

O-166-05

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No 2285192A
BY REDENVELOPE INC.
TO REGISTER A SERIES OF TWO TRADE MARKS
REDENVELOPE / RED ENVELOPE
IN CLASSES 35 & 42**

**AND IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 91408
BY RED LETTER DAYS PLC**

BACKGROUND

1) On 9 November 2001, Redenvelope Inc. of 201 Spear Street, 3rd Floor, San Francisco, California, 94105, United States of America applied under the Trade Marks Act 1994 for registration of a series of two trade marks “ REDENVELOPE / RED ENVELOPE”.


2) Registration was sought in respect of the following services:

In Class 35: “Advertising; business management; business administration; advertising and marketing services; promotion services; database management services; business information services provided online from a computer database or the Internet; composing advertisements for use as web-pages; market surveys; analysis of advertising response and market research; consultancy, advisory and information services relating to prize draws all provided from a global computer network or the Internet; consultancy, advisory and information services relating to mail order services in the field of gifts; consultancy, advisory and information services for retail outlets carried out via a global computer network or the Internet; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase these goods from an Internet web-site, on-line catalogue, electronic shopping or mail order specialising in the field of gifts.”

In Class 42: “Providing information by means of a global computer network or the Internet; graphic design; graphic design for the compilation of web-pages on the Internet; creating and maintaining web sites.”

3) On 15 January 2003 Red Letter Days Plc of 77 Muswell Hill, Muswell Hill, London, N10 3RE filed notice of opposition, subsequently amended, to the application. The amended grounds of opposition are in summary:

a) The opponent is the proprietor of the following trade mark:

Mark	Number	Effective Date	Class	Specification
<p>RED LETTER</p> <p>Red Letter</p> 	2205212	06.08.99	9	Cameras, sunglasses.
			14	Key rings; jewellery; articles of precious metal; watches and clocks.
			16	Printed matter; printed publications; books; vouchers; plastic bags; postcards; stationery; gift certificates; gift vouchers.
			18	Umbrellas; bags; luggage.
			21	Mugs; cups; plates; bowls; glasses.
			22	Lanyards.
			25	Clothing; footwear; headgear.

Series of three			26	Badges.
			33	Champagne; wine; alcoholic beverages.
			36	Insurance services; gift certificates; gift vouchers; leasing, rental and sale of property.
			39	Travel services; delivery of flowers; delivery of magazines; delivery of food and drink products.
			41	Entertainment services, namely, arrangement and provision of sporting activities, leisure activities and special interest events; arranging of sporting activities; cultural activities; training services all relating to leisure and lifestyle activities; arranging of leisure activities; educational services all relating to leisure and lifestyle activities; exhibition and conference services.
			42	Web site design services.

b) The mark in suit is similar to the opponent's trade mark, and the services applied for are identical or similar. The mark applied for therefore offends against Sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994.

c) The opponent enjoys a reputation and goodwill in its earlier trade mark, RED LETTER, in the UK with regard to special days out as gifts and use of the mark in suit would, without due cause, take unfair advantage of, and would be detrimental to, the distinctive character of the opponent's earlier trade mark and would offend against Section 5(3) of the Trade Marks Act 1994. The opponent alleges:

“It is considered that the services of the Applicant's mark are dissimilar to the goods and services of the Opponent's detailed in 1 above as falling in classes 36 (gift certificates and gift vouchers are considered similar), 39, 41 and “catering services for the provision of food and drink; accommodation services; beauty services; spa services; hair dressing services” falling in Class 42. The goods listed in Classes 9, 14, 16, 18, 21, 22, 25, 26 and 33 are considered similar goods to the retail services listed in class 35, of the Applicant's Mark, but in the event that they are considered to be dissimilar, Section 5(3) is considered to apply to the goods listed in 1 above as falling in classes 9, 14, 16, 18, 21, 22, 25, 26 and 33.”

d) The opponent also claims to have established a very significant reputation in the mark RED LETTER DAYS, and also the images of red envelopes and so the mark offends against Section 5(4)(a) of the Trade Marks Act 1994.

e) The opponent also claims that the mark was applied for in bad faith contrary to Section 3(6) of the Trade Marks Act 1994 as the applicant was aware of the

opponent's reputation having opposed the registration of the opponent's trade mark in opposition number 51367.

4) The applicant subsequently filed a counterstatement denying the opponent's claims, other than accepting that "creating and maintaining web sites" and "website design services" both in Class 42 are similar services.

5) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 16 March 2005 when the applicant was represented by Mr Vanhegan of Counsel instructed by Messrs Field Fisher Waterhouse, and the opponent by Ms McFarland of Counsel instructed by Messrs Olswang.

OPPONENT'S EVIDENCE

6) The opponent filed two statutory declarations by Rachel E Elnaugh, both dated 6 August 2003, the joint Managing Director of the opponent company. She states that the company set up in July 1989 was originally a partnership trading as The Red Letter Company, it was incorporated in November 1989 under the name Red Letter Days Ltd and the trading name changed to Red Letter Days in May 1991. She claims that the trade mark RED LETTER together with a red colour scheme and red envelope packs and images of red envelopes were first used in November 1989, with the trade mark RED LETTER in red typescript being adopted in 1990. The trade mark was amended slightly in October 2002 although she does not give details of the change.

7) Ms Elnaugh states that her company currently has a 20% share of the market in selling special events and days out. She states that many of these events are sold as gifts through retail outlets such as Debenhams, House of Fraser and Alders. At exhibit RE2 she provides a copy of a Mintel report dated October 2001 which states that the opponent, Red Letter Days, is the market leader in the activity days out market.

8) At exhibit RE3 Ms Elnaugh filed a number of brochures. Some were copies with a few original pages included but these were not paginated or compiled so it was not clear precisely which page belonged to which brochure. The first brochure dated 1989/90 refers to "Red Letter Days" and also a "Red Letter Package". The latter is referred to having a "red gloss envelope embossed with our gold question mark". There are front covers from the years 1993-2001. These have details of "The Red Letter Package" which shows a picture of a red envelope. Some also contain details of other vouchers called "spectrum vouchers" which are sent out in envelopes coloured Violet, Magenta, Blue, Green, Yellow, Orange and White. These were included in the 1998 brochure and those prior to this date. All the brochures offer a range of activity days out.

9) At exhibit RE4 she provides copies of various pages which detail insurance issues and examples of activity days out. Also included is a brochure said to be the 2001-2002 example. Ms Elnaugh claims that this exhibit shows the material that is sent out in red envelopes. The brochure shows that full details are sent out in what is described as an "anonymous envelope" which is plain white. It would appear that the red wallet

is inside this and contains details of the activity day out which has been purchased as a gift.

10) At exhibit RE5 Ms Elnaugh provides a corporate services pack which allows employers to offer incentives to their workforce. This states that the voucher and details relating to the activity purchased will be sent in a plain envelope. It also shows a picture of a red envelope with details inside it. The activities are colour coded according to price and referred to as e.g. “Blue Experience Voucher”, the other colours used are Orange, Yellow, Purple, Bronze, Silver and Gold. This is not dated.

11) Ms Elnaugh states that in 1997 they began selling their activities through Boots stores and in June 2001 they launched “Multi-choice Experience box retail product” which was sold by Debenhams. At exhibit RE6 she provides pages from the Debenhams website dated December 2002 and a copy of an advertisement which whilst not specifically dated appears to relate to the period January – June 2002, after the relevant date.

12) At exhibit RE7 she provides leaflets showing the opponent’s product under the name “red letter days” and with the names of House of Fraser, Alders and Debenhams alongside. These all show a photograph of a red envelope/wallet containing the details of the activity purchased. At exhibit RE8 she provides an example of the gift pack as purchased in a retail outlet which consists of a red plastic wallet opened out and contained in a clear plastic box. The activity purchased can be seen as can the voucher which is in a holder with a neck tag attached. Exhibit RE9 shows the wallet when taken out of the box. Ms Elnaugh suggests that this is how the gift will be given. Ms Elnaugh states that her company has worked with a number of retailers such as Tesco, Sainsbury’s, Selfridges, Beatties and Boots as well as organisations such as Mencap. Exhibits RE7-9 are not dated. At exhibit RE10 she provides what are described as joint promotions material with these stores and organisations. However, most are not dated. Of the two that are, one is dated December 2002, the other has a hand written date of 1998 written on it and states that “a Red Letter Day, exclusive to Boots customers” is available.

13) Ms Elnaugh states that her company supplies products to Air Miles and at exhibit RE11 she provides print outs from the Air Miles website which show use of the trade mark “Red Letter Days” but none of the exhibits are dated. The opponent’s products were also sold in M&S stores in the UK during the Christmas season 2000. It is claimed that the opponent’s “Red Letter Day” trade mark was used which is unusual for M&S who normally insist on their own branding. At exhibit RE12 she provides print outs from the M&S web site which show use of the opponent’s trade mark some of which are dated November 2000 relating to actual gifts and experiences.

14) Ms Elnaugh provides turnover figures as shown below, but does not state if these relate only to the UK and only to the “Red Letter” trade mark, or to use of “Red Letter Days” or other marks.

Year ended	£million
Jan 96	1.1
Jan 97	1.8
Jan 98	3.3

Jan 99	4.9
Jan 00	5.7
July 2001	11.4

15) Ms Elnaugh states that 29% of sales in the fiscal year 2001-2002 came from retail stores. No figure for prior to the relevant date is provided. It is also claimed that 80-90% of products purchased overall were purchased as gifts. The basis for this is not disclosed. She provides an estimate that £10 million has been spent on promoting the business since its inception.

16) Ms Elnaugh states that the company's advertising "places special emphasis on the brands RED LETTER, the red colour being used, and the red envelope gift packs which have become part of my Company's signature". At exhibit RE15 are two flyers one from 2001 and the other from October 2002. Both show the red plastic wallet that the voucher and details are packed in. She also provides a guest list and pictures from the re-launch in October 2002 at exhibits RE16 & 17 however, these are after the relevant date. Ms Elnaugh also states that her company is involved in a number of on-line ventures, and at exhibit RE18 she provides copies of various websites which are all dated after the relevant date. At exhibit RE19 she provides copies of various press articles most of which are after the relevant date. Of the two that are prior to the relevant date, one shows a member of staff from the opponent company on a publicity stunt, the other mentions using the products as incentives for staff and that they receive a red envelope. There has been advertising on television and radio but all after the relevant date.

17) At exhibits RE25, 26, 28 & 29 Ms Elnaugh provides numerous copies of articles (many of which are the same) from newspapers and magazines. Many of these articles were published prior to the relevant date and all mention the name of the company and the type of product available.

18) At exhibit RE30 Ms Elnaugh provides a copy of the 2001/2002 brochure. This gives details of the manner in which the product is posted. The brochure shows that full details are sent out in what is described as an "anonymous envelope" which is plain white. It would appear that the red wallet is inside this and contains details of the activity day out which has been purchased as a gift. It is clear from the brochure that the box sets sold by Debenhams do not use the red wallet.

19) Ms Elnaugh provides at exhibit RE31 a CD showing television advertisements both of which show a date of 2002. At exhibit RE32 she provides a copy of a television interview with herself shown on 10 June 2003. All of which are after the relevant date.

20) The opponent also filed a witness statement, dated 6 August 2003, by Alan Michael Fiddes the opponent's Trade Mark Attorney. He states that the applicant was aware of his client's objections to the use of the applicant's mark in the UK prior to submitting the application for registration. The applicant also opposed the registration of the opponent's marks citing the risk of confusion amongst its pleadings. Mr Fiddes provides copies of correspondence between the parties, the evidence filed in the earlier case between the parties, the registry decision, papers dealing with the appeal and lastly a printout from the Registry showing that the opponent's mark is registered.

APPLICANT'S EVIDENCE

21) The applicant filed fourteen witness statements. The first, dated 27 October 2003, is by Pamela Knox the Senior Vice-President of Marketing of the applicant company. She states that her company has been trading in the field of gifts and the delivery of gifts since 1997. At exhibit PK1 she provides copies of the company website to illustrate the type of gifts on offer. These include, inter alia, jewellery, cigars, sports equipment, flowers and toys. These gifts are available for delivery throughout the USA, although they can be ordered over the internet. She states that since 1999 over one million items have been delivered and orders have been placed from countries all around the globe. She states that her company has over 1100 customers in the UK.

22) Ms Knox states that her company send out 20 million paper catalogues and 30 million electronic messages per annum. At exhibit PK3 she provides examples which all show prices in US\$. She provides other examples of advertising but much of it relates to use in the USA. Ms Knox does refer to sales of magazines such as "Elle", "GQ", "Food and Wine" and "Vanity Fair" in the UK. However, it is not clear when or if advertisements were placed in the UK, or indeed any, editions of these magazines. Ms Knox also states that her business has received publicity through articles written about the company in newspapers and magazines as well as the internet. She lists these publications and provides copies of some of the articles at exhibits PK9,10 & 12, however, most are clearly American publications and there is no evidence that they were sold or viewed in the UK. She also provides evidence, at exhibit PK11, of the company and its product being featured (without payment) on television shows. Although all the shows are made for American television Ms Knox points out that several of the shows are also shown in the UK via satellite channels. However, no details are provided of when the relevant shows were shown on UK TV.

23) Ms Knox states that the businesses of the two parties are significantly different in that the opponent "only offer experiences" whilst her company provides gift items such as "jewellery, clothing, home décor items and personal accessories". Ms Knox provides turnover figures relating to the USA which include some purchases made by UK clients for delivery in the USA. At exhibits PK14 & 15 she provides copies of the applicant's internet advertising, which from the spellings and associated matter on the print-outs all appear to be of American origin. Ms Knox states that her company sends out e-mails world wide to customers and also receives online orders from customers globally including many from the UK.

24) At exhibits PK17 & 18 Ms Knox refers to two surveys. The first was carried out solely in the USA. The second relates to existing customers of the applicant in the UK. However, it appears that only sixteen people responded.

25) The second witness statement, dated 31 October 2003, is by Paula Johns, who works for the applicant's Trade Mark Attorney. She states that she carried out an Internet search for the terms "red" and "gifts". This provided over 200,000 "hits". At exhibit PJ2 she provides the results from searching "meaning of red letter day", this

shows over 20,000 hits. Both searches are dated October 2003. Lastly, Ms Johns provides extracts from “The Chambers Dictionary” “Brewer’s Dictionary of phrase & fable” and the on-line “Webster’s Dictionary” for the terms “Red letter day” and “red letter”. These give meanings for “Red letter days” of:

“Marked with red letters; as holidays or saints’ days in the old calendars; deserving to be so marked, special.”

“A lucky day; a day to be recalled with delight. In Almanacs, and more commonly in ecclesiastical calendars, important feast days and saints’ days were printed in red with other days in black.”

“A day that is fortunate or auspicious; - so called in allusion to the custom of marking holy days, or saints’ days, in the old calendars with red letters.”

“Of or pertaining to a red letter; marked by red letters.”

26) The third witness statement, dated 29 October 2003, is by Eleanor Halsall a member of the Institute of Linguists. She provides, at exhibit EH1, an extract from her report titled “etymology and contemporary use of the terms Red Letter Day(s) and Red Envelope”. The origins of “red letter day(s)” appears to relate to its use to mark calendars, particularly for Saints’ days, and more recently as marking a memorable occasion be it joyful or sad. “Red Envelope” derives from the Chinese custom of giving money in a red envelope as a gift. In the UK its contemporary use is in the sense of giving or making donations.

27) The fourth witness statement, dated 4 November 2003, is by Professor Francisco Ariza, a former language professor at Manchester Metropolitan University. He provides a comparison of the mark in suit (REDENVELOPE) and the opponent’s marks “RED LETTER” and “RED LETTER DAYS” both phonetically and conceptually. He also gives his opinion on the confusability of the marks. I do not find his comments of assistance in reaching my decision.

28) The fifth witness statement, dated 4 November 2003, is by Janette Vince the Managing Director of Thanksdarling Ltd. She states that her company is “an on-line gift company specialising in Experiences/Activities as gifts”. She states that her company trades in the UK selling directly to the public. She states that red envelopes are a traditional colour used for greetings cards particularly at Christmas and Valentine’s Day. She states that “I do not believe that such coloured envelopes used in the area of gifts will distinguish one proprietor from another”. She states that “there is a distinction in the gift industry that sells products and the gift experience industry in providing a service”. She likens gift experience agencies to travel agents and other agents/brokers.

29) The sixth witness statement, dated 4 November 2003, is by Daniel Mountain, the Managing Director of Buyagift Ltd, an on-line gift company specialising in the sale of activity vouchers and gifts on-line. He states that his company trades in the UK selling directly to the public. He states that red envelopes are commonly used for cards, as a visit to any card shop would confirm. He claims that red envelopes are commonly used when enclosing gift vouchers. He states that in his experience there is “a small

crossover between the gift industry selling experiences and the gift industry selling gift items”. He states that his company uses the generic phrase “red letter days” to describe special occasions for gifts.

30) The seventh witness statement, dated 2 December 2003, is by Mark Ugar of Microsoft Corporation. He states that his company provides web space for web advertising for various companies as well as search engines to assist consumers. The applicant company advertises with his company the opponent does not. He states that “From the manner in which the words RED LETTER and REDENVELOPE are categorised, there is no overlap or confusion that could arise in the searches”. He continues; “Our search engines will not reveal RED LETTER or RED LETTER DAYS if REDENVELOPE is searched and vice versa”. He also states that the services and products of the two companies are categorised differently.

31) The eighth witness statement, dated 16 December 2003, is by Laine Kern an Account Executive with Yahoo! Inc. She states that her company provides web space for web advertising and also a web site directory. She states that the applicant and the opponent companies are listed on her company’s UK website directory. She states that she is not aware of any confusion between the companies.

32) The ninth witness statement, dated 21 November 2003, is by Stuart Frankel of Performics Inc. a company which provides Internet advertising services to, amongst others, the applicant. He states that he is not aware of any instances of confusion between the two parties in this case.

33) The tenth witness statement, dated 12 November 2003, is by Sharon Little the Administrator of the Greeting Card Association in the UK. She states that the organisation has over 215 members in the UK and Ireland made up of publishers and distributors of greetings cards. She states that in her experience red envelopes are commonly used in relation to greetings cards, particularly at Christmas or on Valentine’s day. She also states: “In my opinion, greeting cards and gifts often go hand in hand. Coloured envelopes are used to complement greeting cards and the gifts which are wrapped”.

34) The eleventh witness statement, dated 30 October 2003, is by John Botting the Managing Director of Colneis Marketing Ltd. His company publishes greetings cards and he states that they frequently use red coloured envelopes with cards. He states that he has worked in the industry for 50 years and that red coloured envelopes used for greetings cards are often used to match gifts which are wrapped in similar coloured or complimentary coloured wrappers. He states that red coloured envelopes are “eye-catching” and used particularly at Christmas and Valentine’s day. Lastly, he claims that greetings cards and gifts often go together.

35) The applicant also filed three witness statements by Cheng Foong Tan a solicitor employed by the applicant’s Trade Mark Agent. The statements are all dated 13 November 2003. He attaches copies of witness statements, most of which were subsequently filed in their own right. However, in one instance this did not occur. Attached to his third witness statement at exhibit CFT1 is a witness statement, dated 24 October 2003 by Gerald Puttick the Sales Manager of Afour Limited trading as Paper State. This statement was prepared for proceedings in OHIM between the same

parties as the instant case. Mr Puttick states that his company manufactures paper, cards and envelopes and sells to the retail stationery, crafts and arts markets. His company distributes throughout the UK. He states that “red coloured envelopes are widely available from a large number of paper merchants, envelope manufacturers and stationery distributors”.

OPPONENT’S EVIDENCE IN REPLY

36) The opponent filed three witness statements in reply. The first, dated 11 May 2004, is by Joel Barry the opponent’s Trade Mark Attorney. Attached as exhibits to his statement are witness statements from Sharon Little, Professor Francisco Ariza and Dr Jeremy Munday. All provide their views on the confusability of the two marks which, whilst differing from their previous statements, still do not assist me in reaching my decision.

37) Mr Barry also provides at exhibit JAB-4 a certified copy of an agreement between Buyagift Ltd and the opponent. This was signed on behalf of Buyagift Ltd by Daniel Mountain who provided a witness statement for the applicant in this case. The agreement states that the opponent is the proprietor of the registered trade mark 2205212 “RED LETTER” and that Buyagift agrees not to infringe the registered mark, not to seek to pass off by reference to similar words its services or products as being associated with those of Red Letter Days. The background to this agreement is not provided so it is unclear what action Buyagift had taken which caused the opponent to seek such an agreement and the associated restitution.

38) The second witness statement, dated 10 May 2004, is by Aclish McMahon a trainee solicitor who was instructed by the opponent’s Trade Mark Attorney to carry out a survey of “the general public in relation to their perception of the commercial activities of the applicant and the opponent”. She states that 65 members of the public were approached on 25 February 2004. Precise details of where the survey took place, questions asked, the responses of all those approached and the items they were shown were not provided. I do not regard the results of this survey as being of assistance in reaching my decision.

39) The third witness statement, dated 18 November 2004, is by Rachel Elnaugh who has provided evidence earlier in this case. She claims that the mark RED LETTER was first used in November 1989 as was a red colour scheme and red envelope packs and images of red envelopes. She states that the decision to modernise the typeface was made “on or around March 2002” and she denies that it had anything to do with the applicant’s activities or legal disputes between them.

APPLICANT’S ADDITIONAL EVIDENCE

40) The applicant filed an additional witness statement, dated 10 September 2004, by Allan Poulter their Trade Mark Attorney. He states that from the evidence provided by the opponent it is clear “that the representation of RED LETTER DAYS has changed to become more like the applicant’s use of REDENVELOPE. In particular, in 2000 and 2001, the opponent used a stylised font, whereas, by 2002, and in common with the applicant’s use of REDENVELOPE, RED LETTER DAYS appears in a script font. It is to be noted that this change of font only occurred a few months

after the applicant filed the application which is the subject of this opposition". At exhibit AMP1 he provides copies of search results showing use of the different marks on the opponent's website in the years 2000- 2002 and shows the change mentioned.

41) That concludes my review of the evidence. I now turn to the decision.

DECISION

42) At the hearing the opponent raised as a preliminary point the issue of the admission into the case of the further evidence they sent to the Registry on 2 March 2005. This consisted of a second witness statement by Joel Barry and two exhibits. The exhibits provided are:

a) a letter from the solicitors for the applicant in which they accept that their client opposed the registration of the opponent's Trade Mark RED LETTER, and that as part of that opposition it was alleged that the trade mark RED LETTER was confusingly similar to the trade mark REDENVELOPE;

b) The second exhibit is a copy of the witness statement by the Chief Executive of the applicant company filed with regard to the earlier dispute between the two parties where he also alleges that the marks are confusingly similar.

43) After listening to the submissions of both parties I decided to allow the evidence into the proceedings.

44) I shall deal first with the ground of opposition under Section 5(2)(b) which reads:

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

(a)....

(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."

45) An "earlier trade mark" is defined in Section 6, the relevant parts of which state:

"6.-(1) In this Act an "earlier trade mark" means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,"

46) The opponent is relying on a registered UK Trade Mark which is plainly prior to the application in suit.

47) In determining the question under section 5(2)(b), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel Bv v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R 723. It is clear from these cases that:

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

(b) the matter must be judged through the eyes of the average consumer, of the goods / services in question; *Sabel Bv v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*;

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

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

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

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

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

(h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG*;

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

48) In essence the test under Section 5(2)(b) is whether there are similarities in marks and goods and/or services which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgements of the European Court of Justice mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of

similarity in the goods and/or services, the category of goods and/or services in question and how they are marketed. Furthermore, in addition to making comparisons which take into account the actual use of the respective marks, I must compare the mark applied for and the opponent's registration on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods and services covered within the respective specifications.

49) I also have to consider whether the opponent's mark has a particularly distinctive character either arising from the inherent characteristics of the mark or because of the use made of it. The mark "Red Letter" could be descriptive with regard to some of the goods in Class 16 but for all the other goods and services it must be regarded as inherently distinctive. Even within Class 16 "vouchers; plastic bags; postcards; gift certificates; gift vouchers" would not be described as "letters" and so the mark is inherently distinctive for these goods. The opponent has filed turnover figures but does not state that they relate solely to the UK, nor is it clear precisely what goods and services these figures relate to. The opponent has a wide range of goods and services included in the specification of its registered mark and it is not stated that the figures provided relate solely to the registered mark used in this opposition. It is stated that in August 2003 the opponent enjoyed a 20% share of the market in selling special events and days out, but the relevant date is November 2001. The Mintel report, dated October 2001, does state that "Red Letter Days is the dominant company in this [activity days] field". A lot of the other exhibits relied upon to show use of the opponent's mark actually show use of the company name, "Red Letter Days". I do not consider the use of the opponent's company name as use of the opponent's trade mark as to my mind they are conceptually quite different. A "red letter" refers either to a letter of the alphabet written or printed in red, literally a red letter, or it refers to an item of correspondence or letter on red stationery. The company name has a quite separate well known meaning which refers to a memorable or significant day.

50) I am therefore unwilling to accept that the opponent has acquired any reputation in its "Red Letter" registered mark. However, I do accept that in the field of selling activity days it has acquired a reputation in the mark "Red Letter Days".

51) I also have to consider the claim to reputation in red envelopes by the opponent. At the hearing this was the subject of some debate with the opponent claiming that it had shown substantial use of red envelopes as part of its business. The question arose as to whether the opponent had used other colours of envelopes. The opponent denied this, although at the hearing the issue could not be satisfactorily resolved due to the lack of pagination of the evidence and its copious volume. Subsequent to the hearing the opponent's supplied a page from the 1995-1996 brochure which it states shows that even when supplying its "Spectrum vouchers" a red envelope was used. Having the opportunity to reflect again on the evidence I am not convinced that this has always been the case. I attach to this decision a page from the 1994-1995 brochure (Annex A) which although in black and white shows clearly that a range of coloured envelopes were used. I also attach a page from the 1997 brochure (Annex B) which again despite being in black and white clearly shows envelopes of different colours being used. In the 1998 brochure (Annex C) there is a reference to Spectrum vouchers which states "They come in a colour-coded pack", see attached. For ease of reference I also attach the page supplied by the opponent to validate its claim (Annex D). To my mind this is not conclusive as it would appear that the differently coloured Spectrum

vouchers are in a variety of coloured envelopes which may, or may not, then go into a red envelope. Quite why the item would be “double bagged” as it then is posted in a plain white envelope (see evidence summary paragraph nine) is not clear. The issue is not addressed specifically in the evidence provided. Making the best I can from this I believe that the opponent did use different colour envelopes for its Spectrum vouchers, at least in the period 1994-1998 inclusive. The opponent provided no evidence from the trade or public that the red envelopes would be seen as a trade mark at all let alone the opponent’s trade mark. I therefore do not accept that the opponent had a reputation in red envelopes for any goods or services.

52) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was recently considered by David Kitchen Q.C. sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchen concluded at paragraph 17 of his decision:

“The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr Thorley. Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become more distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

53) In the present case it is my view that the opponent’s registered mark has a degree of inherent distinctiveness and that the opponent’s “Red Letter Days” mark also has some reputation in relation to the selling of activity days.

54) I will first compare the goods and services of the two parties. For ease of reference these are:

Applicant’s goods	Opponent’s Goods
In Class 35: Advertising; business management; business administration; advertising and marketing	In Class 9: Cameras, sunglasses.
	In Class 14; Key rings; jewellery; articles of precious metal; watches and clocks.

<p>services; promotion services; database management services; business information services provided online from a computer database or the Internet; composing advertisements for use as web-pages; market surveys; analysis of advertising response and market research; consultancy, advisory and information services relating to prize draws all provided from a global computer network or the Internet; consultancy, advisory and information services relating to mail order services in the field of gifts; consultancy, advisory and information services for retail outlets carried out via a global computer network or the Internet; the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase these goods from an Internet web-site, on-line catalogue, electronic shopping or mail order specialising in the field of gifts.</p>	<p>In Class 16: Printed matter; printed publications; books; vouchers; plastic bags; postcards; stationery; gift certificates; gift vouchers.</p>
	<p>In Class 18: Umbrellas; bags; luggage.</p>
	<p>In Class 21: Mugs; cups; plates; bowls; glasses.</p>
	<p>In Class 22: Lanyards.</p>
	<p>In Class 25: Clothing; footwear; headgear.</p>
	<p>In Class 26: Badges.</p>
	<p>In Class 33: Champagne; wine; alcoholic beverages.</p>
	<p>In Class 36: Insurance services; gift certificates; gift vouchers; leasing, rental and sale of property.</p>
	<p>In Class 39: Travel services; delivery of flowers; delivery of magazines; delivery of food and drink products.</p>
<p>In Class 41: Entertainment services, namely, arrangement and provision of sporting activities, leisure activities and special interest events; arranging of sporting activities; cultural activities; training services all relating to leisure and lifestyle activities; arranging of leisure activities; educational services all relating to leisure and lifestyle activities; exhibition and conference services.</p>	
<p>In Class 42: Providing information by means of a global computer network or the Internet; graphic design; graphic design for the compilation of web-pages on the Internet; creating and maintaining web sites.</p>	<p>In Class 42: Web site design services.</p>


55) At the hearing the opponent contended that the opponent's goods in Classes 9-33 inclusive are in classes which are traditionally gifts and that the applicant's specification in Class 35 includes internet selling of gifts. I am willing to accept that the opponent's goods in Classes 9-33 could be considered as gifts as could almost any manufactured item, although someone receiving a lanyard (Class 22) might feel somewhat short changed. The applicant is offering a retail service for gifts and so in the broadest possible sense there is, just, a degree of overlap in the specifications.

56) The opponent also contended that the whole of the applicant's Class 35 specification, which simplistically could be said to be managing a business, would encompass the activities included under the opponent's specifications in Classes 39 and 41. The opponent offered that its Class 41 services were closest to the applicant's Class 35 services. Again if one takes the broadest view possible then clearly some of the services offered by the applicant under Class 35 would be encompassed by virtually any other business and this would include the services offered by the opponent under Classes 36, 39 and 41. At its best, this is a tenuous contention.

57) Lastly, I consider the applicant's Class 42 specification. The applicant accepted that there was clear overlap in the area of "web site design services" in the opponent's Class 42 specification and its own Class 42 "graphic design for the compilation of web-pages on the internet; creating and maintaining web sites". The opponent contends that the rest of the specification is generally covered by its activities under Classes 36, 39 and 41. The same answer applies here as was given in paragraphs 55 and 56 above.

58) The average consumer for the opponent's goods and services (except for its Class 42 services) would be the general public. Most of the opponent's services are aimed at the business market. However, its electronic shopping and mail order services in Class 35 and its general information services in Class 42 would have as an average consumer the general public. The opponent's strongest case is based on the average consumer being the general public and so in carrying out the global test it is the general public which I will take as the average consumer.

59) I now move on to compare the marks of the two parties which for ease of reference are:

Applicant's mark	Opponent's mark
<p>REDENVELOPE RED ENVELOPE</p>	<p>RED LETTER</p> <p>Red Letter</p> 

60) I do not believe that the applicant's mark will be seen by the average consumer as anything other than the two well known words RED ENVELOPE even when the first part of the series where the mark is shown as a single word is used. Similarly, whichever of the opponent's series of three marks is used the average consumer would view the mark as the well known words RED LETTER. The comparison will therefore be made between the marks "RED ENVELOPE" and "RED LETTER" as this provides the opponent with its strongest case.

61) Clearly, the marks start with the same word “red” and therefore have visual, phonetic and conceptual identity at the start. However, the second part of each mark is quite different visually and phonetically. It was contended that the conceptual similarity remained. I accept that there is a degree of conceptual similarity between the words “envelope” and “letter” in that a written communication is made up of letters of the alphabet and a missive is called a letter and is frequently sent in an envelope. However, the letter is the contents whilst the envelope is merely a form of packaging. There is therefore a considerable degree of conceptual difference between the two words. The opponent contended that the first part of a mark is the most important and memorable element. This dictum is generally accepted and is particularly relevant where the mark is an invented or unusual word. In the instant case the first part of each mark is a well known word and colour. In such instances the dictum is less relevant. Considering the marks as wholes, to my mind the differences between the two marks outweigh the similarities.

62) The opponent referred me to *SA Societe LTJ Diffusion v SA Sadas* [2002] ETMR 40 and invited me to consider the differences between the marks as “minute or wholly insignificant”. I do not accept this contention. Both sides agreed that the issue under Section 5(2)(b) must be viewed in terms of the net effect of all the factors outlined above. The average consumer whilst being reasonably well informed and reasonably circumspect and observant rarely has the opportunity to make a direct comparison between the marks and so the concept of imperfect recollection must be taken into account. The opponent also reminded me that I must take into account the likelihood of association with the earlier trade mark although of course this does not refer to merely the bringing to mind of the earlier trade mark but an association where the goods and/or services are believed to be provided by some undertaking linked to them.

63) Taking account of all of the above when considering the marks globally, I believe that there is no likelihood of the average consumer being confused into believing that the goods or services provided by the applicant are those of the opponent or provided by some undertaking linked to them. The opposition under Section 5(2)(b) therefore fails.

64) I now turn to the ground under section 5(3) (prior to amendment) which reads:

“5.(3) A trade mark which -

- (a) is identical with or similar to an earlier trade mark, and
- (b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

65) In *General Motors Corporation v. Yplon SA* Case C-375/97 the European Court of Justice established the parameters for claiming a reputation in relation to Section 5(3):

“Article 5(2) of the First Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to trade marks is to be interpreted as meaning that, in order to enjoy protection extending to non-similar products or services, a registered trade mark must be known by a significant part of the public concerned by the products or services which it covers. In the Benelux territory, it is sufficient for the registered trade mark to be known by a significant part of the public concerned in a substantial part of that territory, which part may consist of a part of one of the countries composing that territory.”

66) To succeed under this ground the opponent must show that it enjoys a reputation in the earlier right. I have found earlier in this decision that the opponent has no reputation in the trade mark RED LETTER. This ground of opposition therefore fails.

67) Next, I consider the ground of opposition under section 5(4)(a) which reads:

“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
- (b)

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.”

68) In relation to passing off the opponent needs to establish that at the relevant date, 9 November 2001, it enjoyed goodwill/reputation.

69) In *South Cone Inc. v. Jack Bessant, Dominic Greensmith, Kenwy House, Gary Stringer (a partnership)* [2002] RPC 19 Pumrey J. in considering an appeal from a decision of the Registrar to reject an opposition under Section 5(4)(a) 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 requirements 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 *Trade Mark 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 to the relevant date.”

70) This cannot be interpreted in a prescriptive fashion. There will be occasions when the evidence does not fall within the above parameters but still establishes goodwill for passing off purposes - see the decision of Professor Annand, sitting as the Appointed Person, in *Loaded BL O/191/02*.

71) Earlier in this decision I found that use of the mark in suit, actual or on a fair and notional basis would not result in confusion with the opponent’s mark. Accordingly, it seems to me that the necessary misrepresentation required by the tort of passing off will not occur. The opposition under Section 5(4)(a) of the Act with regard to the opponent’s trade mark RED LETTER must fail.

72) The opponent also sought to rely upon its alleged reputation in the image of a red envelope under this provision of the Act. However, earlier in this decision I found that the opponent had shown that it enjoyed no goodwill or reputation in such an image and so the opposition under Section 5(4)(a) based upon the image of a red envelope must fail.

73) The opponent also sought to rely upon its use of the mark “Red Letter Days” under Section 5(4)(a). Earlier in this decision I found that the opponent had reputation in this mark in the field of selling activity days.

74) In deciding whether the mark in question “REDENVELOPE/ RED ENVELOPE” offends against this section, I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC, in the *WILD CHILD* case [1998] 14 RPC 455. In that decision Mr Hobbs stated that:

“The question raised by the grounds of opposition is whether normal and fair use of the designation WILD CHILD for the purpose of distinguishing the goods of interest to the applicant from those of other undertakings (see Section 1(1) of the Act) was liable to be prevented at the date of the application for registration (see Art.4(4)(b) of the Directive and Section 40 of the Act) by enforcement of rights which the opponent could then have asserted against the Applicant in accordance with the law of passing off.

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 *Even 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.

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.””

75) The date at which the matter must be judged is not entirely clear from Section 5(4)(a) of the Act. This provision is clearly intended to implement Article 4(4)(b) of Directive 89/104/EEC. It is now well settled that it is appropriate to look to the wording of the Directive in order to settle matters of doubt arising from the wording of equivalent provisions of the Act. It is clear from Article 4(4)(b) that the earlier right had to have been “acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed....”. The relevant date is therefore 9 November 2001, the date of the application.

76) With these considerations in mind I turn to assess the evidence filed on behalf of the parties in the present proceedings as set out earlier in this decision, and the arguments put forward at the hearing. In considering the closeness of the fields of activity between the two parties I am comparing the applicant’s specification under Classes 35 and 42 and the opponent’s activity of selling activity days. Clearly, the only possible overlap with the opponent’s activity is the following aspect of the applicant’s Class 35 specification: “the bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase these goods from an Internet web-site, on-line catalogue, electronic shopping or mail order specialising in the field of gifts”. All the other parts of the applicant’s specification are remote from the opponent’s activity.

77) Considering the two marks “RED ENVELOPE” and “RED LETTER DAYS” both have an identical first word. There is some conceptual similarity between the second words of each mark as set out in paragraph 61 above. However, phonetically and visually the second words of each mark are very different. The opponent’s mark also has a third word which is also a common English word. However, the opponent’s mark as a whole has a distinctive meaning of a memorable or calendar day. This takes it further away from the applicant’s mark. To my mind the differences between the goods and services and the marks far outweigh any similarities such that the average consumer would not be misled into believing that the goods and services offered by the applicant were goods or services of the opponent. The opposition under Section 5(4)(a) with regard to RED LETTER DAYS must fail.

78) Lastly, I turn to consider the ground of opposition under Section 3(6) which reads:

“3(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

79) Section 3(6) has its origins in Article 3(2)(d) of the Directive the Act which implements Council Directive No. 89/104/EEC of 21 December 1988 which states:

“Any Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that....

(c) the application for registration of the trade mark was made in bad faith by the applicant.”

80) The Directive gives no more clue as to the meaning of “bad faith” than the Act. Subsequent case law has avoided explicit definition, but has not shirked from indicating its characteristics. In *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367, Lindsay J stated at page 379:

“I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.”

81) In the Privy Council judgement *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, Nicholls LJ described dishonesty as “..to be equated with conscious impropriety”. This was in the context of accessory liability in the misapplication of trust assets to the detriment of a beneficiary. However, I think the same general principles would apply in trade mark law. He added:

“In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others’ property..... The individual is expected to attain the standard which would be observed by an honest person in those circumstances. It is impossible to be more specific. Knox J captured the flavour of this, in a case with a commercial setting, when he referred to a person who is “guilty of commercially unacceptable conduct in the particular context involved”: see *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700 at 761. Acting in reckless disregard of others’ rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubtUltimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.”

82) Thus dishonest behaviour is characterised by intention and/or recklessness. Such conduct would clearly be bad faith. It is also obvious, however, from the *Gromax* judgement, that bad faith also describes business dealings which, though not actually dishonest, still fall short of the standards of acceptable commercial behaviour. This

includes conduct that is not knowingly fraudulent or illegal, but may be regarded as unacceptable or less than moral in a particular business context and on a particular set of facts. In *Demon Ale Trade Mark* [2000] RPC 355, the Appointed Person said:

“I do not think that Section 3(6) requires applicants to submit to an open-ended assessment of their commercial morality. However, the observations of Lord Nicholls on the subject of dishonesty in *Royal Brunei Airlines Sdn Bhd v Phillip Tan* [1995] 2 AC 378 (PC) at page 389 do seem to me to provide strong support for the view that a finding of bad faith may be fully justified even in a case where the applicant sees nothing wrong in his own behaviour.”

83) I also take into account the comments by Mr Simon Thorley Q.C. acting as the Appointed Person in *R. v. Royal Enfield Trade Marks* [2002] RPC 24 at paragraph 31 where he said:

“An allegation that a trade mark has been applied for in bad faith is a serious allegation. It is an allegation of a form of commercial fraud. A plea of fraud should not lightly be made (see Lord Denning M.R. in *Associated Leisure v Associated Newspapers* [1970] 2 Q.B. 450 at 456) and if made should be distinctly alleged and distinctly proved. It is not permissible to leave fraud to be inferred from the facts (see *Davy v. Garrett* (1877-78) L.R. 7Ch.D 473 at 489). In my judgement precisely the same considerations apply to an allegation of lack of good faith made under section 3(6). It should not be made unless it can be fully and properly pleaded and should not be upheld unless it is distinctly proved and this will rarely be possible by a process of inference.”

84) The opponent, Red Letter Days plc, contends that when it applied to register its own “Red Letter” trade mark it was opposed by the applicant, Redenvelope Inc, who claimed in the statement of grounds that the marks RED LETTER and RED ENVELOPE were similar. The notice of opposition which made this claim was submitted on 1 September 2000. By the time that the case was heard in May 2003 the only ground of opposition pursued was under Section 3(1)(b). Obviously in the intervening period Redenvelope Inc had reviewed its position and altered its opinion. Quite what caused this Damuscean conversion is not clear. Also during this period Redenvelope Inc. filed its own application.

85) The opponent claims that in filing its own application whilst claiming that the marks of the two parties were similar is an act of bad faith. I do not accept this contention. To my mind the behaviour of the applicant in this case is not the kind which could be said to “fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined”. If it were then the opponent’s own behaviour would be subject to comment as in the earlier case referred to when they were the applicant they denied that the marks of the two parties were similar, yet prior to their application being resolved they became the opponent in the instant case and reversed their original position. The ground of opposition under Section 3(6) fails.

86) As the applicant is successful it is entitled to a contribution towards its costs. I order the opponent to pay the applicant the sum of £2500. 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 15th day of June 2005

**George W Salthouse
For the Registrar,
the Comptroller-General**

Spectrum Vouchers are available in the following colours:

GOLD ●

SILVER ●

EMERALD ●

AMBER ●

OCHRE ●

●

●

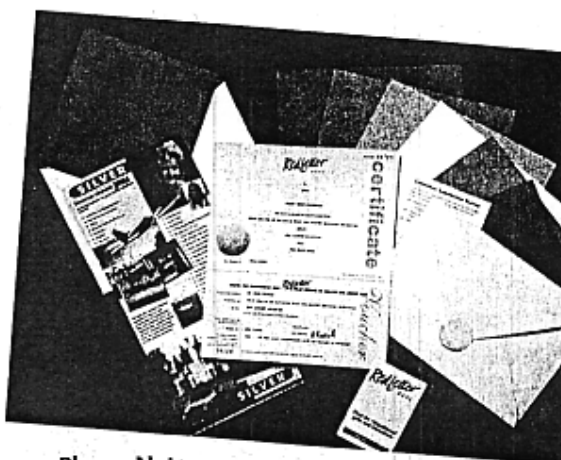
●

●

RedLetter DAYS
0181 343 8822

Each Spectrum Voucher comes in a special presentation pack containing:

- The colour coded Voucher which can be personalised to include your special message
- A directory of all the experience options within your chosen colour band
- A special unpriced version of this brochure
- An information sheet on how to redeem the voucher



Please Note

Spectrum Vouchers are valid for a year from the date of issue. Each experience directory is updated quarterly with new products and locations. Please note that experience choices fluctuate throughout the year, and the listings given in this brochure are therefore only an indication of the options available. We always aim to give you maximum choice - please call our Customer Services Team for the latest information. Spectrum Vouchers may be exchanged for experiences outside their colour band subject to our normal exchange conditions (see page 3) giving you maximum flexibility when redeeming the Voucher. For GOLD and SILVER vouchers **only** we offer a bespoke booking service allowing you to create experiences to your own specification from any of the suppliers featured in this brochure. Full details will be included in the Spectrum Pack.

See pages 62 & 63 for full details on our new FAB and WOW vouchers for kids!

Choose from over 30 experiences including: Horse Riding • Activity Days • Falconry • Gliding • Health Spa Days Llama Trekking • Sporting Tours • Scuba Diving High Speed Passenger Rides • White Water Rafting
Choose from over 30 experiences including: Falconry • Flying • Gliding • Golf • Health Spa Days • Name a Star JCB Racing • Fine Wines • Reverse Bungee Jumping Hairdressing at Vidal Sassoon
CYAN SPECTRUM VOUCHER £99
Choose from over 30 experiences including: 4 x 4 Driving • Hotel Breaks • A Survival Weekend • Flying Football Experiences • Camel Trekking • Cookery Experiences • Theme Evenings • Image Make-Over and Photo Shoot
EMERALD SPECTRUM VOUCHER £139
Choose from over 30 experiences including: Ballooning • Hang Gliding • Tank Driving • Motor Racing • Steam Train Experiences • Yacht Racing • White Water Raft Charter Motor Bike Racing • Hovercraft Flying • Military Driving
OCHRE SPECTRUM VOUCHER £175
Choose from over 30 experiences including: Stock Car Racing • Hotel Breaks • Polo Experiences • Ferrari Driving Yacht Sailing • Health Spa Days • Helicopter Flights • Eagle Handling VIP Theatre Experiences
AMBER SPECTRUM VOUCHER £249
Choose from over 30 experiences including: Golf Breaks • Orient-Express British Pullman Lunch Trips • Theatre Breaks Recording Studio Sessions • Fishing Experiences • Pamper Breaks Makeover Sessions • Multi Activity Weekends • High Speed Powerboating
SCARLET SPECTRUM VOUCHER £375
Choose from over 30 experiences including: Luxury Breaks • Golf Breaks • Yacht Charters • Scuba Diving Day Excursions on the Orient-Express British Pullman Powerboating • VIP Champagne Theatre Evenings • Group Activities

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RedLetter
DAYS

Some people are really hard to choose for.

So, if you're not sure which experience to pick, choose Red Letter Days' Spectrum Vouchers. These unique vouchers are available in seven colour-coded denominations from £39 to £375.

Each colour denotes a different range of Red Letter Days' gift experiences and there's at least twenty to choose from.

So, there's bound to be a day that's just perfect.

However, unlike ordinary gift vouchers, Spectrum Vouchers bear no monetary value - so your recipient has no idea how much you've spent. They come in a colour-coded pack, they're valid for a year and you can personalise your voucher with a special message just for them.

A Red Letter Days' Spectrum Voucher is a really wonderful way to give someone an experience they'll never forget.

Shown to the left are just a selection of experiences in each Spectrum band.

**All Inclusive Pricing
Personalised Gift Pack
No Quibble Exchange
Friendly Experienced Staff
Complete Peace of Mind
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Red Letter Days Spectrum Vouchers

Spectrum Vouchers are ideal where you're not sure which experience your recipient would prefer and where you don't want to reveal the cost of your gift. They make fabulous gifts and great incentive scheme and promotional prizes!

Spectrum Vouchers are available in seven colour coded denominations and entitle your recipient to choose any experience marked with the same colour symbol from this brochure.

Spectrum Vouchers:

- Violet
- Magenta
- Blue
- Green
- Yellow
- Orange
- Red

 Please Note that because each Spectrum Voucher covers a range of experiences, the cost of the Spectrum Voucher will not necessarily be the same as the cost of purchasing a particular experience from that colour band. White symbols in the brochure indicate an experience not included in the Spectrum Voucher scheme. We regret that we are unable to make refunds in respect of Spectrum Vouchers.

Your Spectrum Voucher Pack contains:

- The Colour Coded Voucher of your choice.
- An Unpriced Version of the Red Letter Days catalogue to help your recipient choose their experience.
- A Spectrum Directory giving detailed information on all the experiences in that colour band.
- An Information Sheet about the Spectrum Voucher and How to Book.
- A Message Card which we can either leave blank or complete on your behalf.
- A Presentation Band and Gold Seal.

Red Letter Days Gift Vouchers

Available to any denomination from £25 upwards, we'll prepare a special Red Letter Days gift voucher to the exact value you require which can be used in payment towards any Red Letter Days experience. These vouchers are valid for one year from the date of issue and can be ordered by calling 0181 343 8822 or by completing the order form on page 49 in the normal way.

The Original 'Red Letter' Package

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Where you know exactly which experience to order, we'll prepare a 'Red Letter' Information Pack and send this to you or direct to your recipient if you prefer.

Beautifully presented in the form of a red gloss laminated envelope with a special gold seal it makes the perfect gift. Inside your recipient will find:

- A personalised Gift Certificate and Voucher for the experience chosen, valid for at least six months.
- Detailed information on the experience of your choice.
- A list of centres for any multi-location experience.
- Our supplier's colour brochures, containing further information (where available).
- Detailed information on How to Book and our Exchange Service.
- A Certificate of Personal Accident Insurance where cover has been purchased (see page 5 for details).
- Where you have booked the experience for a specific date, confirmation of the booking made and detailed joining instructions will also be enclosed.

If you have opted to receive the 'Red Letter' Pack yourself we will leave it unsealed to enable you to check the contents before you present it to your recipient. Each Pack is delivered through the post in a plain hard-backed envelope protecting the contents and keeping your gift choice a secret.



Please note that where you are ordering a gift from our Instant/Personalised gift range (pages 34/35), no Red Letter package will be dispatched if the gift itself has been ordered to arrive in time for the occasion.



RedLetter
DAYS