

O-188-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3050257 BY
INVENTOR-E LTD**

TO REGISTER:

**SmartSafe
&
Smart Safe**

**AS A SERIES OF 2 TRADE MARKS
IN CLASSES 9 & 35**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 402685 BY
SMARTRAC IP B.V.**

BACKGROUND & PLEADINGS

1. On 6 April 2014, Inventor-e Ltd (“the applicant”) applied to register **SmartSafe** and **Smart Safe** as a series of two trade marks for the following goods and services:

Class 9 - Stock and inventory control apparatus (electric and electronic); data processing apparatus for the management of stock and stock records; electronic apparatus relating to the monitoring of stock; electronic monitoring devices; electrical, electronic, measuring, monitoring and control apparatus for use in stock dispensing; apparatus for dispensing measured, metered or pre-determined quantities of goods, components and/or materials; parts and fittings for all the aforesaid goods; computer software; computer software relating to the management, monitoring, control and dispensing of stock; stock and inventory control apparatus using RFID and weight sensor technology.

Class 35 - Stock control and management services; electronically controlled stock control, monitoring and management services; ordering services; inventory management and control services; preparation of inventories; computerised inventory control; computerised stock ordering and management; including any of the aforesaid services provided via the Internet or telecommunications or a computer network or on-line from a computer database; stock and inventory control services using RFID and weight sensor technology.

The application was published for opposition purposes on 13 June 2014.

2. The application is opposed by Smartrac IP B.V. (“the opponent”). The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is only directed against the goods in class 9 of the application. The opponent relies upon the goods shown below in the following Community Trade Mark registrations (“CTM”).

CTM no. 3987286 for the trade mark: **SMARTRAC** applied for on 17 August 2004 and for which the registration procedure was completed on 2 December 2005:

Class 9 - Scientific, nautical, surveying, measuring, electric apparatus and instruments, namely electric apparatus and instruments for electrical engineering, namely for conducting, converting, storage, regulating and control, and electric apparatus and instruments for weak-current engineering, namely for communications technology, high-frequency engineering and control engineering; electric apparatus and instruments (included in class 9); magnetic data carriers, optical and magneto-optical data carriers; transponder cards and chip cards; readers for transponder cards and chip cards; programmable radio frequency identification apparatus (RFID), in particular transponders in the form of contact or non-contact chip cards with an integrated microchip for access systems, fare payment systems, identification applications and for air ticket applications; transponders with an integrated microchip for access systems, being electronic keys, for cashless payment systems and for customer acquisition and identification; transponders in the form of disc-type labels (tags) with an integrated microchip for parking systems, being tickets or transport tickets, in the leisure industry, being ski

passes, and for industrial applications; transponders, in particular in the form of adhesive laminate inlays with an integrated microchip for use in access systems, automatic fare-collection systems, for identification purposes and for air tickets; transponders in the form of pre-embossed or pre-laminated chip cards with an integrated microchip for use in the production of combination cards for access systems, for automatic fare collection, identification systems, electronic money exchanges, cashless sales systems and portable database systems; transponders in the form of programmed devices for implanting under the skin for identifying animals; transponders in the form of attachable signboards (tags) with an integrated microchip for identifying trees, telegraph poles and similar objects, and for use in the art sector to identify works of arts, copies of the original and restored works of art; transponders in the form of contact and non-contact paper labels (tags) with an integrated microchip for use in the management of supply chains, in production supervision, luggage identification, for express parcel services and goods transport services, for use in preventing fraud and the identification of works of art; transponders in the form of adhesive labels (tags) with an integrated microchip for identifying industrial gas cylinders; encoding apparatus and reading apparatus, monitors and screens for all the aforesaid goods, software applications for operating the aforesaid goods; Electronic passports and security documents; electronic labels; electronic payment devices; all the aforesaid products other than for the field of polyurethane, injection moulding and extrusion; all the aforesaid goods/services other than in the field of measuring and determining the position, orientation and/or movement of objects, persons or animals.

CTM no. 10740777 for the trade mark:

SMARTRAC ((•))

applied for on 20 March 2012 and for which the registration procedure was completed on 12 January 2013:

Class 9 - Scientific, surveying, electric apparatus and instruments, namely electric apparatus and instruments for electrical engineering, namely conducting, transforming, storing, regulation and control apparatus and instruments, and electric apparatus and instruments for communications engineering, namely for telecommunications, high frequency and control technology; Magnetic data carriers; Data processing equipment and computers; Computer software; Electric and electronic components for computers; Processors; Computer chips; Computer peripheral devices; Optical and magneto-optical data carriers; Transponder and chip cards and contactless cards, including modules therefor; Readers for transponder and chip cards and contactless modules; Programmable radio identification

devices (RFID), In particular transponders in the form of contact or contactless chip cards with integrated microchips; RFID-readers; Biometric readers and Component parts thereof; Encoding apparatus and reading apparatus, monitors and screens for all the aforesaid goods, software applications for operating the aforesaid goods; Electronic passports and security documents; Electronic labels; Substrate carriers with electronic circuits (smartlabels); Electronic payment devices; All the aforesaid products other than for the field of polyurethane, injection moulding and extrusion; All the aforesaid goods other than in the field of measuring and determining the position, orientation and/or movement of objects, persons or animals; Other than the aforesaid goods for use in the field of air-conditioning, cold and heat pump technology.

3. The applicant filed a counterstatement in which the basis of the opposition is denied. As these are the only comments I have from the applicant, they are reproduced below in full:

“SmartSafe as a trade mark is significantly different to Smartrac. “Smart” being a generic term can only be differentiated as a trade mark by an associated word. We see no similarity in the mark itself other than the use of the word “Smart”.

Inventor-e operates in the industrial sector with inventory management and supply chain management solutions and Smartrac is a significantly different trade mark to SmartSafe.

We refute the fact that there can be any confusion with the trade mark as “SmartSafe” is being used for an industrial vending solution employing Inventor-e patented technology of weight sensors combined with RFID. Patents have been granted for this technology in both the UK and the USA, with patents pending in other countries including Europe. The trade mark is therefore being used on a very specific solution, on this basis we do not see how confusion can occur. Please see our website www.inventor-e.co.uk, click on solutions then SmartSafe to obtain an overview of the solution. This solution simply does not compete with anything that Smartrac produce.

In addition, Smartrac have provided no evidence for confusion with customers even though we have been marketing the solution for over 6 months.

We also have other solutions that we have been selling for several years that utilise the word “Smart” in the registered trade mark and there has been no confusion whatsoever with Smartrac.”

4. Although neither party filed evidence, the opponent filed written submissions during the course of the evidence rounds and in lieu of attendance at a hearing. I will keep these written submissions in mind and refer to them, as necessary, below.

DECISION

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

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

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

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

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

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

6. In these proceedings, the opponent is relying upon the two CTMs shown in paragraph 2 above, both of which qualify as earlier trade marks under the above provisions. As CTM no. 3987286 had been registered for five years or more at the date the application was published for opposition purposes, it is, in principle subject to the proof of use provisions contained in section 6A of the Act. However, because in its counterstatement the applicant indicated it did not want the opponent to provide such proof, the opponent may rely upon all of the goods it claims. As the second CTM upon which the opponent relies i.e. no. 10740777 had not been registered for five years or more at the publication date of the application, the proof of use provisions do not apply; once again, the opponent may rely upon all the goods it claims.

Section 5(2)(b) – case law

7. 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The approach to the comparison

8. The applicant has applied for a series of two trade marks which consist of the words Smart and Safe in title case; they differ only to the extent that in the second

trade mark there is a space between the words whereas in the first trade mark the words are conjoined. As a consequence, it matters not which trade mark in the series I use for the purposes of comparison. For the sake of convenience, I will base my considerations on the trade mark SmartSafe.

9. The opponent relies upon two trade marks which either consist of or contain the word SMARTRAC presented in upper case. CTM no. 10740777 contains a device element which is not present in CTM no. 3987286 and, in my view, it is the second of these registrations that places the opponent in the best position (at least insofar as the competing trade marks are concerned). Consequently, I will base my considerations on the word only version, although the specification of goods of the word and device trade mark will also be taken into account when I compare the competing goods. Later in this decision, I will compare the competing trade marks and comment upon what I consider to be the overall impressions they convey. Suffice to say at this point, that I doubt the presence of the device element is likely to be determinative.

Comparison of goods

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

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

11. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

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

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301,

paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedral v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

13. The competing goods are shown in paragraphs 1 and 2 above. The opponent’s specifications in class 9 include the use of the word “namely” and the formulation “in particular”. The word “namely” must be approached, as indicated in the Trade Mark Registry’s classification guidance on the basis shown below:

“Note that specifications including “namely” should be interpreted as only covering the named Goods, that is, the specification is limited to those goods. Thus, in the above “dairy products namely cheese and butter” would only be interpreted as meaning “cheese and butter” and not “dairy products” at large. This is consistent with the definitions provided in Collins English Dictionary which states “namely” to mean “that is to say” and the Cambridge International Dictionary of English which states “which is or are”.”

The use of the formulation “in particular” has no such limiting effect.

14. In its submissions filed during the evidence rounds, the opponent states:

“The applicant argues that its mark is allegedly being used in relation to a very specific solution that “does not compete with anything that Smartrac produce”. However, that is irrelevant for the purposes of assessing this opposition. The correct comparison is between the opponent’s registered goods upon which the opposition is based, and the opposed goods. That must take into account notional and fair use of the respective marks for the full range of the respective goods and services. It should also be noted that the application includes coverage of more general terms than the specific solution mentioned by the applicant...”

15. The opponent is correct. As it points out, what I am required to do is compare the applicant’s specification of goods in class 9 with the specification of goods relied upon by the opponent (also in class 9). In the submissions mentioned above, the opponent provided an extensive analysis of the competing goods. Having done so, it concluded:

“...it is clear that there is identity of many of the respective goods. Many of the goods of the opposed application fall within the terms of the opponent’s registration and are therefore identical. Where the goods are not identical [the comparison it provides] highlights the close similarity of the goods having regard to their nature, users and uses.”

16. The applicant elected not to comment upon these submissions. In its submissions filed in lieu of a hearing, the opponent provided further submissions on the similarity in the competing goods. Some of the goods in the application, for

example, “data processing apparatus for the management of stock and stock records” are identical to “data processing equipment” in CTM no. 10740777 (on the *Meric* principle), and “computer software” and “computer software relating to the management, monitoring, control and dispensing of stock” in the application are either literally identical or identical on the *Meric* principle “to computer software” in CTM no. 10740777. In addition, bearing in mind that the applicant’s own specification in class 9 includes a reference to “data processing apparatus for the management of stock and stock records” it appears to me that:

“Stock and inventory control apparatus (electric and electronic); electronic apparatus relating to the monitoring of stock; electronic monitoring devices; electrical, electronic, measuring, monitoring and control apparatus for use in stock dispensing; apparatus for dispensing measured, metered or pre-determined quantities of goods, components and/or materials; parts and fittings for all the aforesaid goods; stock and inventory control apparatus using RFID and weight sensor technology”,

in the application, are identical, or if not identical, are similar to (at least) “data processing equipment” in CTM no. 10740777 to a high degree. However, for reasons of procedural economy, I do not intend to undertake a detailed comparison of all of the competing goods. Instead I will proceed on the basis that the contested goods are identical to those covered by the earlier trade mark(s). If the opposition fails, even where the goods are identical, it follows that the opposition will also fail where the goods are only similar.”

The average consumer and the nature of the purchasing process

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

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

18. The average consumer is a business user wishing to acquire goods which dispense stock or manage, monitor and control stock levels and records. Although I have no evidence or submissions on how such goods are selected, it seems reasonable, given the obvious importance of making an informed decision, for one to infer that before making a final selection, the average consumer will undertake a range of enquiries which are likely to include, for example, inspecting promotional material, product reviews etc. (whether in hard copy or on-line), contacting a range of possible suppliers and arranging meetings to discuss precise requirements/viewing

demonstrations of the goods in situ. All of the above suggest that while aural considerations may play a part in the selection process, it is the visual aspect of the trade marks that is likely to be the most important. As the cost of the goods at issue is likely to be significant, and as they are likely to play a key role in the efficient running of an undertaking, one would expect the average consumer to pay a relatively high degree of attention to their selection.

Comparison of trade marks

19. 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.”

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

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21. In its submissions filed during the evidence rounds, the opponent states:

“In the counterstatement, the applicant describes the word element SMART as a generic term. The opposed mark is SmartSafe/Smart Safe. How would the opponent describe the word SAFE other than as a generic term by the same rationale? Any distinctive character in the applicant’s mark therefore resides in the overall combination SmartSafe. The opponent’s mark is SMARTRAC with one of its registered marks also containing a device element. Both, however, are essentially SMARTRAC registrations. It is a well established principle of trade mark law that consumers pay greater attention to the start of marks than the end. The start of the respective marks is identical in the first five letters and the first syllable. The shared element SMART dominates the overall impression created by the respective marks. They are clearly similar.”

22. In its submissions filed in lieu of a hearing, the opponent states:

“The word SMART in the respective marks is arguably descriptive and non-distinctive. Equally, the word SAFE in the opposed mark is non-distinctive or descriptive. In other words, the distinctive character of the respective marks lies in their overall combination. It is submitted that the impression created by both marks is sufficiently similar for the marks to be confused. Given the descriptive nature of the word SAFE and the quasi-descriptive nature of the word TRAC in the opponent’s mark it is easy to imagine consumers misremembering or confusing the respective marks.”

23. The opponent’s trade mark consists of the word SMARTRAC presented in upper case. As no part of the trade mark is highlighted or emphasised in any way, it has no dominant or distinctive component; the overall impression it conveys will be of a single word with no obvious meaning. The applicant’s trade mark consists of the well known English language words Smart and Safe presented in title case, both elements making an equal contribution to the overall impression the trade mark conveys. In its counterstatement the applicant argues that the word Smart is generic, and in its written submissions the opponent appears to accept that the word SMART is descriptive and non-distinctive; I agree. I also agree with the opponent that in relation to the applicant’s goods in class 9, the word Safe is likely to be considered descriptive. As a consequence, I agree with the opponent that the distinctiveness in the applicant’s trade mark lies in its totality.

24. The fact that the competing trade marks contain the word SMART/Smart as an identifiable element inevitably leads to a reasonable degree of visual and aural similarity between them. Considered from a conceptual standpoint, the presence of the word SMART/Smart in both trade marks is likely to convey the concept of intelligence. However, the presence of the word Safe in the applicant’s trade mark results in it evoking the concept of both intelligence and safety; the latter concept being absent from the opponent’s trade mark. Although the opponent argues that the letters TRAC in its trade mark will evoke the notion of tracking, given the well known meaning of the word SMART, I see no reason why the average consumer would construe the opponent’s trade mark as SMAR-TRAC; much more likely, in my view, is that it will be construed as SMART-RAC. While there is some conceptual similarity between the competing trade marks, it is only in respect of an element i.e. SMART/Smart which the parties accept is descriptive and non-distinctive. However, even if the average consumer does see the opponent’s trade mark as a contraction of SMART TRAC, any conceptual similarity would still only rest in the word SMART/Smart.

25. Finally, I return to my comments in paragraph 9. Even if the device element present in CTM no. 10740777 were to be considered distinctive (it is certainly not negligible within the context of the trade mark as a whole), if the opponent cannot succeed in relation to its word only trade mark, it will be in no better position in relation to its trade mark which also contains a device element, as the presence of this device would serve to further distinguish the competing trade marks from a visual perspective.

Distinctive character of the opponent's earlier trade mark

26. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. As the opponent has not filed any evidence, I have only the inherent characteristics of its trade mark to consider. Although the opponent's trade mark contains the word SMART, as this word is accompanied by the letters RAC as part of a unified whole, the trade mark will, in my view, be construed as an invented word, and is, as a consequence, possessed of a high degree of inherent distinctive character.

Likelihood of confusion

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

- I would proceed on the basis that the competing goods are identical;
- the average consumer is a business user who will select the goods by predominantly visual means and who will pay a relatively high degree of attention when doing so;
- CTM no.3987286 offers the opponent the best prospect of success;
- the distinctiveness of the competing trade marks lie in their totalities;
- the competing trade marks are visually and aurally similar to a reasonable degree and any conceptual similarity results from a shared element which is descriptive and non-distinctive;
- the opponent's earlier trade mark is possessed of a high degree of inherent distinctive character.

28. As the opponent argues, I accept that the start of a trade mark is likely to have more visual and aural impact than the end (the comments of the GC in *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 refer). However, that is only a rule of thumb; it is of little assistance when the shared element is descriptive and non-distinctive as is the case here. In those circumstances, one must look to the other elements in the competing trade marks to establish if there is a likelihood of confusion. Comparing the trade marks as wholes and bearing in mind the concept of safety which will be evoked by the applicant's trade mark which is absent from the opponent's trade mark, combined with the nature of the purchasing process and the degree of care the average consumer is likely to take, I am satisfied that there is no likelihood of either direct confusion (i.e. where one trade mark is mistaken for the other) or indirect confusion (i.e. where the average consumer assumes the goods come from undertakings which are economically linked).

Overall conclusion

29. The opposition which, I remind myself, is directed only against the goods in class 9 of the application, has failed and subject to any successful appeal, the application may proceed to registration in respect of all the goods and services for which registration has been sought.

Costs

30. The applicant has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide, but bearing in mind that the applicant has not been professionally represented, I award costs to the applicant on the following basis:

Preparing a statement and considering the opponent's statement: £150

31. I order Smartrac IP B.V. to pay to Inventor-e Ltd the sum of **£150**. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 22ND day of April 2015

C J BOWEN
For the Registrar
The Comptroller-General