

O-298-04

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 2291247 IN THE NAME OF  
HARVARD APPARATUS LIMITED**

**AND**

**IN THE MATTER OF  
OPPOSITION THERETO UNDER NO. 90723  
IN THE NAME OF NORMAN HARRISON**

**Trade Marks Act 1994  
In the matter of application No. 2291247  
in the name of Harvard Apparatus Limited**

**And**

**In the matter of opposition thereto  
under No. 90723 in the name of Norman Harrison**

**Background**

1. On 29 January 2002, Harvard Apparatus Limited applied to register the trade mark FLUOVAC in Class 10 in respect of **ANAESTHESIA APPARATUS**.
3. On 19 June 2002, Norman Harrison filed notice of opposition based on the following grounds:
  1. **Under Section 5(4)(a)** by virtue of the law of passing off.
  2. **Under Section 3(6)** the applicants were well aware of the opponent. Having previously had a commercial relationship as a distributor and were well aware that the mark applied for belonged to the opponent. In making the application they acted in bad faith.
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 7 July 2004, when the applicants were represented by Ms Helyn Mensah of Counsel, instructed by Cripps Harries Hall, Solicitors. The opponent was represented by Mr Bruce Marsh of Wilson, Gunn, McCaw, his trade mark attorneys.

**Opponent's evidence**

6. This consists of four Witness Statements. The first is dated 27 February 2003, and comes from Norman Harrison, who describes himself as an inventor and scientist, stating that since 1980 he has operated his own company selling products that he had created, designed and made, a schedule of these being attached as a schedule to his Statement.

7. Mr Harrison says that in September 2001, he met with Mr Marks of Harvard Apparatus Limited (the applicants) at the premises of IMS, a company that Harvard had purchased. Mr Harrison says that at the meeting Mr Marks fully accepted that all rights in the FLUOVAC belonged to him, in support referring to a letter from Mr Marks shown as document 1. The letter, dated 12 September 2001, was written by Mr Michael Marks as Managing Director of Harvard Apparatus Limited, to Nicholls & Co whom Mr Harrison says are his solicitors. Mr Harrison highlights the following extract:

The complications are as I explained in our first telephone conversation, that when we purchased IMS we were led to believe that the Fluovac was a wholly owned product of the company and that your client was a sub-contractor. I am sure that you can imagine my surprise during my first meeting with Norman, when it became apparent that this was not the case.

8. Mr Harrison takes this to be an admission that IMS did not own the rights in FLUOVAC, stating that Mr Marks had had the opportunity to investigate the issue, and to make enquiries with IMS staff. Document 2 consists of further correspondence between Mr Harrison's solicitors and Mr Marks'. Whilst the letters contain details relating to the respective rights claimed, they do not add any factual evidence to the case particularly as some are marked as being 'without prejudice'. Document 3 consists of a letter sent by Mr Harrison's solicitors to Ms Julia Davenport, the previous owner of IMS. Mr Harrison says that they have not received a reply.

9. Mr Harrison goes on to give the history of his involvement with the FLUOVAC apparatus, stating that in 1979, whilst working as a research scientist for ICI, he was asked to participate in some work and take photographs of equipment and diagrams that were to form part of an article entitled 'Evaluation of a scavenging system for use with inhalation anaesthesia techniques in rats' (document 4) published on 2 November 1979. Mr Harrison refers to a letter that he sent to Air Control Installations Chard Limited regarding air flow measurements (document 5). Neither the article, nor the letter make any mention of FLUOVAC. The article makes no mention of Mr Harrison having any involvement.

10. Mr Harrison says that following his retirement in October 1980, he obtained permission from ICI to redesign and market the scavenging equipment, stating that ICI allowed him to acquire all rights to the equipment on the proviso that he should not mention the company. He recounts his development and testing of the equipment, saying that this all took place before IMS came into existence.

11. Mr Harrison states that his first customer was ICI, who in August 1982 ordered eleven units which at that time were named FLUOSORBER. Document 6 being a photograph of the equipment which bears no marking by which to date it, or to indicate the name under which the

apparatus was sold. Mr Harrison says that he entered an agreement with James W Turner (Liverpool) Limited under which they had rights to sell the FLUOSORBBER.

12. Mr Harrison says that he renamed the equipment FLUOVAC (although not when) because it was shorter, the prefix FLUO coming from the anaesthetic Afluothane® and VAC coming from the vacuum process used by the machine. He states that he sold the equipment to several pharmaceutical companies, including in 1982, IMS, a company run by Julia Davenport to whom Mr Harrison had been married. He refers to a letter that he received from Ms Davenport, extracts from which he quotes. He places particular reliance on the fact that Ms Davenport refers to her own company's products as indicating that the FLUOVAC is his, but does not refer to the fact that Ms Davenport states the FLUOVAC to be manufactured for her company by Mr Harrison. Mr Harrison refers to document 8 which consists of a selection of correspondence and documentation mostly relating to C.E. Certification, some, although not all referring to FLUOVAC. Whilst they show Mr Harrison to have been involved in the development, manufacture and supply of the FLUOVAC apparatus, it is not clear whether this is on his own account, or on behalf of another company. Mr Harrison asks, if IMS state the product was theirs and not his, why did they not obtain conformity themselves?

13. Mr Harrison goes on to say that between December 2001 and 29 October 2002, he manufactured and sold 194 FLUOVACS, only 76 being sold to Harvard Apparatus Limited who were just one customer. Document 9 consists of a purchase order dated 21 September 2001, by which IMS Limited ordered eighteen FLUOVACS from Mr Harrison's company, the delivery to be made to Harvard Apparatus Limited. Document 10 consists of a schedule of sales of the FLUOVAC and various parts and accessories in the period April 2001 to April 2002, to IMS, Harvard, and two other companies.

14. Document 11 consists of a photograph and description of a FLUOVAC, Mr Harrison drawing attention to the engraved label he says that he attached. The page is undated and I can see nothing that supports Mr Harrison's claim to have affixed the label. He refutes the applicant's claim to having devised and affixed the mark to the FLUOVAC, in support referring to document 12. This consists of a photograph of a FLUOSORBBER being offered for sale by James W Turner (Liverpool) Limited. There is no mention of Mr Harrison or his company, and the page cannot be dated. Document 13 consists of an advertisement from an American company advertising FLUOVAC. There is nothing by which to date the advertisement, and apart from a manuscript entry stating that the nozzle was made by ARP, Mr Harrison's company, nothing to show a connection with Mr Harrison. Document 14 consists of a letter dated 16 October 2001, from Vet Tech Solutions (one of the companies listed in document 10) to Mr Harrison, seeking to purchase the FLUOVAC and ancillary equipment. Mr Harrison takes the view that the fact that the letter refers to FLUOVAC as "your product" supports his claim to be the owner of the mark, and the goodwill and reputation it has.

15. Mr Harrison produces a second Witness Statement dated 16 March 2003, in which he confirms that since 1980 when he began construction of the FLUOVAC, he has sold some

2,155 units, having a total value of , 646,500. In support he exhibits the following documents:

- S letter from Air Control Industries Limited confirming that they have been supplying Mr Harrison with fans for the construction of his anaesthetic scavenging equipment which he calls FLUOVAC,
- S schedule of sales of unspecified products by Air Control Industries Limited, the earliest dating from 1986,
- S manuscript record of sales of FLUOVAC from 1980. This states that there are no records available from 1980 to 1986, giving an estimate of 70 units per annum. From 1986 onwards a year-by-year figure is given.

16. The next Witness Statement is dated 26 February 2003, and comes from Barry David Harrison, a mechanic/technician, and Mr Norman Harrison's son.

17. Mr Harrison says that in 1981 he began working in the engineering business that his father had started some two years previously. He states that at that time the main products of the business was a scavenging unit, with most of the development being carried out in their own workshops. Mr Harrison says that he recalls the product was called FLUOVAC, and that IMS was one of their customers.

18. Next come two identically worded Witness Statements, both dated 25 February 2003, made by Greg Spencer and Robert Whalley, the Managing Director and Research and Development Director of VetTech Solutions Limited respectively. Both recount working for Julia Davenport at IMS, although do not say over what period or in what capacity. They state that one of the products sold by that company was a FLUOVAC which was purchased by IMS from Mr Norman Harrison. They say that they always understood the name FLUOVAC and the product of that name to be the property of Norman Harrison.

### **Applicants= evidence**

19. This consists of a Witness Statement dated 2 October 2003, from Michael Robert Marks, Managing Director of Harvard Apparatus Limited, a position he has held since 1999, and since 2001, a Director of IMS Limited, a wholly owned subsidiary.

20. Mr Marks gives the history of the FLUOVAC apparatus, stating that around 1982 it was being sold by a partnership trading as International Market Supply (IMS), the partners being Julia Harrison (referred to above as Julia Davenport) and David Jones, the business becoming a limited company in 1998. He says that Harvard Apparatus Limited acquired the entire share capital of IMS in June 2001, and in October 2001, acquired as a going concern, all undertakings and assets of the company, including their business selling the FLUOVAC and the goodwill in

the name.

21. Mr Marks gives details of the number of FLUOVAC units sold by IMS in the years 1982 to 1998. The earliest sales are shown to have been made in 1985 when 10 units are said to have been sold, the peak being in 1993 when 120 units are stated to have been sold. For the years 1999 to 2001, Mr Marks gives the actual value of the FLUOVAC units sold as being , 81,562.13, , 65,646,16 and , 78,795,04 respectively. Mr Marks states that the accounting records of IMS do not show the amounts spent promoting the FLUOVAC.

22. Mr Marks refers to exhibit MM1, which consists of a letter dated 14 July 1982, from Mrs J A Harrison of IMS, to a Dr Prinz of the Department of Medicine, University of California. The letter refers to an enquiry being made to Mr N Harrison of A.R.P, regarding the scavenging unit that Dr Prinz had seen on a visit to ICI Pharmaceuticals Division. The letter states that IMS are in the process of redesigning and improving the unit to include a double mask and a specification of 110 volts. Mrs Harrison continues saying that the replacement Aldasorbers will be available from IMS in Autumn 1982, and that she will provide further details when the apparatus is on the market. She concludes by giving details of freight charges to the USA. There is no mention of FLUOVAC.

23. Exhibit MM2 consists of a letter dated 26 January 1983, from Mrs J A Harrison of IMS, to Heidi Luginger of Engstroem Elektronedizin GmbH. The letter says that Engstroem distribute the Aldasorber in Germany, and encloses literature on the FLUOVAC supplied by IMS mentioning that it incorporates the Aldasorber. The letter also mentions FLUOSORBER apparatus.

24. Exhibit MM3 consists of a letter dated 31 January 1983, from Mrs J A Harrison of IMS, to Nelia Wohanka of Conjoint Export Services Ltd, enclosing literature on the FLUOVAC, and discussing the possibility of Conjoint selling the product in overseas markets, specifically in South America. The letter gives details of the cost of the FLUOVAC.

25. Exhibit MM4 consists of a letter dated 14 February 1983, from Mrs J A Harrison of IMS, to J.H.A. Goodwin of Patton Consultants in Taiwan. The letter gives technical information relating to the FLUOVAC, details of its price and encloses literature.

26. Exhibit MM5 consists of a letter dated 17 February 1983, from Mrs J A Harrison of IMS, to L J Curry, Director of Inter-Pharma Limited, enclosing literature on the FLUOVAC, and discussing the possibility of meeting with Mr Curry to discuss a potential market for the apparatus. Mrs Harrison mentions that the FLUOVAC unit is sold directly to universities, research and similar outlets in the UK. The letter gives unit costs for the apparatus and ancillary items.

27. Exhibit MM6 consists of a letter dated 17 May 1984, to ICI plc, referring to gaining U L approval of the FLUOVAC in the USA, and mentioning various technical details. It is not possible to determine the sender.

28. Exhibit MM7 consists of an instruction sheet relating to the use of the FLUOVAC. This bears the name and address of IMS, but is not dated. Mr Marks says that he believes the sheet dates from 1986, although not how or why he believes this to be the case.

29. Exhibit MM8 consists of an extract from a paper on Laboratory Animal Anaesthesia dating from 1987, which refers to a scavenging unit being available from IMS, although does not mention FLUOVAC.

30. Exhibit MM9 consists of an extract from a paper entitled "A modified anaesthetic vapour extraction system" credited to Susan Hunter, J B Glen and C J Butcher of ICI, stated to be a reprint from Laboratory Animals Vol 18, No 1, January 1984. A footer states "Received 8 June 1983. Accepted 25 July 1983". The paper refers to the FLUOVAC giving IMS as the supplier.

It appears to have been written by at least one of the scientists, J B Glen credited with the paper referred to by Mr Harrison in his first Statement, and mentioned in this later paper. It refers to modifications such as placing the adsorber in a vertical position and changes to the electric fan, both stated by Mr Harrison to be improvements that he made between 1980 and August 1982, when he says he supplied ICI with eleven units under the name FLUOSORBER.

31. Exhibit MM10 consists of a letter dated 7 November 1986, from Valerie Wright of the University of Oxford, to Julia Harrison of IMS, Mr Marks referring to the fact that it mentions "your system". As it does not mention FLUOVAC, or even a scavenging system, it provides no useful evidence.

32. Exhibit MM11 consists of an extract from a paper entitled "A modified anaesthetic induction chamber for rats" published in 1992. The paper refers to the FLUOVAC giving IMS as the supplier.

33. Exhibit MM12 consists of an article referring to IMS as being the supplier of the FLUOVAC, which Mr Marks says originates from "1995 or later". Given that the references mention another paper dating from 1996, this paper must post-date that date.

34. Exhibit MM13 is an extract from an article dating from 1998, which although mentioning IMS as being the supplier of a gas scavenging system, makes no reference to FLUOVAC.

35. Exhibit MM14 consists of a paper dating from January 1993, entitled "An overview of the IMS FLUOVAC system" referring to the apparatus as having been in use for "some years", a letter dated 16 July 1986 referring to IMS as having supplied a FLUOVAC scavenging unit, and a letter dated 28 April 1986 from David Jones, a partner in IMS regarding the conformity of the electric motor of the FLUOVAC with a BSI standard.

36. Mr Marks goes on to give details of the sales of FLUOVAC by his company for the years 2001 to 2003, which amount to £22,744, £35,591 and £21,698 respectively. He says that his company does not have separate accounts for the amounts spent promoting the FLUOVAC, and

other than saying that it has been included in a catalogue distributed world-wide and at every trade show attended, gives no specific details. A copy of a catalogue dated 2003 is shown as exhibit MM15. The FLUOVAC and various ancillary parts are shown in the catalogue, and is promoted as an IMS and Harvard product. Mr Marks goes on to comment on the evidence of use provided by the opponent, in particular mentioning VetTech Solutions Limited, a company formed by an ex-employee of IMS. He refers to exhibit MM16 which consists of a leaflet relating to a filter weighing mechanism sold under the name VetScav.

37. Mr Marks says that the opponent initially applied the mark to the apparatus on behalf of IMS, but for at least the last ten years this has been done either by IMS or by his company. He refers to exhibit MM17 which Mr Marks says is a list of serial numbers for FLUOVAC as sold by IMS and the applicant, the number being applied by the opponent. Exhibit MM18 consists of a list of customers, inter alia, showing the serial number of the apparatus bought. Mr Marks states that out of total of 2038 serial numbers shown in exhibit MM18, 1,284 (63%) represent units sold by IMS or his company. He goes on to say that he has no explanation for the other 847 serial numbers, but that there is no evidence that these were sales of the FLUOVAC to third parties. Mr Marks estimates that sales of FLUOVAC by IMS prior to 1988 amounted to some 1,500, but does not say how he comes to this figure.

38. Mr Marks says that Julia Davenport has told him that she thought of the name FLUOVAC which was decided upon at a meeting between her and Mr Harrison, and that IMS would market and sell the product because the opponent did not have the necessary expertise. But regardless of who invented the mark, it has been IMS who have marketed and sold the product bearing the name, and who have built up a reputation and goodwill in the mark.

39. Mr Marks does not dispute that the FLUOVAC apparatus has been manufactured on behalf of IMS and his company by the opponent, but submits that it is IMS and his company that have marketed and sold the product under the mark on their own account as their product.

40. Exhibit MM19 consists of technical drawings and other documentation which Mr Marks says relate to IMS seeking to ensure conformity of the components to CE standards. He says that this supports the view that IMS regarded the product as their own, and that the fact that IMS agreed that the opponent as the manufacturer of the product should secure the compliance is in no way inconsistent. The remainder of Mr Marks' Statement consists of submissions, which although I have not summarised, I will take fully into account in my decision.

### **Opponent's evidence in reply**

41. This consists of a Witness Statement dated 17 March 2004 from Norman Harrison, the opponent in these proceedings. The Statement consists of submissions on the evidence provided by Mr Marks on behalf of the applicants, and exhibits that in all but two cases have already been summarised. I do not therefore intend to summarise the submissions or duplicated evidence, but will take them fully into account in my decision.



42. Of the two new exhibits. Exhibit NH2 consists of a letter dated 5 December 2003, from Jonathon Wood, Managing Director of Datasend Limited, described by themselves as a leading supplier in the biotechnology industry. Mr Wood states he has approached Norman Harrison (ARP Ltd) requesting permission to market his product, the Fluovac. I take this to be a typographical error and Mr Wood is, in fact saying that he sought permission to market the FLUOVAC, which is somewhat different to seeking to purchase the mark as Mr Harrison suggests.

43. Mr Harrison also exhibits a collection of invoices (NH3) for purchases of the FLUOVAC made by VetTech Solutions Limited, all of which date from 2003, well after the relevant date in these proceedings.

#### **Applicants' further evidence.**

44. At the hearing the applicants sought leave to file further evidence consisting of a Supplementary Witness Statement, dated 28 June 2004, from Michael Robert Marks. The Statement introduced a copy of a "Hive Up Agreement" dated 5 March 2004, under which International Market Supply Limited became the property of Harvard Apparatus Limited. After hearing submissions from both sides I admitted the document into the proceedings. Whilst it mentions that all assets of IMS are transferred to Harvard, there is no mention of intellectual property, or more specifically, FLUOVAC. It therefore adds to the picture but does nothing to resolve the ownership of the mark.

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

#### **Decision**

46. Turning first to the ground under Section 5(4)(a) of the Act. That section reads as follows:

A5(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.@

47. Mr Geoffrey Hobbs QC sitting as the Appointed Person in the *Wild Child* case [1998] RPC 455 set out a summary of the elements of an action for passing off. The necessary elements are said to be as follows:

- (c) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (d) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and
- (e) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

48. To the above I add the comments of Pumfrey J in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House, Gary Stringer (a partnership)*, [2002] RPC 19, 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.®

49. The name FLUOVAC is used in connection with apparatus for anaesthetising small animals and in scavenging unwanted gases. There appears to be no dispute that the apparatus originated from ICI, a company that Mr Harrison worked for as a research scientist. Mr Harrison says that he came into contact with the then un-named scavenging apparatus in 1979 when he was asked to participate in some work that was to form part of a paper on the evaluation of scavenging apparatus. The paper was subsequently published on 2 November 1979, and whilst it makes no mention of Mr Harrison, I see no reason to doubt his claim; the applicants have not done so.

50. Mr Harrison says that it was whilst working on the paper, that he noticed the scope for improving the apparatus, and having taken early retirement, obtained permission to do so from

ICI. He gives a detailed account of the improvements that he made to the apparatus, including the redesign of a fan unit supplied to Mr Harrison by Air Control Industries Ltd. Exhibit Doc5, a letter to that company dated 2 October 1979, and a letter dated 13 March 2003 (Doc A) confirms that that company has been supplying Mr Harrison with fans for his scavenging apparatus since 1980.

51. Mr Harrison says that he initially sold the product under the name FLUOSORBER, the first customer being ICI, who are said to have purchased eleven units in August 1982. Exhibit MM1, consists of a letter dated 14 July 1982, from Ms Julia Harrison/Davenport of IMS, to a Dr M Prinz, which refers to an enquiry having been made to Mr N Harrison of A.R.P. regarding an anesthetic scavenging unit that Dr Prinz had seen during a visit to ICI. From this it seems reasonable to infer that these scavenging units were the ones that Mr Harrison says that he supplied.

52. At the same time as the ICI order, Mr Harrison says that he granted James W Turner (Liverpool) Ltd rights to sell the apparatus. Confirmation of this is given in a leaflet (Doc12). Although un-dated, the leaflet can be allocated a date range by the use of FLUOSORBER, a name that Mr Harrison says he stopped using some time after the ICI delivery in August 1982 when he adopted the name FLUOVAC. Mr Harrison says that he subsequently sold the FLUOVAC to several pharmaceutical companies, although provides no further details or corroborative evidence, and that at some time in 1982, Ms Julia Davenport of IMS became a customer, but again there is an absence of detail and supporting evidence. The most that can be said that is that assuming these sales took place, they must have occurred some time after the ICI sale in August of 1982. A letter dated 26 January 1983 (exhibit MM2) from Ms Davenport of IMS to a potential customer is the earliest documentary evidence of the name FLUOVAC. The letter refers both to the FLUOVAC anesthetic scavenging unit, and users of a similar apparatus called FLUOSORBER.

53. It would therefore seem that the name FLUOVAC came into being some time between August 1982 and 26 January 1983. Unfortunately, the evidence does not tell me whether the name was the invention of Mr Harrison and applied to his previously named FLUOSORBER apparatus that he subsequently sold, inter alia, to IMS who in turn sold it on, or whether Mr Harrison's company supplied scavenging apparatus to IMS, either un-named and subsequently branded FLUOVAC by them, or already branded FLUOVAC, the name having been applied on their behalf. If anything the evidence appears to raise more questions than it answers, for example, if Mr Harrison coined the name FLUOVAC for use with scavenging apparatus to be supplied by him, why was the enquiry from Dr Prinz passed on to IMS when Mr Harrison appears to have put in place his own distribution arrangements for the FLUOSORBER?

54. The evidence showing use of the FLUOVAC name following its first appearance in January 1983 does little to clarify the muddy waters surrounding its origins or ownership. Examples of correspondence to prospective customers show IMS to have had a continual involvement in the sales and promotion of the FLUOVAC scavenging apparatus. They issued instructions on its use, and were regularly referred to in technical journals as being the producer or supplier of the

apparatus. Mr Harrison exhibits a letter (Doc7) sent to him in August 1997, by Ms Davenport of IMS, relating to CE marking requirements. The letter states:

AWith our own products we have to demonstrate Due Diligence in management of CE issues and formal safety assessment of products....I assume that you have not progressed along this path with the Fluovac which you manufacture for us. We could include the equipment in with our own as an IMS product...Although we can have the equipment tested at our expense the initial pre-test report on the Fluovac revealed certain points which would need correction prior to testing...Perhaps you would examine each of the points and comment on them...@

55. A further letter from Mr Harrison to IMS/Ms Davenport dated 17 December 1997 (Doc 8) refers to Mr Harrison's company as having supplied a number of FLUOVAC apparatus, quoting the serial number of each unit. These serial numbers appear in the list of sales shown at MM18, confirming delivery to IMS on the date of Mr Harrison's letter, and dispatched to a customer shortly thereafter. The letter goes on to state that the next batch will conform to the new CE regulations and that a revised parts list and drawings to CE regulations will be supplied at some later date. Mr Harrison also mentions an increase in the price for the units, stating that this was necessary because of the introduction of a more expensive motor, and the extra time and cost involved in assembly with the CE approved design.

56. From this correspondence it would seem that Ms Davenport does not regard the FLUOVAC to be an IMS product, but what does that mean? It could be that IMS have products that they themselves manufacture, and others that are made for them by other manufacturers. It could just as easily mean that IMS are buying Mr Harrison's apparatus and selling it on. Either scenario could be consistent with Mr Harrison being responsible for the CE issue.

57. Mr Harrison provides figures relating to the sales of FLUOVAC dating from October 1980, but given that by his own evidence he did not adopt the name until after August 1982 (the ICI sale) this cannot be an accurate statement of affairs. He provides an estimate of the number of units that he sold between October 1980 and August 1986, stating this to amount to some 70 units annually, but does not say how he came to this figure. The first specific figures for sales of FLUOVAC date from August 1986, showing that up to December of that year Mr Harrison sold some 25 units.

58. Mr Harrison exhibits a letter (Doc A) from Air Control Industries Limited (ACI) that attests to that company having supplied Mr Harrison/ARP with fans for the FLUOVAC since 1980. Whilst I accept that they may have been supplying fans used in the development of the apparatus, and that were later used in the FLUOSORBER and subsequently the FLUOVAC, for the reason stated above they cannot have been supplying them for the FLUOVAC from 1980. Also exhibited is Mr Harrison's order history with ACI. This records the earliest order as being the purchase of ten fans on 19 August 1986. Coincidentally, this is the same month and year that Mr Harrison appears to have started maintaining records of the sales of FLUOVAC. There is no explanation as to why, if ACI were supplying Mr Harrison in 1980, there is no mention of

this in their records. But whatever, this evidence does not assist me in answering the question as to the ownership of the FLUOVAC name.

59. Mr Harrison says that from 1980 to March 2003, he has sold some 1,735 units. For the period August 1986 to March 2003, the ACI record shows over 2000 transactions with Mr Harrison, although this does not say whether these relate solely to fans. From the product coding and amount per unit it seems reasonable to infer that the vast majority relate to fans, the primary item supplied by the company to Mr Harrison. Extracting the entries that do not appear to relate to fans, this record appears to show sales of fans to Mr Harrison in the period August 1986 to March 2003 in excess of Mr Harrison's total sales of FLUOVAC, of which 420 are estimated to have been made in the five to six years prior to ACI's records. There is no obvious explanation for this apparent inconsistency.

60. Setting aside the questions over the commercial relationship, there does not seem to be any dispute that IMS obtained the FLUOVAC from Mr Harrison. A comparison of the respective sales figures show that IMS account for all but a small proportion of Mr Harrison's production. This is also shown by an examination of exhibit MM18, which consists of a list of the sales of the FLUOVAC made by IMS. This helpfully includes the serial number of each unit. The earliest entry dates from November 1985, and for some unknown reason relates to unit 1467. There are also unexplained gaps in the serial numbers listed. This leaves me with a question. If the FLUOVAC belonged to IMS and was being made on their behalf by Mr Harrison, how is it that Mr Harrison was apparently able to sell the apparatus himself? Again, this evidence does little to clarify who owns the mark.

61. There are Witness Statements from Greg Spencer and Robert Whalley, both ex-employees of IMS who subsequently set up a company under the name of VetTech solutions Limited. I am somewhat concerned by the fact that these Statements are expressed in identical language. Mr Whalley's Statement appears to have contained two errors relating to the date he commenced employment with IMS, and surprisingly, his age. Whilst it is possible that Mr Whalley made an error in his recollection of the date of his employment, it seems unlikely that he would have done so in respect of his age. This reinforces my suspicion that Mr Whalley's, if not both Statements were pre-prepared ready for a signature. In the *Royal Berkshire Polo Club* trade mark case [2001] RPC 32, Geoffrey Hobbs QC sitting as the Appointed Person stated:

These and the preceding paragraphs of their statutory declarations contain synchronised statements expressed in what appear to me to be closely prescribed terms. Such statements invite scepticism of the kind expressed by Lord Esher M.R. in *Re Christiansen's Trade Mark* (1886) 3 R.P.C. 54 CA, at 60:

"Now, to my mind, when you have evidence given upon affidavit, and you find a dozen people, or twenty people, all swearing to exactly the same stereotyped affidavit, if I am called upon to act upon their evidence, it immediately makes me suspect that the affidavits are then not their own views of things and that they

have adopted the view of somebody who has drawn the whole lot of the affidavits, and they adopt that view as a whole and say 'I think that affidavit right' and they put their names to the bottom.'"

62. Whilst I do not go so far as to say that for this reason the two Statements should not be given any weight, I do approach them with a degree of scepticism. Mr Spencer and Mr Whalley both state that they know the FLUOVAC to be one of the products sold by IMS, and that they were all purchased from Norman Harrison. They also say they understood the FLUOVAC name and product to be the property of Norman Harrison. Mr Spencer and Mr Whalley do not give any details of the capacity in which they were employed by IMS, or the basis on which they make their statement, and it is therefore not possible to assess whether they were in a position to know anything about the FLUOVAC. Consequently, I do not consider that these Statements provide any conclusive support to Mr Harrison's claim to be the owner of the FLUOVAC name.

63. Mr Harrison takes the view that the letter dated 12 September 2001 from Mr Marks of Harvard Apparatus Limited to his solicitors (Doc 1) is an admission by Mr Marks that the FLUOVAC name did not belong to IMS, and accordingly, cannot belong to Harvard. What Mr Marks says is that when his company purchased IMS they were led to believe that the FLUOVAC was a wholly owned product of the company and that Mr Harrison was a sub-contractor, and goes on to express his surprise at it becoming apparent that this was not the case. Presumably Mr Harrison had told Mr Marks that he owned the FLUOVAC and not IMS. Whilst this could be interpreted as an acknowledgment that Mr Harrison owns the rights to FLUOVAC, it can just as easily be taken to be the natural reaction by Mr Marks to being told that IMS did not own the name when he believed that they did. Mr Marks continued his letter stating that it was his intention to meet with his solicitors to look at options and determine a course of action. From the subsequent exchange of correspondence it is clear that Mr Marks and his solicitors did not accept Mr Harrison's claims. In my view, neither the letter, nor the offer to purchase the rights that Mr Harrison believes he holds can be taken to be an admission of Mr Harrison's claim to own FLUOVAC.

64. The person that could possibly have shed some light on the true position regarding the ownership of the mark is Julia Davenport/Harrison, but for whatever reason she appears to have chosen to remain outside of these proceedings. That being the case, I am left to make the best that I can based on the facts before me.

65. The evidence has provided little in the way of assistance in trying to unravel this case, seeming to raise more questions than it provides answers, and I would say not adequately proving either side's case. That said the onus rests with the opponent who must establish that he has a goodwill or reputation for the scavenging apparatus in the mind of the consumer by association with the name FLUOVAC. In my view he has not done so. Having failed to discharge that onus, I do not see how I can find there to be any misrepresentation, or that the opponent will suffer damage. I therefore dismiss the ground under Section 5(4)(a).

66. This leaves the ground under Section 3(6). That section reads as follows:

**A3(6)** A trade mark shall not be registered if or to the extent that the application is made in bad faith.@

67. A claim that an application has been made in bad faith implies some deliberate action by the applicant which they know to be wrong, or as put by Lindsay J in the *GROMAX* trade mark case [1999] RPC 10 A...includes some dealings which fall short of the standards of acceptable commercial behaviour...@ It is a serious objection which places an onus of proof upon the party making the allegation. The first requirement placed upon the opponent is to prove that the mark in dispute belongs to him and not the applicants. On my assessment the opponent has failed to establish this, and whilst the applicants have also fallen short in this respect, the onus is not on them. This being the case I do not see how I can reach the conclusion that making the application was an act of bad faith on the part of the applicants and I dismiss the ground founded under Section 3(6).

68. The opposition having failed on all grounds, I order the opponent to pay the applicants the sum of , 2,100 as a contribution towards their costs. This sum 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 29th day of September 2004**

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