

O-284-08

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2368710
BY LINMARK ELECTRONICS LIMITED TO
REGISTER THE TRADE MARK DUAL IN CLASS 9**

AND

**IN THE MATTER OF OPPOSITION NO 93500
BY CRAIG JAMESON BAILLIE, STEPHEN LAMBERT
AND DUAL GLO LIMITED**

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by Craig Jameson Baillie, Stephen Lambert and
Dual Glo Limited**

BACKGROUND

1. On 21 July 2004 Linmark Electronics Limited (Linmark) (previously Karstadt Quelle AG) applied to register the trade mark DUAL in relation to:

“Record players, tape recorders, sound amplifiers, radio receiving apparatus, loudspeakers and fitted cabinets containing loudspeakers and tuners for use with all the aforesaid goods; but not including metal framed cabinets for loudspeakers.”

2. The application proceeded to publication on the basis of “prior rights in Registration No 961804”. That was a reference to the registration of a stylised version of the word DUAL set against a black square background (the actual mark can be seen in a related opposition case No 93429 where it is an earlier trade mark relied on by Linmark).

3. The specification set out above has since been reduced in scope following a partially successful opposition by a third party (under No 0-257-07). The goods that were removed are ‘record players, tape recorders, and radio receiving apparatus’. There was no appeal against that decision.

4. On 7 July 2005 Craig Jameson Baillie, Stephen Lambert and Dual Glo Limited filed notice of opposition citing both absolute and relative grounds. Firstly, objection is raised under Section 3(1)(b), (c) and (d) in terms that refer to the descriptiveness of the word ‘dual’ as either indicating a number of items, referring to aspects of functionality or number of elements involved in particular devices.

5. Secondly, objection is raised under Section 3(6) on the basis that “this is the second opposition our client has had to file to this mark”. Reference is made to the outcome of UK trade mark application No 2299417A and opposition No 92261.

6. Finally, there is an objection under Section 5(2)(b) based on the mark DUAL GLO (No 2345904). This mark is the subject of opposition No 93429 that has been dealt with in a separate decision.

7. The applicant filed a counterstatement denying the above grounds. In relation to the grounds under Section 3(1) I note it says that evidence that the mark has become distinctive through use will be provided if it is necessary to do so.

8. Both sides filed evidence. Neither side has asked to be heard. Written submissions have been received from Bromhead Johnson on behalf of the opponents under cover of a letter dated 8 July 2008. The applicant's attorneys, William A Shepherd & Son wrote on 15 July 2008 to say that written submissions were considered unnecessary and inviting me to ignore those of Bromhead Johnson. Although the latter submissions were received a few days out of time I see no reason to disregard them.

Section 3(1)

9. The relevant part of the statute reads as follows:

“3.-(1) The following shall not be registered -

- (a)
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

10. The above provisions mirror Article 3(1)(b)(c) and (d) of First Council Directive 89/104 of 21 December 1988. The proviso to Section 3 is based on the equivalent provision of Article 3(3).

Relevant authorities

11. It seems from the wording of the statement of grounds that the opponents' principal ground of objection is one of descriptiveness and hence arises under paragraph (c). An issue may also arise under paragraph (b). I will start, therefore, by setting out the relevant considerations and authorities.

12. The European Court of Justice has repeatedly emphasised the need to interpret the grounds for refusal of registration listed in Article 3(1) and Article 7(1), the equivalent provision in Council Regulation 40/94 of 20 December 1993 on the Community Trade Mark in the light of the general interest underlying each of them (Case C-37/03P, *Bio ID v OHIM*, paragraph 59 and the case law cited there and, more recently, Case C-273/05P *Celltech R&D Ltd v OHIM*).

13. The general interest to be taken into account in each case must reflect different considerations according to the ground for refusal in question. Thus, in the case of the

registration of colours per se, not spatially delimited, the Court has ruled that the public interest is aimed at the need not to restrict unduly the availability of colours for other traders in goods or services of the same type. Also, in relation to Section 3(1)(b) (and the equivalent provisions referred to above) the Court has held that “.....the public interest is, manifestly, indissociable from the essential function of a trade mark” (Case C-329/02P, SAT.1 *SatellitenFernsehen GmbH v OHIM*). The essential function thus referred to is that of guaranteeing the identity of the origin of the goods or services offered under the mark to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin (see paragraph 23 of the above mentioned judgment). Marks which are devoid of distinctive character are incapable of fulfilling that essential function.

14. There are now a number of judgments from the ECJ which deal with the scope of Article 3(1)(c) of First Council Directive 89/104 and Article 7(1)(c) of Council Regulation 40/94 (the Community Trade Mark Regulation), whose provisions correspond to Section 3(1)(c) of the UK Act. I derive the following main guiding principles from the cases noted below:

- subject to any claim in relation to acquired distinctive character, signs and indications which may serve in trade to designate the characteristics of goods or services are deemed incapable of fulfilling the indication of origin function of a trade mark – *Wm Wrigley Jr & Company v OHIM* – Case 191/01P (*Doublemint*) paragraph 30;
- thus Articles 7(1)(c) (Section 3(1)(c) pursues an aim which is in the public interest that descriptive signs or indications may be freely used by all – *Wm Wrigley Jr v OHIM*, paragraph 31;
- it is not necessary that such a sign be in use at the time of application in a way that is descriptive of the goods or services in question. It is sufficient that it could be used for such purposes – *Wm Wrigley Jr v OHIM*, paragraph 32;
- it is irrelevant whether there are other, more usual signs or indications designating the same characteristics of the goods or services. The word ‘exclusively’ in paragraph (c) is not to be interpreted as meaning that the sign or indication should be the only way of designating the characteristic(s) in question – *Koninklijke KPN Nederland NV and Benelux-Merkenbureau*, Case C-363/99 (*Postkantoor*), paragraph 57;

Opponents’ evidence

15. Michael David Spencer, a trade mark attorney and partner in Bromhead Johnson has filed four witness statements (one of them by way of reply evidence). The evidence generally corresponds to that filed in the related opposition (No 93429) where the parties’ roles are reversed. Unfortunately, there is not a complete correlation between the exhibit numbers. For ease of reference the Annex to this decision identifies the ‘matching’ exhibits in the two sets of proceedings. With the exception of MDS2 (wrongly labelled as MDS1) the exhibits relate more closely to the relevant date here than they do in the related action between the parties. The applicant has in any case not suggested that the MDS2 exhibit is not

representative of the position at the relevant date even though the exhibited material has been derived from an internet search conducted two years later.

16. I propose to adopt the relevant part of my evidence summary from the related case (Opposition No. 93429) as follows:

“The applicants’ evidence in relation to the word DUAL

25. Before turning to the distinctive and dominant components of the respective marks and my appraisal of the similarities between them I turn to the applicant’s evidence. This is given in a witness statement by Michael David Spencer, their trade mark attorney at Bromhead Johnson where he is a partner.

26. His evidence consists of the following:

MDS1 - a state of the register search for marks consisting of, or incorporating, the element DUAL from which it is suggested that the opponent should not be able to claim a monopoly in the word.

MDS2 - internet print-outs for goods being sold commercially which are described as comprising dual features.

MDS3 - a copy of the hearing officer’s decision in the revocation action against No 961804 referred to above.

MDS4 - copies taken from the August 2001 edition of Hi-Fi Choice magazine showing the word ‘dual’ used as a descriptive term in the relevant trade.

MDS5 - current details of No 961804

MDS 6-12 - details downloaded from the Google and Ask search engines showing the results of searches for the word ‘dual’ in conjunction with the goods of the earlier trade mark (‘louspeakers’, ‘sound amplifiers’ etc) from which I am asked to conclude that the word DUAL is being used in a descriptive manner. The MDS6 search was conducted on 8 January 2004, the others on 26 or 27 July 2004.

27. Firstly, as regards the state of the register material at MDS1, I note the following observations of Daniel Alexander QC sitting, as a Deputy High Court Judge in *Digipos Store Solutions group Ltd v Digi International Inc*, [2008] RPC 24.

“62 The evidence of use is re-inforced by what has been described as "state of the Register" evidence. Before turning to that material, it is necessary to consider what reference it is appropriate to make to the state of the register. In [British Sugar \[1996\] RPC 281](#) at 305 Jacob J said:
"It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. [MADAME Trade Mark \[1966\] RPC 541](#) and the same must be true under the 1994Act."

63 That was said in the context of a case where absolute grounds were relied on as the basis for refusing registration. However, in the present case, this material is not relied on in support of an argument that a mark which shares characteristics with those already registered should, for that reason, also be registered: the register is not relied on for its precedent value, in my judgment, rightly so. The register is not in this case deployed to show actual use of the marks recorded there either: for that purpose too, it would be of limited, if any, evidential value. Instead, the register is relied upon to show that, as a matter of fact, a significant number of traders have expressed the intention of using (and *may* be using) the prefix DIGI- as part of a mark in relation to class 9 goods which (one is invited to infer, in the absence of detailed specifications) involve a digital or computer-related element. It does not seem to me to be illegitimate, as a matter of principle, to deploy material of this kind for that limited purpose and, for that purpose, it is of some value as part of a larger body of material.”

28. MDS1 contains some 100 marks in a range of Classes including mainly ones that are registered but also some new applications. Not surprisingly, the marks range from the fanciful (DUALASE) to what is likely to be outright descriptive (DUAL FILTER with other distinctive matter for cigarettes) and degrees of allusiveness in between. Within the body of material at MDS1 there are a significant number of registrations in respect of Class 9 goods where ‘dual’ may serve a descriptive function but only a full examination of the potential significance (if any) of the word in the context of specific goods would tell the whole story. I regard this material as being indicative of the potential meaningfulness of ‘dual’ as an element in certain circumstances but is not conclusive as to the position in this particular case.

29. Exhibits MDS2, MDS4 and MDS6 to 12 address, in various ways, the extent to which ‘dual’ is a term that is in descriptive use in trade. An overall word of caution is necessary in that much of the material in these exhibits is from almost three years after the relevant date and in the case of MDS2 approaching five years after the relevant date. This evidence is potentially open to the charge that it is not properly reflective of the position that existed in October 2001. However, Mr Nugent’s reply evidence does not take issue with the evidence on this account merely arguing that this material is an “attempt to undermine the validity and integrity of Trade Mark No 961804”. It is a reasonable inference that the opponent is not suggesting that the use of ‘dual’ exemplified in these exhibits misrepresents what the position would have been at the relevant date.

30. A further point that needs to be made about this material is that certain of the exhibits (MDS6 to 12) mainly consist of the Google and Ask search reports without the benefit of the underlying pages from the resulting lists. It is not always possible to distinguish between descriptive reference and brand usage from the limited references given. The first page of MDS6 illustrates the problem. The first ‘hit’ contains “BRAND NEW INDOOR OUTDOOR DUAL LOUDSPEAKERS...” (presented in upper case). The second reference contains “.....the design of the internal dual loudspeakers enables...”. Both of these references seem to me to be more consistent with descriptive use than trade mark use though there is just about scope for argument. Finally, it is not always possible to distinguish between UK and overseas

use though there is no reason to suppose that overseas use of such a common and well understood word would be materially different to the UK.

31. With those cautionary observations in mind, the evidence shows a significant number of references where 'dual' is used in combination with other words to describe particular features of home entertainment products. Drawing on the exhibits, there is a dual deck cassette recorder (also with a dual auto reverse function), a dual format DVD recorder, a dual CD/MP3 player (I take dual here to mean combined), a dual alarm clock/radio, a dual rack mountable CD player, dual layer technology, dual-channel preamplifiers, a dual band tuner, a dual band DAB/FM radio, dual centre speakers, dual subwoofers, dual (loudspeaker) enclosures, dual core loudspeakers, dual tape speed, dual cassette system, dual head tuner etc. This is an indicative list of uses of the term and not an exhaustive one.

32. It will be apparent from the above examples that the word 'dual' is most commonly encountered in contexts where some other word or words need to be added for the full descriptive force to be apparent. This appears to be because 'dual' is being used to describe some aspect of functionality that itself needs to be described, thus a dual band radio or a dual channel amplifier. There are, however, examples in the evidence where 'dual' is simply used to indicate two of the products in question (dual loudspeakers) or the presence of two function within a product (a dual clock/radio) or simply a duplicated capacity within a product (a dual CD player or cassette system). Usage of the term 'dual' seems to be sufficiently well entrenched in these circumstances to function as a description without the need for added explanation. These examples are not, however, in the majority and most of the uses of 'dual' I have described fall within the first group, that is to say it is a word used in combination with other matter to describe a product or an aspect of the functionality of a product. In short the word itself (setting to one side, for the moment, the stylisation of the earlier trade mark) is either descriptive or lacking in distinctiveness. I bear in mind the impact of these findings in going on to consider issues to do with the marks themselves."

17. There is one further piece of evidence contained in the opponents' reply evidence that I must refer to. This is exhibit MDS2904A being a copy of an exhibit submitted on behalf of the applicant's predecessor in title during the course of revocation No 81595. My attention has been drawn to the sixth, seventh and eighth pages of the exhibit which are said to show the applicant's own goods bearing the word DUAL in both a trade mark and non trade mark sense. Additionally, the seventeenth page of the exhibit comprises an article from Hi Fi Choice magazine explaining that the brand DUAL derives from the fact that the early products had two power sources (electricity or clockwork). The latter appears to be of dubious relevance now and is not a characteristic that is any longer a feature of the goods so far as I am aware. The other pages from the exhibit are more relevant and show packaging for various types of home entertainment systems with the DUAL brand (stylised set against a black box background) prominently displayed. Elsewhere on the packaging there are the words 'dual mini system' and 'dual micro system' in lower case lettering throughout. A close inspection of the bullet points on the packaging of the 'dual mini system' confirms the direct descriptiveness of the word 'dual'. The depicted system is said to have a 'dual tape deck'.

18. The collective force of the evidence is to establish a prima facie case that ‘dual’ is commonly used to indicate two of something or to describe some aspect of functionality. In the latter case it is usually accompanied by a supporting word.

19. I now turn to the effects of these findings on the objections raised by the opponents. It seems to me that in relation to loudspeakers the evidence establishes that ‘dual’ is widely used to mean ‘a pair of’. In other words it serves without further qualifying words to indicate the number of speakers being offered. It, thus, falls, squarely within Section 3(1)(c) as indicating a characteristic of the goods, namely quantity.

20. I would also hold that in relation to fitted cabinets containing loudspeakers the same objection applies. The cabinets or enclosures for loudspeakers are intimately connected with the loudspeakers themselves and susceptible to the same objection. I find support for that view in the following passage from the Appointed Person’s decision in *Fourneaux de France v The Range Cooker Co Plc*, O-240-02.

“Having listened with care to the arguments that have been addressed to me on this appeal, I have come to the conclusion that cooker hoods and extractors are closely connected items of commerce, and that they are both so closely connected with cookers that it would be unrealistic to treat the words FOURNEAUX DE FRANCE as descriptive of the character of the latter but not the former. The expression “cookers from France” is descriptive at a high level of generality. That makes it suitable, in my view, for descriptive use in the marketing of units of equipment of the kind found in modern cooker installations including not only grilling and roasting units, but also hood and extractor units.”

21. Loudspeakers and fitted cabinets for loudspeakers are likewise closely connected items of commerce. The objection under Section 3(1)(c) also applies to all these goods. A mark that is descriptive of a characteristic of goods is on that account necessarily devoid of distinctive character with regard to the same goods within the meaning of Section 3(1)(b), *Koninklijke KPN Nederland NV and Benelux-Merkenbureau(Postkantoor)*, Case C-363/99 at paragraph 86. So these goods are also caught under Section 3(1)(b).

22. The evidence in relation to sound amplifiers and tuners is less persuasive in establishing that dual is used as a straightforward indicator of quantity or otherwise descriptive in its own right. Nevertheless, MDS13 does yield a few examples of ‘dual tuner’ used either in the sense that there are two of them or perhaps as an abbreviated reference to some aspect of functionality. Thus “As well as the SRX310/SRD510 series it was used in the dual-tuner model SRX330, to permit simultaneous VCR recording of one satellite channel while viewing”. Other examples in MSD13 show use of dual in combination with other matter. Thus, ‘dual band tuner’ (also in MDS2), ‘dual head tuner’ and ‘dual conversion tuner’. In these latter cases the addition of the words ‘band’, ‘head’, and ‘conversion’ give the dual element context.

23. The position in relation to sound amplifiers is similar. Dual is usually accompanied by another descriptive word in combinations such as ‘dual power’, ‘dual distribution amplifier’ and ‘dual channel power amplifier’ (all from MDS11). From MDS2 there is also ‘dual hi gain amplifier’ and ‘dual mono integrated amplifier’.

24. When these product specific references are considered in the context of the widespread use of dual generally in the trade (that is the area of home entertainment products and systems) to indicate the presence of some duplicated feature of functionality it is not credible to suppose that the average consumer would regard DUAL as distinctive of any particular trader (absent use establishing a contrary position). Nevertheless, I am not persuaded that the evidence quite establishes that DUAL per se is descriptive of a characteristic of sound amplifiers and tuners. Rather, it seems to me that the evidence establishes that the word is devoid of distinctive character because it does not enable the consumer or end-user to distinguish the applicant's products because the consumer would be familiar with use of the word in the home entertainment products' trade in circumstances which point away from the word being used to indicate trade origin. The objection to these goods is, therefore, under Section 3(1)(b). I do not propose to give separate consideration to the objection under Section 3(1)(d).

The applicant's position

25. The applicant's counterstatement, possibly in anticipation of a prima facie finding against it, indicated that it would rely on the proviso to Section 3(1) to show that the mark has become distinctive as a result of the use made of it.

26. In the event the applicant filed a single witness statement by Gary William Anthony Johnston, its trade mark attorney. Mr Johnston's evidence makes brief submissions on Mr Spencer's evidence and encloses a single exhibit, this being a copy of the decision of the Registry hearing officer in No O-257-07, involving cross opposition actions between the current applicant and a third party which to the best of my knowledge is unrelated to the current opponents. These cross opposition actions also involved an attack on No 2368710. The hearing officer held that the opposition was successful under Section 3(1)(b) and 3(1)(d) in relation to record players, tape recorders and radio receiving apparatus but failed in relation to the balance of the goods, that is to say the goods I am now dealing with in this second attack. He reached that view having considered evidence of acquired distinctiveness filed by the applicant (paragraph 102 of the decision).

27. Mr Johnston says:

“In the circumstances, therefore, the Registrar has already determined that DUAL does not fall foul of the provisions of Section 3(1)(b) and 3(1)(c) of the Trade Marks Act 1994 and there is no sound reason why the Registrar should be persuaded otherwise given the scant evidence filed to support this Opposition.”

28. There is no suggestion that the earlier decision set up some kind of estoppel in the applicant's favour. Given that it involved a different (unrelated) opponent that would certainly not be the case. The evidence from that case has not been adopted into the current set of proceedings. It seems likely that Linmark's evidence was substantially the same judging from the hearing officer's evidence summary at paragraph 20 et seq of O-257-07. The opponent's evidence in that case is likely to have been different to that filed here. It is not possible to assess the strength of the objection established by the opponent which led the hearing officer to come to the view in paragraph 102 that “the threshold to show acquired distinctiveness through use in relation to loudspeakers, amplifiers and tuners is not as high as that required in relation to the other goods applied for in Class 9”.

29. The hearing officer's finding of acquired distinctiveness is not binding on me and I must make my own assessment based on the material before me.

The related action involving the parties

30. As this point I must digress slightly to touch on the related opposition under No 93429 where the parties' roles are reversed. At an interlocutory hearing held on 25 May 2007 a Registry hearing officer considered a request by the opponents in this case that the two sets of proceedings should be consolidated. The request was resisted by Linmark. By letter dated 31 May 2007 the hearing officer conveyed his decision that, having regard to the issues and the stages reached in the proceedings, formal consolidation was not appropriate. He, nevertheless recognised that there was a degree of commonality in the issues and ordered the suspension of No 93429 to await the completion of the evidence rounds in No 93500 with a view to a single hearing (which Linmark appear to have contemplated at that time according to a later paragraph in the after hearing letter) and/or composite written submissions.

31. The hearing officer was clearly mindful of the fact that there was likely to be some overlap in the evidence and set out in his letter of 31 May 2007 what he considered to be a sensible approach to the future conduct of No 93500 as follows:-

“The Opponent's evidence-in-chief is complete and can be admitted into the proceedings and, (assuming no request for written grounds) a period for the Applicant to file their evidence-in-chief can commence. However, as the evidence the Applicant may wish to file may be the same or similar to evidence filed in other proceedings, and in order to reduce time and expense, it would (if appropriate) be acceptable for them to file this evidence in the form of a witness statement adopting earlier filed evidence into these proceedings; a similar approach can also (if appropriate) be adopted by the Opponent when they file their evidence-in-reply.”

32. Implicit in that was the expectation that the applicant (Linmark) would introduce into this action the evidence that it had already filed in No 93429. In the event, as I have said, the applicant has only filed a copy of the hearing officer's decision in an action against the current application by a different opponent. The effect of that state of affairs is that no evidence has been filed in this opposition to counter the prima facie case made out by the opponents. In summary the position is that:

- the applicant's counterstatement, whilst not conceding the descriptiveness/non-distinctiveness of DUAL, flagged up the fact that it anticipated evidence of acquired distinctiveness might be needed.
- the applicant resisted consolidation which would have had the effect of bringing its evidence of use from No 93429 into these proceedings.
- the applicant has not followed up the clear invitation in the hearing officer's letter following the interlocutory hearing on consolidation which would have provided a straightforward and economical means whereby evidence of use could have been adduced into this action.
- it has not filed a copy of the evidence from the unrelated action, O-257-07, as it could have done.

- as the current application proceeded to publication on the basis of prior rights in No 961804 it could have filed any evidence relied on in that respect but has not done so.

33. There was, of course, no obligation on the applicant to do any of these things but I am drawn to the irresistible conclusion that it must now live with the consequences of not filing evidence to deal with the opponent's case. On that basis the opposition succeeds under Section 3(1)(b) and (c).

34. If, on the other hand, that was held on appeal to be the wrong approach and that I should have taken account of the evidence filed on behalf of Linmark in the related action, the applicant would face a further difficulty. The overwhelmingly predominant use shown in that case is of the word DUAL in stylised form against a black box background. In revocation action No 81595 against the registration of that form of the mark (O-301-05) the hearing officer held as follows:

“There is evidence of use of Dual and DUAL in relation to *record players*. The question then arises as to whether this use is use of the trade mark in a form that does not alter the distinctive character of the trade mark. The font that the word is in is, to my eye, not a common one; although it might be a standard one. The size of the lower case u and a are disproportionate to that of the capital D. The capital D itself has elements of a letter o to it. The nature of the word requires a dark background as the letters are in white, the white on black strikes me as quite noticeable. There is more to the trade mark than the simple reproduction of the letters. I consider that the stylisation of the trade mark, although not enormous, does strike the eye and that use of Dual in title or upper case does alter the distinctive character of the trade mark.”

35. The hearing officer thus distinguished between the stylised mark and the plain form word. The example referred to above of use of the word dual in an outright descriptive sense by Linmark (per exhibit MDS2904A of the opponent's reply evidence) merely serves to reinforce the care that is needed in distinguishing between the various uses of the word. If it was necessary to take a view on the matter I would hold that Linmark's evidence of use in the related action was insufficient to establish that the plain form word DUAL had been shown through use to be distinctive of the applicant.

The other grounds of opposition

36. There remain the opponents' objections under Sections 3(6) and 5(2)(b). The complaint under Section 3(6) is that this is the second opposition that the opponents have had to launch. The first was opposition No 92261 to application No 2299417A. I understand that in that case the applicant failed to file a form TM8 and counterstatement by the due date with the result that the application was deemed to be withdrawn. The application in question had a filing date of 1 May 2002. There is no reason why the applicant should not be free to re-apply as it has now done particularly bearing in mind that its own use position and the relative position of the parties may have changed in the intervening period. It is not an act of bad faith to have its position tested at the later date.

37. So far as the relative ground objection is concerned this is in part a response to the applicant's action against the mark DUAL GLO that I have dealt with under No 93429. That

opposition has failed. That case was based on Linmark's earlier stylised DUAL trade mark. In contrast the marks here are DUAL GLO against the plain form word DUAL. The issue is, therefore, a slightly different one though I do not consider a different outcome would result particularly given the composite and allusive nature of the opponents' mark in the context of luminescent goods. The opposition also fails on this ground.

38. The opposition has succeeded under Section 3(1)(c) and/or (b). The opponents are entitled to a contribution towards their costs. Where evidence has been filed that is common to both cases (and to avoid a double award) I have apportioned the costs' element between the two related cases. I order the applicant to pay the opponents the sum of **£1300** in respect of this case. 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 15th day of October 2008

**M Reynolds
For the Registrar
The Comptroller-General**

ANNEX

Exhibit Numbers

Opposition No 93429

MDS1 State of the register material
MDS2 Internet offers of goods
MDS3 Decision in Rev 81595
MDS4 Cutting from Hi Fi Choice
MDS5 Register details for No 961804
MDS6 Internet search (dual and loudspeakers)
MDS7 Internet search (dual and loudspeakers)
MDS8 Internet search (dual and record players)
MDS9 Internet search (dual and tape recorders)
MDS10 Internet search (dual and amplifiers)
MDS11 Internet search (dual and radios)
MDS12 Internet search (dual and tuners)

Opposition No 93500

MDS1*
MDS2*
MDS3
MDS5
MDS6
MDS4 (MDS2), MDS7
and MDS2904 B
MDS4 (MDS3) also MDS8
MDS9
MDS10
MDS11
MDS12
MDS13

*the actual exhibits have the numbers transposed.