

O-090-05

TRADE MARKS ACT 1994

**IN THE MATTER OF
REGISTRATION NOS 900404 AND 1014798
OF THE TRADE MARKS:**

HANG-TEN

AND



**IN THE NAME OF
HANG TEN INTERNATIONAL**

AND

**THE APPLICATIONS FOR REVOCATION THERETO
UNDER NOS 80024 AND 80025
BY
LANCASTER INDUSTRIES LLC**

TRADE MARKS ACT 1994

In the matter of registration nos 900404 and 1014798
of the trade marks:

HANG-TEN

and



in the name of Hang Ten International
and the applications for revocation thereto
under nos 80024 and 80025
by Lancaster Industries LLC

BACKGROUND

1) On 6 August 2001 Lancaster Industries LLC, which I will refer to as Lancaster, filed applications for the revocation of the following trade mark registrations:

- No 900404 of the trade mark HANG-TEN. The trade mark is registered for the following goods:

shorts, jackets, shirts and shoes, all for beachwear; swimwear being articles of clothing.

The trade mark was registered on 18 August 1967.

- No 1014798 of the trade mark:



The trade mark is registered for the following goods:

bathing suits, bikinis, sunsuits, jackets, shirts, trousers, shorts, skirts, dresses, socks (for wear), shoes and sandals.

The trade mark was registered on 12 December 1975.

The registrations now stand in the name of Hang Ten International, which I will refer to as HTI. The goods of the two registrations 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.

2) Lancaster states that it has made investigations to ascertain whether the trade marks have been put to use in the period 1 August 1996 to 31 July 2001. These investigations have not revealed any use of the trade marks.

3) Lancaster requests that the registrations be revoked upon the grounds of non-use in accordance with section 46(1)(b) of the Trade Marks Act 1994 (the Act) as there has been no use of the trade marks during the period 1 August 1996 to 31 July 2001 and there are no proper reasons for non-use.

4) Lancaster seeks the revocation of the registrations in their entirety or that the registrations be limited to goods upon which the trade mark has been used (if any).

5) Lancaster seeks an award of costs.

6) HTI filed counterstatements. It claims that the trade marks were included in a licence agreement between HTIL Corporation BV, an associated company of HTI, and Copperstore Limited. Use of the trade marks has been made in pursuance of the licence agreement and with the consent of the registered proprietor.

7) In relation to registration no 900404, HANG-TEN, HTI claims that in so far as there may not have been use on any of the specified goods, there are proper reasons for non-use within the meaning of section 46(1)(b) of the Act. These reasons relate to unsatisfactory conduct on the part of the licensee, Copperstore Limited.

8) Initially HTI claimed that the registrations should be maintained for all of the goods of the registrations. However, by the time of the hearing it had limited its claim to the maintenance of *shirts* and *shorts* in the specifications.

9) HTI seeks an award of costs.

10) Only HTI furnished evidence.

11) The case was heard on 17 March 2005. HTI was represented by Mr Penny of counsel, instructed by Duane Morris. Lancaster was represented by Mr Edenborough of counsel, instructed by Barlin Associates.

EVIDENCE OF HTI

12) HTI supplied fundamentally the same evidence in relation to the two applications for revocation. I consider that it would be captious to allocate one set of evidence purely to one revocation. I will deal with the evidence in its entirety and consider it in its entirety in relation to each of the applications.

Witness statement of Paul Taupier

13) Mr Taupier is the legal manager of HTI of California. The trade mark HANG TEN was coined in California in 1960 and since that time has been used by HTI and its predecessors, licensees or associated companies in respect of leisurewear in more than sixty countries, including the United Kingdom.

14) In July 1998 HTIL Corporation, BV, a company incorporated in the Netherlands, entered into a licence agreement with the English company Copperstore Limited. Mr Taupier states that HTIL Corporation, BV is effectively under the same ownership as HTI and that the July 1998 licence agreement was made with the consent of HTI. Sales took place under the licence agreement in the United Kingdom in respect of, at least, shorts and shirts, all being suitable for beachwear. Some of the garments sold in the United Kingdom were manufactured by A4 Moshay Company, a California corporation located in Los Angeles.

15) HTI found Copperstore an unsatisfactory licensee, particularly in reporting the sales which had been made, and the licence was terminated with effect from 1 January 2001 in favour of a new licensee, Mantavogue Limited. Mantavogue is an English company located in Plymouth. (According to the witness statement of Mr Adams (see below) the licence was terminated on 31 March 2000.)

16) Mr Taupier exhibits at PT-1 a copy of the licence agreement dated 1 July 1998 between HTIL Corporation, BV and Copperstore. The licence agreement gives rights to use of trade marks "including the word "Hang Ten", designs showing bare footprints, and combinations thereof". Appendix "A" to the agreement lists the licensed items as:

screenprinted t-shirts
knit and woven tops
knit and woven shorts and pants
fleece tops and bottoms
nylon windbreakers
headwear

Also exhibited at PT-1 is a copy of the general conditions pertaining to the agreement. Conditions GP12, GP13, GP14, GP15 and GP19 specifically relate to trade mark issues.

17) Mr Taupier exhibits at PT-2 a copy of a report relating to the United Kingdom in respect of a period expiring on 30 June 1999. The report is from HWA International Ltd

(Copperstore Ltd) and shows shipments for the sum of \$US 29,850. It is to HTIL, not HTI. Mr Taupier states that it was in respect of actual and not minimum royalties. There were difficulties in obtaining royalty payments from Copperstore and litigation was commenced in February 2000. These proceedings were eventually settled on payment of an agreed sum by Copperstore.

18) Mr Taupier exhibits at PT-3 two shirts manufactured by A4 Moshay Company. These shirts are samples of those that were supplied to Copperstore for sale in the United Kingdom and Mr Taupier states that shirts to the same pattern were offered for sale by Copperstore in the United Kingdom prior to March 2000. Both of these shirts are short sleeved and would be described as casual wear; one is a t-shirt. The label inside of each shirt shows a trade mark virtually identical to that of registration no 1014798. At the bottom of the t-shirt, on the outside, is a label upon which is written HANGTEN.

Witness statements of Raymond Joseph Higgins

19) From February 1992 to 20 December 2002 Mr Higgins was the finance director of Copperstore. Copperstore went into liquidation on 5 February 2003. From 1 July 1998 to 31 March 2000 Copperstore was licensed to use registration no 900404 by HTIL Corporation, BV. Mr Higgins also exhibits a copy of the licence agreement. The licence was terminated by mutual agreement on 31 March 2000 (see above re conflict of evidence in relation to this date). Copperstore marketed t-shirts, sweatshirts and shorts in the United Kingdom under the licence. The first sale took place on 22 April 1999. From the date of the first sale, up to the termination of the licence, the total sales value of the goods marketed by Copperstore amounted to about £25,000.

20) Mr Higgins exhibits at RJH-2 a copy of the spring/summer 1999 catalogue of HWA International Limited, which I will refer to as HWA. HWA was a company registered in England and Wales and set up by Copperstore to act as a sales organisation for shirts and shorts marked with the trade mark. The catalogue shows HANG TEN in various scripts and formats. The goods in the catalogue are t-shirts (short and long sleeve), crew neck and half zip sweats, hooded sweats and shorts. The short sleeve t-shirts have upon their fronts various HANG TEN logos, each logo has a name eg “deep freeze” and “mavericks”. The final page of the catalogue shows the mavericks logo and includes the following wording:

“H.W.A International Ltd. are sole licensees for Hang Ten products for the United Kingdom, France, Italy, Spain, Portugal and the Benelux countries.”

Mr Higgins exhibits garments at RJH-3 (from revocation 80025) which are from Copperstore’s residual stock. These garments are a t-shirt and two sweat shirts (one with a zip). On the back of each of these garments is a HANG TEN “deep freeze” logo. The inside label of each garment shows the words HANG TEN with a device of feet.

21) Most of the customers supplied by HWA were retail outlets in coastal areas of the West Country of England, owing to the beach orientated nature of the goods. However,

Copperstore supplied goods to Intersport Great Britain Limited, who at the time had several hundred retail outlets throughout the United Kingdom. Exhibited at RJH-3 are copies of invoices from Copperstore dated 4 May 1999 and from HWA dated 5 May 1999. The first invoice is to Intersport. It is for 123 “Hang Ten Men’s Crew Sw. Stone” of four different sizes. The total value of the invoice, prior to VAT, is £2,046.72. The second invoice is to Splash in Newquay, Cornwall. The invoice is headed HANG TEN. The goods are described as crewneck sweats, half zip sweats and short sleeve t-shirts. All of the goods are also described as “Mavericks” (see above re mavericks). The invoice is for thirty items for each of the first two sets of goods and twenty for the last set. Mr Higgins states that t-shirts, sweatshirts and shorts were displayed and promoted at the Forty Degrees exhibition at Earls Court from 21 to 23 February 1999.

Witness statement of Vincent Adams

22) Mr Adams was a director of Copperstore. The first part of Mr Adams’s statement reiterates several of the points made by Mr Higgins and includes several of the same exhibits, including the catalogue. At VA-3 Mr Adams exhibits two stock lists for Copperstore, as at 17 November 2002 and 19 December 2002. Both stock lists refer to the same number of HANG TEN items: 10,930 t-shirts, 2,022 half zips and 1,892 crews. Mr Adams states that the stock would have been marked with the trade mark as set out in the catalogue. The stock was produced between 1 July 1998 and 31 March 2000. The stock was sold to a company called United Overseas in Peterborough in December 2002 with the consent of Plus Licens AB, which he describes as the representative of HTI.

Additional evidence

Further witness statements of Raymond Joseph Higgins

23) Mr Higgins states that whilst there were no longer any shorts in stock at the time he provided his first statements he did purchase two pairs of shorts, one khaki and one beige, from the manufacturer at the time of delivery to Copperstore. Mr Higgins exhibits the shorts and a colour photograph of them. Both shorts bear a label with the device of feet and the words HANG TEN. Mr Higgins states that shorts were sold and marketed using the words HANG TEN.

24) The first sale of the shorts took place on 22 April 1999. The shorts were sold by HWA to the same outlets as previously referred to by Mr Higgins. Mr Higgins is unable to quantify the precise extent of those sales given the amount of time which has passed and the fact that Copperstore went into liquidation on 5 February 2003. The shorts were displayed and promoted by Copperstore at the 40 Degrees exhibition at Earls Court from 21 to 23 February 1999.

DECISION

Preliminary Issue

25) On 9 March 2005 HTI filed the witness statements referred to in paragraphs 23 and 24 above. HTI requested that these witness statements be admitted into the proceedings. Mr Penny submitted that until recently it was not known that Mr Higgins had the shorts in his possession. Mr Edenborough did not consider that the additional evidence should be admitted into the proceedings. He submitted that there was no reason the evidence could not have been adduced into the proceedings at the correct time. There was no precipitating event.

26) Hearing officers, in considering the issues relating to additional evidence, have looked for guidance by analogy with the practice adopted for filing additional evidence in appeals. The considerations for the filing of additional evidence at appeal stage have been considered in *Hunt-Wesson Inc's Trade Mark Application* [1996] RPC 233, then in *Wunderkind Trade Mark* [2002] RPC 45, then in *État Française Représentée Par la Ministère de L' Agriculture de la Forêt v Bernard Matthews Plc* [2002] ETMR 90 and most recently in *EI Du Pont de Nemours & Company v ST Dupont* [2004] FSR 15. Analogy is not the same as equivalence and analogy can distort. The various trade marks rules have set out a system of filing evidence, these have stated in what sequence the evidence should be filed and sets out time limits, which can be extended. The system is designed for certainty, fairness and efficient administration. It is designed to avoid an infinite tennis match of evidence and counter evidence. However, the system does include provisions for filing additional evidence. It accepts that not everything can run to a strict timetable. Rule 13(C)(6) of the Trade Marks (Amendment) Rules 2004 states:

“The registrar may, at any time if she thinks fit, give leave to either party to file evidence upon such terms as she thinks fit.”

In this case I cannot see that allowing the additional evidence into the proceedings would cause any prejudice in terms of delay or cost to Lancaster. This absence of prejudice was the key to my coming to a decision in relation to the admittance of the evidence. There was no request to cross-examine Mr Higgins and I could not see that Lancaster would be in a position to put in counter evidence. Lancaster has not put in any evidence at all. The evidence may have little overall effect, however, it cannot be said that it would have no effect. It does show use of the composite trade mark, or something very close to it, on shorts. The ultimate effect of the evidence was impossible to judge until after the hearing and my consideration of the submissions of counsel. In my view, it is preferable to have evidence in rather than out at first instance; it is preferable that a decision is made upon the basis of the best available evidence. The most telling reason for not admitting late evidence is, in my view, a prejudice that is unacceptable and/or will not allow for compensation through costs. Consequently, I allowed the additional evidence into the proceedings.

27) Mr Edenborough queried if the rules to admit the evidence were the previous rules or the amended rules. The transitional arrangements of the Trade Marks (Amendment) Rules 2004 state:

“22. Any proceedings commenced under rule 13, 18, 23, 25, 32 or 33 of the unamended Rules where the applicant (or, as the case may be, the proprietor) -

(a) has not filed Form TM8 before 5th May 2004 -

(i) shall proceed under the unamended Rules until the date upon which Form TM8 is filed by the applicant (or, as the case may be, the proprietor); and

(ii) shall proceed, subject to rule 23, under the amended Rules from the point in time immediately after Form TM8 is filed;

(b) has filed TM8 before 5th May 2004 shall proceed under the unamended Rules; but where a new step is taken under such Rules on or after 5th May 2004, the amended Rules, subject to rule 23, shall apply to such proceedings from the point in time immediately after that step is taken.”

I consider that the filing of additional evidence was a new step, after 5 May 2004, and so the request for the admission of the additional evidence is governed by the Trade Marks (Amendment) Rules 2004. If I am wrong in this it would make no difference to the effect of my decision as the evidence would be admitted into the proceedings under rule 31(8) of the Trade Marks Rules 2000.

Substantive Issues

28) Section 46 of the Act reads as follows:

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

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

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

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

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

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

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

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

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

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

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

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

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

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

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

29) Article 19 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) states:

“1. If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.

2. When subject to the control of its owner, use of a trademark by another person shall be recognized as use of the trademark for the purpose of maintaining the registration.”

30) Article 10 (3) of the First Council Directive 89/104 of December 21, 1988 (the Directive) states:

“Use of the trade mark with the consent of the proprietor or by any person who has authority to use a collective mark or a guarantee or certification mark shall be deemed to constitute use by the proprietor.”

31) Consideration has to be taken, also, of section 100 of the Act which states:

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

Consequent upon section 100 the onus is upon the registered proprietor to prove that it has made genuine use of the trade mark in suit, or that there are proper reasons for non-use.

32) The issue of use, and in particular genuine use, was considered by the European Court of Justice (ECJ) in *Ansul BV v. Ajax Brandbeveiliging BV [FNI]* Case C-40/01 [2003] RPC 40 where it held:

“36 "Genuine use" must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark. Such use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin.

37 It follows that "genuine use" of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers and the consequences of

registering it in terms of enforceability *vis-à-vis* third parties cannot continue to operate if the mark loses its commercial *raison d'être*, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings. Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns. Such use may be either by the trade mark proprietor or, as envisaged in Art.10(3) of the Directive, by a third party with authority to use the mark.

38 Finally, when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.

39 Assessing the circumstances of the case may thus include giving consideration, *inter alia*, to the nature of the goods or service at issue, the characteristics of the market concerned and the scale and frequency of use of the mark. Use of the mark need not, therefore, always be quantitatively significant for it to be deemed genuine, as that depends on the characteristics of the goods or service concerned on the corresponding market.

.....

43 In the light of the foregoing considerations the reply to the first question must be that Art.12(1) of the Directive must be interpreted as meaning that there is "genuine use" of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark. The fact that a mark is not used for goods newly available on the market but for goods that were sold in the past does not mean that its use is not genuine, if the proprietor makes actual use of the same mark for component parts that are integral to the make-up or structure of such goods, or for goods or services directly connected with the goods previously sold and intended to meet the needs of customers of those goods."

Use with consent of proprietor

33) Mr Edenborough submitted that the evidence did not support the claim that the use of the trade marks, if there was use, was use with the consent of the proprietor. It is to be noted that TRIPS refers to control, whilst the Directive refers to consent. In *Heidelberger Bauchemie GmbH* Case C-49/02 [2004] ETMR 99 the European Court of Justice stated:

“20 Since the Community is a party to the TRIPS Agreement, it is required to interpret its legislation on trade marks so far as possible in the light of the wording and purpose of that Agreement (see, to that effect, Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 28).”

So there is an issue as to how consent in the Directive should be defined. However, Mr Edenborough did not seek to make anything of this matter. In this case, taking into account the nature of the licence agreement, this is not a matter of a bare licence.

34) Mr Edenborough submitted that there are two fundamental problems with the purported chain of consent. The evidence does not establish that HTIL Corporation BV had a licence to licence out HTI's trade marks. He submitted that it is noticeable that there is no head licence agreement between HTI and HTIL Corporation BV. Consequently, an essential link is missing in the chain of consent. It is not established that HTI, as opposed to HTIL Corporation BV, consented to the use of the trade marks. Mr Edenborough went on to submit that Copperstore had only the right to sub-licence with the “prior written consent” of HTIL Corporation BV (clause GP12 of the agreement). He further submitted that the statement of Mr Higgins and the catalogue show that HWA actually marketed the products upon which HTI relies. Not only is there no evidence that HWA was granted prior written consent but this is not even alleged. Mr Higgins merely states that HWA was set up by Copperstore to act as a sales organisation for shirts and shorts marketed under the trade mark. Of the two invoices, one relates to Copperstore and one to HWA. Mr Penny drew my attention to the second paragraph of Mr Taupier's statement:

“HTIL Corporation, B.V. is effectively under the same ownership as Hang Ten International and the July 1998 License Agreement was made with the consent of Hang Ten International.”

Mr Penny also looked to the following wording in GP12:

“Included within the prohibitions set forth herein are: (1) any transfer of any interest of Licensee under this Agreement to any entity in which the present controlling shareholders of Licensee do not have voting control....”

He suggested that this indicated that the transfer of the licence to an entity which was controlled by the licensee was acceptable within the terms of the agreement. Mr Edenborough submitted that this was merely one of example of what was not acceptable,

it could not be interpreted from this that the sort of transfer made by Copperstore to HWA was acceptable without the prior written consent of the licensor.

35) I do not consider that it can be denied that there are, at least, evidential breaks in the chain of consent. The agreement in its second paragraph states:

“Whereas Licensor has been granted the rights to license and enter into agreements with third parties to utilize certain trademarks and tradenames owned by Hang Ten International...”

Mr Taupier states that the agreement was made with the consent of HTI. He has not been called for cross-examination. There is nothing to gainsay the truth of his statement. On the basis of the evidence, on the balance of probabilities, I consider that HTIL Corporation BV was authorised to act for HTI in the licensing of the trade mark to Copperstore.

36) This, however, leaves the issue of HWA. Mr Taupier does not mention HWA, he only refers to the agreement between HTIL Corporation BV and Copperstore. There is no evidence that HTI sanctioned the use of the trade mark by HWA or were in any way aware of it. The statement exhibited at PT-2 has the company name as HWA International Ltd (Copperstore Ltd). This in my view does not indicate that HTI was aware of the devolution of title to HWA, let alone approved of it. Mr Taupier states that the report was supplied by Copperstore, he does not pick the presence of HWA on the report. Neither Mr Higgins nor Mr Adams states that HTI knew of the devolution, let alone approved of it. Neither Mr Higgins nor Mr Adams explains why HWA was set up to market the shirts and shorts for which Copperstore had the licence. One presumes that there was a reason behind this decision. One also presumes that both of these witnesses would have been aware of the conditions of the licence agreement. There is certainly no claim that prior consent was given to this devolution. I find the absence of any clear statement or evidence as to HTI's knowledge/approval of the devolution telling. On the basis of the evidence before me, without reference to clause GP12 of the agreement, I find that, on the balance of probabilities, that it has not been established that use of the trade marks by HWA was use with the consent of HTI. It would have been easy enough for any of the witnesses to state that use by HWA was with the consent of HTI. If one considers GP12 the basis for this finding becomes all the stronger. GP12 requires prior written consent if the licence is transferred. The use by HWA is use by a third party, whether under the effective control of Copperstore or not. It is use that breaches GP12 and so I cannot see how it can be considered to be with the consent of HTI. I prefer Mr Edenborough's reading of this clause to that of Mr Penny. I do not consider that the examples within the clause limit the effect of the clause, which is quite definite in its meaning and intent – no assignment or transfer without the prior consent of licensor. If Copperstore breaches the terms of the agreement by unsanctioned devolution of the licence how can it be with consent?

37) To summarise the above; I find that there is a chain of consent from HTI to Copperstore but not from HTI, or HTIL Corporation BV, to HWA. Consequently,

use by HWA cannot be considered to be with the consent of HTI and so cannot assist the latter in its resistance to the revocation actions.

Use on sweatshirts

38) On the basis of the current defence of HTI only the following goods could remain in the specifications:

shorts, shirts, all for beachwear for the word only trade mark;

shirts, shorts for the composite trade mark.

Mr Edenborough accepted that the examples of the goods exhibited and those shown in the catalogue fell within the parameters of appendix A of the licence agreement. However, he did not accept that sweatshirts, which appear in HTI's evidence, fall within the term *shirts* and neither that they would be classified as *beachwear*. Mr Edenborough submitted that sweatshirts were more in the nature of jumpers rather than shirts. Mr Penny preferred a broader definition of *shirts* that would include formal shirts, blouses, t-shirts and sweatshirts. The HWA catalogue and invoice refer to these goods as sweats. The issue is both as to how one would refer to these "sweats" and whether the specifications of the registrations encompasses them. Neuberger J in *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267 stated:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations" or any other word found in Schedule 4 to the Trade Mark Regulations 1994 anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context. In particular, I see no reason to give the words an unnaturally narrow meaning simply because registration under the 1994 Act bestows a monopoly on the proprietor."

Jacob J in *British Sugar Plc v James Robertson & Sons Ltd* stated:

"When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all a trade mark specification is concerned with use in trade."

In *Thomson Holidays Ltd v Norwegian Cruise Line Ltd* [2003] RPC 32 Aldous LJ stated:

"In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court

having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use.”

I would never call a sweatshirt a shirt, I would always call it a sweatshirt. There is no indication from the evidence that the sweatshirts would be called shirts in trade. In my view the average consumer would not consider that the word *shirts* means sweatshirts. I can see no reason why the trade would think differently. In order to assist me in my considerations I have consulted “Collins English Dictionary” (5th Ed 2000) , it defines sweatshirt in the following fashion: “a long-sleeved knitted cotton sweater worn by athletes, etc.” The definition clearly supports Mr Edenborough’s submission. However, dictionary definitions do not necessarily tell everything. However, taking into account the dictionary definition and my own experience, I come to the conclusion that Mr Edenborough is correct in his submission that sweatshirts do not fall within the term *shirts* of the specification. As these goods are not encompassed by the specifications of the registrations, any use of the trade marks in relation to them cannot assist HTI. This means that the Copperstore invoice is of no help to HTI as it appears to relate solely to sweatshirts, assuming “Crew. Sw” is short for crew neck sweats as per the HWA catalogue. (I have doubts as to whether t-shirts falls within the parameters of the word *shirts*. I think of a t-shirt as a separate item from a shirt. However, this was not argued before me. As there was such specific argument in relation to sweatshirts and no argument in relation to t-shirts, I do not consider it appropriate to diverge from the mutual, if tacit, position of counsel for the two sides in relation to these goods.)

Cumulative conclusion

39) The use by HWA cannot be taken into account, owing to the break in the licence chain. The sole evidence of use by Copperstore is the invoice for sweatshirts, which are not covered by the specifications. On this basis the revocations, subject to the claim in relation to no 80024 that there are proper reasons for non-use, will succeed in their entirety. However, in the event that I am found to be wrong in these findings, I will go on to consider other aspects of the cases.

The claims to use

40) Mr Penny referred to the report exhibited at PT-2, as well as at other places. He saw this as showing use of the trade marks and use on a reasonable scale. Mr Edenborough viewed it as proving nothing. The report refers to apparel, so there is no indication what goods it relates to, it could be sweatshirts. There is no indication as to the trade marks used upon the apparel. Mr Penny noted the size of the sum involved \$29,850. However, there is no indication that the goods went out from HWA. If the goods were held by Copperstore or HWA I consider that this must be considered internal use and so not genuine use (see *Ansul*). I cannot see how goods furnished to a licensee by the proprietor of a trade mark can be other than internal use, otherwise a coach and horses would be

driven through the judgment of *Ansul*. The licensee is taking the position of the proprietor in a non-use case. The presence with a licensee is not a presence in the marketplace. As Mr Higgins states that HWA was set up by Copperstore and presumably under its control, which is the presumption behind Mr Penny's arguments in relation to the chain of consent, then the presence of goods with HWA also represents internal use (see *Peak Holding AB v Axolin-Elinor AB* Case C-16/03). This statement does not indicate or show that \$29,850 worth of goods have gone onto the market. Clause GP1 of the agreement states:

“In the event that Licensee sells to a related party of Licensee, then Net Shipments shall in no event be an amount less than the fair market value of the Licensed Items.”

Consequently, if Copperstore sold the goods to HWA then it would still have to treat these as a sale for purposes of reporting to HTI. So, Mr Higgins statement that the “figure of \$29,850.00 reflects the U.S. dollar equivalent of the actual sales made in the United Kingdom under the License for the period April to June 1999” could mean transfer of goods from Copperstore to HWA. As HWA is a separate legal entity there could, for the purposes of the licence agreement, be no transfer of the goods without sale. In considering this matter I take into account the two invoices exhibited. The HWA invoice states that the goods remain the property of HWA until they are paid for in full. So there must have been a transfer in title, one that according to GP1 would have to be reported. In considering the PT-2 report, I consider it useful to look at other matters in the case. The only evidence of sales are the two invoices. Why only two invoices? Why those two invoices? Are they the only two invoices? There is also the large amount of stock that was left over after the termination of the agreement: 10,930 t-shirts, 2,022 half zips and 1,892 crews – exhibit VA-3 to the statement of Mr Adams. With such a large amount of stock left over it is quite possible that what was declared in the PT-2 report never left the control of Copperstore or HWA. Taking into account all these matters I do not consider that the PT-2 report can help to establish the use of either of the trade marks upon any of the goods of the registration.

41) Mr Higgins states:

“From the date of the first sale in April 1999 up to the termination of the License the total sales value of the Goods marketed by Copperstore amounted to about £25,000.00.”

By “the Goods” Mr Higgins means t-shirts, sweatshirts and shorts. His statement does not make clear that these were goods that were actually sold. Marketed and sold are not synonyms, marketed could simply refer to stocks held that were available for sale. The £25,000 worth of goods, taking into account the use of the term “marketed”, could include the goods that were left over at the termination of the agreement. I may be being overly acute in my reading of Mr Higgins words. However, if he means sold why does he not use the word sold? If £25,000 of goods had been sold, rather than marketed, why has HTI only exhibited the two invoices?

42) Mr Edenborough argued that the two invoices exhibited by HTI did not show that the goods ever arrived at the end user. Consequently, he submitted that the use was internal. It seems that this is contrary to the judgment in *Peak Holding AB v Axolin-Elinor AB* where the European Court of Justice stated:

“44 The answer to the first question must therefore be that Article 7(1) of the Directive must be interpreted as meaning that goods bearing a trade mark cannot be regarded as having been put on the market in the EEA where the proprietor of the trade mark has imported them into the EEA with a view to selling them there or where he has offered them for sale to consumers in the EEA, in his own shops or those of an associated company, without actually selling them.”

I cannot see how once the goods are with a third party who is not an associated company or licensee that this can be considered to be internal use. The goods and the trade mark are both before and with a third party and that is not internal use. Mr Edenborough went onto submit that sale from HWA and Copperstore to Intersport or Splash is a middleman interaction and is not sufficient to create a market or to maintain a market for the goods with the true end consumers. If the goods are with a middleman I cannot see how the sale to the middleman can be considered to be internal. I do not consider that one can consider that the invoices can be considered on their own in relation to the satisfaction of the *Ansul* requirements. It is necessary to consider the evidence in its entirety. Normally if an undertaking sells goods to a retailer there is a presumption that the retailer puts the goods on the market. After all that is their purpose in purchasing the goods. There is no indication that the two retailers have any link to Copperstore or HWA other than in the purchasing of the goods. Mr Edenborough’s argument is based on the presumption that the two undertakings did not put the goods out for sale. To me this is a somewhat unlikely proposition. It would show a rather cavalier attitude to the purchasing of goods, certainly a very uncommercial approach. Both invoices are marked as being paid. The HWA invoice appears to be to one shop. I find it difficult to imagine a shop paying out £1,714.91 (including VAT) for goods and then not trying to sell them. I do not consider that it is reasonable to expect registered proprietors to have to go to the lengths of trying to get records from retailers as to the sales of goods to the retailers’ customers.

43) Mr Edenborough was plying the argument that even if there had been use it was not use that satisfied the *Ansul* criteria for genuine use:

“in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark.”

No one has suggested that the use has been token use. The use of a trade mark need not be “quantitatively significant”. As the Court of First Instance (CFI) stated in *The Sunrider Corp v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) T-203/02:

“38 In interpreting the notion of ‘genuine use’, account must be taken of the fact that the *ratio legis* of the provision requiring that the earlier mark must have been put to genuine use if it is to be capable of being used in opposition to a trade-mark application is to restrict the number of conflicts between two marks, where there is no good commercial justification deriving from active functioning of the mark on the market (Case T-174/01 *Goulbourn v OHIM – Redcats (Silk Cocoon)* [2003] ECR II-789, paragraph 38). **However, the purpose of the provision is not to assess commercial success or to review the economic strategy of an undertaking, nor is it intended to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks.**”

(my emphasis)

The above case dealt with the proof of use provisions in a Community Trade Mark opposition case. However, I consider that the principle holds good. The requirement for use is not a requirement for commercial success.

44) The HWA catalogue has been exhibited. However, there is no indication as to how many, if any, of these catalogues were distributed and to whom they were distributed. In *Vitakraft-Werke Wührmann & Sohn GmbH & Co KG v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Case T-356/02 the CFI commented on the problems with the mere filing of catalogues as evidence of use:

“34 In the present case, the catalogues submitted to the Board of Appeal establish neither the fact that they were distributed to a potential Spanish clientele, nor the extent of any distribution, nor the number of sales made of goods protected by the mark. The intervener has provided no indication supported by evidence to enable any useful conclusions to be drawn in that regard. The mere existence of those catalogues could, at most, make it probable or credible that goods protected by the earlier marks were sold or, at least, offered for sale within the relevant territory, but it cannot prove that fact.”

HTI also relies upon the presence at the 40^o Exhibition between 21 February and 23 February 1999. There are an absence of details in relation to this. Exactly what goods were displayed and how? What promotional materials were used? Was Copperstore exhibiting or HWA? If the former, were other goods also being displayed? What was the nature of the exhibition?

45) HTI claims use upon shorts. Shorts appear in the HWA catalogue. However, there is no invoice with shorts upon it. A large amount of residual stock is listed in exhibit VA-3, none of the goods are shorts. Mr Higgins’ in his late evidence exhibits two pairs of shorts that he purchased. However, his purchase of the shorts does not tell me anything about what sales were made and efforts made to promote the goods. His purchase of the shorts must, in my view, be characterised as internal use. Mr Higgins states that the first sale of shorts took place on 22 April 1999. He is unable to quantify the precise extent of the sales of shorts but still can give the specific date of 22 April 1999 as the date of the first

sale. From where does this date come? Presumably to be so precise Mr Higgins must have documentary support for this claim, where is it?

46) In *Kabushiki Kaisha Fernandes v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-39/01 CFI at paragraph 47 held:

“In that regard it must be held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned.”

In this case there is a considerable lack of solid and objective evidence. Taking into account the requirements of the licence agreement this is surprising. Clause GP2 requires records to be kept, GP3 requires monthly reports of shipments, GP4 requires annual reports. The actual solid and objective evidence amounts to two invoices for sweatshirts and t-shirts emanating from a two day period in May 1999, one catalogue, the PT-2 report and several specimen items. So, assuming that the use by HWA is use with the consent of HTI and assuming that sweatshirts are included in the specification, based upon this evidence, could HTI resist complete revocation of the two registrations? As I have indicated above there is no requirement for commercial success to maintain a registration. However, to be balanced against this are the comments of Blackburne J in *La Mer Technology Inc v Laboratoires Goemar SA* [2004] WL 2945720:

“34. It follows therefore that I am in substantial agreement with Mr Mellor’s analysis of the relevant law and reject Mr Tritton’s as altogether too limited. It is not sufficient merely to say, as Mr Tritton does, that use has occurred which is neither purely token nor purely internal. The European Court of Justice in *Ansul* could easily have said so and done so very shortly, on the reference to it by Jacob J, but did not. The Court of Justices exposition of the law as I have endeavoured to summarise it carries the matter some way beyond Mr Tritton’s description of genuine use as no more than the flipside of use which is neither purely token nor purely internal.”

The evidence shows that there was some activity between February and June 1999. Mr Adams states that the first sales took place in Spring 1999. There is nothing to suggest that after this period there was an activity in relation to goods being sold under the trade marks. In his opinion in *Ansul* Advocate General Ruiz-Jarabo stated:

“62. In any event, irrespective of the volume of transactions carried out under the mark or their frequency, *the use must be consistent*, and not sporadic or occasional.”

This was not a view that was taken up by the ECJ in its judgment. I think that the implication must be that sporadic or occasional use is not disqualified from being genuine use. Despite the sparsity of solid and objective evidence, taking into account all the circumstances of the case, I consider that if I am wrong in my conclusion at paragraph 39,

that there has been use in relation to sweatshirts and t-shirts in order to create or preserve an outlet for them. I consider that the use requirement was satisfied only for a short period, but it was satisfied. The sporadic and occasional use does not disqualify the use. I do not consider that the evidence supports the maintenance of shorts in the specification. They are absent from the invoices and they are absent from the list of the residual stock. In coming to this conclusion I have not considered the trade marks as used, which I will now do.

The form of the use of the trade marks

47) In *Budejovický Budvar Narodní Podnik v Anheuser-Busch Inc* [2003] RPC 25 the Court of Appeal dealt with issues relating to use of a trade mark in a form which does not alter the distinctive character of the mark in the form in which it was registered. In that case Lord Walker stated:

“40 These points are uncontroversial, not to say pedestrian, but they do to my mind help to show what is the right approach to the language of s.46(2) of the Act, which is at the heart of the first appeal: "... use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered." (This language is word for word the same as the English language version of Art.10.2(a) of the Directive.)

41 The word "elements" can be used, and often is used, to refer to the basics or essentials of a matter. However it can hardly have that meaning in s.46(2), since a basic or essential difference in the form in which a trade mark is used would be very likely to alter its distinctive character. In s.46(2) "elements" must have a weaker sense (of "features" or even, as Mr Bloch came close to submitting, "details").

42 The deputy judge touched on this and some related points in paras [18-22] of his judgment. He stated that the elements of a mark must be assessed separately. He also stated (or at least implied) that only some of the elements might contribute to the distinctive character of the mark. He pointed out that the inquiry was as to whether the mark's distinctive character was altered (not substantially altered).

43 I have no wish to be overcritical of the way in which the deputy judge expressed himself, especially since I think he was a little overcritical of the way in which the hearing officer had expressed himself. But I am inclined to think that the deputy judge made the issue rather more complicated than it is. The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?

44 The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer, but

is nevertheless capable of analysis. The same is true of any striking and memorable line of poetry:

"Bare ruin'd choirs, where late the sweet birds sang"

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

45 Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of "whose eyes?-- registrar or ordinary consumer?" is a direct conflict. It is for the registrar, through the hearing officer's specialised experience and judgment, to analyse the "visual, aural and conceptual" qualities of a mark and make a "global appreciation" of its likely impact on the average consumer, who:

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

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

All of the specimen items exhibited have an inside tab with a form of the composite trade mark upon it. On two of the items, the t-shirts, the form is identical to that of the composite trade mark. On the other items there is a difference in that the words HANG TEN are written at the same level beneath the feet device. I do not consider that this alteration is such as to alter the distinctive character of the trade mark. Use on the inside tab is, in my view, the quintessence of trade mark use in relation to clothing.

48) I can find no use of HANG-TEN with the hyphen. However, there is use of HANG TEN on both invoices. At the top of the catalogue the words HANG TEN, without any stylisation, appear three times. On the back of the catalogue there is a reference to HANG TEN (without stylisation) products. Such use is use in relation to the goods. I do not consider that the absence of the hyphen alters the distinctive character of the trade mark.

49) So if I am wrong in my conclusion in paragraph 39, taking into account the judgment of Aldous LJ in *Thomson Holidays Ltd v Norwegian Cruise Line Ltd* [2003] RPC 32, I consider that a fair way to describe the use made of the trade marks by the proprietor is:

sweatshirts and t-shirts all for beachwear (for 900404);

sweatshirts and t-shirts (for 1014798)

Sweatshirts and t-shirts are terms commonly used by the average consumer. In my experience such goods are always referred to in these terms, they are never referred to as shirts. They have specific functions and forms. The beachwear qualification must remain in for 900404 or the scope of the specification would be expanded.

Proper reasons for non-use

50) The claim that there are proper reasons for non-use has only been made in relation to registration no 900404, HANG-TEN. The claim is based upon the unsatisfactory conduct on the part of the licensee, Copperstore Limited.

51) Article 19 of TRIPS states, inter alia:

“Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other government requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use.”

Park J in *Magic Ball* [2000] RPC 439 dealt with the issue of proper reasons for non-use. Park J approved the findings of the hearing officer in *Invermont* [1997] RPC 125 where the latter stated:

“I do not think that the term “proper” was intended to cover normal situations or routine difficulties”.

52) I find it somewhat odd that this claim has been made in relation to registration no 900404 but not in relation to the other registration. If there were proper reasons for non-use of one trade mark, as both were the subject of the licence, it would seem logical that there were proper reasons for the other. The claim was made in relation to all the goods of the specification. This is again surprising. The basis of the claim is the difficulties encountered with Copperstore, however, the licence with Copperstore does not encompass all the goods of the registration. So how could there be a justification for goods for which Copperstore did not have a licence? At the hearing Mr Penny was only seeking to keep shirts and shorts in the specifications. I take it, therefore, that the claim for proper reasons for non-use relate to these goods only.

53) The premise of the claim strikes me as bearing an inherent contradiction within it. HTI states that it did make genuine use of the trade mark, thanks to the efforts of Copperstore, but if it is found that it didn't this was the fault of Copperstore. So the claim to proper reasons for non-use is contingent upon the failure of HTI's first case. This strikes me as being built on poor foundations. The argument seems to run if Copperstore didn't do a good enough job to keep us on the register then that represents a basis for staying upon the register. It also has, in my view, an inherent conflation of the possible use made and the actual proof of use filed.

54) If HTI seeks to keep its registration on this basis it is necessary to put clear evidence of the problems it had with Copperstore. It has not exhibited anything in relation to the litigation. It has not exhibited any of its records in relation to its dealings with Copperstore.

55) HTI's argument really rests upon commercial problems and difficulties, nothing out of the ordinary, lack of commercial success represents a routine difficulty. Its claim certainly does not fall within the examples given in TRIPS. SP5 of the licence agreement specifically deals with the failure to market, giving HTIL Corporation BV the power to terminate the agreement in the event of a failure to licence. It has had plenty of time to get its goods upon the market, to choose alternative licensors.

56) It was not argued before me, however, I feel I need to consider whether the failure of Copperstore to properly devolve the licence to HWA represents a proper reason for non-use. If HTI believed that the goods were being marketed by Copperstore and not HWA, which is the premise behind Lancaster's success in relation to the consent issue, can this represent a proper reason for non-use. If it cannot, is HTI caught in a Catch 22 situation? There are clauses in the terms of the licence agreement in relation to supervision of the licence by HTI. Copperstore was under obligation under SP10(D) to submit all advertising and promotional items, programmes and materials relating to the licensed items. So Copperstore should have submitted the HWA catalogue. Under SP10A Copperstore was under an obligation to promote the goods. Consequently, HTI under the terms of its licence agreement should have been aware of the use by its trade mark by HWA. It had the means of dealing with the issue in its licence agreement. It apparently failed so to do. Consequently, I do not consider that HTI is in a Catch 22 situation. It had its fate in its own hands, it should have enforced the terms of its licence agreement. If HTI had been aware of the unauthorised use by HWA, which it ought to have been, and sought to do something about the situation, then I consider that there could have been a basis for a claim that there were proper reasons for non-use for at least *t-shirts for beachwear*.

57) Consequent upon the above I dismiss the claim there were proper reasons for non-use in relation to registration no 900404.

FINAL FINDING

58) I have no doubt that HTI is still interested in the use of its trade marks in the United Kingdom. However, its interest and desire to keep the trade marks upon the register cannot counter the revocation provisions of the Act. The provisions are not about interest or desire but actual use, with the consent of the proprietor; or proper reasons for non-use. It has failed to substantiate its case in relation to these matters and the consequences flow from this. The evidence has had many lacunae and has given rise to many unanswered questions. The letters i have not been dotted nor the letters t crossed. This is despite the length of time that HTI has had to compile its evidence, time that was extended up to the date of the hearing in order that the shorts could come into the proceedings.

59) On the basis of my finding at paragraph 39 I find that both registrations are to be revoked in their entireties. At the interlocutory hearing of 10 June 2004 Lancaster amended its pleadings with the aim that the effective date of revocation would be no later than 31 July 2001. Taking into account the decision at the interlocutory hearing of 10 June 2004, the date from which the revocations will take place is 31 July 2001.

COSTS

60) Mr Edenborough submitted that the award of costs should include costs towards aborted interlocutory hearings scheduled for 25 March 2004 and 7 December 2004. In relation to the latter aborted hearing he requested costs off the scale. Mr Penny agreed that costs should be awarded in respect of these two hearings but he did not agree that those for 7 December 2004 should be off the scale. Both interlocutory hearings were called at the request of HTI and then aborted at its request. Taking into account the length of the skeleton argument and the documents copied with it, I award £100 in respect of the aborted hearing of 25 March 2004 to Lancaster. I have a wide discretion in the award of costs (as per *Rizla Ltd's Application* [1993] RPC 365). Mr Edenborough submitted that the award of costs should be off the scale because the request for hearing was the result of a completely misconceived application by HTI. Any requests that are turned down can be characterised as misconceived, although the degree of misconception may vary. I cannot see that an award off the scale is justified simply because the basis for a request for a hearing may have been unsoundly based. The Civil Procedure Rules in relation to indemnity costs states:

“Advancing a case which is unlikely to succeed or which fails in fact is not a sufficient reason for an award of costs on the indemnity basis: *Shania Investment Corp v. Standard Bank London Ltd*, November 2, 2001 (unreported).”

There might have been some confusion but I do not see that confusion gives rise to off the scale costs. The aborting of the hearing obviously saved costs in that Lancaster’s representatives did not have to be present. In relation to the aborted hearing of 7 December 2004 I award Lancaster £200. I can see nothing in the behaviour of HTI that was anyway unconscionable or in the least underhand.

61) Lancaster Industries LLC having been successful is entitled to a contribution towards its costs. I order Hang Ten International to pay Lancaster Industries LLC a total sum of £2250 (including costs for the aborted interlocutory hearings). This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of April 2005

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