

TRADE MARKS ACT 1994

IN THE MATTER OF AN APPEAL TO THE
APPOINTED PERSON

IN THE MATTER OF Trade Mark Application No.
3846195 in the name of J. C. Bamford Excavators
Limited

AND IN THE MATTER OF Opposition thereto in
the name of Hydromek Hidrolik ve Mekanik
Makina Imalat Sanay ve Ticaret Anonim Rekie

DECISION

1. This is an appeal from the decision of Ms L Fayter (the “Hearing Officer”) dated 13 May 2024 (the “Decision”).
2. The Appellant (“JCB”) is the proprietor of Trade Mark Application No. 3846195 (the “**Trade Mark**”) for:

HYDROMAX

The application is made in respect of a large number of goods in classes 7, 11 and 12. These are shown in Annex A.

3. The Respondent opposed the entire breadth of the Trade Mark under section 5(2)(b) of the 1994 Act, relying upon the earlier mark WO000000122871 (the “**Earlier Mark**”), for

HIDROMEK

The Earlier Mark is also registered in respect of a large number of goods, however this time just in classes 7 and 12. These are shown in Annex B.

4. The Hearing Officer decided the matter on the papers and upheld the opposition in relation to all the goods for which registration was sought in classes 7 and 12. However, the opposition failed in relation to all of the goods in class 11. The Appellant seeks to overturn the finding in relation classes 7 and 12. There is no cross-appeal in relation to class 11.
5. The appeal challenges three aspects of the Decision: 1) the visual comparison of the marks 2) the aural comparison of the marks 3) the assessment of the likelihood of confusion.

Nature of the Appeal

6. Although the parties referred to slightly different sets of cases as authority, there was no material dispute as to the approach I should take. The appeal is by way of a rehearing. The approach to such a rehearing was summarized by Mr Daniel Alexander KC sitting as the Appointed Person in *TT Education Ltd v Pie Corbett Consultancy Ltd* [2017] RPC (17) 655 (AP), at [14]-[56] and subsequently approved and applied by Joanna Smith J in *Axogen v Aviv* [2022] EWHC 95 (Ch) as follows:

“24. Although I was referred to numerous cases on the subject ..., the approach of the appeal court to a statutory appeal under section 76(1) of the TMA is uncontroversial. I bear the following principles, relevant to the issues before me, firmly in mind:

- i) The appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [52(i)]);
- ii) The appeal court will allow an appeal where the decision of the lower court was “wrong” (see CPR 52.11). Neither surprise at a Hearing Officer’s conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS O/039/21* at [14]);
- iii) The decision of the lower court will be “wrong” if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge’s conclusion was “outside the bounds within which reasonable disagreement is possible” (*Actavis Group* at [81]);
- iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mark* [2003] RPC per at [26]). There is a “spectrum of appropriate respect for the Registrar’s determination depending on the nature of the decision” (*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.
- v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country* at [50]-[51]).
- vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge’s conclusion is outside the bounds within which reasonable disagreement is possible (*Actavis Group* at [80]).
- vii) Another variable to be taken into account will be “the standing and experience of

the fact-finding judge or tribunal” (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts (*Shanks* at [28] citing the warning given by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49).

viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; “The duty to give reasons must not be turned into an intolerable burden” (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English* at [17], *Fage* at [115]). The issues the resolution of which were vital to the judge’s conclusions should be identified and the manner in which she resolved them explained (*English* at [19]).

ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*IT Education* at [52(vi)]).

7. This appeal firmly concerns consideration of several of the Hearing Officer’s evaluative decisions. I therefore also I also bear firmly in mind the guidance given by the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8 (albeit I understand this guidance to be consistent with the decision in *Axogen*), where Lords Briggs and Kitchin explained at [49]-[50]:

“... on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge’s treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

On the other hand, it is equally clear that, for the decision to be “wrong” under CPR 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.”

Grounds of Appeal

8. The Appellant does not challenge the Hearing Officer’s decisions in relation to:

- a. the legal principles to be applied;
- b. the goods covered by the Earlier Mark and Trade Mark, and her findings as to the identicalities and similarities between them;
- c. the identification and assessment of the characteristics of the average consumer for the parties’ respective goods in question, and the likely circumstances in which they would be purchased, and
- d. her finding that a significant proportion of consumers will see the Earlier

Mark as having no meaning in the English language and therefore that the Earlier Mark is inherently distinctive to a high degree.

9. Instead, as I have said, they challenge her decisions in relation to degree of visual, and aural similarity of the marks and her overall finding in relation to the likelihood of confusion.

Visual Similarity

10. The Hearing Officer's findings on visual similarity are set out at paragraphs 51-53 of the Decision as follows:

“51. The opponent's mark consists of the word “HiDROMEK” written in a minimally stylised and capitalised typeface (apart from the letter “i” which is in lower-case). I also note that the letter “H” at the beginning of the mark is cut off by the tittle of the letter “i”, which is a triangular shape. I consider that the word “HiDROMEK” plays a greater role in the overall impression, with the stylisation playing a lesser role.

52. The applicant's mark consists of the word “HYDROMAX”. There are no other elements to contribute to the overall impression which lies in the word itself.

53. Visually, the applicant states that the marks are dissimilar, however, they acknowledge that the marks overlap in the letters H, D, R, O and M. These submissions are, therefore, illogical. Moreover, I note that the letters H, D, R, O and M appear in the same order and positioning within the 8 letter marks. Consequently, these act as visual points of similarity. However, the opponent's mark is presented in a minimally stylised font. I also note that the second letter of the opponent's mark is the letter “i” and the second letter of the applicant's mark is the letter “Y”. The seventh and eighth letters of the opponent's mark are “E” and “K” and the applicant's seventh and eighth letters are “A” and “X”. Whilst these act as visual points of difference, I bear in mind that the letter “i” and “Y” in the parties marks share the bottom vertical line element, and the letters “K” and “X” share the diagonal top and bottom lines on the right hand side of the letters. Therefore, these letters share some visual similarity. Taking all of the above into account, I consider that the marks are visually similar to between a medium and high degree.”

11. The Appellant submitted that the Hearing Officer a) erred by carrying out an artificially dissected comparison of the marks, rather than carrying out an overall assessment, b) failed to place sufficient weight on the differences between the marks caused by stylisation of the Earlier Mark and c) was wrong to reject the submissions that the marks were visually dissimilar.

12. I reject the submission that the hearing Officer's assessment involved an artificial dissection of the marks. It is clear that the Hearing Officer had firmly in mind that she should not, when comparing the marks, carry out a comparison based on an artificial dissection. Thus, she stated at paragraph 49 of the Decision:

“49. 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.”

13. It was not suggested that any part of the approach stated in paragraph 49 is wrong in law, and my clear understanding is that it is not. There is no reason to believe that having correctly stated the law, the Hearing Officer then either misunderstood what she had stated or failed to apply what she had stated. It is undoubtedly true that in paragraphs 51 and 53 of her decision, the Hearing Officer looked at the detailed similarities and differences of the marks on a letter-by-letter basis. I do not believe that by so doing she applied the wrong legal test. Rather paragraphs 51 and 53 is an explanation of her thought process on the road to reaching an overall conclusion. Indeed, it is difficult to see how else the Hearing Officer could have explained her findings in relation to which features were distinctive and dominant, and which were not, without recourse to addressing the detailed features of the marks.

14. I also reject the submission that the Hearing Officer failed to take sufficient account of the effect of the stylisation of the Earlier Mark. It is clear that her analysis did consider the effect of stylisation (see the Decision, paragraphs 51 - 53). The Appellant identified no error of principle in the manner that she weighed the effect of that stylisation (e.g. by failing to take into account some aspect of the stylisation that she could not reasonably have ignored) nor do I believe that such an error is disclosed by the Decision.

15. Finally, I am firmly of the view that there is nothing wrong in principle with the Hearing Officer's finding that the marks were not dissimilar. That finding, in my view, clearly lies within the range of findings open to a reasonable hearing officer.

It is also the finding I would reach had I decided that the Hearing Officer had erred in her approach and this matter needed to be reassessed.

Aural Similarity

16. The relevant part of the Hearing Officer's Decision is at paragraph 54 and states as follows:

“54. Aurally, the applicant submits that the beginning of the opponent's mark will be pronounced as “HID-RO” and the beginning of the applicant's mark will be pronounced as “HIGH-DRO”. However, I disagree. I consider that this approach treats both marks very differently, and because they consist of the same number of letters (8), their syllables are likely to be broken down in the same places. On this basis, I consider that the opponent's mark is likely to be pronounced as HI-DRO-MEK, and the applicant's mark is likely to be pronounced as HI-DRO-MAX. Therefore the first two beginning syllables are aurally identical, and the last syllable shares the beginning “M” element. Consequently, the marks are aurally similar to a high degree.”

17. The Appellant submitted that the Hearing Officer erred and should instead have:

- a. found that the Respondent's Mark would be pronounced, HID-RO-MEK not HIGH-DRO-MEK;
- b. placed greater weight on what it submitted was the difference in the cadence between the marks;
- c. placed greater weight on the difference in pronunciation of the last two letters of the marks, i.e. EK and AK.

In my view, none of these points gives rise to an error of principle. Furthermore, there is no doubt in my mind that the Hearing Officer's conclusion fell within the range of evaluative decisions she was entitled to make.

18. I therefore reject this ground of appeal.

Likelihood of Direct Confusion

19. Whilst this Ground of Appeal is couched in terms of an error of law on the part of the Hearing Officer, there is, in fact no attack on the Hearing Officer's summary of the

applicable law. That law is in the context of this case entirely standard and does not need to be repeated here. After summarizing the law, the Hearing Officer went on to take expressly consider her findings in relation to the similarity of the marks, the similarity/identity of the goods (which varies), the average consumer (and his/her degree of attention), the inherent distinctiveness of the earlier mark, and imperfect recollection. She found that that the average consumer would pay between a medium and high degree of attention during the purchasing process, and that a considerable proportion of customers would see the marks as having on meaning in the English language. Taking all these factors together, she went on to find that there was a likelihood of direct confusion in relation to the class 11, but not the class 7 and 12, goods.

20. The Appellant submitted that the Hearing Officer erred as follows:

- a. Her visual and aural comparisons were flawed.
- b. She failed to give sufficient weight to the higher level of attention that would be paid by the average consumer.
- c. Her finding was inconsistent with the decision in *REALMZ v realme* (O/00092/24).

21. I have dealt with, and dismissed, the first criticism above.

22. I also reject the second submission. The Hearing Officer gave express consideration to the characteristics of the average consumer (see Decision paragraphs 45 – 47) and found, as I have said, that the level of attention that would be paid was medium to high. The Appellant did not challenge that finding head on. Nor was there, in my view, any proper basis for so doing. The Appellant's submission amounts to no more than saying that the Hearing Officer should have placed more weight on the degree of attention of the average consumer when carrying out her overall assessment than she did. This is not an adequate basis for interfering in the Hearing Officer's decision as it identifies no relevant flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor.

23. Finally, the submission in relation to the REALME case is, in my view, a bad point. That decision, as the Appellant conceded, concerned different marks and different goods/services. It was not suggested, nor in my view could be suggested, that the *REALMZ* decision disclosed a relevant new principle of law. It necessarily follows that the decision in REALME turned on its own particular facts, and (assuming it was rightly decided, which was not a matter on which I was addressed) is therefore irrelevant to this appeal.
24. Overall, it is therefore clear to me that the Hearing Officer directed herself correctly as to the law on the likelihood of confusion and based on the evidence before her, reached a decision that lay in the range of reasonable decisions open to her. I therefore also dismiss this ground of appeal.

Conclusion

25. The Appeal fails. The Respondent is entitled to a contribution to its costs on this appeal which I will order in the sum of £1500 (being £1000 for preparation for the appeal and £500 for attendance at the hearing). The Respondent is also now entitled to the sum of £650 awarded by the Hearing Officer but in respect of which payment was stayed pending this appeal. These sums shall be paid within 21 days of this decision.

GEOFFREY PRITCHARD
The Appointed Person

5 March 2025

ANNEX A

- 7: Power operated machines and apparatus all for the digging, excavating, mechanical handling, lifting, loading and transporting of earth, minerals, goods and materials, soil, crops and of like materials; backhoe loaders; hydraulic excavators; telescopic handlers; skid steer loaders; tracked loaders; wheeled loaders; compacting and vibrating machines and equipment; compaction rollers; engines (not for land vehicles); generators; hydraulic cylinders and pistons (not for land vehicles); machines and machine tools for access, lifting, handling and elevating; lifting, handling and elevating apparatus and equipment; hydraulic and pneumatic lifting equipment and machines; powered access machines and equipment; powered access systems; access platforms; powered access work platforms; mobile elevating work platforms; aerial work platforms; elevating or lifting platforms; scissor lifts; telescopic and articulated boom platforms; parts and fittings included in class 7 for all the aforesaid goods; all excluding apparatus for the application of torque (not including engines) and apparatus for the application of tension, namely bolting equipment, bolt tensioners, hydraulic bolt tensioners, hydraulic nuts, hydraulic torque wrenches, tensioners, tensioning heads being parts of machines, tensioning pieces being parts of machines.
- 11: Lighting apparatus and installations; static lighting towers; mobile lighting towers; parts and fittings included in class 11 for all the aforesaid goods.
- 12: Vehicles; agricultural vehicles; tractors; articulated dump trucks; forklift trucks; rough terrain forklift trucks; site dumpers; engines (for land vehicles); parts and fittings included in class 12 for all the aforesaid goods.

ANNEX B

7. Machines, machine tools and industrial robots to process and give shape to wood, metal, glass, plastic materials and mined materials; lifting installations for the transport of persons and goods; machines and robots to process grain, fruit, vegetable and food; agricultural machinery and tools other than hand-operated; engines and motors not for land vehicles, electrical motors, their parts and apparatus except for land vehicles; parts for land vehicles, namely, carburetors, engine cases, intake manifolds; bearings, ball and rolling bearings; hydraulic jacks for wheel removing and mounting; alternators, generators, electricity generator, solar-powered electricity generators; machines for painting, automatic spray guns for paint, electric, hydraulic and pneumatic punching machines and guns, electric glue guns, spray guns for paints; compressed air guns for the extrusion of mastics, electric hand drills, power-operated hand saws (machines), electric air compressors, washing installations for vehicles; electric welding machines, gas-operated welding machines, namely electric arc welding machines, electric soldering machines, non electric soldering irons, electric arc cutting apparatus, electrodes for welding machines and industrial robots; printing machines and apparatus; packaging machines, bottling and capping machines, industrial printing machines, namely, labelers, sorting machines; machine tools for forming, riveting, swaging and flaring of metal and plastics, electrical apparatus for sealing plastic (packaging); machines for the textile industry, sewing machines, electric clothing pressing machines; centrifugal pumps, compressed air pumps, pumps for heating installations; fuel dispensing pumps for service stations, self-regulating fuel pumps; electrically operated kitchen machines used for chopping, grinding, crushing, trimming and crumbling; washing machines, dishwashers, spin driers (not heated), floor polishing machines, carpet cleaning machines; electric vacuum cleaners and their parts; automatic vending machines; electrolysis apparatus for electroplating purposes and galvanizing machines; electric door openers and closers; gaskets for internal combustion engines, metal engine gaskets for vehicles, non-metal engine gasket for vehicles; construction machines, namely, bulldozers, mechanical shovels, excavators, rock drilling machines, power-operated lifting and moving equipments, namely, loaders, backhoe loaders; glass, stone, leather or metal working machines, wood working machines.

12. Automobiles, trucks, buses, tow trucks, tractors, refrigerated vehicles, namely, trailers, trucks, concrete mixing and transporting vehicles, military vehicles for transport purposes, namely, boats, automobiles; ambulances, watering trucks, hose trucks, sports cars, motorized golf carts, garbage trucks, mobile funeral service vehicles, namely, hearses; trailers for transporting mobile kitchens, forklifts, namely, fork lift trucks, sewage trucks, automobile engines, automobile chassis, axles for land vehicles; automobile parts, namely, axle-trees, connecting rods for land vehicles other than parts of motors and engines; transmissions gearboxes, parts for land vehicles, namely, clutches; jet engines for use with land vehicles, transmission chains for land vehicles, gears for vehicles, land vehicle tires, wheel rims for vehicles, connecting pushrods for land vehicles, not being engine parts; automobile bodies, automobile bumpers, land vehicle doors, automobile hoods, automobile fenders, vehicle parts, namely shock absorbers; hydraulic, pneumatic, electric or mechanical suspension springs for motor cars, vehicle parts, namely cylinders and parts, namely, springs for shock absorbers for motor cars, brake cylinders; brakes for land vehicles, brake linings and shoes for land vehicles, fuel tanks for vehicles, namely, land vehicles, automobiles; mudguards of bicycles and motorbikes, bicycles, motorbikes, mopeds and motorized scooters, and their bodies, handlebars; land vehicle trunks, tipping bodies for lorries, tractor trailers, frigorific trunks for trailers; vehicle seats, head supports for motor car seats, safety seats for children in vehicles, shaped and fitted vehicle covers, sunshades for automobile windshields, trailer hitches for vehicles; directional signals for vehicles, windshield wipers for vehicles, windshield wiper arms for land vehicles; tires, inner tubes and tubeless tires, all for vehicles; tire-fixing sets comprised of tire patches and tire valves; rubber patches for vehicle tires, adhesive rubber patches for repairing inner tubes; valves for vehicle tires; windows for vehicles, safety windows for vehicles, rearview mirrors and side mirrors for vehicles; land vehicle parts, namely, tire chains; bicycle and ski carriers, saddles for vehicles, namely, bicycles; tire inflating pumps; anti-theft alarms for motor cars, horns for vehicles, namely, automobiles; safety belts for automobiles, airbags for vehicles, vehicle seat covers; baby strollers, wheelchairs, baby carriages; railway hand cars, shopping carts, carrier tricycles, and household goods handling carts, namely shopping carts; railway vehicles, namely, locomotives, trains, tramways, street cars, wagon cars; water vehicles and parts, namely, rowboats, motorboats, ships, yachts, cutter boats, boats, ferryboats, canoes, steering gears, rudders, spars, timbers, fenders, screw propellers, funnels (smokestacks), hulls for water vehicles; air vehicles and parts, namely, dirigible air balloons, airplanes, helicopters, space vehicles and parachutes.

