

O-076-11

In the matter of UK Trade Mark Applications Nos. 2505873 “GENEE
POWER BOARD” and 2505907 “GENEE SLATE” in the name of
GENEE WORLD LIMITED (The Applicant)

and

Consolidated Oppositions Nos. 99048 and 99046 by VIGLEN LIMITED
(The Respondent)

and

In the matter of an Appeal to the Appointed Person by The Applicant
against the Decision of the Hearing Officer on behalf of the
Comptroller General dated 19 August 2010

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D E C I S I O N

Introduction

1. This is an Appeal by the Applicant, Genee World Limited, against a decision of Mr David Landau, the Hearing Officer, in a trade mark opposition brought by Viglen Limited.
2. The trade marks in question are word marks for the words “GENEE POWER BOARD” and “GENEE SLATE”.
3. The specification for “GENEE POWER BOARD” is

Interactive white boards, none being computers, computer hardware or

data processing equipment

The specification for “GENEE SLATE” is

Graphic tablets, none being computers, computer hardware or data processing equipment

Both sets of goods are in class 9 of the Nice Agreement as amended.

4. The Opponent relies on its registered mark “GENIE”. This mark is registered for

Computers

These goods are also in class 9.

5. The Opposition was brought under s5(2)(b) of the Trade Marks Act 1994.
6. The Hearing Officer gave a lengthy and considered decision in the course of which he reviewed the evidence filed by both sides and set out the legal principles which he had to apply. The Appellant made no challenge to the Hearing Officer’s account of the evidence or the law.
7. Ultimately, the Hearing Officer decided that there was a likelihood of confusion between the mark “GENIE” used for computers and the marks “GENEE POWER BOARD” and “GENEE SLATE” used for interactive white boards and graphic tablets respectively. The basis of his decision,

in summary, was as follows:

- (a) the most dominant and distinctive component of the marks applied for was the word “GENEE”
- (b) the word “GENEE” was extremely similar to the word “GENIE”, being aurally and conceptually identical and visually almost identical;
- (c) the additional matter in the marks applied for was highly allusive to the nature of the goods for which registration was sought;
- (d) interactive whiteboards and graphic tablets were closely connected with computers. Interactive whiteboards display the output from a computer and interact with computers. Graphic tablets also interact with computers and can be used as methods of input to a computer.
- (e) in the circumstances, it was likely that the average consumer would consider that an interactive whiteboard under the mark “GENEE POWER BOARD” and a graphic tablet under the mark “GENEE SLATE” came from the same source as “GENIE” computers.

This Appeal

- 8. Before me, the Applicant was represented by Mr Pienaar of RevoMark.
- 9. It is well-established and ought to be clearly understood by all trade mark practitioners that appeals from a Hearing Officer are (save in exceptional cases) not re-hearings. They are reviews of the Hearing Officer’s decision. A decision on a “multifactorial” issue such as likelihood of confusion will not be interfered with by an appellate tribunal, whether the Appointed Person or the High Court, in the absence of a distinct and material error of principle or unless he was plainly

wrong taking account of the evidence. See REEF Trade Mark [2003] RPC 5. The oft-cited observation of Buxton LJ in Norowzian v Arks (No. 2) [2000] FSR 363 at 370 applies just as much to appeals from Hearing Officers to the Appointed Person as it does to appeals from the High Court to the Court of Appeal:

“...where it is not suggested that the judge has made an error of principle a party should not come to the Court of Appeal simply in the hope that the impression formed by the judges in this court, or at least by two of them, will be different from that of the trial judge”

10. I make this point because Mr Pienaar at one point before me argued that his client was entitled to seek “*a second opinion*” from the Appointed Person. It must be made clear that this is not the case. If the losing party before the Hearing Officer cannot identify any real error of principle and cannot say that the Hearing Officer was plainly wrong on the evidence, then any appeal is doomed to fail.

11. Having read the Grounds of Appeal and the skeleton argument in support (which was in fact simply a replica of the Grounds of Appeal, save for one extra paragraph) I was unable to identify what error of principle was being contended for. When pressed at the hearing, Mr Pienaar ultimately identified four alleged errors on which he relied. I deal with these individually below.

The alleged errors in the Hearing Officer’s decision

12. Mr Pienaar’s first three alleged errors concerned the nature of the goods in respect of which his clients had applied to register their marks.

(a) “Audio-visual apparatus”

Mr Pienaar contended that the Hearing Officer was wrong to characterise interactive whiteboards and graphic tablets as “audio visual apparatus”. On this subject, the Hearing Officer stated as follows at paragraph 48 of his Decision:

“Mr Pienaar described the equipment of the applications as being audio visual equipment and considered that there is a clear demarcation line between such equipment and computers.”

If Mr Pienaar had not so described the equipment in question, then I would have had some sympathy with the suggestion that this was an error of principle. However, I have had the benefit of seeing the skeleton argument submitted by Mr Pienaar below. At pages 13-14 under the heading “*Uses/Functions/Purposes*” this sets out in a series of bullet points the Applicant’s contentions as to the nature of the Geenee Power Board and the Geenee Slate. In both cases, the final bullet point states “*Regarded as presentational/visualisers/audio-visual equipment.*” In the circumstances, I cannot see how it can seriously be suggested on behalf of the Applicant that the Hearing Officer erred in his account of the nature of the goods. He plainly did not – he was simply adopting the submissions of the Applicant itself.

(b) “Powered boards”

Mr Pienaar contended that the Hearing Officer was wrong to state, as he did at paragraph 44 of his decision that:

“The goods of the Genee Power Board application are interactive whiteboards, ie boards that are powered”

Before me, Mr Pienaar alleged that interactive whiteboards were not powered. Given that the product is an interactive display unit which responds to touch and communicates with a computer, this seemed inherently unlikely. When I asked for the evidence which supported the suggestion that the product was not powered, I was referred to the brochure for the Genee Power Board at RS 6 to the evidence of Mr Singh filed on behalf of the Applicant. This brochure clearly states that the Power Board has a power consumption which varies from 75-100 mA. I would surmise that it draws this power from the USB link to a computer. However, there can be no doubt that the Hearing Officer was correct to say that interactive whiteboards (such as the Genee Power Board) are goods which are powered. There was no such error as was suggested by Mr Pienaar.

(c) “Slates”

Mr Pienaar contended that the Hearing Officer was wrong to characterise the graphic tablets of the application (which are stated in the specification not to be computers) as “slates”. The term “slate” means a tablet computer, not a graphic tablet. In fact, the Hearing Officer did not suggest that graphic tablets were “slates”. On the contrary, he clearly recognised the distinction between graphic tablets and slates in the sense of tablet computers. In paragraph 44 of his Decision he said as follows:

“It is the case that the goods of the applications are neither power boards nor slates (being tablet computers). Tablet computers are known as slates and so it is not a great jump to a graphic tablet being viewed as a slate of another form by the average consumer. Graphic tablets are in the form of slates, if electronic ones. Even if slate were not directly descriptive of graphic tablets it is strongly allusive of them.”

Ultimately Mr Pienaar was unable to explain how this account of the significance of the word “slate” in the context of graphic tablets was in any way wrong.

13. The fourth alleged error suggested by Mr Pienaar was that the Hearing Officer had failed to understand or take account of the fact that the average consumer of these products was sophisticated and careful. This is clearly not correct. The Hearing Officer dealt with the average consumer in this field at paragraph 41, saying as follows:

“Computers, graphic tablets and interactive whiteboards are items of some cost. They are products which require consideration in their purchase in order to ascertain their technical qualities, including in their interaction with other components, whether that be computer peripherals, computer hardware or computer software. Consequently, the purchasing process will be a careful and educated one. The goods of the applications will be bought normally for business or education purposes and so the purchaser will be particularly sophisticated. Computers will be bought by the same clientele as the goods of the application, however, they will also be bought by the public at large. All

these factors will lessen the effects of imperfect recollection.”

At paragraph 62 he said:

“It is readily accepted that the purchasing decision in relation to the goods will be careful and considered, however, this is counterbalanced by the high degree of similarity between the trade marks. A careful purchasing decision is not necessarily going to militate against confusion where there is a high degree of similarity between the marks.”

14. What Mr Pienaar was really saying was not that the Hearing Officer had erred in principle in failing to take account of the sophisticated nature of the average consumer, but that he should have been more influenced by this factor, to the extent that he should have considered that it removed the likelihood of confusion. This is not a complaint of an error of principle at all.

15. Questions such as likelihood of confusion will nearly always permit a range of opinions. They involve the weighing of a number of different factors, and different people will inevitably give different weights to each factor. The fact that another Hearing Officer might have weighed the factors differently and come to a different result does not justify an appeal.

Conclusion

16. The Appellant was unable to identify any error of principle in the Hearing Officer’s decision, or to suggest that it was clearly wrong on the evidence. This was a classic example of a “knee-jerk” appeal made in the

hope that an Appointed Person might take a different view from the Hearing Officer on likelihood of confusion. Appeals should not be brought on that basis.

17. In fact I do not take a different view from the Hearing Officer on likelihood of confusion. But, even if I had, I would not have overturned his decision which was plainly within the bounds of what a reasonable tribunal was entitled to decide.

Costs

18. No special order having been sought, I direct that the Applicant, Genee World Limited do pay to the Opponent, Viglen Limited, the sum of £150 in respect of the (rightly very short) skeleton argument filed in opposition to the Appeal and £400 in respect of the attendance of Mr Setchell at the hearing. The total order for costs is therefore £550.

IAIN PURVIS QC
THE APPOINTED PERSON

18 FEBRUARY 2011