

O-273-06

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION  
NO. 2401646 TO REGISTER  
A TRADE MARK IN CLASS 7 AND 12  
BY IGNITE SUPER LTD**

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### **IN THE MATTER OF APPLICATION No. 2401646 TO REGISTER A TRADE MARK IN CLASSES 7 AND 12 BY BRIAN DICKINSON OF IGNITE SUPER LTD.**

#### **BACKGROUND**

1. On 15<sup>th</sup> September 2005 Brian Dickinson of Ignite Super Limited, Unit 34, Britannia Mill, Barley Holme Road, Crawshawbooth, Rossendale, BB1 8AX applied to register a trade mark no. 2401646 under the provisions of the Trade Marks Act 1994 in respect of the following goods:

HT Lead Assemblers in Class 12  
General automotive components in Class 7

The mark applied for is shown below.



2. An examination report detailing the examiner's view of Ignite Super Ltd's application was issued on 4 October 2005. In this report the applicant's attention was drawn to conflicting earlier rights and an objection under Section 5(2) of the Act was raised.

3. The following earlier conflicting earlier rights were identified as citations against the applicant's mark in both class 7 and class 12:

- i/ Registered UK mark in the name of Sunrise Medical Limited  
1503409 POWERTEC  
Goods: Class 12  
Invalid wheelchairs and vehicles; electrically powered vehicles, scooters and wheelchairs; parts and fittings for all the aforesaid goods; all included in Class 12; but not including any such goods being patching or repairing materials for vehicle tyres.
- ii/ Registered UK mark in the name of Deere and Company  
2025440 POWERTECH  
Goods: Class 12  
Internal combustion engines.
- iii/ Registered OHIM mark in the name Power Tech Fischer GmbH  
E1481894



**Goods: Class 12**

Equipment parts for automobiles, namely parts for vehicle bodies of metal, plastic and/or rubber, bumpers, screens for bumpers, corners for bumpers, spoiler bumpers, front spoilers, spoiler corners, front aprons, front grilles, decorative trimming, aerodynamic trimming, mud-guard trimming, edge-protection trimming, tops for doors, running boards, roof spoilers, roof wings, roof railings, sun roofs, detachable folding tops, hoods for bonnets and boots, rear spoilers, rear wings, rear aprons, rear screens, mudguard widening pieces, interior and exterior mirrors, covering screens, mechanical locking devices, wheels of metal, in particular of steel or light metal, hub caps, widening pieces, track wideners, wheel housing widening devices, shock absorbers, vehicle suspension, shock absorbing legs, telescopic struts, sliding struts, suspension arm struts, suspension arm supports, steering wheels (with integrated airbags), gear shift levers, dashboards, instrument cockpits, consoles, car seats, head rests, support cushions, safety belts, pads for belts, roll bars, roll cages; windscreens; special-purpose tanks; exhaust installations, silencers for exhaust installations; trailer couplings.

- iv/ Registered OHIM mark in the name Zarnack Beteiligungsgesellschaft & Co. KG E1987700



Goods:

**Class 07:**

Pumps (machines); conveyors (machines); motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles); motors, electric, other than for land vehicles; hydraulic motors and engines, hydraulic controls for machines, motors and engines; belts for conveyors; belt conveyors; pneumatic transporters; parts for pumps (machines), in particular pump diaphragms and pump plungers, included in class 7.

- v/ Registered OHIM mark in the name Eurogreen International Inc E3537231 POWERTEK

**Goods: Class 12**

Golf carts, electric golf carts; electric golf cars;  
spare parts of the aforementioned goods

- vi/ Registered OHIM mark in the name of Lincoln Global Inc  
E3558186 POWERTEC

**Goods: Class 7:**

Electric welding machines.

**Class 09:**

Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, in particular electric welding apparatus and arc-welding apparatus, and power sources therefor; wire feed devices for electric welding apparatus and arc-welding apparatus; welding electrodes.

- vii/ Registered OHIM mark in the name of Lincoln Global, Inc  
E3558211 POWERTEC PRO

**Goods: Class 07:**

Electric welding machines.

**Class 09:**

Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, in particular electric welding apparatus and arc-welding apparatus, and power sources therefor; wire feed devices for electric welding apparatus and arc-welding apparatus; welding electrodes.

4. No reply was received to the examination report and on the 11<sup>th</sup> May 2006 the application was refused under Section 37(4) of the Trade Marks Act 1994.

5. I am now asked under Section 76 of the Act and Rule 62(2) of the Trade Marks Rules 2000 to state in writing the grounds of my decision and the materials used in arriving at it.

## **DECISION**

6. The grounds for objection to the application are under the terms of Section 5(2) of the Act. If none of the objections under this section of the Act were justified, then the final refusal of the mark under Section 37(4) of the Act should not have been issued.

### **Comparison of marks (Section 5(2))**

#### **The Law**

7. **Section 5(2)** of the Act reads as follows:

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

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

(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”

8. An earlier trade mark is defined in Section 6(1) which states:

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

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

9. I take into account the guidance provided by the European Court of Justice (ECJ) in the following cases: *Sabel BV v Puma AG* [1998] R.P.C. 199. *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co GmnH v Klijsen Handel .bV.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R. 723.

10. It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally taking into account all relevant factors. *Sabel BV v Puma AG*,
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*. The average consumer 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 kept in his/her mind. *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel*,
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. *Sabel BV v Puma AG*,
- (d) The visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components. *Sabel BV v Puma AG*,
- (e) A global assessment of the likelihood of confusion implies some interdependence between the relevant facts, and in particular a similarity between the trade marks and between these goods or services. Accordingly, a lesser degree of similarity between these goods and services may be offset by a greater degree of similarity between the marks and vice versa. *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Incm*,
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it. *Sabel BV v Puma*,
- (g) mere association in the sense that the later mark brings the earlier mark to mind is not sufficient for the purposes of section 5(2). *Sabel BV v Puma*,
- (h) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section. *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*,

11. The global comparison of marks therefore means that a number of elements must be analysed before effective judgement can be made.

### **Prima facie comparison**

#### **Comparison of the marks**

12. Seven earlier rights were identified as being sufficiently similar to this application to constitute objections under Section 5(2) of the Act. They were raised as citations against this application in both classes 7 and 12. For the sake of clarity I shall consider each citation in turn. I shall consider whether it was a valid bar to the progress of this application in both classes. In this analysis I shall first compare the marks, then the goods, then the likelihood of confusion

#### **13. Citation i/**

**1503409 POWERTEC** consists of a single invented word with no additional stylization or get up.

14. The applicant's mark is a composite mark. It consists of a oblong black background containing the word POWERTEC. The terms within the word POWERTEC are differentiated because the word POWER is italicised and consists of white letters on the black background. The term TEC is shown in grey capitals on the same black background. The mark is further stylised by an ellipse which passes around the TEC element and 'behind' the letter E in "Power".

#### **Comparison of the goods**

15. The cited mark covers the following goods: Invalid wheelchairs and vehicles; electrically powered vehicles, scooters and wheelchairs; parts and fittings for all the aforesaid goods; all included in Class 12; but not including any such goods being patching or repairing materials for vehicle tyres.' The applicant's mark covers 'HT Lead Assemblers' in class 12 and 'General Automotive Components' in class 7. The term 'HT Lead Assemblers' refers to high tension lead assemblies. Essentially these are boxes containing the electronics and wiring necessary to fire an automobile engine. Broadly speaking the automobile components covered in the Class 7 part of this application are parts of engines which (regardless of whether the engines power vehicles or static machines) are correctly classified in Class 7.

16. The cited mark covers parts and fittings for electrically powered vehicles at large and it seems reasonable to me to infer that high tension lead assemblies would be included within this group of goods. In Class 12 the likelihood of confusion must be assessed in relation to identical goods. In

Class 7, I consider the components of engines may be used in vehicle engines and must be construed as being similar to other mechanical vehicle parts in Class 12.

### **Likelihood of confusion**

17. According to the guidance laid down by the European Court of Justice the likelihood of confusion must be considered using a global comparison taking into consideration all the relevant factors mentioned above. The issue to be decided can, for the sake of simplicity, be expressed as follows: ‘is an average consumer of parts of electronically powered vehicles likely to think that goods sold under the applicant’s mark actually originate from the source identified by the previously registered POWERTEC mark?’

18. The average consumer is considered to be reasonably circumspect. However, he or she must be understood as potentially having an imperfect recollection of any two marks. Confusion is not confined to a context where a shopper can stand in front of two products and measure the differences in their branding. Confusion can also occur when a consumer encounters one product some time after the other. Here we must understand that a holistic analysis occurs in the mind of the average consumer. The consumer does not disassemble marks; whole is compared with whole. In situations where marks are highly distinctive, or contain a highly distinctive element, confusion is more likely than in those where marks are relatively weak.

19. In this situation the registered earlier mark, the word POWERTEC, has a reasonable degree of distinctive character. It is an invented word comprising two recognisable components: the word POWER and the shortened form of the word TECHNOLOGY. [See New Shorter Oxford English Dictionary, Oxford, 1993 “TEC n – see TECH” – “TECH = TECHNOLOGY”]. As a valid, distinctive mark, it is entitled to a degree of protection commensurate with its level of distinctive character.

### **Decision regarding section 5(2)**

20. Aurally the marks would be pronounced in the same way. Conceptually the words share the same allusion to technology that delivers power. Visually they differ only to the extent that the current application has a ‘get -up’. Given the fact that the dominant and distinctive feature of the applicant’s mark is also the word POWERTEC (stylised) and the marks cover identical and closely related goods, I consider there is a probability of confusion between these marks sufficient to give rise to a likelihood of confusion within the meaning of Section 5(2)(b) of the Act.

### **21. Citation ii/**



**2025440 POWERTECH** consists of single invented word with no additional stylization or get-up. The mark applied for has already been described.

### **Comparison of the goods**

22. The cited mark covers, amongst other goods (described at para 3 ii), ‘internal combustion engines’. The applicant’s goods in both Classes 7 and 9 can best be understood as parts of engines and as such I think there is potential for confusion as to the origin of parts of engines and the engine as a whole. It seems to me to be plausible that a consumer who associated a mark with complete internal combustion engines would presume that a sufficiently similar mark used on parts of that engine would emanate from the same source.

### **Likelihood of confusion**

23. In this situation the earlier mark, the word POWERTECH, has a reasonable degree of distinctive character. It is an invented word comprising two recognisable components: the word POWER and the a shortened form of the word TECHNOLOGY [see ref in para 19 to O.E.D]. As a valid, distinctive mark, it is entitled to a degree of protection commensurate with its level of distinctive character.

24. Aurally the marks would be pronounced in the same way. Conceptually they share the same allusion to power derived from technology. Visually they differ only in that the applicant’s mark is stylised.

### **Decision regarding section 5(2)**

25. Given the fact that the dominant and distinctive feature of the applicant’s mark is also the word POWERTEC (stylised) and the marks cover closely related goods, I consider there is a probability of confusion between these marks sufficient to give rise to a likelihood of confusion within the meaning of Section 5(2)(b) of the Act.

### **26. Citation iii/**



**E1481894** consists of a stylized combination of the word Power and the word Tech. Given the stylization of the words and their allusive quality the mark has a clear identity as a trade mark, the scope of its protection is not mitigated by any ambiguity over its distinctive character or its capacity to be understood as a badge of origin by the relevant public. The current application has already been described.

### **Comparison of the goods**

27. The cited mark covers a wide specification (the most relevant part of which is 'Equipment parts for automobiles') – the goods listed in detail relate to the body, interior, suspension and exhausts of cars. These goods are not identical to either the applicant's specification in Class 12 or Class 7. They would, however, be understood by the relevant public as being components of cars, and as parts of car engines the applicant's goods relate to the same market. The goods must be understood as being closely related.

### **Likelihood of confusion**

28. In this situation the earlier mark, the registered mark POWER TECH, has a reasonable degree of distinctive character. It consists of a word and an abbreviation which clearly function as a trade mark. As a valid, distinctive mark, it is entitled to degree of protection commensurate with its level of distinctive character. The applicant's mark differs from it in its stylisation and in the spelling of the final word TECH/TEC. I do not consider this difference to have a strong impact on the identity of the mark and feel that the average consumer, who would refer to goods sold under these marks aurally and may visually recall them imperfectly is not likely to easily differentiate between the two.

### **Decision regarding section 5(2)**

29. Visually the marks differ only in respect of their stylisation or get up, neither contains strong visual elements. Aurally the marks may be referred to in the same way. Conceptually the average consumer would link the marks because the words power and the abbreviation allude to the nature of the goods. Given the fact the dominant and distinctive feature of the applicant's mark is a stylised form of the same words as those registered (stylised) and the marks cover closely related goods I consider there is a probability of confusion between these marks sufficient to give rise to a likelihood of confusion within the meaning of Section 5(2)(b) of the Act.

### **30. Citation iv/**



**E1987700** consists of a stylized combination of the word Power and the word Tec. It is prefixed by a device element comprising of a 'broken' oblong surrounding a circular device. It has a clear identity as a trade mark, the scope of its protection is not mitigated by any ambiguity over its distinctive character or its capacity to be understood as a badge of origin by the relevant public. The current application is composite mark which has already been described. It consists of an oblong black background containing the word POWERTEC.

### **Comparison of the goods**

31. The cited mark covers a variety of goods (described above) in Class 7. The specification covers, specifically, 'parts and fittings of machines'. The applicant's mark covers 'general automotive components in Class 7'. The 'automotive components' which are contained in Class 7 are essentially interchangeable engine parts which are components of either static engines or those adapted for use in vehicles. The term 'parts and fittings of machines' is a very broad term which includes within its ambit the goods identified above. For this reason global comparison of marks must be undertaken in terms of identical goods in respect of Class 7. With regards Class 12 it seems to me likely that machine parts in Class 7 would include goods similar to HT Lead Assemblies in Class 12.

### **Likelihood of confusion**

32. In this situation the earlier mark, the registered mark POWER TEC (and device) has a moderate degree of distinctive character. It consists of a word and an abbreviation. It also includes a separate device element at the front of the mark. Notwithstanding the differences between the marks I feel the dominant and distinctive feature of the cited mark remains the term POWER TEC. This is the element that will be referred to in speech and is the most likely to be recalled, conceptually.

### **Decision regarding section 5(2)**

33. Visually the marks have significant differences, the device element of E1987700 is distinctive. However, the marks are aurally identical and share the same conceptual reference to power derived from technology. Given the fact the dominant and distinctive feature of the applicant's mark is a stylised form of the same words as those registered (stylised) and the marks cover closely related goods I consider there is a probability of confusion between these marks sufficient to give rise to a likelihood of confusion within the meaning of Section 5(2)(b) of the Act.

### **34. Citation v/**

**POWERTEK E3537231** consists of the unstylized word POWERTEK . It has a clear identity as a trade mark, the scope of its protection is not mitigated

by any ambiguity over its distinctive character or its capacity to be understood as a badge of origin by the relevant public. The current application is a composite mark and has already been described.

### **Comparison of the goods**

35. The relevant goods covered by the cited registration have been noted above – essentially they are golf carts and cars and their ‘spare parts’. These spare parts could include engine components covered in both classes 12 and 7 and so, once again, the comparison of goods reveals the fact that, in certain instances, potentially identical goods are at stake.

### **Likelihood of confusion**

36. In this situation the earlier mark, the registered mark POWERTEK has a moderate degree of distinctive character. It has no particular meaning and must be afforded a reasonable degree of protection. The spelling of the end of the cited mark is more significant here, the letters TEK have no relationship with the word TECHNOLOGY (there is no reference in the O.E.D. to any meanings of the word TEK). This gives the cited mark a slightly more invented feel. When compared with the applicant’s mark it is clear that the key issue is the degree to which the term POWERTEK and the dominant and distinctive element of the applicant’s mark POWERTEC clash.

### **Decision regarding section 5(2)**

37. Visually the applicant’s mark differs in its stylisation and the differences in the spelling of the word TEK and TEC at the ends of the marks which allows one to differentiate between them by sight. However, aurally, the marks are identical. Conceptually the K element in the earlier right reduces its illusive power. However, in view of the strong aural similarity between the marks, the proximity of the goods and the fact that visually, although it is possible to differentiate between the marks, they are still very similar, I consider there is a probability of confusion between these marks sufficient to give rise to a likelihood of confusion within the meaning of Section 5(2)(b) of the Act.

### **38. Citation vi/**

**POWERTEK E3558186** consists of the unstylized word POWERTEC . It has a clear identity as a trade mark, the scope of its protection is not mitigated by any ambiguity over its distinctive character or its capacity to be understood as a badge of origin by the relevant public. The current application has been described already.

### **Comparison of the goods**

39. At the time the examination report was issued no English translation of the goods covered by this application was available: the following translation is now available online:

**Class 07:**

Electric welding machines.

**Class 09:**

Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, in particular electric welding apparatus and arc-welding apparatus, and power sources therefor; wire feed devices for electric welding apparatus and arc-welding apparatus; welding electrodes.

**Likelihood of confusion**

40. I do not consider the goods covered by the cited mark to be sufficiently close to the applicant's mark to justify the objection. However, at the time the exam report was available no translation of the cited specification was available.

**Decision regarding section 5(2)**

41. At the time of issuing the examination report this citation was justifiable, however it no longer constitutes a bar to this application. A translation was requested and, although it is not available on line, were it to have arrived before the applicant filed the form TM 5 I have no doubt that this objection would have been waived.

**42. Citation vii/**

**POWERTEK E3558211** consists of the unstylized words POWERTEC PRO. It has a clear identity as a trade mark, the scope of its protection is not mitigated by any ambiguity over its distinctive character or its capacity to be understood as a badge of origin by the relevant public. The current application has been described already.

**Comparison of the goods**

43. At the time the examination report was issued no English translation of the goods covered by this application was available: the following translation is now available online:

**Class 07:**

Electric welding machines.

**Class 09:**

Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, in particular electric welding apparatus and arc-welding apparatus, and power sources therefor; wire feed devices for electric welding apparatus and arc-welding apparatus; welding electrodes.

**Likelihood of confusion**

44. I do not consider the goods covered by the cited mark to be sufficiently close to the applicant's mark to justify the objection. However, at the time the exam report was issued no translation of the cited specification was available.

**Decision regarding section 5(2)**

45. At the time of issuing the examination report this citation was justifiable, however it no longer constitutes a bar to this application. A translation was requested and, although it is not available on line, were it to have arrived before the applicant filed the form TM 5 I have no doubt that this objection would have been waived.

**Overall decision regarding section 5(2)**

46. Having considered all of the seven cited marks, I conclude that, in respect of the goods in both Classes 7 and 12 there is a likelihood of confusion sufficient to warrant an objection under Section 5(2)(b) of the Act. For the reasons given, it is refused under the terms of section 37(4) of the Act because it fails to qualify under Section 5(2) of the Act.

**Dated this 25th day of September 2006**

**Dan Anthony  
For the Registrar  
The Comptroller General**