

O-242-07

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2393915
BY TOOLMAN LTD
TO REGISTER THE TRADE MARK:**



IN CLASSES 7 AND 8

AND

**THE OPPOSITION THERETO
UNDER NO 94364
BY
DANIEL GRAYSON T/A J W BERISFORD**

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INTRODUCTION

1) On 3 May 2005 Toolman Ltd, which I will refer to as TL, applied to register the above trade mark. The application was published for opposition purposes in the *Trade Marks Journal* on 24 February 2006 with the following specification:

powered hand tools for automatic use;

hand tools for industrial use in connection with vehicles and tool storage.

The above goods are in classes 7 and 8 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 24 May 2006 Daniel Grayson t/a J W Berisford, whom I will refer to as Berisford, filed a notice of opposition to the registration of the application. Berisford states that it has extensively used the trade mark TOOLMAN since 1997 in relation to a wide range of products including tools and other products and in particular hammers, spirit levels, pliers, screwdrivers, tarpaulins, adhesives, tape measures, ratchets, sockets, tool bags, spanners, trowels, floats, scrapers, knives, clamps, chisels, saws, glues, luggage straps, hexagon keys, pliers, brushes, strings and tube cutters. Berisford claims that it has established a reputation in the trade mark TOOLMAN in relation to the goods of the application of TL. Berisford claims that use of the trade mark TL would lead to “confusion with earlier and established rights by virtue of rules of law in particular the law of passing off”. Consequently, registration of the trade marks would be contrary to section 5(4)(a) of the Trade Marks Act 1994 (the Act).

3) TL filed a counterstatement. It denies that the grounds of opposition.

4) Both sides seek an award of costs.

5) Only Berisford filed evidence.

6) The sides were advised that they had a right to a hearing and that if neither side requested a hearing a decision would be made from the papers and any written submissions that were received. Neither side requested a hearing, nor were any written submissions received.

EVIDENCE

7) This consists of a witness statement made by Daniel Anthony Grayson. Mr Grayson states that he is a partner in a partnership trading as JW Berisford. He states the Berisford has a trade in relation to tools and workshop and industrial apparel and consumables. He states that he has been involved in the tool supply trade for fifteen years.

8) Mr Grayson states that the nature of the tool supply trade is diverse and ranges from market stall sales of tools and accessories through to depot style retail outlets and commercial delivery of bespoke tools. He states that most tools are sold through retail outlets in which a wide range of tools, both manual and powered, are offered and purchased side by side. Mr Grayson states that it is common for a tool supplier to re-brand a range of tools, particularly hand tools, and purchasers make their choices based upon the quality and service reputation of particular purveyors. He gives examples of this as Draper, Stanley and Black & Decker. Mr Grayson states that in such circumstances reputation in relation to tools extends beyond existing products to products which would simply be considered an extension of an existing range.

9) Mr Grayson states that Berisford has used the trade marks TOOLMAN and TOOLMAN with device since 1997 in relation to a wide range of tools and in particular hand tools in a similar geographical area to TL. At exhibit A examples of use of the word and device trade mark are shown. The examples show prominent use of the word TOOLMAN, to the side of which is a stylised drawing of a tradesman carrying a tool of some description. The examples show use for a bonding system (to assist in the drying of glue), socket sets and knife blades. Mr Grayson states that the Berisford tools have been sold to domestic and industrial users.

10) Mr Grayson states that he exhibits at exhibit B invoices from suppliers who have delivered "tool products" for re-branding under the trade mark TOOLMAN. He states that the exhibit also includes copies of letters received from suppliers indicating that they have delivered products under the trade name TOOLMAN. The first part of the exhibit consists of three copies of the same invoice addressed to Toolman Quality Tools. The invoice appears to relate to a feature that was to be published in *The Woodworker* in April 2002. The invoice indicates that the feature was ordered by Mr Grayson. The next part of the exhibit is a letter dated 28 November 2006 from the Metallic Wool Co Ltd. It is addressed to Mr Grayson and states that the company has been supplying steel wool to Berisford since 1998 and that the steel wool is packed in Berisford's own label sleeve, TOOLMAN. The letter is addressed to J W Berisford Tools & Marketing. A letter from Hilka Tools (UK) Ltd dated 4 December 2006 is exhibited. It is addressed to "Daniel" at

J E Berisford & Co. The letter states that Hilka has been supplying goods under the TOOLMAN trade mark since 1997. Initially a range of tape measures were supplied but screwdrivers, pliers and wrenches have since been supplied. The letter states that over that period of time purchases of \$US 250,000 and £50,000 have been made. The following invoices are included in the exhibit:

From	To	Goods	Date	Additional information
Metallic Wool Co Ltd	Berisford Tools & Marketing	grade fine grade medium grade coarse	13/01/00	All supplied in TOOLMAN own label sleeves
S Betts & Sons Ltd	JW Berisford	trowels	04/06/03	Described a TOOLMAN general purpose trowel
Rackford Engineering Supplies – Plant Hire Ltd	Berisfords	hacksaws handsaws staples sweeping brushes	16/09/04	
First Measure Industrial Co Ltd	R Grayson t/s JW Berisford	measuring tapes	21/06/97	Brand - TOOLMAN
Jewel Blade Co Ltd	JW Berisford	heavy duty 2 notch	15/09/97	Marked TOOLMAN
Richard Carter Ltd	JW Berisford	felling axe	04/03/99	Stamped TOOLMAN
Jewel Blade Co Ltd	JW Berisford	heavy duty 2 notch	05/03/99	Marked TOOLMAN

11) Mr Grayson states that he includes at Exhibit C examples of packaging and tools incorporating the TOOLMAN trade mark supplied by JW Berisford since 1997. (In fact the exhibit consists of pictures of packaging and tools.) The pictures show luggage straps, spanners, bits, blades, sockets, hammers, glue, scrapers, chisels, squares, knives, tape measures, tapering knives, clamps, rollers, maintenance spray, pliers, spirit levels, cold chisels, mallets, plumb bobs, Allen keys, vices, angle grinder spanners, screwdriver bits for electric drills and electric screwdrivers, pipe cutter wheels, holesaw kits, key sets, planes, adjustable wrenches and spanners and wheel nut wrenches. There is prominent use of TOOLMAN in relation to these goods, both on packaging and upon the goods. There is, however, no indication as to from when the packaging and tools emanate.

12) Mr Grayson states that one of Berisford's principal forms of sale is through market stalls. At Exhibit D is a picture taken at a market held on 6 June 1999. The picture shows TOOLMAN and device prominently displayed on a fabric sign attached to a van. In front of the van, boxes containing products can be seen. The only products that are readily identifiable are brooms.

13) Mr Grayson states that in addition to direct retail sales, Berisford has a website and website catalogues. Included in Exhibit E is a copy of the first catalogue, emanating from 6 August 1998. In the catalogue the following goods can be seen: builders' line, protractor, wire wheel brushes (one of which is suitable to fit all power drills), pliers of various types, hammer wedges, scutch combs, paint brushes, wire brushes, hosepipes, masonry drills, spirit levels, wall plugs and mortice locks. TOOLMAN can be seen upon some of the products, at the top of every page is the word Tool Man in cursive script. Mr Grayson states that more recently Berisford has supplied a CD catalogue, he states that this catalogue was available from March 2002. Included in Exhibit E is a copy of the cover of the CD catalogue for 2005.

14) Mr Grayson states that products sold by Berisford under the TOOLMAN trade mark are imported or locally manufactured with TOOLMAN trade mark applied under its instruction. He states that since 1997 Berisford has sold at least £750,000 worth of products under the trade mark TOOLMAN. Mr Grayson gives the following approximate annual turnover figures:

2000 In excess of £71,000
2001 Approaching £44,000
2002 In excess of £126,000
2003 In excess of £64,000
2004 Approaching £70,000

15) Mr Grayson states that tools supplied by Berisford are manufactured in the United Kingdom, the Far East, Americas and Europe. The source supplying the tool is instructed to apply the trade mark TOOLMAN, on behalf of Berisford, to either the packaging or the tool.

16) Mr Grayson states that Berisford has spent in excess of £8,000 promoting and advertising the trade mark TOOLMAN. The expenditure for advertising and promotion since 2001 is as follows:

2001 £510
2002 £670
2003 £380
2004 £1,040
2005 £2,500

Mr Grayson states that promotion of the TOOLMAN brand is effected by way of Berisford's website, magazine advertisements, labels, packaging, banners, catalogues and

catalogue CDs. Included in Exhibit E are pages downloaded on 10 May 2006 from the website www.berisfords.co.uk, so well after the date of application.. A copy of a page from *Traditional Woodworking* of August 2002 has an advertisement for TOOLMAN “new and used woodworking tools”. The website address www.toolman.co.uk is given. A printout is included in Exhibit E which gives details of the website www.toolman.co.uk, the printout shows that the domain name was registered on 27 April 1999 and that the registrant is Mr Grayson. Also included in the exhibit is a printout from the Wayback Machine Internet archive which gives details of the pages available on the [toolman.co.uk](http://www.toolman.co.uk) website from 2000 to 2004 (inclusive).

17) Mr Grayson states that principal sales of TOOLMAN goods have been made in the South Yorkshire area where the reputation is the strongest. Sales have been made in Sheffield, Manchester, Liverpool, Hull, Scarborough, Glasgow, Blackpool, Stoke, Belfast, London, Swansea, Birmingham, Southampton, Newcastle, Edinburgh, the Shetland Islands, Nottingham, Bristol and the Outer Hebrides.

18) Mr Grayson states that TL was incorporated on 4 April 2003.

DECISION

19) Section 5(4)(a) of the Act states:

“4) 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,”

To succeed in relation to the law of passing-off Berisford must establish that it has a goodwill or reputation in relation to a business and that use of the trade mark by TL would give rise to both confusion/deception and damage. If fails on any one count its case failsⁱ.

Material date

20) It is first necessary to decide what the material date for this case is. All issues must be considered in relation to this date. It is well established that the material date for passing-off is the date of the behaviour complained ofⁱⁱ. Section 5(4)(a) is derived from article 4(4)(b) of First Council Directive 89/104 of December 21, 1998 which states:

“rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark”.

Consequently, the material date cannot be after the date of application. In his evidence Mr Grayson states that Berisford has used its TOOLMAN and TOOLMAN and device

trade marks in a similar geographical area to TL. This statement does not establish clearly if TL has used the trade mark for which it has applied, it certainly does not give any indication that any such use was before the date of application for registration. Consequently, the only date upon which I can base my considerations is the date of application for registration, 3 May 2005.

Goodwill

21) Berisford has to establish that at the material date that it had a protectable goodwillⁱⁱⁱ. This means that firstly it has to establish that it had a business at this date, goodwill relates to a business. It is then necessary for it to establish that its business was associated with the sign TOOLMAN. It is also necessary to decide in relation to what goods the sign had been used as of the material date.

22) Berisford's evidence contains some faults. Exhibit B contains letters from the Metallic Wool Co Ltd and Hilka. These letters are vehicles to give evidence by the signatories. The letters are statements that have been put into the format of letters. I consider that the evidence which Berisford is trying to get in to the proceedings by this means should have been adduced by way of witness statement or statutory declaration. To allow these letters into the proceedings would be to countenance the circumvention of rule 55 of the Trade Marks Rules 2000 (as amended)^{iv}. The form of evidence is important, as well as the content. That form is prescribed by rule 55 and a key part of that form is that the evidence is made under oath or includes a statement of truth. The "letters" are not subject to this fundamental and essential requirement. Consequently, I do not intend to take the contents of the letters into account due to this fundamental failing.

23) One of the invoices from Exhibit B is addressed to Berisford Tools & Marketing. The invoice in relation to *The Woodworker* is addressed to Toolman Quality Tools. Both these invoices have been sent to the address of Berisford. There is no indication as to the status or nature of these undertakings. However, the other invoices in Exhibit B are addressed to JW Berisford, R Grayson t/a JW Berisford or Berisfords; and so clearly relate to the opponent. Even if several undertakings, operating from the same address, share the goodwill relating to the business undertaken in relation to the TOOLMAN sign, this does not nullify the goodwill enjoyed by Berisford; shared goodwill, being severally owned, is owned by those amongst whom it is shared. (I am also confused as to how Mr Grayson is trading as JW Berisford but describes himself as being in a partnership, but I cannot see that anything turns upon this.)

24) Certain of the evidence emanates from after the material date. A good deal of the evidence cannot be dated, in particular that which constitutes Exhibit C; consequently, it is not possible to clearly relate the use of TOOLMAN in relation to each of the goods upon which it has been used by reference to the material date.

25) There is exhibited evidence, particularly the catalogue from 6 August 1998 exhibited at Exhibit E and some of the invoices in Exhibit B, which show use of the sign

TOOLMAN in relation to a variety of hand tools prior to the material date. This is the unchallenged evidence of Mr Grayson^v in relation to the use of the sign, although his statement does lack specific identification of dates at times.

26) In his statement Mr Grayson refers to the TOOLMAN and device sign in a manner that suggests that use of this sign is part of the grounds of opposition. This is not the case, the grounds are based upon use of TOOLMAN, one sign only. Where TOOLMAN has been used with a device, being the device of a tradesmen it does not enjoy a great deal of distinctiveness for the goods, it is the word that stands out and can, in my view, be considered to be use of the sign TOOLMAN, the device being seen as a separate sign. There is also clear evidence of use of TOOLMAN by itself, if sometimes in cursive script.

27) How goodwill is to be established has been dealt with in several judgments^{vi}. *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* establishes that one cannot just follow a formula or demand certain predetermined requirements to be met. It is a matter of what the evidence establishes or fails to establish. The business in relation to Berisford's use of TOOLMAN is not enormous but it is a business that had been established for a number of years prior to the material date. The law of passing-off protects small businesses as well as great ones; although it does not protect a trivial goodwill^{vii}. The evidence shows that Berisford's goodwill is small rather than trivial and so is protectable. **I consider that Berisford has established that as of the material date it had a protectable goodwill by reference to the sign TOOLMAN in relation to a variety of hand tools and tools that could be used with power tools.** Although, as Mr Grayson states, the core of the business is in South Yorkshire, it spreads far wider than that and cannot, in my view, be limited to just that area.

Confusion/deception

28) TL's trade mark is in colour but is not limited to colour; it also has a device element. The largest element of the trade mark is the word TOOLMAN, this seems to me to be the element with which the goods under which it is sold will be mainly associated. I consider that the trade mark is dominated by TOOLMAN.

29) TOOLMAN gives an allusion to tools, alludes to someone who uses or supplies tools. I cannot see that is directly descriptive of the goods that Berisford sells by reference to it. The law of passing-off does not normally protect descriptive or generic terms^{viii}, I do not consider that TOOLMAN falls into either of these categories.

30) The trade mark of TL and the sign of Berisford are, in my view, highly similar; in trade it would be difficult to distinguish between them. The goods for which Berisford has established that it enjoys a protectable goodwill and those of the trade mark application are identical or very similar. **In my view use of the trade mark of TL for the goods of the application would be bound to give rise to confusion/deception. I find it difficult to see how the relevant public could not be deceived.**

Damage

31) The confusion/deception that is likely to arise will have three potential effects:

- Diverting trade from Berisford to TL
- Potentially injuring the trade reputation of Berisford if there were any failings in the goods of TL.
- By the injury which is inherently likely to be suffered by any business when on frequent occasions it is confused by customers or potential customers with a business owned by another proprietor or is wrongly regarded as being connected with that business^{ix}.

Consequently, I find that it has been established that there would be damage to the goodwill of Berisford.

Conclusion

32) Berisford's case is made out under section 5(4)(a) of the Act and the application of TL is refused in its entirety.

Costs

33) Daniel Grayson t/a J W Berisford having been successful is entitled to a contribution towards its costs. I award costs upon the following basis (based upon the scale):

Opposition fee:	£200
Statement of case:	£300
Considering statement of case in reply:	£200
Preparing and filing of evidence:	£500

Total **£1,200**

34) I order Toolman Ltd to pay Daniel Grayson t/a J W Berisford the sum of £1,200. This sum is 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 22nd day of August 2007

**David Landau
For the Registrar
the Comptroller-General**

ⁱ Mr Geoffrey Hobbs QC, sitting as the appointed person, in the *Wild Child case* [1998] RPC 455 explains the nature of what is to be considered in a passing-off case:

"A helpful summary of the elements of an action for passing off can be found in Halsbury's Laws of England 4th Edition Vol 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 and *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] ACT 731 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 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."

.....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."''

ⁱⁱ *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 and *Inter Lotto (UK) Ltd v Camelot Group PLC* [2004] RPC 8 and 9.

ⁱⁱⁱ The accepted definition of goodwill was given by Lord Macnaghten in *IRC v Muller & Co's Margarine Ltd* [1901] AC 217:

"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. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyse goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seem to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such. For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again."

^{iv} Rule 55 of the Trade Marks Rules 2000 (as amended) states:

"(1) Where under these Rules evidence may be admitted by the registrar in any proceedings before her, it shall be by the filing of a statutory declaration or affidavit.

(2) The registrar may in any particular case take oral evidence in lieu of or in addition to such evidence and shall, unless she otherwise directs, allow any witness to be cross-examined on his statutory declaration, affidavit or oral evidence.

(3) Where these Rules provide for the use of an affidavit or statutory declaration, a witness statement verified by a statement of truth may be used as an alternative; the Registrar may give a direction as she thinks fit in any particular case that evidence must be given by affidavit or statutory declaration instead of or in addition to a witness statement verified by a statement of truth.

(4) The practice and procedure of the High Court with regard to witness statements and statements of truth, their form and contents and the procedure governing their use are to apply as appropriate to all proceedings under these Rules.

(5) Where in proceedings before the registrar, a party adduces evidence of a statement made by a person otherwise than while giving oral evidence in the proceedings and does not call that person as a witness, the registrar may, if she thinks fit, permit any other party to the proceedings to call that person as a witness and cross-examine him on the statement as if he had been called by the first-mentioned party and as if the statement were his evidence in chief."

^v The weight of unchallenged evidence in witness statements has been dealt with by Mr Richard Arnold QC, sitting as the appointed person in *Tripp Limited v Pan World Brands Limited* BL O/161/07:

"36. Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider

that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence."

It was also dealt with by Mr Geoffrey Hobbs QC, sitting as the appointed person, in *Condé Nast Publications Limited v Toiletries & Cosmetics Limited* BL O/154/07:

"The evidence that was before him was, as I have already indicated, in all material respects uncontradicted. It was not challenged by cross-examination or put to the test of an order for production of documents. In the circumstances the Hearing Officer had no alternative but to accept the evidence and assess it for what it was worth, bearing in mind the criticisms which the Applicant had made of it. That is what he did. As I pointed out in the WILD CHILD case, the Registrar is often required to act upon evidence that might be regarded as less than perfect when judged by the standard applied in High Court proceedings. That is also on a daily basis the position in civil tribunals up and down the country. It does not follow that assertions without any real substantiation must be accepted as sufficient to support the contentions of those who put them forward. It is none the less necessary to assess the evidence that has been presented and decide whether it is or is not sufficient to enable the decision-taker to reach a conclusion on the civil standard as to what the outcome should be. Moreover, as confirmed by the Court of Appeal in *Stephens v Cannon* [2005] EWCA Civ 222 (14th March 2005), a decision-taker should not resort to the burden of proof for the purpose of determining the rights of the parties in civil proceedings unless he or she cannot reasonably make a finding in relation to the disputed issue or issues on the basis of the available evidence, notwithstanding that he or she has striven to do so."

^{vi} *South Cone Inc v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19, *Loaded* BL O/191/02 and *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5.

^{vii} *Hart v Relentless Records Ltd* [2003] FSR 36.

^{viii} See for instance *Office Cleaning Services Ltd v Westminster Officer Cleaning Association* [1946] 63 RPC 39 and *Radio Taxicabs (London) Ltd v Owner Drivers Radio Taxi Services Ltd* [2004] RPC 19. In the former case Lord Simonds stated:

"... in the case of trade names the Courts will not readily assume that the use by a trader as part of his trade name of descriptive words already used by another trader as part of his trade name is likely to cause confusion and will easily accept small differences as adequate to avoid it."

^{ix} see *Habib Bank Limited v Habib Bank AG Zurich* [1982] RPC 1.