

O/142/17

TRADE MARKS ACT 1994

TRADE MARK APPLICATION No. 3128942

BY OCTOPUS INVESTMENTS LIMITED

AND

OPPOSITION No. 406299

BY OPUS ENERGY GROUP LIMITED

1. I issued a decision earlier today in which a sentence was omitted from paragraph 25.
2. This is an opposition by Opus Energy Group Limited (“the opponent”) to an application filed on 28th September 2015 (“the relevant date”) by Octopus Investments Limited (“the applicant”) to register the series of two trade marks shown below.



3. The applicant’s marks are proposed to be registered in relation to a wide variety of goods and services in classes 1, 4, 7, 9, 35, 36, 37, 39, 40 & 42. The full list is shown in annex A. It is sufficient for present purposes to note that most of the goods/services appear to be related, to a greater or lesser degree, to the production, distribution and sale of fuel and energy.

4. The opponent relies on five earlier trade marks. These include UK 2617512, which consists of the words **OPUS ENERGY**. This mark was registered in 2012 in relation to goods and services in classes 1, 4, 35, 36, 37, 39, 40 & 42. The full list is shown in annex B. The opponent says that the goods and services are identical to the goods and services covered by those in the corresponding classes of the contested application. Further, that the applicant’s goods in classes 7 and 9 are similar and complementary to the goods and services covered by the earlier mark. In these

circumstances, the opponent claims that the similarities between the marks is sufficient to create a likelihood of confusion amongst the public. Registration would therefore be contrary to s.5(2)(b) of the Trade Marks Act 1994 (“the Act”).

5. The opponent further claims that use of the applicant’s mark would, without due cause, take unfair advantage of, or be detrimental to, the reputation and/or distinctive character of the earlier mark. Registration of the contested mark would therefore also be contrary to s.5(3) of the Act.

6. In addition, the opponent claims to have acquired goodwill and reputation under the mark OPUS ENERGY as a result of the use of that name in relation to a business trading in a wide range of goods and services relating to fuels and energy. It says that use of the contested mark would deceive the public into believing that the applicant is connected with the opponent. Use of the contested mark would therefore constitute a misrepresentation to the public, which would damage the opponent’s goodwill and be contrary to the law of passing off. Registration of the mark would therefore be contrary to s.5(4)(a) of the Act.

7. The opponent has 4 other earlier marks which consist of, or include, the words OPUS ENERGY. The marks shown below were registered in 2014 under UK 3022328 as a series of two.



The goods and services are the same as those shown in annex A.

8. It is not necessary to show the other two earlier marks, which are EU trade marks. This is because they are no more similar to the contested mark than the marks shown above. Additionally, the earlier EU marks are registered for only a sub-set of the services covered by the earlier UK marks.

9. The applicant filed a counterstatement denying the grounds of opposition.

10. Both sides seek an award of costs.

The evidence

11. The opponent's evidence consists of two witness statements by Mr Geoffrey Hemmings, who is the opponent's Commercial Lawyer. The second of these statements was made in reply to the applicant's evidence and submissions described below.

12. Mr Hemmings states that the opponent was incorporated in 2002 and has grown into a major supplier of energy to businesses, with a focus on renewable sources. It sells gas and electric to businesses and offers power purchase agreements to generators of renewable electricity. By the date of Mr Hemmings' statement (August 2016), the opponent had entered into 2200 power purchase agreements.

13. Mr Hemmings provides the opponent's revenue figures for 2013/14, 2014/15 and 2015/16. These show annual income of between £370m and (in the year preceding the relevant date) about £550m. At the relevant date, the opponent has what it calls 244k "supply points". It is not clear if this means 244k customers or whether the same customer may have multiple supply points. I consider that the latter is more likely. In 2012, the opponent had 143k "supply points".

14. The opponent has won a number of awards. For example, the opponent came first for customer service in Datamonitor's business-to-business customer satisfaction surveys for 2012 and 2014. The opponent also achieved 'Customer First' accreditation from Customer First UK in 2014.

15. The opponent's total marketing expenditure in 2014 and 2015 was in excess of £230k and £290k, respectively. In 2014 - 2015 advertisements were taken out in The Telegraph, The Times, the Independent, the Guardian, Metro and on LinkedIn. The opponent also undertook some radio advertising in 2015 on talkSPORT and Total Absolute Radio. However, I cannot tell whether this was before or after the relevant date.¹ The opponent also advertises online. For example, it took out an advertisement in Spectator Online in May 2014.

16. Mr Hemmings says that sponsorship deals are a key part of the opponent's marketing strategy. The opponent was an official sponsor of Northampton Town Football Club in 2015 and sponsored Olympic gymnast Daniel Keatings and boxer Chantelle Cameron. It has also sponsored individual races at Cheltenham Racecourse since 2013.

17. The opponent also exhibits regularly at exhibitions and conferences. For example, the opponent had a stand at the annual Energy Event in 2014, as well as Renewable UK (2014), Renewable Futures (2014), Renewable Energy Marketplace (2015) and All Energy (2015).

18. Mr Hemmings' second statement includes copies of recent and historical pages from the opponent's website.² Mr Hemmings says that *"these show the primary colour palette to be dark blue, white, grey and pink."* The screen shots from March 2014 and February 2015 show use of the second mark in the series as shown in paragraph 6 above, i.e. in pink and dark blue. The screen shots from 8th May 2016 and November 2016 show use of the same mark, but this time in dark blue and white, i.e. the opponent had changed the colours used for its trade mark by 8th May 2016. I note that Mr Hemmings states (in his witness statement of December 2016) that the opponent had been using these colours *"consistently over the last two years"*. I also note that in each instance the word OPUS appears in upper case and the word 'energy' in lower case.

¹ Full details of advertising in 2014/15 are said to be set out in exhibit GH7, but the quality of the print is so poor that I cannot make out the dates.

² See exhibits GH11 and GH12

19. The opponent's evidence also includes recent and historical screen shots from the applicant's website.³ Mr Hemmings states that the two screenshots from March 2016 show use of the mark applied for. However, on the pages filed in evidence, the applicant's trade mark is not fully visible. This is because it appears at the top of the pages, which have been chopped off. All I can see is the bottom of a blue band on which appears (in white letters) the word 'energy'. This may be use of the second word of the applicant's mark, but it is not clear. There are further screenshots from the applicant's website in November 2016, which clearly show use of 'octopus energy' in lower case white letters on a dark blue background, as shown below.



There is also an example of the use of the mark in blue letters on a white background.

20. According to Mr Hemmings, the applicant has chosen to use the mark in the same colours as the opponent uses. Further, he points out that the applicant also uses a "*rounded font*", which he considers to be highly similar to the one used by the opponent.

21. There is evidence drawn from various third party websites that the applicant entered the energy market in 2015 and was still regarded as a "*new supplier*" in 2016.⁴ The evidence also indicates that the applicant is targeting domestic energy consumers.⁵

22. Finally, Mr Hemmings includes extracts from two Ofgem reports which record that despite some positive developments "*there remains a large proportion of*

³ See exhibit GH14

⁴ See exhibits GH13 and GH16

⁵ See exhibits GH13, GH14 and GH16

[energy] consumers who are still disengaged” and “more than one in five consumers are very disengaged”.⁶

23. The applicant’s evidence consists of a witness statement by Sylvie Tate, who is a Trade Mark Attorney with Groom, Wilkes and Wright LLP, who represent the applicant in these proceedings. Ms Tate provides evidence of companies called Octopus Investments Ltd and Octopus AIM VCT Plc. The latter appears to be a venture capital trust. The former seems to manage the latter. Octopus Investments Ltd appears to have been registered with the Financial Conduct Authority since 2001. According to its webpage from 2015 it had 50k investors and £5bn under its management.⁷ At that time it used the word Octopus in the stylised form shown in the mark applied for. There is no evidence that Octopus Investments Ltd/Octopus AIM VCT Plc provided energy supply services prior to the relevant date.

Representation

24. I have already mentioned that the applicant is represented by Groom, Wilkes and Wright LLP. The opponent is represented by Sipara. Both sides filed written submissions, but neither party asked for a hearing.

Section 5(2)(b)

25. Section 5(2)(b) of the Act is 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”.

Comparison of goods and services

⁶ See exhibits GH15 and GH16

⁷ See exhibits ST1 to ST3

26. Except for classes 7 and 9, most of the goods and services covered by the application are identical to, or subsumed within, descriptions of goods and/or services for which the earlier marks are registered in the same classes. For reasons of procedural economy, I will not undertake a full comparison of the goods and/or services. Instead I will first assess the opposition where the contested goods and/or services are identical to those covered by the earlier trade marks. If the opposition fails where the respective goods/services are identical, it follows that it will also fail where the respective goods/services are only similar.

The case law

27. The following principles are gleaned from the decisions of the EU courts 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, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

(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) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) 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;

(h) 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;

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

(j) 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;

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

Average consumer and the purchasing act

28. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*.

29. The opponent submits that the services in classes 35, 36, 37, 39, 40 and 42 of the application are selected with a lower than average degree of attention. In this connection, the opponent points to the evidence from Ofgem that consumers in the energy sector are relatively disengaged from the process of choosing an energy supplier. The applicant contests this assessment. According to the applicant, consumers in the energy sector are wary about rogue suppliers and therefore more careful than usual about choosing suppliers.

30. I do not accept that the evidence from the Ofgem reports means that consumers pay a lower than average degree of attention when selecting an energy supplier. Rather the reports identify a certain degree of reluctance to engage in the process of changing energy suppliers. If this means that consumers are often reluctant to change energy supplier, then it follows that there is no need to choose between the services of different undertakings. In these circumstances the trade marks of the competitors in this field are simply irrelevant. However, this does not mean that when consumers decide to select a new supplier, or compare the services offered by their existing supplier with those of its competitors, they pay a low degree of attention. There is no evidence in this case to support the applicant's submission to the opposite effect: that ordinary consumers pay an exceptionally high degree of attention when selecting an energy supplier. I therefore find that domestic consumers pay, at least, a normal degree of attention when selecting energy supply services and associated goods, i.e. energy. There is no reason to believe that the position is any different when it comes to business consumers of energy.

31. Although the parties have focussed on consumers of energy, the list of goods/services covered by the contested mark goes much wider. There are numerous goods/services within the application that appear to be aimed at a

specialist public and/or for whom the relevant consumer would be likely to pay a high degree of attention because of the risks involved. For example *‘electric apparatus, namely, apparatus for conducting, switching, transforming; accumulating, regulating or controlling electricity’, ‘decontaminants for fuels’, ‘import-export agencies in the field of energy’, ‘brokerage of financial investments in energy companies’, ‘construction, repair, dismantling and maintenance of power plants’ and ‘testing of gas and electricity generating plants, gas and electric appliances, pipework, transmission lines and apparatus and instruments utilising gas and electricity’*. I will therefore keep in mind that relevant consumers will apply a range of degrees of attention when selecting the goods/services covered by the application. This range varies from (at least) normal to high.

32. In the absence of evidence, there is no reason to believe that the goods/services covered by the application are selected predominantly by visual or aural means. I will therefore assume that, as is usually the case, the process is primarily a visual one, but that aural expression of the marks, such as word of mouth recommendations, may also play an important part in the selection process.

Distinctive character of the earlier trade mark

33. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not

contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

34. The opponent submits that the earlier marks are highly distinctive. The applicant does not appear to dispute this, although it seems to take issue with the extent of the reputation of the opponent’s marks.

35. OPUS is a dictionary word meaning a classical piece of music or a reference to an artistic work. However, these meanings may not be known to many consumers, in which case the word will appear to be an invented or fancy word. Either way, the word OPUS is inherently distinctive to a high degree in relation to the goods/services at issue. I find that the word OPUS is the most dominant and distinctive element of all the earlier marks. I accept that the device element of the earlier composite marks (whether registered in colour or in black and white) is inherently distinctive to an average degree. It therefore represents a second distinctive feature of these marks. The word ‘energy’ has little or no distinctive character in relation to most of the goods and services covered by the earlier marks. I acknowledge that this is not necessarily the case for a small number of services, e.g. *Advertising and marketing services, public relations, business management, administration, information and consultancy and database management services* in class 35. However, even for these services the word ‘energy’ would have little distinctiveness if it were used in relation to services directed at the energy sector.



36. There is nothing inherently distinctive about the colours used in the colour version of the earlier composite marks, or in the font used for the letters in the words ‘OPUS energy’. Nevertheless, it follows from my findings that OPUS is the (most)

dominant and distinctive element of all the earlier marks, and that it is inherently highly distinctive, that all the earlier marks are highly distinctive by nature.

37. There is limited evidence of use of the earlier composite marks shown in paragraph 6 above. However, the opponent appears to have established a business under the earlier OPUS ENERGY word mark by the relevant date supplying energy to businesses. The opponent’s revenue figures appear large, but its share of the total market for energy was probably relatively modest. I do not therefore consider the evidence supports the case that the distinctiveness of the opponent’s marks had been enhanced even further through use to the very apex of the spectrum of distinctiveness.

Comparison of marks

38. The respective trade marks are shown below:

<p style="text-align: center;">OPUS ENERGY</p> 	
<p>Earlier trade marks</p>	<p>Contested trade marks</p>

39. The opponent submits that I should take account of all potential uses of the marks applied for. This includes use in similar colours, with letters in a similar font, and with similar get-up.

40. It is true that In *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*,⁸ the CJEU stated that when assessing the likelihood of confusion under Section 5(2) it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. The UK courts have traditionally regarded the registration of a trade mark in black and white as covering use of the mark in any colour (and vice versa). The correctness of that approach was the subject of a reference to the CJEU in *Specsavers v Asda Stores Ltd*.⁹ Kitchen L.J. provided the CJEU with his provisional view,¹⁰ which was that “a mark registered in black and white is, as this court explained in *Phones 4u*, registered in respect of all colours”. He gave his reasons for this view, which were, in essence, that:

“In the case of a mark which has in fact been registered in black and white, its distinctiveness has been accepted in respect of every colour and the issue is a rather different one, namely whether, through use, it has gained enhanced distinctiveness as a whole or in one or more of its components. I see no reason why those components should not include colour. Nor do I think this creates any practical problems because third parties must consider whether a mark has acquired enhanced distinctiveness through use in any event.”

41. The CJEU’s answer was:

“Article 9(1)(b) and (c) of Regulation No 207/2009 must be interpreted as meaning that where a Community trade mark is not registered in colour, but the proprietor has used it extensively in a particular colour or combination of colours with the result that it has become associated in the mind of a significant portion of the public with that colour or combination of colours, the colour or colours which a third party uses in order to represent a sign alleged to infringe that trade mark are relevant in the global assessment of the likelihood of confusion or unfair advantage under that provision.”

⁸ Case C-533/06 at paragraph 66 of the judgment

⁹ [2012] EWCA Civ 24

¹⁰ See paragraph 96 of the judgment of the Court of Appeal in *Specsavers* [2012] EWCA Civ 24

42. The Court of Appeal in *Specsavers* took this answer as confirming the correctness of Kitchen L.J.'s provisional view.¹¹

43. I therefore accept that it is appropriate to consider the use of the opponent's earlier word mark, and the second mark in the series of two registered under UK 3022328, in any colour. That is not appropriate for the first mark in the series, which is registered in the specific colours dark blue and pink. For the same reasons, it is necessary to consider the use of the second mark in the series of two applied for by the applicant in any colour. The first mark in the series is applied for in a specific, mainly purple, colour scheme. This means that I must consider the use of this mark in the colours applied for.

44. The opponent's earlier word mark - OPUS ENERGY - is registered in standard characters. I therefore accept that I must consider use of this mark in any standard font, including the font used for the letters OCT- PUS in the applicant's marks. The word elements of the opponent's earlier composite marks, and the word element of the applicant's marks, are registered and applied for, respectively, in particular fonts. These marks must be considered in these fonts.

45. I do not accept that it is also appropriate to include in my assessment of the s.5(2)(b) ground the particular get-up used in association with the earlier or later marks. In this connection, I note that in *J.W.Spear & Sons Ltd and Others v Zynga Inc.*¹², Floyd L.J. considered whether the CJEU's judgment in *Specsavers* meant that matter used with, but extraneous to, the earlier mark should be taken into account in assessing the likelihood of confusion with a later mark. The judge stated:

"46. Mr Silverleaf submitted that, in the light of this guidance, the proposition stated by Jacob LJ in *L'Oreal* can no longer be regarded as representing the law. He starts by recognising that acquired distinctiveness of a trade mark has long been required to be taken into account when considering the likelihood of confusion. He goes on to submit that *Specsavers* in the CJEU has made it

¹¹ See paragraph 5 of the judgment of the Court of Appeal in *Specsavers* [2014] EWCA Civ 1294

¹² [2015] EWCA Civ 290

clear that the acquired distinctiveness to which regard may properly be had included not only matter appearing on the register, but also matter which could only be discerned by use. The colour, on which reliance could be placed in *Specsavers*, was matter extraneous to the mark as it appeared on the register. It followed that if something appears routinely and uniformly in immediate association with the mark when used by the proprietor, it should be taken into account as part of the relevant context.

47. I am unable to accept these submissions. The CJEU's ruling does not go far enough for Mr Silverleaf's purposes. The matter not discernible from the register in *Specsavers* was the colour in which a mark registered in black and white was used. It is true that in one sense the colour in which a mark is used can be described as "extraneous matter", given that the mark is registered in black and white. But at [37] of its judgment the court speaks of colour as affecting "*how the average consumer of the goods at issue perceives that trade mark*" and in [38] of "*the use which has been made of it [i.e. the trade mark] *in that colour or combination of colours*". By contrast Mr Silverleaf's submission asks us to take into account matter which has been routinely and uniformly used "*in association with the mark*". Nothing in the court's ruling requires one to go that far. The matters on which Mr Silverleaf wishes to rely are not matters which affect the average consumer's perception of the mark itself."*

Consequently, extraneous matter which is, or may be, used with the trade marks, such as get-up, is irrelevant for this purpose.

46. The opponent submits that the marks are similar because:

- The opponent's word mark (and the word element of the earlier composite marks) are contained within the applicant's marks.
- The emphasis on the letter 'O' in the applicant's marks highlights the presence of the word OPUS, which is a distinctive element of the earlier marks.

- The last 10 letters of the marks. i.e. – OPUS ENERGY, are the same. The [word elements of the] marks differ only by three letters, i.e. OCT-

47. The applicant denies that the marks are similar.

48. I accept the opponent's first and third points above. However, bearing in mind the CJEU's guidance that average consumers normally compare marks as wholes, and also my finding that the common word ENERGY is relatively low (or completely lacking) in distinctive character for most of the goods/services at issue, I do not regard these points as establishing that there is a material degree of visual or aural similarity between the marks.

49. I find that the presence of the prefix – OCT – has a strong visual and aural distinguishing effect. This is because, appearing as it does at the beginning of the applicant's marks, the prefix cannot be easily missed.¹³

50. The highpoint of the opponent's case, in my view, is that the separation between the letters OCT-O-PUS in the applicant's marks allows the word OPUS to be picked out when the marks are seen.

51. Set against this, the word element of the applicant's marks is easily recognised as the well-known word OCTOPUS. This meaning is reinforced by the inclusion of a device element reminiscent of the tentacle of an octopus. By contrast, the word OPUS has a different meaning, or has no recognisable meaning. Assuming the latter is more likely, it is well established that the presence of a conceptual meaning in one of the marks under consideration is sufficient to establish a degree of conceptual dissimilarity.¹⁴

52. Overall, I find that the applicant's marks have only a very low degree of overall similarity to the opponent's earlier word mark. I do not find the position materially

¹³ See paragraph 81 of the decision of the General Court in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, which (amongst many other decisions) recognised the general importance of the beginnings of trade marks.

¹⁴ See paragraph 20 of the judgment of the CJEU in *The Picasso Estate v OHIM*, Case C-361/04 P

different if I consider both word marks used in the same colour and/or with the letters in the same (normal) font.

53. There is even less similarity between the applicant's marks and the opponent's earlier composite marks. This is because the device elements of the respective marks bear no similarity to one another. They are therefore a further point of visual distinction between the marks. In my judgment, these marks are dissimilar. Again, I do not find the position materially different if I consider the respective marks used in the same colour and/or with the letters in the same (normal) font.

Likelihood of confusion

54. In the light of my finding that the applicant's marks are dissimilar to the opponent's earlier composite marks it follows that there can be no likelihood of confusion between them.¹⁵

55. As regards the opponent's earlier word mark, I find that the very low degree of overall similarity between this mark and the marks applied for is sufficient to avoid a likelihood of confusion. This is so even after allowing for the identity of most of the goods/services and for the highly distinctive character of the word OPUS in OPUS ENERGY. I cannot imagine any circumstances where the applicant's marks could be directly mistaken for the opponent's mark. I have also considered the likelihood of confusion through imperfect recollection of one or another of the marks, but the strong conceptual identity of the applicant's marks (and the presence of a different, or absence of any, conceptual identity in the earlier OPUS ENERGY word mark) makes this very unlikely.

56. The opponent's best point, in my view, is that because the middle O in Octopus is made up of a sucker-like feature at the tip of the tentacle device, consumers who recognise the visual, aural and conceptual differences between the marks may nevertheless notice the word OPUS within the word OCTOPUS. According to the opponent, this may lead consumers to assume that these are variant marks used by

¹⁵ See the CJEU's judgment in *Calvin Klein Trademark Trust v OHIM*, Case C-254/09 P, paragraphs 53 -58.

the same or related undertakings. The opponent is concerned that this will be even more likely to happen if the applicant's marks are used in the same colour and/or font as the opponent's word mark. However, I find that the strong conceptual identity of the applicant's marks makes it unlikely that average consumers will pick out the letters OPUS from the word OCTOPUS (despite the effect of the stylisation) and then attribute any sort of independent significance to the letters OPUS. Whilst I see the opponent's concern, I find that it is based on an exaggerated likelihood of the average consumer analysing the applicant's marks and finding a second meaning over and above the obvious meaning of OCTOPUS. In short, the applicant's marks are just OCTOPUS marks. That is as far as an average consumer paying an average or higher level of attention is likely to get during the course of selecting the goods/services at issue.¹⁶

57. It follows that there is no likelihood of direct or indirect confusion between the applicant's marks and the opponent's earlier word mark.

58. The s.5(2)(b) ground therefore fails.

Section 5(3)

59. Section 5(3) states:

“(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 European Union trade mark or international trade mark (EC), in the European Union) 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.”

¹⁶ At least for energy related services, the likelihood of consumers identifying the opponent's word mark within the applicant's composite marks would be even lower if I were to have accepted the opponent's submission that consumers pay a low degree of attention when selecting an energy provider,.

60. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark’s ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a

change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

Reputation

61. I am satisfied on the evidence that the opponent's word mark – OPUS ENERGY - had the necessary reputation at the relevant date. The reputation would have been mainly amongst business users of energy and producers of renewable energy. The earlier mark would have had a reasonable reputation amongst consumers in this group, but not the highest level of reputation.

62. I am not satisfied that the opponent's earlier composite marks had a qualifying reputation at the relevant date. To the extent that they exploited the reputation of the word mark, this is covered by the reputation of UK 2617512.

[Link](#)

63. In *Calvin Klein Trademark Trust v OHIM*,¹⁷ the CJEU rejected an appeal against a judgment of the General Court rejecting an opposition against an application for what was then a Community trade mark (now a European Union trade mark) under what is now article 8(5) of the European Union Trade Mark Regulation, which is analogous to s.5(3) of the Act. The court held that:

“68. It should be noted that, in order for Article 8(5) of Regulation No 40/94 to be applicable, the marks at issue must be identical or similar. Consequently, that provision is manifestly inapplicable where, as in the present case, the General Court ruled out any similarity between the marks at issue.”

64. As I have found that the opponent's earlier composite marks are dissimilar to the applicant's marks, this means that, even if I had found that they had a qualifying reputation at the relevant date, the opposition under s.5(3) would have to be rejected to the extent that it is based on those marks.

65. So far as the opponent's earlier word mark - OPUS ENERGY - is concerned, I bear in mind that my earlier finding that the marks are not similar enough to give rise to a likelihood of confusion is not decisive of the question of whether the relevant public will make a mental link between the marks.¹⁸

66. Addressing that question, I note that the relevant public for the applicant's goods and services partially overlaps with the public for whom the opponent's mark has a reputation. This finding is not affected by the evidence that the applicant currently offers energy supplies to domestic (as opposed to business) users. This is irrelevant

¹⁷ Case C-254/09P

¹⁸ Case C-408/01, *Adidas-Salomon v OHIM*, paragraphs 28 and 29

because the applicant's specification is not limited in this way. Indeed I note that the applicant's specification in class 40 expressly mentions energy produced for industrial use.

67. The strength of the reputation of the opponent's mark is also relevant to the likelihood of the relevant public making a link between the marks. As I noted earlier, the earlier mark had a reasonable (rather than strong) reputation at the relevant date.

68. The distinctiveness of the earlier mark must also be taken into account. I earlier found that the earlier mark is highly distinctive in nature.

69. The degree of similarity between the marks is an important factor. I earlier found that the marks are similar to only a very low degree.

70. The opponent asks me to take into account that the applicant uses the words OCTOPUS ENERGY in a similar font and colours to those used for the earlier mark OPUS ENERGY. Unlike the legal position under s.5(2)(b), for the purposes of assessing an objection under s.5(3) it may be permissible to take into account evidence about the way that the applicant mark uses its marks, including matter extraneous to the marks themselves, if this shows that the mark applied for is intended to 'free-ride' on, and thereby take unfair advantage of, the reputation of the earlier mark.¹⁹ It cannot therefore be ruled out that evidence of such an intention could also be relevant to the prior question of whether the public will make the necessary link between the reputed mark and the mark applied for.

71. In its evidence in reply, the opponent identified the applicant's adoption in 2016, i.e. after the relevant date, of the colours blue and white for the use of its word mark OCTOPUS ENERGY, i.e. neither of the marks under consideration here. Although the complaint about colour relates to a different trade mark to the contested marks, I consider that the applicant's actions after the relevant date in relation to its word-only

¹⁹ See paragraphs 86 – 89 of the judgment of the General Court in *The Coca-Cola Company v OHIM*, Case T-480/12

mark could, in principle, shed light backwards on the applicant's intentions at the relevant date with regard to the composite marks under consideration. I will therefore consider what, if any, significance should be attached to the applicant's post-filing use of the words in the contested marks in the colours used by the opponent for its word only mark.

72. The applicant's use of a blue and white trade mark appears to have commenced in 2016. There is nothing to suggest that the applicant had previously used colours similar to those used by the opponent. The opponent's witness said, in December 2016, that the opponent has used its mark in the colours blue and white for two years. This suggests that the opponent first used those colours at the end of 2014. There is no evidence actually showing use of any of the opponent's marks in blue and white prior to May 2016.²⁰ Further, I note that the screen shot from the opponent's webpage in evidence from March 2015 shows that the opponent was still using its composite mark in blue and pink at that time.²¹ Therefore, Mr Hemmings was not accurate when he stated in December 2016 that the opponent had been consistently using the colours blue and white for two years. It is therefore unclear when the opponent first used its marks in the colours blue and white, except that it could not have been later than May 2016. The opponent identified the applicant's first use of its word mark in the colours blue and white as occurring in March 2016.

73. Therefore, bearing in mind that:

- Mr Hemmings' evidence on this point was filed as evidence in reply, meaning that the applicant has not had the normal opportunity of filing evidence in answer to it;
 - It is not clear from the evidence that the opponent even used the colours blue and white prior to the applicant's first use of those colours;
- I do not intend to attach any weight to Mr Hemmings' evidence on this matter.

²⁰ See the third screenshot in GH11

²¹ See second screenshot in GH11

74. In any event, the use of white letters on a blue background, or vice versa, is not *prima facie* distinctive. Absent evidence that those colours had become a distinctive feature of the opponent's mark through the extensive use of the mark in those colours, I do not regard the applicant's subsequent use of its word mark in blue and white as indicating an intention to free-ride on the reputation of the opponent's mark.

75. The opponent also complains about the applicant's use of a similar "*rounded font*" for the words OPUS ENERGY. However, as I noted earlier, this is a banal non-distinctive font/feature. Therefore, I do not regard the applicant's use of a similar font, either on its own, or in combination with the coincidence of colours, as sufficient to infer that the contested marks are intended to take unfair advantage of the reputation of the opponent's OPUS ENERGY word mark.

76. Returning to the 'normal' factors covered in paragraphs 65-68 above, I find that the very low degree of similarity between the marks and the relatively modest extent of the reputation of the opponent's mark are sufficient to offset the high level of inherent distinctiveness of the mark OPUS ENERGY, even where the services (and therefore the users) directly overlap. I find that the relevant public will not make any kind of link between the contested marks and the word mark OPUS ENERGY. It follows that use of the contested marks will not result in any of the conditions set out in s.5(3).

77. The s.5(3) ground of opposition therefore also fails.

Section 5(4)(a)

78. Section 5(4)(a) states:

"A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) [.....]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

79. The necessary requirements to establish a passing off right are well established. They are, essentially, (1) goodwill in a business identified by a sign, (2) a misrepresentation by the defendant by the use of a sign similar enough to the claimant’s sign to deceive (intentionally or otherwise) a substantial number of the claimant’s customers or potential customers into believing that the defendant’s goods or services are those of the claimant, and (3) damage to the claimant’s goodwill caused by the defendant’s misrepresentation.

80. The opponent claims to have established goodwill under the sign OPUS ENERGY by the relevant date. I accept that the opponent had an established business at that date procuring renewable electricity and selling energy to business users. I also accept that OPUS ENERGY was distinctive of the goodwill in the opponent’s business.

81. However, the reasons which led me to conclude that there is no likelihood of confusion under s.5(2)(b), and no likelihood of the public linking OPUS ENERGY with the contested marks for the purposes of s.5(3), also lead me to conclude that use of the contested marks will not constitute a misrepresentation to the public. In particular, I find that use of the contested marks is unlikely to deceive a substantial number of the opponent’s customers or potential customers into believing that the applicant’s goods/services are those of the opponent, or that the opponent is otherwise responsible for the quality of the goods/services offered under the contested marks.

82. I have again taken into account the opponent's claim that the applicant intended to pass-off or, at least, "*live dangerously*" by adopting similar colours and font for its OPUS ENERGY word mark. However, for the reasons I have already given, I do not accept that the opponent has established either proposition.

83. As misrepresentation has not been established and misrepresentation is an essential component of the tort of passing off, it follows that the opponent's claim that the applicant is passing off fails. The s.5(4)(a) ground therefore also fails.

Overall outcome

84. The opposition has failed and, subject to appeal, the contested trade marks will be registered.

Costs

85. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £1300 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

£300 for considering the opponent's notice of opposition and filing a counterstatement;

£700 for considering the opponent's evidence;

£300 for filing written submissions in lieu of a hearing.

I order Opus Energy Group Limited to pay Octopus Investments Limited the sum of £1300. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 24th day of March 2017

A James

Allan James
For the Registrar

Annex A

Class 1

Decontaminants for fuels.

Class 4

Electricity; fuels and illuminants, combustible compositions; fuels; hydrocarbon fuels; electrical energy from renewable sources; fuel gas; gas and gaseous fuels; industrial oils and greases; lubricants.

Class 7

Generators; electricity generators; wind turbines; gas turbines; hydraulic turbines; micro-hydro electric power systems; hydroelectric installations for generating electricity; uninterruptible power supplies [machines] for the generation of electrical energy; Electricity generating sets; pipe installation apparatus; pumps and compressors; machines for use in the generation, transmission, distribution, supply and conservation of energy; fuel economisers; alternators; power supply apparatus [generators]; parts and fittings for all the aforesaid goods.

Class 9

Scientific, electronic, photographic, cinematographic, optical, weighing and measuring apparatus and instruments; electric apparatus, namely, apparatus for conducting, switching, transforming; accumulating, regulating or controlling electricity; scientific apparatus and instruments for measuring, signalling, checking (supervision); apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording disks; calculating machines and data processing apparatus; apparatus for monitoring domestic or industrial consumption of electrical energy, gas, heat and water; apparatus for analysing signals, current and voltage; electrical apparatus and instruments for processing storing, transmitting, distributing or receiving data; instruments and installations for encoding, decoding, transcoding, encrypting, deciphering, recording, transmitting, reproducing and amplifying sound, images and information; computer communication, office automation, home automation and building automation terminals; magnetic or optical data media, interfaces, reading devices for data processing, optical drive, micro processors, central processing devices, software, software packages, data banks and database management systems; electrical and electronic apparatus and instruments for use in or in relation to the generation or distribution of power, gas, water or electricity or telecommunications; batteries; circuit breakers, electric control panels, electric apparatus for commutation, electricity distribution boxes, consoles and boards, electric branch boxes, junction boxes, electric converters, electric transformers; branch and distribution boxes, electrical cables, conductors, conduits, connectors and switches; electrical connection insulation apparatus; insulation resistance metres; insulation testers; door bells, alarms; fuses and fuse wires; electric locks; sheets for electric cables; soldering apparatus; protective clothing; safety apparatus and instruments; intercommunication apparatus; telecommunications apparatus and instruments; electronic and infrared remote control devices; apparatus for use in remote control of electricity, gas, heat, water and energy supplies; remote switching apparatus and instruments; power generation monitoring apparatus; computer software for use in or relating to the generation or distribution of power, gas, water or electricity; solar panels for electricity generation; fuel meters; fuel measuring and dispensing equipment; electronic devices for heating, cooling and ventilating systems; lighting controls; external power supplies; devices for monitoring and conserving energy use; devices for tracking energy use; solar photovoltaics; energy regulators; energy control devices; thermal energy measuring apparatus; solar energy collectors for electricity generation; electric control devices for energy management; parts and fittings for all the aforesaid goods.

Class 35

Import-export agencies in the field of energy; Business project management; advertising; business advisory services; organisation, operation and supervision of incentive and loyalty schemes; operation and supervision of an incentive scheme for the purpose of reducing levels of carbon dioxide or other greenhouse gases; advertising, marketing and business enquiry services all relating to electrical and gas equipment and apparatus and to energy services and the generation and distribution of power, gas, water or electricity; compilation of data so obtained; retail and wholesale services connected with the sale of gas and water; consulting and information on consumption

of energy, gas and power; business management assistance and business organisation and management consulting in the field of environmental protection, new energies, preservation of natural wealth and sustainable development; business consulting in the field of environmental protection, new energies, preservation of natural wealth and sustainable developments; market research and studies in the field of environmental protection, new energies, preservation of natural wealth and sustainable developments; consultation services and provision of information on the cost of electricity, gas and energy; advisory and consultancy services in relation to all the aforesaid.

Class 36

Financial consultancy in the energy sector; brokerage of financial investments in energy companies; brokerage in the field of energy; raw materials brokerage (gas, coal, hydrocarbons, electricity and water); financial advice and stock exchange activities in the field of energy; energy quoting on the stock exchange; raw materials market prices fluctuations and trends measuring services; actuary agent services; invoicing and debt recovery services in the field of energy; building and investment of capital in the field of energy; charitable fund raising services; analysis, planning and development for financial purposes; financial partnership services; financial services relating to the use of energy efficient gas and electric services and appliances; awarding of grants in relation to the use of energy efficient gas and electric services and appliances; brokerage of carbon offsets; brokerage of carbon credits; issuing of tokens of value in relation to incentive schemes for the purpose of reducing levels of carbon dioxide and/or other greenhouse gases in the atmosphere; advisory and consultancy services in relation to all the aforesaid.

Class 37

Construction, repair, dismantling and maintenance of power plants; construction, repair, dismantling and maintenance of power lines; building, maintenance and repair of recycling/waste treatment and refuse installations; installation of solar powered systems; servicing of power generating apparatus and installations; installation of energy-saving apparatus; repair of energy supply installations; construction of wave energy power plants; maintenance and repair of energy generating installations; repair of energy production plants and machines ; construction, maintenance, servicing and repair of gas and electricity generating plants; electrical wiring services; installation, maintenance, repair and servicing of gas and electric appliances, pipe works and transmission lines; installation, maintenance, repair and servicing of apparatus and instruments using gas or electricity; thermal insulation of products; advisory and consultancy services in relation to all the aforesaid.

Class 39

Power supply and distribution; energy distribution; storage of energy and fuels; leasing the use of power lines to third parties for the transmission of electricity; gas and electricity storage, supply and distribution services; storage, distribution, transportation and delivery of gas and gaseous fuels; transmission and/or distribution and/or supply of gas, electricity and other energy sources; electricity supply services; electricity distribution; information and advisory services relating to all the aforesaid services.

Class 40

Power generation; energy production services; production of energy by power plants; the production of energy for domestic and industrial use from renewable sources such as solar, wind and water; waste disposal; treatment of waste, recycling of waste; air deodorising, air refreshing and water purification and recycling services; insulation of existing buildings; production of energy; energy generation; water treatment; sewage treatment, waste treatment; recycling of chemicals; processing and refinement of fuel materials; conversion of by products from cooling towers into a domestic heating supply; consultancy; information and advisory services relating to all the aforesaid services.

Class 42

Advisory, information and consultancy services relating to energy management and efficiency; energy monitoring; energy auditing; programming of energy management software; development of energy and power management systems; research in the field of energy; organisation of energy efficiency projects; energy efficiency management and consultancy; auditing energy consumption of buildings; energy conservation management; preparation of reports on energy consumption of buildings; auditing of energy consumption and of efficiency of operation of appliances and safety checking of appliances and pipework; testing of gas and electricity generating plants, gas and electric appliances, pipework, transmission lines and apparatus and instruments utilising gas and electricity; prospecting and exploiting natural, fossil and nuclear fuel resources; provision of information, advice and consultancy in relation to carbon offsetting; development and implementation of processes which are intended to reduce levels of greenhouse gases in the atmosphere; research and consultancy, all relating to the aforesaid services; geological surveys; industrial design services; preparation of reports; engineering services; studies in research on environmental conservation, natural wealth and sustainable development; technology transfer; scientific and industrial research; studies and consulting on the environment, ecology and sustainable development; research on energy and renewable energy; expert appraisal services in the fields of the environment,

energy, including new energies, natural wealth and sustainable development; technical study and advice concerning the distribution of energy consumption; technical evaluation and estimate services concerning energy consumption; technical services for collecting information from remote energy consumption calculators; provision of electricity, gas and water metre reading; information and advisory services relating to all the aforesaid services.

Annex B

Class 1

Chemicals and chemical products; petrochemicals and petrochemical products, ethane, propane, butane and olefins; chemical additives; and resins included in this class.

Class 4

Industrial oils and greases, fuels, illuminants, gas, electricity, gasoline, coal, natural gas, natural gas in liquid form, liquefied petroleum gases; fuel and energy products included in this class, namely oil.

Class 35

Advertising and marketing services; public relations; market research; business management, administration, information and consultancy; database management services; buying of energy products, energy by-products, energy, fuel and power for third parties; retail services connected with the sale of energy products, energy by-products, energy, fuel and power for third parties; information, advice and consultation in relation to the aforesaid services.

Class 36

Commodity trading; financial services; financial management and consultancy; investment advice and consultancy; financial risk management and advisory services relating thereto; trading of energy products, energy by-products, energy, fuel and power; energy and energy products brokerage services; provision of customized price risk management services in the field of energy products, energy by-products, energy fuel and power; and managing and trading of investment funds and hedge funds; information, advice and consultation in relation to the aforesaid services.

Class 37

Building, construction, repair, maintenance, renovation, redevelopment, demolition, replacement and installation of fuel, power and energy storage installations, refineries and equipment; information, advice and consultancy services in relation to the aforesaid; consultancy and advisory services relating to the construction, maintenance and repair of pipelines, storage and processing facilities for energy products, energy by-products, energy, fuel and power; terminalling services, namely, the maintenance of energy terminal facilities; the maintenance of pipeline systems and storage facilities for the transport and storage of energy and energy by-products; information, advice and consultation in relation to the aforesaid services.

Class 39

Distribution, transmission, gathering and storage of energy by-products, energy, fuel and power, namely, the operation of pipeline systems and storage facilities for the transport and storage of energy and energy by-products; terminalling services, namely, the operation of energy terminal facilities and leasing of energy terminal facilities to third parties; provision of information and advisory services in respect of distribution, transportation, gathering terminalling, storage, provision, transport, supply and collecting of energy products, energy by-products, energy, fuel and power; consultancy and advisory services relating to the operation of pipelines and storage facilities for energy products, energy by-products energy, fuel and power.

Class 40

Generation, production, processing and treatment of energy, energy by-products, energy, fuel and power; consultancy and advisory services relating to the operation of processing facilities for energy products, energy by-products, energy, fuel and power; provision of information, advice and consultation in respect of the aforesaid services.

Class 41

Training and education in respect of distribution, transportation, gathering, terminalling, development, trading, storage, provision, selling, buying, transport, supply and collecting of energy products, energy by-products, energy, fuel and power.

Class 42

Exploration of energy, energy by-products, energy, fuel and power; research and development into energy products and energy by-products; engineering and consultancy services in the field of energy by-products, energy, fuel and power; engineering services, namely provision of technical information regarding the construction, maintenance and repair of pipelines and energy storage and terminal facilities; inspection and quality assessment and evaluation services in the field of energy, energy by-products, energy, fuel and power; laboratory analysis and testing services; materials testing and evaluation services; analytical services, including sampling and reporting of data from energy sources; conducting feasibility studies relating to the exploration and exploiting of energy products and energy by-products; underwater exploration; biological and bacteriological research; geological research and surveys; geological prospecting; development of energy products, energy by-

products, energy, fuel and power; energy auditing services; information, advice and consultation in respect of the aforesaid services.

Class 45

Provision of advice and information regarding regulations and laws pertaining to the transport, distribution and storage of energy, energy by-products, energy, fuel and power.