particular range purchased may not be something which has particular significance. Consumers may well recall the name of the manufacturer/supplier (Kessler) (and thus this forms part of the attractive force of the business that brings in custom) but not necessarily the particular range purchased. This problem is magnified by the fact that fitted kitchens are purchased very infrequently, so customers/potential customers will not build up familiarity on the basis of repeat purchase.

59. For any goodwill to be relevant in a claim to passing-off, the sign relied upon must be distinctive of the plaintiff. Given the issues I have set out above, I consider that the resonance the name VERVE has with the opponent's customers will be very limited and I cannot say that the sign is distinctive of it. The propositions I have outlined can be tested by considering the test for misrepresentation which was outlined by Morritt L.J. in *Neutrogena Corporation and Another v Golden Limited and Another*, 1996] RPC 473:

“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.”

60. If the sign relied upon is not distinctive of the opponent, or, at the best, only very weakly distinctive of it, I do not consider that a substantial number of people will be deceived into believing that the goods offered by Arlec under its mark are the responsibility (or connected in some way) to Capallini/Kesseler. This finding is reinforced given that although the kitchens sold by Kesseler in the UK may have integrated lighting, the goodwill is, essentially, in the field of fitted kitchens. Thus, there is even less propensity for deception when one considers the lighting products (even if they could be used in a kitchen) applied for. The opposition fails.

Overall outcome

61. Subject to any appeal:

- i) Capallini's registration (no. 2526097) is revoked with effect from 27 February 2015.
- ii) Arlec's application (no. 3149189) may proceed to registration.

Costs

62. Arlec has been successful in both sets of proceedings and is, therefore, entitled to a contribution towards its costs. My assessment is set out below, an assessment which includes an award of £300 in recognition of, and as a contribution towards, the extra costs that Arlec faced due to the various procedural issues discussed earlier:

Official fee (for revocation) - £200

Preparing a statement of case (in the revocation) and counterstatement (in the opposition), and considering the cases presented by Capallini - £500

Filing and considering evidence - £500

Written submissions - £500

Procedural issues - £300

Total - £2000

63. I order Capallini LLP to pay Arlec Australia Pty Ltd the sum of £2000 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 04th day of October 2017

Oliver Morris

For the Registrar,

The Comptroller-General