

O-082-10

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION

No. 2428932

**BY THE DEPARTMENT OF TOURISM AND LEISURE
(A DEPARTMENT OF THE ISLE OF MAN GOVERNMENT)**

TO REGISTER THE TRADE MARK

TOURIST TROPHY

**IN CLASSES 4, 6, 9, 12, 14, 16, 18, 20, 21, 24,
25, 26, 28, 30, 32, 33, 34, 36, 37, 39, AND 41**

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER No. 96308 BY

TRIUMPH DESIGNS LIMITED

BACKGROUND

1) On 3 August 2006, the Department of Tourism and Leisure (a Department of the Isle of Man Government (hereinafter the applicant), applied to register the trademark TOURIST TROPHY in respect of the following:

Class 4: Industrial oils and greases; motor oils; fuels; petrol; diesel; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 6: Badges, signs and plates; key rings; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 9: DVD's, videos, audio and sound recordings; sunglasses; motorcycle helmets and protective headgear; protective clothing, footwear and eye wear for motor cyclists, mobiles phone holders and accessories; hands free sets; telecommunication apparatus and instruments; pre-recorded television programmes; scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, life-saving and teaching apparatus; audio and visual apparatus and instruments; apparatus for recording and transmitting sound and images; guidance apparatus and instruments; encoded cards; computer software; computer programmes; computer games and apparatus; video games and apparatus; computer games console and apparatus; games contained in computer media disks for video and computer games; apparatus for playing audio and visual games; electronic games consoles; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 12: Motorcycles; parts and fittings therefor.

Class 14: Jewellery, watches, clocks, articles of precious metal, costume jewellery; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 16: Annuals, stationery; novelty books, printed matter; periodicals; books, magazines, publications, posters; comic books, activity books, colouring books, stickers, decalcomanias; bookmarks; artists' materials; writing or drawing implements; calendars, pictures, organisers (non-electronic); instructional and teaching materials; office requisites; erasers, sharpeners; rulers; albums; greeting cards; wrapping and packaging materials; photographs; adhesives; sticky tape; paperweights; pencil sets; pencil or pen boxes; paper napkins; postcards; diaries, ring binders, colouring paints and crayons; colouring prints; prints; carrier bags and paper bags; writing paper; envelopes; scrapbooks; rulers, pencil sharpeners, erasers, folders; stencils; paper napkins and bibs; serviettes; greeting cards; gift wrap; gift tags; party paperware; paper plates; streamers; paper notes; blackboards; craft model kits; educational materials; paper flags; paper towels; paintings; bookends; bookmarks; boxes for gifts; mobiles of paper; photo frames; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 18: Bags, luggage, cases, rucksacks, wallets, walking sticks, umbrellas; saddlery; whips; leather and articles of leather; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 20: Furniture, mirrors, picture frames; ornaments, figurines and statuettes; artworks of wood, plastic, wax or plaster; sleeping bags; baskets; beds and bed fittings; bins; boxes; chests; cots and cradles; curtain rails, rings, and hooks; mattresses; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 21: Mugs, cups, small domestic utensils and containers; glassware, earthenware; articles of porcelain; cleaning implements; beer mugs; boxes and bottles; cooking pots and saucepans; cooking utensils; flower pots; lunch boxes; napkin rings; pepper mills; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 24: Textiles including tea towels and beach towels; bed and table covers; curtains; wall hangings; flags; pennants; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 25: Clothing, footwear, headgear; belts; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 26: Non-metallic badges and buttons; cloth badges; ornamental pins for personal wear; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 28: Toys, games and playthings; model replica motorcycles and trophies; handheld computer and electronic games; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 30: Coffee, tea, cocoa, sugar, ice-cream, confectionery; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 32: Beer and non-alcoholic drinks; fruit juices; mineral water; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 33: Alcoholic beverages (except beer); wines, spirits, liqueurs; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 34: Lighters for smokers; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 36: Financial services and financial advice; banking; provision of loans; credit card services; none of the aforesaid relating to motor-car racing or to motor-car sport.

Class 37: Motorcycle repair and maintenance services.

Class 39: Motorcycle rental.

Class 41: Entertainment and sporting events for motorcycles; organisation, production and staging of races, competitions and events for motorcycles; provision of computer games and video games and computer video programmes from a computer database or via the Internet; electronic games; provision of news content by remote means; none of the aforesaid relating to motor-car racing or to motor-car sport.

2) The application was examined and accepted, and was subsequently published for opposition purposes on 16 November 2007 in Trade Marks Journal No.6710.

3) Triumph Designs Limited (hereafter the opponent), filed a notice of opposition, dated 18 February 2008. The grounds of opposition are in summary:

a) The opponent is the proprietor of the following trade mark:

Trade Mark	Number	Application Date and Registration Date	Specification
TROPHY	1555714	04.12.93 29.03.96	Class 12: Motorcycles; body panels for motorcycles; all included in Class 12.

b) The opponent claims to have reputation in the goods for which its mark is registered. It is only opposing the following goods (amended in the evidence rounds):

Class 9: Motorcycle helmets and protective headgear; protective clothing, footwear and eye wear for motor cyclists.

Class 12: Motorcycles; parts and fittings therefor.

Class 28: Toys, games and playthings; model replica motorcycles.

c) The opponent states that the mark applied for is similar to the opponent's earlier registration and that the goods specified above are similar to those for which its mark is registered. The opponent states that the application offends against Section 5(2)(b) and 5(3) of the Trade Marks Act 1994.

4) On 21 August 2008, the applicant filed a counterstatement which denied the opponent's claims. The applicant puts the opponent to strict proof of use.

5) Both sides filed evidence and both seek an award of costs in their favour. The matter came to be heard on 25 February 2010. At the hearing, the opponent was represented by Ms Bowhill of Counsel instructed by Messrs Potter Clarkson LLP, the applicant was represented by Mr Malynicz of Counsel instructed by Messrs Murgitroyd & Company.

OPPONENT'S EVIDENCE

6) This consists of a witness statement, dated 20 January 2008, by John Eastham the Deputy Chairman of the opponent. He states he has been associated with the company since 1991, and that, via an associated company Triumph Motorcycles Limited, the mark TROPHY was first used on motorcycles in the UK in 1991. Since this time, he states, various models have been introduced and an estimated 3,000 motorcycles sold in the UK under the TROPHY mark.

7) Mr Eastham states that the TROPHY model range is "extremely well known within the motorcycle industry in the UK, and this reputation also extends to motorcycle enthusiasts". He states that there are numerous references to the TROPHY models on the internet. Mr Eastham provides his opinions on the issue of confusion between the marks and goods which is not evidence, but which I will take into account in my decision. Lastly, he provides the following exhibits:

JE1: This consists of a Triumph "Accessories & Clothing" brochure which is dated 2002. This mentions the TROPHY range of motorbikes and offers accessories for the bike such as, inter alia, locks, stands, pannier bags and foot rests. It is not clear to whom this was distributed or where. The only item of clothing which would seem to have the mark "Trophy" upon it is a patch.

JE2: This consists of two sheets of paper. The first of which has the words "Triumph Motorcycles Limited" followed underneath by "Motorcycle Warranty Record". It states the model as a "VA-HJE Trophy 1200 Emerald Green". The VIN plate is SMTTC34SCW2 141723, engine number 142256. The dealer is stated to be "number 160000 Triumph GB Sales". The invoice date was 5 September 2001, whilst it states the registration date as 6 January 2003. It would appear to have been a demonstrator as it states "REG NO LG52VAD DEM/STK". The name of the owner has been redacted. The second sheet is very similar but the VIN number is SMTTC345CW2 141453, and the engine number 141994. The dealer is identical and the invoice date is shown as 4 February 2002 with the machine being registered on 1 March 2003. The owner's name is similarly redacted.

APPLICANT'S EVIDENCE

8) The applicant filed a witness statement dated 15 June 2009, by Annie Gale the Senior Business Development Manager of the applicant. She states she has been involved in the marketing and promotion of the Tourist Trophy races since 2004 and her comments arise from her own knowledge and also the records of the applicant.

9) Ms Gale comments that the opponent's evidence shows use of the mark TRIUMPH TROPHY not just TROPHY and that the use is by a third party and no comment is made regarding consent. She states that the evidence amounts to token use only, and that no evidence has been provided regarding reputation, merely assertion. Ms Gale gives a brief history of the Tourist Trophy or TT races that have taken place on the Isle of Man since 1907 and which attract worldwide coverage and participants. Between 1949 and 1976 the TT races formed the British round of the FIA World Championship for motorcycles. The applicant has been involved in

organising these races since their inception, initially in conjunction with others such as the Automobile Car Club of Britain and Ireland (now the RAC). The races have been shown on television both in sports and news programmes for decades. They have also been extensively covered by radio and the press. In 2005 when the races were shown on the BBC programme Grandstand it attracted over 900,000 viewers. Ms Gale states that in 2007 the applicant spent £2.7 million on the organisation and promotion of the TT races, with approximately 10-20% being directly attributable to promotion and advertising. She states that approximately 35,000 people per annum visit the Isle of Man to watch the races. Due to the fact that they take place on public roads, these figures cannot be equated to tickets sold for grandstands etc.

10) Ms Gale states that the applicant has a number of partners and licensees who produce merchandise linked to the TT races. At exhibit AG3 she provides a print out from a website which shows a huge variety of products linked to the TT races. She states that motorcycle specific items such as leathers, helmets and special editions of motorcycles have been produced under licence from the applicant. At exhibit AG4 she provides printouts from a website advertising a Suzuki Tourist Trophy GSX-R motorcycle. However, the mark TOURIST TROPHY cannot be seen on the actual machine and the use of the words in the advertising refers merely to replica machines as raced in the Tourist Trophy races. These motorcycles cost £10,000 and there was a limited run of 450 such vehicles. Ms Gale also provides a table showing use under most of the Class headings applied for. She states that as a result of the use of the mark TOURIST TROPHY over 100 years by the applicant it has achieved significant reputation that significantly predates the opponent's use.

OPPONENT'S EVIDENCE IN REPLY

11) The opponent filed a second witness statement, dated 15 September 2009, by Mr Eastham. He confirms that the brochure at exhibit JE1 in his earlier statement was available during the period 16 November 2002 – 16 November 2007. He also points out that the warranty records provided at exhibit JE2 in his earlier witness statement show a date of registration within the relevant period. He states that the use of the mark by the associated company Triumph Motorcycles Ltd was with the consent of the opponent. He also states that the use shown of the mark is use of the mark TROPHY together with a house mark TRIUMPH. He disputes whether Ms Gale's experience qualifies her to claim that she has been "involved in the motorcycle industry". Mr Eastham does not dispute that the mark TOURIST TROPHY is well known for motorcycle races and it is for this reason that the opposition has been carefully worded against few of the goods and services applied for by the applicant. He points out that none of the evidence provided by the applicant substantiates use of the mark in suit on any of the goods or services, indeed for the most part even the acronym TT is hardly used.

12) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

13) At the hearing the opponent withdrew the ground of opposition under section 5(3). I therefore turn to consider the remaining ground of opposition which is under section 5(2)(b) which reads:

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

- (a)....
- (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.”

14) An “earlier trade mark” is defined in section 6, the relevant part of which states:

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

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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.”

15) The opponent is relying upon its trade mark listed in paragraph 4 which is clearly an earlier trade mark. It was registered on 29 March 1996 and is therefore subject to The Trade Marks (Proof of Use, etc) Regulations 2004. However, the applicant accepted at the hearing that the opponent had shown use of its mark upon the goods for which it is registered in Class 12. In the comparison test I shall regard the opponent’s mark as protected for the whole of its registered specification.

16) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P (LIMONCELLO)*. It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

17) In essence the test under section 5(2)(b) is whether there are similarities in marks and goods and services which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the

judgments mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the applicant's mark and the mark relied upon by the opponent on the basis of their inherent characteristics assuming normal and fair use of the marks on the goods outlined at paragraph 3 above.

18) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was considered by David Kitchin Q.C. (as he was then) sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchin concluded at paragraph 17 of his decision:

“The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr. Thorley Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v. Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become more distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

19) The opponent has singularly failed to show that it has reputation in the goods for which its mark is registered, or that its mark has become more distinctive through use. The opponent has provided evidence that it registered two motorcycles (both in 2003) and also that it had a brochure which is said to have been available before and after the relevant date of August 2006. The opponent claims to have sold 3,000 motorcycles in the UK under its TROPHY mark since 1991. As this date is some fifteen years prior to the relevant date and no further details of sales per year are provided this is of little assistance to the opponent in proving reputation. The opponent claims that it has reputation and referred specifically to reviews in the brochure. These are simply comments from members of the public stating that they are content with their motorcycle. Even if these are genuine they do not prove that more than a handful of customers have commented positively on their motorcycle. The opponent has provided no evidence of turnover, market share, public awareness or evidence for independent witnesses or the trade as to its reputation. It is certainly not sufficient for them to enjoy enhanced protection because of reputation. However, I do accept that the opponent's mark is inherently distinctive for the goods

for which it is registered. This was contested by the applicant who contended that the word “TROPHY” for a motorbike which could be seen as “sporty” was a laudatory term. Whilst the word “Trophy” is a well known word and it is equally well known that those who are successful in motorcycle racing receive trophies to commemorate their success it is a term which alludes to a successful racing pedigree rather than being directly laudatory. I therefore reject the applicant’s contention and will consider the opponent’s mark to be inherently distinctive for motorcycles.

20) I shall first consider the goods of the two parties. The opponent is selective in the goods it has opposed and so, for ease of reference, I set out the goods of the opponent and those of the applicant that are opposed.

Applicant’s specification	Opponent’s specification
Class 9: Motorcycle helmets and protective headgear; protective clothing, footwear and eye wear for motor cyclists.	Class 12: Motorcycles; body panels for motorcycles; all included in Class 12.
Class 12: Motorcycles; parts and fittings therefor.	
Class 28: Toys, games and playthings; model replica motorcycles.	

21) In carrying out the comparison I will take into account *British Sugar Plc v James Robertson & Sons Ltd* (TREAT) RPC 281. This identified the following as elements to be considered, uses, users, nature, trade channels, where the items are to be found and whether they are in competition.

22) I also take into account the views of Neuberger J in *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267 stated:

“I should add that I see no reason to give the word "cosmetics" and "toilet preparations" or any other word found in Schedule 4 to the Trade Mark Regulations 1994 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. In particular, I see no reason to give the words an unnaturally narrow meaning simply because registration under the 1994 Act bestows a monopoly on the proprietor.”

23) The issue of complementary goods was considered in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 325/06, where the CFI stated:

“It is true that goods are complementary if 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 (see, to that effect, Case T-169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685 , paragraph 60, upheld on appeal in Case C-214/05 P Rossi v OHIM [2006] ECR I-7057 ; Case T-364/05 Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL) [2007] ECR II-757 , paragraph 94; and Case T-443/05 El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños) [2007] ECR I-0000 , paragraph 48).”

24) It was agreed at the hearing that the average consumer for the goods of the parties must be those of the general public interested in motorcycles.

25) I shall first consider the applicant's goods in Class 12. It was accepted at the hearing that these are identical. I now turn to consider the applicant's Class 9 goods with the goods of the opponent. It was contended that these were similar goods in that the users (motorcyclists) were the same and that they were sold through the same trade channels. It was also claimed that the uses were the same as one had to wear a helmet and protective clothing to ride a motorcycle. Failing this I was asked to take judicial notice that such items were manufactured by motorcycle manufacturers and sold alongside motorcycles. Although a helmet is legally required, protective equipment is not, albeit recommended. No evidence was provided regarding trade channels, or whether motorcycle manufacturers also manufactured such items. In the absence of any evidence it is my view that the uses, nature and trade channels are different. Nor do I believe that such items are indispensable or important for the use of motorcycles such that customers will believe that the responsibility for the goods lies with the same undertaking. They are therefore not similar or complementary, in any way.

26) Moving onto the applicant's goods in Class 28, Ms Bowhill contended that motorcycle riders regarded their machines as "toys" and referred me to the brochure which contains quotes from motorcycle riders to this effect. In my opinion this is a dog that will not hunt. She also stated that replica motorcycles would be purchased by motorcycle riders. I am willing to accept this, but they will also be purchased by the general public who have no interest in motorcycles. These goods are not similar in any way to the opponent's goods in Class 12.

27) I now turn to consider the marks of the two parties. The mark in suit is "TOURIST TROPHY" whilst the opponent's mark is "TROPHY". The applicant's mark contains more than one word or element and is, therefore, a composite mark. The *Medion* case acknowledges that the overall impression conveyed to the relevant public by a composite mark may, in certain circumstances, be dominated by one or more of its components. Mr Malynicz contended that the conceptual meaning of the mark in suit belies the contention that the word "TROPHY" is the dominant aspect. He pointed out that visually there are more differences, in terms of shared letters, than similarities. Also that as the word TOURIST comes first in the mark in suit it is likely to be more prominent in the average consumer's mind. Phonetically there are differences in the number of syllables. But, it was the conceptual difference that overrode the similarities. He contended that the word "TROPHY" is well known as meaning a cup or decorative object, but when the word "TOURIST" is placed before it, the meaning changes as it becomes a specific type of trophy. However, this is not a strong conceptual image as tourists do not usually get trophies, and there is no standard type of trophy for tourists. I do not accept that the average consumer would be aware that proper name for the annual TT races is the Tourist Trophy race. In any case, the reputation of the TT races lies in the actual races. There is no evidence that the average consumer would expect the event organisers to license the manufacture of goods. TOURIST TROPHY is not a combination that conjures up a particular image in a consumer's mind. As such I do not believe that the conceptual differences should be given the type of weight sought by the applicant.

28) Overall, there are visual and aural similarities, as well as differences. There is also a conceptual difference between the marks. Overall I believe that the differences and similarities between the marks of the two parties balance each other.

29) I take of all of the above into account when considering the marks globally. To my mind, the similarities in the marks are such that when used on identical goods such as those in Class 12 I believe that there is a likelihood of consumers being confused into believing that those goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. The opposition under Section 5(2)(b) therefore succeeds in relation to the goods in Class 12. However, when used on the applicant's goods in Classes 9 & 28 there is not a likelihood of confusion, due to the dissimilarity of the goods. The applicant's mark will therefore proceed to registration for all the goods and services for which it was applied for, with the exception of the goods in Class 12.

COSTS

30) Both parties have had a measure of success but the applicant was the more successful. I order the opponent to pay the applicant the sum of £700. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this
09 day of March 2010**

**George W Salthouse
For the Registrar,
the Comptroller-General**