

O/246/12

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NOS 2491504 AND 2491505

**BY
MARK DAVID KAY**

TO REGISTER THE TRADE MARKS

MV MECCANICA VERGHERA

AND



IN CLASSES 7, 12, 37 AND 40

AND

**THE CONSOLIDATED OPPOSITIONS THERETO
UNDER NOS 98380 AND 98384**

**BY
MV AGUSTA MOTOR S.P.A.**

Background and the issues in dispute

1. Mark David Kay applied to register two trade marks on 1 July 2008. The marks are shown below, together with their trade mark application numbers:

(i) 2491504

MV MECCANICA VERGHERA

(ii) 2491505



2. Both trade mark marks were applied for in respect of the same specifications of goods and services, as follows:

Class 07: Parts and fittings for motors and for internal combustion engines; ignition systems and fuel delivery systems and parts and fittings thereof, all for internal combustion engines; exhausts, exhaust systems, fuel filters, air filters and oil filters, all for motors and engines; hydraulic pumps, hydraulic cylinders, hydraulic motors, hydraulic valves; pneumatic valves; electric fans for engines and motors.

Class 12: Land vehicles, parts thereof and fittings therefor.

Class 37: Restoring, tuning, repair and maintenance services, all for vehicles; consultancy, information and advisory services relating to vehicle restoring, tuning, repair and maintenance; preparation of vehicles for motor sports or for display at shows and conventions.

Class 40: Customising and modifying services, all for vehicles; consultancy, information and advisory services relating to vehicle customising or modifying.

3. Mr Kay's trade marks were both published in the *Trade Marks Journal* on 5 September 2008 and both were subsequently opposed by MV Agusta Motor S.p.A. ("the opponent") under sections 3(6), 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act"), with an additional section 5(4)(a) ground brought against the device mark application. The opponent claims, under section 3(6), that the trade mark applications are virtually identical (2491504) or extremely similar (2491505) to the opponent's original company name MECCANICA VERGHERA, its current

logo and also its former logo. The opponent states that Mr Kay operates a website, www.mv-agusta.co.uk, the domain name of which is a significant part of the opponent's current company name and is the subject of a UK and Community trade mark registration. The opponent states that Mr Kay's business specialises in the opponent's products and that he uses one of the opponent's current logos on his website. The opponent claims that Mr Kay is trading in the opponent's products and is clearly aware of the opponent; hence his applications have been made in bad faith.

4. The opponent's section 5(2)(b) ground against Mr Kay's application for MV MECCANICA VERGHERA relies upon the following three marks and goods:

(i) Community Trade Mark ("CTM") 1584796



Class 12: *Motorcycle parts and fittings.*

Filing date: 30 March 2000

Date of completion of registration procedure: 27 April 2001

(ii) CTM 1584705

MV AGUSTA

Class 12: *Land vehicles, apparatus for locomotion by land.*

Filing date: 30 March 2000

Date of completion of registration procedure: 4 May 2004

(iii) UK 2054757B

MV-AGUSTA

Class 12: *Land vehicles; parts and fittings for land vehicles included in Class 12.*

Filing date: 30 January 1996 with priority date from Italy of 4 August 1995

Date of completion of registration procedure: 24 January 1997

5. CTM 1584796 is also relied upon under section 5(3), claiming a reputation in motorcycle parts and fittings. The opponent's claim under section 5(2)(b) is that the presence of MV in the parties' marks, which is distinctive for similar goods and services will lead to a likelihood of confusion. Under section 5(3), the opponent claims that it has such an extensive reputation and goodwill within the

motorcycle industry in relation to “the MV mark” that there would be unfair advantage or detriment to the opponent’s business, goodwill and reputation.

6. The opponent’s section 5(2)(b) ground in relation to Mr Kay’s device mark application also relies upon the following marks (including CTM 1584796, as above):

(i) CTM 1045277



Class 12: *Vehicles; apparatus for locomotion by land.*

Filing date: 19 January 1999

Date of completion of registration procedure: 29 February 2000

(ii) CTM 1584796



Class 12: *Motorcycle parts and fittings.*

Filing date: 30 March 2000

Date of completion of registration procedure: 27 April 2001

(iii) CTM 629022



Class 7: *Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles);*

Class 12: *Vehicles; apparatus for locomotion by land.*

7. These three earlier marks are also relied upon under section 5(3). The opponent's claim under section 5(2)(b) is that the similarities between the parties' marks and the identical or similar goods and services will lead to a likelihood of confusion. The opponent draws particular attention to its marks which incorporate a cog device and the letters MV in the middle of the cog, which it states is extremely similar to Mr Kay's device mark application. Under section 5(3), the opponent claims a reputation in all the class 12 goods upon which it relies. It contends that there will be unfair advantage or detriment to the opponent's business, goodwill and reputation because of the opponent's extensive reputation in the motorcycle industry; furthermore, this is all the more likely because the applicant is trading in the opponent's products.

8. The opponent's section 5(4)(a) ground, brought against Mr Kay's device mark only, relies upon use of a sign corresponding to its CTM 629022, shown above. The opponent states that this sign was first used in the UK in Dorset in 1999 on "vehicles; apparatus for locomotion by land; motorcycles and parts and fittings". The opponent says:

"The applicant has clearly adopted a logo which the opponent used to use and which is still very similar to the opponent's current logo. The applicant is also trading in the opponent's products. Accordingly, use by the applicant of its logo in the course of trade constitutes a misrepresentation and it is reasonably foreseeable that the opponent will encounter some damage whether it be to its business or its reputation or goodwill."

9. Mr Kay denies all the grounds of opposition to his applications. He states that:

"It will be shown in evidence in the course of these proceedings that the subject trade mark [MV MECCANICA VEGHERA] has been used continuously since at least as early as 1996 [and as early as 1992 in relation to his device mark] in respect of 4 cylinder air-cooled motorcycles (and their parts) of a pre-1980 design, such use being made by the applicant, by his Company M.V. –Meccanica Verghera Limited and by a predecessor in business, Mr David Kay (the applicant's father)."

10. In relation to the section 3(6) ground, Mr Kay puts the opponent to proof of the opponent's original company name and the succession of title thereto; he puts the opponent to proof that his device mark is in fact the logo which the opponent used to use (as stated by the opponent); and Mr Kay puts the opponent to proof of the relevance of the legitimate use of one of the opponent's logos to promote the goods of the opponent. Mr Kay also requires the opponent to explain the circumstances and submit in evidence the papers involved in objection to his domain name (although the opponent does not specifically mention any objection in its notice of opposition) and the outcome of that objection.

11. Mr Kay denies the section 5(2)(b) ground but does not require the opponent to prove use of those marks which are subject to the proof of use regulations¹ (CTM 1584796, UK 2054757B, CTM 1045277 and CTM 629022). He denies that the letters MV are distinctive in relation to “Motor Vehicles” and draws attention to the use of his marks pre-dating the opponent’s marks, requiring the opponent to show the “realisation” of a likelihood of confusion and association. Mr Kay denies the section 5(3) and 5(4)(a) grounds and particularly the opponent’s claim that the earlier marks have a reputation in “vehicles; apparatus for locomotion by land as a whole”. Finally, Mr Kay requires the opponent to declare how long it has been aware of the use of his marks and how long it has acquiesced in such use.

12. Following the filing of the defences to the opposed applications, the proceedings were consolidated. Both parties filed evidence and written submissions but neither wished to be heard, both being content for a decision to be made from the papers on file.

Comments on the pleadings

13. At this stage, it is appropriate to make some comments about elements of the parties’ pleadings. Firstly, as noted above, Mr Kay has not put the opponent to proof of genuine use of its marks which had been registered for five years or more at the date when his applications were published. The effect of this is that the marks may be considered across the notional breadth of the specifications of goods relied upon.

14. Secondly, in relation to CTM 1584796, the opponent has stated in its notice of opposition that it relies upon *Motorcycle parts and fittings*. However, its registration in class 12 is for *Vehicles, apparatus for locomotion by land*. There are no parts and fittings listed in the registered specification in class 12. Vehicles and apparatus for locomotion by land are complete items. Although this specification covers motorcycles *per se*, the opponent cannot claim that its registration for complete goods, namely vehicles and locomotive apparatus, entitles it to rely on motorcycle parts and fittings. This is beyond the notional breadth of its specification. The consequence of this is that the opponent cannot rely upon this mark for its section 5(2) and 5(3) grounds.

15. Finally, the notices of opposition contain certain inconsistencies of approach in relation to the issue of similarity/identity of goods and services. In relation to Mr Kay’s word mark, the opponent claims that its goods in class 12 are similar to those of Mr Kay’s application in class 12; however, in relation to Mr Kay’s device mark, the opponent claims that its class 12 goods are identical to those of Mr Kay’s class 12 goods. I will come back to this point later in the decision.

¹ See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations) 2004 (SI 2004/946) which came into force on 5th May 2004.

Evidence

The opponent's evidence-in-chief

16. The opponent has filed witness statements from Giovanni Castiglioni and Lucy Mills. Mr Castiglioni is the opponent's managing director. Ms Mills is an associate at Potter Clarkson LLP, the opponent's trade mark attorneys.

Mr Castiglioni's evidence

17. Mr Castiglioni states that he has been the opponent's managing director since 2010 and has been associated with the opponent since 2005. He states that all of the information in his witness statement is either known to him personally or is from records or other information held by the opponent, and that he is conversant in the English language.

18. Mr Castiglioni begins his statement by asserting that the opponent is one of the leading motorcycle companies in the world, producing high powered motorcycles and their parts. In the six years prior to his statement (dated 22 December 2010), he states that global sales for the opponent's business amounted to an annual average of €40,000,000, with 220 people employed in its business. Mr Castiglioni states that the opponent has 33 authorised dealers in the UK. A list of these is provided in exhibit GC7 in the form of website prints from www.mvagusta.co.uk (which show CTM 629022), although there is nothing to indicate the position at the filing date of Mr Kay's applications.

19. Mr Castiglioni gives his version of the history, supported by exhibits in the form of website extracts and a book, of the opponent which he states was founded in 1945 under the name Meccanica Verghera, "commonly abbreviated as MV". The opponent established itself over a 30 year period as a leader in the motorcycle industry and in motorcycle racing. In relation to racing, Meccanica Verghera motorcycles won 38 World Championship GP rider titles and 37 manufacturer's world crowns. The 'elite' riders raced with MV AGUSTA. This was the period when the MV and MV AGUSTA marks were used on the opponent's motorcycles; however, during the 1970s, economic difficulties and racing regulations led to a decline in the manufacture of Meccanica Verghera motorcycles and the last of the remaining motorcycles was sold in 1980.

20. The next instalment in the history took place eleven years later, when the "Castiglioni Group" (elsewhere in the evidence referred to as "Cagiva") bought the MV AGUSTA mark, but it was not until 1997 that the first prototype of the new MV AGUSTA motorcycle was exhibited. Mr Castiglioni states that the 1999 F4 Gold Series had a high profile, and amongst its high profile buyers were King Juan Carlos of Spain and Formula One driver Eddie Irvine.

21. Mr Castiglioni states that the “MV AGUSTA” company was bought by Proton in December 2004, was then sold to an Italian company GEVI S.p.A. in 2005, and then in July 2008, Harley Davidson acquired the “MV AGUSTA Group”. Harley Davidson transferred the ownership back to the Castiglioni family and their holding company MV Agusta Holding s.r.l. on 6 August 2010.

22. Exhibit GC6 shows copies of photographs from trade shows in Milan and



Monaco from 1997, 1998, 1999 and 2000. The marks appear on the display stands and the motorcycles. Mr Castiglioni emphasises that the motorcycles are at the premium end of the market: an average motorcycle retails at around €14-15,000 whereas an MV AGUSTA motorcycle costs around €21,000, with limited editions costing much more (the F4 cost €100,000). A limited number are made so as to preserve the prestige of the motorcycles (as for, example, Ferrari cars). Sales figures for the years 2004 to 2008 of what Mr Castiglioni calls MV AGUSTA are as follows:

Year	No. of Motorcycles sold	Turnover in excess of (Euros)
2004	268	3,921,091
2005	215	3,235,695
2006	294	4,095,045
2007	218	2,701,327
2008	165	1,073,306

Mr Castiglioni states that the opponent and its predecessors in title have marketed the MV AGUSTA motorcycles mainly through magazine and sponsor activities. The amount spent on advertising is in excess of €100,000 (it is unclear whether this is an annual amount).

23. Mr Castaglioni states that the abbreviation MV is synonymous with the founding company of the MV AGUSTA brand, Meccanica Verghera. Exhibit GC12 is an extract from www.thefreedictionary.com website which shows a list of sixty MV abbreviations, one of which is Meccanica Verghera. (Also shown are mini van, moving vehicle, and motorised valve.) The fame and prestige of MV AGUSTA motorcycles has been the subject of limited edition prints (exhibit GC13 shows references to these in a gallery, along with Ducati and Bugatti Veyron prints) and the motorcycle has featured in UK motorcycle magazines, examples of which are shown at exhibit GC 14 from 1999 when the F4 was road tested. Mr Castaglioni states that MV AGUSTA motorcycles are still involved in racing, such as in the Super Bike World Championship competitions in 2004, 2005 and 2007 which featured the MV AGUSTA F4 model, alongside famous names such as Ducati, Suzuki, Kawasaki, Honda and Yamaha. Mr Castiglioni states that the MV and MV AGUSTA trade marks are extremely well known within the motorcycle industry and amongst motorcycle enthusiasts. He states that MECCANICA VERGHERA, the name of the founding company of the MV AGUSTA brand, is

also well known amongst enthusiasts as being synonymous with MV AGUSTA and he says it would still be associated with the opponent.

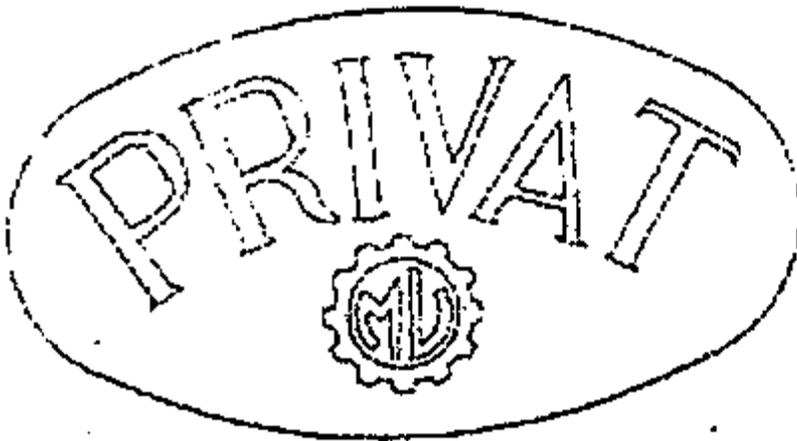
24. Mr Castiglioni states that Mr Kay is replicating the opponent's motorcycles. Exhibit GC19 is a print dated 26 February 2009 from a website called mv-agusta.co.uk, which Mr Castiglioni states is Mr Kay's website. The print appears to be the home page of the website: it says "Welcome to MV MECCANICA VERGHERA" "So you think you're ready for an MV Agusta". It shows a sign which corresponds to the opponent's mark (but without the wording "motorcycle art"):



and it says "we specialise in pre 1980 4 cylinder MV AGUSTA motorcycles".

Lucy Mills' evidence

25. Most of Ms Mills' witness statement contains legal submissions which I will not summarise here but will bear in mind when I assess the grounds of opposition. With regard to Mr Kay's device mark application, Ms Mills states that the opponent has used this logo which also forms part of an Italian trade mark registration:



26. Ms Mills states that investigations into Mr Kay's activities have revealed that he is carrying on a business which involves manufacturing and marketing replicas of the opponent's motorcycles and their parts and fittings. Ms Mills states that Mr Kay's other application, for MV MECCANICA VERGHERA, is almost identical to the opponent's original company name, Meccanica Verghera.

Mr Kay's evidence

27. Mr Kay's evidence comes from himself and his father, David John Kay. The latter states that he is the founder of the business which uses the trade marks which are the subject of the oppositions. He has transferred the business, with associated goodwill, to his son, Mark Kay (the applicant). I will therefore look firstly at David Kay's witness statement, which is dated 29 March 2011.

28. Mr Kay gives his version of the history of the Italian "MV" motorcycle business. He states that MV Meccanica Verghera S.p.A. was founded in February 1945 to manufacture motorcycles and associated products. Mr Kay says that although Gruppo Agusta owned the company, the first products bore the trade mark "M.V." or "MV" which he says were either in plain letters or in logo form, including the form which Mark Kay has applied for under application number 2491505. He states that it was not until later that AGUSTA MV or MV AGUSTA or PRIVAT MV were used as the main brands. Mr Kay states that MV MECCANICA VERGHERA was never used as a trade mark by MV Meccanica Verghera S.p.A.

29. Mr Kay refers to Mr Castiglioni's witness statement. He says:

"5. In paragraph 3 of his witness statement, Giovanni Castiglioni falsely states that his company (MV Agusta S.p.A.) was originally founded in 1945 under the name Meccanica Verghera. This is clearly untrue. MV Meccanica Verghera SpA is not "his Company" because MV Meccanica Verghera SpA was liquidated in 1989, having ceased production in 1977 or, by some accounts, 1978. Giovanni Castiglioni refers to the sale of the last bikes in 1980 (in fact they had been produced in 1979) without admitting that MV Meccanica Verghera SpA was in liquidation and that liquidation was completed without the sale of the business and its assets. "His Company" (Cagiva Motors S.p.A.) acquired the trade marks in 1992 and then eventually transferred the trade marks to "his Company" in 1997. He admits, obscurely, in paragraph 4 that (at least) the MV AGUSTA brand was unused for 11 years and claims that the brand was "reborn" when the Castiglioni Group purchased this abandoned brand in 1991 (1992 seems more accurate). However, he goes on to state that the birth took place in 1997, when a prototype of his Company's "F4" motorcycle was exhibited. In fact, at prototype stage the F4 was branded CAGIVA and it was not until the machine went into production in 1998 that it was branded MV AGUSTA.

According to the material relating to the Italian trade marks forming part of Giovanni Castiglioni's Exhibit GC14, MV Meccanica Verghera SpA owned the Italian trade mark rights in "MV" and related brands from about 1951 until 1991, when they were transferred to Eli Linee Nord Italia S.p.A. The next year, 1992, the trade mark registrations were transferred to Cagiva

S.p.A. (later to become Cagiva Motors S.p.A.) but, as Giovanni Castiglioni confirms, the marks were still not put into use. Then in 1997 the rights were transferred to Meccaniche Riunite S.p.A., which changed its name to MV Agusta Motor S.p.A. before transferring the rights to MV Agusta Motorcycles S.p.A. In 2007 MV Agusta Motor S.p.A. and MV Agusta Motorcycles S.p.A. merged to form the current company MV Agusta Motor S.p.A. Perhaps “his Company” is the Company that has owned the trade marks since 2007 or perhaps since 1997. To be generous, it could be said that his family has had an interest in the trade mark registrations since 1992 but it would be accurate to say that, as he admits in the text of his witness statement, his family did not commence use of the trade marks concerned until 1997 (more accurately 1998).

6. From 1978 (or 1977) until 1997 (or 1998), i.e. a full 20 years, no motorcycles or engines or their parts were being made in Italy bearing any of the MV or AGUSTA MV or MV AGUSTA brands. From 1989 to date, no replacement engine parts of the original machines have been made in Italy.

7. **IN SUMMARY** and contrary to Giovanni Castiglioni’s false statement in paragraph 3 of his witness statement, no one Company used the MV trade marks from 1945 to date: The true history of the MV brand (in its various forms) is that MV Meccanica Verghera SpA used them from 1945 until 1977 (or 1978) and MV Meccanica Verghera SpA (in liquidation) used them until 1989 in the sense that the marks still appeared on spare parts produced until 1977 or 1978. The marks were unused in the United Kingdom (except for my use, as detailed later in this my witness statement) from at least 1978 until 1997/8 when, as Giovanni Castiglioni states, the trade marks his Company had acquired in 1992 were resurrected by his Company’s launch of newly-produced motorcycles.”

30. Mr Kay exhibits (DK1) a copy of a book by Mick Walker which he states to be a detailed and independent history of the brand which, although containing some inaccuracies, is, Mr Kay says, more reliable than the exhibits shown by Mr Castiglioni about the history of the trade marks.

31. Mr Kay goes on to give details about the use of the opposed trade marks in the UK. Mr Kay has been a motorcycle enthusiast all his adult life, particularly so in relation to what he calls the “extraordinary success” in the early 1950s of the racing and road motorcycles produced by MV Meccanica Verghera S.p.A. Mr Kay bought one of these racing bikes in 1977 and with fellow enthusiasts founded “MV Agusta Owners club of Great Britain” in 1978. Mr Kay states that the cessation of production by MV Meccanica Verghera S.p.A. in 1977 or 1978 and its liquidation in 1989 caused problems for UK owners of MV motorcycles. Mr Kay arranged to purchase spare parts from the factory: exhibit DK2 is a copy of a letter dated 25 May 1990 detailing the sale of spare parts to the MV Agusta

Owners Club of Great Britain. The letter is on headed paper which says “M.V. – Meccanica Verghera S.p.A. “IN LIQUIDAZIONE” and “GRUPPO AGUSTA”. The body of the letter says:

“We agree upon sale price of MV material (detailed list of which we will send you as soon as possible), in today quantities and conditions.

All costs of packing will be at M.V. charge – free of charge Borgomanero.

....

We inform you that sales that you effect will be as M.V. MECCANICA VERGHERA and not as M.V. MECCANICA VERGHERA AGUSTA.”

Mr Kay states that some parts, such as engine casings, were no longer available after about 1983 and that he commenced manufacture of engines and parts through his company M.V.A. Engines Limited (incorporated in 1984 under that name). By 1985 Mr Kay could produce complete air cooled MV engines and from 1989 he commenced production of MV engines and complete MV racing motorcycles, initially through his company Eiger MV Engineering Limited and then, from 1983 through Kay MV Engineering. In 1989 Mr Kay helped to organise the purchase of the remaining original MV spare parts from the spare parts department, which was on the point of closure, of M.V. Meccanica Verghera S.p.A., in liquidation.

32. Mr Kay states that he formed a partnership with his son, Mark Kay, in October 1996, under the name MV Meccanica Verghera to continue to make and sell their products. The business traded from October 1996 to November 2005. Mr Kay states that during this period he supplemented the work of the partnership by continuing to operate Kay MV Engineering. In October 1997, Mark Kay and David Kay registered the domain name “mv-agusta.co.uk” which has been active ever since, although Mr Kay says that at the date of his witness statement it was undergoing reconstruction. He states that he and Mark Kay had also incorporated the company M.V. – Meccanica Verghera Limited in November 1990 but did not commence trading through this company until December 2005 when he retired from the MV Meccanica Verghera partnership and passed the business to his son. The company has traded continuously since December 2005.

33. Contrary to Mr Castiglioni’s statement that Mr Kay’s use of the opposed trade marks was not extensive and perhaps involved only a few motorcycles, Mr Kay exhibits at DK3 the volume of his sales from 1990 to 1995 under the marks “MV logo and MV MECCANICA VERGHERA:

Eiger MV Engineering Limited

1990	£33,283
1991	£46,068
1992	£12,496

Kay MV Engineering

1993	£33,888
1994	£31,051
1995	£42,731

34. Mr Kay exhibits a letter from his chartered accountant regarding turnover of the connected businesses since 1996:

Mr DJ Kay t/a Kay MV Engineering

1996	£51,441
1997	£36,412
1998	£37,897
1999	£41,573
2000	£42,815
2001	£44,936
2002	£33,929
2003	£27,671
2004	£22,203
2005	£63,431

Mr DJ Kay t/a MV Meccanica Verghera

1997	£32,319
1998	£28,430
1999	£42,100
2000	£46,319
2001	£48,454
2002	£48,292
2003	£23,260
2004	£27,951
2005	£33,528

MV Meccanica Verghera Limited

2006	£50,465
2007	£49,161
2008	£47,804
2009	£57,444

35. Mr Kay points out that the total turnover of all these companies from 1990 to 1998, when Mr Castiglioni's company first used the MV AGUSTA brand, was £386,016 and the total turnover from 1990 to 2009 was £1,137,352. Mr Kay states that Mr Castiglioni would be correct in saying that Mr Kay only manufactured a few motorcycles if he is talking about complete items. He says:

“...[Giovanni] and Claudio Castiglioni have been aware since at least 1999 (and probably since 1992 when they acquired the bare trade marks, such as prominence in relation to the MV “legacy”) that our principal business and the use of the MV brands was in respect of parts of motorcycles (rather than complete ones) and restoring, re-building and re-engineering services in relation to the pre-1977 machines. In fact, our work “involved” very many of the original machines. We only produced an average of 3 complete machines utilising Magni Italian or original MV chassis per year but dealt with many more. Even those 3 bikes are not replicas in one important sense. Mark and I never have (and, I hope, never will) produce complete bikes “from scratch” – they are all original pre-1997 MV machines made by MV Meccanica Verghera SpA which we have re-engineered, repaired and restored and are never 100% made by us – I calculate that no more than 45% of each machine has been made or repaired by us and that the remaining 55% (more, in many cases) is original. I find the idea of fakes which are sold as original MV motorcycles abhorrent and I would hope that such imitations would be treated as illegal...The only complete machines we produce are pre-1975 racing machines which are either ridden by ourselves or raced by our nominated riders. In 2010 we had ratified the fastest lap of the Isle of Man TT circuit for air-cooled GP motorcycles at 109.1 mph which bettered the Mike Hailwood Honda and Agostini MV Augusta 1967 records of 108.3 mph. The machine was badged with my son's applied-for logo”.

36. A photograph of the motorcycle referred to above is shown at exhibit DK5, together with a “Manx race report” in “Classic World” (presumably a classic motorbike magazine). Mark Kay is shown beside the bike which bears the device mark which he has applied for. The picture caption says:

“1972 MV500 GP, Mark Kay

Mark Kay's MV500 triple is a labour of love. Almost every component has been made by him, or to his design. “We got an original MV, took it to bits, then measured and drew every last nut and bolt” says Mark. “It took two years to build, and four years to get to where we are now, racing on the island”.

37. Mr Kay states that he and his son “‘have always bent over backwards’ to respect the legacy of the real MV motorcycle business (i.e. pre-1977 and before the speculators moved in during the early 1990s to profit from a perceived

heritage).” Mr Kay exhibits at DK6 photographs of what he refers to as various iterations of the device mark, which appear on motorcycles and parts, dated between 1992 and 2009. Mr Kay states that he and his son promoted and made their activities “famous” under their “MV brands” by showing the quality of their engineering skills to enthusiasts for the “MV heritage”, such as by racing their bikes in re-runs of Isle of Man races and classic events. DK8 shows a list of events in which the Kays participated with what Mr Kay describes as “our MV machines”; DK9 provides photographs and reports from the events:

Events and results, 1986 – 2004

1. 1986, David Kay raced an MV sidecar outfit built by Mark Kay in the IoM Open Class race.
 2. 1988, Mark Kay raced the MV sidecar outfit in the IoM 1st Classic race, making him the last rider to win a TT race with an MV.
 3. 1989, David Kay and Mark Kay built complete Eiger MV motorcycle which won “Best in Show” at the Manchester International Bike Show.
 4. 1985 to 1994, raced 64 times with MV sidecar and never out of the first three placings and never broke down on the race track.
 5. 1990, Isle of Man Southern 100 race with 750 Kay built MV engine which crashed when lying in third place.
 6. 1992, Isle of Man TT race with 750 cc solo MV.
 7. 1996, solo bike raced in Scottish Classic Bike Races – unsuccessful.
 8. 1990 to 2004, built and raced 500GP Replica using Gilera logo with the approval of their Managing Director;.. Gilera purchased during this period by Cagiva.
 9. 1978 to 2009, made numerous public appearances at shows and special events including Italy, France, Holland, Belgium, Germany and the Isle of Man.
38. None of these uses are clearly of the name MV MECCANICA VERGHERA in relation to newly built products and the replica motorcycle (item 8) appears to have borne the Gilera logo. A report from the 1989 Classic Bike Show refers to the top award going to the Kays’ recently complete MV Agusta special, based on a 1975 750S, featuring “many British made and machined parts, including the crankcase” and taking Mark Kay 140 hours to machine. It “deserved the accolade “classic Bike of the Year” – if only for the sheer effort involved in producing such an engineering marvel from scratch. This fiery red Italian was

Birmingham born and bred". It is possible to discern on the bikes the mark which corresponds to the opponent's earlier mark:



39. Mr Kay ends his witness statement with details of contact which he and his son have had with the opponent over the last fifteen years. Mr Kay states that he (as MV Meccanica Verghera) was approached by an Italian firm in 1999, acting on behalf of the opponent, who complained about the use of the trade marks and the domain name. Mr Kay exhibits (DK10) correspondence and a copy of the results of a Nominet decision from 2001 in connection with the domain name dispute (the domain names were agusta-mv.co.uk and mv-agusta.co.uk) in which the Kays were successful. Mr Kay points out that the opponent was aware of the Kays' activities in 1999 and contrasts this with Mr Castiglioni's statement that the opponent became aware of the Kays' business in 2005. DK11 includes letters before action from 2005, and a letter from the opponent's trade mark attorney advising that the opponent had decided not to take action at that time (13 December 2005).²

40. Mr Kay states that the reason why he suggested to his son that he should make his trade mark applications is that he considered that the opponent, having twice raised the issue of the trade marks and twice not pursued action, could do so again, threatening his son's business. Mr Kay refers to Mark Kay's trade mark applications as consolidating the rights which he and his son had built up over more than two decades.

41. Mark Kay's witness statement is dated 29 April 2011. He is the owner of the business which uses the trade mark applications which he has made. He states the business was begun by his father, David Kay, and that he has been intimately connected with it since the late 1980s. He makes some 'corrections' to David Kay's statement regarding the legal status of the original 1940s MV Meccanica Verghera S.p.A. business, which it is not necessary to go into. He states:

"As my father has already pointed out in his witness statement, there was no business for the Castiglioni family to purchase in 1991 or 1992 and there had been no business in the many intervening years. The purchase was of the bare "paper" trade mark registrations and the Castiglioni family chose not to use any of the marks until 1998, i.e. a full 20 years after the

² Both sides have referred to the correspondence, as will be seen further on in this evidence summary, therefore any claim to claim to privilege is waived.

original Joint Stock Company (which had no connections with the Castiglioni family) ceased use.”

42. Mr Kay also states that Mr Castaglioni’s statement contains falsehoods, also referred to in David Kay’s statement. Mr Kay states that the success of the MV bikes prior to 1988 cannot be attributed to the opponent and that Mr Castaglioni’s exhibits “conveniently hide the truth”, the truth being that the successful MV business from 1945 to 1977 was unconnected with the business which the opponent began in 1998. Mr Kay states that the exhibits were designed for marketing purposes to convince the reader that the use of the brand had been continuous and seamless.

43. Mr Kay states that he wishes to clarify matters referred to in David Kay’s witness statement. Firstly, he wishes to make it clear that the Kays’ principal business “is not and never has been the manufacture of motorcycles”. He states that the essence of the business is the manufacture of replacement engine parts and casings and complete replacement engines for original classic MV bikes, and also the services of restoring, re-building and re-engineering the pre-1977 MV bikes. He states that his father has long had a passion for MV motorcycles and quite “fanatical” about keeping pre-1977 motorcycles usable. Mr Kay states that both he and his father have been the only suppliers of the replacement parts since the spare parts department of MV Meccanica Verghera SpA finally closed in 1990. He states that from 1983 to 1990, some original spares had been available but others were only available from him and his father. He states that they have now supplied their goods and services to the owners of ‘classic’ MV bikes worldwide since 1983.

44. Mr Kay refers to the early days of his father’s business, now his business. He states that, as shown by David Kay’s evidence, the branding was inconsistent in that the names used were, for example, Eiger MV, MVA Engines and Kay MV Engineering, the common element being MV with various logos. Mr Kay states that when he became closely involved with the business in the early 1980s, he and his father agreed to focus on the name MV MECCANICA VERGHERA. This was because it focussed on the engineering heritage, the essence of their business, rather than on financial or sponsorship heritage symbolised by the name Agusta. Also, MV Meccanica Verghera SpA had told the Kays it was happy for parts to be sold under the name MV MECCANICA VERGHERA (as in David Kay’s exhibit DK2, referenced above). Mr Kay states that he chose to concentrate on the logo which is the subject of the opposed device mark application because he was already using it on castings of engine parts and because it is firmly associated with the engineering heritage of the original Italian business. The trade mark has been used consistently on parts of engines and whole bikes since about 1984 until the present date, and has been used in relation to the business since about 1990 to the present date. Mr Kay states that MV MECCANICA VERGHERA has been used in relation to the business since about 1997 to the present date. It was a conscious effort since David Kay began

his business to avoid the AGUSTA name and to concentrate on the MV element in order to make it clear that the business was engineering-focussed and independent. Many of the pre-1977 motorcycles show the original MV Agusta branding and that is left on or touched up if requested, to ensure the motorcycles are restored to the original pristine condition.

45. At the time the Kays registered their domain name and started selling their products and services, in 1997, the only MV Agusta machines in private hands were pre-1977 models because the Castiglioni family had not yet sold any of their new MV Agusta machines. Mr Kay says that those accessing the website immediately knew that the Kays, as MV Meccanica Verghera, were specialists in restoring the vintage motorcycles.

46. The remainder of Mr Kay's statement refers to the history of the contact between the parties, as set out by David Kay in his witness statement.

The opponent's evidence-in-reply

47. This comes from Francesco Braga who is a legal advisor to the opponent. It is a mixture of fact and submission. I will, of course, bear the submissions in mind in making my decision. Mr Braga begins by highlighting that here is no evidence of the transfer of the business and goodwill from David Kay to Mark Kay. Mr Braga then goes on to deal with the genealogy of the Italian business, which he states was inaccurate in Mr Castaglioni's witness statement. The opponent was not formed in 1945. It was the original MV Meccanica Verghera S.p.A. which was formed in 1945 and its assets including the trade marks and goodwill were bought by the opponent's predecessors in title, Cagiva S.p.A. in 1992. He lists the transfers as follows:

- Assignment from MV Meccanica Verghera S.p.A. to Eli Nord Italia S.r.l on 10 December 1986 and addendum to the assignment on 30 January 1991.
- Assignment from Eli Nord Italia S.r.l to Cagiva S.p.A. on 3 April 1992 and addendum to the assignment June 1993.
- Assignment from Cagiva Motors S.p.A. to Cagiva Motors S.p.A. on 8 August 1997.
- Assignment from Cagiva Motors S.p.A. to Meccaniche Riunite S.p.A. , also on 8 August 1997.
- Change of name from Meccaniche riunite S.p.A. to MV Agusta Motors S.p.A. on 18 September 1997.

- Assignment from MV Agusta Motor S.p.A. to MV Agusta Motorcycles S.p.A. on 29 June 2001.
- Merger of MV Agusta Motorcycles S.p.A. into MV Agusta S.p.A. on 23 January 2006.

48. Mr Braga supports this stated list with copies of deeds of assignment, change of name and merger documents in exhibit FB1, together with his own translations of the relevant parts. He states that the documents show that the rights to the MV AGUSTA trade marks passed from the original Italian company MV Meccanica Verghera S.p.A. to the opponent's group of companies, specifically Cagiva S.p.A. in 1992, together with the associated goodwill in the trade marks.

49. Mr Braga states that the opponent and predecessors have used the MV and MV Agusta marks in relation to new bikes and their parts since as early as 1997 (as in exhibit GC6 showing photographs from the Milan trade show in 1997). He states that the opponent has no objection to Mr Kay selling spare parts of the original MV Agusta Motorcycles as long as the use of names and logos is descriptive. However, Mr Braga says that Mr Kay provides no explanation as to why he decided to establish his business using the MV MECCANICA VERGHERA, use the logos and apply to register them as trade marks. Mr Braga says that Mr Kay should have been aware that the names and logos were not his. He states that it is only recently that the opponent has become aware of non-descriptive use and the full extent of the activities of Mr Kay. Mr Braga says that the response (as detailed in David Kay's witness statement and exhibit DK11) from the Kays' trade mark attorney in 2005, which stated that the Kays were not making and selling replicas, was the reason why the opponent did not take any further action, but since then investigations had caused the opponent concern, together with Mark Kay's trade mark applications.³ Mr Braga says that awareness of descriptive use does not equate to awareness of descriptive use and filing of trade mark applications. He states that the opponent knew of the applicant (the Kays) as Kays Engineering rather than the more recent name MV Meccanica Verghera.

Decision

Section 5(2)(b)

50. The leading authorities which guide me in relation to section 5(2)(b) of the Act are from the Court of Justice of the European Union ('CJEU'): *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria*

³ See also the footnote above.

GmbH C-120/04 and Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

e) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

f) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*.

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(i) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(j) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(k) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(l) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

Average consumer

51. The average consumer is reasonably well informed and reasonably circumspect and observant, but his level of attention is likely to vary according to the category of goods or services. Although the evidence shows that both parties are involved in motorcycles, and the applicant focuses on the vintage market, the assessment of the nature and purchasing behaviour of the average consumer is to be carried out according to the notional scope of the parties' specifications. The average consumer for vehicles, and services relating to vehicles, is the general public (legally able to drive). Purchasing a vehicle is an expensive, considered process and one to which a relatively high level of attention will be paid. It is a visual purchase (both in the sense of the research and the examination of the vehicle, although I bear in mind that there will also be an aural aspect (e.g. during discussion with a dealer or vendor). The aural aspect will also be a factor in relation, in particular, to restoring, motor sports preparation and customising of vehicles. For these services, a high level of attention will be paid to their selection.

Comparison of goods and services

52. In comparing the parties' specifications (the specifications of both of the applications are identical), all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

53. 'Complementary' was defined by the General Court ("GC") in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06:

"82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...".

54. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited ("Treat")* [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

55. If goods or services fall within the ambit of terms within the competing specification, they are considered to be identical, as stated by the General Court ("GC") in *Gérard Meric v OHIM*, case T-133/05.

56. In *Avnet Incorporated v Isoact Limited* [1998] F.S.R. 16 Jacob J held that:

"In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

Jacob J also said, in *Treat*:

"When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all a trade mark specification is concerned with use in trade".

57. Specifications should not be given an unnaturally narrow meaning, as per *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32, although in the context of a non-use issue, the court considered interpretation of specifications:

"In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has

made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use”.

58. I will make the comparison by assessing Mr Kay’s goods and services against CTM 629022, which has the widest goods coverage of the earlier marks, grouping together the applicant’s goods or services if they are susceptible to common reasoning⁴.

CTM 629022	Applications
<p data-bbox="235 596 797 779"><i>Class 7: Machines and machine tools; motors and engines (except for land vehicles); machine coupling and transmission components (except for land vehicles);</i></p> <p data-bbox="235 814 797 888"><i>Class 12: Vehicles; apparatus for locomotion by land.</i></p>	<p data-bbox="824 596 1386 995"><i>Class 07: Parts and fittings for motors and for internal combustion engines; ignition systems and fuel delivery systems and parts and fittings thereof, all for internal combustion engines; exhausts, exhaust systems, fuel filters, air filters and oil filters, all for motors and engines; hydraulic pumps, hydraulic cylinders, hydraulic motors, hydraulic valves; pneumatic valves; electric fans for engines and motors.</i></p> <p data-bbox="824 1031 1386 1104"><i>Class 12: Land vehicles, parts thereof and fittings therefor.</i></p> <p data-bbox="824 1140 1386 1434"><i>Class 37: Restoring, tuning, repair and maintenance services, all for vehicles; consultancy, information and advisory services relating to vehicle restoring, tuning, repair and maintenance; preparation of vehicles for motor sports or for display at shows and conventions.</i></p> <p data-bbox="824 1470 1386 1652"><i>Class 40: Customising and modifying services, all for vehicles; consultancy, information and advisory services relating to vehicle customising or modifying.</i></p>

⁴ As per the decision of Mr Geoffrey Hobbs Q.C., sitting as the appointed person, in *Separode Trade Mark* BL O/399/10.

59. Class 7

Hydraulic motors

These fall within the ambit of the more general term ‘motors’ in the opponent’s specification and are therefore **identical**.

Parts and fittings for motors and for internal combustion engines; ignition systems and fuel delivery systems and parts and fittings thereof, all for internal combustion engines; exhausts, exhaust systems, fuel filters, air filters and oil filters, all for motors and engines; hydraulic pumps, hydraulic cylinders, hydraulic valves; pneumatic valves; electric fans for engines and motors.

These goods are all parts and fittings for motors and engines: motors and engines are specified in the opponent’s specification. Parts and fittings for these goods are highly complementary to the finished article. Motors and engines will not function without the parts and the parts would be redundant without the motors and engines. The same manufacturer of the motors and engines will sell the parts, hence the channel of trade is the same. Methods of use will be highly similar, if not identical. The users will be the same: those who use the engines will use the parts. In *Ford Motor Co. v OHIM*, Case T-67/07, although the judgment was given in the context of an absolute grounds consideration, the following statement by the GC in paragraph 44 has clear implications for the comparison of finished articles and their parts:

“In this case, the goods designated in the application for registration as parts and fittings for land motor vehicles are meant to be used exclusively in connection with those vehicles and cannot be used alone. The parts and fittings for land motor vehicles covered by the application for registration are inseparably linked to those vehicles and it is therefore appropriate to adopt a solution in relation to those parts and fittings that is identical to that adopted in relation to land motor vehicles.”

The goods listed above are **highly similar** to the opponent’s motors and engines.

60. Class 12

Land vehicles, parts thereof and fittings therefor.

The opponent’s term *vehicles* clearly covers Mr Kay’s term *land vehicles* and so these goods are **identical**. In relation to Mr Kay’s parts and fittings for land vehicles, the GC judgment cited above is particularly germane to the instant case as it, too, concerns vehicles and their parts and fittings. The logic set out above in relation to parts and fittings also applies here. *Parts thereof and fittings*

therefore are **highly similar** to the opponent's *vehicles; apparatus for locomotion by land*.

61. Classes 37 and 40

Restoring, tuning, repair and maintenance services, all for vehicles; consultancy, information and advisory services relating to vehicle restoring, tuning, repair and maintenance; preparation of vehicles for motor sports or for display at shows and conventions.

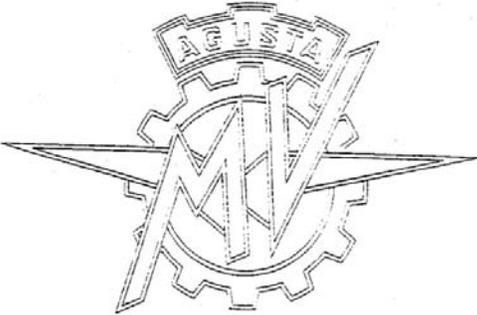
Customising and modifying services, all for vehicles; consultancy, information and advisory services relating to vehicle customising or modifying.

Although these services fall into two separate classes, they are all connected with vehicle performance, care, restoration and modification, so are all subject to common reasoning. The consultancy, information and advisory services will stand or fall with the main services to which they relate.

62. The opponent's best case lies with its class 12 goods, *Vehicles; apparatus for locomotion by land*. In comparing goods with services, there is, of course, a difference between the nature of a good and the nature of a service. Goods and services can, however, be complementary, share channels of trade and users and they can be in competition with one another. The parties' evidence about their respective businesses shows a close link between the goods and services. The same undertaking provides the vehicle as modifies it, repairs it, prepares it for racing and gives advice to the users of the vehicle: the channels of trade and the users are the same. There is a complementary and, also, a competitive relationship between the goods and the services: the choice is whether to repair or modify an existing vehicle or buy a new one, and the choice is whether to use the services of the vehicle manufacturer or an independent service provider. It is common for vehicle manufacturers to enter their vehicles in the field of motorsport (e.g. Honda, Mercedes and Lotus). Although there are differences between methods of use, purpose and nature of goods and services, the above comparison (and the evidence) shows that in other respects the goods and services are closely allied. I conclude that Mr Kay's class 37 and 40 services and the opponent's *vehicles; apparatus for locomotion by land* are **similar to a very good degree**.

Comparison of trade marks

63. I find it convenient to begin with a comparison between the opponent's CTM 629022 and Mr Kay's device marks. The opponent does not rely upon the device mark against Mr Kay's word mark.

CTM 629022	Mr Kay's mark
	

64. The authorities direct that, in making a comparison between the marks, I must have regard to each mark's visual, aural and conceptual characteristics. I have to decide which, if any, of their components I consider to be distinctive and dominant, without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details. The opponent's mark is complex, composed of a number of features. The eye is drawn firstly to the centre of the mark, that is to say, the angular, sharply pointed letters MV in combination with the cog device. From there, the eye travels outwards to the flashes and upwards to the word AGUSTA. All of the individual elements are distinctive, but the dominant distinctive element is the combination of the MV across the centre of the cog device. Mr Kay's device mark also has a cog device with a letter element in the centre of the cog. The letter M is clearly an M; in respect of the other component there is some resemblance to a letter V and it is a natural response to interpret it as such because there is a clear letter preceding it (the M). The cog device and the letters within the cog are sharply defined (more so than the letters and cog in the opponent's mark). The eye is naturally drawn to the centre of a circular element in marks, i.e. the letter component, but the cog device is also striking in Mr Kay's mark. Of the two elements of which Mr Kay's device mark is composed, the MV element has the edge in terms of dominance and distinctiveness, but not greatly so.

65. In comparing the visual, aural and conceptual characteristics of the opponent's mark against Mr Kay's device mark, the most obvious visual similarities are the cog devices in each mark with the letters MV across the middle. As said above, the MV component in the opponent's mark is clearly the letters MV, while in Mr Kay's mark there is a clear letter M and, because there is already a letter, the natural inclination of the eye is to interpret the element after it also as a letter, in which case it will be seen as a V. Although the opponent's MV letter combination is similar to the letters MV in Mr Kay's mark only to a low degree and the cog devices are different (the opponent's is in outline form, whilst the cog in Mr Kay's mark is solid), the combination of MV letters in the centre of

cog devices is nevertheless a point of similarity between the marks. The other elements of the opponent's mark are absent from Mr Kay's mark and, although both marks contain the letters MV, the opponent's mark also contains AGUSTA, which will be spoken. There is a reasonable level of aural similarity: the AGUSTA element may or may not be the element spoken before MV, which is more prominent in the opponent's mark than its MV component. As regards conceptual similarities, MV does not have a meaning beyond the bare fact that it is the letters MV. The AGUSTA element is non-English and does not have a meaning. The cog devices in both marks are easily recognisable as such, the loose concept of which is that they are parts of machines. The combination of the letters MV across the middle of a cog device is the most significant part of the comparison between the opponent's mark and Mr Kay's mark: the combination leaves a similar impression both on the eye and the mind. There is a reasonable level of similarity between the opponent's CTM 629022 and Mr Kay's device mark.

Likelihood of confusion between CTM 629022 and Mr Kay's device mark

66. It is important that I consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use (nurture) the greater the likelihood of confusion⁵. The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public⁶. In its evidence, the opponent has shown some use of the mark as represented by CTM 629022 from some time prior to the dates on which the applications were made (exhibit GC6, the photographs from the trade shows in Milan and Monaco from 1997-2000). The mark is complex and is composed of several elements which are distinctive in their own right. The combination of all the elements makes for a high degree of inherent distinctive character and the evidence is not of such a level that it can enhance (by use) what is already a high degree of distinctive character (by nature). I will proceed on the basis that the opponent's earlier mark CTM 629022 possesses a high degree of inherent distinctive character.

67. In deciding whether there is a likelihood of confusion between the marks, I must weigh the various factors I have identified and also bear in mind the principle of interdependency, whereby a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon*). I have found that Mr Kay's goods and services range from identical to similar to a very good degree to the opponent's goods.

⁵ *Sabel BV v Puma AG* [1998] RPC 199.

⁶ *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

68. I bear in mind the whole mark comparison and the dominant and distinctive elements within the marks. I should guard against dissecting the marks so as to distort the average consumer's perception of them; the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind. In my view, the imperfect picture triggered in relation to CTM 629022 and Mr Kay's device mark will be of the letters MV in the middle of a cog. These are the dominant and distinctive elements in each mark, the point of visual convergence and the conceptual hook upon which the memory will rely. I think it unlikely that the marks would be directly confused with one another. However, according to the jurisprudence cited above, I must also have regard to a scenario where, although the marks are not mistaken directly, there is a belief or an expectation upon the part of the average consumer that the goods bearing the individual marks emanate from a single undertaking because there are points of similarity which lead to association. If the association between the marks causes the public wrongly to believe that the respective goods come from the same or economically linked undertakings⁷, there is a likelihood of confusion. This is often called 'indirect confusion', but it is, nevertheless, confusion within the meaning of section 5(2)(b) of the Act. Mr Iain Purvis QC, sitting as the appointed person in *L.A. Sugar Trade Mark* BL O/375/10⁸ explained indirect confusion in the following terms:

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

69. The italicised part of Mr Purvis' explanation neatly describes the problem for Mr Kay's device mark: it is different to the opponent's CTM 629022 but it has in common with it the cog device with the letters MV in the centre of the cog and these are the common dominant elements in the context of the marks as wholes. Putting all the various factors which I have identified together, my conclusion is that **there is a likelihood of confusion between the opponent's CTM 629022 and Mr Kay's device mark**. The Kay's own use does not prevent the

⁷ *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29

⁸ All BL-prefixed decisions are available for viewing on the Intellectual Property Office's website.

opponent's objection succeeding based on its earlier CTM because there can be no statutory acquiescence defence before the applicant's mark has been registered for 5 years. **The opposition succeeds under section 5(2)(b) in relation to Mr Kay's device mark.**

Mr Kay's word mark

70. Here the comparison is to be made between the opponent's earlier marks CTM 1584705 MV AGUSTA and UK 2054757B MV-AGUSTA. As explained in paragraph 14, the opponent cannot rely upon CTM 1584796 because the specification does not cover the goods relied upon.

71. As regards Mr Kay's word only mark, this is clearly composed of the letters MV at the beginning of the mark, followed by the words Meccanica Verghera. Although it is a rough rule of thumb that the beginnings of marks are more important because it is the first component of marks which are read first, in the case of Mr Kay's word mark, the words are much more dominant and important. This is a) because they are much longer than the first element (MV) and b) because they are not English words. Meccanica is faintly evocative of the English word 'mechanical'; verghera will be seen as an invented word. In combination, MECCANICA VERGHERA has the feeling of words of Italian/Mediterranean origin. The dominant and distinctive part of Mr Kay's mark is MECCANICA VERGHERA and, as both words are of roughly equal length and are non-English words, both are more or less equal in the dominant distinctive roles which they play. This logic follows through to the opponent's earlier marks relied upon against Mr Kay's word mark, which also consist of an MV element and a non-English word, which has no evocative connotations but which looks Italian/Mediterranean and is longer than the MV element. Visually and aurally, there is a low level of similarity arising from the MV components, but no more than that because of all the other components of each mark are so different and are proportionately much more dominant in each of the marks (whether Mr Kay's mark or the opponent's marks). Conceptually, the marks are neutral, each consisting substantially of (different) non-English words which bear no resemblance to each other. There is, at best, similarity only to the lowest of degrees between the MV AGUSTA marks and Mr Kay's word mark MV MECCANICA VERGHERA.

Likelihood of confusion between earlier marks and Mr Kay's word mark

72. The high level of attention shown by the average consumer and the significant differences between the marks work against the opponent. Even with all other factors were in the opponent's favour i.e. identity of goods and a high level of inherent distinctive character, there will not be a likelihood of confusion, either directly or indirectly. The differences are sufficient to put enough distance between the parties' mark so that, despite the MV components, there is nothing else common to the marks which will cause the average consumer, paying an

above average or high level of attention, to perceive a common pattern or connection in the manner which I have described above. There will be no mistaking one for the other (direct confusion) and no belief that Mr Kay's mark is another mark belonging to the opponent (indirect confusion). Any link made between the marks by those aware of the history of the Italian business is irrelevant for this purpose because it is not the result of similarity between the marks and goods/services. **There is no likelihood of confusion between the opponent's earlier marks and Mr Kay's word mark. The opposition under section 5(2)(b) fails in relation to Mr Kay's word mark.**

Section 5(4)(a)

73. This ground has been brought against Mr Kay's device mark only. As the opponent has been successful against Mr Kay's device mark under section 5(2)(b), I do not need to consider its section 5(4)(a) ground.

Other grounds of opposition

74. Since the opponent has been unsuccessful in its 5(2)(b) ground of opposition against Mr Kay's word mark, I will go on to consider the other grounds of opposition. Before doing so, I will deal briefly with Mr Kay's point, raised in his counterstatement, about the opponent being estopped from bringing these proceedings because of the exchange of letters, referred to in the evidence summary, whereby (according to Mr Kay), the opponent knew of, and 'acquiesced' in the Kays' activities. However, Mr Braga states that the response from the Kays' attorney in 2005 indicated that there was no manufacture or sale of replicas, which satisfied the opponent at that time but that, since then, the opponent had become concerned about the activities of the Kays, including that they were trading as MV Meccanica Verghera rather than Kays Engineering and the filing of trade mark the applications, which suggested the contrary. This is borne out by David Kay's evidence where he states that he was concerned that the opponent, having twice raised the issue of trade marks, could do so again and threaten his son's business. None of this amounts to an acceptance by the opponent of the position as reflected in the trade mark applications and therefore there is no estoppel.

Section 3(6)

75. Section 3(6) of the Act states:

"A trade mark shall not be registered if or to the extent that the application is made in bad faith".

76. The material date for bad faith is the date of the filing of the application for registration⁹. Bad faith cannot be cured by some action after the date of the application¹⁰, although it is possible for actions taken after the date of application to cast light on the decision to make the trade mark application.

77. Bad faith includes dishonesty and “some dealing which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular field being examined¹¹. Certain behaviour might have become prevalent but that does not mean that it can be deemed to be acceptable¹². It is necessary to apply what is referred to as the “combined test”¹³, which means it is necessary to decide what Mr Kay knew at the time of making his application and then, in the light of that knowledge, to decide whether his behaviour fell short of acceptable commercial behaviour. Bad faith impugns the character of an individual or the collective character of a business; as such it is a serious allegation¹⁴. The more serious the allegation, the more cogent must be the evidence to support it. However, the matter still has to be decided upon the balance of probabilities.

78. A strong theme permeates the Kays’ evidence: both father and son are passionate about MV Agusta motorcycles and their heritage. David Kay gives evidence about his knowledge of the history of the MV Agusta brands and (according to his account) of MV Meccanica Verghera as a company. In

⁹ *Chocoladefabriken Lindt & Sprungli AG v Franz Hauswirth GmbH* Case C-529/07, paragraph 35.

¹⁰ *Nonogram Trade Mark* [2001] RPC 21.

¹¹ *Gromax Plasticulture Limited v Don and Low Nonwovens Ltd* [1999] RPC 367.

¹² *Harrison v Teton Valley Trading Co* [2005] FSR 10.

¹³ *Hamilton and (3) Michael Anthony Jordon v (1) Eurotrust International Limited (2) Peter Stephen William Henwood and (3) Andrew George Sebastian* Privy Council Appeal No. 38 of 2004 and also the decision of Professor Ruth Annand, as the appointed person, in *Ajit Weekly Trade Mark* [2006] RPC 25: “41 I believe the parties are agreed that the upshot of the Privy Council decision in *Barlow Clowes* is: (a) to confirm the House of Lords’ test for dishonesty applied in *Twinsectra*, i.e. the combined test⁵; and (b) to resolve any ambiguity in the majority of their Lordships’ statement of that test by making it clear that an enquiry into a defendant’s views as regards normal standards of honesty is not part of the test. The subjective element of the test means that the tribunal must ascertain what the defendant knew about the transaction or other matters in question. It must then be decided whether in the light of that knowledge, the defendant’s conduct is dishonest judged by ordinary standards of honest people, the defendant’s own standards of honesty being irrelevant to the determination of the objective element. I also bear in mind the observations of Lawrence Collins J. in *Daraydan Holdings Ltd v Solland International Ltd* [2005] 4 All E.R. 73 at 93 concerning the affirmation of recent decisions of the Privy Council made by serving Law Lords after full argument.”

¹⁴ *Royal Enfield Trade Marks* [2002] RPC 24.

particular, David Kay's evidence¹⁵ indicates a belief on his part that the original company had been liquidated and that only the bare Agusta marks had been sold on, which were unattached to any business until 1997/8 when the Agusta F4 was produced as a high end niche product. Mr Castiglioni's evidence also does not claim to have bought the MV Meccanica Verghera name: he states the opponent bought the MV Agusta marks. David Kay's references to 'the brands' at the time when his son made the applications, would seem therefore to be references to the MV AGUSTA marks, not the name MV Meccanica Verghera because he states that it was never used as a trade mark. There would also appear to be support for this belief in David Kay's reference to the letter dated 25 May 1990 (see paragraph 31) detailing the sale of spare parts to the MV Agusta Owners Club of Great Britain which says:

"We inform you that sales that you effect will be as M.V. MECCANICA VERGHERA and not as M.V. MECCANICA VERGHERA AGUSTA."

79. This letter related to the sale of spare parts, the sourcing of which had become a major problem for MV Agusta owners in the UK. The letter shows that David Kay knew that up until 1990 the Italian company was still trading in spare parts in the UK, but not thereafter because it was then the UK Owners' Club who took over such activity. In 1996, the Kays formed the partnership under the name MV Meccanica Verghera to sell their products: the evidence shows that this business, which passed to Mark Kay in 2005, when he continued trading as MV Meccanica Verghera Limited, had been trading under MV Meccanica Verghera for twelve years by 2008, when the word mark was applied for, in relation to the majority of the goods and services in the application. Further, Mark Kay/David Kay and their business had been the only supplier of parts during this period. They sold their own parts, and therefore had established an independent goodwill in a business providing parts and restoration/customisation services under the name MV Meccanica Verghera.

80. As far as concerns all the goods applied for in class 7, all the services applied for (classes 37 and 40) and the parts and fittings in class 12, the combination of the Kays' beliefs about what had happened to the MV Meccanica Verghera name, and the resumption of parts sales by their companies and the longevity of those sales and motorcycle services, meaning that the goodwill was theirs between 1996 and 2008, lead me to conclude that the word mark was not an application which was made in bad faith. Were it not for statements made in the evidence regarding complete motorcycles, it might also follow that this conclusion would include land vehicles. The term 'land vehicles' covers complete motorcycles and this aspect of the application has been singled out by David Kay in the following manner, shown with my emphasis:

"...[Giovanni] and Claudio Castiglioni have been aware since at least 1999 (and probably since 1992 when they acquired the bare trade marks, such

¹⁵ See my paragraph 29.

was prominence in relation to the MV “legacy”) that our principal business and the use of the MV brands was in respect of parts of motorcycles **(rather than complete ones)** and restoring, re-building and re-engineering services in relation to the pre-1977 machines. In fact, our work “involved” very many of the original machines. **We only produced an average of 3 complete machines utilising Magni Italian or original MV chassis per year but dealt with many more. Even those 3 bikes are not replicas in one important sense. Mark and I never have (and, I hope, never will) produce complete bikes “from scratch” – they are all original pre-1997 MV machines made by MV Meccanica Verghera SpA which we have re-engineered, repaired and restored and are never 100% made by us – I calculate that no more than 45% of each machine has been made or repaired by us and that the remaining 55% (more, in many cases) is original. I find the idea of fakes which are sold as original MV motorcycles abhorrent and I would hope that such imitations would be treated as illegal.**...The only complete machines we produce are pre-1975 racing machines which are either ridden by ourselves or raced by our nominated riders. In 2010 we had ratified the fastest lap of the Isle of Man TT circuit for air-cooled GP motorcycles at 109.1 mph which bettered the Mike Hailwood Honda and Agostini MV Augusta 1967 records of 108.3 mph. The machine was badged with my son’s applied-for logo”.

81. This is significant because (i) the application is not limited to re-conditioned motorcycles and does, in fact, cover notional use on complete bikes made ‘from scratch’; and (ii) the admission that complete bikes would be seen as fakes is an admission that the residual goodwill of the original Italian company MV Meccanica Verghera S.p.A. survives so far as complete motorcycles is concerned. In relation to bad faith, the cited authorities show that I must apply the combined test which is a) what did the applicant know at the time it made the application and b) would the applicant’s conduct (in applying for the trade mark) be judged by the ordinary standards of honest people (people who are reasonable and experienced men in the particular field) as falling short of acceptable commercial behaviour. The authorities state that it is unnecessary to enquire as to what the applicant’s own standards of behaviour are (an applicant will doubtless take the view that his particular action, however dubious in others’ eyes, is honest in his own). However, David Kay’s emphatic statements show his views regarding the production of complete/replica motorcycles, which amounts to (I am sure unwittingly) friendly fire: he leaves the reader of his evidence in no doubt that the production of complete bikes from scratch for sale (as opposed to for their own racing purposes) is “abhorrent” and something which he and his son had never done and which he hoped never would do. Unfortunately, this very activity is covered by the term ‘land vehicles’ in the application. I should add here that although Mark Kay is the applicant, he relies on the evidence filed and both father and son are indissociable in their knowledge of the relevant heritage and their commitment to Mark Kay’s

motorcycle business, Mark Kay having made the applications to register the trade marks upon his father's advice. Further, Mark Kay's evidence also makes it clear that their principal business "is not and never has been the manufacture of motorcycles". So, I will make no distinction between what David Kay and Mark Kay knew and thought at the time of the application for the word mark.

82. Although I have found that the **bad faith objection fails in relation to all the goods in class 7, parts and fittings in class 12 and all the services in classes 37 and 40, I find that it succeeds in relation to 'land vehicles' (class 12)** because it covers the complete bikes/replica bikes, the production/sale of which the applicant himself views as an activity which should be illegal. With the exception of land vehicles, which the opponent has successfully opposed, the last part of my decision will look at whether the opponent can succeed under its section 5(3) ground in relation to the goods and services in class 7, 37 and 40, and land vehicle parts and fittings in class 12.

Section 5(3)

83. As stated earlier in this decision, the opponent cannot rely upon its CTM 1584796 under this ground because its statement of use was made in relation to goods which are not covered by its CTM. The other two earlier marks under this ground are both for MV AGUSTA. It is a pre-requisite of this section of the Act that the earlier mark has the necessary reputation at the relevant date, as per *General Motors Corporation v Yplon SA* [1999] E.T.M.R. 950. Once this is established, the next stage of the enquiry is to establish whether there would be a link between the marks, as per the CJEU's judgment in *Intel Corporation Inc. v CPM United Kingdom Limited, Case C-252/07*¹⁶, although it is unnecessary to find that there is a likelihood of confusion in order to find that there is a link¹⁷.

16. "1. Article 4(4)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that whether there is a link, within the meaning of Case C-408/01 *Adidas-Salomon and Adidas Benelux*, between the earlier mark with a reputation and the later mark must be assessed globally, taking into account all factors relevant to the circumstances of the case.

2. The fact that, for the average consumer, who is reasonably well informed and reasonably observant and circumspect, the later mark calls the earlier mark with a reputation to mind is tantamount to the existence of such a link, within the meaning of *Adidas-Salomon and Adidas Benelux*, between the conflicting marks."

¹⁷ *Ferrero SpA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-552/09 P*: "53 It is true that those provisions differ in terms of the degree of similarity required. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue such that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) may be the consequence of a lesser degree of similarity between the earlier and later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see, to that effect, *Adidas-Salomon*

Even assuming both reputation and a link to go in the opponent's favour (based on a historical connection because there is little inherent similarity between M.V. MECCANICA VERGHERA and MV AGUSTA), Mr Kay's long-established trade under the word mark in relation to the class 7 goods, which are all parts and fittings, the parts and fittings in class 12 and the services in classes 37 and 40, gives him due cause to use the mark MV MECCANICA VERGHERA (I also note that, according to the opponent's section 5(4)(a) pleading, its own use of the MV logo did not commence in the UK until 1999, after the Kays had started trading as MV MECCANICA VERGHERA). It is unnecessary therefore for me to decide which of the heads of damage (detriment or unfair advantage) under section 5(3) may apply because Mr Kay has a due cause defence; i.e. the taking of any unfair advantage or causing of any detriment are not "without due cause"¹⁸. **Consequently, the section 5(3) ground fails.**

and *Adidas Benelux*, paragraphs 27, 29 and 31, and *Intel Corporation*, paragraphs 57, 58 and 66).

54 On the other hand, it is not apparent either from the wording of those provisions or from the case-law that the similarity between the marks at issue must be assessed in a different way, according to whether the assessment is carried out under Article 8(1)(b) of Regulation No 40/94 or under Article 8(5)."

¹⁸ In *Premier Brands UK Ltd v Typhoon Europe Ltd & Another* [2000] ETMR 1071, Neuberger J stated: "Thirdly, it appears to me that this conclusion is consistent with the view of the Benelux Court in *Lucas Bols* [1976] I.I.C. 420 at 425, where, when discussing the meaning of "without justifiable reason" which appeared in a similar context in the Uniform Benelux Trade Mark Act as "without due cause" in section 10(3), the Court said this:

"What this requires, as a rule, is that the user (of the mark) is under such a compulsion to use this very mark that he cannot honestly be asked to refrain from doing so regardless of the damages the owner of the mark would suffer from such use, or that the user is entitled to the use of the mark in his own right and does not have to yield this right to that of the owner of the mark ...".

On the same page, the court went on to suggest that a "justifiable reason" may be "if the user can assert an older right than that of the [registered proprietor]" but went on to emphasise that whether the alleged infringer can establish a "justifiable reason" must be "resolved by the trial judge according to the particular facts of each case".

In my judgment, those observations represent the approach which should be adopted to the words "being without due cause" in section 10(3), although it is fair to say that two criticisms can be made of this conclusion. The first criticism raises a practical problem, in the sense that this construction could be said to produce a degree of uncertainty; the second point which may be made is that, on this construction, it is not entirely to see what function the words "being without due cause" actually have. So far as the practical problem is concerned, I do not consider that it has a great deal of weight. Most cases of alleged trade mark infringement turn on their own particular facts; further, the protection potentially accorded to a trade mark proprietor by section 10(3) can be pretty wide. It does not therefore seem to me inappropriate that the tribunal considering the question of infringement under this provision is accorded some degree of flexibility as to how the provision is to be enforced. It should be made clear that I am certainly not suggesting that the court has some sort of roving commission or wide discretion; the observations I have quoted from *Lucas Bols* are quite clear on that point."

Overall outcome

84. The outcomes for Mr Kay's two trade mark applications are as follows:

(i) The opponent has been successful completely in its opposition against Mr Kay's device mark (2491505) which will be refused registration.

(ii) The opponent has been successful in its opposition in relation only to 'land vehicles' in Mr Kay's word mark application (2491504). Land vehicles will be deleted from the application¹⁹. The remaining goods and services of Mr Kay's word mark application will proceed to registration, i.e. 2491504 will become registered for:

Class 07: Parts and fittings for motors and for internal combustion engines; ignition systems and fuel delivery systems and parts and fittings thereof, all for internal combustion engines; exhausts, exhaust systems, fuel filters, air filters and oil filters, all for motors and engines; hydraulic pumps, hydraulic cylinders, hydraulic motors, hydraulic valves; pneumatic valves; electric fans for engines and motors.

Class 12: ~~Land vehicles~~, Parts of land vehicles and fittings for land vehicles.

Class 37: Restoring, tuning, repair and maintenance services, all for vehicles; consultancy, information and advisory services relating to vehicle restoring, tuning, repair and maintenance; preparation of vehicles for motor sports or for display at shows and conventions.

Class 40: Customising and modifying services, all for vehicles; consultancy, information and advisory services relating to vehicle customising or modifying.

¹⁹ See Tribunal Practice Notice 1/2012 Partial Refusals, paragraph 3.2.2(a).

Costs

85. The Registrar works to a published scale of costs (Tribunal Practice Notice 4/2007). An award of costs is intended to be a contribution rather than compensatory. With the exception of the opponent's limited success against the word mark application in respect of *land vehicles*, both sides have been successful in equal measure. I regard the almost equal measure of success as producing an almost equal sharing of the costs burden (i.e. neither side will get costs from the other side, but will bear its own costs), save for a small amount to be awarded to the opponent in recognition of its successful opposition in relation to land vehicles against the word mark application. Consequently, I order Mark Kay to pay MV Agusta Motor S.p.A. the sum of £100. 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 25th day of June 2012

**Judi Pike
For the Registrar,
the Comptroller-General**