

**o/617/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003625600**

**BY KADENA INDUSTRIES LIMITED**

**TO REGISTER THE TRADE MARK:**

**Powersheer**

**IN CLASS 9**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 426789**

**BY POSITEC GROUP LIMITED**

## BACKGROUND AND PLEADINGS

1. On 13 April 2021, KADENA INDUSTRIES LIMITED (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 11 June 2021. The applicant seeks registration for the following goods:

Class 9      Chargers for electric batteries; galvanic cells; battery chargers; galvanic batteries; batteries, electric; rechargeable electric batteries; Universal serial bus [USB] cables; USB cables; power controllers.

2. The application was opposed by Positec Group Limited (“the opponent”) on 13 September 2021. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following trade marks:

The logo consists of the words "POWER" and "SHARE" stacked vertically in a bold, sans-serif font. The letters "E" in both words are replaced by three horizontal bars. The entire logo is tilted slightly to the right.

UK registration no. UK00917798018

Filing date 9 February 2018; registration date 11 August 2018.

**(“the First Earlier Mark”)**

The logo consists of the words "POWER" and "SHARE" stacked vertically in a bold, sans-serif font. The letters "E" in both words are replaced by three horizontal bars. The entire logo is tilted slightly to the right.

UK registration no. UK00914949416

Filing date 21 December 2015; registration date 15 April 2016.

**(“the Second Earlier Mark”)**

# POWER SHARE

# POWERSHARE

(Series of 2)

UK registration no. UK00003623411

Filing date 8 April 2021; registration date 5 November 2021.

**(“the Third Earlier Marks”)**

3. Under section 5(2)(b), the opponent relies upon some of the goods for which its First Earlier Mark is registered, all of the goods for which its Second Earlier Mark is registered and some of the goods for which its Third Earlier Marks are registered, as underlined in the Annex to this decision.

4. The opponent claims that there exists a risk of confusion, both direct and indirect, because the marks have a high level of aural and visual similarity, as well as strong conceptual similarities, and the goods are identical and/or similar.

5. The applicant filed a counterstatement denying the claims made.

6. The opponent is represented by Boulton Wade Tennant LLP and the applicant is represented by RevoMark. Neither party requested a hearing nor filed evidence. However, the opponent filed submissions in lieu. This decision is taken following a careful perusal of the papers.

7. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

## DECISION

8. Section 5(2)(b) reads as follows:

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

(a)...

(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.”

9. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark ... or international trade mark (UK) ... 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,

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B

which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

[...]"

10. Section 6A of the Act states:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a),  
(aa) or (ba) in relation to which the conditions set out in section 5(1),  
(2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed  
before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered,  
or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

11. The opponent’s marks qualify as earlier marks in accordance with section 6(1)(a) as their filing dates are earlier dates than the applicant’s mark. As the First Earlier Mark and the Third Earlier Marks had not completed their registration process more than 5 years before the filing date of the mark in issue, it is not subject to proof of use pursuant to section 6A(1) and (1A) of the Act.

12. As the Second Earlier Mark had completed its registration process more than five years before the application date of the mark in issue, it is subject to proof of use pursuant to section 6A(1) and (1A) of the Act. However, as the applicant did not request that the opponent prove use of all of its marks, the opponent is entitled to rely upon all of the goods for which the marks are registered.

## MY APPROACH

13. On the basis that the opponent's Third Earlier Marks are word marks, and covers the same/highly similar goods in its specification to the opponent's First and Second Earlier Marks, I will focus my comparison on the opponent's Third Earlier Marks, returning to the remaining earlier marks only if it is necessary to do so.

14. Therefore, for the remainder of this decision, I will be referring to the opponent's Third Earlier Marks as 'the opponent's marks'.

### Section 5(2)(b) case law

15. 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:

- (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.



## Comparison of goods

16. The competing goods are as follows:

<b>Opponent's goods</b>	<b>Applicant's goods</b>
<p><u>Class 9</u>            Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; detection apparatus, electronic stud finders, non-electric wall stud finders; magnetic data carriers, recording discs; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus, calculators, printers, smart watches; electrical inverters, chargers, battery jump starters, electronic surveillance apparatus, especially network camera, laboratory robots, teaching robots, security surveillance robots, humanoid robots with artificial intelligence, robotic electrical control apparatus, speakers, radios, internal fans for computers; computer software, computer software</p>	<p><u>Class 9</u>            Chargers for electric batteries; galvanic cells; battery chargers; galvanic batteries; batteries, electric; rechargeable electric batteries; Universal serial bus [USB] cables; USB cables; power controllers.</p>

applications; software; application software; downloadable software; downloadable mobile applications; application software for smart phones; application software for mobile phones, tablets, laptops and computers; downloadable mobile and computer software for power tools and gardening tools, especially as control system; remote controls; remote control apparatus; software for remote controls; remote control apparatus for garden tools and power tools; GPS tracking and location devices, measuring instruments and apparatus, levels (instruments for determining the horizontal), laser measuring instruments; battery chargers, battery packs, batteries, batteries for lighting; electrical power supplies, electric power converters; protective knee pads, goggles, protective goggles, clothing for protective or safety purpose; gloves for protective or safety purpose; electrically heated clothing for protective or safety purposes, electrically heated gloves for protective or safety purposes, locks, digital door locks, Electronic lock fingerprint door locks; Electronic access control device for interlocking door; rearview cameras for vehicles; peepholes [magnifying lenses] for doors; alarms, especially fire alarms, anti-theft

warning apparatus, Detection of flammable gas alarm; gas testing instruments; Flash warning signal; Emergency warning light; parts, fittings and accessories in this class for the aforesaid goods; none of the aforesaid goods for use in relation to the payment of household bills, specifically household bills for the supply of utilities.	
--	--

17. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

“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 trade mark application (Case T-388/00 Institut for Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

#### *Battery chargers*

18. I consider that the applicant’s above goods are self-evidently identical to “battery chargers” in the opponent’s specification.

#### *Chargers for electric batteries*

19. I consider that the applicant’s above goods would fall within the broader category “battery chargers” in the opponent’s specification. I consider them identical on the principle outlined in *Meric*.

#### *Galvanic batteries; batteries, electric; rechargeable electric batteries*

20. I consider that the applicant's above goods would fall within the broader category of "batteries" in the opponent's Third Earlier Marks specification. I consider them identical on the principle outlined in *Meric*.

*Power controllers*

21. I consider that the applicant's above goods would fall within the broader category of "apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity" in the opponent's specification. I consider them identical on the principle outlined in *Meric*.

*Universal serial bus [USB] cables; USB cables*

22. I acknowledge that USB cables can be used for multiple purposes such as transferring data and electric transmission as well as commonly being used as charging cables for a wide range of devices. Consequently, I consider that the applicant's above goods would fall within the broader category of "apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity" in the opponent's specification. Consequently, I consider them identical on the principle outlined in *Meric*.

23. However, I also consider that the applicant's above goods would also fall within the broader category of "battery chargers" in the opponent's specification. I consider that the average consumer would consider that a battery charger would cover the cables for that charger, and therefore, I consider that the above terms are also identical on the principle outlined in *Meric*.

*Galvanic cells*

24. I note that neither the opponent or applicant has provided me with any evidence or definition as to what galvanic cells are. In the absence of such, I consider that some types of batteries are made up of a set of galvanic cells. Therefore, albeit the opponent argues that galvanic cells are identical to "batteries" in its specification, identity cannot

be established because as set out in *Les Éditions Albert René v OHIM*,<sup>1</sup> it is clear that just because a particular good is used as a part, element or component of another, it should not result in a finding of similarity between those goods. However, it does not mean that there can never be similarity between such goods where there is overlap in the factors identified in *Treat*.

25. I consider that the term “galvanic cells” in the applicant’s specification is similar with the opponent’s “batteries”. I consider that they would overlap in purpose because the goods are used to store chemical energy and convert it to electrical energy. I therefore consider that there may be an overlap in trade channels because the same undertaking is likely to produce both goods. I also consider that there may be some overlap in nature. However, I do not consider that the goods overlap in method of use because batteries would be used directly in electrical goods, such as a TV remote, whereas the galvanic cells are used within the batteries themselves. I also do not consider that the goods would be in competition nor complementary. Taking the above into account, I consider that the goods are similar to between a medium and high degree.

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

26. 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 the goods are likely to be selected by the average consumer. 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

---

<sup>1</sup> Case T-336/03

“average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

27. The average consumer for the goods will be members of the general public and business users. The cost of purchase is likely to be relatively low. The frequency of purchase is likely to vary, however, I consider that it is most likely to be relatively frequent. The average consumer will take various factors into consideration such as the cost, quality and suitability of the goods for the user’s particular needs. Consequently, I consider that a medium degree of attention will be paid during the purchasing process.

28. The goods are likely to be purchased from the shelves of a retail outlet (be that general or specialist in the case of goods such as galvanic cells, for example) or their online equivalent. Consequently, visual considerations are likely to dominate the selection process. However, I recognise that word-of-mouth recommendations and verbal advice means that aural considerations cannot be discounted.

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

29. 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 the trade marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“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.”

30. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

31. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
<p data-bbox="236 779 758 927"><b>POWER SHARE</b> <b>POWERSHARE</b></p> <p data-bbox="400 992 587 1028">(Series of 2)</p>	<p data-bbox="979 902 1251 947">Powersheer</p>

32. The opponent's marks consists of two word only marks, both of which are the words POWER SHARE, with the first mark presented as two separate words and the second as a whole. There are no other elements to contribute to the overall impression which lies in the word(s) itself.

33. The applicant's mark, while a figurative mark, consists of the word 'Powersheer' presented in title case in a standard typeface. I consider that the word Powersheer plays a greater role in the overall impression of the mark, with the stylisation playing a lesser role.

34. Visually, the marks coincide in the presence of the letters P, O, W, E, R, S and H at the beginning of both marks. The opponent submits that consumers pay more attention to the beginning of the marks. I agree. However, the opponent's marks end in the letters A, R and E, whereas the applicant's mark ends in the letters E, E and R.

These act as visual points of difference. Consequently, I consider that the marks are similar to between a medium and high degree.

35. Aurally, the opponent's marks will be pronounced as POW-ER-SH-AIR. The applicant's mark will be pronounced as POW-ER-SH-EAR. As the marks share the first three syllables, I consider that the marks are aurally similar between a medium and high degree.

36. Conceptually, both marks share the word POWER. I note that this is allusive of both the opponent's and the applicant's goods (chargers, batteries and power controllers) which all use power, which is energy, specifically electronic energy, to operate other goods.<sup>2</sup> The opponent's marks ends in the word SHARE. I consider that this in conjunction with the word power means 'to share power'. The applicant's mark ends in the word 'sheer' which is synonymous with the words total, complete, absolute or utter. In this instance, the applicant's mark conveys the meaning of 'sheer power' which emphasises how powerful its goods are.

37. Regardless, as both marks share the word power, I consider that the marks are conceptually similar to a medium degree.

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

38. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 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

---

<sup>2</sup> <https://www.collinsdictionary.com/dictionary/english/power> (point 9, uncountable noun)



C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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 promotion of 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).”

39. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

40. As the opponent has not filed any evidence to show that the distinctiveness of its marks has been enhanced through use, I only have the inherent position to consider.

41. As noted above, I consider that the opponent’s marks convey the meaning of ‘to share power’. I consider that the meaning of the mark, as a whole, is allusive of the goods because batteries and battery chargers will essentially share its power so that an electronic item can work. Consequently, I consider that the opponent’s mark is inherently distinctive to between a low and medium degree.

### **Likelihood of confusion**

42. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that

exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to 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 that he has retained in his mind.

43. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually similar to between medium and high degree.
- I have found the marks to be aurally similar to between medium and high degree.
- I have found the marks to be conceptually similar to a medium degree.
- I have found the opponent's mark to be inherently distinctive to between a low and medium degree.
- I have identified the average consumer as members of the general public, and business users, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the goods.
- I have found the parties' goods to be identical to similar to between a medium and high degree.

44. I bear in mind the decision of the CJEU in *L'Oréal SA v OHIM*, Case C-235/05 P, in which the court confirmed that weak distinctive character of the earlier trade mark does not preclude a likelihood of confusion. Further, I bear in mind the comments of

Mr Iain Purvis Q.C., sitting as the Appointed Person, in *Kurt Geiger v A-List Corporate Limited*, BL O-075-13. He said:

“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.”

45. I also take into account the decision *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch) in which the court confirmed that if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion.

46. Therefore, taking all of the above case law into account, I consider that it is important to ask, ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

47. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. Albeit the word POWER is the common beginning element of both marks, in the context of the goods at issue, I am of the view that the word ‘POWER’ is of low inherent distinctive character. Therefore, I do not consider that the average consumer would overlook the differing endings of each of the marks (SHARE and SHEER). I consider that the visual and aural differences between these words would not go unnoticed especially because the effect of these ending elements is to create a clear conceptual hook in which to differentiate the marks (to share power

verses sheer power). Consequently, I do not consider that there would be a likelihood of direct confusion.

48. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

49. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

50. Having noticed that the competing trade marks are different, I see no reason why the average consumer would assume that they come from the same or economically linked undertakings. As highlighted above, even though the marks share the common element POWER, I consider that this element is allusive and low in inherent distinctiveness for the opponent’s and the applicant’s goods for which the marks are applied for/registered. I do not think that the common element is of such a level of

distinctiveness that the average consumer would believe that only one undertaking would use it in relation to the class 9 goods at issue. It is more likely to be viewed as a coincidence that both marks use the word POWER given its allusiveness of the goods that provide power in the form of electricity. Therefore, I do not consider that the average consumer would think that the applicant's trade mark was connected with the opponent. Even if the opponent's marks are brought to mind, this is mere association, not confusion: see *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81. Consequently, I consider there is no likelihood of indirect confusion.

51. For the avoidance of doubt, I do not consider that the First and Second Earlier Marks would have put the opponent in any stronger position. Even if identity is found between all of the goods in these marks' specifications and the applicant's, I consider that the stylisation and presentation of the First and Second Earlier Marks makes them even less similar to the applicant's mark than the Third Earlier Marks. Therefore, as I have found no likelihood of confusion (direct and indirect) for the Third Earlier Marks, I do not find there to be a likelihood of confusion (direct and indirect) for the First and Second Earlier Marks.

## **CONCLUSION**

52. The opposition is unsuccessful, and the application may proceed to registration.

## **COSTS**

53. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£200** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£200
<b>Total</b>	<b>£200</b>

54. I therefore order Positec Group Limited to pay KADENA INDUSTRIES LIMITED the sum of £200. This sum is to 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 20<sup>th</sup> day of July 2022**

**L FAYTER**

**For the Registrar**

## ANNEX

### The First Earlier Mark

#### Class 7

Machine tools; machine coupling and transmission components (except for land vehicles); agricultural, earthmoving, construction, oil and gas extraction and mining equipment; cultivators (machines), scarifiers, power tillers, power-operated sprayers, spreaders (machines), fertilizer spreading machines; pumps; moving and handling equipment; generators, current generators, electricity generators, solar-powered electricity generators; machines and machine tools for material processing and production; machines for processing of wood, machines for machining metals; dispensing machines; sweepers, machines and apparatus for cleaning, washing apparatus; electric power operated tools, wrenches (machines), electric hammers, drilling machines, impact drills, hammer drills, drill press, screwdrivers, drill bits, sharpeners, saws (machines), jigsaws (machines), circular saws, grinders (machines), sanders, polishers, shoe polishers, cutting machines, routers, planers, hot air guns, hot glue guns, engraving machines, air compressors, electric welding machines, lathes; electric power operated and gasoline engine power operated garden tools, tree pruners (machines); blowers, shears, grass shears; grass trimmers, hedge trimmers, chain saws, lawn mowers, garden pumps, garden shredders, high pressure washers, vacuum cleaners, road sweepers, snow throwers, swimming pool cleaning machines; pneumatic tools, pneumatic welding apparatus, pneumatic guns, pneumatic impact wrenches, pneumatic screwdrivers, pneumatic drillings, pneumatic spray guns, pneumatic scissors, pneumatic shovels, pneumatic crop lifter (machines); lawn edger, electric; grinding machines, nailing guns; motors and engines not for land vehicles, gasoline engines not for land vehicles; spray guns for paint; jacks (machines); mixers (machines); robots (machines); Robotic lawn mowers; Robotic snow throwers; Robotic grass trimmers; Robotic edge trimmers; Robotic watering machines; Robotic cleaners, namely, robotic vacuum cleaners, robotic floor cleaning machines, robotic road sweeping machines; robotic jigsaw machines, robotic motor hand saws, robotic electric hand drills, robotic mechanisms used in agriculture, robotic painting machines; compressing fans, fans for motors and engines, fans being parts of machines, agriculture machines; woodworking machines; planning machines; engraving machines; electric kitchen appliances, namely, mixers, electric food blenders, electric

food grinders for commercial, industrial or domestic uses, electric food slicers, electric food choppers, electric egg beaters, electric can openers, electric fruit peelers, electric juice extractors, electric juicers, electric knife sharpeners, electric pasta makers for domestic use, electric vegetable peelers, electric food processors; electric disintegrators; hydraulic door openers and closers (parts of machines); elevating apparatus; apparatus for dressing; metalworking machines; electric machines and apparatus for polishing; portable power tools; hand-held power tools, other than hand-operated; electric spray guns; electric plastics welders; electric sand-blasting apparatus; sand paper grinding machines, electric breakers [power tools]; starters for motors and engines; 3D printers; power operated brushing machines; electric cleaning machines and devices; brushes [parts of machines]; brushes for vacuum cleaners; brushes, electrically operated; parts, fittings and accessories in this class for the aforesaid goods.

#### Class 9

scientific, nautical, surveying, photographic, cinematographic, optical, weighing, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; detection apparatus, electronic stud finders, non-electric wall stud finders; magnetic data carriers, recording discs; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus, calculators, printers, smart watches; electrical inverters, chargers, battery jump starters, electronic surveillance apparatus, surveillance robots, humanoid robots with artificial intelligence, robotic electrical control apparatus, speakers, radios, internal fans for computers; computer software, computer software applications; software; application software; downloadable software; downloadable mobile applications; application software for smart phones; application software for mobile phones, tablets, laptops and computers; downloadable mobile and computer software for power tools and gardening tools, especially as control system; remote controls; remote control apparatus; software for remote controls; remote control apparatus for garden tools and power tools; GPS tracking and location devices, measuring instruments and apparatus, levels (instruments for determining the horizontal), laser measuring instruments; battery chargers, battery packs, batteries, electrical power



supplies, electric power converters; protective knee pads, goggles, protective goggles, clothing for protective or safety purpose; gloves for protective or safety purpose; electrically heated clothing for protective or safety purposes, electrically heated gloves for protective or safety purposes; parts, fittings and accessories in this class for the aforesaid goods.

#### Class 11

apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes and parts, agricultural irrigation units, air purifiers; ice boxes; electrically heated clothing; electrically ice boxes; robots for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; electric fans, ventilating fans, tanning apparatus; filter for industrial and household; heat guns; parts, fittings and accessories in this class for the aforesaid goods.

#### Class 12

vehicles; apparatus for locomotion by land, air or water; scooters, electrically powered scooters, bicycles, electric bicycles; vehicle tire deflators, tire inflators; delivery robots, drones, wheeled carriers; multipurpose wheeled carriers in this class; carts for garden use; wheelbarrows; wheelbarrows for garden use; trolleys; carts; hand cars; dollies (trolleys); parts, fittings; kits for converting wheelbarrows into hay wagons; kits for converting wheelbarrows into garden carts; parts, fittings and accessories in this class for the aforesaid goods.

#### Class 20

furniture, mirrors, picture frames; ladders and movable steps, non-metal tool boxes; saw horses, multipurpose saw horses with non-metal clamps; workbenches; worktables, industrial worktables; workstations having multi-use work surfaces; portable work tables, especially, saw tables for clamping and holding saws; workbench accessories, especially, attachable work tables and saw horses; parts, fittings and accessories in this class for the aforesaid goods.

#### Class 28

Games and playthings; gymnastic and sporting articles not included in other classes; decorations for Christmas trees; Toys, toy robots, ball inflators; parts fittings and accessories in this class for the aforesaid goods.

### **The Second Earlier Mark**

#### Class 9

Batteries for power tools; batteries for lighting; battery chargers; battery packs.

### **The Third Earlier Mark**

#### Class 9

Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; detection apparatus, electronic stud finders, non-electric wall stud finders; magnetic data carriers, recording discs; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus, calculators, printers, smart watches; electrical inverters, chargers, battery jump starters, electronic surveillance apparatus, especially network camera, laboratory robots, teaching robots, security surveillance robots, humanoid robots with artificial intelligence, robotic electrical control apparatus, speakers, radios, internal fans for computers; computer software, computer software applications; software; application software; downloadable software; downloadable mobile applications; application software for smart phones; application software for mobile phones, tablets, laptops and computers; downloadable mobile and computer software for power tools and gardening tools, especially as control system; remote controls; remote control apparatus; software for remote controls; remote control apparatus for garden tools and power tools; GPS tracking and location devices, measuring instruments and apparatus, levels (instruments for determining the horizontal), laser measuring instruments; battery chargers, battery packs, batteries, batteries for lighting; electrical power supplies, electric power converters; protective knee pads, goggles, protective goggles, clothing for protective or safety purpose; gloves for protective or safety purpose; electrically heated clothing for protective or safety purposes, electrically heated gloves for protective or safety purposes, locks, digital

door locks, Electronic lock fingerprint door locks; Electronic access control device for interlocking door; rearview cameras for vehicles; peepholes [magnifying lenses] for doors; alarms, especially fire alarms, anti-theft warning apparatus, Detection of flammable gas alarm; gas testing instruments; Flash warning signal; Emergency warning light; parts, fittings and accessories in this class for the aforesaid goods; none of the aforesaid goods for use in relation to the payment of household bills, specifically household bills for the supply of utilities.

### Class 35

Advertising; business management; business administration; office functions; wholesale and retail services, wholesaling and retailing of goods, including online Retail and wholesale services relating to machine tools, machine coupling and transmission components (except for land vehicles), agricultural, earthmoving, construction, oil and gas extraction and mining equipment, cultivators (machines), scarifiers, power tillers, power-operated sprayers, spreaders (machines), fertilizer spreading machines, pumps, moving and handling equipment, generators, current generators, electricity generators, solar-powered electricity generators, machines and machine tools for material processing and production, machines for processing of wood, machines for machining metals, dispensing machines, sweepers, machines and apparatus for cleaning, washing apparatus, electric power operated tools, wrenches (machines), electric hammers, drilling machines, impact drills, hammer drills, drill press, screwdrivers, drill bits, sharpeners, saws (machines), jigsaws (machines), circular saws, grinders (machines), sanders, polishers, shoe polishers, cutting machines, routers, planers, hot air guns, hot glue guns, engraving machines, air compressors, electric welding machines, lathes, electric power operated and gasoline engine power operated garden tools, tree pruners (machines), blowers, shears, grass shears, grass trimmers, hedge trimmers, chain saws, lawn mowers, garden pumps, garden shredders, high pressure washers, vacuum cleaners, road sweepers, snow throwers, swimming pool cleaning machines, pneumatic tools, pneumatic welding apparatus, pneumatic guns, pneumatic impact wrenches, pneumatic screwdrivers, pneumatic drillings, pneumatic spray guns, pneumatic scissors, pneumatic shovels, pneumatic crop lifter (machines), lawn edger, electric, grinding machines, nailing guns, motors and engines not for land vehicles, gasoline engines not for land vehicles, spray guns for paint, jacks (machines), mixers

(machines), robots (machines), Robotic lawn mowers, Robotic snow throwers, Robotic grass trimmers, Robotic edge trimmers, Robotic watering machines, Robotic cleaners, namely, robotic vacuum cleaners, robotic floor cleaning machines, robotic road sweeping machines, robotic jigsaw machines, robotic motor hand saws, robotic electric hand drills, robotic mechanisms used in agriculture, robotic painting machines, compressing fans, fans for motors and engines, fans being parts of machines, agriculture machines, woodworking machines, planning machines, engraving machines, electric kitchen appliances, namely, mixers, electric food blenders, electric food grinders for commercial, industrial or domestic uses, electric food slicers, electric food choppers, electric egg beaters, electric can openers, electric fruit peelers, electric juice extractors, electric juicers, electric knife sharpeners, electric pasta makers for domestic use, electric vegetable peelers, electric food processors, electric disintegrators, hydraulic door openers and closers (parts of machines), elevating apparatus, apparatus for dressing, metalworking machines, electric machines and apparatus for polishing, portable power tools, hand-held power tools, other than hand-operated, electric spray guns, electric plastics welders, electric sand-blasting apparatus, sand paper grinding machines, electric breakers [power tools], starters for motors and engines, 3D printers, power operated brushing machines, electric cleaning machines and devices, brushes [parts of machines], brushes for vacuum cleaners, brushes, electrically operated, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of scientific, nautical, surveying, photographic, cinematographic, optical, weighing, signalling, checking (supervision), life-saving and teaching apparatus and instruments, apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity, apparatus for recording, transmission or reproduction of sound or images, detection apparatus, electronic stud finders, non-electric wall stud finders, magnetic data carriers, recording discs, cash registers, calculating machines, data processing equipment and computers, fire-extinguishing apparatus, calculators, printers, smart watches, electrical inverters, chargers, battery jump starters, electronic surveillance apparatus, especially network camera, laboratory robots, teaching robots, security surveillance robots, humanoid robots with artificial intelligence, robotic electrical control apparatus, speakers, radios, internal fans for computers, computer software, computer software applications, software, application software, downloadable software, downloadable mobile applications, application software for smart phones,

application software for mobile phones, tablets, laptops and computers, downloadable mobile and computer software for power tools and gardening tools, especially as control system, remote controls, remote control apparatus, software for remote controls, remote control apparatus for garden tools and power tools, GPS tracking and location devices, measuring instruments and apparatus, levels (instruments for determining the horizontal), laser measuring instruments, battery chargers, battery packs, batteries, batteries for lighting, electrical power supplies, electric power converters, protective knee pads, goggles, protective goggles, clothing for protective or safety purpose, gloves for protective or safety purpose, electrically heated clothing for protective or safety purposes, electrically heated gloves for protective or safety purposes, locks, digital door locks, Electronic lock fingerprint door locks, Electronic access control device for interlocking door, rearview cameras for vehicles, peepholes [magnifying lenses] for doors, alarms, especially fire alarms, anti-theft warning apparatus, Detection of flammable gas alarm, gas testing instruments, Flash warning signal, Emergency warning light, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth, orthopaedic articles, suture materials, therapeutic and assistive devices adapted for persons with disabilities, massage apparatus, apparatus, devices and articles for nursing infants, sexual activity apparatus, devices and articles, vibromassage apparatus, massage apparatus, respiratory masks for artificial respiration, apparatus for artificial respiration, dental burs, protection devices against X-rays, for medical purposes, electric acupuncture instruments, gloves for medical purposes, ear plugs [ear protection devices], surgical masks, respiratory masks for medical purposes, sanitary masks for dust isolation for medical purposes, sanitary masks for virus isolation purposes, sanitary masks for medical purposes, ear plugs for protection against noise, belts for medical purposes, feeding bottles, condoms, artificial limbs, canes for medical purposes, thread, surgical, Surgical instruments and apparatus, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes and parts, agricultural irrigation units, air purifiers, ice boxes, electrically heated clothing, electrically ice boxes, robots for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes, electric fans, ventilating fans, tanning apparatus, filter

for industrial and household, heat guns, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of vehicles, apparatus for locomotion by land, air or water, scooters, electrically powered scooters, bicycles, electric bicycles, vehicle tire deflators, tire inflators, delivery robots, drones, wheeled carriers, multipurpose wheeled carriers in this class, carts for garden use, wheelbarrows, wheelbarrows for garden use, trolleys, carts, hand cars, dollies (trolleys), parts, fittings, kits for converting wheelbarrows into hay wagons, kits for converting wheelbarrows into garden carts, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of furniture, mirrors, picture frames, ladders and movable steps, non-metal tool boxes, saw horses, multipurpose saw horses with non-metal clamps, workbenches, worktables, industrial worktables, workstations having multi-use work surfaces, portable work tables, especially, saw tables for clamping and holding saws, workbench accessories, especially, attachable work tables and saw horses, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of household or kitchen utensils and containers, cookware and tableware, except forks, knives and spoons, combs and sponges, brushes, except paintbrushes, brush-making materials, unworked or semi-worked glass, except building glass, glassware, porcelain and earthenware, lunch boxes, kitchen containers, griddles [cooking utensils], bottle openers, electric and non-electric, glass flasks [containers], porcelain ware, china ornaments, drinking vessels, watering devices, watering cans, buckets, washtubs, nozzles for watering hose, Household trash can, garbage cans, aromatic oil diffusers, other than reed diffusers, electric and non-electric, electric combs, electric brushes, except parts of machines, toothbrushes, electric, floss for dental purposes, make-up removing appliances, thermally insulated containers for food, vessels of metal for making ices and iced drinks, coolers [ice pails], gardening gloves, lint removers, electric or non-electric, crystal [glassware], drinking troughs, insect traps, electric devices for attracting and killing insects, plug-in diffusers for mosquito repellents, Ultrasonic insect repellent, articles for cleaning purposes, parts, fittings and accessories in this class for the aforesaid goods; wholesaling and retailing services of games and playthings, gymnastic and sporting articles not included in other classes, decorations for Christmas trees, Toys, toy robots, ball inflators, parts fittings and accessories in this class for the aforesaid goods.