

O-322-07

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 82507
BY MOBILE AND WIRELESS GROUP LIMITED
FOR REVOCATION OF REGISTRATION No. 2043423
STANDING IN THE NAME OF AVALON ENTERPRISE AB**

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BACKGROUND

1. Trade mark No. 2043423, MOBILE PLANET, is registered in respect of:

Computers; computer terminals; computer peripheral devices; computer input and output devices; computer memories; disc drives; screen displays; keyboards; modems; parts and fittings for all the aforesaid goods.

2. The registration stands in the name of Avalon Enterprise AB. The application that resulted in this registration was filed on 3 November 1995 with registration being achieved on 3 July 1998.

3. On 19 May 2006 Mobile and Wireless Group Limited applied for revocation of this registration in its entirety under Section 46(1)(b). Two (alternative) five year periods have been specified in the grounds (as amended). These are 11 January 2001 to 10 January 2006 (with an effective revocation date of 11 January 2006) and 19 May 2001 to 18 May 2006 (with an effective revocation date of 19 May 2006).

4. The registered proprietor filed a counterstatement denying the above grounds.

5. Only the registered proprietor has filed evidence. The parties were reminded that they were entitled to be heard. Neither side has requested a hearing. Written submissions have been received from Sanderson & Co on behalf of the registered proprietor (their letter of 11 June 2007). Eric Potter Clarkson, who act for the applicant for revocation responded to these submissions by letter dated 18 June 2007. Acting on behalf of the Registrar and with the above material in mind I give this decision.

The Law

6. Section 46 reads as follows:

“46.-(1) The registration of a trade mark may be revoked on any of the following grounds -

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of

five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the Registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

7. The onus is on the proprietor to show use when a challenge arises (Section 100).

8. An issue arises in this case as to whether the mark is used in relation to the goods of the registration or a retail or distribution service. An issue also arises in relation to the

mark(s) as used and whether it is an acceptable variant for Section 46(2) purposes. The relevant case law and the issues themselves are best considered after an analysis of the registered proprietor's evidence.

The evidence

9. This consists of a witness statement by Martin Clarke, the Managing Director of Mobile Planet UK Limited (MPUK). He has held that position since the company's incorporation in March 2006. Previously he held the same position in Mobile Planet Limited (MPL) from its incorporation in May 1995 to September 2002. Mr Clarke describes the relationship of the above-mentioned companies to the proprietor of record as follows:

- “2. MPL is a subsidiary of 24store (Europe) Ltd. (“24SE”). In September 2005 the Intellectual Property rights of 24SE and its UK subsidiaries – including MPL – were sold to Avalon Enterprise AB (“AEAB”) of Markvadsgatan 5, SE-113 53 Stockholm, Sweden
3. As a part of that sale, UK Trade Mark Registration No. 2043423 – **MOBILE PLANET** (“the Mark”) was formally assigned from MPL to AEAB with effect from 11th April 2006. The mark is now used by MPUK in the United Kingdom, under license from AEAB.”

10. He says that the mark was first used in the course of trade in the UK in May 1995 and continues to be used in relation to all the goods of the registration. There are three exhibits in support of this claim:

- MC1 - invoices for goods sold under the mark during the period 22 May 1996 to 2 May 2003. The invoices are said to be by way of examples of use and the total volume of sales was considerably greater than the cumulative value of the exhibited invoices (£24,171.40).
- MC2 - invoices for goods sold during the period 5 April 2006 to 24 July 2006. Again this is said to be a sample only and the total volume of sales was considerably greater than the cumulative value of the exhibited invoices (£49,391.31).
- MC3 - examples of advertisements placed in a variety of trade and consumer publications during the period from August 1997 to April 2003.

11. It is, in my view, necessary to consider the invoices and advertisements in rather more detail in order to gain a true impression of the nature of the business. The following tabulation records the material content of the invoices (by which I mean ignoring shipping, delivery costs or other references to peripheral matters).

12. In relation to MC1:

Invoice No.	Date (taxpoint)	Description	Unit Price (£)
SI001253	22 May 1996	Sams Port off Case-Nylon	56.94
SI001604	5 September 1996	PCMCIA TDK V.34 Global class	142.00
SI002100	9 January 1997	Sams Pad Lap Cover-Nylon Sams O'Nite Comp Case-Nylon Sams O'Nite Comp Case-Lthr	13.83 46.67 88.33
SI003008	19 May 1997	Sams O'Nite Comp Case-Nylon Sams Port Off Case-Nylon	46.67 17.17
SI004009	10 September 1997	Sams Trad Lap Brief-Nylon	25.56
SI004909	26 January 1998	TOS DAA Module 33.6KBS 750CDT	145.00
SI005994	12 May 1998	PCMCIA ENET/33.6 PSION COMBO (COMBO)	130.00
SI005973	8 May 1998	AST ASC M5160T P166MMX 32/3.3GB (NEW VER)	1147.00
SI007419	1 September 1998	PCMCIA PSION Gold Card 56K Global	140.00
SI009008	15 January 1999	AST ASC VL5260T P266MMX 32/3.2GB TFT W95	983.00
SI010363	7 May 1999	Samsung VM6260CT CEL 266 32/4.OGB 98 PCMCIA ENET/56K PSION NETGLOBAL – 10/100 PCMCIA PSION GLOBAL GSM ERICSSON 600/700 U/G	819.00 159.00 68.00
SI012006	20 September 1999	Samsung GS/GT/VM AC Adaptor	41.00
SI013272	7 January 2000	TOS SAT PRO 4220XCDT PIII450 64/5.6GB TFT NT S/N Z9396017E	1657.00
SI014842	4 May 2000	PAN CF47 KY8G W95 PIII 450 64/8.0GB CD	1468.00
SI016258	6 September 2000	Samsung VM7500CT NT CEL 500 64/6.0GB (NIMH) Sams Office Case – Nylon	974.00 19.95
SI017512	4 January 2001	TOS Warranty (TFT Models) 2YR EXT.	105.56
SI019007	11 May 2001	Samsung VM7700XTD ME PIII 700 64/10GB DVD	1043.00
SI020359	21 September 2001	Samsung GT8850XTD W2K PIII 850 128/20GB DVD	1285.00
SI021475	25 January 2002	TOS Internal Modem Cable	11.00
SI022652	28 May 2002	FUJ LB AMILO WME CEL 850 128/10GB 12.1" CD 56K	579.00
SI022841	21 June 2002	256MB Samsung 100MHZ TPM	85.00
SI023566	26 September 2002	Sams Reply PDA (Blue)	8.80
SI024279	20 December 2002	TOS Mouse dark grey USB TOS FDD USB TECRA	21.00 49.00

		9XXX/PORTEGE 4XXX TOS Warranty 3 year on-site Tecra/Portege	162.00
SI024552	3 February 2003	Sams Pocono – Office case	19.95
SI024775	24 April 2003	PAN FDD USB	93.00
SI024779	2 May 2003	Samsung battery VM8000	83.00

13. In relation to MC2

Invoice No.	Order Date	Description	Unit Price (£)
1	23 February 2006	PAN CF37/72 Battery Li-Ion	138.00
3	12 April 2006	PAN CF29 LTQGZ PM1.6GHZ 512/80 13. PAN CF28 CDRW/DVD COMBO	2,449.00 220.00
5	3 April 2006	Samsung X1 PM 1.2Gz 768/60GB WXPP	1,112.00
22	27 April 2006	Lexmark E342N Laser Printer	283.00
27	3 May 2006	40GB HDD Samsung 9.5mm 60GB HDD Samsung 9.5mm	42.00 55.00
34	4 May 2006	TOS Tecra M3 P-M 1.73GZ 512/40GB W TOS Advanced Port REP 111 Plus	853.00 145.00
64	12 May 2006	TOS Tecra M3 P-M 1.73GZ 512/40GB W Targus Notepac – Black	853.00 15.50
82	16 May 2006	Mitsubishi ES100 Projector Screenline Projector Screen 6ft B Tech Projector Close Coupler B-Tech Projector Carousel Installation	765.00 320.00 25.00 25.00 275.00
97	8 May 2006	Pan CF18 XPP PL.2GHZ 512/60 10.4”TF	1899.00
125	2 May 2006	Pan CF29 LTQGZ PM1.6GHZ 512/80 13. Pan CF28 CDRW/DVD Combo	2499.00 220.00

14. I have omitted a number of other invoices that relate to the period after the filing date of the application for revocation.

15. I should say that in addition to the above recorded descriptions of the goods the invoices are headed Mobile Planet Limited [or Mobile Planet UK Ltd] and carry the footnote “Goods remain the property of Mobile Planet Limited [or Mobile Planet UK Limited] until full payment is received”.

16. The final exhibit, MC3, contains advertisements displaying the words MOBILE PLANET for goods from the following manufacturers Panasonic, Acer, Toshiba, Fujitsu, TDK, Samsonite and Aiwa. The products covered include notebook PCs, modems, speakers, laptop covers and cases and drives. A number of the advertisements carry the supporting strapline “Distributing Mobile Solutions for a

Mobile Planet”. The advertisements are said to have been placed in a variety of trade and consumer publications from August 1997 to April 2003. The publications were PC Dealer, Micro Scope, Computer Shopper and PC Direct.

17. Because the invoices refer to products in abbreviated form and often by reference to technical aspects of the products it is not always easy to determine the exact nature of the goods concerned. It can be inferred from the unit pricing of certain of the products (and/or the description) that they must relate to smaller items of hardware or ancillary items such as batteries and cases (the latter are in Class 9 if adapted for computers though whether such items can be said to come within “parts and fittings” is more debatable). However, taking the invoice evidence and the advertisements together I accept that the registered proprietor has conducted a trade involving most if not all of the goods of the specification.

18. My main concern is the nature of that trade and in particular whether the words MOBILE PLANET can be said to have been used as a trade mark in relation to goods. It will be apparent from my summary of the position above that the registered proprietor trades in third party brands. This is apparent on the face of the advertisements in MC3 and carries through to the invoices in MC1 and 2. I need to say a little more about the latter by way of explanation.

19. I have listed above the third party manufacturers whose products appear in the advertisements. A number of these appear to be reflected in invoiced sales assuming PAN to mean Panasonic, TOS to mean Toshiba, FUJ to mean Fujitsu and so on. I note that a number of the invoices refer to the sale of e.g. Samsung, Mitsubishi and other manufacturers’ products despite the fact that the advertisements make no mention of these brands. That is not in itself to be taken as a point against the registered proprietor. It is, however, not possible to discern from either the invoice or advertisement evidence that MOBILE PLANET is being used on or in relation to the goods.

20. On the contrary the use of MOBILE PLANET in the advertisements at MC3 seems to me to be use in relation to a retail service or a service for arranging the distribution of goods. The associated strapline “Distributing Mobile Solutions for a Mobile Planet”, although not used on all the advertisements, reinforces me in that view of the general nature of the registered proprietor’s business though I accept that the word ‘distributing’ might be capable of other interpretations if the remainder of the evidence pointed a different way. Other textual content is to the same effect. Thus, “At Mobile Planet we pride ourselves on keeping a keen eye on all the latest releases”. The clear implication of that statement is that its maker reviews the product offerings of the various manufacturers in the field with a view to offering the best or most up to date items to its customers through its retail or distribution service (I note for instance that a number of the invoices record that goods were delivered to PC World and Dixons).

21. I accept that it is not essential for a mark to be used on the goods of the registration. Section 46(1) refers to use “in relation to the goods”. Can the use shown be said to be in relation to the goods illustrated in the advertisements and the subject of the invoice evidence?

22. Firstly, the natural inference to be drawn from the advertisements is that the third party manufacturers are making themselves responsible for the quality of the goods and that this is to be distinguished from Mobile Planet's obligations as retailer or distributor of the goods in question. Secondly, the position might be different if the goods depicted and offered for sale were not branded. In those circumstances consumers might reasonably think that the distributor or retailer is making himself responsible for the goods in addition to the distribution or retail service itself. But that is not the case here. MOBILE PLANET is, on my appraisal of the evidence, used as the mark of a retail or distribution service for computers and related items but not that of the underlying goods.

23. Jacob J (as he then was) considered a similar point in *Euromarket Designs Incorporated v Peters and Another* [2001] F.S.R. 20 and observed that:

“57. In this connection it should be borne in mind that the Directive does not include an all-bracing definition of “use”, still less of “use in relation to goods.” There is a list of what may *inter alia* be specified as infringement (Art.5(3), corresponding to s.10(4)) and a different list of what may, *inter alia*, constitute use of a trade mark for the purpose of defeating a non-use attack (Art. 10(2), equivalent to s.46(2)). It may well be that the concept of “use in relation to goods” is different for different purposes. Much may turn on the public conception of the use. For instance, if you buy Kodak film in Boots and it is put into a bag labelled “Boots”, only a trade mark lawyer might say that Boots is being used as a trade mark for film. Mere physical proximity between sign and goods may not make the use of the sign “in relation W [to]” the goods. Perception matters too. That is yet another reason why, in this case, the fact that some goods were sent from the Crate & Barrel US shops to the UK in Crate & Barrel packaging is at least arguably not use of the mark in relation to the goods inside the packaging. And all the more so if, as I expect, the actual goods bear their own trade mark. The perception as to the effect of use in this sort of ambiguous case may well call for evidence.”

24. A similar point has arisen recently in *Céline SARL v Céline SA*, Case C-17/06 where the ECJ was asked to consider whether a trade mark proprietor was entitled to stop unauthorised use as a company, trade or shop name of a sign identical to an earlier word mark. In its judgment the ECJ held:

“21 The purpose of a company, trade or shop name is not, of itself, to distinguish goods or services (see, to that effect, Case C-23/01 *Robelco* [2002] ECR I-10913, paragraph 34, and *Anheuser-Busch*, paragraph 64). The purpose of a company name is to identify a company, whereas the purpose of a trade name or a shop name is to designate a business which is being carried on. accordingly, where the use of a company name, trade name or shop name is limited to identifying a company or designating a business which is being carried on, such use cannot be considered as being ‘in relation to goods or services’ within the meaning of Article 5(1) of the directive.

22 Conversely, there is use ‘in relation to goods’ within the meaning of Article 5(1) of the directive where a third party affixes the sign

constituting his company name, trade name or shop name to the goods which he markets (see, to that effect, *Arsenal Football Club*, paragraph 41, and *Adam Opel*, paragraph 20).

23 In addition, even where the sign is not affixed, there is use ‘in relation to goods or services’ within the meaning of that provision where the third party uses that sign in such a way that a link is established between the sign which constitutes the company, trade or shop name of the third party and the goods marketed or the services provided by the third party.”

25. As is acknowledged in the above paragraph from *Euromarket Designs* consumer perception is relevant and evidence may be of assistance in resolving the question. Such evidence as there is before me in this case points away from rather than towards the usage being seen as in relation to goods. Only third party brands are evident on the goods. The mark MOBILE PLANET is merely used as the name of the retail or distribution service.

26. The above finding effectively decides the matter. However, there is a further problem with the evidence which I will briefly consider in case the matter goes to appeal. The invoice evidence shows use of Mobile Planet Limited or Mobile Planet UK Ltd that is to say the company names rather than MOBILE PLANET. A supplementary issue would, therefore, arise as to whether such use can be said to fall within Section 46(2) as being “in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered”. For convenience I will refer to this as an acceptable variant.

27. The leading authority on the principles to be applied in determining issues under Section 46(2) is *Bud and Budweiser Budbraü Trade Marks* [2003] RPC 25 where Lord Walker said:

“The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?”

The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer, but is nevertheless capable of analysis. The same is true of any striking and memorable line of poetry:

“Bare ruin’d choirs, where late the sweet birds sang”

is effective whether or not the reader is familiar with Empson’s commentary pointing out its rich associations (including early music, vault-like trees in winter, and the dissolution of the monasteries).

Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of “whose eyes? – registrar or ordinary consumer?” is a direct conflict. It

is for the registrar, through the hearing officer's specialised experience and judgment, to analyse the "visual, aural and conceptual" qualities of a mark and make a "global appreciation" of its likely impact on the average consumer, who:

"normally perceives a mark as a whole and does not proceed to analyse its various details."

The quotations are from paragraph [26] of the judgment of the Court of Justice in Case C-342/97 *Lloyd Schuhfabrik Meyer GmbH v Klijsen Handel BV* [1999] E.C.R. I-3819; the passage is dealing with the likelihood of confusion (rather than use of a variant mark) but both sides accepted its relevance."

28. The answer to the first of the questions posed by Lord Walker in the above passage is clear. The marks as used incorporate elements, that is to say company designations that are not present in the mark in the form in which it is registered. The more difficult issue is whether that alters the distinctive character of the mark as registered.

29. Richard Arnold QC, sitting as the Appointed Person, considered the application of the principles contained in the *Bud* case in O/262/06 *Nirvana Trade Mark* where the issue was whether use of NIRVANA NATURAL was a successful defence to a non-use claim against the registered mark NIRVANA. The Appointed Person, whilst accepting the case was close to the line, held that the Hearing Officer was entitled to come to the view that NATURAL would be seen as a descriptor and hence that the overall impression conveyed to the average consumer by the composite mark would be that of a NIRVANA brand.

30. Closer to the circumstances before me is *New Covent Garden Soup Co*, O/312/05, where the Registry Hearing Officer found as follows:

"24. In the *Bud* case, the application of s46(2) came into issue because certain features of the registered marks had been omitted from the marks used. The omission of a part of a registered mark inevitably gives rise to doubt as to whether the distinctive character of the registered mark has been retained when only some elements of it have been used. In this connection, I would accept CGMA's submission that the use of NEW COVENT GARDEN SOUP (omitting the element "CO") is use of a mark differing in elements which do affect the distinctive character of the registered word mark. This is because the registered mark brings to mind a particular soup company whereas the variant mark does not."

31. I have the converse of that position. The invoice evidence shows use of the company name but it is the plain words MOBILE PLANET that are registered. Nevertheless, it may be said that the logic of that position should apply here.

32. Lord Walker's judgment in the *Bud* case refers to the need to analyse the visual, aural and conceptual qualities of a mark in reaching a view on the question of whether use is of an acceptable variant. Indications such as 'Limited' and 'UK Ltd' would be

taken as merely indicating the existence of a company, they are necessarily descriptive and would be seen as such by consumers. It might also be argued that what distinguishes one company from another are not words such as 'Limited' but the actual name of the particular company concerned. By that I mean the substance of the name rather than generic indications of corporate status such as 'Company', 'Company Limited', 'PLC' etc. On that basis MOBILE PLANET would be the words that distinguish the two companies involved here from other companies.

33. If that is the case, does it mean that the addition of the company designators does not alter the distinctive character of the registered mark? I find some support for answering this question in the affirmative in *Reed Executive Plc v Reed Business Information Ltd, Reed Elsevier(UK) Ltd and totaljobs.com Ltd* [2004] E.T.M.R. 56, where in considering the issue of own name defence to infringement Jacob LJ found that:

“Clearly the words “Reed Business Information” were used as the name of a trading entity in every context in which they appeared on the totaljobs website. It matters not that the word “Ltd” or some other indication of incorporation is added.”

34. Furthermore, in *Antoni Fields vs Klaus Kobec Limited and Michael Cohen* [2006] EWHC 350 (Ch) Mr Richard Sheldon QC, sitting as a deputy judge of the High Court, considered the *Reed* case and held in relation to the issue of whether marks were identical that:

“I would find it surprising if the word “limited” could be ignored for the purposes of the “own name” defence....but not for the purposes of assessing whether use of Klaus Kobec Limited is use of a sign identical to the Mark...”

35. The mark in question was Klaus Kobec. The deputy judge also went on to hold that “.....“klauskobec.com” is identical use of the Mark, the addition of “.com” having no trade mark significance (for similar reasons as the addition of “Ltd”).”

36. Those cases were not dealing with the issue of what might constitute an acceptable variant mark for section 46(2) purposes. But it would be surprising if a party could not claim the benefit of Section 46(2) in the circumstances pertaining here when use of Klaus Kobec Limited and klauskobec.com were held to be use of the identical mark (Klaus Kobec) for infringement purposes. With some hesitation (because I am not aware that the point has been tested in the context of a revocation action) I conclude that the registered proprietor is entitled to have use of the company names taken into account here on the basis provided for in Section 46(2).

37. The company name point arises in relation to the invoice evidence. It might be thought that the issue is of academic importance in the light of the advertisements in MC3 as these clearly do show use of MOBILE PLANET in addition in some cases to the company name. In this respect, although the mark at the foot of each page arguably incorporates other distinctive matter (the O of MOBILE being in the form of a sun emerging from eclipse), the plain words MOBILE PLANET are clearly used in the narrative text “Notebooks from MOBILE PLANET”, “At MOBILE PLANET we pride ourselves ...”.

38. The difficulty about these advertisements on their own is that they appear to be undated and can only be attributed to relevant periods on the basis of the general statement made by the registered proprietor and recorded above. Mr Clarke refers to them as having been placed in trade and consumer publications during the period from August 1997 to April 2003. Only the periods from 11 January 2001 or 19 May 2001 onwards are relevant for present purposes. In other words I am unable to identify any particular advertisement as appearing in any particular magazine at a relevant date.

39. It follows that, if I am wrong on the issue of whether the use was in relation to services rather than goods, then the proprietor would have to rely on the invoice evidence (and hence my above view on use of the company names). In those circumstances I would have held that genuine use had been shown. However, in the light of my finding as to the nature of the proprietor's use ie. as a distribution or retail service, the point does not need to be pursued any further.

40. The application for revocation succeeds and the rights of the proprietor should be deemed to have ceased under Section 46(6) from the earlier of the alternative dates sought namely 11 January 2006.

41. The applicant is entitled to a contribution towards its costs.

42. I note the following in the registered proprietor's written submissions filed by Sanderson & Co:

“The Applicant took no steps to determine whether the Mark was in use in the United Kingdom before filing the Application for Revocation. Had it done so, these proceedings could likely have been avoided. Furthermore, the Applicant made no attempt to contact the Registered Proprietor before initiating the Revocation proceedings, which again might have lead [sic] to these proceedings being avoided. Still further, the Application for Revocation appears to be motivated entirely by the likely conflict between the Registration and the Applicant's own Trade Mark Application No. 2,410,916, rather than by any genuine belief that the Mark was not being used. Finally, since the Applicant has filed no evidence in support of its Application for Revocation, it is submitted that any costs incurred by the Applicant must be minimal. As such, it is submitted that the Applicant should bear its own costs regardless of the Registry's Decision.”

43. Eric Potter Clarkson replied to the point that the application for revocation was filed without notice. They say that the applicant's attorneys were in contact with WP Thompson & Co, the attorneys acting for the predecessors in title of the registration in suit prior to the revocation action being filed. In the absence of a satisfactory outcome to the correspondence the action was filed to protect the applicant's position. As the proprietor's current attorneys have not responded on this point I take it that they were unsighted as regards the correspondence with the previous attorneys. In any case, notice or not, the proprietor has chosen to defend the action.

44. As regards the second point, the applicant's motivation for attacking the registration, I do not understand why the proprietor should express surprise that a

likely conflict between the registration in suit and the applicant for revocation's own pending application proved to be the motivating factor for this action. Seeking revocation of an earlier trade mark is one of the normal mechanisms available to an applicant to deal with potential conflicts.

45. Finally, it is submitted that the applicant has filed no evidence so any costs of its own should be minimal. I propose to award costs on the standard scale. Clearly as the applicant filed no evidence it will not be rewarded in that respect but it is still entitled to an award in respect of the filing of the action, and reviewing the proprietor's own evidence.

46. I order the registered proprietor to pay the applicant the sum of £900. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 1st day of November 2007

M REYNOLDS
For the Registrar
The Comptroller-General