

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/08/2009

Before :

THE HON MR JUSTICE FLOYD

Between :

NUDE BRANDS LIMITED **Claimant**
- and -
(1) STELLA MCCARTNEY LIMITED
(2) YSL BEAUTE LIMITED
(3) L'OREAL (U.K.) LIMITED **Defendants**

Richard Miller QC and Thomas Elias (instructed by **Stephenson Harwood**) for the **Claimant**
Giles Fernando (instructed by **Baker & McKenzie LLP**) for the **Defendants**

Hearing dates: 17th and 18th August 2009

Judgment

Mr Justice Floyd :

1. This is an application by Nude Brands Limited (“NBL”) for an interim injunction to restrain the First Defendant Stella McCartney Limited (“SML”), the Second Defendant YSL Beaute Limited (“YSLB”) and the Third Defendant L’Oreal (U.K.) Limited (“L’Oreal”) from infringing Community Trade Mark Registration No 5 781 745 for the word “NUDE” by applying the sign “STELLANUDE” to perfume products.
2. NBL is the proprietor of CTM 5 781 745 for the word NUDE, which is registered for a very large range of goods and services but including cosmetics and perfumery. The registration was applied for on 24th March 2007 and grant of the registration was published on 10th August 2009.
3. Currently NBL’s NUDE range includes cleansers, moisturisers, eye care products, face masks, body lotions and supplements. Collectively these can be regarded as skincare products. The range is identified by the predominant use of a graphical square shaped logo comprising four U shapes at right angles to one another with the word NUDE in small letters within one of the U shapes, presumably so that the first three Us represent N, U and D and the fourth (with the small word “NUDE” within it) represents the E.



4. NBL has never marketed a NUDE perfume, but intends to do so. The evidence establishes that this is anything but imminent, as the lead time for such a product is 2-3 years, and the evidence does not establish that the plans for such a perfume product have got beyond producing some free sampler products. NBL's products are sold in the mid to high end of the market, at retail outlets such as Harvey Nichols, Selfridges and Space NK. Their products are marketed as being free of synthetic ingredients, although this is not always so as they include synthetic preservatives.
5. NBL's products have achieved UK sales on a retail basis of about £150,000 in 07/08, £420,000 in 08/09 and £140,000 in the first quarter of 09/10. In excess of £250,000 has been spent on advertising and promotion in the UK. There has been extensive editorial coverage of the NBL product line in the UK and Irish fashion press from May 2007 onwards.
6. SML is principally a fashion company which makes and sells women's clothing designs of Stella McCartney. SML has, together with YSLB, also sold perfume products under the brand name STELLA and SHEER STELLA, and cosmetic products under the name CARE. SML and L'Oreal are now proposing to sell an eau de toilette and a scented linen spray under the name STELLANUDE. It is this which gives rise to the complaint in this action.
7. In April 2008, an associated company of YSLB sought NBL's agreement through their respective French attorneys to the use of the mark NUDE on a proposed Stella McCartney eau de toilette. The mark NUDE was to be applied below the mark STELLA, in capital letters and in a smaller typeface. An example of the proposed use was requested and supplied. This shows the word NUDE in capital letters below the marks STELLA and STELLA McCARTNEY. Consent was refused in the first half of May 2008 in a courteous but firm email from NBL.
8. On September 3rd 2008 TMark Conseils wrote saying that the YSL company considered that the project could be pursued despite the earlier rights of NBL, given the descriptive nature of the word "nude", the different representation of the name on the product packaging, the use of smaller letters for the mark underneath STELLA and STELLA McCARTNEY and the differences between perfume and skincare products. The word Nude now has a capital initial letter only: the rest in small type. They repeated the request for confirmation that NBL had no objection to this use.
9. A chasing letter was sent on 23rd September, again asking for confirmation that NBL had no objection to the contemplated use of the mark NUDE, on the basis that it

would be used in a form and presentation which was different to NBL and for different products.

10. On 25th September Rebecca Delorey wrote that she was “without news” about the consent asked for by their client and that she would ask again if the position had changed since May. On 29th September Valerie Dorey of TMark Conseils sent an email to Rebecca Delorey saying that “the project of my client is no longer the same as in the month of May and I hope that this evolution will satisfy your client”.
11. There was no further letter on behalf of NBL. Ms Delorey’s evidence is that she did not understand what the “evolution” of the product was, and that her understanding of this email was that YSL was abandoning its plans to use the name NUDE and that there was consequently no need to pursue any request to NBL for consent. I must accept that evidence for present purposes, although a review of the complete correspondence suggests that she was mistaken. The evolution referred to was probably the small change between the examples of use originally supplied and the samples supplied later.
12. A further email from TMark Conseils was apparently sent on 28th October seeking a response from NBL. Rebecca Delorey does not comment on this email in her evidence. Rather she says that she believes that the last communication was the email of 29th September 2008.
13. On 26th May 2009 TMark Conseils wrote to say that the decision had been taken to use STELLANUDE rather than NUDE, and providing an example of the use in the SML house style. The letter was sent by fax, and received by the French representatives of NBL, but did not, according to the evidence of Rebecca Delorey, come to the attention of the person responsible or NBL. There is a dispute, which I cannot resolve at this stage, as to whether a hard copy of the fax was sent, and if so, whether that came to the attention of the Rebecca Delorey or NBL.
14. NBL became aware of the proposed launch of the STELLANUDE products on 20th July 2009. The application was issued on 3rd August, and came before Blackburne J on 6th August, when it was adjourned to allow the Defendants to put in evidence. The launch is scheduled in the UK for this Saturday, August 22nd. The application comes before me as vacation judge in August, as a matter of urgency. There is no suggestion that, having learned of the imminent launch, NBL have failed to act swiftly.
15. The product which is alleged to infringe the NUDE trade mark is depicted below on the right, alongside the earlier STELLA products, STELLA and SHEER.



16. STELLANUDE is described by SML’s worldwide fragrances Managing Director, M Pinabel, as “priced at an accessible point for the average consumer, and is part of the overall commercial strategy of increasing awareness of the Stella McCartney brand in both the perfume sector and more broadly”. Ms Crook, SML’s director of Merchandising and Business Development, explains that

“The main SML “ready to wear” and accessories collections are positioned at the high-end designer level and are perceived by consumers as aspirational products. In keeping with SML’s brand values of wishing to have a wider consumer appeal, products like fragrances offer an important entry price point to the brand.”
17. It is clear that the intended launch of the STELLANUDE products is to be on a substantial scale. Some 4.8 million Euros worth of product at wholesale prices has been manufactured for worldwide distribution.
18. The term “nude” is currently used as a descriptor in the fashion industry to describe a colour palette of soft neutral tones. Such descriptive use has occurred in relation to fashion generally and also in relation to cosmetics. The use in relation to cosmetics would appear, on the material before me, to be fairly well established. Such descriptive use is obviously less appropriate in relation to a perfume, where the colour is not “worn” in the same way as cosmetics or clothing.
19. More recently the term “nude” has been used in the fashion industry to describe a fashion trend said to be associated with a look of effortless sophistication. SML has been particularly associated with this recent trend.

20. SML and L’Oreal rely on some use of the sign “NUDE” by other traders in relation to perfume. In particular they rely on a product named “YOUTH DEW AMBER NUDE” launched by Estee Lauder in 2005 in the United States; a perfume released by Bill Blass in the United States in 1990 and still apparently available called “NUDE”; and a further product called BIJAN NUDE. The extent to which these have been sold and continue to be sold in the United Kingdom is not clear from the evidence, although samples of the first two were purchased in London, apparently fairly easily, by representatives of SML during the hearing.
21. In February 2009 NBL granted a licence to Christian Dior (“Dior”) to market a limited range of products under the mark NUDE, subject to restrictions as to the manner of use. The precise terms of the licence are confidential to Dior and NBL. The agreement was part of a settlement of oppositions to trade mark applications. I was shown an example of a licensed product under the Dior agreement, which is a “hydrating makeup” sold as DIORSKIN NUDE, with the word NUDE beneath DIORSKIN in similar size type.
22. The principles on which to grant or refuse interim relief are not in dispute. I should first enquire whether the evidence discloses a triable issue of trade mark infringement, and then go on to consider whether or not, in view of the likely harm to each party if an injunction is wrongly granted or withheld, the balance of convenience favours the grant of an injunction.

Triable issue: validity

23. The validity of the mark falls to be determined pursuant to the Community Trade Mark Regulation, Council Regulation (EC) No 207/2009. SML and L’Oreal intend at trial to attack the validity of the mark on the ground that it is descriptive and non-distinctive.
24. Article 7 of the Regulation provides, as absolute grounds of invalidity:
 - “1. The following shall not be registered:
 - ...
 - (b) trade marks which are devoid of any distinctive character;
 - (c) trade marks which consist of signs or indications which may serve, in trade, to designate the kind, quality.....or other characteristics of the 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 or established practices of the trade;”
25. Mr Fernando, who appeared on behalf of the defendants, argued that the mark NUDE did not arguably reach the threshold of registrability. He argued that for cosmetics it was descriptive; for fashion generally it indicated a colour palette and a trend, and for

perfume, given that there were similar consumers, it would have the same connotation as for fashion generally.

26. Mr Miller QC, who appeared on behalf of NBL, submitted that the case for validity was more than arguable on the present evidence. Whilst he did not formally concede the case in relation to cosmetics, he pointed out that what is important here is whether the defendants will be able to show that the mark is descriptive for perfume. He drew my attention to Article 52(3) of the Regulation, which provides that:

“Where the ground of invalidity exists in respect of only some of the goods ... for which the mark is registered, the trade mark shall be declared invalid as regards those goods and services only.”

27. Mr Fernando fortified his case in relation to perfumes by reference to the other users of NUDE as a brand name for perfume. He argued that, given the availability of these brands, NUDE on its own is incapable of distinguishing the products of one manufacturer from another.
28. In my judgment it is plainly arguable that that the mark would survive the attack outlined by Mr Fernando. As to descriptiveness, it is not clearly established that, at the date of the application for the mark, NUDE was devoid of distinctive character in the relevant market in relation to perfumes, or that, in relation to perfumes, it was an indication which may serve to designate the kind or quality of the goods or any other characteristic, or that, in relation to perfumes, it had become customary in the trade. These are matters which will have to be thoroughly investigated at trial.
29. Whilst the use by other traders of the brand name NUDE in relation to perfume may give those traders relative rights to invalidate the mark, it does not give those rights to any defendant. I am not at this stage persuaded that this evidence has a bearing on any absolute ground of invalidity. It certainly does not go as far as establishing ground 7(1)(d) - customary indication in trade. Ground 7(1)(b) is concerned with the inherent character of the mark, not with what other traders have done with it. The traders in question are plainly using the mark as a brand name: so I do not see how this use can help to establish that the mark consists exclusively of signs or indications which may serve to indicate the kind or quality or other characteristics of the goods, and thus support an attack under 7(1)(c).
30. Mr Fernando’s real aim in running these validity points was, I suspect, to bolster his arguments on the balance of convenience: but NBL’s case on validity at this stage is plainly arguable.

Triable issue: Infringement

31. The rights conferred by a Community Trade Mark are set out in Article 9(1). These are the same as those provided for by the Community Trade Mark Directive and the 1994 Trade Marks Act in respect of national marks. Article 9(1)(a) says that there is infringement where there is double identity of mark and sign and goods. Article 9(1)(b) provides, amongst other things, that there is infringement where the mark and sign are similar and there exists a likelihood of confusion because of the similarity of the mark and the sign.

32. The necessary comparison is between the mark as registered and the sign. In order to determine whether infringement occurs under Article 9(1)(a) or 9(1)(b) it is necessary to form a view as to what sign SML is going to use. The registered mark is the word “NUDE”. The sign intended to be used is “STELLANUDE”. Although the mark NUDE is clearly present in the sign, my view is that the sign is not identical to the mark. In *S.A. Societe LTJ Diffusion v Sadas Vertbaudet SA* [2003] FSR 34, the Court of Justice said at [54]:

“..Art. 5(1)(a) of the Directive must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole it contains differences so insignificant that they may go unnoticed by the average consumer.”

33. The sign does include an addition to the word “NUDE”, and it is one which will be noticed by the consumer. Nevertheless, in my judgment it is plainly arguable that the sign STELLANUDE is similar to the mark NUDE.
34. NBL contend the launch of the STELLANUDE products will involve infringement of their CTM because of a likelihood of confusion. They contend that the average consumer will perceive that sign as made up of two parts: STELLA and NUDE. The average consumer will conclude that there is some association between the goods sold and the proprietor of the mark NUDE.
35. The rules for determining whether there is a likelihood of confusion are well known: see *Sabel v Puma* [1998] RPC 199 and *LloydSchuhfabrik v Meyer* [1999] FSR 627. They are summarised in *Kerly* (14th Edn) at page 589 as follows:

“(1) It is a global test taking into account all factors relevant to the parties’ marks and the goods and services in issue.

(2) The relevant factors include the degree and nature of use of the claimant’s registered mark, its inherent and acquired distinctiveness.

(3) The similarity of the goods/services as well as of the marks themselves is a part of the consideration.

(4) The visual, oral and conceptual similarity of the marks must be considered

(5) Particular regard is to be had to the dominant and distinctive elements of the marks.

(6) The sort of confusion required to satisfy the test is confusion as to origin.”

36. NBL rely on what was said in *Medion AG v Thomson Multimedia Sales Germany and Austria GmbH*, Case C-120/04, which concerned the alleged infringement of the trade

mark LIFE by the composite sign THOMSON LIFE (two words). The Court of Justice said this:

“30 However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element.

31 In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.

32 The finding that there is a likelihood of confusion should not be subject to the condition that the overall impression produced by the composite sign be dominated by the part of it which is represented by the earlier mark.

33 If such a condition were imposed, the owner of the earlier mark would be deprived of the exclusive right conferred by Article 5(1) of the directive even where the mark retained an independent distinctive role in the composite sign but that role was not dominant.

34 This would be the case where, for example, the owner of a widely-known mark makes use of a composite sign juxtaposing this mark and an earlier mark which is not itself widely known. It would also be the case if the composite sign was made up of the earlier mark and a widely-known commercial name. In fact, the overall impression would be, most often, dominated by the widely-known mark or commercial name included in the composite sign.

35 Thus, contrary to the intention of the Community legislator expressed in the 10th recital in the preamble to the directive, the guarantee of the earlier mark as an indication of origin would not be assured, even though it still had an independent distinctive role in the composite sign.

36 It must therefore be accepted that, in order to establish the likelihood of confusion, it suffices that, because the earlier mark still has an independent distinctive role, the origin of the goods or services covered by the composite sign is attributed by the public also to the owner of that mark.

37 Accordingly, the reply to the question posed must be that Article 5(1)(b) of the directive is to be interpreted as meaning that where the goods or services are identical there may be a likelihood of confusion on the part of the public where the contested sign is composed by juxtaposing the company name of another party and a registered mark which has normal distinctiveness and which, without alone determining

the overall impression conveyed by the composite sign, still has an independent distinctive role therein.”

37. NBL contend that paragraph 34 of the Court’s judgment shows that even where an earlier mark is not the dominant element of a composite mark, there can be infringement. If it were otherwise the proprietor of a well known mark would be able to take any lesser known mark provided that it attached its own mark to it.
38. SML and L’Oreal contend that there is no arguable case of a likelihood of confusion, because:
 - (a) “NUDE” is only one element of a composite mark,
 - (b) “STELLANUDE” is in Stella McCartney’s house style,
 - (c) Stella McCartney is particularly connected with the “nude” trend.
39. They submit that it is inconceivable that anyone seeing STELLANUDE on the shelves as part of the SML range (for example as depicted above) would be deceived into thinking that it is connected with NBL.
40. So far as perception of the mark to the consumer is concerned, it is clear to me that, to put it at its lowest, there is a danger of the average consumer separating out the two components of the sign. For example references in the trade press for September have variously referred to the SML product as “Nude” and “Stella Nude”. Indeed SML’s PR dossier indicates a use, albeit as a single word of StellaNude, i.e. with capital letters for each part of the mark.
41. For present purposes it is enough to say that I consider NBL’s case of trade mark infringement to be plainly arguable. There is no difficulty in seeing the NBL mark in the defendant’s sign: indeed the respective elements although merged into a single word perform different functions. The goods are identical to goods in respect of which the mark is registered.
42. Equally the defence is arguable. There is not much use of NUDE by NBL, and none in relation to perfume. As is often the case, everything will turn on the evidence at trial.

Over what period must the balance of convenience be considered?

43. NBL ask for an expedited trial, and have advanced their arguments on this application on the basis that such a trial will be ordered. They made an application to Blackburne J for expedition, which he refused on the material before him. NBL renew their application before me for a trial as early as possible in the October term. SML and L’Oreal oppose expedition.
44. The question of whether the trial should be expedited is closely related to the question of the harm which NBL will suffer if an injunction is not granted. It seems to me that if I am not satisfied that NBL will suffer significant irreparable harm between now and an unexpedited trial, I should not order an expedited one. I therefore turn to consider the question of harm to NBL first.

Harm to NBL if injunction refused

45. NBL contend that they will suffer loss under a number of heads:

(1) Damage to reputation. STELLANUDE is a lower price “flanker” product, in contrast to the higher price more exclusive market at which NBL aim their products. The damage is likely to be severe as the scale of the launch is enormous in relation to NBL’s turnover in the NUDE products. SML flanker products, like SHEER STELLA, have in the past attracted adverse publicity, as a trenchant article by Chandler Burr in the New York Times online edition for April 30th 2009 shows. Mr Burr, who is apparently the New York Times’ perfume correspondent, describes SHEER STELLA as “the Bernie Madoff of perfumes”. Moreover, the STELLA products do not share the same commitment to use of natural ingredients as the NBL ones.

(2) Damage by loss of exclusivity and dilution of its trade mark. The NBL business is at a critical stage of its development.

(3) Loss of business opportunity in respect of a NUDE perfume.

46. Mr Fernando meets the case on reputation by saying that it depends on proving real passing-off style confusion between the NBL products and STELLANUDE, which NBL cannot succeed in doing. Even if there is, as must be assumed for this purpose, an arguable case of *trade mark* infringement, he submits that in reality no purchaser of the NUDE products will be confused into thinking that STELLANUDE is anything other than a brand of SML perfume. He says that it is no coincidence that there is no passing off claim here. He submits that any adverse publicity will therefore attach to SML and not to NBL. Secondly he submits that any loss of exclusivity has to be seen in the context of a market where there already exist at least three other NUDE perfumes which the injunction will do nothing to restrain. Finally, the loss of business opportunity is, he submits, speculative and too far in the future to require the grant of an injunction now to perfect it.

47. Mr Fernando also relies on the Dior licence agreement, which he submits shows that, far from wishing to preserve the exclusivity of the mark, or prevent its dilution, NBL are prepared to trade in the permission to use the mark in return for money.

48. In my judgment, although I cannot go all the way with Mr Fernando’s submissions, the risk of irreparable harm occurring to NBL’s business or mark in the period between now and a trial is fairly small. My reasons can be summarised as follows:

i) The risk of confusion between NBL’s products and SML’s is, in my provisional view, small. The purchaser will know that she (or, more gallantly, he) is purchasing an SML perfume. The evidence does not show any real basis for supposing that a customer would be led into thinking that some form of association had been created between NBL and SML. The press reviews which have appeared make no such connection. There is no evidence of such joint venture products occurring in commercial practice.

ii) Numerous factors reinforce the view in (i): the use of the house style, the absence of the NBL logo or house style, the fact that “nude” is in fairly

widespread descriptive use elsewhere in the industry, the fact that the nude trend in the industry is already associated with SML, and the fact that the product is likely to be sold side-by-side with other SML products.

- iii) NBL does not currently enjoy exclusivity under its mark. Although the scale of sales of the existing NUDE brands is not yet clear, it does appear that at least two of the brands are fairly easily obtainable. The starting point is one where the mark NUDE alone does not guarantee that the product comes from NBL: some form of additional identifier, such as NBL's graphic device or SML's association with their fashion house would appear to be necessary.
- iv) The NUDE perfume project is far in the future. If NBL succeed in the action they will have removed SML from the market long before it is launched.
- v) The Dior licence shows that NBL are not able or concerned to protect the exclusive repute of the brand or prevent dilution. There are no quality control provisions in it. The licensed DIORSKIN hydrating makeup contains numerous synthetic ingredients, and is a product much closer to the core business of skincare than the SML flanker product STELLANUDE. As Mr Fernando submitted, it is difficult to see why NBL are prepared to grant such permissions in relation to their core business, or at least very close to it, and not in relation to a product which is further away. I infer that the reason that NBL are prepared to countenance such a product is because it is closely linked to the name Dior which appears both separately on the package and as part of DIORSKIN NUDE. But if NBL are prepared to allow use of NUDE on such a synthetic product, why is STELLANUDE, closely associated with SML's branding more harmful?
- vi) I would add that there is no suggestion that SML would not be good for any damages which they were ultimately ordered to pay.

49. Accordingly I would not regard this as a case in which, in order to protect the business and trade mark of NBL it is necessary to order an expedited trial. To do so would be to advance the case to the prejudice of other litigants, earlier in the queue, with equally or more pressing commercial and other claims. The balance of convenience is therefore to be considered pending a trial in the normal course.

Harm to SML and L'Oreal if injunction granted

50. SML's evidence was that all the arrangements for the launch of the product have been made. The cancellation deadlines for much of the advertising has passed. 26,000 units of the product are already in retailers such as Boots and the Perfume Shop. These retail partners have allocated specific slots for in-store promotions, and that schedule could not be moved. More fundamentally, M. Pinabel's evidence was that planning of the launch date is time critical. If the window of opportunity of the planned launch of STELLANUDE cannot go ahead, his view was that there was no question of it being delayed for a few months. The 2009 launch will have to be cancelled, most likely permanently. M. Pinabel summarises the position by saying that preventing the launch would cost the defendants many millions of pounds in lost investment and will bring about an incalculable loss to the goodwill and reputation of the defendants in the industry, with the media and in the minds of consumers.

51. Mr Miller's answer to all this was to say that the same could not be said for a delay of a few weeks to a trial in October or November. But, as I have already held, this is not a case where the threatened harm to NBL can be regarded as sufficiently great to justify such an early trial. Therefore I cannot dismiss M Pinabel's concerns that the effect of an injunction might be as grave as he predicts. I think I should approach the balance of convenience on the basis that an injunction will lead to the loss of the 2009-2010 Christmas selling period, and the probable loss of the brand to SML altogether.
52. Against this, it is fair to say that I was somewhat troubled by the rather slapdash manner in which YSLB's French counterpart approached the question of obtaining NBL's consent. Given that any interruption of the launch would have the effect that M. Pinabel predicts, it is perhaps unfortunate that SML did nothing further to ensure that the May 2009 request had reached and been considered by NBL. To take silence as consent in such circumstances is a highly risky strategy. Had SML and YSLB put NBL on the spot by ensuring they had notice of their intentions, NBL would not have been presented with such a *fait accompli* as they now are. Nevertheless, this is not a case where it can be said that SML have ignored NBL: the fact that the May 2009 fax (and if sent the hardcopy letter) went astray is not their fault. Moreover, it is a fair inference that SML and YSLB were proceeding on the basis of a genuine belief that their products, presented in the way described, did not infringe. In the end I was not persuaded that these pre-action interchanges really affected the view I should take of the harm on which SML and L'Oreal rely.

Balance of injustice

53. I have come to the conclusion that the balance of injustice in this case requires me to refuse the injunction. It seems to me that, in this particular case, the likely damage to SML and L'Oreal if an injunction is wrongly granted outweighs the damage to NBL if it is refused. Whilst NBL may ultimately prevail at the trial, it seems to me that an injunction and damages at that stage, though far from perfect as remedies, are more likely to be able to restore them to their rightful position than an award of damages under the cross undertaking to SML. The effect of an injunction wrongly granted against SML would be to cause a massive disruption to their business, and probably cause them to abandon use of the brand altogether. Against this I regard the likelihood of actual confusion between the products in the market place in the form in which they are currently presented as minimal. In coming to this conclusion I have not needed to attach any weight to an attack by SML on the ability of NBL to pay. Nevertheless, even though an offer to fortify the cross undertaking in damages by deposit of up to £1 million with NBL's solicitors was made, I was not persuaded that if an injunction was granted, NBL's asset position is such that the award of damages on the cross undertaking would provide full protection to SML and L'Oreal.
54. Accordingly I dismiss the application for an interim injunction and the application for an expedited trial. I will hear counsel on the form of order if it cannot be agreed.