

O-055-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 83257
BY GILMAR SPA
FOR A DECLARATION OF INVALIDITY IN RESPECT OF
TRADE MARK NO. 2402387 IN THE NAME OF
ICE CLOTHING CO LTD**

TRADE MARKS ACT 1994

**IN THE MATTER OF application No. 83257
by Gilmar S.p.A. for a Declaration of Invalidity
in respect of trade mark No. 2402387
in the name of Ice Clothing Co Ltd**

DECISION

1. Trade Mark No. 2402387 is for the mark ICE BABES and is registered in Class 25 in respect of “Clothing, footwear, headgear.”

2. By an application dated 19 June 2008, Gilmar S.p.A. applied for the registration to be declared invalid under the provisions of Sections 47(2)(a) and (b) of the Act. The application is made on the following grounds:

- 1. Under Section 5(2)(b)** because the registration is for a mark that is similar to the applicant’s earlier trade mark and covers goods that are similar to those for which the applicants’ earlier mark is registered.

The applicants rely on an earlier international registration No 832107 based on an Italian registration with a priority date of 5 May 2004. This is for the word and letter ICE B, which the applicants allege is a similar mark to ICE BABES. They further say that the goods in Classes 25¹ and 18 of their international registration are identical and similar, respectively, to those covered by the mark that is the subject of this application.

¹Although the designation originally encompassed goods in Classes 18 and 25, a successful opposition removed all goods in Class 25 in respect of the UK.

- 2. Under Section 5(4)(a)** by virtue of the law of passing off based on the applicant’s UK use of ICE B, since January 2004, and other marks containing ICE as an element since 1982, including but not limited to ICEBERG, SPORT ICE, ICE JEANS, ICE ICE ICEBERG and ICE J, in relation to a selection of clothing, shoes, belts and bags.

3. The registered proprietors filed a counterstatement in which they deny the grounds on which the application is based.

4. The registered proprietor and the applicants for invalidity both ask for an award of costs in their favour.

5. Both sides filed evidence in these proceedings, which, insofar as it may be relevant I have summarised below. The matter came to be heard on 9 December 2009, when the registered proprietors were represented by Ms Catherine Slater of Serjeants, their trade mark attorneys.

The applicants were represented by Ms Kate Széll of Venner Shipley LLP, their trade mark attorneys.

Applicants' evidence

6. This consists of three Witness Statements. The first is dated 23 October 2010 and comes from Dean Rust, who since 1998 has owned Dias Limited.

7. Mr Rust says that his company has distributed (retailed) goods manufactured by, or on behalf of Gilmar S.p.A. since 1995, saying that he was aware that goods “under the brands then used” had been distributed in the UK “from at least as early as the beginning of the eighties.” Mr Rust makes particular reference to goods branded “SPORT ICE” being present on the UK market through several points of sales and were advertised in fashion magazines “at least as early as the nineties”, the goods being promoted through Gorland in London.

8. Mr Rust says that his company first distributed clothing and accessories for Gilmar S.p.A under the names ICEBERG and ICE JEANS. He says that from 1995 to date he has distributed such goods from his shop under a range of ICE brands including ICE J, ICE B and ICE ICEBERG, with ICE JEANS taking over the reputation and position of SPORT ICE goods as these were phased out in 1997 and 1998.

9. The next two Witness Statements are dated 8 October and 11 November 2008, and come from Massimo Marani who is the Chief Financial Officer of the applicant company, a position he has held since 1994. Mr Marani confirms that he has a good understanding of the English language, and confirms that the information he gives comes from his own personal knowledge or the records of his company.

10. At Exhibit MM1 Mr Marani shows a copy of a Witness Statement dated 5 September 2005 from Mr Silvano Gerani, the President of Gilmar S.p.A. filed in relation to the opposition to the application to register PINK ICE, No. 2358107. I do not propose to summarise this here but will do so separately after Mr Marani's Statement.

11. Mr Marani begins his first Statement by explaining that the applicant produces and sells clothing and accessories under a range of marks, first using the mark ICEBERG in relation to these goods in the UK in 1982. At least as early as 1992 it started using the mark SPORT ICE and in 1998 started to use the mark ICE JEANS. Mr Marani states that the applicant “subsequently expanded its use of marks containing the word ICE”, as examples referring to ICE ICE ICEBERG, ICE J and ICE B. He gives no further details of any use of these later marks. He explains that the mark ICE JEANS overlapped with and eventually replaced the use of SPORT ICE. Although not saying when use of the mark SPORT ICE ceased, the latest dated use of the mark is found at exhibit MM2 which consists of an invoice dated 17 March 1997.

12. Mr Marani next gives details of turnover in relation to use of the mark SPORT ICE, stating a total turnover in the UK between 1992 and 1997 of some 4 million Lira (which he equates to some €206,500). Exhibit MM2 consists of sample invoices for sales of SPORT ICE goods to retailers in the UK with dates ranging from July 1992 to March 1997, and a letter dated 12 November 1992 from Gorland Corporation Limited, his company's UK agent. This refers to sales of the SPORT ICE UOMO COLL (Mr Marani says that uomo coll is

Italian for men's collection) in the period July to September 1992 to the amount of £40,823. This equates to approximately a quarter of the total turnover for the period 1992 to 1997.

13. Exhibit MM3 consists of extracts of agreements (in Italian with informal translations into English) dated 20 January 1992 appointing Gorland as UK agents within the UK in relation to sales of garments, accessories and leatherware under the marks SPORT ICE MEN and SPORT ICE WOMEN. Mr Marani next introduces Exhibit MM4 which consists of faxed exchanges between the applicant company and its agent in December 1993. These refer to payments, and invoices on which commission is due deriving from the "93 Season", mentioning "SPORT ICE DONNA", "ICEBERG MARE DONNA" (Mr Marani explaining that "donna" is the Italian word for "woman), "ICEBERG SERA", "SPORT ICE UOMO", "ICEBERG DONNA", "ICEBERG MARE UOMO", "ICEBERG UOMO JEANS" and "SPORT ICE".

14. Exhibit MM5 consists of copies of photographs and drawings of goods sold in the UK under the mark SPORT ICE showing the mark in various forms on sew-in labels and as a motif on the front, back and sleeves of a range of shirts and jackets. Although mostly undated, a number bear the header "SPORT ICE COLLEZIONE P/E 96", which could relate to the 1996 collection. Mr Marani says that the garments and style of use of the brand is typical from the start until now. Exhibit MM5 is introduced as photographs of "typical" SPORT ICE labels and swing tags.

15. Mr Marani says that the promotion of SPORT ICE goods takes place through advertisements, placements in magazines, and by shows. Exhibit MM7 consists of copies of invitations from SPORT ICE sent to UK customers advising them of fashion shows presented under the name Pitti, taking place in Florence in 1994, 1995 and 1996. Exhibit MM8 consists of the name and address details of UK recipients of the invitation to the 1993 Pitti show. Exhibit MM9 consists of photographs that Mr Marani says are of some of the promotions and stands at the Pitti exhibitions, the name SPORT ICE is prominent on clothing and signage.

16. Earlier I referred to Mr Marani having exhibited a copy of a witness statement of Mr Silvano Gerani (Exhibit MM1) filed in relation to opposition proceedings involving his company (Opposition 93015 by Gilmar S.p.A. to application No. 2358107 for the mark PINK ICE in the name of Lacharité Apparels (1989) Inc.). Mr Marani states that he confirms the statements of Mr Gerani.

17. In his Witness Statement Mr Gerani confirms that he is President of the applicant company, a position he has held since 1980. Mr Gerani says that the information that he gives comes from his own personal knowledge or the records of his company to which he has full access.

18. Mr Gerani states that the applicant first started using the mark ICEBERG in relation to clothing within the UK in 1982 and that the mark is "currently" used in relation to a range of clothing and accessories. He says that the applicant has also used the marks ICE JEANS and ICE ICE ICEBERG. He gives the following details of combined turnover and advertising spend for goods sold in the UK under the marks ICEBERG and ICE JEANS:

ICEBERG

	1998 €000	1999 €000	2000 €000	2001 €000	2002 €000	2003 €000	2004 €000	2005 €000
Wear	1,114	1,552	1,626	1,286	1,662	1,586	1,647	427
Accessories	43	46	72	116	124	124	75	5
Total	1,157	1,598	1,698	1,402	1,786	1,710	1,722	432
Marketing Expenditure	263	105	412	607	352	390	328	139

19. In relation to use of the mark ICE JEANS details of turnover and marketing in the UK are given as follows:

	1998 €000	1999 €000	2000 €000	2001 €000	2002 €000	2003 €000	2004 €000	2005 €000
Wear	4,137	4,569	6,788	4,4042	4,382	4,588	3,943	1,196
Accessories	75	74	173	116	99	109	78	44
Total	4,212	4,643	6,961	4,158	4,481	4,697	4,021	1,240
Marketing Expenditure	51	60	226	292	159	79	-	-

20. The remainder of Mr Gerani's copy witness statement refers to the contents of a number of exhibits none of which have been provided so I am unable to consider the statements on their evidential value. He concludes his evidence by saying that the applicant has acquired a strong reputation and goodwill in the marks ICEBERG, ICE JEANS and ICE ICE ICEBERG in the UK and that because of the way the marks are presented, the ICE element of the marks is particularly associated with its goods.

21. The final Witness Statement is dated 11 November 2008 and is a second statement from Massimo Marani.

22. Mr Marani says that he is obtained details of his company's expenditure on advertisements of ICE branded clothing and accessories placed in magazines distributed in the UK, details of which he shows as Exhibit MM10. These details relate to expenditure in the years 1992 to 1996 and refer to advertisements placed in magazines such as Vogue, Elle, Marie Claire, Vanity Fair, Arena, Harpers and Queens and GQ. The amounts given are as follows:

1992	1993	1994	1995	1996
£50,477.05	£35,949.05	£49,154.43	£93,688.75	£319,080.50

23. Exhibits MM11 to MM15 are said to consist of copies of the covers of the magazines listed in Exhibit MM10 relating to the ICEBERG and SPORT ICE advertising campaigns from 1992 to 1996, respectively. A number of pages of the exhibit appear to be advertising either from the applicant's brochures or prepared for inclusion in other publications. The remainder are copies from various magazines such as Elle Vogue, Marie Claire, Vanity Fair, Arena, Harpers and Queens, Tatler, Harvey Nichols Magazine and GQ, the earliest dating

from February 1992. The exhibit also includes invoices to support the insertion of advertisements. Exhibit MM16 consists of invoices issued by Gilmar S.p.A. the earliest dating from 25 March 1994. These relate to clothing which Mr Marani says was branded as SPORT ICE although there is nothing to show that this was the case.

Registered Proprietors' evidence

24. This consists of a Witness Statement dated 28 February 2008 from Surinder Channa, the sole director of the registered proprietor's company which was incorporated on 7 August 1996. This Witness Statement does no more than introduce a copy of a Witness Statement dated 28 February 2008 filed as part of opposition proceedings whereby Ice Clothing Co Limited opposed the protection of an international designation for the mark ICE B in the UK.

25. Mr Channa says that the registered proprietor's business is the manufacture and sale of ladies' clothing and made its first sale on 16 November 1996. From then until 2002 the entire business of the company has been the manufacture and/or sale of ICE branded ladies clothing, either direct to independent clothes shops, cash and carries, or through a showroom at Commercial Road in London. Mr Channa says that his company also supplies a few wholesalers. At Exhibit SC 1 he exhibits photographs of various garments showing sewn-in labels and swing tags bearing the word ICE in various forms of stylisation although still clearly the word ICE. The photographs have been endorsed with dates of use from between October 1999 and 2002. Mr Channa states that the garment labels and swing tags have been re-designed periodically which is borne out by the photographs at SC1. The earliest is marked as dating from between October 1999 and December 2000 and shows a blouse/top with the sewn in label and swing tag bearing the word ICE. Another marked as being from 2001 shows ICE ICE ICE in script that graduates from light to dark in a sort of shadow effect. The next is marked as originating from 2002 and shows the word ICE in an italicised script with a red heart replacing the dot above the letter i.

26. Three of the remaining photographs show the mark ICE in conjunction with the word BABES. In one case on a white sew-in label with BABES in lower-case red lettering preceding the word ICE in a similar font but in black. The remaining two examples show the words on black sew-in labels and swing tags. In these the word ICE is in a white italicised script with a red heart replacing the dot above the letter I, and the word BABES is in red italics. In one example ICE precedes the word BABES, with the positioning being reversed in the second. The swing tags bear the words in the same format but quite separated, with ICE near the top and BABES in the bottom right-hand corner. These photographs are endorsed as dating from 2003, the third bears no date.

27. Mr Channa provides the following details of the opponent's total turnover and number of garments sold:

Period/Year ending	Turnover (£)	Garments sold (est)
30/09/1997	133,717	23,880
30/09/1998	624,539 (<i>See below</i>)	111,525
30/09/1999	1,149,258	205,225
30/09/2000	1,378,422	245,150
30/09/2001	1,308,436	233,650
30/09/2002	1,952,257	----
30/09/2003	2,192,999	----
30/09/2004	1,792,800	----

28. At SC2 Mr Channa exhibits copies of the opponent company's profit and loss accounts for the same years from which the above figures have obviously been extracted. There is one discrepancy in that the turnover figures quoted is different from the figure given for year ending 30/09/1998 appears in the profit and loss figures as £624,536 although nothing turns on this. Having analysed a small number of invoices for sales made over less than two weeks in October 1999, Mr Channa estimates that the average price of an ICE branded garment was approximately £5.60 and this provides the basis for his estimate of the number of garments sold under the mark.

29. Mr Channa states that in 2002 the opponent began to manufacture "some other brands". In particular, it made a number of garments into which JAPAN labels were sewn for one of its existing customers. Mr Channa states that he was not interested in expanding this aspect of the business as "my priority has always been the sale of our own ICE and (later) ICE BABES branded clothing." I take it from this that the JAPAN clothing was made for a third party. Mr Channa states that the opponent had no commercial reason to keep separate records of sales made under the mark ICE and other marks. He estimates that for each of the years ending 30/09/2002 and 30/09/2003 an "absolute maximum" of £300,000 of the above turnover figures would have been attributable to non ICE branded clothing. For the period October 2003 to the end of May 2004 he estimates the figure to be £200,000.

30. Mr Channa says that prior to 1998 his company did not export clothing, but since that date has done so mainly to Southern Ireland and, to a much lesser extent, Iceland. Mr Channa estimates these sales to amount to £100,000 for the years 1998-2000, £200,000 in 2002 and £220,000 for the years 2003 and 2004. He says that it is reasonable to assume (although not why) that the portion of exports attributable to sales ICE branded clothing corresponds to UK sales, from which he provides further figures relating to turnover and garment sales.

31. Mr Channa next provides information about a number of orders he placed for labels and swing tags each year between 1996 and May 2004. These range from some 18,000 garment labels in 1996 to 256,550 in 2003 with a high of 417,690 in 2002. Swing tags ordered for these same years are given as 20,000, 215,900 and 349,250 respectively. At SC3 Mr Channa exhibits copies of the relevant invoices and indicates that he cannot be certain that these are all the orders he made for labels, particularly in the period 1996 to 1999. At SC4 he exhibits copies of the artwork for the labels and swing tags as supplied to him. These are dated from May 1999 to December 2003 and bear the mark ICE either on its own, duplicated or in the "shadow" form that I referred to earlier with the word CLOTHING. One label is dated 2004 but because of the state of the photocopy I am unable to see anything on the label shown.

32. Whilst the registered proprietor manufactures a large proportion of the clothing it sells, Mr Channa confirms that it also outsources some manufacturing. As Exhibit SC5 he provides copies of instructions given to other companies in the period between 1997 and 2004. He comments that they all indicate that ICE labels and swing tags are to be attached to the garments.

33. As Exhibit SC6, Mr Channa exhibits sample invoices showing sales of ICE clothing in the UK since 1996. Those dating from 1996 and 1997 show them to be “from” Ice Clothing or Ice Clothing Co Ltd. The remainder, dating from 1998 onwards, are on headed paper where the heading is shown as Ice Clothing or Ice Ice Ice. All show the sale of garments from the registered proprietor’s company and in relation to a wide range of clothing. As Exhibit SC7 Mr Channa exhibits a number of invoices said to relate to the first orders he made for the purchase of labels and swing tickets carrying the mark ICE BABES. The earliest is dated October 2002 with a further order being made on 30 March 2005 following the first sales under the mark ICE BABES mark which are said to have taken place in September 2003.

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

Decision

35. The application for a Declaration of Invalidity is made under the provisions of Section 47 of the Act, which reads as follows:

“47.-(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

(2) The registration of a trade mark may be declared invalid on the ground -

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration

(2A)* But the registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the

declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) within the period of five years ending with the date of the application for the declaration the earlier trade mark has 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, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

(a) 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

(b) 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.

(2D) In relation to a Community trade mark, any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Community.

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

36. The first ground of objection is made under Section 5(2)(b) which reads as follows:

“5. - (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected

(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.”

37. An earlier trade mark is defined in Section 6 of the Act as follows:

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

(a) a registered trade mark, international trade mark (UK), or international trade mark (EC) 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,”

38. The designation of the UK was made as of the date of registration which is within five years of the relevant date, so the provisions of The Trade Marks (Proof of Use, etc.) Regulations 2004 do not apply.

39. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the ECJ in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] FSR. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] ETMR 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P (LIMONCELLO)*. 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) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive

character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(h) 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*,

(i) 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 and Adidas Benelux BV*,

(j) 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*.

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-3/03P *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market* [2004] ECR I-3657 at 32, That is the case where the component in the complex is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it (Case T-6/01 *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 33, and Case T-28/05 *Ekabe International v OHIM – Ebro Puleva (OMEGA3)* [2007] ECR II-4307, paragraph 43, *Shaker di L. Laudato & C. Sas v OHIM (LIMONCELLO)*

40. The applicants rely on one earlier trade mark, an international registration under the Madrid Protocol under number 832107 for the mark ICE B, as compared to the subject mark, ICE BABES. As can be seen from the above cases, where composite marks are involved the contribution of the individual elements to the mark as a whole and in the impression conveyed to the public are important factors when considering whether two marks are similar and the potential for confusion. It therefore seems necessary to look first at the distinctiveness and dominance of the component parts of the marks before moving to assess the factors relevant as part of the global appreciation.

41. ICE is an ordinary English word that I consider to be sufficiently well known so as not to need a reference work to determine its likely significance to the relevant public, or the fact that it has no reference to the goods of the earlier mark, direct or otherwise. As a trade mark for the relevant goods it has a strong distinctive character. Single letters are used in codification of products, and absent any other distinguishing matter are generally not considered to possess a distinctive character. There is no obvious connection between the word ICE and the letter B so as to make a cohesive whole. Factoring in its positioning as the first element, when taken as a whole ICE is the distinctive and dominant element of the earlier mark and in the overall impression it conveys.

42. The mark that is the subject of these proceedings consists of the words ICE and BABES. I do not disagree with the applicants contention that the word ICE is highly distinctive in relation to clothing and also accessories; it has no connection with a characteristic of such goods. In their skeleton the applicant's submit that BABES is a "...trendy, slang word..." with "...an allusion to the clothes being for women", and as such has a low distinctive character. I note that Collins English Dictionary contains the following definitions:

“**n** **1** a baby **2. Informal.** a naïve gullible, or unsuspecting person (often in the phrase a **babe in arms.** **3. Slang chiefly U.S.** a girl or young woman.”

43. Taken at face value, as an alternative for “baby” the term BABES could be regarded as descriptive of babies clothing. That said, the use of “babes” would be somewhat unusual, the more usual way in which such goods would be described being “babies”.

44. Turning to the “slang” use to which the applicants particularly refer, I would say that notwithstanding the reference to the US (which probably reflects the age of my dictionary), these days the term BABES is quite widely known and used in the UK to describe a girl or young woman. In their written submissions the registered proprietors appear to agree that BABES can be a reference to young women when used in connection with clothing, but have a different view of the mark ICE BABES as a whole. I am not aware that there is such a thing as clothing for BABES in the girl/young woman sense, as distinct from a mark such as ICE JEANS where JEANS will most likely be regarded as description of a type of clothing, BABES would not be usual or appropriate for such descriptive use. It is also the case that the registered proprietor's goods are not only for babies, girls or young women, so for these the word BABES would have no descriptive significance.

45. Although I have said that ICE does not require any explanation as to its meaning, I take note that Collins English Dictionary gives examples of phrases that use the attributes of ICE, for example, “break the ice” (to overcome shyness), “on thin ice” (being in a dangerous or vulnerable position) and being “put on ice” (stored/on hold). It is here where the registered proprietor's see the impact of ICE and BABES as a combination. They submit that in the context of clothing “...the conceptual meaning will either be taken as referring to goods for wear by young women in cold weather or as a reference to clothing for “cool” young women.” I am aware that ICE is used to describe a person with an unflappable or unemotional personality. In combination the words ICE BABES hang together such that the relevant public is more likely to see ICE as saying something about BABES than as a word on its own with BABES merely descriptive. So whilst ICE is clearly distinctive, and the most prominent (particularly by virtue of its relative positioning) element of the applicant's mark, the word BABES has a contribution to the distinctive whole that is certainly not negligible.

46. Given that the earlier mark and the mark applied for have the word ICE in common, without any detailed consideration it is reasonable to say that there must be a degree of visual similarity. The applicant's mark is very short consisting of the word ICE, with a single and separated letter B as a suffix. As the most significant element of the mark, and particularly so given its positioning (the beginning being generally accepted as having the most impact) the word ICE is going to draw the attention of the consumer's eye. This becomes even more likely given that ICE is a recognisable and well known word that has no cohesion with the following letter B. The registered proprietor's mark also has ICE as the first element so has a visual significance by virtue of its relative positioning to the suffix word BABES, but in this

case is not the biggest element by simple letter count. Additionally, the suffix is also a well known word that in meaning can tie in with the word ICE, so the visual attention will be more to the elements working in combination. Adding this to the fact that when comparing short marks small differences have a disproportionately large effect, I take the view that compared whole against whole the visual similarities are outweighed by the differences.

47. As both of the respective marks have the word ICE as the first element it is a reasonable to say that to this extent there will be identity in their sound. The suffix letter in the applicant's earlier mark is separated from ICE so making it unlikely that the mark will be treated as a single word, and more likely that each element will be enunciated. ICE has a soft ending whereas the letter B will have just that, a short, distinct and hard "BEE" sound. In the registered proprietor's mark, the suffix word also begins with a letter B but influenced by the following letter "A (so as to make a softer "BAY" sound) is longer and softer. So whilst there is aural identity in ICE, this dissipates when the marks are taken as a whole.

48. To the extent that the respective marks contain the word ICE they will send the same message to the relevant public. It is, however, the marks as a whole that must be compared and that is where the difference exists. The applicant's earlier mark has the letter B following ICE whereas the registered proprietor's mark has the word BABES. I have already commented that ICE is a word with a strong level of distinctiveness whereas single letters are generally considered to lack distinctive character. ICE and B do not combine to create a meaningful whole; it will be seen as an "ICE" mark codified by, or with a meaningless letter. I have given my view on the way ICE can be used in everyday language to convey certain personality attributes, and how I consider the word will impact on the perception of the relevant public when combined with BABES, creating an idea of a cool, emotionally contained young girl/woman. This leads to the conclusion that the respective marks say different things and should be regarded as conceptually different.

49. Taking these assessments into account I consider the differences to outweigh the similarities such that the respective marks cannot be considered similar.

50. The established tests in assessing the similarity or otherwise of goods and services is set out in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*. I also have regard to the decision of the CFI in *Saint-Gobain SA v OHIM Case T-364/05*. From these I determine that I must consider the uses and users of the respective goods or services, the physical nature of the goods or acts of service, and the trade and distribution channels through which they reach the market. In the case of self-serve consumer items this will also include consideration of where the respective goods are likely to be found, particularly in multi product outlets such as supermarkets. The extent to which the respective goods or services are competitive or complementary is also a relevant consideration guided by how they are classified in trade, and known by the relevant consumer. Other than where the proof of use provisions have been applied, the comparison is a notional one based on the wording used in the specifications rather than the actual markets involved.

51. The relevant goods of the earlier mark are:

Class 18: Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and

travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.

52. The mark in suit is registered in respect of:

Class 25: Clothing, footwear, headgear.

53. In his decision sitting as the Appointed Person in the *React* trade mark case [2000] R.P.C. 285, Mr Simon Thorley stated:

“There is no evidence to support Ms Clark’s submission that, in the absence of any particular reputation, consumers select clothes by eye rather than by placing orders by word of mouth. Nevertheless, my own experience tells me it is true of most casual shopping. I have not overlooked the fact that catalogues and telephone orders play a significant role in this trade, but in my experience the initial selection of goods is still made by eye and subsequent order usually placed primarily by reference to a catalogue number. I am therefore prepared to accept that a majority of the public rely primarily on visual means to identify the trade origin of clothing, although I would not go so far as to say that aural means of identification are not relied upon.”

54. The decisions in *Claudia Oberhauser v OHIM (Fifties)* [2003] E.T.M.R. 58, and *Criminal Clothing Ltd v Aytan’s Manufacturing (UK) Ltd*, [2005] EWHC 1303 indicate that the circumstances in which the relevant goods and the trade marks are encountered by the consumer, particularly at the point at which the purchase is made, is an important consideration. That said, the matter must be considered by applying an assessment of all relevant factors.

55. The mark in suit is registered in Class 25 in respect of clothing, footwear and headgear. The applicant’s earlier mark covers goods of leather and imitation leather, in their submissions focusing the application towards “bags, handbags, purses, wallets and unspecified “clothing accessories” contained within the general descriptions. In their argument that the respective goods should be regarded as similar, the applicants refer me to the decision of the CFI in *El Corte Inglés SA v Office for Harmonization in the Internal Market (Trade Marks and Designs)(OHIM)* Case T- 443/05. In this case the CFI held that goods may be considered complementary if they have a common aesthetic function by jointly contributing to the external image (look) of the consumer concerned. The CFI went on to state:

“50 The perception of the connections between them must therefore be assessed by taking account of any attempt at coordinating presentation of that look, that is to say coordination of its various components at the design stage or when they are purchased. That coordination may exist in particular between clothing, footwear and headgear in class 25 and the various clothing accessories which complement them such as handbags in class 18. Any such coordination depends on the consumer concerned, the type of activity for which that look is put together (work, sport or leisure in particular), or the marketing strategies of the businesses in the sector. Furthermore, the fact that the goods are often sold in the same specialist sales outlets is likely to facilitate the perception by the relevant consumer of the close connections

between them and strengthen the perception that the same undertaking is responsible for the production of those goods.”

56. To my mind the CFI are not saying that certain goods in Classes 18 and 25 are invariably similar, rather that they may be so provided that the relevant circumstances of “consumer”, “activity”, “marketing” and “outlet” would lead to the relevant consumer to the belief that the same undertaking is responsible for the goods.

57. My own experience matches the conclusions of the CFI in that I know it is not unusual for traders in clothing to also trade in items, for example, handbags, purses/wallets, as a matching accessory to clothing such as footwear. The same is the case in respect of “bags” and umbrellas which may be coordinated with overcoats/headwear, and “belts” with many types of clothing. They are, however bought in addition to, rather than as an alternative so I do not consider them to be in any way competitive. Taking this into account I am led to the conclusion that as there is nothing in the wording of either of the respective specifications that would separate them in the market, I must notionally assume that they operate in the same sector, and share the same channels of trade, from manufacture to retail. Additionally, I can see no reason why the consumer of the respective goods should be any different, which in this case must be the public at large.

58. These goods notionally range from the cheap and simple that will be selected with minimal attention to the brand, to the high-end expensive and exclusive where the purchaser will be well informed and circumspect in all aspects of the selection. The consumer will be used to seeing such goods available from a single trader, and marketed as a range to complete a particular look. These goods may not be sold on the same shelves, but being complementary are likely to be displayed in reasonably close proximity. There is no evidence on this, but it would be surprising if this accessorising did not feature in the marketing activity. My conclusion is that some of the goods in Class 18 of the earlier mark should be considered similar to the clothing, headgear, and particularly the footwear covered by the subject registration.

59. Whilst the registered proprietors have made the usual denials and put the applicants to proof in respect of their claims to the use and any reputation, I note that neither they, nor the applicants have specifically challenged the evidence filed by the other. So in considering the question of the use of the respective trade marks I will proceed on the basis set out by Mr Richard Arnold QC (as he then was) when sitting as the Appointed Person in *EXTREME* Trade Mark (BL O/161/07), namely, that if the evidence is not “obviously incredible” and the opposing party has not adduced evidence to contradict the witness's evidence, then the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the evidence.

60. Mr Marani states that the applicants have produced and sold clothing and accessories in the UK since 1982 under the mark ICEBERG, and from at least as early as 1992 using the mark SPORT ICE. In 1998 they started to use the mark ICE JEANS, this use overlapping with SPORT ICE until that mark was phased out. The exact date when the use of SPORT ICE ceased is not given but there is evidence of use in an invoice dated 17 March 1997 (MM2). This sits with the information given by Mr Marani who states the early use of SPORT ICE in the UK being between 1992 and 1997 as being in the order of some 4 million Lira, extrapolated to some €206,500. Approximately one quarter of this is derived from sales

of the SPORT ICE UOMO COLL (uomo coll is Italian for men's collection) by an agent in the period July to September 1992. The evidence of later UK sales mentions "SPORT ICE DONNA", "ICEBERG MARE DONNA", Mr Marani explaining that "donna" is the Italian word for "woman", "ICEBERG SERA", "SPORT ICE UOMO", "ICEBERG DONNA", "ICEBERG MARE UOMO", "ICEBERG UOMO JEANS" and "SPORT ICE". Besides being use from well before the relevant date, the only evidence of an accessory is the mention of a belt in an invoice dated 2 September 1992. Mr Marani says that the applicants have used other marks containing the word ICE, citing by way of example ICE ICE ICEBERG, ICE J and ICE B.

61. Mr Gerani corroborates the use of ICEBERG in the UK from 1982 in relation to a range of clothing and accessories. He further confirms that the applicant has used the marks ICE JEANS (as a replacement for the earlier used SPORT ICE) and ICE ICE ICEBERG. He provides details of the turnover for ICEBERG and ICE JEANS in the years 1998 to 2005 which is stated to be in respect of "Wear" and "Accessories". The term "Wear" is self-explanatory and particularly so when considered in conjunction with the supporting exhibits which depict clothing for men and women. Whilst I do not have any market-related information by which to gauge the stated amounts it is possible to say that they are not of an insignificant scale. The turnover for ICE JEANS branded goods is between two and four times higher than for ICEBERG so are of even greater significance, whereas those given for "accessories" are in the same ball park.

62. What is meant or encompassed by "accessories" is not clear from the evidence, the only goods that fall within this description being the "belts" previously mentioned and the "accessories and leatherware" in the distribution agreements. In the Statement of Case the applicants refer to use in respect of "belts and bags", but whatever they are the turnover figures are of a small scale compared to the trade in clothing, and not impressive in the overall context of the likely market for such goods.

63. The applicant's advertising and promotion of ICE branded clothing and accessories in most years has been substantial in the amount spent, and involved many quality magazines such as Vogue, Elle, Marie Claire, Vanity Fair, Arena, Harpers and Queens and GQ. The difficulty is that the evidence primarily consists of copies of the front covers of the publications in some cases accompanied by invoices relating to the placement of advertisements, but very few copies of the advertisement itself. Those that are shown promote clothing under SPORT ICE, SPORT ICE BY ICEBERG, ICEBERG and ICEBERG JEANS.

64. In paragraph 2 of the Statement of Case the applicants single out the mark ICE B, claiming its use from January 2004, whilst in paragraph 3 they claim use from 1982. Mr Marani adds to the uncertainty, at paragraph 4 of his Witness Statement (8 October 2008) stating that "My Company first started using ICEBERG... in 1982...ICE JEANS as early as 1998 and SPORT ICE at least as early as 1992....subsequently expanded its use...to include...ICE B..." and other ICE marks. To me the word "subsequently" would mean following the latest of the previously given dates, but whatever is the case, there is an almost complete lack of any evidence of any actual use of this mark. The one instance I have found is far from conclusive being an invoice from The Conde Nast Publications Ltd for a whole-page advertisement in August 1994. This has a manuscript entry "ICEB" which could be ICE B, but there is no accompanying advert to show how the mark appeared or the associated

goods. Mr Rust says that his company distributed clothing for Gilmar S.p.A. under a range of ICE brands including ICE B but not what, from when and in what scale. Turnover relating to SPORT ICE, ICEBERG and ICE JEANS has been provided but not for any other mark. The same is the case in respect of the expenditure on advertising and promotion. Setting aside the fact that I have found the mark ICE B not to be similar to ICE BABES, in these circumstances I do not see how I can proceed on the basis that the applicants have any reputation in ICE B. The position is all but identical in respect of ICE J, the only evidence being the mention of it having been used.

65. Taken at face value this evidence supports the conclusion that the applicants initially established a reputation in SPORT ICE, but given the time that has elapsed between the cessation of its use and the relevant date it is unlikely to have much if anything remaining at the relevant date. It may, however have added to the reputation established in respect of ICEBERG and ICE JEANS (with or without other matter) in respect of clothing but the evidence does not support such a conclusion in respect of any “accessories”.

66. In their skeleton the applicants assert that “...The use of acronyms is common, particularly in the clothing world where, for example, Dolce & Gabbana is abbreviated to D&G; Calvin Klein is abbreviated to “CK””. From this they assert that as a “trendy, slang word” it is not unlikely that the use of “B” after the highly distinctive “ICE” would be seen as an acronym for “BABES”. In the cases of D&G and CK the abbreviation is of the names of designers (D&G is the duo Domenico **Dolce** and Stefano **Gabbana**). There is no evidence whatsoever that the letter B is an abbreviation or acronym for BABES, whether on its own or placed after a distinctive word, or that the relevant public will perceive the use of the letter in such a way. Where this argument may have legs is on the possibility of imperfect recollection. The applicants rightly refer to the fact that consumers “...only recall marks imperfectly and rarely compare them side by side.” That is indeed the case, but they also recognise that when comparing marks it is the “...overall impression, bearing in mind the distinctive and dominant component...”

67. The mark at issue is not an unused mark, having been used over a period of time when the applicants were using their ICE marks, and in connection with the same type of goods. Whilst the fact that there has been actual use concurrently with the earlier trade mark does not save it from objection, it may be relevant in determining whether there is a likelihood of confusion.

68. The registered proprietors say that they made their first sale of ICE branded clothing on 16 November 1996. Supporting exhibits show use in various forms of stylisation, although still clearly the word ICE, in the period between October 1999 and 2002. This includes use on a label bearing ICE ICE ICE dating from 2001, where each successive word graduates from light to dark in a sort of shadow effect. In respect of ICE BABES they say that the use commenced in 2000 with the first sales under the mark said to have taken place in September 2003. The earliest evidence relating to the mark is found at SC7 which consists of invoices dating from October 2002 and March 2005 for the supply of ICE BABES woven labels and swing-tickets. The invoices are accompanied by art work showing the style of label. These invoices should properly be regarded as “internal use”. Photographs shown as Exhibit SC1 show the garments with labels marked ICE BABES in a similar style, but not identical format to those shown in SC7. Two are endorsed as dating from 2003. The stated use in terms of turnover is not overly impressive but is of a scale that shows a real commercial activity in the sale of ICE and ICE BABE branded goods, and particularly so when the unit costs are

factored in to reveal the number of items sold.

69. So where does this lead me? I reach the conclusion that whilst there are similarities, in particular in respect of the goods and consequently also the connected notional circumstances of the manufacture and market, the differences in the respective marks are such that use of the mark applied for will not lead to confusion. The opposition under Section 5(2)(b) therefore fails. I reach this decision without factoring in that there may have been concurrent use, which had I done so would only have made the outcome in the registered proprietor's favour more certain.

70. This leaves the ground under Section 5(4)(a). That section reads as follows:

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

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

(b)

71. 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”.

72. The requirements for this ground of opposition have been restated many times and can be found in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *WILD CHILD* Trade Mark [1998] R.P.C. 455. Adapted to opposition proceedings, the three elements that must be present can be summarised as follows:

(1) that the opponents' 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 applicant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the applicant are goods or services of the opponents; and

(3) that the opponents have suffered or are likely to suffer damage as a result of the erroneous belief engendered by the applicant's misrepresentation.

73. To the above I add the comments of Pumfrey J in the *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* case [2002] RPC 19, in which he said:

“27. 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 & Co Ltd'd Application (OVAX) (1946) 63 RPC 97 as qualified by BALI Trade Mark[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.

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

74. The first issue to determine is the material date at which this objection must be judged. A similar provision to section 5(4)(a) of the Act is to be found in Article 8(4) of Council Regulation 40/94 of December 20, 1993. This was the subject of consideration by the Court of First Instance in *Last Minute Network Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* joined cases T-114/07 and T-115/07. In that judgment the CFI stated:

"50 First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51 However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000"

75. The material date is therefore the date of the application for registration. However, if there has been use of the trade mark by the registered proprietors prior to the date of application this must be taken into account as it could establish that it was the senior user. Additionally, it may show that there are circumstances that mean that the use of the subject mark would not be liable to be prevented by the law of passing-off. (See *Croom's Trade Mark Application* [2005] RPC 2 and *Daimlerchrysler AG v Javid Alavi (T/A Merc)* [2001] RPC 42.)

76. In their Counterstatement the applicants claim to have first used the mark in suit, ICE BABES in the UK since 2000. However, in paragraph 22 of his Witness Statement (Exhibit A) Mr Channa states that the first sales of ICE BABES branded goods were made in September 2003 which is the date that the applicants submit is the "very earliest" material date for passing-off.

77. I have already gone into some depth in explaining why I do not consider the applicants to have shown that a reputation exists in respect of the marks ICE B, and I do not see that there is any basis for inferring that the position is any different in respect of goodwill. This is,

however somewhat immaterial given the applicants claim use of ICE B from January 2004 and their acceptance that the material date is potentially September 2003. Added to the fact that I consider the mark ICE B to be dissimilar to ICE BABES I do not see how there can be any potential for misrepresentation or damage. The position is all but identical in respect of ICE J, the only evidence being the mention of it having been used.

78. Turning to the SPORT ICE mark which the applicants potentially used in the period from 1992 until 1998 (or thereabouts). I have already said that taken at face value the evidence supports the conclusion that a reputation in the mark existed in respect of clothing, and I see no reason why the position should be any different in respect of goodwill. However, given the time between the cessation of its use and the material date (whether the date of application or the earlier date of September 2003) it seems likely that what goodwill there was will have dissipated. Even if that were not the case at the material date for passing off, under the guidance in *Last Minute et seq*, if the goodwill existed at the earlier date but not at the later there would be no cause of action for passing off.

79. The applicants rely on use of their marks ICEBERG and ICE JEANS from 1982 and 1998 respectively, in respect of clothing and clothing accessories. I have already explained why I consider the evidence to support the conclusion that the applicants and these marks have an established reputation in respect of clothing, but not accessories. I do not see any reason to reach a different conclusion in respect of goodwill. This goodwill pre-dates the registered proprietor's use of ICE BABES and in respect of ICEBERG also their use of ICE in various forms. That being the case the applicants have cleared the first hurdle.

80. From a visual standpoint the word ICEBERG may have the word ICE in common with ICE BABES, but as a whole looks quite different. Whilst the commonality in the letters at the beginning of the marks (ICEB) creates an aural similarity, to the ear each ending will have its own sound that is quite distinct from the other and that is the case even allowing for potential slurring. ICEBERG is an ordinary word in common use and as such will be familiar to English speakers as a large piece of ice that is floating in open water. This is a very different idea to that conveyed by the words ICE BABES. In my assessment the marks ICEBERG and ICE BABES are different, and as such I do not see how that, when taking this and the extent of their goodwill into account, use by the registered proprietors would amount to a misrepresentation even in connection with the same or similar goods. I believe it follows that there is no real likelihood of damage.

81. This leaves the applicant's ICE JEANS mark. In their skeleton argument the applicants contend that:

“...the word ICE overwhelms and dominates the word JEANS in the word ICE JEANS. As with the mark in that case, PINK ICE, ICE BABES consists of the distinctive word ICE together with a word low in distinctiveness for the same reasons as given in the PINK ICE decision (paragraph 38), ICE BABES is likely to be seen as a sub-brand of ICE JEANS.”

82. I have no argument with the contention that in the word “ICE” is a very distinctive with no direct or allusive meaning in relation to clothing. Nor do I disagree that JEANS has descriptive connotations for certain types of such goods. However, I have already explained why I do not consider BABES to be a word with the descriptive potential of JEANS (and I

would add, also PINK). The words JEANS and BABES have no visual, aural or conceptual similarity whatsoever, so whether viewed as an “ICE” mark, or as the whole, ICE JEANS, I do not consider this to be a similar mark to ICE BABES as a totality. That being the case I do not see that there can be a misrepresentation that could lead to damage to the applicant’s goodwill.

83. The ground of objection under Section 5(4)(a) fails and is dismissed. I would add that having made this finding I do not need to consider the registered proprietor’s use of ICE which had I done so (discounting the dissimilar mark ICEBERG) on its face would have put the registered proprietors in the position to claim to be the senior user of ICE.

84. The application having failed on both grounds the registered proprietors are entitled to a contribution towards their costs. I order the applicants to pay the registered proprietors the sum of 2,900. 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 11 day of February 2010

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