

**O-250-17**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3153622 BY  
VIBE INTERNATIONAL LTD  
TO REGISTER:**

**Vibe**

**AS A TRADE MARK IN CLASS 9**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 407282 BY THEVIBE LIMITED**

## BACKGROUND & PLEADINGS

1. On 8 March 2016 (claiming an International Convention priority date of 22 September 2015 from an earlier filing in Namibia), Namib Brand Investments (Pty) Ltd applied to register the trade mark **Vibe** for the goods shown in paragraph 9 below. The application was published for opposition purposes on 27 May 2016. Following publication, the application was assigned to Vibe International Ltd (“the applicant”). As nothing appears to turn on this change of ownership, I need say no more about it at this point.

2. On 30 August 2016, the application was opposed in full by Thevibe Limited (“the opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent is the owner of the following United Kingdom trade marks:

No. 3125007 for the trade mark: **VIBE TICKETS** which was applied for on 1 September 2015 and entered in the register on 4 December 2015. The opponent relies upon the goods shown in paragraph 9 below.

No. 3125012 for the trade mark (shown below) which was also applied for on 1 September 2015 and entered in the register on 4 December 2015. The opponent relies upon the same goods as those in No. 3125007:



In its Notice of opposition, the opponent states:

“The sign applied for “Vibe” (words) contains the entire and distinctive word/verbal element of the opponent’s [trade marks]. The additional “tickets” word contained in the opponent’s mark is non-distinctive and does not differentiate from the application. Therefore the mark and the sign are highly

similar and indeed, the sign applied for is likely to be seen as indicative of the opponent's products.

The goods opposed are either identical or highly similar to the goods protected under the opponent's earlier marks in class 9...The goods in the specification of the mark applied for are sold or supplied in the same type of distribution channels and to the same average consumer as those of the opponent."

3. The applicant filed a counterstatement in which the basis of the opposition is denied. Its comments in relation to the competing goods is shown in paragraph 11 below. I will return to its views on the similarity in the competing trade marks later in this decision.

4. In these proceedings, the opponent is represented by Kempner & Partners LLP and the applicant by CKL Brands Limited. Although neither party filed evidence, both filed written submissions during the course of the evidence rounds. Although neither party elected to be heard, the opponent filed written submissions in lieu of attendance at a hearing.

## **DECISION**

5. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

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

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

6. An earlier trade mark is defined in section 6 of the Act, which states:

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

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

7. In these proceedings, the opponent is relying upon the two trade marks shown in paragraph 2 above, both of which qualify as earlier trade marks under the above provisions. As neither of these earlier trade marks had been registered for more than five years at the date when the application was published, neither are subject to proof of use, as per section 6A of the Act. The opponent is, as a consequence, entitled to rely upon all of the goods it has identified.

### **My approach to the comparison – the opponent’s strongest case**

8. The opponent is relying upon the two trade marks shown above, the specifications in class 9 of which are identical. However, as trade mark No. 3125007 consists of the words “VIBE TICKETS” presented in block capital letters, it offers, in my view, the opponent its strongest case in these proceedings. If the opponent does not succeed on the basis of this earlier trade mark, it will, in my view, be in better position in relation to its other (stylised) trade mark.

## Comparison of goods

9. The competing goods are as follows:

The opponent's goods	The applicant's goods
<p><b>No. 3125007</b></p> <p><b>Class 9</b> - Computer software; downloadable computer software, computer software and downloadable computer software for the sale and purchase of tickets for concerts, films, shows, sports events and other forms of entertainment, for issuing tickets and for paying therefore; downloadable electronic publications relating to concerts, films, shows, sports events and other forms of entertainment.</p>	<p><b>Class 9</b> - Computer Hardware; Computer Software; Computer peripherals; Electronic data processing installations; computer network apparatus; parts and fittings for the aforesaid goods.</p>

10. In its submissions, the opponent comments on the competing goods in the following terms:

“5.4 (a) The term “Computer Software” of the Application is identical to “Computer software” as covered by the Earlier Marks;

(b) The term “Computer Hardware” covers the collection of physical parts of a computer system and includes the computer case, monitor, keyboard, and mouse. It also includes all the parts inside the computer case, such as the hard disk drive, motherboard, video card etc. “Computer hardware” is designed to work hand in hand with “computer software”. In addition, computer hardware companies also manufacture software, share the same distribution channels and target the same consumers. Moreover, “computer software” are complementary

goods. It follows from this that “Computer Hardware” is highly similar to the “Computer software” covered by the Earlier Rights.

(c) The term “Computer peripherals” covers any auxiliary device such as a computer mouse or keyboard that connects to and works with the computer in some way. As with “computer hardware”, such devices are designed to work with “computer software”, they share the same distribution channels and target the same consumers. They are also complementary to the Opponent’s goods. It follows that “Computer peripherals” are highly similar to the “Computer software” covered by the Earlier Rights.

(d) The term “computer network apparatus” covers equipment required for devices to communicate with each other and interact on a computer network. Such devices may include gateways, routers, network bridges, and modems, wireless access points, networking cables, line drivers, switches, hubs and repeaters. As with the term ‘Computer Hardware’ above, ‘computer network apparatus’ is designed to work in conjunction with “computer software”. In addition, computer hardware companies also manufacture software, share the same distribution channels and target the same consumers. Moreover, “computer software” are complementary goods. It follows from this that “computer network apparatus” is highly similar to the “Computer software” covered by the Earlier Rights.

(e) The term “Electronic data processing installations” covers computer hardware and systems used for the automated process of commercial data. Examples of this would be stock updates applied to an inventory, banking transactions applied to an account and customer booking and ticketing transactions to a ticket provider’s reservation system, such as that employed by the Opponent. As with “Computer Hardware” above, “computer network apparatus” are designed to work hand in hand with “computer software”, share the same distribution channels and target the same consumers. It follows that “Electronic data

processing installations” are highly similar to the “Computer software”, as covered by the Earlier Rights.”

11. In its counterstatement, the applicant states:

“5. The opponent claimed that all the goods in class 9 are identical or similar to the goods covered in the same class. However, the nature intended purpose and the consumers may be completely different although the entities belong to and compete fairly in the same marketplace...

6. Further, the goods offered in class 9 by the respective marks differ significantly. The subject mark specifies “electronic data processing installations” and “computer network apparatus”. The very nature and purpose of these goods differs significantly from those of the earlier mark such that they cannot be regarded as similar. Further, simply because the earlier mark is protected for a broad specification of goods in class 9 cannot imply *per se* that any other trade mark seeking protection for any other specification of goods in the same class should be denied by the office. This would result in a clear trespassing of the Parliament’s original legal intent and go beyond the scope of the Act.

7. Besides, the distribution channels of the goods at hand must be taken into consideration. Although this was not explicitly mentioned in *Canon*, it is widely used as an assessment criterion...The reasoning behind this criterion is that if goods are offered through the same distribution channels, the consumer may be more likely to assume that the goods...are possibly offered by the same entity and vice versa. Applying this factor to the present case, the goods in class 9 of the earlier marks and [the application] are significantly different as highlighted above.

8. As such, the goods in the [application] are sold in different outlets, are of a different nature and serve different purposes...”

12. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the Court stated at paragraph 23 of its judgment that:

“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”.

13. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

14. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“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.”

15. 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.”

16. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criteria capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“...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”.

As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-O-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

17. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the GC stated:

“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 *Vedial 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).”

18. In approaching the comparison, I must, as the case law dictates, give the words in the competing specifications their natural meanings in the context in which they appear. I must not give them an overly liberal interpretation nor should I strain the words in the competing specifications unnaturally to produce an overly narrow meaning. Bearing the above in mind, my analysis is as follows:

The term “computer software” appears in both parties’ specifications and is identical.

19. In its submissions, the opponent argues that (with the exception of “parts and fittings for the aforesaid goods” in the application upon which it does not comment), the remaining goods in the applicant’s specification i.e. “computer hardware”, “computer peripherals”, “computer network apparatus” and “electronic data processing installations” are highly similar to its “computer software”.

20. To begin with, I agree that “computer software” in the opponent’s specification is the high-point of its case on similarity. I further note that the opponent’s “computer software” is unlimited and so may be put to any purpose. Turning to the applicant’s specification, all of the terms I have itemised above are broad terms encompassing a wide range of goods. As the opponent’s submissions highlight, such terms are, to some extent, interchangeable. Whilst it could be argued that the phrase “electronic data processing installations” in the application encompasses the opponent’s “computer software”, no matter how exactly the average consumer may construe the individual terms in the applicant’s specification, it is clear that all of its goods are for use in the field of computing and would, broadly speaking, be described as computer hardware.

21. Considered in that context, even if the physical nature and method of use of the opponent’s “computer software” differs from that of the applicant’s computer hardware, the users, intended purpose and trade channels (i.e. undertakings who both produce and trade in the goods) may be identical, or if not identical, similar to a high degree. There is, in my experience, a well-established complementary relationship between “computer software” and computer hardware such that the average consumer will be aware, to use the words in *Boston*, that “one is indispensable or important for the use of the other”. As *Boston* goes on to explain, this is likely to lead the average consumer to assume “that the responsibility for those goods lies with the same undertaking”. Having balanced the similarities and differences I have identified above, I conclude that the opponent’s “computer software” is similar to a high degree to the applicant’s “computer hardware”; “computer peripherals” and “computer network apparatus” and, if not identical, at least highly similar to the applicant’s “electronic data processing installations.”

22. The opponent has not commented upon the degree of similarity between its “computer software” and the “parts and fittings for the aforesaid goods” in the applicant’s specification. To the extent that there may be goods which are regarded as parts and fittings for “computer software”, these would, self-evidently, be highly similar to the opponent’s “computer software”. In view of my earlier conclusions on the similarity between the opponent’s “computer software” and the applicant’s computer hardware, I conclude that the parts and fittings for the applicant’s computer hardware are similar to the opponent’s “computer software” albeit to a lesser extent; I would pitch the degree of similarity as medium.

### **The average consumer and the nature of the purchasing act**

23. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods; I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

24. The average consumer of all of the goods at issue is either a member of the general public or a business user selecting on behalf of a commercial undertaking. My own experience (as a member of the general public), informs me that all of the goods at issue will, for the most part, be obtained by self-selection i.e. from the shelves of a

bricks and mortar retail outlet or from the equivalent pages of a website or catalogue; visual considerations are, as a consequence, likely to be an important part of the selection process. However, given the technological nature of the goods at issue, it is also likely that such goods will be the subject of, for example oral enquiries to sales assistants (both in person and by telephone), indicating that aural considerations must not be forgotten. Absent submissions to the contrary, I see no reason why the same conclusions would not apply to a business user. As to the degree of care the average consumer will display when selecting the goods at issue, given the nature of the goods and as even a member of the general public buying for personal use is likely to be alive to a range of factors such as compatibility with existing devices, security, speed, price etc. I would expect an above average degree of attention to be paid by them during the selection process. A business user is likely to be conscious of many of the same factors. They will also have in mind the businesses existing infrastructure and the potential impact of any selection they make on that infrastructure (and its likely impact on the well-being of the business). In addition, as costs in the business sector are likely to be higher and, for example, meetings with potential suppliers and a tendering arrangement may also be a part of the process, I would expect a business user to pay quite a high degree of attention to the selection of the goods at issue.

### **Comparison of trade marks**

25. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight

in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

26. It would be wrong, therefore, artificially to dissect the trade marks, although, it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are:

<b>Opponent’s trade mark</b>	<b>Applicant’s trade mark</b>
VIBE TICKETS	Vibe

27. Although I do not intend to repeat the parties’ competing written submissions on this issue here, I will, of course, bear them all in mind in reaching my own conclusions and refer to them, as necessary, below.

28. The applicant’s trade mark consists exclusively of the four letter word “Vibe” presented in title case. That is the overall impression it will convey and where its distinctiveness lies.

29. The opponent’s trade mark consists of two words of four and seven letters respectively. Whilst it is presented in block capital letters, the first word i.e. “VIBE” is to be regarded as identical to the applicant’s trade mark (the CJEU’s comments in *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00 refer).

The word “TICKETS” is also presented in block capital letters; the meanings of both words are so well-known as to require no further explanation. Although an ordinary English language word, as far as I am aware (and there are, unsurprisingly, no submissions to the contrary), “VIBE” is neither descriptive nor non-distinctive for “computer software”. As a consequence, absent use, I regard it as possessing at least a medium degree of inherent distinctive character. In its submissions, the opponent states that the word “TICKETS” has “little distinctive character, and therefore carries little

weight in the overall analysis” (paragraph 5.7 refers). For its part, the applicant states: “Although the [word TICKETS] may be descriptive for some of the goods...of the earlier mark, this is not the case for the majority of class 9. For example, the term “TICKETS” used for...computer software” is particularly unique and unusual. As such, the element cannot be disregarded as having a low distinctive character” (paragraph 7(a) refers).

30. In relation to the opponent’s computer software “for the sale and purchase of tickets for concerts...for issuing tickets and for paying therefore”, the word “TICKETS” is, as the applicant appears to accept, “descriptive” of such goods. That is also the case in relation to the opponent’s “downloadable electronic publications relating to concerts...” in relation to which the word “TICKETS” would be seen as indicating the subject matter of the publication i.e. one which provides information on, for example, the price and availability of tickets in relation to a range of sporting and entertainment events. Although the opponent’s “computer software” and “downloadable computer software” is unlimited, as such terms would include, inter alia, software for tickets and ticketing the same conclusion applies. However, even if that were not the case, given its very well-known meaning, any distinctive character the word “TICKETS” may possess will, at best, be very limited. Given the positioning of the word “VIBE” as the first word in the opponent’s trade mark and the very limited (if any) distinctiveness the word “TICKETS” may possess, it is the word “VIBE” which will make by far the greater contribution to both the overall impression the opponent’s trade mark conveys and its distinctiveness.

31. I will now go on and compare the competing trade marks from the visual, aural and conceptual standpoints bearing the above conclusions in mind. Whilst I remind myself of the applicant’s submissions in this regard, having preferred the opponent’s position in relation to how the word “TICKETS” in its trade mark should be treated, the applicant’s submissions have little relevance. As the first word in the opponent’s trade mark is by far the most distinctive word and is identical to the only word in the applicant’s trade mark, even factoring in the presence of the word “TICKETS” in the opponent’s trade mark, it still results, in my view, in a high degree of visual similarity between the competing trade marks.

32. As the words in the competing trade marks will be well-known to the average consumer, the manner in which they will be articulated is entirely predictable. Even if the word “TICKETS” in the opponent’s trade mark is articulated (which is far from certain), the fact that the applicant’s trade mark and the first word in the opponent’s trade mark will be pronounced in an identical fashion, results in a degree of aural similarity between them which I would pitch as well above average. However, if, as I suspect may be the case, the word “TICKETS” is not articulated at all, the competing trade marks would be aurally identical.

33. Finally, the conceptual comparison. In its submissions, the opponent states:

“5.9 Conceptually, the word “Vibe” is both a noun and a verb. As a noun, it means a person’s emotional state or the atmosphere of a place as communicated to and felt by others. As a verb, “vibe” is to enjoy oneself by listening to or dancing to popular music, or to transmit or give out a feeling or atmosphere. The addition of the word “Tickets” does not affect the conceptual assessment. The marks are conceptually similar.”

34. I agree with the opponent’s submissions and conclusion. The competing trade marks are conceptually similar to a high degree.

### **Distinctive character of the earlier trade mark**

35. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those



goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

36. As the opponent has not filed any evidence of any use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. In its submissions, the opponent states:

“5.11 The opponent’s earlier marks are highly distinctive, per se...”

37. The opponent has, however, offered no explanation for this conclusion. Balancing the conclusions I have reached above, the opponent’s trade mark is, in my view, possessed of an average degree of inherent distinctive character. That is not, of course the end of the matter, as it is the distinctiveness of the shared component i.e. “VIBE” which is key; I will return to this point below.

### **Likelihood of confusion**

38. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision I concluded that:

- the competing goods are either identical (computer software), similar to a high degree (the applicant’s hardware and parts and fittings for its computer software) or similar to an medium degree (parts and fittings of the applicant’s hardware);

- the average consumer is either a member of the general public or a business user selecting the goods on behalf of a commercial undertaking;
- while visual considerations will have an important role to play in the selection of the goods at issue, aural considerations will also play their part;
- the average consumer will pay at least an above average degree of attention to the selection of the goods at issue;
- the overall impression conveyed by the applicant's trade mark lies in its totality;
- while the overall impression conveyed by the opponent's trade mark stems from the two words of which it is composed, the overall impression it conveys and its distinctiveness is heavily weighted in favour of the first word i.e. "VIBE";
- the competing trade marks are visually and conceptually similar to a high degree and aurally similar to at least a well above average degree;
- the opponent's earlier trade mark is possessed of an average degree of inherent distinctive character.

39. As I mentioned earlier, it is the distinctive character of the shared element that is key. This approach was confirmed in *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, when Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the trade marks that are identical or similar. He stated:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

40. In other words, simply considering the level of distinctive character possessed by the earlier trade mark is not enough. It is important to ask “in what does the distinctive character of the earlier trade mark lie?” Only after that has been done can a proper assessment of the likelihood of confusion be carried out. Earlier in this decision, I concluded that the shared component i.e. the word “VIBE” has at least a medium degree of inherent distinctive character.

41. In reaching a conclusion on the likelihood of confusion, I begin by reminding myself that, inter alia, (i) the competing goods are either identical or (for the most part) similar to a high degree, (ii) the competing trade marks are visually and conceptually similar to a high degree and aurally similar to at least a well above average degree and (iii) the shared component i.e. the word “VIBE” is possessed of at least a medium degree of inherent distinctive character. Although I have concluded that the average consumer will pay at least an above average degree of attention to the selection of the goods at issue (thus making them less prone to the effects of imperfect recollection), I am, nonetheless, satisfied that even if the average consumer paid a high degree of attention, there would be a likelihood of confusion. Given the identity between the first word in the opponent’s trade mark and the applicant’s trade mark, this confusion is likely to be direct i.e. the trade marks will be mistaken for one another. However, even if that is not the case, the fact that the second word in the opponent’s trade mark is more likely than not be construed as descriptive, the average consumer is, in my view, likely to assume that “VIBE/Vibe” is being used as a trade mark by the same (or a related) undertaking for a range of computer software and computer hardware, with the trade mark which includes the word “TICKETS” being used by it to differentiate that part of its

business which deals with tickets/ticketing. That, in my view, will result in indirect confusion.

42. In an official letter dated 31 March 2017 which was sent to the parties following the conclusion of the evidence rounds, the tribunal stated:

**“You are advised that the final decision in relation to this case will be made on the basis of the evidence and/or submissions now accepted into the proceedings. The Hearing Officer will decide the case on the specification(s) currently before him. If, however, the applicant considers it has a fall-back position in the form of a limited specification, it should make this clear to the Hearing Officer (i.e. a limited specification should not be submitted for the first time at any appeal hearing). This will not represent a binding restriction of the specification and no inference will be made, by the Hearing Officer, if such a limitation is, or is not, offered.”**

43. The applicant did not respond to that invitation. As I mentioned earlier, the applicant’s specification includes a range of broad terms; these broad terms may include goods which are not similar to the goods upon which the opponent relies. However, the interdependency principle indicates that a higher degree of similarity in the competing trade marks may off-set a lower degree of similarity in the competing goods. Given the high degree of similarity in the competing trade marks and as any limited specification offered by the applicant may also include goods which are similar to the goods upon which the opponent relies (even if only to a low degree), I do not consider it appropriate to give the applicant a further opportunity to offer a fall-back specification and decline to do so.

### **Overall conclusion**

**44. The opposition has been successful and, subject to any successful appeal, the application will be refused.**

## Costs

45. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. As I mentioned earlier, during the course of these proceedings the application was assigned to Vibe International Ltd. In a letter to the tribunal dated 17 March 2017, the new applicant confirmed that it (i) had sight of all the forms filed, (ii) stood by all the statements in the counterstatement and (iii) was aware of and accepted liability for costs for the whole proceedings in the event the opposition succeeds (which it has). Using the TPN mentioned as a guide, I award costs to the opponent on the following basis:

Preparing a statement and considering the applicant’s statement:	£300
Filing written submissions (including considering and commenting upon the applicant’s written submissions):	£400
Official fee:	£100
<b>Total:</b>	<b>£800</b>

46. I order Vibe International Ltd to pay to Thevibe Limited the sum of £800. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 23<sup>RD</sup> day of May 2017**

**C J BOWEN**  
**For the Registrar**