

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2018635
BY CLIMATEMASTER LTD TO REGISTER A MARK
IN CLASS 11**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER
NO 49931 BY CLIMATE MASTER INC**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No 2018635
by Climatemaster Ltd to register a mark
in Class 11**

and

**IN THE MATTER OF Opposition thereto under
No 49931 by Climate Master Inc**

DECISION

1. On 26 April 1995 Climatemaster Ltd applied to register the following mark for a specification of goods which reads "air conditioning apparatus, heat pumps, de-humidifiers and refrigerated units".



2. The application is numbered 2018635. It proceeded to publication on the basis of "honest concurrent use with registration No 1514734".

3. On 29 June 1999 the proprietors of the above mentioned registration filed notice of opposition to the application. Details of registration No 1514734 are as follows:

No	Mark	Class	Specification
1514734	CLIMATE MASTER	11	Heat pumps and parts and fittings therefor, all for commercial purposes; all included in Class 11; but not including portable oil burning space heaters

4. The opponents also say they are the registered proprietors of a Community Trade Mark (No 402883) which enjoys a claim to seniority based on their UK registration.
5. Objection is said to arise under Section 5(2) in that the mark applied for is said to be similar to the opponents' earlier trade mark and relates to goods which are either the same or similar to those of the earlier trade mark. There is also a reference to discretion but it is well established that no such general power is available to me.
6. The applicants filed a counterstatement denying the above grounds and adding that they had used their mark on a continuous basis since July 1987. On that basis it is said that they are entitled to registration on the basis of honest concurrent use by virtue of Section 7 of the Act.
7. Both sides ask for an award of costs in their favour.
8. Both sides filed evidence. The matter came to be heard on 30 July 2001 when the applicants were represented by Mr Peter Banks, a director of the company and the opponents by Ms F Clark of Counsel instructed by Ladas & Parry.

BACKGROUND

9. This is the second action between the parties. The earlier action involved opposition proceedings under the Trade Marks Act 1938 where the parties roles were reversed. A decision on that case (opposition No 42357) was issued on 8 September 1998. The Hearing Officer found in favour of the current opponents who were at the time applicants for the mark CLIMATE MASTER. As a result of their success in those proceedings the application then under attack proceeded to registration. That registration, No 1514734, now forms the basis of the opponents' objection to the composite mark of Climatemaster Ltd's application.

THE EVIDENCE

10. The opponents have filed evidence in chief as follows:

Graham Farrington	-	Statutory Declaration of 17 March 2000
Steven J Golsen	-	Statutory Declaration of 9 February 2000
Brian Chaloner Thompson	-	Statutory Declaration of 21 March 2000

11. The applicants' evidence in chief is:

Peter Banks	-	Statutory Declaration of 28 December 2000
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12. The opponents' evidence in reply comes from:

Graham Farrington	-	Witness Statement of 28 March 2001
Brian Chaloner Thompson	-	Witness Statement of 27 March 2001

13. Mr Farrington is the opponents' professional representative in this matter. Mr Golsen is

the Chairman and Chief Executive of Climate Master Inc. Mr Thompson is a self-employed consultant working on behalf of Climate Master Inc. Mr Banks is a Director of Climatedmaster Ltd.

THE LAW

14. Section 5(2) reads:

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

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

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

15. As the respective marks are not identical, Section 5(2)(b) applies here. It is not disputed that the opponents' registration, No 1514734, is an earlier trade mark within the meaning of Section 6(1) of the Act. In the related dispute under the 1938 Act Climatedmaster Ltd's case was based essentially on Section 11. A copy of the evidence from the earlier action has been filed in the current proceedings. It is clear from this that the mark applied for is the same as that which formed the basis for the failed Section 11 action. The Hearing Officer's views on the matter of confusion were as follows:

"It is indeed true that the opponent's evidence does not deal with the matter of confusion to any great extent; nevertheless, Mr Peter Banks (for the opponent) in his statutory declaration of 29 February 1996 refers at paragraph 6 to discussions between the parties and, referring to an offer made by the applicant says:

"... I was lead to believe that if we declined their offer to purchase the CLIMATEMASTER name, they would adopt an alternative name in the United Kingdom and I believed that under those circumstances, confusion was no longer likely to result."

Moreover, in terms of confusion which may already have occurred, the opponent claims that the applicant has not used the mark to any great extent in the United Kingdom and that consequently the potential for confusion or deception to date is extremely limited. I also bear in mind that both parties are seeking to obtain/protect an exclusive right to use the name CLIMATE MASTER in this country in relation to heat pumps, albeit the opponent's trade mark also includes a device of a polar bear. To some extent therefore I suspect the likelihood of confusion must be implicit and the opponent was entitled to regard it as a matter upon which the tribunal would not require evidence."

16. In the event the action failed because the Hearing Officer reached the following view:

“Thus I come to the conclusion that, rather like the situation in *Nova* (above), any confusion or deception that may occur cannot be laid at the door of the applicant, but must be due to the subsequent entry into the market of another party (in this case the opponent) using a similar mark for similar goods. That being the case, there is no point in going further and applying the established test for objection under Section 11 to determine whether there is likely to be deception and/or confusion amongst a substantial number of persons.”

17. It is clear from these passages that the Hearing Officer was of the view that the marks and the goods were similar. In the circumstances that was not, I think, an unexpected conclusion.

18. It is a little surprising, therefore, that now that the parties roles are reversed, Mr Banks of *Climatemaster Ltd* expresses the view that:

“Because of the goodwill and reputation which my company owns in the *CLIMATEMASTER LTD* name and the distinctive company logo, we cannot understand the comments regarding confusion between the marks. They are distinctly different and thereby confusion is very unlikely to occur.”

19. In fairness to Mr Banks I think his view is based on what he sees as the absence of any instances of confusion despite his firm's continued trading.

20. Mr Farrington's reply evidence for the opponents captures the difficulty inherent in the position adopted by Mr Banks.

“In 1996 when Mr Banks' company was seeking to oppose the opponent's application for registration his evidence was that his mark and the opponent's mark were confusingly similar and that if the opponent's mark was allowed to proceed to registration it would jeopardise his business. In 2000 Mr Banks believes that the same marks are different, confusion would not occur and that failure to register his application would now be what jeopardises his business.”

21. I should place on record my own view on the issue of similarity of marks and goods within the meaning of the Section 5 test bearing in mind particularly that the previous decision was reached under the preceding law and a different test.

22. For this purpose I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] ETMR 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1999] ETMR 1, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77 and *Marca Mode CV v Adidas AG* [2000] ETMR 723. In particular I bear in mind that I must consider the distinctive and dominant components of the respective marks (*Sabel v Puma*) and that a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa (*Canon v MGM*).

23. It cannot, I think, be disputed that the parties' respective specifications, in part, cover identical goods. Both, for instance, cover heat pumps. Mr Thompson, for the opponents, describes a heat pump in the following terms.

“Contrary to the indication given by the name a heat pump is essentially a sophisticated form of air-conditioning unit. An air-conditioner will perform a cooling function. It has a cooling apparatus which cools air and redirects it back into a building and rejects the heat outside. A heat pump not only can perform the cooling function of an air-conditioning unit but it also has the ability to heat air, by reversing its refrigeration cycle. A heat pump can therefore regulate the conditions inside in a building by both heating and cooling.”

24. That explanation has not been challenged in evidence and similarity of goods must I think have been implicitly accepted in the previous action between the parties though I cannot place complete reliance on such a view of the matter given the different nature of the test under Section 11 of the preceding Act and the course that action took.

25. Nevertheless if I understand Mr Banks' position correctly at the hearing he was not entirely comfortable with the explanation offered by Mr Thompson albeit that no evidence to the contrary has been filed. Guidance from the ECJ in relation to similarity of goods is contained in the CANON case referred to above as follows:

"23. 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 end users and their method of use and whether they are in competition with each other or are complementary."

26. In addition to Mr Thompson's evidence I have the trade brochures from the parties. The applicants' business is described in PB3 as being "a specialist company providing high quality installation of heat pumps and air conditioning systems". The company's business cards etc. refer to "air conditioning, heat pumps, dehumidifiers". The opponents' main brochures at SJG1 (the 801 series document) refers to "water-source heat pumps satisfy modern demands for energy efficiencies in heating/cooling multi-room buildings". Other references demonstrate the range of capabilities of the goods

"When cooling, heat is rejected to the water from the air being cooled; when heating, heat is absorbed from the water and transferred to the air."

and

"Each unit reverses from cooling to heating by means of a reversing valve. An automatic changeover thermostat signals the unit to operate on either the cooling or heating cycle."

27. Neither the applied for specification or the specification of the opponents' earlier trade mark specify end usage beyond being for commercial purposes. It is quite clear that both

parties' goods are used in large buildings (hotels, offices, apartment blocks etc). It would seem that the opponents' goods are in the main specified by architects, contractors and the like whereas the applicants rely in large measure on referrals. There may in practice, therefore, be some differentiation in trade channels but considering as I must notional use across the breadth of the specifications I regard the applicants' goods (other than heat pumps which are identical) as being similar in nature to the opponents' goods and to be capable of performing similar functions. The potential customer base must also overlap. I have little difficulty in concluding, therefore, that the respective goods are similar within the terms of the CANON test.

28. Turning to the marks the applicants' is not identical to that of the opponents and has a prominent device element and the company indicator 'Ltd'. Mr Banks emphasised the importance of the polar bear device and the fact that it attracts attention. I agree that the device contributes to the overall character of the mark. Ms Clark, for the opponents, was inclined to suggest that the association of polar bears with cold climates renders the device allusive. If that is so it is at the margins only. In my view it is a significant and distinctive element in the mark and must be given due weight. Climatemaster Limited is the applicants' name. It is presented somewhat differently in the mark applied for with rather greater prominence being given to the word CLIMATE and rather less to the words MASTER LTD. The bear device 'sits on' the word CLIMATE and a border largely surrounds the words. The elements are thus fully integrated into the composite mark. I regard the device and the words as being likely to attract equal attention and carry equal weight in customers' eyes. There is no clear evidence as to how the applicants' mark is referred to orally but I would be surprised if the familiar adage that words speak in trade marks did not apply. The result is that the words and device must in my view be considered distinctive and equally important elements of the applicants' mark.

29. I do not need to say a great deal about the opponents' mark which is for the words CLIMATE MASTER. It is well established (*Sabel v Puma* paragraph 24) that 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. I do not think the words can be said to have any above average inherent claim to distinctiveness. Furthermore, on the evidence before me (largely material filed in the previous proceedings which the Hearing Officer found to be far from persuasive) I do not consider the opponents can claim any enhanced level of distinctiveness for their mark through use. Mr Thompson has provided supplementary information on trade or preparations for trade in the period between 1992 and 1995 but it is a long way from furthering the opponents' cause.

30. Nevertheless the applicants' mark self evidently incorporates the whole of the opponents' earlier trade mark and in my view captures the distinctive character of that mark notwithstanding the presence of the polar bear device. Although the device is unlikely to fail to make a visual impact it does not so dominate the mark that it is likely to displace or significantly reduce the impact of the words which is the element in conflict. It was held in CANON:

"..... the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked

undertakings, constitutes a likelihood of confusion within the meaning of Article 4(1)(b) of the Directive (see *SABEL*, paragraphs 16 to 18)."

31. It seems to me that someone who was familiar with the opponents' mark and who subsequently encounters the applicants' mark in relation to identical or closely similar goods might reasonably think that they were in some way related or perhaps that the opponents were now using an additional device element with their word mark. I regard that as being no less true simply because the products are aimed primarily at a professional market.

32. I should also explain for the benefit of the applicants, who were not professionally represented at the hearing, that the opponents' registration enjoys a prima facie presumption of validity as a result of Section 72 of the Act which reads:

"72. In all legal proceedings relating to a registered trade mark (including proceedings for rectification of the register) the registration of a person as proprietor of a trade mark shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it."

33. It follows that there is no requirement that an opponent must show use of his mark. In *REACT Trade Mark*, 2000 RPC 285, Simon Thorley QC sitting as the Appointed Person had no evidence before him of use of the opponents' mark but indicated

"Both counsel therefore accepted that in this case I must approach the matter on the basis of a notional and fair use of the trade mark *REACTOR*, and then to compare that with a notional and fair use of the device trade mark applied for and to assess the degree of visual, aural and conceptual similarity."

34. I have found that the respective sets of goods are identical and/or closely similar and that the association between the marks is likely to lead to a belief that the companies are in some way connected. That position is, of course, consistent with the view reached in the previous proceedings albeit that I have come to it by a somewhat different route. In the normal course of events these findings would point strongly to a likelihood of confusion. However, the applicants say that they have used their mark on a continuous basis since 1987 and are thereby entitled to registration on the basis of honest concurrent use by virtue of Section 7 of the Act. I go on to consider this claim.

35. Section 7 of the Act reads as follows:

7. - (1) This section applies where on an application for the registration of a trade mark it appears to the Registrar -

- (c) that there is an earlier trade mark in relation to which the conditions set out in Section 5(1), (2) or (3) obtain, or
- (d) that there is an earlier right in relation to which the condition set out in Section 5(4) is satisfied,

but the applicant shows to the satisfaction of the Registrar that there has been honest concurrent use of the trade mark for which registration is sought.

(2) In that case the Registrar shall not refuse the application by reason of the earlier trade mark or other earlier right unless objection on that ground is raised in opposition proceedings by the proprietor of that earlier trade mark or other earlier right,

(3) For the purposes of this section "honest concurrent use" means such use in the United Kingdom, by the applicant or with his consent, as would formerly have amounted to honest concurrent use for the purposes of Section 12(2) of the Trade Marks Act 1938.

(4) Nothing in this section affects -

- (a) the refusal of registration on the grounds mentioned in Section 3 (absolute grounds for refusal), or
- (b) the making of an application for a declaration of invalidity under Section 47(2) (application on relative grounds, where no consent to registration).

(5) This section does not apply when there is an order in force under section 8 below."

36. The provisions of Section 7 of the Act were considered by the Hearing Officer in *C.D.S. Computer Design Systems Ltd v Coda Ltd*, 2001 RPC 240. In that decision the Hearing Officer said:

"First of all I note that this provision of the Act does not derive from Council Directive No 89/104/EEC of 21 December 1998 to approximate the laws of the Member States relating to trade marks. It is thus a piece of home spun legislation which can only be interpreted as complementing rather than conflicting with the Directive. I say that because Article 5 of the Directive (the equivalent of Section 5 of the Trade Marks Act) requires a trade mark to be excluded from the register if it conflicts with an earlier trade mark or other earlier right. However, the fifth recital to the directive gives Member States latitude as to the stage at which such relative grounds are to be taken into consideration. The fifth recital states:

"Whereas Member States also remain free to fix the provisions of procedure concerning the registration, the revocation and invalidity of trade marks acquired by registration; whereas they can, for example, determine the form of trade mark registration and invalidity procedures, decide whether earlier rights should be invoked either in the registration procedure or in the invalidity procedure or both and, if they allow earlier rights to be invoked in the registration procedure, have an opposition procedure or an ex officio examination procedure or both; whereas Member States remain free to determine the effects of revocation or invalidity of trade marks;"

In relation to all applications for registration under the Act, the Trade Marks

Registry must examine them against the provisions of Sections 3 and 5 and undertake a search under the provisions of Section 37 for that purpose. If, and when, as a result of the search an earlier trade mark or earlier right is identified which is considered to be the same or similar in respect of both the trade mark and the specification of goods and services, then the Trade Marks Registry must raise an objection to the application for registration. However, if the applicant is able to show, to the satisfaction of the Trade Marks Registry, that there has been honest concurrent use of the trade mark the subject of the application with the earlier mark, under the provisions of Section 7, and with due regard to the fifth recital, the application may be accepted and published. Where the concurrent use has not been in respect of all of the goods or services for which the application is sought to be registered, the acceptance will be for those goods where there has been honest concurrent use. If there is no opposition to the application for registration either from the owner of the earlier right against which the applicant for registration claims honest concurrent use or any third party, then the application will in due course be registered. However, if opposition is filed then the registrar must determine whether the grounds for refusal upon which the opposition is based are made out. If the opposition is based upon Section 5 then the provisions of the appropriate subsections must be considered. The fact that honest concurrent use has been shown at the examination stage cannot overcome the objection.

If, for example, the trade mark the subject of the application for registration and the trade mark the subject of the earlier right were identical, and the specification of goods or services of the application was identical to the specification of the goods or services covered by the earlier trade mark, then refusal must follow under Section 5(1), which bars absolutely the registration of identical trade marks in respect of identical goods or services (unless the proprietor of the earlier trade mark consents to the registration of the later trade mark). But in relation to Section 5(2) the respective trade marks or respective specifications of goods or services may only be similar and the fact that there has been actual use of the trade mark in suit concurrently with the earlier trade mark, may be relevant in determining whether there is a likelihood of confusion.

In the circumstances and for the reasons above I reject Mr Hacon's submission that because the proprietor of the earlier trade mark against which the applicant for registration has claimed honest concurrent use has opposed the application, the provisions of section 7(2) make the refusal mandatory. However, as I have already said, the mere fact that there has been honest concurrent use is not a defence, which in itself will save an application, but it is one of the "relevant" factors which should be taken into account in determining whether there is a likelihood of confusion."

37. I now turn to the applicants' evidence bearing on their use of the mark applied for. A statutory declaration has been filed by Mr Peter Banks, director of the company who also represented the applicants at the hearing. He has been with the company throughout the period since April 1988 when the logo which is the subject of the current application, was devised. The logo is said to have been first used publicly at the Expo Humberside Exhibition on 25 May 1988 and has been in continuous use since that date. It features, as one might

expect, on letterheads, brochures, business cards etc. Exhibits PB2 and PB3 are provided in support of and as examples of this use.

38. Mr Banks describes the company's business as follows:

"3. My company specialises in the design, manufacture, installation, service, hire and commissioning of; air and water cooled air conditioners, heat pumps, water chillers, dehumidifiers, ventilation, fume extraction systems, refrigerant recovery units and both the name CLIMATEMASTER LTD and the company logo have been used continuously in relation to such activities.

4. The products and services of my company have been provided throughout the United Kingdom and set out below are a selection of towns and cities wherein goods and services with a sales value exceeding £4,000 have been sold:-

Bedford	Cambridge	Colchester	Dunstable
Edinburgh	Glenrothes	Great Yarmouth	Grimsby
Huntingdon	Ipswich	Kings Lynn	Luton
Lowestoft	Northampton	Norwich	Orpington
Otley	Peterborough	Scunthorpe	Sheffield
Stevenage			

In addition to the towns and cities listed, sales and promotional materials issued by my company have been circulated throughout the United Kingdom to such an extent that my company owns a substantial reputation and goodwill in relation to the name CLIMATEMASTER LTD and in relation to the company logo.

5. Annual sales turnover figures for my company for the years 1988-to-date are as set out below:-

Year Ending	Turnover £
31.05.1988	- 7,567
31.05.1989	- 26,816
31.05.1990	- 24,522
31.05.1991	- 96,400
31.05.1992	- 60,117
31.05.1993	- 72,800
31.05.1994	- 101,985
31.05.1995	- 42,285
31.05.1996	- 55,573
31.05.1997	- 35,613
31.05.1998	- 69,392
31.05.1999	- 63,812
31.05.2000 (figures awaiting final audit - estimated sales 54,812)	
31.05.2001 (Sales to-date indicate estimated turnover 75,000)	

Exhibit PB4 hereto comprises a representative sample of invoices issued by my company over the years 1988-1995."

39. The opponents have made a number of criticisms of this evidence. Firstly Mr Farrington, their trade mark attorney, noted in his witness statement that the exhibits to Mr Banks' declaration (and the declaration itself) were substantially the same as those filed in evidence in 1996 to support the honest concurrent use position during the course of prosecution of this application before the Registry. However the invoices had been changed and in point of fact a different set of invoices used. Mr Banks explained that this was because the invoices previously supplied (or copies thereof) had been lost so a further selection of invoices had been provided. The loss is not in itself critical but gave rise to a further and more fundamental point of concern for the opponents. This is encapsulated in Mr Farrington's witness statement commenting on the two sets of invoices (for ease of reference hereafter I will refer to them as the 1996 invoices and the 2000 invoices).

"An analysis of the invoices attached to the newer PB4 shows that these relate principally to labour and materials rather than to goods. Most of the invoices rendered to Leeds Permanent relate to remedial works, the two to Banks Refrigeration Services Ltd are wholly for labour. There is nothing in any of that evidence to suggest Mr Banks has used his mark on any goods for which his application is filed. The position is even clearer when the invoices from PB4 in 1996 are analysed. The work for British Steel involved the installation of Airedale Concept 2000 brand heat pumps, City Amusement Centres were supplied Dakin brand heat pump air conditioning units, Mr Bennett received Airedale brand equipment, Hussmann Refrigeration had a Mitsubishi brand air conditioning system installed. Not one invoice relates to the installation of an air-conditioning unit or heat pump bearing the Applicant's mark."

40. I should say by way of explanation that the comparison process is possible because the opponents have (as they were entitled and able to do) filed a copy of the evidence relied on by the applicants at the examination stage. It is part of Exhibit GF2. I will return to these issues below.

41. There has been no challenge to the honesty of the applicants' use and for my part I entirely accept the honesty of their trade. The relevance of honest concurrent use to my appraisal of the issue of likelihood of confusion must entail some analysis of the nature and extent of use and the area of trade. These are concepts that were well established under the PIRIE case 1933 RPC 147 when considering honest concurrent use.

42. I do not know what the size of the market is for heat pumps, air conditioning apparatus and such like goods or what position the parties occupy in that market. Both parties' evidence suggests that the goods would have applications in virtually any large building complex (offices, retail premises, apartments, hotels, schools etc). That suggests a potential market of some considerable size. There appears to be some disagreement between the parties as to the typical value of a heat pump unit. Mr Farrington suggests that a single unit sells for £10,000 (paragraph 8 of his witness statement). That estimate sits uneasily with Mr Golsen's view that a unit would typically sell for £600 to £700 (paragraph 2 of SJG 3). Also Mr Farrington is not, I think, an expert in the field. Mr Banks was more inclined to the lower of these figures.

43. The point is of some relevance in so far as it helps me to judge the size and nature of the applicants' business. Even if the lower of the above estimates of typical unit costs are nearer the mark it must, I think, point to the applicants' business being of modest size. It also appears that their business has a relatively narrow client base with a considerable number of the invoices being for British Steel in Scunthorpe and various Leeds Permanent Building Society branch offices.

44. However it is the nature of the applicants' use as much as the scale of use that was the subject of argument at the hearing. It is worth remembering at this point that the application under attack has been made in respect of air conditioning apparatus, heat pumps, de-humidifiers and refrigerated units in Class 11. That is to say it is an application for goods and not services (installation and repair of the goods at issue would for instance fall within Class 37 of the Nice Classification system). The opponents' contention put simply is that the applicants are in the business of designing, installing, commissioning, maintaining etc. heat pumps and related goods under the mark, in other words the provision of services. Furthermore it is said that any goods supplied as part of those services are third party branded goods. The point is of some importance in relation to the claim to honest concurrent use and the affect of that use on the likelihood of confusion. The turnover figures given by Mr Banks are for the company and do not distinguish between sales of goods and services. I assume the same is true of the relatively small sum spent on advertising and promotion (£5,500). The principal source of further information on the applicants' trading activities are the company brochure at PB3 and the invoices at PB4 and GF2 to Mr Farrington's witness statement. The company brochure confirms that the company offers "design, installation, commissioning, service and maintenance contracts, refurbishment of existing equipment." I note too that the company is said to be an approved installer for Toshiba, Mitsubishi, Marstair, Qualitair, Prestair and Myson. The brochure therefore lends some support to the opponents' claim that the applicant is primarily a service provider who supplies third party goods where necessary. From the photographs of installed products shown in the brochure it is possible to see certain third party brands but also the applicants' polar bear device either alone or in association with the other brands. I find this evidence on its own to be inconclusive. Without further elucidation it does not tell me whether the applicants' mark is being used in relation to the goods (in addition to a third party brand) or as the mark applied in relation to, say, an installation service.

45. Mr Banks dealt frankly with the position at the hearing. I approach his comments with some hesitation for no reason other than that his explanation of his company's business arguably came close to giving oral evidence at times. In essence he acknowledged that his company supplied both services and goods. The goods can either be equipment from third party suppliers or items that have been designed and produced by Climatemaster Ltd. A mixture of technical requirements and cost will determine which it is in any particular case. If an off the shelf product from a third party can do the job it is likely to be specified or supplied. If not then Climatemaster Ltd has the capacity to design and custom build equipment.

46. It will be apparent from that brief overview of the applicants' activities that some care is needed to distinguish between the provision of services and the provision of goods. A supplementary issue arises with regard to the latter as to precisely what marks are shown. The

evidence before me does not, for reasons I will explain, enable me to distinguish between the various strands of the applicants' activities.

47. The 1996 invoices (PB4 of GF2) show a mixture of installation of third party goods, installation of goods where the invoices do not refer to a brand and remedial work. The latter includes the supply of materials (again no brands are mentioned). It may be that the applicants' own brand appeared on some of the goods or materials but I simply cannot tell from the invoices alone.

48. The 2000 invoices largely relate to remedial work on installed equipment. I take this to be primarily the service of maintenance/repair. A further invoice relates to relocation of a piece of equipment and the final two to labour costs charged to a related company. The remedial work invoices mainly cover costs of materials, hours and plant. The plant charge is small and may simply relate to the hiring of equipment to undertake the work. Most of the cost is materials and hours (labour). The labour cost is typically about three times the cost of materials. It is not possible to determine from the invoices what the term 'materials' covers and what branding was used.

49. In summary the applicants' evidence shows some goods' sales involving third party brands; some goods sales where no brand is mentioned in the invoices and I have no means of knowing what brand (if any) was actually used; some sales of materials the precise nature of which and any associated branding is not revealed; and a large proportion of invoices relating to the service activities undertaken by the applicants.

50. Given the closeness of the marks and goods at issue the applicants' concurrent trading would only weigh heavily in my consideration of the likelihood of confusion if there were clear evidence that the parties' activities had exposed the relevant public to the competing brands and that the latter were shown to be able to distinguish between them. In practice I am unable to reach such a conclusion. The absence of instances of confusion is, it seems to me, little more than a reflection of both parties' relatively small scale activities to date and the fact that the applicants' activities are directed more towards the provision of services. It seems likely also that the parties have hitherto operated in discrete areas of the marketplace with the opponents primarily selling systems to prospective building owners/developers/consulting engineers and the applicant's having a largely referral based business and a small number of core customers. The fact that confusion has not arisen in the past is not a guarantee that it will not occur in the future. I must also bear in mind what it will be notionally open to the applicants to do if they were to secure a registration. In the circumstances I find that there is a likelihood of confusion and the opposition succeeds under Section 5(2)(b).

51. The opponents have been successful and are entitled to a contribution towards their costs. I order the applicants to pay the opponents the sum of £935. This sum is based on the published scale of costs and makes some allowance for the fact that the opponents were represented by Counsel at the hearing. 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 28 day of August 2001

M REYNOLDS
For the Registrar
The Comptroller-General

