

O/062/13

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2583257
IN THE NAME OF JUSTIN BLACKHURST

AND
OPPOSITION THERETO UNDER NO 102712
BY NEXT RETAIL LIMITED

Background

1. Application No 2583257 seeks registration of the trade mark SEO NEXT. It was applied for on 1 June 2011 and stands in the name of Justin Blackhurst. Registration is sought in respect of the following services:

Class 35:

Search engine optimisation services; internet marketing; information, advisory and consultancy services in relation to these services

Class 38

Telecommunication services; portal services; email services; providing user access to the internet; information, advisory and consultancy services in relation to these services

Class 42

Computer consultancy services; design and development of computer hardware and software; computer programming; digital development; web design, drawing and commissioned writing for the compilation of websites; information, advisory and consultancy services in relation to these services

2. Following publication in the *Trade Marks Journal* on 26 August 2011, notice of opposition was filed by Next Retail Limited ("NRL"). In support of objections founded on the provisions of section 5(2)(b) and 5(3) of the Act, NRL rely on the following trade marks insofar as they are registered (or have applied to register) the following goods and services:

Trade Mark	Specification
CTM 1620434* NEXT Filing/registration date: 19.4.2000/2.7.2003	Class 35 Retail services in the fields of clothing, headgear and footwear, jewellery, fashion accessories, household articles, towels, bedding, textiles, furniture, lighting apparatus, toys, electrical products, cosmetics, non-medicated toilet preparations, eye ware, carrying cases, handbags and all manner of bags, kitchenware, paints, wallpaper and other products for decorating the home, pictures, picture frames, electrical products, cameras; the bringing together for the benefit of others of a variety of goods including the aforesaid products; enabling customers to conveniently view and purchase these goods; services for the retail of products through high street stores, via mail order catalogues or over the Internet; providing on-line retail store services in the field of the aforesaid

	<p>goods; information and advice in relation to retail services relating to the aforesaid goods; business management consultancy including giving assistance and advice in the establishment of retail stores in the field of the aforesaid goods; on-line trading services, trading services in respect of a wide range of goods; excluding modelling agency services.</p> <p>Class 42</p> <p>Technical consultancy and advising in the establishment of retail stores in the field of clothing, headgear and footwear, jewellery, fashion accessories, household articles, towels, bedding, textiles, furniture, lighting apparatus, toys, electrical products, cosmetics, non-medicated toilet preparations, eye ware, carrying cases, handbags and all manner of bags, kitchenware, paints, wallpaper and other products for decorating the home, pictures, picture frames, electrical products, cameras.</p>
<p>CTM 5848131</p> <p>NEXT DIRECTORY</p> <p>Filing/registration date:</p> <p>20.4.2007/28.8.2008</p>	<p>Class 9</p> <p>Apparatus for recording, transmission or reproduction of sound or images; parts and fittings for all the aforesaid goods.</p> <p>Class 35</p> <p>Business management consultancy including giving assistance and advice in the establishment of retail stores connected with the sale of clothing, headgear and footwear, jewellery, watches, fashion accessories, household or kitchen utensils and containers, glassware, porcelain and earthenware, towels, bedding, textiles, furniture, lighting apparatus, toys, apparatus for reproducing sound and video, apparatus for heating, steam generating, cooking, refrigerating, drying, ventilating, cosmetics, non-medicated toilet preparations, eye wear, carrying cases, leather goods, handbags and all manner of bags, kitchenware, paints, wallpaper, pictures, picture frames, cameras; on-line trading services connected with the sale of clothing, headgear and footwear, jewellery, watches, fashion accessories, household or kitchen utensils and containers,</p>

	<p>glassware, porcelain and earthenware, towels, bedding, textiles, furniture, lighting apparatus, toys, apparatus for reproducing sound and video, apparatus for heating, steam generating, cooking, refrigerating, drying, ventilating, cosmetics, non-medicated toilet preparations, eye wear, carrying cases, leather goods, handbags and all manner of bags, kitchenware, paints, wallpaper, pictures, picture frames, cameras.</p>
<p>2371317*</p> <p>NEXT</p> <p>Filing/registration date: 23.8.2004/4.2.2005</p>	<p>Class 35</p> <p>Advertising, business management, business administration; office functions</p>
<p>2453621</p>  <p>Filing/registration date: 25.4.2007/24.10.2008</p>	<p>Class 35</p> <p>Retail services, including retail services offered via a general merchandising and clothing store, mail order catalogue, online, via television channel, via mobile phone and by direct marketing, all connected with the sale of clothing, headgear and footwear, jewellery, watches, fashion accessories, household articles, towels, bedding, textiles, furniture, lighting apparatus, toys, electrical products, cosmetics, non-medicated toilet preparations, eyewear, carrying cases, leather goods, handbags, sports bags, travel bags, shopping bags, toiletry bags, messenger bags, carrier bags, document bags and children's bags, kitchenware, paints, wallpaper, wall stickers and borders, pictures, picture frames, electrical products, cameras; the provision of information and advice in relation to retail services relating to the aforesaid goods; business management consultancy including giving assistance and advice in the management of retail stores in the field of the aforesaid goods.</p>
<p>CTM 8218885</p> <p>NEXT</p> <p>Filing/registration date: 15.4.2009/ not yet registered</p>	<p>Class 36</p> <p>Insurance; financial affairs; monetary affairs; real estate affairs; arranging and providing credit, debit and charge card services; provision and arranging of payment protection insurance; instalment loans, providing and financing personal loans; hire purchase financing;</p>

	<p>arranging and providing hire purchase agreements; debt collection; management of customer accounts and mail order accounts; providing extended warranties; providing warranties for domestic appliances; providing warranties for electrical appliances.</p> <p>Class 39 Transport; packaging and storage of goods; travel arrangement; transportation, storage, packaging and delivery of goods.</p> <p>Class 45 Maintaining lists of wedding presents for selection by others; preparation of wedding present lists; maintaining list of gifts for selection by others; preparation of gift lists.</p>
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3. Under grounds founded on section 5(4)(a) of the Act, NRL relies on use in the UK of the mark NEXT on a wide variety of goods as well as retail, distribution, business consultancy and financial services since 1982 and the mark NEXT DIRECTORY in respect of a mail order catalogue and on-line retail website for a variety of retail, distribution and related services since 1987.

4. Mr Blackhurst filed a counterstatement in which he denied each of the grounds of opposition. He also put NRL to proof of use on certain services of those marks listed above and identified with an asterisk.

5. NRL filed evidence and both parties filed written submissions. The matter came before me at a hearing which took place on 26 October 2012. Mr Blackhurst was represented by Mr Tim Rose of Wilson Gunn, his legal representatives in these proceedings. NRL was similarly represented by Mr Shaun Sherlock of Marks & Clerk LLP.

The objections under section 5(2)(b) of the Act

6. Under this ground, NRL is relying on the trade marks set out at paragraph 2 above. Registration Nos. 2453621 and CTM 5848131 are not subject to the provisions of section 6A of the Act regarding proof of use of the marks given that their registration processes were completed less than five years before the publication date of the mark for which registration has been applied. CTM 8218885 is a pending application and also not subject to the provisions of section 6A of the Act. Registration Nos. 2371317 and CTM 1620434, for which Mr Blackhurst has requested proof of use, both completed their registration processes more than five years before the publication date of the mark for which registration has been applied. The provisions of section 6A of the Act relating to proof of use are therefore relevant to these earlier marks and proof of use is required for the period 27 August 2006 to 26 August 2011.

7. Section 5(2)(b) of the Act states:

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

- (a) ...
- (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

8. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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,

(b)

(c)

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

9. Section 6A of the Act states:

“6A (1) This section applies where-

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if-

(a) within the period of five years ending with the date of publication of the application 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) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) 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.

(5)

(6) 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.

(7)....”

10. Section 100 of the Act is also relevant, this reads:

“**100.** 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.”

11. At the hearing, Mr Rose accepted that NRL has used and has a reputation in the word NEXT in relation to retail services but maintained the request for NRL to prove use in relation to the following services:

1620434

Class 35

Business management consultancy including giving assistance and advice in the establishment of retail stores in the field of the aforesaid goods;

Class 42

Technical consultancy and advising in the establishment of retail stores in the field of clothing, headgear and footwear, jewellery, fashion accessories, household articles,

towels, bedding, textiles, furniture, lighting apparatus, toys, electrical products, cosmetics, non-medicated toilet preparations, eye ware, carrying cases, handbags and all manner of bags, kitchenware, paints, wallpaper and other products for decorating the home, pictures, picture frames, electrical products, cameras.

2371317

Class 35

Advertising, business management, business administration; office functions.

12. I go on to consider the evidence of the use made of both marks in relation to these services. The leading authorities on the principles to be applied in determining whether there has been genuine use of a trade mark are: *Ansul BV v Ajax Brandbeveiliging BV* [2003] RPC 40 and *Laboratoire de la Mer Trade Mark* [2006] FSR 5. The general principles were summarised by the Appointed Person in *Pasticceria e Confetteria Sant Ambroeus Srl v G & D Restaurant Associates Ltd (Sant Ambroeus Trade Mark)* [2010] RPC 28 as follows:

“(1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely “token”, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods

and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: Ansul, [38] and [39]; La Mer, [22] -[23].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: Ansul, [39]; La Mer, [21], [24] and [25].”

NRL’s evidence

13. NRL’s evidence takes the form of a witness statement of Sarah Louise Noble dated 12 June 2012. Ms Noble has been a company solicitor for NRL since 1998.

14. Ms Noble states that NRL is a sister company to Next Directory each of which is a wholly owned subsidiary of Next Group Plc which in turn is a subsidiary of Next Plc. This latter company is a public listed company which is listed in the top 100 companies on the London Stock Exchange. A brief history of NRL’s business is exhibited at SLN1. NRL first used the trade mark NEXT in the UK in 1982 on goods including clothing, fashion accessories and household goods and has expanded to sell footwear, headgear, electrical goods and fitness equipment. The products have been sold through Next branded stores, a mail order catalogue and a website.

15. The mail order catalogue, under the mark NEXT DIRECTORY, was launched in 1988. At SLN3 are exhibited a selection of pages from the mail order catalogues dating from 2008 to 2010. The catalogue had 1m active customers by 2000 and 2m by 2007. The website, www.next.co.uk was launched in 1999 and, at SLN2 Ms Noble exhibits pages taken from the website which provide a brief „business overview’. At the date of the witness statement, NRL operated around 500 stores throughout the UK and, at SLN5 Ms Noble exhibits a list of these stores.

16. Whilst no indication is given of NRL’s turnover, Ms Nobel gives the following figures of annual turnover for the parent company, Next Plc:

Year	£
2001	1,588.5m
2002	1,871.7m
2003	2,202.6m
2004	2,516m
2005	2,858.5m
2006	3,106.2m
2007	3,283.8m
2008	3,329.1m
2009	3,271.5m
2010	3,406.5m
2011	3,453.7m

17. Ms Nobel states that NRL expends substantial sums of money on advertising and publicising its products sold under the mark NEXT. At SLN7 she exhibits a summary of the annual promotional budget along with copies of magazine advertisements for NRL's goods. There are five pages within the exhibit but no explanation is given of how the pages relate to each other. From page 200 of the exhibit it is clear that advertising has taken place by page advertising (which I take to be pages in printed publications), on billboards, TV advertisements and through other marketing initiatives with the following total sums shown on page 201 of the exhibit:

Year	Total £000s
2004	17,000,000
2005	17,394,777
2006	25,945,184
2007	46,763,351

18. At SNL8 Ms Nobel exhibits what she refers to as „a collection of photographs and materials demonstrating how the mark NEXT has been applied to the goods and used on the stores by' NRL. The vast majority of the pages show various photographs taken both outside and inside a number of its stores. Most of the photographs do not show any use of the mark but there are some which show the entrance to stores with the words „next HOME' or „next' on the store fronts as well as a few taken from inside the stores showing the words on what appear to be signage. The exhibit also shows photocopies of various swing tags and labels from various items of clothing, some of which show the word NEXT.

19. As set out above, proof of use of the marks is required for a range of services including business management and technical consultancy, advertising and office functions. In her witness statement, Ms Noble refers to NRL being involved in the retail of a wide range of goods including clothing, fashion accessories and household goods which are sold on the high street, by mail order or through its website but makes no reference to it being involved in any other area of business. There are, however, a number of exhibits attached to her witness statement which refer to NRL's business.

20. Exhibit SLN1 sets out a history of the development of the company (e.g. womenswear launched in 1981, Next for Men 1984, Next Interiors 1985) but makes no mention of any trade in the relevant services for which proof of use is required. Exhibit SLN2 is a business overview downloaded on 12 April 2011. This document does make mention of customer services management being provided to clients (including to Next Directory) through the operation of various call centres, but it indicates that this is done through another Next Group business called Ventura.

21. The only other evidence of use not directly about the retailing of goods is at SLN4, which includes pages from NEXT Directory catalogues. It indicates (page 105) that customers can visit the website to see reviews from other customers and look at goods from every angle as well as visit the „My Account' page to pay for goods or arrange returns. The exhibit also contains 4 pages downloaded on 29

December 2009 from the careers.next.co.uk website which provides information on the Group's warehouse and distribution sites and indicates that between them they have or provide "over 88,000 store deliveries, 130+ vehicles in our UK fleet and 40 million parcels delivered every year".

Findings on proof of use

22. There is no evidence of use under the mark NEXT by NRL in relation to any of the services set out above for which proof of use is required. As well as the absence of evidence of use in relation to those services, I note the following extracts taken from NRL's own evidence at SLN6, which is a copy from the Annual Report and Accounts of January 2011, where, in the introduction (page 139) it states:

"NEXT is a UK based retailer offering exciting, beautifully designed, excellent quality clothing, footwear, accessories and home products. NEXT distributes through three main channels: NEXT Retail.....NEXT Directory.....and NEXT International, with more than 180 stores around the world. NEXT also has a growing website capability in more than 30 countries."

At page 168 it states:

"NEXT continues to be predominantly a single business selling products under the NEXT brand."

23. As NRL has not proven use of its marks in relation to the services for which proof was required, it is not entitled to rely on these two earlier marks in respect of those services. Consequently, 2371737 cannot be relied upon in these proceedings and I make no further mention of it. CTM 1620434 can be relied upon only to the extent that it covers services for which proof of use was not required. I will take this into account in my consideration of the objection under the provisions of section 5(2)(b) of the Act.

24. In determining the question under Section 5(2)(b), I take into account the guidance provided by the Court of Justice of the European Union (CJEU) in *Sabel v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R 77, *Marca Mode CV v Adidas AG* [2000] E.T.M.R.723, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di Laudato & C. Sas v OHIM* C-334/05 (Limoncello), as cited with approval in *Och-Ziff Management Europe Ltd and Oz Management LP v Och Capital LLP, Union Investment Management Ltd and Ochoki* [2010] EWCH 2599 (Ch). It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, 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 and whose attention varies according to the category of goods or services in question;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) 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;
- (k) if the association between the marks causes the public to wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

25. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 28, Jacob J gave advice as to how similarity should be assessed. He identified the following factors to be taken into account:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

26. Subsequently, in *Canon Kabushiki Kaisha v MGM Inc* the CJEU stated:

“23. In assessing the similarity of the goods or services concerned.....all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, intended purpose and their method of use and whether they are in competition with each other or are complementary.”

27. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06 the General Court (GC) stated:

“82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM- Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05, *Saint-Gobain Pam v OHIM –Promamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM –Bolaños Sabri (PiraÑam diseño original Juan Bolaños)* [2007] ECR-1-0000, paragraph 48).”

28. In *Gérard Meric v OHIM*, Case T-133/05, the GC said:

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03

Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

29. Finally, in *Avnet Incorporated v Isoact Ltd* [1998] FSR 16, Jacob J stated:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meaning attributable to the rather general phrase.”

30. I shall deal with each of the marks relied on by NRL separately.

CTM 1620434

Following my findings in relation to proof of use, the services to be compared are as follows:

NRL’s services	Applicant’s specification
<p>Class 35</p> <p>Retail services in the fields of clothing, headgear and footwear, jewellery, fashion accessories, household articles, towels, bedding, textiles, furniture, lighting apparatus, toys, electrical products, cosmetics, non-medicated toilet preparations, eye ware, carrying cases, handbags and all manner of bags, kitchenware, paints, wallpaper and other products for decorating the home, pictures, picture frames, electrical products, cameras;</p> <p>the bringing together for the benefit of others of a variety of goods including the aforesaid products; enabling customers to conveniently view and purchase these goods;</p> <p>services for the retail of products through high street stores, via mail order catalogues or over the Internet;</p> <p>providing on-line retail store services in the field of the aforesaid goods;</p> <p>information and advice in relation to retail services relating to the aforesaid goods</p>	<p>Class 35:</p> <p>Search engine optimisation services; internet marketing; information, advisory and consultancy services in relation to these services</p> <p>Class 38</p> <p>Telecommunication services; portal services; email services; providing user access to the internet; information, advisory and consultancy services in relation to these services</p> <p>Class 42</p> <p>Computer consultancy services; design and development of computer hardware and software; computer programming; digital development; web design, drawing and commissioned writing for the compilation of websites; information, advisory and consultancy services in relation to these services</p>

on-line trading services, trading services in respect of a wide range of goods; excluding modelling agency services	
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31. I consider, first, the applicant's *search engine optimisation services*. For NRL, Mr Sherlock submitted at the hearing:

"This is a very broad term which can mean a number of things. My interpretation of it would be that it is services which enhance the placing of a website. So it is essentially making sure that your website is higher up the search list than somebody else's....It is, as such, a service that [NRL] are providing to their customers to make sure that their website is easily found."

32. For his part, Mr Rose submitted the respective services are not similar. He said:

"Without sounding too glib, it is important for a department store on a high street that its customers can find it easily in the town but that does not mean that because it has protection for retail services, it has built up the protection for town planning. You cannot say, just because you are at the top of the list of searches, that means you are providing search engine optimisation services."

33. I agree with Mr Sherlock that search engine optimisation services are such that allow the visibility of a website or webpage to be raised so that it will appear earlier, or higher in the ranking, in the results of a search. But the user of such a service is the person seeking to raise the profile of his website not the person seeking to access that, or another's, website. The nature of search engine optimisation services is a technical one which will not come to the attention of the searcher and end user of any website accessed. In my view, the respective users, uses and natures differ from NRL's services and they are not in competition nor are they complementary. These respective services are not similar.

34. It follows from the above that *information, advisory and consultancy services in relation to [search engine optimisation] services* are also dissimilar services to [NRL's] *information and advice in relation to retail services*. Whilst they both have similar natures in that they are advisory services, the users and uses differ and they are neither in competition nor complementary services.

35. *Internet marketing* is a specialist service. To my mind, the core meaning of the service is to advise and assist a business with the presentation and content of its website so as to enhance e.g. its ease of use and its accessibility so as to maximise its effectiveness to the business. Whilst retailers may use the Internet as a vehicle by which it offers its goods that does not make the respective services similar. I consider the respective uses, users and nature of the services differ and they are neither in competition nor are they complementary services and thus I consider them to be dissimilar services. It follows that the *information, advisory and consultancy*

services in relation to such services also differ. If, however, I am found to be wrong in my consideration of these services, then any similarity is low.

36. I consider NRL's services to be dissimilar to those of the application in classes 38 and 42. The services of the application are technical ones allowing for the provision of electronic technologies and related advice services. Whilst NRL may provide its services via e.g. the Internet or telephone, they are simply vehicles for the retailing services and not electronic technology services per se. The users, uses and nature of the respective services differ and they are not in competition nor are they complementary.

2453621

37. The services to be compared are as follows:

NRL's specifications	Applicant's specification
<p>Class 35</p> <p>Retail services, including retail services offered via a general merchandising and clothing store, mail order catalogue, online, via television channel, via mobile phone and by direct marketing, all connected with the sale of clothing, headgear and footwear, jewellery, watches, fashion accessories, household articles, towels, bedding, textiles, furniture, lighting apparatus, toys, electrical products, cosmetics, non-medicated toilet preparations, eyewear, carrying cases, leather goods, handbags, sports bags, travel bags, shopping bags, toiletry bags, messenger bags, carrier bags, document bags and children's bags, kitchenware, paints, wallpaper, wall stickers and borders, pictures, picture frames, electrical products, cameras;</p> <p>the provision of information and advice in relation to retail services relating to the aforesaid goods;</p> <p>business management consultancy including giving assistance and advice in the management of retail stores in the field of the aforesaid goods.</p>	<p>Class 35:</p> <p>Search engine optimisation services; internet marketing; information, advisory and consultancy services in relation to these services</p> <p>Class 38</p> <p>Telecommunication services; portal services; email services; providing user access to the internet; information, advisory and consultancy services in relation to these services</p> <p>Class 42</p> <p>Computer consultancy services; design and development of computer hardware and software; computer programming; digital development; web design, drawing and commissioned writing for the compilation of websites; information, advisory and consultancy services in relation to these services</p>

38. My findings here mirror those in respect of CTM 1620434 in that I find all of the applicant's services to be dissimilar to NRL's retail services but that if I am wrong in relation to *internet marketing and information, advisory and consultancy services in relation to such services* then any similarity is low.

39. NRL's earlier registration also includes *business management consultancy*. Whilst this includes *giving assistance and advice in the management of retail stores in the field of the aforesaid goods* it is not limited to such management and therefore covers business management consultancy at large. Whilst the services of the application may be used by businesses in the course of their trade, in line with *Avnet* the core meaning of NRL's service is providing the skills to manage a business rather than providing skills relating to each specialist area that a business might use or access in the course of that business e.g. banking, computing, legal issues. Whilst the users of the respective services may therefore overlap, the uses and natures of those services differ to all of those of the application. Neither are the respective services in competition or complementary. The respective services are dissimilar.

CTM 5848131

40. The goods and services to be compared are as follows:

NRL's goods and services	Applicant's services
Class 9 Apparatus for recording, transmission or reproduction of sound or images; parts and fittings for all the aforesaid goods.	Class 35 Search engine optimisation services; internet marketing; information, advisory and consultancy services in relation to these services
Class 35 Business management consultancy including giving assistance and advice in the establishment of retail stores connected with the sale of clothing, headgear and footwear, jewellery, watches, fashion accessories, household or kitchen utensils and containers, glassware, porcelain and earthenware, towels, bedding, textiles, furniture, lighting apparatus, toys, apparatus for reproducing sound and video, apparatus for heating, steam generating, cooking, refrigerating, drying, ventilating, cosmetics, non-medicated toilet preparations, eye wear, carrying cases, leather goods, handbags and all manner of bags, kitchenware, paints, wallpaper, pictures, picture frames, cameras; on-	Class 38 Telecommunication services; portal services; email services; providing user access to the internet; information, advisory and consultancy services in relation to these services Class 42 Computer consultancy services; design and development of computer hardware and software; computer programming; digital development; web design, drawing and commissioned writing for the compilation of websites; information, advisory and consultancy services in relation to these services

<p>line trading services connected with the sale of clothing, headgear and footwear, jewellery, watches, fashion accessories, household or kitchen utensils and containers, glassware, porcelain and earthenware, towels, bedding, textiles, furniture, lighting apparatus, toys, apparatus for reproducing sound and video, apparatus for heating, steam generating, cooking, refrigerating, drying, ventilating, cosmetics, non-medicated toilet preparations, eye wear, carrying cases, leather goods, handbags and all manner of bags, kitchenware, paints, wallpaper, pictures, picture frames, cameras.</p>	
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41. Dealing first with NRL's goods in class 9, they are (or are parts and fittings of) goods in the manner of equipment which will be used by the general public to record, transmit or reproduce sounds or images. They are goods which, self-evidently, have different users, uses and natures to those of the applicant's services in class 35. The respective goods and services are not in competition nor are they complementary. They are dissimilar.

42. In respect of the applicant's services in classes 38 and 42, these are all telecommunications, computing and internet services and related information, advisory and consultancy services. Whilst e.g. an email service or web design service could include provision for the reproduction or transmission of a sound or image, such services have different users and are of different natures to NRL's goods in class 9 and they are neither complementary nor competitive with them. They are dissimilar.

43. NRL did not provide any evidence to support any claim of similarity of the respective goods and services. For the reasons given above, I find each of the applicant's services to be dissimilar to those in Class 35 of NRL's earlier mark and dissimilar to its goods in Class 9.

CTM 8218885

44. The services to be compared are as follows:

NRL's services	Applicant's services
<p>Class 36 Insurance; financial affairs; monetary affairs; real estate affairs; arranging and providing credit, debit and charge card services; provision and arranging of payment protection insurance;</p>	<p>Class 35 Search engine optimisation services; internet marketing; information, advisory and consultancy services in relation to these services</p>

<p>instalment loans, providing and financing personal loans; hire purchase financing; arranging and providing hire purchase agreements; debt collection; management of customer accounts and mail order accounts; providing extended warranties; providing warranties for domestic appliances; providing warranties for electrical appliances.</p>	<p>Class 38 Telecommunication services; portal services; email services; providing user access to the internet; information, advisory and consultancy services in relation to these services</p>
<p>Class 39 Transport; packaging and storage of goods; travel arrangement; transportation, storage, packaging and delivery of goods.</p>	<p>Class 42 Computer consultancy services; design and development of computer hardware and software; computer programming; digital development; web design, drawing and commissioned writing for the compilation of websites; information, advisory and consultancy services in relation to these services</p>
<p>Class 45 Maintaining lists of wedding presents for selection by others; preparation of wedding present lists; maintaining list of gifts for selection by others; preparation of gift lists</p>	

45. NRL, perhaps unsurprisingly, is silent as to why it considers the respective services to be similar or identical. NRL's services are, broadly speaking, for the provision of insurance or finance, transport services or gift list services. They are services that will be used by those requiring insurance or financial services, those seeking to move something from one place to another or those involved in arranging a wedding or other celebratory event. The applicant's services, again broadly speaking, are telecommunication and computer related services. Whilst some of NRL's services may be accessed or arranged electronically, as almost everything can be nowadays, that does not make the respective services similar. The respective services have different users, uses and natures. They are not in competition nor are they complementary. The respective services are dissimilar.

46. In order for there to be a positive finding under section 5(2)(b) there has to be at least some similarity in the respective goods and/or services. I have found the goods and services of NRL's earlier marks CTM 5848131 and CTM 8218885 to be dissimilar to those of the application. NRL's opposition under this ground on the basis of these marks fails.

47. I also found that there is no similarity of the respective services in relation to earlier marks CTM 1620434 and 2453621 but acknowledged that if I am found to be wrong in my assessment of the similarity of the respective services as set out in paragraph 35 above then any similarity is a low one and on this basis, I go to consider the matter further.

The average consumer and the nature of the purchasing process

48. NRL's services are retail services in respect of a wide range of goods. They are widely available services which will be accessed with relatively little consideration via a store, by mail order or via the Internet by the general public on an everyday basis. Mr Blackhurst's services in class 35 are specialist, technical ones which will be used by businesses to create, maximise the effectiveness of and improve the visibility of their websites. Mr Blackhurst's services are such as will be bought on an infrequent basis and are services for which the average consumer is likely to pay a good deal of attention in the purchasing process because of the technical nature of those services and the need to ensure they meet the purchaser's technical requirements.

Comparison of the respective marks

49. For ease of reference, and in light of my findings above, the respective marks to be compared are:

Earlier marks	Application
CTM 1620434 NEXT	SEO NEXT
2453621 	

50. Whilst earlier mark no 2453621 is for a series of two marks each presented on a plain rectangular background and in a particular font, with one in upper case and the other in lower case, there is nothing particularly remarkable about that font or presentation. Both marks in the series are for the word NEXT. CTM 1620434 is also for the word NEXT, written in plain block capitals. I intend to treat them as a single mark for the purposes of comparison. As a single word, the mark has no distinctive or dominant components: the distinctiveness rests in the totality of the mark. The word NEXT is an ordinary, everyday, dictionary word in common usage to refer to the relationship in time or place of one thing to another e.g. someone or something coming after, or being adjacent to, something or someone else.

51. There is no dispute that the letters SEO are an abbreviation for Search Engine Optimisation. This is a process by which the website owner ensures the visibility of his website or webpage is increased leading to its being higher up in the rankings of the results of a particular search thus making that website or webpage more likely to be found more easily by the person carrying out that search whether or not that is the website for which they are searching.

52. For services other than search optimisation services, SEO has no meaning. SEO is not, as far as I am aware, an English word but it is possible that some may attempt to pronounce it as such (as in say-oh or see-oh) but it is equally likely that others may pronounce it as individual letters. However it is pronounced, it is, for these other services, a distinctive element of the mark and equally dominant within the mark as the word NEXT.

53. Both marks share the word NEXT but differ in respect of the inclusion within the application of the element SEO as its first element. The respective marks have a moderate degree of similarity from both the visual and aural perspectives.

54. At the hearing, Mr Rose submitted that the inclusion of SEO within the mark would „contextualise’ the word NEXT. I queried this and he went on to explain that this meant that the average consumer would know that the word NEXT:

“relates to the next generation. That is, the way forward, developing it”.

55. Whilst I am aware that the term „next generation’ is used in computing to refer to e.g. future systems or developments, the word „generation’ does not form part of the mark before me and there is no evidence before me that the average consumer would see the word in this way. But even if it was, Mr Rose’s interpretation of the mark would still bring an image to mind of a relationship in time in that it is something „coming afterwards’ and would lead, in my view, to the marks being moderately similar from the conceptual perspective.

The distinctiveness of the earlier marks

56. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which it has been acquired and, secondly, by reference to the way it is perceived by the relevant public (see *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings (see *Windsurfing Chiemsee v Huber and Attenburger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585).

57. There is no dispute that the word NEXT has a reputation in relation to retail services in connection with the sale of e.g. clothing and household goods. The inherent distinctive character of the mark (which I consider to be of an average level) will have been enhanced through its use in relation to such goods and services.

Likelihood of confusion

58. In determining whether there is a likelihood of confusion, a number of factors have to be borne in mind. The first is the interdependency principle whereby a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. I also have to factor in the distinctive character of the earlier marks as the more distinctive they are the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods or services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely on the imperfect picture of them he has retained in his mind

59. I have found that the respective marks are moderately similar from the visual, aural and conceptual perspectives. At best, the following services of the application will have a low degree of similarity to the following services within the earlier mark.

Class 35

Internet marketing; information, advisory and consultancy services in relation to these services.

60. Taking all matters into account, the differences in the respective marks and the low level of any similarity between the respective services lead me to find that there is no likelihood of confusion in relation to these services. The opposition brought under the grounds of section 5(2)(b) and reliant on earlier marks CTM 1620434 and 2453621 fails.

61. The opposition based on grounds under section 5(2)(b) of the Act fails in its entirety.

The objection under section 5(3) of the Act

62. Section 5(3) of the Act states:

“ A trade mark which-

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

63. In relying on this ground, NRL claims that use of the mark of the application:

“... would take unfair advantage of and be detrimental to the distinctive character or repute of [NRL's] marks. [Mr Blackhurst] would benefit from the substantial and highly regarded reputation and goodwill that has been developed by [NRL] over many years in trade marks consisting of or

containing NEXT, such that the impression of their products would be enhanced and achieve a wider recognition that might otherwise be obtained. The detriment to [NRL] would arise as a result of dilution of their rights in the trade marks consisting of or containing the mark NEXT. It would also be damaging to [NRL] if customers or potential customers consider there to be an economic link between the parties that does not exist.”

64. In order to be successful in an objection based on section 5(3) of the Act, NRL must prove each of the earlier marks on which it relies has a reputation. Reputation in this context means that the earlier trade mark is known by a significant part of the public concerned with the goods or services covered by that mark (see paragraph 26 of the CJEU’s judgment in *General Motors Corp. V Yplon SA (CHEVY)* [1999] ETMR 122). The Court stated:

“27 In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking promoting it.”

65. Some of the trade marks relied upon by NRL under section 5(3) of the Act are Community trade marks. In *PAGO International GmbH v Tirol Milch registrierte Genossenschaft mbH* Case C-302/07 the CJEU considered the requirements for establishing a reputation in respect of a Community trade mark. It stated:

“30 The answer to the first question referred is therefore that Article 9(1)(c) of the regulation must be interpreted as meaning that, in order to benefit from the protection afforded in that provision, a Community trade mark must be known by a significant part of the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of facts of the main proceedings, the territory of the Member State in question may be considered to constitute a substantial part of the territory of the Community.”

66. Under this ground, NRL relies upon the same earlier marks as it did for the grounds it brought under section 5(2)(b) of the Act. CTM 8218885 has not yet achieved registration and there is no evidence of any use of the services for which registration is sought. Consequently, there is no evidence it has any reputation in respect of such services. The objection under this ground based on this mark is dismissed.

67. In relation to CTM 5848131 NEXT DIRECTORY, there is evidence that NRL launched its mail order service by way of a catalogue issued under this mark in 1988. It is said to have had 1m active customers by 2000 and over 2m active customers by 2007. There is no evidence that NRL has used this mark in relation to any of the services for which it is registered in class 35 and consequently no evidence of any reputation in respect of such services. In relation to the goods for which the mark is registered, the only evidence I have been able to find, is a single page in the Spring/Summer catalogue from 2007 exhibited at SLN3 (page 24). It shows that NRL offered for sale a pair of travel speakers (£14) a pocket AM/FM

radio (£10) and a key ring camera (£15). Whilst this is a long way from proving that it has a reputation in the goods as registered, there is no doubt that NRL sells a wide range of products and, at the hearing, I asked Mr Rose whether, and to what extent the applicant accepted that NRL had a reputation under the marks relied upon. His response was that it had a reputation “to the extent that they are providing retail services and goods, such as clothing footwear and headgear or the goods shown in their evidence”. (My emphasis). Given the evidence shows NRL to be offering speakers, radios and a camera for sale in its catalogue, I take this to be an acceptance that NRL has a reputation under this mark in relation to the goods for which it is registered. On this basis I consider its reputation is reasonably strong and, its inherent distinctiveness being average, its distinctiveness through use is similarly reasonably strong.

68. That leaves CTM 1620434 and 2453621. Both are registered for retail services as well as business management consultancy services. I have already found, in relation to CTM 1620434 for which proof of use was required, that NRL is not entitled to rely on this mark in relation to business consultancy services as there is nothing in the evidence to show that NRL has provided any such services. That being so NRL is not entitled to rely on either mark under this ground, in relation to such services. The applicant accepts that NRL has a reputation in these marks in relation to retail services.

69. I therefore go on to consider the objection under section 5(3) of the Act in relation to the three earlier marks for which it is accepted that NRL has a reputation. For ease of reference they are earlier marks CTM 5845131, CTM 1620434 and 2453621. In addition to having a reputation, a link must be made between the respective marks. In *Adidas-Salomon Case C-408/01* the CJEU stated:

“The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 23). The existence of such a link must, just like a likelihood of confusion in the context of Article 5(1)(b) of the Directive, be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, in respect of the likelihood of confusion, *SABLE*, paragraph 22, and *Marca Mode*, paragraph 40).”

70. In *Intel Corporation Inc v CPM (UK) Ltd (C-252/07)* (“Intel”) the CJEU provided further guidance on the factors to consider when assessing whether a link has been established. It stated:

“41. The existence of such a link must be assessed globally, taking into account all factors relevant to the circumstance of the case...”

42 Those factors include:

-the degree of similarity between the conflicting marks;

-the nature of the goods or services for which the conflicting marks were registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public;

-the strength of the earlier mark's reputation;

-the degree of the earlier mark's distinctive character, whether inherent or acquired through use;

-the existence of the likelihood of confusion on the part of the public."

71. I take note that both the CJEU and the GC have reiterated the comment made in *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] FSR 767 (albeit in relation to section 10(3)) that the purpose of the Regulation is not to prevent registration of any mark which is identical or similar to a mark with a reputation and am mindful of the comments of Patten J in *Intel Corporation Inc v CPM United Kingdom* [2006] EWCH 1878 where he stated:

"But the first step to the exploitation of the distinctive character of the earlier mark is necessarily the making of the association or link between the two marks and all that Neuberger J is, I think, saying in this passage [*Premier Brands* at p789] is that the existence of a later mark which calls to mind the earlier established mark is not sufficient to ground an objection under s.5(3) or s10(3) unless it has one or other of the consequences specified by those provisions. It must be right that the making of the association is not necessarily to be treated as a detriment or the taking of an unfair advantage in itself and in cases of unfair advantage it is likely to be necessary to show that the making of the link between the marks had economic consequences beneficial to the user of the later mark."

72. Although the issue of the effect on economic behaviour arose in the above case in the context of detriment or dilution, it is, I believe, reasonable to infer that similar considerations would also arise in the context of the question of unfair advantage. Indeed in *Electrocoin Automatics Limited v Coinworld Limited and Others* [2005] FSR 7, Mr Geoffrey Hobbs Q.C, sitting as a Deputy Judge stated:

"102. I think it is clear that in order to be productive of advantage or detriment of the kind prescribed, "the link" established in the minds of people in the market place needs to have an effect on their economic behaviour. The presence in the market place of marks and signs which call each other to mind is not, of itself, sufficient for that purpose."

73. In *C A Sheimer (M) Sdn Bhd's TM Application (VISA)* [2000] RPC 484 Geoffrey Hobbs Q.C. sitting as the Appointed Person considered whether Sheimer's mark

"would, without due cause:

(iv) take unfair advantage of the distinctive character or repute of Visa International's earlier trade mark".

In setting out his finding, he stated:

“I think it is clear that Sheimer would gain attention for its products by feeding on the fame of the earlier trade mark. Whether it would gain anything more by way of a marketing advantage than that is a matter for conjecture on the basis of the evidence before me. Since I regard it as quite likely that the distinctive character or reputation of Visa International’s earlier trade mark would need to increase the marketability of Sheimer’s products more substantially than that in order to provide Sheimer with an unfair advantage of the kind contemplated by Section 5(3) I am not prepared to say that requirement (iv) is satisfied.”

74. I must be satisfied, therefore, that, for those people who make a link between the respective marks, the link they make affects their economic behaviour and, if so, that the reputation of the earlier mark is transposed to the later mark with the result that marketing and selling of Mr Blackhurst’s services becomes easier.

75. NRL is long established as a retailer and its goods are widely available both on the high street, via mail order or via the Internet. There is no evidence that NRL has ever used its marks in relation to any other area of trade. In my view, given the disparity of the respective goods and services, no link would be made between the respective marks. Even if I am wrong in this, I do not consider that Mr Blackhurst would gain any unfair advantage through the use of his mark. It is not clear to me exactly what advantage he would gain and, furthermore, there is no evidence of any intention on his part nor any other added factor that would support NRL’s claim under this ground. In relation to dilution, I can see no reason why the capacity of the earlier marks to distinguish NRL’s services would be diminished to any extent, and certainly not one that would have any impact on the economic behaviour of the relevant public. That being the case, the opposition brought under section 5(3) of the Act fails.

The objection under section 5(4)(a) of the Act

76. Under this ground, NRL relies on the earlier signs or rights NEXT (used since 1982) and NEXT DIRECTORY (used since 1987). I do not consider that NRL can be in any better position under this ground in relation to these marks than it was under section 5(2)(b) and I decline to deal with it further.

Summary

77. NRL’s opposition fails in its entirety.

Costs

78. Mr Blackhurst has succeeded in defending his application and is entitled to an award of costs in his favour. He was professionally represented. I take note that NRL’s evidence was not particularly well directed in view of the basis of its claims and would have taken some time and effort to review. Whilst Mr Blackhurst filed no evidence, written submissions were filed on his behalf and a hearing took place. Taking all these factors into account, I make the award on the following basis:

Preparing a statement and considering the opponent's statement:	£300
Considering the opponent's evidence:	£800
Preparation for and attendance at hearing:	£300
Total:	£1400

79. I order Next Retail Limited to pay Mr Justin Blackhurst the sum of £1400. 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 7th day of February 2013

**Ann Corbett
For the Registrar
The Comptroller-General**