

O-085-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2639654
BY WILLIAM & DANIEL BARRY TO REGISTER THE TRADE MARK**

Sky

IN CLASSES 11 AND 35

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 104572
BY BRITISH SKY BROADCASTING GROUP PLC AND SKY INTERNATIONAL
AG**

BACKGROUND

1) On 24 October 2012, William Barry and Daniel Barry (“the applicants”) applied under the Trade Marks Act 1994 for registration of the mark “Sky” in respect of the following goods and services:

Class 11: *Glow sticks, glow bracelets, chemically-activated light sticks, chemically-activated light bracelets, wrist lights for illumination purposes, garden candles, flameless candles, candle lamps, candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns, light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, led candles, led lights for lighting purposes incorporated into key chains, small toys or other similar personal items, led lights for strings, flowers, branches and other ornamental decorations, led underwater lights, lighted party-themed decorations, electric light decorative laces, light emitting diodes (led's) incorporated into laces, electric light decorative strings, luminous house numbers, oil lamps, lights being outdoor christmas ornaments, lights being outdoor halloween ornaments, lights being outdoor guy fawkes ornaments, lights being outdoor valentines ornaments, lights being outdoor ornaments, pen lights, portable battery-operated lights that can be placed on surfaces where other light sources are unavailable, self-luminous light sources.*

Class 35: *Online retail, retail and wholesale services, all connected with the sale of candles, lanterns, illuminated balloons and playthings; advertising and sales promotion (including TV, online and in print) relating to candles, lanterns, illuminated balloons and playthings.*

2) On 28 February 2013, British Sky Broadcasting Group plc and Sky International AG (“the opponents”) filed notice of opposition to the application. The grounds of opposition are in summary:

- a) the application offends under Section 5(1) of the Trade Marks Act 1994 (“the Act”) because it is in respect of an identical mark to earlier marks in the name of the opponents. Further, the applicants’ *advertising and sales promotion (including TV, online and in print) relating to candles, lanterns, illuminated balloons and playthings* are identical services to those of the opponents’ earlier marks;
- b) the application offends under Section 5(2)(a) of the Act because it is in respect of an identical mark to the same earlier marks and all the

remaining goods and services of the application are similar to those of the earlier marks;

- c) the application offends under Section 5(3) of the Act because it is respect of an identical mark and similar goods and services to a number of earlier marks in the name of the opponents, in which it claims a reputation. The opponents claim that the identity of marks and similarity of goods and services is such that the relevant public will believe that they are used by the same undertaking or believe that there is an economic connection between them. It also claims that that use of the mark by the applicants would take unfair advantage and also result in detriment to both the reputation and distinctive character of the earlier marks;
- d) the application offends under Section 5(2)(b) and Section 5(4)(a) of the Act. The former of these grounds is not pursued by the opponents because of its position that the marks are identical and therefore, it is appropriate to deal with the issues under Section 5(2)(a). The Section 5(4)(a) grounds were not pursued at the hearing.

3) For the purposes of the Section 5(1), 5(2)(a) and 5(3) grounds, the opponent relies upon earlier marks 2500604 SKY, Community Trade Mark (CTM) 8178436 SKY, CTM 6870992 SKY, 2485679 SKY PLAYER, CTM 5084785 SKY THREE, CTM 9049974 SKY NEWS and CTM 9049950 SKY SPORTS. However, its best case lies with the first of these, an approach also taken by the opponents' counsel at the hearing. Therefore, I will limit my considerations to those based upon the opponents' case where it relies upon this earlier mark.

4) In the opponents' statement of case it is required to identify what services covered by its earlier mark it relies upon. When completing the Form TM7 in respect of the Section 5(1) grounds, the opponents have listed *advertising and sales promotion (including TV, online and in print) relating to candles, lanterns, illuminated balloons and playthings*, however, these terms do not appear in its Class 35 specification. Further, in respect of the Section 5(2)(a) grounds, the opponents rely upon all of what is a very extensive list of goods and services. It is not necessary to reproduce the whole list, but rather, I adopt the approach taken by the opponents' counsel at the hearing and I will only consider the Section 5(1) and Section 5(2)(a) claims based upon the same list of goods and services relied upon at the hearing.

5) Taking account of the above, the relevant details of this mark, standing in the name of the first opponent, are shown below:

| Mark details | Goods and services relied upon |
|--|--|
| <p>2500604</p> <p>SKY</p> <p>Filing date: 20 October 2008</p> <p>Date of entry in register: 7 September 2012</p> | <p>Class 25: ..., wristbands, ...</p> <p>Class 28: Toys, games and playthings; ...</p> <p>Class 35: Advertising and promotional services; ...; the bringing together, for the benefit of others of a variety of goods namely ..., candles, ..., lighting, ... toys, games and playthings, ..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive television shopping channel, a digital television shopping channel, an Internet walled garden or by means of interactive television and/or telecommunications</p> |

6) Further, the services covered by the earlier marks and relied upon for the purposes of Section 5(3) can be summarised as television and communication services, in which a reputation in such has been conceded (see the following paragraph).

7) The applicants subsequently filed a counterstatement acknowledging the opponents' reputation and goodwill by making reference to the comments of Mrs Justice Asplin in *British Sky Broadcasting Group Plc & others v Microsoft Corporation & another* [2013] EWHC 1826 (Ch), 236, 6, namely that "[a]s a result of its considerable marketing budget, Sky has reputation and goodwill across its entire business" and "Sky is a provider of television and communication products and services including broadband in the United Kingdom". However, they deny:

- that it has any standing or goodwill in the field of candle lanterns, illuminated balloons and playthings;
- that the parties goods and services are similar.

8) It claims:

- to have a trading record going back to 2005 and its own considerable goodwill in the UK;
- the opponents have not used their mark in respect of the applicants' goods and services "and subsequently the specifications of a number of registrations are under notice of revocation due to non-use";
- it has gone about its business without any confusion with the opponents;
- that the applicants' 2005 application for the mark "SkyLanterns" (subsequently refused by the Registry) would have alerted the opponents to the applicants' existence and cannot plead ignorance of the activities of the applicants;

- it is the earlier rights holder in respect of its goods and services and that under Section 48 of the Act, the opponents must be considered as having “acquiesced for a continuous period of five years in the use of a registered trade mark in the United Kingdom whilst being aware of that use for the last 8 years”.

9) Both sides filed evidence in these proceedings. Both sides ask for an award of costs.

The Hearing

10) The matter came to be heard on 27 November 2014 when the opponents were represented by Mr Henry Ward of counsel, instructed by Olswang LLP and the applicants were represented by Mr Kevin Hickey.

11) As I mentioned at paragraph 2(d), above, Mr Ward did not pursue the Section 5(4)(a) grounds.

12) For the purposes of the hearing, Mr Ward provided a list of the opponents’ goods and services that represented the opponents’ best case. In respect of the grounds based upon Section 5(1), the list goes somewhat wider than the list provided in the opponent’s statement of case (see paragraph 4, above). I permitted Mr Ward to run his arguments based on this revised list. As I explained at the hearing, this is no more than a technical change to the pleadings that is unlikely to have any impact on the final outcome.

Evidence

13) Both sides filed evidence, however, this is not of assistance in determining the Section 5(1) or Section 5(2)(a) grounds. The opponents’ evidence goes to the scope and scale of its reputation, but goes no further than already conceded by the applicants in their counterstatement (see paragraph 6, above).

DECISION

Section 5(1)

14) Section 5(1) reads:

“5. - (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.”

15) Firstly, I must consider if the respective marks are identical. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union (“the CJEU”) held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

16) The respective marks differ only that one is represented as “Sky” and the other as “SKY”. The fact that one is in capital letters and the other where only the first letter is a capital, are differences that are so insignificant as to go unnoticed by the average consumer. There is nothing in the submissions of the parties to suggest that this is not the jointly held view. I conclude that the marks are identical.

17) At the hearing, Mr Ward submitted that the following goods and services are identical:

| Opponents’ goods and services | Applicants’ goods and services |
|---|--|
| Class 25: <i>Wrist bands</i> | Class 11: <i>glow bracelets, chemically-activated light bracelets, wrist lights for illumination purposes</i> |
| Class 28: <i>Toys, games and playthings</i> | Class 11: <i>light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, led lights for lighting purposes incorporated into key chains, small toys or other similar personal items, electric light decorative laces</i> |
| Class 35: <i>Advertising and promotional services;; the bringing together, for the benefit of others of a variety of goods namely ... candles, ..., toys, games and playthings, ...lighting..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive television shopping channel, a digital television shopping channel, an Internet walled garden or by means of interactive television and/or</i> | Class 35: <i>Online retail, retail and wholesale services, all connected with the sale of candles, lanterns, illuminated balloons and playthings; advertising and sales promotion (including TV, online and in print) relating to candles, lanterns, illuminated balloons and playthings.</i> |

18) I bear in mind the following guidance of the General Court (“the GC”) in *Gérard Meric v OHIM*, T-133/05:

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedral v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

19) Taking account of this guidance, the applicants’ *advertising and sales promotion (including TV, online and in print) relating to candles, lanterns, illuminated balloons and playthings* are self evidently covered by the broader term *[a]dvertising and promotional services*. Similarly, I take the view that *illuminated balloons* are covered by the term *playthings* and, consequently, the applicants’ *[o]nline retail, retail and wholesale services, all connected with the sale of candles, ..., illuminated balloons and playthings* are self evidently identical to the opponents’ *the bringing together, for the benefit of others of a variety of goods namely ... candles, ..., and playthings, ..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive television shopping channel, a digital television shopping channel, an Internet walled garden or by means of interactive television and/or telecommunications*. The respective services are therefore identical.

20) I also keep in mind the following guidance of Neuberger J. (as he then was) in *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC),:

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

and the following guidance of Jacob J. (as he then was) in *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of

activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

21) Finally, I keep in mind that it is permissible to take into account the class number specified by the applicants when assessing the meaning of the descriptions of goods and services included in the application, see *Altecnic Ltd's Trade Mark Application* [2002] RPC 34 (COA). Having regard for all of this guidance, I do not consider that Mr Ward is correct in his submissions that the remaining goods and services are identical. Whilst *wrist bands* in Class 11 may be very similar to the *glow bracelets* and *wrist lights* in the applicants' specification, they are not identical. To begin with, wrist bands are not bracelets and, further, if they were to incorporate lights they would be proper to Class 11. Therefore, I conclude they are not identical.

22) In respect of the applicants' *light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, led lights for lighting purposes incorporated into key chains, small toys or other similar personal items, electric light decorative laces* these are all goods that are incorporated into balloons, similar products, key chains and small toys and are not the balloons, key chains or small toys themselves (that are *toys* or *playthings*). In respect of *electric light decorative laces*, whilst these may be targeted at children, they are not *toys* or *playthings*. Therefore, I conclude that none of the respective goods are identical.

23) Finally, the applicants' *[o]nline retail, retail and wholesale services, all connected with the sale of ... lanterns* are not identical to the opponents' services because its services do not relate to lanterns.

24) In respect of Section 5(1) of the Act there is no requirement to consider the issue further because where identity of marks and services exist, there is a presumption of a likelihood of confusion. In light of the above, in respect of the grounds based upon Section 5(1), and subject to the merits of a number of defences relied upon by the applicants that I will comment on later, the opponent is successful in respect of the following of the applicants' services:

Online retail, retail and wholesale services, all connected with the sale of candles, ..., illuminated balloons and playthings; advertising and sales promotion (including TV, online and in print) relating to candles, ... illuminated balloons and playthings

Section 5(2)(a)

25) Next, I will consider the grounds based upon Section 5(2)(a) of the Act. This reads:

5. - (1) ...

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

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

26) The following principles are gleaned from the decisions of the CJEU in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98:

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

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

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

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

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

(f) 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;

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

Comparison of goods and services

27) In assessing the similarity of goods, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23:

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

28) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281).

29) In terms of understanding what a "complementary" relationship consists of, I note the judgment of the GC in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-325/06* where it was 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 *Segio 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 Ingles v OHIM - Bolanos Sabri (PiraNAN diseno original Juan Bolanos)* [2007] ECR I-0000, paragraph 48)."

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

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or

phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

31) The respective goods and services are:

| Opponents' services | Applicants' services |
|--|--|
| <p>Class 25: ..., wristbands, ...</p> <p>Class 28: Toys, games and playthings; ...</p> <p>Class 35: Advertising and promotional services; ...; the bringing together, for the benefit of others of a variety of goods namely ..., candles, ..., lighting, ... toys, games and playthings, ..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive television shopping channel, a digital television shopping channel, an Internet walled garden or by means of interactive television and/or telecommunications</p> | <p>Class 11: Glow sticks, glow bracelets, chemically-activated light sticks, chemically-activated light bracelets, wrist lights for illumination purposes, garden candles, flameless candles, candle lamps, candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns, light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, led candles, led lights for lighting purposes incorporated into key chains, small toys or other similar personal items, led lights for strings, flowers, branches and other ornamental decorations, led underwater lights, lighted party-themed decorations, electric light decorative laces, light emitting diodes (led's) incorporated into laces, electric light decorative strings, luminous house numbers, oil lamps, lights being outdoor christmas ornaments, lights being outdoor halloween ornaments, lights being outdoor guy fawkes ornaments, lights being outdoor valentines ornaments, lights being outdoor ornaments, pen lights, portable battery-operated lights that can be</p> |

| | |
|--|---|
| | <p><i>placed on surfaces where other light sources are unavailable, self-luminous light sources.</i></p> <p>Class 35: <i>Online retail, retail and wholesale services, all connected with the sale of ..., lanterns, ...</i></p> |
|--|---|

The applicants' Class 11 goods

32) At the hearing, Mr Ward submitted that the applicants' *glow bracelets, ... chemically-activated light bracelets, wrist lights for illumination purposes* are all "plainly similar" to the opponent's *wristbands* in Class 25. I agree. Both parties' goods are worn on the wrist and are therefore similar in nature and share the same purpose and method of use. Wristbands, especially those designed to be attractive to children may be sold alongside or close to the applicant's goods and, therefore, may share trade channels. Finally, both sets of goods may be in direct competition with each other, where the consumer may make a choice between a wristband without built-in illumination and a bracelet with illumination. I conclude that there is a reasonably high level of similarity.

33) In respect of the applicants' *[g]low sticks and chemically-activated light sticks*, these are goods predominantly aimed at children and, consequently, may involve the same trade channels to the opponents' *toys and playthings* with both being sold in the toy department of large stores or in specialist toy shops. Generally, they may be in competition where a child has to choose between a *glow stick* or a *toy* or other *plaything*. Further, the nature may be similar and the intended purpose may be the same as *playthings* in the form of wands or similar that are illuminated and powered by battery. Taking all of this into account, I conclude that the respective goods share a moderately high level of similarity.

34) The applicant's *garden candles, flameless candles, candle lamps, ... led candles* have no obvious similarity with the opponent's *toys, games and playthings*. However, I will consider similarity with certain of the opponents' Class 35 services that appear to represent its best case, namely, *the bringing together, for the benefit of others of a variety of goods namely ..., candles, ..., lighting, ..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive television shopping channel, a digital television shopping channel, an Internet walled garden or by means of interactive television and/or telecommunications*.

35) The GC in *Oakley v OHIM*, T-116/06 recognised that retail services for goods may be complementary and therefore similar to goods where those goods are identical to those being the subject of the retail services. More recently, Mr Geoffrey Hobbs, sitting as the Appointed Person in *MISS BOO Trade Mark*, BL O-391-14, considered the same issue in the context of clothing and shoes and

the retailing of the same. After reviewing the case law, including the GC's judgement in *Oakley*, he commented as follows:

25. ... the assessment of 'similarity' had to proceed substantively upon the premise that the Listed Services in Class 35 could not simply be characterised as dealing in goods of the kind to which they were linked. On the contrary, they had to be seen as involving real and significant performance of the functions of selecting an assortment of goods offered for sale and offering a variety of retail services aimed at inducing consumers to purchase goods of the kind specified. And then, from that perspective, it was necessary to give effect to the propositions noted in paragraph [19] above and to do so on the basis that there is no rule that 'complementarity' always or necessarily equals 'similarity' for the purposes of Section 5(2)(b). In evaluating whether and, if so, to what degree retail services across the spectrum covered by the Listed Services were 'similar' to 'handbags' in Class 18 and 'shoes for women' in Class 25, it was necessary, in keeping with the principle of proportionality, to consider the greater or lesser likelihood that a single economic undertaking would naturally be regarded as responsible for providing not only goods of that kind, but also retail services of the kind in question. The degree to which retail services within the spectrum were found on evaluation to be 'similar' to such goods would be a co-variable with the degree of 'similarity' between the signs in the overall assessment of the existence or otherwise of a likelihood of confusion.

36) Ms Anna Carboni, sitting as the Appointed Person in *GIANT Trade Mark*, BL O-264-14 considered whether the hearing officer in that case was correct to rely upon *Oakley* when finding similarity between clothing (that includes clothing for cycling) and the retailing of bicycles. As Ms Carboni noted, at paragraph 27, that the GC had held that in respect of the "retail of clothing" on the one hand and "clothing" on the other, that the nature, purpose and method of use were different and that any finding of similarity would rest on different factors. Further, at paragraph 31, Ms Carboni observed that in this modern age, retail outlets, particularly online outlets sell "almost anything" and cautioned the tribunal in giving undue weight to the existence of an overlap in channels to distribution.

37) In the current case, the opponents' specification includes retail services relating to candles and lighting. It is clear to me that the goods to which the retail services relates includes the applicant's goods. As Ms Carboni noted in *GIANT*, these respective goods and services differ in nature, purpose and method of use and, therefore, any similarity must rest on different factors. Retail outlets specialising in candles and/or lighting are not uncommon and therefore there is a specific overlap in channels of trade that goes beyond merely being provided by an Internet super-retailer selling "almost anything". The opponent has provided examples of this in its evidence at Exhibits SJW2 and SJW3. Mr Hickey submitted that the retailers identified in these exhibits are not retailers through

which the applicants sell their goods. This is irrelevant for the purposes of the notional comparison I must make. As a result, the average consumer may expect that the provision of retail services relating to lighting and candles is provided by the same undertaking as the goods themselves. Consequently, there is some similarity between the applicants' goods and the opponents' services. However when considering all the factors, this similarity is no more than low to medium.

38) Next, I consider similarity of the opponents' goods and services with the applicants' *candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns*. At the hearing, Mr Ward drew my attention to Mr Hickey's own characterisation of the applicants' goods as being "candle lanterns, illuminated balloons and playthings" and suggested that the last two of these terms fall within the scope of the opponent's goods. I note this, but I must consider the specification of goods as listed and not some informal, and potentially misleading, paraphrasing of it. The various lanterns listed are not obviously toys or playthings and they differ in nature, purpose and method of use. Further, they are not in competition. I conclude there is no similarity. The opponents also have the retailing of candles in their Class 35 specification, but it is not clear to me that the trade channels will be the same, even where the lanterns are in the form of candle lanterns. Certainly, there are no submissions or evidence before me that suggest that candles and Chinese lanterns are normally sold by the same retailers. Consequently, I conclude that these goods and services do not share any similarity.

39) In respect of *light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, ... led lights for lighting purposes incorporated into ... small toys*, these are very close in nature, if not the same as playthings (in the case of balloons incorporating LEDs) and toys (in the case of small toys incorporating LED lights). The nature, purpose and methods of use may be the same, as may be the trade channels. Further, they may be in competition with other playthings and toys. There is a high level of similarity.

40) The remaining lights covered by the applicants' specification are *led lights for strings, flowers, branches and other ornamental decorations, led underwater lights, lighted party-themed decorations, electric light decorative laces, light emitting diodes (led's) incorporated into laces, electric light decorative strings, luminous house numbers, ... lights being outdoor christmas ornaments, lights being outdoor halloween ornaments, lights being outdoor guy fawkes ornaments, lights being outdoor valentines ornaments, lights being outdoor ornaments, ...portable battery-operated lights that can be placed on surfaces where other light sources are unavailable, self-luminous light sources*. These all have applications far removed from toys and playthings, but the reasoning provided in

paragraphs 36 – 39 above also apply to the comparison of these goods with the opponents' retail services relating to lighting and I conclude that there is low to medium similarity.

41) In respect of the applicants' *oil lamps* there is not obvious similarity with any of the opponents' goods or services. The opponents' retailing in respect of lighting represents its best case, but I am not aware that such retailers may also sell oil lamps and I have no submissions or evidence on this point. I conclude that oil lamps have no similarity with the opponents' goods or services.

42) Finally, I consider whether any of the opponents' goods or services have any similarity with the applicants' *Led lights for lighting purposes incorporated into key chains, ... or other similar personal items and pen lights*. I understand *pen lights* to describe a small light incorporated into a pen or a pen-like handle. It is not clear to me how any of these goods are similar to any of the opponents' goods. In terms of nature, purpose and method of use, there appears to be no similarity. Neither is it obvious that they are in competition with the opponent's goods or that they share any trade channels. The opponents' retailing in respect of lighting once again presents them with its best case. However, whilst at a general level led lights incorporated into key chains, other similar personal items and pen lights may have the same purpose as the goods the subject of the opponent's retailing service, namely to illuminate, such a general common purpose is insufficient to find any similarity with the retail services themselves. Taking all of this into account, I conclude there is no similarity with any of the opponent's goods and services.

The applicants' Class 35 services

43) In respect of the applicant's services relating to illuminated lanterns, as I have already discussed (at paragraph 38 above) it is not clear to me that the goods are sold through the same trade channels as the goods that the opponents' services relate. Consequently, whilst the nature, purpose and methods of use of the respective services will be the same, they will not be in competition. Taking all of this into account, I conclude that there is some similarity, but this is only low.

The average consumer and nature of the purchasing act

44) Matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23), who is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, paragraph 27). The degree of care and attention the average consumer uses when selecting goods and services can, however, vary depending on what is involved (see, for example, the judgment of the GC in *Inter-Ikea Systems B.V. v. OHIM*, Case T-112/06).

45) In respect of all the goods and services of both parties, the average consumer is principally the general public. The level of care involved in the purchase will vary with some goods, such as toys, playthings, glow sticks, glow bracelets and candles being bought with only a low level of care. Such goods are generally of low value. Other goods such as the various lighting goods may be of higher value and will involve a higher level of care and attention, but not the highest level. Similar conclusions can be drawn concerning the respective retail and wholesale services with the nature of the purchasing act varying depending upon the nature of the goods being purchased.

Comparison of marks

46) I have already concluded that the respective marks are identical.

Distinctive character of the earlier trade mark

47) I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use the greater the likelihood of confusion (*Sabel BV v Puma AG* [1998] RPC 199). The distinctive character of the earlier mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91).

48) The opponents' mark consists of the dictionary word SKY. As a word that is readily understood by the average consumer it is not of the highest level of distinctive character. Nevertheless, it is not obviously descriptive, or even allusive, of the goods and services that the opponents rely upon. I therefore conclude that it is endowed with a normal level of distinctive character.

49) Whilst the opponents enjoy an undisputed large reputation in respect of broadcast and media (and with the accompanying enhancement to the distinctive character of its mark in respect of these services), the opponents do not suggest that the reputation (and hence, enhanced distinctive character) extends to the goods and services relied upon by them for the purposes of Section 5(2)(a). Therefore, the opponent must rely upon the inherent distinctive character of its mark.

Likelihood of confusion

50) The applicant relies upon a number of broad defences that apply equally to the opponents' Section 5(1) and its Section 5(2)(a) pleadings. I discuss these here. The applicant submits that the opponents have acquiesced to its application because it alleges that the opponents knew of use made by the applicants. Its reasoning for such a claim is that the opponents' watching services would have picked up the applicants' failed attempt to register the mark "SkyLanterns" in 2005. It submits that the opponents would have been alerted to

the applicants' attempt to register a mark containing the word "Sky", but has done nothing to prevent their business. I reject this argument. There is no evidence that the opponents were aware of the applicants' activities, rather it is mere conjecture. Further, even if the opponents had been aware of the applicants' earlier application, it was never accepted for registration and was not advertised for opposition purposes. Consequently, the opponents were not required to challenge the application in order to prevent its registration and neither can they have been expected to make any inferences regarding the trading activities undertaken by the applicants.

51) The applicants also submit that the opponent offends under Section 95 of the Act. This is because it has interpreted the opponents' arguments regarding similarity of the respective goods and services as a claim over goods in which it has not traded. This, it argues, amounts to a false representation as to the goods or services knowing that the representation is false. I dismiss this argument. The opponents do not claim use where there is none. Rather, its claim is that the retail services in respect to such goods are similar to the goods themselves and I have already considered the merits of this argument in my earlier analysis of similarity between the respective goods and services. Contrary to Mr Hickey's submissions on behalf of the applicants, it does not "make a mockery of the registration process to refuse registration in a Class due to a proprietor having a registration in another Class". Class numbers are for administrative purposes only and goods in one class may be highly similar to goods in another class. Similarly, according to the leading case law, goods may be similar to services and vice-versa.

52) It is further argued that the opponents have no reputation in the field of lanterns, illuminated balloons etc. Mr Ward submitted that this is irrelevant for the purposes of considering grounds under Section 5(1) and Section 5(2)(a) where I am required to undertake a notional analysis based on the goods and services listed in the respective specifications. I agree.

53) The opponents have admitted they have not used their mark in respect of the goods and services they rely upon and the applicant submits that the opponents never had a *bona fide* intention to use their mark in respect of these goods and services. There is no evidence of what were their intentions or lack of intention. In the absence of such evidence, the argument is without foundation. Further, even if such an argument was supported by evidence, it is an argument that amounts to an attack upon the validity of the opponents' earlier mark. Section 72 of the Act states that registration of a mark is *prima facie* evidence of its validity and, consequently, any challenge to its validity must be in the form of an attack upon the registration itself. Further, the owner of a trade mark registration is permitted a period of five years before it can become vulnerable to a claim of non-use. Therefore, I reject such an argument presented as a defence in these proceedings (where the validity of the opponents' mark is not the issue).

54) The applicants also make submissions that go specifically to the Section 5(2)(a) pleading. Firstly, they submit that there has been a lack of confusion in the market place. This may be so, but because the opponents do not claim to be trading in the same field, there cannot be the necessary exposure of the consumer of the applicants' goods to both marks in order to demonstrate that the marks are in use in the same market without confusion occurring. I understand the applicants' frustrations, but as the opponents point out, the actual position in the market place must not enter my considerations in respect to grounds based upon Section 5(2)(a). As I have already stated, I must consider the respective lists of goods and services recorded in the registrations relied upon and in the application.

55) I now turn to the factors that will determine the outcome of the case based upon Section 5(2)(a). It is necessary that I adopt the global approach advocated by case law. I must take into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the marks and that of the goods or services designated (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*).

56) There is no dispute that the marks are identical and I also keep in mind that a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa. I have also found the following levels of similarity between the respective goods and services:

| Applicants' goods and services | Opponents' goods and services | Level of similarity |
|---|---|---|
| <p>Class 11</p> <p><i>glow bracelets, ... chemically-activated light bracelets, wrist lights for illumination purposes</i></p> <p><i>[g]low sticks and chemically-activated light sticks,</i></p> <p><i>garden candles, flameless candles, candle lamps, ... led</i></p> | <p><i>wristbands in Class 25</i></p> <p><i>toys and playthings in Class 28</i></p> <p><i>the bringing together, for the benefit of others of a variety of goods namely ..., candles, ..., lighting, ..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive</i></p> | <p>Reasonably high level of similarity</p> <p>Moderately high level of similarity</p> <p>some similarity but no more than low to medium</p> |

| | | |
|--|--|--|
| <p><i>candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns.</i></p> <p><i>light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, ... led lights for lighting purposes incorporated into ... small toys</i></p> <p><i>led lights for lighting purposes incorporated into..., led lights for strings, flowers, branches and other ornamental decorations, led underwater lights, lighted party-themed decorations, electric light decorative laces, light emitting diodes (led's) incorporated into</i></p> | <p><i>television shopping channel, a digital television shopping channel, an Internet walled garden or by means of interactive television and/or telecommunications in Class 35</i></p> <p>All of the opponent's goods and services</p> <p><i>playthings and toys</i></p> <p><i>the bringing together, for the benefit of others of a variety of goods namely ..., candles, ..., lighting, ..., enabling customers to conveniently view and purchase those goods including via an Internet website, an interactive television shopping channel, a digital television</i></p> | <p>No similarity</p> <p>high level of similarity</p> <p>some similarity but no more than low to medium</p> |
|--|--|--|

| | | |
|---|---|---|
| <p><i>laces, electric light decorative strings, luminous house numbers, ... lights being outdoor christmas ornaments, lights being outdoor halloween ornaments, lights being outdoor guy fawkes ornaments, lights being outdoor valentines ornaments, lights being outdoor ornaments, ...portable battery-operated lights that can be placed on surfaces where other light sources are unavailable, self-luminous light sources.</i></p> <p><i>Led lights for lighting purposes incorporated into key chains, ... or other similar personal items; oil lamps,... pen lights</i></p> <p>Class 35</p> <p><i>Online retail, retail and wholesale services, all connected with the sale of ..., lanterns</i></p> | <p><i>shopping channel, an Internet walled garden or by means of interactive television and/or telecommunications in Class 35</i></p> <p>All of the opponent's goods and services</p> <p><i>the bringing together, for the benefit of others of a variety of goods namely ..., candles, ..., lighting, ... toys, games and playthings</i></p> | <p>No similarity</p> <p>Some similarity, but only low</p> |
|---|---|---|

57) I come to the view that there is a likelihood of confusion. I consider that the relationship between the various goods and services for which I have found similarity is one where the consumer may expect the same provider to offer the competing goods and services. As stated earlier, the level of care and attention during the purchasing act may vary from a low level to a higher, but not the highest level. A higher degree of care and attention can sometimes mitigate against a likelihood of confusion, however, in this case, where the marks are identical, I consider that even a careful selection process will not avoid a likelihood of confusion.

58) This finding applies to all of the goods and services where I have found similarity. Consequently, the Section 5(1) and Section 5(2)(a) grounds are successful in respect of all of the applicants' goods and services except:

candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns; Led lights for lighting purposes incorporated into key chains or other similar personal items; oil lamps, pen lights

59) In light of this, the applicants' fall-back position of limiting its application by the removal of Class 35 does not assist.

60) If I am wrong in my conclusion that the respective marks are identical, any differences are such that if the likelihood of confusion were to be assessed under Section 5(2)(b) rather than Section 5(1) and Section 5(2)(a), I would have reached the same conclusions.

Section 5(3)

61) In light of my findings in paragraph 58, I will consider the opponents' Section 5(3) grounds only in respect of the applicant's goods that have survived the Section 5(1) and Section 5(2) grounds. Section 5(3) of the Act reads as follows:

“5.-(3) A trade mark which –

(a) is identical with or similar to an earlier trade mark,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

62) The scope of Section 5(3) has been considered in a number of cases notably *General Motors Corp v Yplon SA (CHEVY)* [1999] ETMR 122 and [2000] RPC 572, *Adidas Salomon AG v Fitnessworld Trading Ltd.* [2004] ETMR 10, *Premier Brands UK Limited v Typhoon Europe Limited (TYPHOON)* [2000] FSR 767, *Daimler Chrysler v Alavi (MERC)* [2001] RPC 42, *C.A. Sheimer (M) Sdn Bhd's TM Application (VISA)* [2000] RPC 484, *Valucci Designs Ltd v IPC Magazines (LOADED) O/455/00, Mastercard International Inc and Hitachi Credit (UK) Plc* [2004] EWHC 1623 (Ch), *Electrocoin Automatics Limited and Coinworld Limited and others* [2005] FSR 7, *Davidoff & Cie SA v Gofkid Ltd (DAVIDOFF)* [2003] ETMR 42, *Intel Corporation Inc. v CPM United Kingdom Ltd (INTEL)* [2009] RPC 15, *L'Oreal v Bellure* [2010] RPC 1 and *Whirlpool Corp v Kenwood Limited* [2010] RPC 2.

63) The applicable legal principles arising from these cases are as follows:

- a) 'Reputation' for the purposes of Section 5(3) means that the earlier mark is known by a significant part of the public concerned with the products or services covered by that mark (paragraph 26 of the CJEU's judgment in *CHEVY*).
- b) Under this provision the similarity between the marks does not have to be such as to give rise to a likelihood of confusion between them; the provision may be invoked where there is sufficient similarity to cause the relevant public to establish a link between the earlier mark and the later mark or sign (*Adidas Salomon v Fitnessworld*, paragraphs 29-30).
- c) Whether there is a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the earlier mark with a reputation and the later mark must be assessed globally, taking into account all factors relevant to the circumstances of the case (*INTEL*).
- d) The fact that, for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark with a reputation to mind is tantamount to the existence of such a link between the conflicting marks, within the meaning of *Adidas-Salomon and Adidas Benelux*. (*INTEL*)
- e) The stronger the earlier mark's distinctive character and reputation the easier it will be to accept that detriment has been caused to it (per Neuberger J. in *Premier Brands*, and the CJEU in *CHEVY*, paragraph 30).
- f) Whether use of the later mark takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the earlier mark, must be assessed globally, taking into account all factors relevant to the circumstances of the case (*INTEL*).
- g) Unfair advantage is taken of the distinctive character or the repute of the earlier trade mark where there is clear exploitation and free-riding on the coat-tails of a famous mark or an attempt to trade upon its reputation (*Spa Monopole v OHIM*).
- h) The use of the later mark may be detrimental to the distinctive character of the earlier mark with a reputation even if that mark is not unique; a first use of the later mark may suffice to be detrimental to the distinctive character of the earlier mark; proof that the use of the later mark is or would be detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future (*INTEL*).

i) Taking unfair advantage of the distinctive character or repute of a mark relates not to detriment caused to the earlier mark but to the advantage taken by the third party. Such an advantage may be unfair even where the use is not detrimental to the distinctive character or to the repute of the mark (*L’Oreal v Bellure*). It is not sufficient to show that an advantage has been obtained. There must be an added factor of some kind for that advantage to be categorised as unfair (*Whirlpool Corp v Kenwood Limited*).

Reputation

64) ‘Reputation’ for the purposes of Section 5(3) means that the earlier mark is known by a significant part of the public concerned with the products or services covered by that mark (paragraph 26 of the CJEU’s judgment in *General Motors Corp v Yplon SA (CHEVY)* [1999] ETMR 122 and [2000] RPC 572). It is sufficient that I proceed on the basis that the opponents have a strong reputation in the mark SKY in respect of broadcasting and media, as sensibly conceded in the applicants’ counterstatement.

The Link

65) Having established the existence and scope of a reputation, I need to go on to consider the existence of the necessary link. I am mindful of the comments of the CJEU in *INTEL* that it is sufficient for the later trade mark to bring the earlier trade mark with a reputation to mind for the link, within the meaning of *Adidas-Salomon and Adidas Benelux*, to be established. The CJEU also set out the factors to take into account when considering if the necessary link exists:

“41. The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstances of the case (see, in respect of Article 5(2) of the Directive, *Adidas-Salomon and Adidas Benelux*, paragraph 30, and *adidas and adidas Benelux*, paragraph 42).

42. Those factors include:

- the degree of similarity between the conflicting marks;
- the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;
- the strength of the earlier mark’s reputation;

- the degree of the earlier mark’s distinctive character, whether inherent or acquired through use;
- the existence of the likelihood of confusion on the part of the public.”

66) It is submitted on behalf of the opponents that due to the identity of the marks and the enormous reputation of the SKY mark, “the relevant link is plainly established”. To illustrate the point, Mr Ward took the example of “BBC Christmas lights”. He submitted that the consumer would immediately make the link with the broadcaster. Similarly, he submitted that the consumer would immediately make the link to the opponents if they came across “Sky Christmas lights”. The two examples are not on all fours for one significant reason. The letters “BBC” have no meaning in the mind of the UK public other than the name of the broadcaster. Therefore, in almost any context, the letters “BBC” may create a link in the mind of the consumer. The word “Sky” on the other hand, is an ordinary dictionary word that all UK consumers will understand. The result is that its distinctive character is not as high as say, the “BBC”. Therefore, the connection with the opponents is not automatic and must be determined taking full account of the full circumstances of its use.

67) Whilst, the respective marks are identical, I have found that the applicants’ goods share no similarity with the opponents’ goods or services. Whilst this is not in itself determinative (a ground based upon Section 5(3) can succeed even where the respective goods are dissimilar), it is nonetheless an important factor to keep in mind. Further, I have found no likelihood of confusion.

68) In simple terms, the question boils down to would the consumer, upon seeing the mark SKY used in respect of the goods listed in paragraph 58, above, make a connection with the opponents? It is my finding that it would not. The word SKY has an allusive quality in respect of the various lanterns listed being goods that are released into the sky. Consequently, it is this allusiveness to the goods that the consumer will perceive, rather than any link to the opponents. I also find that the necessary link is not established in respect of *oil lamps and led lights for lighting purposes incorporated into key chains or other similar personal items; pen lights*. Such goods are far removed from the opponents’ area of reputation and, consequently, the consumer will not perceive a link between the two. They do not constitute goods that the consumer may expect to have a purpose of promoting the opponents’ goods and services. In respect of all of these goods, I conclude the necessary link is not established.

69) As the necessary link has not been established, it follows that there can be no damage and I find that the opponents’ case fails, insofar as it applies to the applicants’ goods that survive the Section 5(1) and Section 5(2) grounds.

Summary

70) The opposition is successful in respect of the following of the applicants' goods and services:

Class 11: *Glow sticks, glow bracelets, chemically-activated light sticks, chemically-activated light bracelets, wrist lights for illumination purposes, garden candles, flameless candles, candle lamps, candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns, light emitting diodes (led's) incorporated into balloons for illuminating transparent balloons and similar products, light emitting diodes (led's) incorporated into metallic and adhesive plastic reflector film for illuminating transparent balloons and similar products, led candles, led lights for lighting purposes incorporated into key chains, small toys or other similar personal items, led lights for strings, flowers, branches and other ornamental decorations, led underwater lights, lighted party-themed decorations, electric light decorative laces, light emitting diodes (led's) incorporated into laces, electric light decorative strings, luminous house numbers, oil lamps, lights being outdoor christmas ornaments, lights being outdoor halloween ornaments, lights being outdoor guy fawkes ornaments, lights being outdoor valentines ornaments, lights being outdoor ornaments, pen lights, portable battery-operated lights that can be placed on surfaces where other light sources are unavailable, self-luminous light sources.*

Class 35: *Online retail, retail and wholesale services, all connected with the sale of candles, lanterns, illuminated balloons and playthings; advertising and sales promotion (including TV, online and in print) relating to candles, lanterns, illuminated balloons and playthings.*

71) The opposition fails in respect of the following of the applicants' Class 11 goods:

candle bags, (being lanterns), floating lanterns, candle lanterns, glass lantern globes, oil lanterns, portable paper lanterns, standing paper lanterns, flying lanterns, fuel cell lanterns, chinese lanterns, electric chinese lanterns, electric lanterns; Led lights for lighting purposes incorporated into key chains or other similar personal items; oil lamps, pen lights

COSTS

72) The opponent has been mostly successful and is entitled to a contribution towards its costs, according to the published scale in Tribunal Practice Notice

4/2007. The opponent filed copious amounts of evidence to demonstrate the level and extent of its reputation. This was unnecessary in light of the applicants' concession in its counterstatement when it referred to the comments of Mrs Justice Asplin who had noted in recent High Court proceedings that, "as a result of its considerable marketing budget" the opponents' have a reputation and goodwill as a provider of television and communication products". Consequently, I award no costs in respect of this evidence. I also make a reduction of £300 to reflect the partial success of the opposition. I award costs on the following basis:

| | |
|--|--------------|
| Preparing a statement and considering the counterstatement | £300 |
| Opposition fee | £200 |
| Preparing and attending hearing | £800 |
| Reduction for partial success | (£300) |
| Total: | £1000 |

73) I order William and Daniel Barry to pay British Sky Broadcasting Group Plc/Sky International AG the sum of £1000 which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

Dated this 23rd day of February 2015

**Mark Bryant
For the Registrar,
the Comptroller-General**