

O-048-04

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION No 2223632
IN THE NAME OF BAISEMARK LTD t/a NORTHERN SUEDE AND LEATHER
TO REGISTER THE TRADE MARK BARNEYS IN CLASS 25

AND

IN THE MATTER OF
OPPOSITION THERETO UNDER No. 80556
BY BARNEY'S INC.

Trade Marks Act 1994

In the matter of application No 2223632

**in the name of Baisemark Ltd t/a Northern Suede and Leather
to register the trade mark BARNEYS in Class 25**

And

**In the matter of opposition thereto
under No. 80556 by Barney's Inc.**

BACKGROUND

1. On 26 February 2000, Baisemark Ltd, trading as Northern Suede and Leather, applied to register BARNEYS as a trade mark in Class 25 in respect of:

Outer clothing of leather.

2. On 17 January 2002, Barney's Inc. filed notice of opposition, the grounds on which the opposition is based being as follows:

Under Section 5(4)(a) by virtue of the law of passing off.

Under Section 32(2)(b) because the application was incorrectly filed in that Northern Suede and Leather Limited did not exist as a corporation and therefore there was a failure to disclose the name of the applicant as required by Section 32(3).

3. The applicants filed a counterstatement in which they deny the grounds on which the opposition is based.

4. Both sides ask that an award of costs be made in their favour.

5. Both sides filed evidence in these proceedings. The matter came to be heard on 11 November 2003, when the applicants were represented by Mr Richard Hill of Wilson Gunn McCaw, their trade mark attorneys. The opponents were represented by Ms Fiona Clarke of Counsel, instructed by Maguire Boss, their trade mark attorneys.

Opponents' evidence

6. This consists of a Witness Statement dated 22 August 2002, from Marc Perlowitz, Executive Vice President and General Counsel of Barney's Inc, a company he has been employed with for sixteen years.

7. Mr Perlowitz claims that his company has built up a substantial reputation in the UK through sales

to British tourists to the United States, and he goes on to give some opinions on the nature of, and statistics relating to the tourist trade. He also mentions sales to British customers effected via his company's web site.

8. He goes on to outline the history of his company, which started trading in 1923, and which he describes as "an exclusive fashion house". He refers to exhibit MP1, which consists of a article dated 17 February 2002, taken from the website of the Observer, which refers to the collections of fashion designers having been available at Barney's in New York and Los Angeles.

9. Mr Perlowitz goes on to refer to exhibits MP2 to MP5, which consists of a number of advertisements that he says were placed in the New York Times, claiming that the publication has a wide circulation in the UK, including at various public locations such as libraries, and also on line via the New York Times website. He says that exhibit MP6 consists of an advertisement placed in a magazine entitled Interview, which was published in the 1970's and 1980's by Andy Warhol. He says that the magazine sells 960 copies, although not whether this is daily, weekly or whatever, and is sold in several leading fashion stores in London. Although the advertisement mentions BARNEY'S NEW YORK, there is nothing that indicates that it appeared in the magazine prior to the relevant date.

10. Exhibits MP8 and MP9 consist of advertisements from the December 1998 and August 2001 editions of New York magazine. Mr Perlowitz says that the magazine is distributed all over the world, referring to sales and pass-on readership in the UK, and visitors to the US reading the publication, but no specific details are provided.

11. Mr Perlowitz says that a significant number of London's buyers of designer goods are likely to have heard of BARNEY'S in New York. He goes on to list the locations of his company's other nineteen stores, including two in Japan.

Applicants' evidence

12. This consists of two Witness Statements. The first, dated 23 December 2002 comes from Richard Hill of Wilson Gunn McCaw, the applicants' representatives in these proceedings, and does no more than introduce the Witness Statement dated 3 March 2001, by Sidney Arron into these proceedings. The earlier Witness Statement had been filed to demonstrate use of the applicants' mark during the ex-parte examination, and on the strength of which the application was allowed to proceed in the face of conflicting marks on the basis of Honest Concurrent Use.

13. Mr Arron is the Managing Director of Baisemark Ltd, who trade as Northern Suede and Leather. He confirms that the mark BARNEYS has been in continuous use by his company since June 1995 in relation to outer clothing of leather. He refers to exhibit SA1 which consists of a brochure depicting leather menswear and women's wear, although this cannot be attributed to any particular date. He lists the turnover figures for the years 1995 through to 1999, which range from £100,000 in 1995, rising year-on-year to £1,500,000 in 1999. He continues saying that his company advertises in trade journals, expending some £5,000 per annum. He refers to his

company having attended the Birmingham NEC Menswear Show in 1998, and the MXL exhibition/show at Earls Court in 1999, expending some £30,000 attending such exhibitions.

Opponents' evidence Rule 13(11)

14. This consists of a further statement by Marc H Perlowitz. Mr Perlowitz gives further details of the extent of his company's advertising in the New York Times, stating that the paper is distributed in the UK, primarily by subscription, and that the first edition available in the UK in which BARNEYS had an advertisement appeared on the 12 August 1948. Mr Perlowitz says that as of 30 September 2000, the total circulation of the New York Times in England was 182 issues per week day, and 869 issues for the Sunday paper. He gives figures relating to the amounts spent by his company placing advertising in the paper. He refers to exhibits A to CC, which consists of purchase orders, predistribution orders, confirmation orders and a list of credit card customers resident in the UK.

15. It is not entirely clear, but the purchase orders list "vendors" in the UK and appears to be purchases by the opponents from UK suppliers, but in any event, all are dated well after the relevant date. The same appears to be the case in respect of the confirmation of order documentation. The list of credit card customers details names and addresses within the UK, but does not say when or what was purchased. This evidence has no evidential value in these proceedings.

16. That concludes my review of the evidence insofar as it is relevant to these proceedings.

Decision

17. The opponents' first ground is not one connected to the ownership of any particular rights, but is an assertion that the application did not comply with the requirements of Section 32(2) of the Act. In a Witness Statement dated 23 August 2001, Mr Harry Nicholas Gee, a solicitor acting for the applicants states that at his clients' request he gave instructions to Wilson Gunn McCaw, a firm of trade mark attorneys, to file an application for the trade mark BARNEYS. He says that the instructions were to file the application in the name of Northern Suede and Leather Limited, whereas it should have been made in the name of Baisemark Limited trading as Northern Suede & Leather. Northern Suede & Leather Limited did not and does not exist. The error was later noticed and brought to Mr Gee's attention by Sidney Aaron, the Managing Director of the applicants' company in a letter dated 22 August 2000. On 9 January 2001, some 11 months after the filing of the application on 26 February 2000, an application was made to have the correct name recorded.

18. The amendment was made under the provisions of Section 39. That section reads as follows:

"39.-(1) The applicant may at any time withdraw his application or restrict the goods or services covered by the application.

(1) If the application has been published, the withdrawal or restriction shall also be published.

(2) In other respects, an application may be amended, at the request of the applicant, only by correcting-

(a) the name or address of the applicant,

(b) errors of wording or of copying, or

(c) obvious mistakes,

and then only where the correction does not substantially affect the identity of the trade mark or extend the goods or services covered by the application.

(3) Provision shall be made by rules for the publication of any amendment which affects the representation of the trade mark, or the goods or services covered by the application, and for the making of objections by any person claiming to be affected by it.”

19. I have no reason to doubt the veracity of Mr Gee’s statement that this was a genuine error. As an amendment to the name the request clearly fell within Section 39(2)(a) and did not fall foul of the proviso to that section. Ms Clarke sought to persuade me that the amendment had been made too late. The correction of the name may well have been requested some considerable time after the filing of the application, but as far as I am aware, neither Section 39 nor any other provision of the Act or Rules place a limit on the time during which an amendment can be made. Ms Clarke was unable to take me to any authority or provision that stated that there is such a time restriction.

20. Whilst the amendment of the name of the applicant is permissible by Section 39, there is another provision that has to be taken into account. Section 32(2) sets out the basic requirements of an application in order for it to achieve a filing date. The section reads as follows:

“**32.**-(1) An application for registration of a trade mark shall be made to the registrar.

(2) The application shall contain-

(a) a request for registration of a trade mark,

(b) the name and address of the applicant,

(c) a statement of the goods or services in relation to which it is sought to register the trade mark, and

(d) a representation of the trade mark.”

21. Section 33 of the Act stipulates that the date of filing of an application for registration of a trade mark is the date on which documents containing everything required by Section 32(2) are furnished to the registrar.

22. Ms Clarke's first line of attack was that the failure of the applicants to provide the correct name and address should result in the application being considered a nullity. Where there is found to be a deficiency in an application, and as a result it does not satisfy the requirements of Section 32, the provisions of Rule 11 put in place a time limit in which to put an application in order, and the consequences of failing to do so. Rule 11 reads as follows:

“**11.-** Where an application for registration of a trade mark does not satisfy the requirements of section 32(2), (3) or (4) or rule 5(1) or 8(2), the registrar shall send notice thereof to the applicant to remedy the deficiencies or, in the case of section 32(4), the default of payment and if within two months of the date of the notice the applicant-

(a) fails to remedy any deficiency notified to him in respect of section 32(2), the application shall be deemed never to have been made; or

(b) fails to remedy any deficiency notified to him in respect of section 32(3) or rule 5(1) or 8(2) or fails to make payment as required by section 32(4) the application shall be treated as abandoned.”

23. Ms Clarke sought to use this provision to say that as the amendment was not made within two months, the consequences must follow. The problem with this is that the error was not apparent to the registrar, and consequently, no notice was or has been sent to the applicants to remedy the deficiency. I do not, therefore, consider that the consequences of Rule 11 can be visited upon the application in this case.

24. In the alternative, the opponents submitted that in not providing the name of the applicants, the application did not satisfy the requirements of Section 32(2), and in accordance with Section 33 of the Act, the filing date should be that on which all of the information required by Section 32 were provided to the registrar. In the case of the latter course of action, Ms Clarke submitted that an adjournment should be granted to enable the opponent to amend the grounds of opposition to rely on any grounds that would now be open to it on the basis of the later date. Mr Hill took the view that the amendment of the name from Northern Suede & Leather limited to Baisemark Limited trading as Northern Suede & Leather was a correction that did not change the identity of the intended applicant, only its correct corporate title.

25. At the hearing I stated that I considered the amendment of the name to be more significant than as put by Mr Hill. The applicants' name should have been shown as Baisemark Limited. Northern Suede & Leather is no more than a trading style. Until the amendment it would not have been apparent that Baisemark Limited had any involvement with the application, and accordingly, that under the provisions of Section 33 of the Act, the requirements of Section 32(2) were not met until the correct name was provided to the registrar, which was done on 9 January 2001.

26. With due consideration I directed that the filing date be amended to this date. The amendment was to be (and subsequently has been) published in the Trade Marks Journal allowing persons who may have been affected by the amendment to object to the application proceeding. The application

was also to be subjected to a further search to determine whether as a consequence of the application having a later filing date, there were other trade marks that would be regarded as “earlier trade marks” for the purposes of Sections 5(1) and 5(2). This has been completed and no earlier marks (other than those revealed in the initial examination) were discovered. I consider that this action ensures that any third party rights have not been prejudiced by the original filing error, and the subsequent amendments.

27. The matter is further complicated by the application having proceeded on the basis of evidence of use filed by the applicants. During its ex-parte examination the registrar had raised objection under Section 5(2)(b), citing three earlier marks, although none owned by the opponents. This was communicated to the applicants’ representatives in an examination report dated 25 September 2000, after the date that Mr Aaron had told them about the error in the applicants’ name, but before the amendment had been requested and agreed by the registrar. One citation was subsequently refused and fell away. To overcome the remaining two, the applicants filed evidence to show that the mark has been in use. The evidence was considered to justify acceptance under the honest concurrent use provisions found in Section 7 of the Act, the proviso being that the specification be restricted to “outer clothing of leather”.

28. The evidence was headed “In the matter of UK trade application No. 2223632 in the name of Northern Suede & Leather Limited”, and sworn by Mr Sydney Aaron of Baisemark Limited trading as Northern Suede & Leather. Ms Clarke submitted that the evidence was flawed and did not provide a basis upon which the mark could, or should have proceeded, and that being published on an incorrect basis, particularly with the wrong filing date, may have affected the basis on which other parties might have regarded themselves in a position to oppose or liable to succeed in opposition.

29. The attack on the evidence is not, in my view, contained within the grounds of opposition, but even if it had been, I am content that it is correctly headed for the proceedings as they stood at the time of its filing, and show actual use in respect of the real and intended applicant. It may not be perfect, but in the circumstances how else could it have been filed? I do not consider it to be appropriate to question whether the substance of the evidence justifies the acceptance of the application.

30. I therefore find that the ground under Section 32(2) succeeds, but only insofar as it results in an amendment to the filing date. I therefore direct that under the provisions of Section 33(1), the filing date of the application will be amended to 9 January 2001, the date that the name of the applicants was furnished to the registrar.

31. Ms Clarke considered that in the circumstances, the current proceedings should be adjourned and her clients permitted to amend their statement of grounds, and to file further evidence to reflect that the target date had moved. On the amendment to the grounds, Ms Clarke made specific mention of the provisions protecting well known marks found in Section 56. I do not see that moving the filing date suddenly opens this as a ground of attack where it was not previously. If the opponents wished to rely on this provision, it was open to them to do so when they started the

proceedings, and that is when they should have done so. I therefore refused Ms Clarke's request to have Section 56 added to the grounds of opposition.

32. The remaining part of the opposition is under Section 5(4)(a). As far as I was aware, the opponents' position had not materially changed because of the later filing date; they had no other rights to rely on other than those protectable by the law of passing-off. The evidence that they had filed covered a period both before and after the later filing date, and I could not see what, if anything, they could provide in support of their case that they could not have provided in the evidence that they had already filed. However, in the interests of fairness I allowed the opponents two months in which to file additional evidence, but on the basis that if the evidence had been available at the time of filing the original evidence, that it be accompanied by an explanation as to why it had not been filed earlier, and that failure to provide an explanation would result in the evidence not being accepted. The power to admit and make directions on the filing of additional evidence comes from Rule 13(11). I further directed that any evidence filed was to be copied to Mr Hill, who would have one month from its receipt in which to make any comments. Evidence was received from the opponents on 19 January 2004, and is summarised above.

33. Turning to the ground under Section 5(4)(a). That section reads as follows:

“5.-(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

34. The opponents contend that they would succeed in an action for passing off against the applicants should their mark be used in the United Kingdom. A helpful summary of the elements of an action for passing off can be found in Halsbury's Laws of England 4th Edition Vol. 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd - v - Borden Inc* [1990] RPC 341 and *Erven Warnik BV - v - J. Townend & Sons (Hull) Ltd* [1979] AC 731 is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

- (1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

- (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of "passing off", and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that;

"To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”

35. To the above I add the comments of Pumfrey J in the *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* case [2002] RPC 387, in which he said:

“There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the Registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent’s reputation extends to the goods comprised in the applicant’s specification of goods. The requirement of the objection itself are considerably more stringent than the enquiry under Section 11 of the 1938 Act (See *Smith Hayden (OVAX)* (1946) 63 RPC 97 as qualified by *BALI* [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed at the relevant date. Once raised the applicant must rebut the prima facie case. Obviously he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of possibilities that passing off will occur.”

36. The opponents’ business has been trading in the United States under the name BARNEYS since 1923, which is approaching 80 years at the relevant date in these proceedings. They have retail outlets in several US cities and also in Japan. Their “flagship” store is located in New York in the major retail area of Madison Avenue. Mr Perlowitz says that the BARNEYS stores are not mass retail outlets, but exclusive fashion houses, at one time being the only New York store to feature European designers, and now features collections of established and newly emerging designers. He describes the typical customer as being affluent, stylish and knowledgeable about fashion. On the evidence before me I have no doubt that BARNEYS has a strong reputation and goodwill in the United States, but the question is whether they have any reputation or goodwill in the United Kingdom?

37. There is no evidence from the trade or the public. There is no evidence that gives even a ballpark figure for the extent of use within the United Kingdom, although given that the opponents are primarily relying upon a trade with UK consumers visiting the United States this is perhaps not surprising. Mr Perlowitz gives figures for the number of visitors from the UK to the US in the years 1999 to 2001, saying that in 1999, nearly 1 million visited New York, the home of the BARNEYS flagship store. Ms Clarke conceded that it is not known how many of these would have visited the

store, but argued that as it is a major tourist attraction, quite a number would have done so. As Ms Clarke accepted, this does little to help me in gauging the opponents' likely reputation.

38. Mr Perlowitz says that British tourists who have visited the BARNEYS stores can, on returning home, purchase from the extensive range of BARNEYS goods via his company's website, and that a great number of sales are made overseas each year. Although the opponents may make provision for orders from outside of the United States via the Internet, as Jacob J said in the 800-FLOWERS case, [2000] FSR 607:

“The mere fact that websites can be accessed anywhere in the world does not mean, for trade mark purposes, that the law should regard them as being used everywhere in the world.”

39. To be of any assistance Internet evidence would, at the very least require details of use of the site by persons within the United Kingdom, and in this case, details of sales effected by this means, but even with such evidence (and there is none in this case) considerable care would have to be exercised in the interpretation of the bare facts. It may well be the site came up in the results of an unrelated search, and the person did not take much, if any notice of its contents. There is no evidence that orders were placed from within the United Kingdom via the website and I do see how I can say that such use has established a reputation within the United Kingdom,

40. There is a list of UK credit card customers but apart from names and addresses there is nothing that says what was bought, or when, so I cannot see what evidential value it has. On my reading there is not one piece of evidence that establishes that any sales of goods have ever been made in the UK, or to any consumer resident in the UK prior to the relevant date in these proceedings.

41. In his evidence Mr Perlowitz provides an extract from The Observer website that contains a report dated 17 February 2002, mentioning BARNEYS alongside prestigious UK stores such as Harrods and Selfridges as stocking the clothes of some new designers. Whilst this could be taken as showing that BARNEYS has a reputation in the UK, and by its association with what must generally be accepted as some of the premier stores in the UK, a prestigious reputation, it does not establish that this was the case at the relevant date. Ms Clarke referred to the fact that the article mentions the 2002 London Fashion Show, and to BARNEYS having purchased the first collection of two new UK based designers. Ms Clarke extrapolated this to be the previous years collection, and potentially, a purchase made prior to the relevant date, but given that the article is dated February 2002, and the collection could have been produced any time within the previous year, this seems unlikely.

42. Then there are the purchase orders and order confirmations. Setting aside the fact that all post date the relevant date by some considerable time, these may well show a trade with the UK, but apparently with suppliers of goods to be sold in the stores in the US. These suppliers undoubtedly are aware of BARNEYS, but there is nothing to say that the goods being exported are branded BARNEYS. Accordingly, I do not see that this evidence provides any basis for a claim to a reputation in the UK.

43. Mr Perlowitz says that since August 1948, his company has regularly placed advertisements in the New York Times, a publication that they say is available in the UK, and also on line via the Internet. He provides some examples of advertisements, all of which were placed after the relevant date in these proceedings. The opponents also mention having placed advertisements in a magazine entitled “Interview”, Mr Perlowitz saying that in the 1970s and 80s, the magazine was run and published by Andy Warhol. A copy of an advertisement said to have been placed in the magazine is exhibited, but cannot be dated as originating prior to the relevant date. Mr Perlowitz does not say whether these are typical or representative of earlier advertisements. It is also relevant that they all refer to the opponents as BARNEYS NEW YORK. Whilst I do not doubt Mr Perlowitz when he says that both the New York Times and Interview magazine are available in the UK, and may even be widely read, there is no evidence that shows use of BARNEYS prior to the relevant date.

44. Mr Perlowitz also mentions the New York magazine in which his company has advertised. He does not say that it is, or was available in the UK, only that American magazines are distributed all over the world and that through sales in the UK and pass-on readership, a significant section of the British population has come into contact with publications in which BARNEYS places advertisements. There is no evidence to support this contention.

45. In my view the opponents’ evidence provides no more than a suggestion that they may have a reputation and/or goodwill within the UK. In the *Radio Taxicabs (London) Limited v. Owner Drivers Radio Taxi Services Limited* [2001] WL 1135216, Mr John Randall Q.C., sitting as a Deputy Judge of the High Court, considered a passing off claim on the basis of goodwill in the name RADIO CABS, making various comments, inter alia, that he was faced with “*the total absence of evidence from members of the wider public*”. The judge went on to find that the burden of proving reputation with the general public lay on the claimant, stating at paragraph 96 of his decision:

“I consider it possible that the claimant may have built up a sufficient reputation in the ways relied upon but I cannot conscientiously put it any higher in the Claimant’s favour than that..... Thus one is left to speculate. Speculation is not enough. At the end of the day the burden of proving on the balance of probabilities, the requisite reputation with the general public in the name “Radio Taxis” lies on the claimant and I find that the claimant has not discharged it.”

46. Where Mr Randall QC refers to the “wider” or “general” public, I believe it is appropriate to read “the relevant consumer of the goods in question”, and taking this, and the comments in the *South Cone* case into account, on the evidence before me I find the opponents to have singularly failed to establish that, at the material date, they possessed a reputation or goodwill in the mark BARNEYS in the UK. That being the case, I do not see that there can be a finding of misrepresentation, or that there is anything that can be damaged by the applicants’ use of their mark. The ground of opposition founded under Section 5(4)(a) is dismissed accordingly.

47. The opposition has been successful, although only insofar as the filing date has been amended. On the substantive issues the opponents have failed to prove their case. In the circumstances I

consider that an award of costs should be made to the opponents, but proportional to the success of their case. I therefore order the applicants to pay the opponents the sum of £1,000 calculated on the basis of £200 being the statutory fee for filing the opposition, £300 for considering the statement of case in reply, and £500 for attendance at the hearing. The evidence filed by the opponents has been of little if any use in establishing their case, and I do not consider that it merits any award of costs. The costs awarded 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 23rd day of February 2004

**Mike Foley
for the Registrar
the Comptroller General**