

O-087-06

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2337082  
BY NEW CENTURY INTELLECTUAL PROPERTY INVESTMENTS  
LIMITED  
TO REGISTER THE TRADE MARK:**

**QUIKSILVER**

**IN CLASS 32**

**AND**

**THE OPPOSITION THERETO  
UNDER NO 92141  
BY QS HOLDINGS SARL**

## Trade Marks Act 1994

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by New Century Intellectual Property Investments Limited  
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by QS Holdings Sarl**

### BACKGROUND

1) On 8 July 2003 New Century Intellectual Property Investments Limited, which I will refer to as New Century, applied to register the trade mark **QUIKSILVER** (the trade mark). The application was published for opposition purposes in the “Trade Marks Journal” on 22 August 2003 with the following specification:

*non-alcoholic beverages; fruit drinks and fruit juices; mineral, aerated and carbonated water; preparations for making non-alcoholic drinks; beers.*

The above goods are in class 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 24 November 2003 Quiksilver International Pty Ltd filed a notice of opposition to the application. During the prosecution of the opposition QS Holdings Sarl, which I will refer to as QS, became the opponent. In this decision I will refer to all actions by Quiksilver International Pty Ltd and QS as being by QS.

3) QS is the owner of the following trade mark registrations:

- Community trade mark registration no 2038552 of the trade mark QUIKSILVER. The application for registration was filed on 9 January 2001 and the trade mark was registered on 6 February 2002. The registration is in respect of the following goods:

*perfumes, fragrances, cosmetics, essential oils, soaps, hair lotions, sun screen preparations, sun tanning preparations, bath gels, bath oils, bath powders, deodorants, shower gels, shampoos, facial scrubs, face powders, skin soaps, skin moisturisers, body lotions, nail polish, lip balms, lip gloss, lipstick, facial makeup and eye makeup;*

*watches and parts, fittings and accessories thereof including watch bands, straps for wrist watches, containers for watches in the form of cases, housings for watch mechanisms; clocks; jewellery; jewels; precious stones.*

The above goods are in classes 3 and 14 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

- Community trade mark registration no 700864 of the trade mark:



The application for registration was filed on 5 December 1997 and the trade mark was registered on 16 June 1999. The registration is in respect of the following goods:

*terrestrial vehicles.*

The above goods are in class 12 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

- United Kingdom trade mark registration no 2272123 of the trade mark QUIKSILVER. The application for registration was filed on 8 June 2001 and the trade mark was registered on 29 March 2002. The registration is in respect of the following goods:

*perfumes, fragrances, cosmetics, essential oils, soaps, hair lotions, sun screen preparations, sun tanning preparations, bath gels, bath oils, bath powders, deodorants, shower gels, shampoos, facial scrubs, face powders, skin soaps, skin moisturisers, body lotions, nail polish, lip balms, lip gloss, lipstick, facial makeup and eye makeup; all for personal use;*

*watches and parts, fittings and accessories thereof including watch bands, straps for wrist watches, containers for watches in the form of cases, housings for watch mechanisms; clocks; jewellery; jewels; precious stones.*

The above goods are in classes 3 and 14 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

- United Kingdom trade mark registration no 1548551 of the trade mark:



The application for registration was filed on 25 September 1993 and the trade mark was registered on 1 September 1995. The registration is in respect of the following goods:

*sunglasses, frames for sunglasses, cases for sunglasses; parts and fittings for all the aforesaid goods; all included in Class 9; but not including any such goods manufactured from, or incorporating mercury;*

*horological and chronometric instruments and apparatus; watches; parts and fittings for all the aforesaid goods; all included in Class 14; but not including any such goods manufactured from, or incorporating mercury.*

- United Kingdom trade mark registration no 1082835 of the trade mark QUIKSILVER. The application for registration was filed on 28 August 1977 and the trade mark is currently registered. The registration is in respect of the following goods:

*articles of outerclothing, and beachwear being articles of clothing.*

The above goods are in class 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

- United Kingdom trade mark registration no 1425993 of the trade mark QUIKSILVER. The application for registration was filed on 27 April 1990 and the trade mark was registered on 21 August 1992. The registration is in respect of the following goods:

*surfboards, skateboards, waterskis, snowskis, sailboards, snowboards, ski bindings, wax for skis; all included in Class 28.*

- United Kingdom trade mark registration no 1425992 of the trade mark QUIKSILVER. The application for registration was filed on 27 April 1990 and the trade mark was registered on 20 March 1992. The registration is in respect of the following goods:

*towels; all included in Class 24.*

- United Kingdom trade mark registration no 1425991 of the trade mark QUIKSILVER. The application for registration was filed on 27 April 1990 and the trade mark was registered on 16 October 1992. The registration is in respect of the following goods:

*Luggage; handbags; cases; all included in Class 18; but not including holdalls.*

4) QS states that it has used its QUIKSILVER trade marks in the United Kingdom on an extensive scale in relation to all of the goods of the registrations. As a result of this use QS had built up a substantial reputation and goodwill in the QUIKSILVER trade mark by the time of New Century's application.

5) QS states that registration of the trade mark would be contrary to the provisions of section 5(3) of the Trade Marks Act 1994 (the Act) in that the trade marks are identical, the respective goods are dissimilar, QS's trade marks have a reputation in the United Kingdom and the use of New Century's trade mark without due cause, would take unfair advantage or be detrimental to the distinctive character and repute of QS's trade marks.

6) QS claims that although the goods covered by New Century's application are dissimilar to those of QS's registrations, the extensive use and reputation of its trade marks throughout the United Kingdom is such that the relevant consumer of QS's goods would believe that drinks sold by New Century under the trade mark emanate from QS or are in some way associated with it.

7) QS states that the addition of a device in Community trade mark registration no 700864 and United Kingdom registration no 1548551 does not remove the relevance of these trade marks to its case. It states that evidence will be adduced to show that the recognition and reputation of the word QUIKSILVER alone is strong enough to override (sic) the device element of the composite trade marks.

8) QS states that the relevant consumer of its goods is "primarily the young, sporty, fashion conscious and highly brand aware youth market" (sic). It claims that such consumers are likely to believe that drinks, particularly, energy drinks sold under New Century's trade mark come from QS or have been licensed or approved by QS. QS claims that the expansion of its QUIKSILVER brand into the drinks area would be a natural progression in trade, particularly given the association between sports and energy drinks, especially extreme sports such as surfing and snowboarding. QS claims that the registration of New Century's trade mark would prevent it being able to extend its brand into drinks. QS states that the New Century's trade mark is the only trade mark on the United Kingdom and Community trade mark databases, besides QS's trade marks, for QUIKSILVER (spelt without the letter c). QS claims that this significant difference in the spelling would not go unnoticed by the relevant consumer if QUIKSILVER was used for drinks. QS claims that New Century's use is without due cause and would take unfair advantage of its extensive reputation and would be detrimental to the distinctive character of its trade mark.

9) QS states that registration of the trade mark would be contrary to section 5(4)(a) of the Act and that use of the trade mark is liable to be prevented by the law of passing-

off as a result of the extensive use and reputation of its trade marks in the United Kingdom since 1984 in relation to the goods covered by its registrations.

10) QS states that the application was made in bad faith with the intention of taking advantage of QS's reputation and preventing it extending its brand in future. Consequently, registration of the trade mark would be contrary to section 3(6) of the Act.

11) QS seeks the refusal of the application and an award of costs.

12) New Century filed a counterstatement. It denies that the registration of the application would be contrary to sections 3(6), 5(3) and 5(4)(a) of the Act. It requests the dismissal of the opposition and an award of costs.

13) Both sides filed evidence.

14) A hearing was held on 8 February 2006. New Century was represented by Mr Hinchliffe of counsel, instructed by Murgitroyd & Company. QS was represented by Mr Edenborough of counsel, instructed by David Keltie Associates.

## **EVIDENCE**

### **Evidence of QS**

15) This consists of a statutory declaration by Charlie Exon, Director of Quiksilver International Pty Limited. Mr Exon is also the general counsel of Quiksilver, Inc, a United States Company. Mr Exon states that Quiksilver, Inc is the parent company of the worldwide group of Quiksilver companies.

16) Mr Exon's declaration is not clearly focused upon the issues in this case; either in respect of the material date or the goods for which a reputation is claimed. There is also matter that does not relate to the United Kingdom. Mr Exon does not confine himself to evidence of fact but makes submissions. I will summarise the evidence to try and bring some clarity and direction to it; at the same time taking into account the nature and substance of the submissions made by both counsel.

17) Mr Exon states that QS has been using its trade marks in the United Kingdom in relation to the products covered by the specifications of its registrations since 1984. Mr Exon gives turnover figures in relation to sales of QUIKSILVER products in the United Kingdom. He does not identify to what products this turnover relates. As the goods covered by the trade marks range from terrestrial vehicles to jewellery to perfumes to towels, the turnover figures of themselves say little. What might be a large turnover figure in relation to towels, would not be such for motor vehicles. The figures are as follows:

2003	46,300,000 €
2002	43,300,000 €
2001	23,485,000 €
2000	15,755,000 €

1999	11,302,000 €
1998	6,462,000 €
1997	2,888,000 €

He does not state if the figures represent wholesale or retail values. Mr Exon states that as of August 2004 there were 780 outlets in the United Kingdom selling QS's products. The evidence of QS shows that it sells goods under trade marks other than QUIKSILVER. Consequently, it is not clear how many of these outlets sell QUIKSILVER trade marked goods. He states that approximately fifty different product catalogues are used and distributed throughout the United Kingdom every year. Exhibited at CE2 is a list of outlets at of 30 April 2004. A number of the outlets are in the Republic of Ireland. Mr Exon states that QS has a number of 'own brand' Quiksilver Boardriders Club retail shops; details of these shops are exhibited at CE3. Exhibited at CE4 is "Quiksilver 2003 Annual Report". This report gives a clear indication of the nature of the business of QS. The "Notes to Consolidated Financial Statements Years Ended October 31, 2003, 2002 and 2001" states:

**“Company Business** The Company designs, produces and distributes clothing, accessories and related products for young minded people and develops brands that represent a casual lifestyle-driven from a boardriding heritage. The Company's primary focus is apparel for young men and young women under the *Quiksilver, Roxy, Raisins, Radio Fiji* and *Gotcha* (Europe) labels. The Company also manufactures apparel for boys (*Quiksilver Boys* and *Hawk Clothing*), girls (*Roxy Girl, Teenie Wahine* and *Raisins Girls*), men (*Quiksilveredition* and *Fidra*) and women (*Leilani* swimwear), as well as snowboards, snowboard boots and bindings under the *Lib Technologies, Gnu* and *Bent Metal* labels. ....”

The “product mix” is given as: 13% tops, 18% outerwear, 20% accessories, footwear and hardgoods, 17% bottoms, 20% t-shirts and 12% swim. The sales by brand are divided as follows: 58% Quiksilver, 32% Roxy and 10% other brands. A further breakdown of goods is given (this does not identify goods with trade marks);

	2003	2002	2001
T-shirts	20%	20%	20%
Accessories	14	12	12
Jackets, sweaters and snowboardwear	12	12	12
Pants	11	11	11
Shirts	10	11	12
Swimwear, excluding boardshorts	8	9	9
Fleece	6	7	6
Shorts	6	6	6
Footwear	5	4	3
Boardshorts	4	3	4
Tops and dresses	3	3	3
Snowboards, snowboard boots, bindings and accessories	1	2	2

As there is no indication in the other evidence of a trade in undergarments and because the publication is from the United States, I assume that pants refers to trousers.

18) In the evidence there is a lack of specificity and a lack of clear evidence to indicate the nature of the goods covered by the terms accessories and hardgoods. Mr Exon refers to a divers product line including purses, fragrances, jewellery, furnishings, beauty care, luggage and travel. However, there is an absence of specificity as to trade mark, turnover and where the use has taken place. What can be seen from the figures is that in 2003 85% of the company's business was the sale of outerwear, which would have been under several trade marks.

19) The marketing expenditure in the United Kingdom on the QUIKSILVER brand has been as follows:

2002/03	561,000€
2001/02	542,412€
2000/01	659,792€
1999/2000	496,486€

Figures are also given for 2003/04, however, the evidence exhibited at CE6 shows that the year runs from November to October, so this is all after the material date. Mr Exon states that QS advertises its QUIKSILVER products in various 'board sports and culture' magazines and 'lifestyle/health' magazines distributed throughout the United Kingdom. He states that in 2002/03 QS spent 69,000€ in advertising in nine core magazines and in 2001/02 65,790€ in advertising in 10 core magazines. He exhibits at CE6 a list of titles in which QUIKSILVER products have been advertised. This is for the period November 2003 to October 2004 and so is after the material period. The magazines in which the advertisements were placed were: "Snowboard UK", "White Lines", "Doc Snow", "Fall Line", "Carve", "Wavelength", "Surfers Path", "Sidewalk Surfer", "Doc Skate" and "Windsurf". The circulation figures of the magazines range from 17,000 to 35,000.

20) Exhibited at CE7 are several catalogues, all but two of them emanate from after the material date. The catalogues show use of QUIKSILVER with device and in a stylised script. The goods shown, in the catalogues emanating from the material date, are casual outer clothing for males (children and adults) and bags. The catalogues project an image of goods for young, outdoor, healthy males; with a strong link to surfing and snow. The "youth 02/03" includes reproduction of posters for the Grommets surfing series in Cornwall, these show sponsorship using QUIKSILVER in lower case. Mr Exon draws attention to a photograph of young girls holding bottles with Roxy written upon them. The bottles clearly bear the name Roxy and not QUIKSILVER. He states that QS is proud of developing environmental awareness and actively supports several environmental associations, including the United Kingdom based Surfers Against Sewage. Mr Exon states that QS sponsors an event known as 'The Quiksilver Crossing', when a selected QUIKSILVER team travels around the world on a dedicated charter boat to discover new surf spots and collect data on coral reefs. He exhibits at CE9 a magazine in relation to this. The magazine is dated summer 2003, for display until 31 December 2003. It is priced for the United States and Canada. Mr Exon draws attention to the fact that there is an advertisement

for Snapple iced tea in the magazine. He states that QS has been involved with co-branding with Snapple in the United States. Two posters relating to events in the United States are exhibited. One is for QUIKSILVER Annual Surf Shop Challenge. It shows sponsorship by DG Shoe Co, boost mobile, ASR, Surf Expo and Snapple. The other poster is for the Boost Mobile Pro of Surf for September 2003. The event took place in California. The poster states that the event will be presented by QUIKSILVER (in a highly stylised form) and with device. There is a list of sponsors: boost mobile, QUIKSILVER, Surfer Magazine, Surflife, Motorola, Warehouse Music, Sony, Snapple and ASP. Exhibited at CE9A is material relating to co-sponsorship and promotion in Australia of QUIKSILVER with Torquay mineral water. The press release states:

“Quiksilver today announced a program and events partnership with Torquay Mineral Water that will see both brands leveraging exposure into strategic markets.”

(The Torquay of Torquay mineral water is in Victoria, Australia.)

21) There is a Peugeot QUIKSILVER range of cars. Exhibited at CE11 are details of sales of Peugeot 106 QUIKSILVER cars: 2737 cars in 1998, 1996 in 1999, 2320 in 2000, 1367 in 2001, 926 in 2002 and 305 up to August 2003.

22) Exhibited at CE13 is a document entitled “QUIKSILVER Awareness Evolution 2001 – 2003”. It contains results of omnibus surveys in April 2001, May 2003 and December 2003. Those who were interviewed were between the age of 15 and 49. The respondents were read a list of sports: surfing, gliding, wind surfing, fun boarding, skate boarding and snow boarding. They were asked if they took part in the activities, would or would not be interested in so doing or had no view. The respondents were then asked which manufacturers of clothing for these sports they could think of. They were read a list of manufacturers of clothing and equipment for these sports and asked which they had heard of. The names upon the list were: QUIKSILVER, O’Neill, Billabong, Rip Curl, Op, Reef, Gotcha, Mambo, Oxbow and Roxy. If the respondent referred to QUIKSILVER in either of the previous two responses he or she was asked how well they knew the brand. They were asked if QUIKSILVER was a brand for someone like them, using a scale of 1 to 10 to graduate their response. Finally they were asked if they had heard of the QUIKSILVER name in advertising and if so where. The spontaneous brand awareness question showed QUIKSILVER being referred to by 9% of all the respondents in April 2001 and 17% in May 2003; for men under 24 years of age the figures were 19% and 34% respectively, for men between 24 and 35 years of age the figures were 7% and 18% respectively. In respect of total brand awareness (ie recognition of brands read out from the list), 53% of all respondents identified QUIKSILVER in April 2001 and 61% in May 2003; for men under 24 years of age the figures were 81% at both times, for men between 24 and 35 years of age the figures were 59% and 60% respectively.

23) Exhibited at CE14 is a leaflet about QUIKSILVER Boardriders Club (the own brand retail shops). This leaflet shows examples of advertisements for placing in the press and for bus shelters. Other promotional methods listed include billboards, cinema and radio advertising, logo banners, posters and kits containing wallets, key

chains, caps, stickers, point of sales material and t-shirts. There is also reference to sponsorship of events, “local young riders”, bars and night clubs. At CE15 material is exhibited in relation to “The Boarding House newquay’s elite surf hotel”. A copy of a page downloaded from theboardinghouse.co.uk on 19 May 2004 is exhibited. There are pictures of the bar of the premise. There is no indication when the photographs were taken. Various pictures and posters can be seen in the photograph, a couple of which seem to relate to QUIKSILVER (not much detail can be seen from the pictures, the clearest trade mark appears on the Smeg refrigerator). There is no indication when this “sponsorship” took place. Mr Exon states that QS supplied various signs, surfboards, posters and promotional items. From the pictures the material it would appear to be decoration. There is no evidence in relationship to the contractual relationship relating to the sponsorship. Neither the hotel nor the bar has taken on the name of QUIKSILVER, as is not uncommon with sponsorship of sports stadia.

24) Exhibited at CE16 are copies of material from various magazines. Most of the magazines cover what may be described as extreme sports. However, there is also material from “Maxim” of July 2002, “Jack” of May 2003 and “Men’s Fitness” of June 2003. All of these magazines appear to be aimed at a male readership. Exhibited at CE17 are circulation figures from ABC; from July to December 2002 “Maxim” had a circulation of 237,701, from Jan to June 2003 “Jack” and “Men’s Fitness” had circulations of 22,308 and 48,743 respectively.

25) Exhibited at CE21 are pages from redbull.co.uk website downloaded on 17 May 2004. The website is that of the well-known beverage Red Bull. This shows relationships between Red Bull and various events and sports such as windsurfing, skateboarding and air races. There is printout of an article dated 17 January 2001 which deals with a sports drink to which Umbro, a sportswear company, licensed its name. The article indicates that there were sales of £2 million up until 31 December 2000, when the drink was withdrawn from sales. A page downloaded on 18 May 2004 relates to Coca Cola clothes, further pages downloaded on the same day show Guinness clothing. Other material, most of it appearing to emanate after the material date and much of it does not appear to relate to the United Kingdom, shows, inter alia, Powerade being the official sports drink of the National Hockey League in the USA, Gatorade sponsoring various sporting events in the United States, Blue Ice (which appears to be an American beverage) being involved in sports sponsorship. There are pages relating to Extreme Drinks which is described as the drinks company inspired by the Extreme Sports Channel and the ‘EX’ brand. The pages show that Extreme Drinks sponsors various sports persons. Copies of pages from the website lostenterprises.com download on 4 August 2004 are exhibited. It is difficult to ascertain from the many pages exhibited exactly what the business of Lost Enterprises is. The pages show that its business is in the United States, it has an energy drink. A banner lists team, clothing, ads, videos, galleries, surfboards, lost girl, contact and dealer locator. The following is included:

“Please leave your “Bud Light” and “Lost” tee shirts, flip flops and torn jeans at home...”

There is a reference to Lost BMX team riders. There are references to surfing events. Mr Exon states that Lost Enterprises is a media and advertising company for surfing and extreme sports. Mr Exon also exhibits at CE21 a printout from the website of the

Killerdana Surf Shop downloaded on 17 May 2004 which shows an O'Neill Road Trip Mug. The prices of the items shown on the page are in dollars.

26) Exhibited at CE21A are details of television advertisements. They all occurred after the material date.

27) Mr Exon refers to an application made by New Century to register the trade mark Pop Idol in the United Kingdom for drinks (application no 2352792).

### **Evidence of New Century**

28) This consists of a witness statement by Clive Garrad. Mr Garrad is the product development manager of New Century. Mr Garrad states that New Century and its sister company Maritime Foods Limited (which has the same shareholders and control) undertake the development of innovative branded food and beverage products. In their portfolio of brands are: Frankie Dettori Italian Foods, Ozfish, Bellavista, Sweet Cred, Red Devil Energy Drink and Fruit Indulgence. He states that New Century comes up with novel branding propositions using trade marks which are evocative of the nature of the product, often in a quirky and memorable way. New Century supplies major supermarkets, including Tesco, Sainsbury and Asda, with food products.

29) Mr Garrad states that in the early part of 2002 the Red Devil brand was sold. He undertook the task to consider the development of a new, soft, sparkling beverage to be positioned somewhere between more traditional carbonated drinks, such as Coca Cola and Tango, on the one hand and the relatively new wave of energy drinks, such as Red Bull, on the other. He states that the product that he had in mind would combine qualities such as vitality and purity with a great taste and look. Mr Garrad states that he wished to ensure that the drink would be free of any of the slightly tainted values associated with high sugar drinks, such as Coca Cola, and the high caffeine levels associated with the more extreme energy drinks, such as Red Bull.

30) Mr Garrad states that he coined the name QUIKSILVER as he felt that it alluded to the brand values which he wished to associate with the product. Quick is suggestive of the flow of the drink and is evocative of vitality, freshness and an active life-style, silver reflects the clear, crisp colour of the product. Mr Garrad states that to give the brand a more original feel he decided to drop the letter c from quick; this he states would make the trade mark stand out more. He states that the adaptation of the word quick in this manner is not unusual. He exhibits at CG1 an extract from the Companies House register showing forty undertakings which use this form of quick in their title.

31) Mr Garrad states that the choice of the name was in no way influenced by the activities of QS. He states that he has no particular knowledge of the clothing market, and specifically no knowledge of the clothing market associated with the boarding scene.

## Further evidence of QS

32) This consists of further witness statement by Mr Exon. Little if any of the evidence appears to me to be evidence strictly in reply (as per *Peckitt's Application* [1999] RPC 337). However, New Century has not objected to the admission of the evidence and so I will take it into account. I will, however, take this matter into account when deciding on the award of costs.

33) Mr Exon exhibits at CE1 a table showing United Kingdom turnover figures for QUIKSILVER branded products. Mr Exon states that the figures are given in hundreds of thousands of euros, however, the actual table indicates that they are given in thousands of euros. Taking into account the scale of the figures the latter must be the case, otherwise the United Kingdom turnover would be greater than the combined world turnover. Various of the headings do not clearly indicate the nature of the goods involved: other, essentials, pos, young men. There is also a heading under the title range which is not explained. The details of the table follow (I have not included figures for 2003 and 2004):

€(000)

	1997	1998	1999	2000	2001	2002
Other	251	115	154	544	496	(352)
Boys	324	800	1,895	2,811	6,048	12,710
Essentials	849	1,790	3,030	4,081	5,594	6,068
POS	0	(2)	3	3	3	2
Snow boots and bindings	19	2	41	0	0	0
Silver edition	0	0	0	409	95	26
Snow	699	1,356	1,820	3,021	2,613	2,033
Sportswear	0	1	(1)	0	0	0
Swimwear	0	18	3	0	7	0
Video	0	4	5	6	6	0
Watches	0	0	0	195	414	313
Young men	4,087	5,313	10,050	11,281	16,887	21,586
Total	6,230	9,397	17,001	22,351	32,164	42,385
Range	41	37	5	(40)	(120)	58
Total (inc range)	6,272	9,434	17,006	22,311	32,044	42,443

The figures in brackets would appear to be negative amounts. In his first statement Mr Exon gives figures for turnover which differ from these. The figures are given in paragraph 17 of this decision. For the relevant periods they are as follows:

2002	43,300,000 €
2001	23,485,000 €
2000	15,755,000 €

1999	11,302,000 €
1998	6,462,000 €
1997	2,888,000 €

For the years 1997 to 2001 there are very wide discrepancies between the figures (the discrepancy for 2002 is of a lesser magnitude). I find this both confusing and of some concern. Am I to rely upon the first set of figures or the second set of figures?

34) Exhibited at CE2 are details of a promotion of QS in conjunction with Harrods. For purchasing a minimum value of goods a week's holiday could be won in the south of France to see the Junior Pro Surfing Championships. The promotion took place in 1999. There is a copy of a page from "Metro" of 16 January 2002 for a competition which links "Metro", the film "Behind Enemy Lines" and QUIKSILVER skiwear. The circulation figure for "Metro" is 375,328, with a readership of 681,000. Material is also exhibited in relation to the 1999 Newquay International Surf Festival. It is from Sports Vision Incorporated and relates to Peugeot Quiksilver. There is reference to the coverage of the festival in various media. There is no indication as to the nature of the branding eg whether QUIKSILVER was used on its own or always in relation to Peugeot, whether there was a dominant brand, whether the exercise related to cars or clothing or both etc etc.

35) Exhibited at CE3 is material relating to the setting up of a website in 1997 and that there were 150,000 connections in its first month. There is no indication as to the location of those connecting to the website. It is also not clear if the figure relates to individual users or hits. ("Hit" means a single request from a web browser for a single item from a web server; thus in order for an individual's web browser to display a page that contains three graphics, 4 "hits" would occur at the server: one for the HTML page itself, and one for each of the three graphics displayed on that page. So a user downloading a single web page with many graphic elements will generate many hits.)

36) Mr Exon exhibits various materials at CE4 relating to advertising plans and strategies. The material indicates that as far as the print media are concerned QS divides its promotion into core and non-core. Core consists of extreme sports publications such as "Snowboard UK", "White Line", "Surfers Path", "Carve" and "Wavelength". Non-core consists of more general publications. The material exhibited at CE4 indicates use of "Sky/Loaded", "Arena" and "GQ Active". There are details of poster campaigns on the London Underground in 1998 and 1999, a national billboard poster campaign in 1999 and a 1999 postcard campaign in cinema foyers in the South East of England (the participant answers a question and fills in his/her details in order to win a Guu snowboard and a QUIKSILVER snow outfit). Included in the exhibit is a market overview compiled for QS in March 1999 by Exposure Progressive Marketing. This includes quotations from staff at "FHM", "Esquire", "GQ", "Company", "Elle", "Sugar", "Looks" and "Draper's Record". The comments of the staff are quite effusive. I consider it is worth bearing in mind that they will see QS as a potential advertiser and so have an interest in praising the brand. Pages from the spring/summer 2000 marketing book are exhibited. They include lists of "selected media", being print publications. This material does not indicate that QS advertised or was promoted in all the selected media. It could be that the publications represent those in which promotion can be considered, not that it has

happened. There is an overview of the promotional activities of Exposure Progressive Marketing in April 2000. A QS publication for autumn/winter shows a press clipping from "FHM" of November 1999, from the size of the reproduction it is not possible to glean what is shown in the clipping. There is material relating to a promotional exercise in 2000 in relation to the Silver Edition range of clothing. "Marketing Book Summer 2001" shows promotional plans for November 2001 to October 2002 which involve advertisements in various magazines: "FHM", "GQ", "Maxim", "Mixmag", "Men's Health", "Esquire", "Mens Fitness" and "Jack". "Quiksilver Marketing 2002" has a page headed press clippings which shows pictures from "FHM", "Maxim", "Arena Homme" and "GQ". Owing to the scale of the illustrations it is not possible to see the precise nature of the clippings.

37) Exhibited at CE5 is the "Quiksilver UK Business Plan" from 1999. It includes the following:

"Continue increasing brand awareness via broad target promotions i.e. Peugeot car promotion, and focussed non-core promotional activities."

"Identify, and obtain market expertise in growing product areas, i.e. kids, eyewear, watches."

38) Exhibited at CE6 are pictures from the Fall/Winter 99/2000 and spring/summer 2000 catalogues showing bags which include a water bottle with the QUIKSILVER name and logo. The exhibit also shows sales figures in euros for the bags, a total of 58,597 euros (the period of the sales is not given).

39) Exhibited at CE7 is material, all from well after the material date, showing sponsorship by Evian, Samsung, Roxy and ASP of the Women's World Surf Championship in Newquay in 2005, a Spanish page for Sofia Mulanovich (a surfer) which shows sponsorship by Red Bull, Telefonica MoviStar, Reef, Lan and Ripley. A copy of an Antipodean promotion for the film "The Sixth Element" about the surfer Ross Clarke-Jones, showing sponsorship by QUIKSILVER and Red Bull.

40) Exhibited at CE8 is more material from theboardinghouse.co.uk. There is no indication that the establishment is co-branded by reference to QUIKSILVER. There is no reference to QUIKSILVER in relation to the bar. The only reference to QUIKSILVER is as follows:

"For those of you who want a little action from your holiday we boast the only Quiksilver and Roxy surf schools in Europe run by 2 x European champion Grishka Roberts. We also hire a full compliment of boards and wetsuits from our surf store."

41) Exhibited at CE9 are pages downloaded from the Internet on 17 March 2005 relating to various Coca Cola merchandise, including clothing, and Guinness merchandise, including clothing.

42) Exhibited at CE10 is a copy of a press release dated 14 June 2004 about the energy drink Extreme Energy. The press release states that it is intended to sell the product in the United Kingdom. Screen prints are exhibited from lostenterprises.com. The prints refer to Lost surfboards, jeans from Lost Enterprises ("Finally the fist

signature Jean from Lost Enterprises”), and Lost energy drink. There are screen prints from redbull.com showing various sports and sports persons, including Sofia Mulanovich.

## **DECISION**

### **Findings of fact**

43) QS claims that it has used its trade marks in the United Kingdom on an extensive scale in relation to all of the goods of the registrations. The evidence that has been furnished does not substantiate this claim; there is, for instance, nothing that substantiates use in relation to class 3 goods. The evidence shows some use in relation to bags, motor cars (with Peugeot) and watches. The core use, and the core business, relates to the goods included in United Kingdom registration no 1082835: *articles of outerclothing, and beachwear being articles of clothing*. The evidence shows that the use is more limited than the specification; the use is on articles of casual outerclothing for males (beachwear will fall within this description). The first use of the trade mark was for clothing for surfers. The market aimed at has expanded to encompass those who are involved in various extreme or non-traditional sports such as snowboarding and skate boarding. The clothing is not designed solely use for sporting activities, it can be worn as simple day to day casual wear or sitting on the beach. A line of clothing for the older man has been introduced, the Silver Edition. The nature of the advertising, in non-core media and such places as London Underground stations, indicate that the clothes are not just aimed at those who practice such pastimes but also those who wish to be identified with the image of the brand. QS describes its brand image as one that represents a casual lifestyle from a boardriding heritage. The nature of the advertising and promotion is designed to engender an image of youth, health, sportiness and risk taking. The nature of the promotion and advertising has constantly had these leitmotifs.

44) It is necessary to decide on the extent of the reputation; to decide how well-known the trade mark was at the material date. Either sets of sales figures are of a good level; although taking the nature of the market they are not enormous. However, reputation is not just about the scale of sales; many prestigious brands sell relatively little by volume. The results of the omnibus surveys are included in the evidence. In *Bach and Bach Flower Remedies Trade Marks* [1999] RPC 1 Neuberger J considered omnibus surveys:

“More specifically, I was also impressed by Mr Barter's evidence as to the general unreliability of surveys of the sort conducted in the present case. They are known as "omnibus surveys" as the interviewees are asked a wide variety of different questions based on NOP's clients' requirements. Mr Barter said: "While omnibus surveys are suitable for commercial purposes they are generally considered to be inappropriate for the purposes of legal proceedings." It is difficult to weigh the value of an answer recorded by an interviewer in circumstances such as these. One cannot assess the context, either in the physical sense or in the sense of knowing precisely what was said before the interview started or precisely what was said by the interviewee (and, possibly, the interviewer) before the crucial question is asked. Nor does one know whether the interviewee asked for clarification of the vital questions

and, indeed, whether the interviewer recorded verbatim the answers given. It is by no means impossible, for instance, that some of the relevant interviewees during the last three weeks expressed some doubt about, or asked for clarification of, the precise meaning of the word "brand". Any such doubts are reinforced by the answers given in cross-examination by some of the interviewees, as discussed below."

There is a clear difference between *Bach and Bach Flower Remedies Trade Marks* and this case as the former related to the distinctiveness of a sign; hence the issue as to meaning of the word brand. None of the instructions to the interviewers have been given, none of the questionnaires exhibited. It may be that there have been errors in the methodology but I consider that the surveys have to be taken into account, in conjunction with the other evidence. The surveys clearly segmented the market by relating the questions to the non-traditional sports world. However, that does not gainsay that 53% of all respondents identified QUIKSILVER in April 2001 and 61% in May 2003; for men under 24 years of age the figures were 81% at both times, for men between 24 and 35 years of age the figures were 59% and 60% respectively. Even taking into account errors in methodology it shows a substantial number of persons aware of the brand, particularly for males under 24 years of age. Taking into account the nature of the promotion and advertising, the degree of knowledge of the under 24s is not surprising; it also indicates that the marketing has been successful in relation to its target public. The evidence shows a large number of outlets for the goods across the United Kingdom, including own brand outlets. There has also been a good amount of promotion in the non-core area.

45) Mr Hinchliffe commented on the nature of use shown. There has been use with a device, there has been use in a very stylised form but the constant has been use of the word QUIKSILVER. If there had not been such constant use it is difficult to envisage how the omnibus surveys would have shown such levels of knowledge of the brand. The logo may well have its own reputation, the logo and the word combined may have their own reputation, however, this does not gainsay the reputation of the word QUIKSILVER on its own. It appears in all the literature, it has how the goods would have to be described orally.

46) For the purposes of the claim in relation to passing-off, QS has to establish that it has goodwill in a business that is identified with the sign QUIKSILVER. In relation to casual outer-clothing for males it has established this. For the purposes of section 5(3), QS has to satisfy a more difficult test. In *General Motors Corporation v Yplon SA* Case C-375/97 [2000] RPC 572 (*Chevy*) the European Court of Justice (ECJ) held:

"The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark."

The clothing is not just designed for those involved in extreme or non-traditional sports; it is clothing that could be worn by all males. Arguments could be put forward for two definitions of the public concerned. It could be argued that the goods have been primarily marketed for young males and so that is the public concerned. QS itself states that its clothing is not just aimed at the young market, hence the Silver Edition. It might be considered that such a definition of the public concerned is too

artificial; clothing cannot be conveniently categorised into clothing for young people and clothing for old people. No doubt QS is happy for males of all ages to purchase its garments. From this second standpoint the public concerned will be the male gender at large. Although certain brands and shops encompass both genders, many clothing brands and shops are restricted to one gender. QS has a separate brand for females, Roxy; consequently, I have considered it appropriate to limit the public concerned by gender. I have used the all encompassing gender term males because QS produces clothes for children as well as adults.

47) There are many faults and failings in the details of the evidence of QS. However, I consider that the evidence should be considered as a whole and used to give a picture of the business and reputation of QS. The closer one approaches any picture, the greater the number of faults and failing one is likely to see. Standing back, to get a proper perspective of the evidence of QS, I have come to the conclusion that QUIKSILVER is known as a trade mark for articles of casual outerclothing for males by a significant number of the male population of the United Kingdom and so has a *Chevy* reputation for such goods.

48) QS's evidence cannot establish a *Chevy* reputation for any other goods. In relation to passing-off, owing to the nature of the goods of the application, the strength of QS's reputation in relation to articles of casual outerclothing for males compared with any reputation it has for other goods and the nature of those other goods, if QS does not succeed on the basis of its core goods it is not going to succeed on the basis of any other goods for which it may have a goodwill. Consequently, QS's case in relation to sections 5(3) and 5(4) of the Act will be considered solely on the basis of its goodwill and reputation in relation to articles of casual outerclothing for males.

49) QS has attempted to show a link or natural progression in trade between clothing and beverages. In consideration of this matter it is necessary to bear in mind that QS's core business is clothing. It has tried to draw parallels with beverage companies that merchandise clothing. However, that is not the matter at issue; it is whether clothing undertakings get involved in producing or licensing beverages. QS has relied on a lot of material about Coca Cola; Coca Cola is the very opposite to the norm. This is one of the most famous, possibly the most famous, trade marks in the world. What Coca Cola does can hardly be considered the norm for any industry. There is also evidence relation to Guinness, another drinks undertaking. QS's evidence in relation to the clothing industry moving into beverages was very limited, even more so in relation to the United Kingdom.

50) QS has adduced evidence in relation to a short lived licensing agreement between Umbro and a sports drink provider. This is its sole example in the United Kingdom. It refers to Extreme Sports Channel merchandising a beverage. Again this is not a matter of a clothing company. There is evidence about Lost Enterprises in the United States. Mr Exon describes Lost Enterprises as a media and advertising company for surfing and extreme sports, not a clothing company. QS points to sponsorship of various sporting events and competitions by beverage companies, including sports and energy beverage companies. Sponsorship is a promotional activity, it is part of advertising. It is part of the brand image building. It is hardly surprising that undertakings wish to be associated with sporting events and have their names seen at

those events; so getting brand exposure and building brand image at the same time. QS comments that it has sponsored events that have also been sponsored by beverage companies; certain of those events have also been sponsored by electronics companies, telecommunication companies and telephone manufacturers. Is the logic of QS's argument that there is a clear link between its clothing and telecommunication services? Where does the line get drawn? There will be numerous corporate sponsors for the World Cup in Germany and the Olympic Games in London. Is their joint sponsorship an indication of a relationship in trade? I can remember when tobacco companies sponsored concerts and recordings, is one to consider that there is an equivalence between classical music and tobacco?

51) QS has made a lot of the activities of Red Bull. Red Bull has clearly been active in the sponsorship of various non-traditional and/or extreme sports events and sports persons. It has been a joint sponsor of a film about a surfer with QS. QS has been involved in the sponsorship of surfing events. QS has been involved with joint sponsorship of surfing events in Australia with Torquay mineral water. QS is effectively running the argument as follows: beverage companies sponsor various sporting events, QS sponsors various sporting events, some sporting events are sponsored by both beverage companies and QS, therefore, there is a connection between beverage companies and QS. The premise is clearly syllogistic. As noted various events and individuals are also co-sponsored by telcos. The logic of QS's argument must be that there is, therefore, a clear relationship between telcos and beverage producers, and clothes manufactures and telcos.

52) QS runs an argument that it is already involved with beverages because of the presence of various QUIKSILVER paraphernalia in the Boarding House in Newquay. There is also a QUIKSILVER surfing school at the establishment. The point of common interest in the two businesses is surfing, not clothing or beverages. QS is involved in surfing, The Boarding House is specifically aimed at surfers; it calls itself an "elite surf hotel". The enterprises coincide in their relationship to surfing not to the hospitality or hostelry trade. QS could, on its argument, also claim that it is involved in the hotel trade. As I have indicated in the summary of the evidence the QUIKSILVER paraphernalia appear as decoration for the bar; that certain public houses use books as decoration does not give them a toe into the publishing industry. The Boarding House does not claim sponsorship by QS, QUIKSILVER is only mentioned in relation to the surfing school. The fundamentals of QS's argument rely on a further step; that hotels are the producers of beverages. This is not, in my experience, the norm. There is a traditional link between brewers and pubs and inns but not to hotels.

53) QS tries to establish a link between its business and the beverage trade because certain of its bags contain bottles with QUIKSILVER upon them and because one of its rivals produces water bottles for sale in the United States. QS shows no link between those who produce water bottles and those who produce beverages. I am certainly not aware of any such link. If QS included a plate in some of its bags would that show a link to the food industry?

54) I do not consider that QS has established any relationship between the beverage trade and either QS's business or that of the clothing industry at large. It has shown no indication that it ever considered this a natural progression in trade. There is an

absence of evidence that there is a normal progression of trade from clothing to beverages, whether in relation to the industries as a whole or those parts concerned with sport.

### **Section 3(6) of the Act – bad faith**

55) Section 3(6) of the Act states that:

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

The basis of QS’s case is that New Century knew about its QUIKSILVER trade mark and that, consequently, the application was made in bad faith. The nature of this claim means that QS has to establish that New Century was aware of its trade mark. Whether the filing of the application, in the light of this knowledge, could be considered an act of bad faith, only becomes an issue if the first claim of QS is proven. (This in itself is a problematic issue, see the decision of Tim Cleary of the Irish Patents Office in *McDermott Laboratories Ltd’s Application* [2006] ETMR 17.)

56) Mr Garrad in his witness statement denies any knowledge of the QUIKSILVER trade mark. He explains how he had “coined” QUIKSILVER for a new beverage product. Mr Garrad was cross-examined. He confirmed that prior to the launching of this opposition that he was unaware of QS’s QUIKSILVER brand. Mr Garrad stated that he had not consulted a dictionary before coining the trade mark. He stated that consideration of a new trade mark would be based upon New Century’s particular market place. As Mr Garrad did not consult a dictionary, it is quite possible that he did not know that quicksilver was an old name for mercury, a highly poisonous substance. Mr Garrad also stated that in New Century’s marketplace the potential connotation with an old name for mercury would be irrelevant. It would seem that Mr Edenborough was trying to show that because of the unfortunate connotations of quicksilver, the only reason that New Century could have chosen QUIKSILVER was because of its reputation as a trade mark of QS. If Mr Garrad did not know of the meaning or considered it irrelevant to the market place then this implication cannot be drawn. Mr Edenborough also asked about New Century’s application for the trade mark Pop Idol. Mr Garrad admitted that he knew of the television show and that negotiations for use of the trade mark with the owners of the show only commenced after the application was made.

57) In bad faith cases involving the alleged taking of another’s trade mark, a prior relationship between the parties is usually established. This shows at least the knowledge of the other’s trade mark. In this case there was no relationship between the parties. New Century have applied for the trade mark Pop Idol. There is, as indicated by Mr Garrad under cross examination, a play on the generic term pop for carbonated beverages in that case. The Pop Idol case does not, in my view, represent similar fact evidence. It certainly cannot be used to presume the knowledge of New Century of the trade mark QUIKSILVER. There is no reason that an undertaking dealing with food and beverages should conduct clearance searches in relation to unrelated markets, such as clothing. Mr Garrad confirmed under cross-examination the truth of his witness statement. QS could have requested disclosure of documents relating to the coining of QUIKSILVER by New Century. It did not do so. QS’s case

is based on the presumption of the knowledge of its trade mark. It has failed to establish this. As QS has not shown that New Century knew of the earlier QUIKSILVER trade marks at the time of filing of the application, the fundamental premise upon which its case is based falls and it must fail under this ground.

**58) The grounds of opposition under section 3(6) of the Act are dismissed.**

**Passing-off – section 5(4)(a) of the Act**

59) Section 5(4)(a) of the Act states:

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

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

60) I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC in the *Wild Child case* [1998] RPC 455. In that decision Mr Hobbs stated that:

"A helpful summary of the elements of an action for passing off can be found in Halsbury's Laws of England 4th Edition Vol 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 and *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] ACT 731 is (with footnotes omitted) as follows:

"The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation."

.....Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing-off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact. In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

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

61) The first matter that I have to decide is the material date. It is well established that the material date for passing-off is the date of the behaviour complained of (see *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 and *Inter Lotto (UK) Ltd v Camelot Group PLC* [2004] RPC 8 and 9). Section 5(4)(a) is derived from article 4(4)(b) of First Council Directive 89/104 of December 21, 1998 which states:

“rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark”.

Consequently, the material date cannot be after the date of application. There is no evidence of use of the trade mark by New Century. So, the behaviour complained of is the acting of filing the application which occurred on 8 July 2003.

62) I have already accepted that QS has established a goodwill in the trade mark QUIKSILVER for articles of casual outer clothing for males. The reputation passes the *Chevy* test for section 5(3) of the Act and so is a strong reputation. The two trade marks are identical. I have already decided that there is no natural relationship or progression in trade from clothing to beverages. Even though the trade marks are identical the distance between the respective spheres of activity means that it is not necessarily the case that there would be confusion or deception. Even if there were

confusion or deception, the distance between the spheres of activity means that it is not an automatic sequitur that there would be damage.

63) The difficulty of establishing confusion where there is a distance between the fields of activities was considered by Millet LJ in *Harrods v Harrodian School* [1996] RPC 697 Millet LJ stated:

“It is not in my opinion sufficient to demonstrate that there must be a connection of some kind between the defendant and the plaintiff, if it is not a connection which would lead the public to suppose that the plaintiff has made himself responsible for the quality of the defendant’s goods or services”

In the same case Millet LJ held:

“The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration.”

In *Stringfellow v McCain Foods (GB) Ltd* [1984] RPC 501 Slade LJ considered the difficulty of establishing damage where the parties are in different lines of business:

“even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than a minimal loss is in my opinion a heavy one.”

In *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1980] RPC 31 Lord Fraser commented upon what the plaintiff must establish:

“That he has suffered, or is *really likely* to suffer, substantial damage to his property in the goodwill by reason of the defendants selling goods which are falsely described by the trade name to which the goodwill is attached.”

Lord Fraser refers to substantial damage to his property.

64) In *Lego System Aktieselskab and Another v Lego M Lemelstrich Ltd* [1983] FSR 155 the distance between the fields of activity was bridged by an enormous reputation, Lego being classed as a household word, and survey evidence.

65) Christopher Wadlow in “The Law of Passing-Off” (third edition) at 4-23 puts forward the following proposition:

“Most of the authorities may perhaps be reconciled with the proposition that the risk of damage is sufficiently real if:

1. Confusion between the parties will be widespread and inevitable, even though there may be no immediate reason to believe that actual damage in any particular form will occur, or
2. There will be some confusion of the parties, and the defendant's business poses a special risk to the claimant because of the way it is currently conducted or because of future developments which can actually be expected.

If confusion with the claimant is slight and tangible damage speculative then there is no liability for passing off.”

66) Mr Edenborough referred to QS's relationship with some drinks by way of co-branding and some bars by way of joint partnership. There is no evidence of any joint partnership with a bar, there is decoration of the bar and a QUIKSILVER surf school at The Boarding House. If there is a partnership, where is the documentation in relation to it? Mr Edenborough seems to conflate co-sponsorship with co-branding. Perhaps it would be better to refer to common sponsorship, as in most of the cases there is no evidence of a link between the various sponsors other than that they are sponsoring the same event. There is evidence of a co-sponsorship with Torquay mineral water in Australia for surfing events. However, QUIKSILVER does not appear on Torquay's water.

67) Mr Edenborough submitted that *Stringfellow v McCain Foods (GB) Ltd* is so historically dated that its relevance to this case is almost de minimis. I do not feel that I can play fast and loose with the judgments of the Court of Appeal, even if I wished so to do. Mr Edenborough could suggest no authority that superseded either *Harrods v Harrodian School* or *Stringfellow v McCain Foods (GB) Ltd*; I am not aware of any. He referred to *Mirage Studios and Others v Counter-Feat Clothing Company Limited and Another* [1991] FSR 145. That case was at first instance and prior to *Harrods v Harrodian School*, so I cannot see that it supersedes *Harrods v Harrodian School* or *Stringfellow v McCain Foods (GB) Ltd*. In that case there had been a relationship between the parties, there were issues of infringement of copyright and licensing and merchandising issues. I can see no parallels with the present case.

68) It is not uncommon for the same trade mark to be used by very different undertakings. Polo is famous for confectionery, cars and clothing. So the sharing of a name does not of itself create confusion. There is a misspelling of quicksilver but the removal of the c in quick, which retains the same sound, is hardly radical or unexpected. Owing to the enormous gap between the fields of activity, I do not consider that confusion or deception would arise. I do not believe that the relevant consumer would consider that QS was responsible for the beverages of New Century. If I am wrong in this finding, owing to the distance in the activities, I do not consider that QS would suffer any damage from the use of QUIKSILVER in relation to the goods of the application. The heavy onus that is put upon QS as per *Stringfellow v McCain Foods (GB) Ltd* has not been satisfied.

### **Section 5(3) of the Act**

69) At the time of the filing of the opposition section 5(3) of the Act stated:

“(3) A trade mark which -

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

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

(Section 5(3) of the Act has subsequently been amended to encompass similar and identical goods and services.)

Section 6(1)(a) of the Act states:

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

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

70) United Kingdom trade mark registration no 1082835 is an earlier trade mark within the meaning of section 6(1)(a) of the Act. It is identical to the trade mark of the application. The respective goods are not similar. The trade mark enjoys the requisite reputation for articles of casual outer clothing for males. In *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] FSR 767 Neuberger J dealt with the issue of “without due cause”:

“Secondly, although I accept that the words "being without due cause" are somewhat opaque in their effect, I consider that they have to be read as not merely governing the words "the use of the sign", but also as governing the words "takes unfair advantage of, or is detrimental to". Section 10(3) must be read in a commercially sensible way. Bearing in mind its overall purpose, it appears to me that (without at this stage intending to indicate where the burden of proof lies) it requires the defendant to show not merely that the use of the allegedly infringing sign in connection with the defendant's goods is "with due cause"; it also requires him to show that although the use of the sign might otherwise be said to "take unfair advantage of or is detrimental to" the mark, the advantage or detriment are not "without due cause".

Thirdly, it appears to me that this conclusion is consistent with the view of the Benelux Court in *Lucas Bols* [1976] I.I.C. 420 at 425, where, when discussing the meaning of "without justifiable reason" which appeared in a similar context in the Uniform Benelux Trade Mark Act as "without due cause" in section 10(3), the Court said this:

‘What this requires, as a rule, is that the user (of the mark) is under such a compulsion to use this very mark that he cannot honestly be asked to refrain from doing so regardless of the damage the owner of the mark would suffer from such use, or that the user is entitled to the use of the mark in his own right and does not have to yield this right to that of the owner of the mark....’

On the same page, the court went on to suggest that a "justifiable reason" may be "if the user can assert an older right than that of the [registered proprietor]" but went on to emphasise that whether the alleged infringer can establish a "justifiable reason" must be "resolved by the trial judge according to the particular facts of each case".

In my judgment, those observations represent the approach which should be adopted to the words "being without due cause" in section 10(3), although it is fair to say that two criticisms can be made of this conclusion. The first criticism raises a practical problem, in the sense that this construction could be said to produce a degree of uncertainty; the second point which may be made is that, on this construction, it is not entirely to see what function the words "being without due cause" actually have. So far as the practical problem is concerned, I do not consider that it has a great deal of weight. Most cases of alleged trade mark infringement turn on their own particular facts; further, the protection potentially accorded to a trade mark proprietor by section 10(3) can be pretty wide. It does not therefore seem to me inappropriate that the tribunal considering the question of infringement under this provision is accorded some degree of flexibility as to how the provision is to be enforced. It should be made clear that I am certainly not suggesting that the court has some sort of roving commission or wide discretion; the observations I have quoted from Lucas Bols are quite clear on that point.

So far as the second criticism of my conclusion is concerned, it is fair to say that it is not easy to see how the use of a sign could take "*unfair* advantage" of a registered mark and yet be *not* "without due cause". In my judgment, however, there are two answers to that point. First, it is conceivable that, in certain circumstances, the court might conclude that, notwithstanding the fact that the alleged infringer's use of a sign took "unfair advantage" of a mark, this was outweighed by the use being with "due cause", within the limited meaning of that expression as explained in Lucas Bols [1976] 7 I.I.C. 420. Secondly, the words "being without due cause" apply not only to a case of alleged unfair advantage, but also to a case where the use of the sign is allegedly "detrimental" to the mark: there is no difficulty in envisaging circumstances where a "detrimental" use could not be "without due cause" within the sense I have suggested.

Having come to this conclusion as to the meaning and effect of the words "being without due cause" in section 10(3), it appears clear to me that those words do not assist TEL in the present case. Its use of the TYPHOON sign in relation to its kitchenware started little more than a year ago, and only a very short time before these proceedings were begun by Premier. Indeed, TEL did not wait to see if its application to register the TYPHOON sign was

challenged by anyone before it launched its kitchenware under that sign. Premier's TY.PHOO mark has been in substantial commercial use for nearly a century, and has been on the register for over 70 years; it is a very well known, and plainly a very valuable, mark. In these circumstances, I have no real hesitation in reaching the conclusion that, if Premier can otherwise succeed in its claim for infringement under section 10(3), TEL obtain no assistance from the words "being without due cause" in that section. The conclusions I have reached on the facts of this case, whether Premier's analysis of the law is correct (as I believe to be the case) or if TEL's analysis is correct, are reached irrespective of where the onus of proof lies. However, it is right to record that in my view on either analysis the onus of proof would rest on TEL. I cannot pretend that the point is straightforward, because there is obvious force in Mr Bloch's contention that, where a proprietor of a trade mark alleges infringement under a particular statutory provision, it is up to him to establish each of the prescribed statutory ingredients necessary to establish infringement. However, as I see it, the words "being without due cause" although not plainly expressed as such, really represent a proviso or exception to the generality of section 10(3). In those circumstances, if an alleged infringer, such as TEL, wishes to rely on those words, it is up to it to establish that it falls within the exception, rather than up to a proprietor of the mark to establish that the proviso does not apply. It is fair to say that this is a conclusion I would have reached even if I had held that TEL's analysis was correct. It follows that Premier will succeed in establishing infringement under section 10(3) provided that it can show that TEL's use of the TYPHOON sign "takes unfair advantage of" and/or "is detrimental to" "the distinctive character or repute of the [TY.PHOO] mark". Premier's case is now based solely on detriment, as Mr Arnold (rightly I think) abandoned what was always Premier's secondary argument based on unfair advantage."

In *Julius Sämann Ltd and others v Tetrosyl Limited* [2006] EWHC 529 (Ch) Kitchin J stated:

"84..... The fact that the sign complained of was innocently adopted is not sufficient to invoke the exception. The defendant must show not only that the use complained of is "with due cause" but also that the taking of unfair advantage or causing of detriment are not "without due cause". All of these matters point to a relatively stringent test....."

Based upon the above, I do not consider that New Century can claim the defence of having due cause to use the trade mark.

71) QS has satisfied all the preliminary criteria for section 5(3) and New Century cannot lay claim to a due cause defence.

72) In *Mango Sport System SRL Socio Unico Mangone Antonio Vincenzo v Diknah SL* (Case R 308/2003-1) [2005] ETMR 5, the First Board of Appeal gave a very helpful summary of the factors that are to be considered in relation to section 5(3) of the Act:

“13 The infringements referred to in that article, 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. The protection conferred thereby is not conditional on a finding of a degree of similarity between the mark with a reputation and the sign such that there exists a likelihood of confusion between them on the part of the relevant section of the public. It is sufficient for the degree of similarity between the mark with a reputation and the sign to have the effect that the relevant section of the public establishes a link between the sign and the mark (see, to that effect, ADIDAS, at [29] and [30] and Case C-375/97 General Motors [1999] E.C.R. I-5421, at [23]).

14 The existence of such a link must, just like a likelihood of confusion, be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, to that effect, ADIDAS, at [30]).

15 The condition of similarity between the mark and the sign, referred to in the above article, requires the existence, in particular, of elements of visual, aural or conceptual similarity (see, to that effect, judgment of the Court of 23 October 2003 Adidas Salomon AG and Adidas Benelux BV v Fitnessworld Training Ltd in Case R C-408/01 "ADIDAS", at [28]).

16 A knowledge threshold is implied in the above provision as regards both the public concerned and the territory concerned. The degree of knowledge must be considered when the earlier mark is known by a significant part of the public concerned, either the public at large or a more specialised public depending on the product or service marketed and covered by that mark. Territorially, the knowledge condition is fulfilled where the trade mark has reputation in a substantial part of the territory of the Member State in question (see, to that effect, judgment of the Court of 14 September 1999 in Case C-375/97 General Motors Corp v Yplon SA ("Chevy") [1999] E.C.R. I-5421, at [22] to [28]).

17 If the condition as to the existence of reputation is fulfilled as regards both the public concerned and the territory in question, it must next be examined whether use without due cause of the trade mark applied for would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

18 The requirements of the latter condition are not cumulative. It is sufficient that the mark applied for would either take unfair advantage of the distinctive character or the repute of the earlier trade mark, or that the mark applied for would be detrimental to the distinctive character or the repute of the earlier trade mark.

19 As to unfair advantage, which is in issue here since that was the condition for the rejection of the mark applied for, that is taken when another undertaking exploits the distinctive character or repute of the earlier mark to the benefit of its own marketing efforts. In that situation that undertaking

effectively uses the renowned mark as a vehicle for generating consumer interest in its own products. The advantage for the third party arises in the substantial saving on investment in promotion and publicity for its own goods, since it is able to "free ride" on that already undertaken by the earlier reputed mark. It is unfair since the reward for the costs of promoting, maintaining and enhancing a particular trade mark should belong to the owner of the earlier trade mark in question (see, to that effect, decisions of the First Board of Appeal of 8 February 2002 in Case R 472/2001-1-- BIBA/BIBA (fig. MARK), First Board of 20 October 2003 in Case 2003-R 1004/2000-1-- KINDERCARE (fig. MARK)/kinder et al., at [26], and of the Fourth Board of Appeal of 26 July 2001 in Case R 552/2000-4 COSMOPOLITAN COSMETICS/COSMOPOLITAN).

20 In that regard, it should be observed that the stronger the earlier mark's distinctive character and reputation the easier it will be to accept that unfair advantage has been taken or detriment has been caused (see, to that effect, judgment of the Court of 14 September 1999 in Case C-375/97 General Motors Corp v Yplon SA ("Chevy") [1999] E.C.R. I-5421, at [30]).

21 Furthermore, the closer the similarity between the marks the greater is the risk that unfair advantage will be taken. An identity or a very high degree of similarity is a factor of particular importance in establishing if an unfair advantage will be taken (see KINDERCARE (fig. MARK)/kinder et al., and Decision of the Second Board of Appeal of 8 November 2001 in Case R 303/2000-2-- Magefesa (fig. MARK)/ Magefesa (fig. MARK), at [21] and [23]).

22 The greater the proximity between the goods and the circumstances in which they are marketed, the greater the risk that the public in question will make a link between the mark and the sign in question. The existence of the similarity of the goods may be taken into account to the extent that the greater the similarity between the goods in question, the greater the risk that unfair advantage will be taken of the earlier mark (see decision of the Third Board of 25 April 2001 in Case R 283/1999-3 HOLLYWOOD/HOLLYWOOD)."

73) The pleadings under section 5(3) are general and cover all parts of the section of the Act. Part of the pleading relates to fettering or inhibition: the stopping of a party going into another area of trade. As far as I am aware the only authority for fettering is decision BL O/455/00 of Simon Thorley QC, sitting as the appointed person, in *Loaded*. Fettering was not considered by AG Jacobs in his overview of the law in his opinion in *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd* C-408/01 [2003] ETMR 91. I am uncertain as to how fettering can be considered to be detrimental to or take unfair advantage of the distinctive character or the repute of the earlier trade mark. In *Loaded* the core business of the opponent was involved:

"Equally the possibility that the widespread use of the trade mark on clothing could materially affect the ability of LOADED magazine to obtain advertisements from others for their clothing in the magazine is real not fanciful for the reasons not given by Mr. Paul."

There is no hint that the core business of QS would be affected detrimentally by a registration by New Century for beverages. Consequently, if fettering is a form of damage, I do not consider that it applies to this case.

74) Mr Edenborough submitted that there would be dilution. In his opinion in *Adidas-Salomon AG and Adidas Benelux BV v Fitnessworld Trading Ltd* AG Jacobs comments on the basis and nature of dilution:

“37. The concept of detriment to the distinctive character of a trade mark reflects what is generally referred to as dilution. That notion was first articulated by Schechter, who advocated protection against injury to a trade mark owner going beyond the injury caused by use of an identical or similar mark in relation to identical or similar goods or services causing confusion as to origin. Schechter described the type of injury with which he was concerned as the gradual whittling away or dispersion of the identity and hold upon the public mind' of certain marks. The courts in the United States, where owners of certain marks have been protected against dilution for some time, have added richly to the lexicon of dilution, describing it in terms of lessening, watering down, debilitating, weakening, undermining, blurring, eroding and insidious gnawing away at a trade mark. The essence of dilution in this classic sense is that the blurring of the distinctiveness of the mark means that it is no longer capable of arousing immediate association with the goods for which it is registered and used. Thus, to quote Schechter again, for instance, if you allow Rolls Royce restaurants and Rolls Royce cafeterias, and Rolls Royce pants, and Rolls Royce candy, in 10 years you will not have the Rolls Royce mark any more'.”

In *Daimler Chrysler AG v Javid Alavi trading as MERC* [2001] RPC 42 Pumfrey J stated:

“The presence of two similar marks where there was only one before seems to me to be detrimental to the distinctive character of the first. I am satisfied that this is not what the words are talking about.”

In *Premier Brands UK Ltd v Typhoon Europe Ltd* [2000] FSR 767 at 801 Neuberger J stated:

“As I have mentioned, the mere fact that the way in which the sign is used by TEL may give rise to an association between the sign and the mark in the minds of some members of the public is, in my judgement, simply not enough on its own to enable the proprietor of the mark, however well known and valuable it may be, to invoke section 10(3).”

Owing to the distance between the goods of the application and those for which QS has a reputation, I cannot see that the presence of an additional QUIKSILVER trade mark will mean that QS's trade mark will no longer arouse an immediate association with those goods for which it has a reputation. I am unconvinced by the claim to dilution.

75) AG Jacobs commented on tarnishing in the following terms:

“38. In contrast, the concept of detriment to the repute of a trade mark, often referred to as degradation or tarnishment of the mark, describes the situation where - as it was put in the well-known *Claeryn / Klarein* decision of the Benelux Court of Justice - the goods for which the infringing sign is used appeal to the public's senses in such a way that the trade mark's power of attraction is affected. That case concerned the identically pronounced marks *Claeryn'* for a Dutch gin and *Klarein'* for a liquid detergent. Since it was found that the similarity between the two marks might cause consumers to think of detergent when drinking *Claeryn'* gin, the *Klarein'* mark was held to infringe the *Claeryn'* mark.”

I do not consider that there has been any argument that use of New Century's trade mark for the goods of the application would tarnish QS's trade mark. I can see no way that it would.

76) This leaves taking unfair advantage of the distinctive character or repute of the earlier trade mark. AG Jacobs analysed this form of damage in the following manner:

“39. The concepts of taking unfair advantage of the distinctive character or repute of the mark in contrast must be intended to encompass instances where there is clear exploitation and free-riding on the coattails of a famous mark or an attempt to trade upon its reputation'. Thus by way of example Rolls Royce would be entitled to prevent a manufacturer of whisky from exploiting the reputation of the Rolls Royce mark in order to promote his brand. It is not obvious that there is any real difference between taking advantage of a mark's distinctive character and taking advantage of its repute; since however nothing turns on any such difference in the present case, I shall refer to both as free-riding.”

The nature of the issue is clearly put in the decision of the First Board of Appeal to which I have referred above:

“In that situation that undertaking effectively uses the renowned mark as a vehicle for generating consumer interest in its own products. The advantage for the third party arises in the substantial saving on investment in promotion and publicity for its own goods, since it is able to "free ride" on that already undertaken by the earlier reputed mark. It is unfair since the reward for the costs of promoting, maintaining and enhancing a particular trade mark should belong to the owner of the earlier trade mark in question....”

In considering advantage I consider that the nature of the reputation of QS's trade mark should be taken into account. The Third Board of Appeal of the Office for Harmonization in the Internal Market (OHIM) commented at paragraph 68 in *Hollywood SAS v Souza Cruz SA* [2002] ETMR 64 on the potential nature of a reputation:

“In the light of these aspects, the idea that the appellant's trade mark conveys a message of health, dynamism and youth cannot be ruled out as a matter of

principle, provided that evidence of this is adduced. However, in order to be protected within the meaning of Article 8(5) CTMR, this image must have acquired a level of reputation. The Opposition Division considered that the opponent had submitted adequate evidence of the existence of the trade mark's reputation, but that it had not proved the existence of an image association with the trade mark possessing this reputation. Therefore the evidence to be adduced must focus specifically on the existence of this image association with the trade mark which possesses the reputation.”

In this case the evidence of QS does substantiate a reputation that conveys a message, to borrow from the above quotation, of health, dynamism and youth. As I stated above;

“The nature of the advertising and promotion is designed to engender an image of youth, health, sportiness and risk taking.”

Through the promotion of the trade mark, it appears to me that the brand image and the trade mark are inextricably linked. It represents a positive reputation and image that others would be only too happy to make use of.

77) In *Mastercard International v Hitachi Credit (UK) Plc* [2005] RPC 21 Smith J held that there “must be real possibilities as opposed to theoretical possibilities” of the damage claimed. In *Electrocoin Automatics Limited v Coinworld Limited and others* [2004] EWHC 1498 (Ch) Mr Geoffrey Hobbs QC (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 proscribed, '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.”

78) It is necessary to make a global appreciation as to whether a link will be made. In this I have taken the following into account:

- The identity of the trade marks.
- The same misspelling.
- The strength of the reputation of the earlier trade mark.
- The inherent distinctiveness of the earlier trade mark.
- The brand image that is part and parcel of the reputation of the earlier trade mark.
- The distance between the goods of the application and those for which QS has a reputation.
- The nature of the goods of the application.
- The nature of the image that New Century is trying to conjure up.

79) Mr Garrad states that he wished to ensure that the drink would be free of any of the slightly tainted values associated with high sugar drinks, such as Coca Cola, and the high caffeine levels associated with the more extreme energy drinks, such as Red Bull. He states that he coined the name QUIKSILVER as he felt that it alluded to the brand values which he wished to associate with the product. Quick is suggestive of

the flow of the drink and is evocative of vitality, freshness and an active life-style, silver reflects the clear, crisp colour of the product. It seems to me that the brand image that he is aiming for is that already achieved by QS. Use of the trade mark QUIKSILVER for beverages, taking into account all the factors I have listed above, would, in my view, have a free ride on the very positive young image that is part and parcel of the reputation of QS. It would take advantage of all the promotion that QS has taken over many years to build up its brand. Especially for young people I consider that use of QUIKSILVER for beverages would come freighted with reputation of QS. I am of the view that a link with the reputation of QS would be made. With the high profile and positive image of QS's QUIKSILVER, I have no doubt that use for beverages would have a definite economic effect. New Century would not just be riding on the coat tails of QS, QS's reputation would be acting as a spring board for New Century's product.

**80) I find that use of New Century's trade mark would take unfair advantage of the repute of QS's QUIKSILVER trade mark. The application is to be refused in its entirety.**

## **CONCLUSION AND COSTS**

81) I clearly have had to take a long journey to get to my finding for QS. The conclusions in relation to sections 5(3) and 5(4)(a) are the result of the former part of the Act not requiring confusion and the latter requiring confusion. This is a case where the advantage taken is of the repute of the earlier trade mark, not its distinctive character. New Century would be wrapping its bottles in the reputation and brand image of QS's QUIKSILVER trade mark.

82) As I have indicated, the evidence in reply of QS was not evidence in reply. It was effectively more evidence in chief used to bolster its case. Parts of QS's evidence were neither aimed at the relevant jurisdiction nor the material date. A large part of the evidence tried, and as far as I am concerned, failed to establish some form of link between the beverage industry and the clothing industry and/or QS. Not content with putting such evidence in the first round of evidence, QS put in more in its second round of evidence. The nature of the evidence meant that it was necessary to do an awful lot of drilling into exhibits to find oil. There were the contradictory turnover figures in the evidence. The cross-examination was aimed at the section 3(6) objection; in which QS failed. I am sure that a large amount of time and effort for New Century would have been saved if the evidence of QS had been clear and focused and if a second round of evidence in chief had not been brought in under the guise of evidence in reply.

83) *Rizla Ltd's Application* [1993] RPC 365 confirms that in the matter of costs the registrar has a wide discretion. In *BUD and Budweiser Budbräu Trade Marks* [2002] RPC 38, Mr Simon Thorley QC, sitting as a deputy judge of the High Court, accepted that off the scale costs could be awarded where a side had behaved unreasonably or put in a large amount of evidence that is of little or no relevance. In that case Mr Thorley was considering the actions of the losing side. However, I consider that such a consideration can equally apply to the winning side. It is a matter of whether the other side was put to effort and expense which, taking into account the nature of the evidence, served no purpose. In *West t/a Eastenders v Fuller Smith*

*Turner PLC* [2004] FSR 32 Pumfrey J decided that in awarding costs the success in relation to separate grounds and the evidence adduced in relation to those grounds should be taken into account.

**84) Taking all the above factors into account I have decided that QS, despite being the winning side, is not entitled to a contribution towards its costs. I make no award of costs.**

**Dated this 23<sup>rd</sup> day of March 2006**

**David Landau  
For the Registrar  
the Comptroller-General**