

O-059-08

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 82638
BY CATERPILLAR INC FOR REVOCATION OF REGISTRATION
NO. 2119555 STANDING IN THE NAME OF
NIFTYLIFT LIMITED**

BACKGROUND

1. Registration No. 2119555 for the trade mark ALLEY CAT stands registered in the name of Niftylift Limited (which I will refer to as NL). The trade mark was applied for on 24 December 1996 and the registration procedure was completed on 11 December 1998. The trade mark is registered for the following goods in class 7.

“Mobile access platforms for use in warehouses, factories, depots, offices, atriums, airports, sports halls, leisure complexes, bus and train stations, shopping centres and car parks.”

2. On 20 September 2006, Caterpillar Inc (which I will refer to as CI) applied for revocation of the registration under Section 46(1)(b) of the Trade Marks Act 1994 (“the Act”). The five year period in which non-use is claimed is the five year period prior to the date of the filing of the application for revocation.

3. On 9 January 2007, NL filed a counterstatement in which they deny the claim to non-use and ask for the revocation action to be withdrawn and an award of costs in their favour. Both sides filed evidence which is summarised below. Neither side has asked to be heard preferring instead for the decision to be taken from the papers on file; neither side provided written submissions. After a careful study of all the papers, I now give this decision.

EVIDENCE

NL’s evidence - rule 31(3)

4. This consists of a witness statement, dated 2 January 2007, by John Keely. Mr Keely explains that he is the Managing Director of NL, a position he has held for 17 years. He confirms that he is authorised to speak on NL’s behalf, adding that the information in his statement comes from his own knowledge or from company records.

5. He says that the trade mark has been used in the period 20 September 2001 to 20 September 2006, and provides the following exhibits as evidence of this use:

Exhibit JK1 – which consists of two invoices from NL dated 8 January and 7 February 2002 respectively, to Geoff Till Access Ltd of Bromsgrove. Both invoices refer to the sale of 1 “Niftylift Alleycat Platform” (serial nos. 02/8946 and 02/8948) and show a sum due of £20,562.50 per invoice, £41,125 in total.

Exhibit JK2 – which consists of an invoice dated 1 November 2001 from NL to Nifty Equipments in Auneuil, France for the sale of 1 “Niftylift Alleycat Platform” (serial no. 02/8944) and shows a total amount due of £16,312.

Exhibit JK3 – which consists of an invoice dated 3 September 2002 from NL to Metronet REW Ltd of London for the sale of 1 “ALLEYCAT” (serial no. 02/9789) and shows a total amount due of £21,326.25.

Exhibit JK4 – which consists of certified copies of test certificates relating to ALLEY CAT and Niftylift Alley Platforms indicating that tests were undertaken on the platforms on 8 January 2002 (no. 028946), 15 January 2003 (no. 028948), 15 August 2003 (no. 027050) and 16 June 2004 (no. 029789). Mr Keely explains that these certificates relate to an overload weight test carried out on every machine as specified by the requirements of the LOLER Regulations and EN280 (which is the current CE standard relating to mobile elevating work platforms). He adds that the tests were carried out by NL in the UK.

6. Also included in exhibit JK4 is what Mr Keely describes as “up to date promotional material relating to the ALLEY CAT product”. This consists of three pages. The first two pages appear to be part of the same promotional leaflet, the second page carrying the legend “KP218-53 UK 04/99” which I take to be a reference to 1999. This leaflet shows the words ALLEYCAT used alone, in proximity to the word NIFTY, and with the words ALLEY and CAT separated by a device of a cat stretching upwards. The final page contains a very small indistinct image of what is perhaps a leaflet. One can discern, inter alia, the text “NIFTYLIFT Hydraulic Work Platforms” together with images of a range of platforms. It is, as far as I can tell, undated; the words ALLEY CAT and the ALLEY CAT and device trade mark can just about be discerned.

7. Mr Keely concludes his statement in the following terms:

“In view of the above information, I trust that the Registrar will agree my company’s mark is still very much in use in the United Kingdom. I therefore ask that the Applicant’s revocation action be refused in its entirety and costs be awarded to my company. I should also add that this evidence of use was provided to the Applicant’s representatives on 27 September 2006, but despite this they have continued with this action and this should be borne in mind in deciding upon costs.”

CI’s evidence - rule 31A(1)

8. This consists of a witness statement, dated 16 April 2007, by James Hurst. Mr Hurst explains that he is the attorney responsible for trade marks at CI, a position he has held for over 2 years. He confirms that he is authorised to speak on CI’s behalf, adding that the information in his witness statement comes from his own knowledge or from CI’s records.

9. Mr Hurst then reviews Mr Keely’s evidence for NL, concluding that Mr Keely’s evidence: “..does not prove genuine use of the trade mark ALLEY CAT for the goods in class 7....”. He makes the following observations:

- that in relation to the four invoices filed, one is from 2001 the remaining three are from 2002, adding that only three machines were sold to outside customers i.e. Geoff Till Access Ltd and Metronet REW Ltd. The fourth machine was, he says, only transferred to NL’s French subsidiary, an assertion he says is supported by reference to exhibit JMH1 which he describes as excerpts from Nifty Equipment’s internet page evidencing the relationship between the two companies;
- that in relation to the test certificates, he argues that these do not prove sales of any machines in the United Kingdom, given that the machines may well have been put on the market in the United Kingdom before the relevant period;

- that in relation to the promotional material, he comments that this material is undated and does not assist.

10. In paragraph 5 of his witness statement Mr Hurst says:

“Having reviewed the proprietor’s evidence it is my view that they have not provided any convincing sales or turnover numbers, and no convincing evidence of use of the mark which is more than token use. No information has been given in respect of advertising and promotion of the trade mark ALLEY CAT by the proprietor. The evidence produced by the proprietor does not amount to proof of an objective presence on the market that is effective or consistent over time to gain a market share. It is rather a sporadic use some years ago which must be qualified as mere token use”.

11. To further support his assertions, Mr Hurst provides as exhibits JMH3-JMH12 ten versions of the internet page www.niftylift.com between 6 December 1998 and 5 June 2005 obtained using the Wayback-Machine internet archive. This, he says, indicates that the page mentioned was updated nine times since its launch in December 1998, adding that although the internet pages contain an exact overview of the proprietor’s entire product range for self-propelled, trailer mounted, vehicle mounted and track mounted work platforms, none of the pages makes any mention of a lifting platform bearing the ALLEY CAT trade mark.

12. Finally, Mr Hurst explains that CI has obtained the cancellation of NL’s class 7 registration of the trade mark ALLEY CAT in the United States, with details provided as exhibit JMH13. Despite Mr Hurst’s comments on how this information should be construed, I do not see how the cancellation of a US trade mark (presumably on the basis it has not been used) can have any bearing on the use position in the United Kingdom.

NL’s evidence – rule 31A(3)

13. This consists of a witness statement, dated 26 July 2007, by Steven Lane a trade mark attorney in the employ of Forresters, NL’s professional representatives in these proceedings. Mr Lane’s witness statement is in the nature of submissions on CI’s evidence. As such, I do not feel it either appropriate or necessary to summarise it here; I will of course bear it in mind and refer to it as necessary when making my decision.

CI’s evidence – rule 31A(5)

14. This consists of a witness statement, dated 29 November 2007, by David Latham a solicitor and partner in the law firm Lovells LLP, CI’s professional representatives in these proceedings. Like Mr Lane’s witness statement, Mr Latham’s witness statement consists, in the main, of submissions on NL’s evidence. Once again, I do not feel it either appropriate, or necessary to summarise it here but will of course bear it in mind and refer to it as necessary when making my decision.

15. That said, Mr Latham comments that while the use made of a trade mark may not need to be quantitatively significant, if, in the market concerned, typical sales of comparable goods by a competing undertaking would typically be much higher then, in his view, genuine use of the trade mark has not been

made. He notes by reference to exhibit DAL1 (which is said to consist of CI's internal database web pages), that CI's sales in the United Kingdom during the period 2002 to 2006 amounted to the sale of 3037 hydraulic work platforms. He then refers to exhibit DAL2 which is said to consist of a summary of the turnover information derived from NL's statutory accounts filed with Companies House for the financial years ending December 2002 to December 2006. Mr Latham notes that while NL is a relatively small company in comparison to CI, its sales turnover in 2006 was over £28m and over £11m in 2002. He concludes that the very few sales of hydraulic work platforms made by NL during the period 2002-2006 constituted a negligible proportion of their turnover during this period.

DECISION

The Law

16. 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)

(d)

(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).....

(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.”

17. Section 100 of the Act is also relevant and reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

Relevant five year period

18. The application for revocation is based on section 46(1)(b) alone. The relevant period is the five years preceding the date of the application for revocation; the application was filed on 20 September 2006. The relevant period is therefore, 20 September 2001 to 19 September 2006.

The authorities on genuine use

19. The two leading authorities on the guiding principles to be applied in determining whether there has been genuine use of a mark are *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer Trade Mark* [2006] F.S.R. 5. From these cases I derive the following main points:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be ‘on the market’ and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);

- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);
- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);
- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- an act of importation could constitute putting goods on the market (*Laboratoire de la Mer*, paragraph 25 referring to the earlier reasoned order of the ECJ);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);
- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);
- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

20. In these proceedings NL rely upon the evidence of Mr Keely to establish that genuine use has been made of their ALLEY CAT trade mark within the relevant period. While I have summarised this evidence at paragraphs 5 and 6 above, it is now appropriate for me to revisit it in a little more detail, bearing in mind the submissions on it contained in the witness statements of Mr Hurst and Mr Latham (for CI) and Mr Lane for NL.

21. There are three categories of evidence provided by Mr Keely; the first are the four invoices at exhibits JK1, 2 and 3; the second category relates to the four test certificates (exhibit JK4), and the third category to the three pages of promotional material (also exhibit JK4). I will deal with the invoice evidence first. The first two invoices are on NL's letter headed paper and are addressed to Geoff Till Access Ltd of Bromsgrove, Worcestershire, England; the invoices are dated 8 January and 7 February 2002, so both fall within the relevant period. Each invoice refers to the sale of 1 "Niftylift Alleycat Platform" (serial nos. 02/8946 and 02/8948) and show a net price of £17,500 and a total amount due of £20,562.50 per invoice, amounting to £41,125 in total. The third invoice once again on NL's letter headed paper is dated 1 November 2001 (again within the relevant period) and is addressed to Nifty Equipments in Auneuil, France. It appears to relate to the sale of 1 "Niftylift Alleycat Platform" (serial no. 02/8944) and shows a net price/total amount due of £16,312. In his witness statement Mr Hurst of CI suggests that this machine was not sold but simply transferred to NL's French subsidiary, providing at exhibit JMH1 excerpts from Nifty Equipment's internet page which he says demonstrates this connection. In his witness statement Mr Lane says of this invoice:

“...However, the product was sold (emphasis added) to the French subsidiary and this in itself must equate to genuine use. If, for example, the platform had merely been sent to the French subsidiary, without any transfer of consideration, then use of the mark could not have been established. Moreover, an act of importation could constitute “*putting goods on the market*” and equally, exportation must be viewed in the same manner.”

Although not decisive, I note that in light of Mr Lane’s explanation, Mr Latham says that this evidence:

“. shows that [NL] sold – if at all – four machines bearing the trade mark ALLEY CAT in the UK during the five years before this action commenced...One of these sales was to [NL’s] French subsidiary.”

The fourth and final invoice, again on NL’s letter headed paper, is dated 3 September 2002 (again within the relevant period) and is addressed to Metronet REW Ltd of Acton, London. It relates to the sale of 1 “ALLEYCAT” (serial no. 02/9789) and shows a net price of £18,150 and a total amount due of £21,326.25.

22. The second category of evidence relates to the test certificates. This consists of four test certificates all on NL’s letter headed paper and relates to overload stability tests for hydraulic lifting platforms carried out on machines described as either ALLEYCAT or Niftylift Alleycat Platforms, indicating that tests were undertaken by NL on the platforms on 8 January 2002 (no. 028946), 15 January 2003 (no. 028948), 15 August 2003 (no. 027050) and 16 June 2004 (no. 029789), all of which fall within the relevant period. In his witness statement Mr Hurst says of this category of evidence:

“The test certificates do not prove any sales of machines in the UK given that the machines examined might well have been put on the UK market before the relevant period of time, namely prior to 20 September 2001. The mere fact of a few ALLEY CAT lifting platforms remaining on the market and being tested is not proof of genuine use of a trade mark.”

Mr Lane responds to this in his witness statement, the relevant part of which reads:

“The mere fact that the platforms are being tested under the name ALLEY CAT is a clear intention on the part of [NL] to ensure the products are “fit” for sale.”

Mr Latham responds to this comment in the following terms:

“Preparation of the test certificates constitutes internal use since the carrying out of such tests need not lead to any sales. Nor do Mr Keely and Mr Lane’s witness statements demonstrate that the test certificates were linked to machines which were either marketed or about to be marketed during the relevant period i.e. before 20 September 2001.”

23. The third category of evidence is what Mr Keely describes as “Up to date promotional material relating to the ALLEY CAT product”. This consists of three pages. As I mentioned above, the first two pages appear to be part of the same promotional leaflet, the second page carrying the legend “KP218-53 UK 04/99”, which I take to be a reference to 1999 (which is before the relevant period). This leaflet

shows the words Alleycat used alone, the words ALLEY and CAT separated by a device of a cat stretching upwards used alone and in proximity to the word Nifty, and the words ALLEYCAT also used in proximity to the word Nifty. The first page describes the ALLEY CAT product as a “Self Propelled Vertical Mast Lift” and contains, inter alia, the following text:

“In the rapidly evolving world of powered access, Niftylift brings you... The Alleycat, designed and built in the UK to meet your specific needs. Think about the benefits you really need from a mobile access platform, do they match the features offered by the “Alleycat”?

Working heights of over 11 metres with an outreach of well over 3 metres, from a self propelled chassis of less than 1 metre wide, work in the confidence that Niftylift has produced an access platform on the cutting edge of technology.

With a weight of less than 3 tons and with non-marking tyres as standard, the “Alleycat” is ideal for working on today’s delicate floors. Another benefit of the low weight ensures that the machine is easily transportable on a small trailer. Fully proportional drive function gives inch perfect control and when linked with 360° turret rotation and an amazingly acute turning circle, operating in the tightest working environments is now possible”

Both pages show the product in use, not surprisingly, in a commercial context. As mentioned above, the final page of the promotional material is indistinct and, as such, is of no evidential value. Of this category of evidence Mr Hurst says:

“[NL] has also submitted three pages which it described as “up-to-date promotional material” However, the material is undated. It therefore does not qualify as evidence for genuine use during the relevant period.”

I note that neither Mr Lane or Mr Latham comment on the promotional material.

24. Before I move on to express my own views on the evidence filed by NL, there are two other issues I need to deal with. These are collectively referred to in the evidence of Mr Hurst as “Evidence of Non-Use”. The first relates to the non-appearance of the words ALLEY CAT on what he describes as NL’s internet page www.niftylift.com between December 1998 and June 2005. The second relates to the cancellation of NL’s ALLEY CAT trade mark in the United States. In his witness statement, Mr Lane appears to accept that the relevant pages exhibited to Mr Hurst’s witness statement as exhibits JMH3-JMH12 do not show use of the ALLEY CAT trade mark, but comments that as the onus is on NL to prove use and not on CI to prove non-use, this evidence is “...irrelevant and should be disregarded”. As to the proceedings in the United States, Mr Lane argues that as the cancellation of NL’s registration does not, as Mr Hurst argues:

“...clearly indicate that the ALLEY CAT mark was not used during the relevant period of time in any relevant jurisdiction”,

it is not relevant to these proceedings. In short, I agree with Mr Lane’s conclusions in relation to both arms of CI’s evidence of non-use, and propose to make no further comments on these aspects of CI’s case.

Has there been genuine use made in the relevant period?

25. CI have, in my view, accepted that NL have made sales of (at least) three machines within the relevant period. The fourth sale to their French subsidiary Nifty Equipments was initially challenged by Mr Hurst and categorised by him as a transfer rather than a sale, although I note that following Mr Lane's explanation of this transaction, it appears that Mr Latham accepts (albeit reluctantly) that a sale may have taken place. I propose to proceed on the basis that all four invoices represent sales, although I should say that the inclusion or not of the sale to NL's French subsidiary is unlikely to effect my overall conclusion.

26. As to the test certificates, these indicate that four separate machines were tested by NL on the dates mentioned, all of which were within the relevant period. The purpose of these tests was, says Mr Lane, to establish that the products were "fit" for sale. Mr Latham suggests that the preparation of these test certificates constituted internal use, adding that the carrying out of such tests need not lead to any sales. While it is clear from Mr Keely's evidence that the tests were carried out in the United Kingdom by NL, he does not explain at which point in the machine's life the tests take place. From Mr Hurst's evidence it appears that the tests are carried out on both new and used machines as required by the LOLER regulations set out in Statutory Instrument 1998 No. 2307 – The Lifting Operations and Lifting Equipment Regulations 1998, although neither party has provided copies of these regulations in evidence. If one compares the serial numbers of the machines referred to in the invoices in exhibits JK1, 2 and 3 with the tests certificates in exhibit JK4, one can see that machine no/serial no. 028946 (which I take to be references to the same machine) was tested on 8 January 2002 prior, one may infer, to its sale to Geoff Till Access Ltd on the same date. Machine/serial nos. 028948 and 029789 were tested on 15 January 2003 and 16 June 2004, following their sale to Geoff Till Access Limited on 7 February 2002 and Metronet REW Ltd on 3 September 2002, possibly in compliance with the LOLER regulations mentioned above. Whilst not evidence of sales, this clearly demonstrates to me that NL had a continued commercial involvement with these ALLEY CAT branded machines during the relevant period.

27. Finally, I turn to the promotional literature. This appears to carry in very faint text at the bottom of the second page (on the bottom right hand side of the "Supplied By:" box), the legend "KP218-53 UK 04/99" which as mentioned above, I have taken to be a reference to 1999. However, Mr Keely says this is "up-to-date promotional literature" which I take to mean current at the time he signed his witness statement i.e. January 2007. Mr Hurst says the document is undated (which given the above I am not sure is correct), and as I noted above, Messrs. Lane and Latham do not comment on this material. In my view, it is not implausible that despite Mr Hurst's evidence to the effect that the ALLEY CAT trade mark does not appear to have been used on NL's website in the period December 1998 to June 2005, that brand specific documentation produced in 1999 and which carries the following disclaimer:

"Due to a policy of continuing development and improvement the manufacture reserves the right to change any specification without notice. Please confirm exact specification before ordering",

may still have been in use at the time of Mr Keely's witness statement in 2007. I note that the leaflet shows various pictures of the machine in use referring to it in the terms I have described at paragraph 23 above.

28. Bearing all of the above factors in mind, and applying the guidance distilled from the case law mentioned in paragraph 19 above, I have concluded that NL's use has: (i) not been merely token, (ii) has been "on the market" and has not been merely internal, (iii) has been with a view to creating or preserving an outlet for the goods, and (iv) is consistent with the essential function of a trade mark i.e. to guarantee the identity of the goods to consumers or end users. I accept that the numbers of machines shown to have been sold during the relevant period is not large, but I note and agree with Mr Lane when he says:

"The actual number of platforms sold is not therefore relevant and so the test is not a quantitative one. Instead the assessment must have regard to the nature of the goods, the characteristics of the markets concerned, and the scale and frequency of use.. Of course, lifting platforms are extremely specialised and expensive items of machinery....Therefore, these machines are not fast moving consumer items and so the same criteria cannot be applied."

29. Mr Latham argues that NL's use should be considered in the context of "normal industry sales of this type" and goes on to compare them to CI's sales in relation to similar goods. I have no information on the nature of the market for these type of goods. It may well be that NL's use is perfectly normal for companies operating in this particular market; put simply, I just don't know.

30. NL's ALLEY CAT trade mark stands registered for:

"Mobile access platforms for use in warehouses, factories, depots, offices, atriums, airports, sports halls, leisure complexes, bus and train stations, shopping centres and car parks."

Effectively NL's trade mark is registered for mobile access platforms for use in various locations. Given the nature of the goods at issue in these proceedings, and in light of the evidence provided by NL, I am satisfied that within the relevant period, NL have made genuine use of their ALLEY CAT trade mark (see below for my comments on the form in which the trade mark has been used) in relation to all of the goods of their registration; there is nothing, for example, in NL's evidence (or CI's comments on it for that matter) which suggests that their mobile access platforms cannot be used in all of the locations specified in their registration.

The trade marks used

31. I can deal with this issue very briefly. There is no suggestion in any of CI's evidence that they feel that NL's use of their ALLEY CAT trade mark has been in anything other than the form in which it is registered or in a form differing in elements which does not alter its distinctive character; that I think was a realistic approach. The trade mark is registered in block capitals and presented as two separate words. However, in use it appears in the range of formats described at paragraph 23 above. Regardless, there is sufficient cumulative use of the trade mark in the form ALLEYCAT (presented in block capital letters as one word), or Alleycat (presented as one word with the initial letter A capitalised), or even (arguably) in the form ALLEY CAT separated by the device of a cat to justify its acceptance either as the trade mark as registered or in an acceptable variant form.

Conclusion

32. In summary, I have concluded that NL have made genuine use of their ALLEY CAT trade mark within the relevant period in relation to all of the goods for which it stands registered. The application for revocation is dismissed accordingly.

Costs

33. NL have been successful and are entitled to a contribution towards their costs. Commenting on costs in his witness statement Mr Keely said:

“....I should also add that this evidence of use was provided to the [CI’s] representatives on 27 September 2006, but despite this they have continued with this action and this should be borne in mind in deciding upon costs.”

There is nothing in CI’s evidence which disputes this statement. The evidence on which NL have succeeded before me was (it appears) provided to CI some seven days after they filed their application for revocation. Regardless they chose not to withdraw the application at that stage, which in turn led to NL filing both a counter-statement and the same evidence of use provided to CI some three months earlier. In addition, NL filed the witness statement of Mr Lane but not, I note, any written submissions. While I have determined that, in my view, genuine use has been made of the ALLEY CAT trade mark by NL, I think it was perfectly reasonable, given CI’s obvious concerns regarding what they considered to be the insufficient scale of use and the uncertain relevance of the test certificates and promotional material provided, for them to pursue this revocation action to its conclusion. As such, I intend to award costs to NL in line with the published scale. The relevant sums are therefore:

Considering Application and accompanying statement:	£200
Statement of case in reply:	£300
Preparing and filing evidence:	£300
Considering evidence:	£150
Total	£950

34. I order CI to pay NL the sum of £950. 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 28th day of February 2008

**C J BOWEN
For the Registrar
the Comptroller-General**