

O-090-11

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO 2424755

IN THE NAME OF

GEOFFREY THORPE

OF THE TRADE MARK:

ROBOT WARS

IN CLASS 41

AND

THE APPLICATION FOR A DECLARATION

OF INVALIDITY THERETO

UNDER NO 83463

BY

ROBOT WARS LLC AND ROBOT WARS LIMITED

Trade Marks Act 1994

**In the matter of registration no 2424755
in the name of Geoffrey Thorpe
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thereto under no 83463
by Robot Wars LLC and Robert Wars Limited**

INTRODUCTION

1) An application to register the trade mark ROBOT WARS (the trade mark) was made by Mr Geoffrey Thorpe on 17 June 2006 and published for opposition purposes on 18 August 2006. The registration process was completed on 1 December 2006. The trade mark is registered for the following services:

arranging and organisation of sports competitions and exhibitions, all featuring radio-controlled and autonomous model vehicles or robots; entertainment services, all featuring radio-controlled and autonomous model vehicles or robots; operating an arena for the staging of sports competitions and exhibitions.

The above services are in class 41 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. The registration is still in the name of Mr Thorpe.

2) On 22 April 2009 Robot Wars LLC and Robot Wars Limited (LLC) filed an application for the invalidation of the registration of the trade mark. Applications for invalidation of a trade mark registration are covered by section 47 of the Trade Marks Act 1994ⁱ (the Act).

3) LLC claim that use of the trade mark is liable to be prevented by the law of passing-off and so the registration should be declared invalid as per section 5(4)(a) of the Act. 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”.

The principles of the law of passing-off were summarised by Lord Oliver in *Reckitt & Colman Products Ltd v. Borden Inc* [1990] RPC 341 at page 406:

“The law of passing off can be summarised in one short, general proposition: no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Thirdly he must demonstrate that he suffers, or in a *quia timet* action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”

4) LLC claimed that registration of the trade mark was contrary to section 5(3) of the Act. At the hearing in relation to the application, LLC withdrew this claim.

5) LLC claim that they first used the trade mark ROBOT WARS in February 1998. They state that the rights to use the trade mark ROBOT WARS and the concept of robotic sports competition were licensed by them to the BBC and Mentorn Barraclough Carey Productions Limited, trading as TV21 (Mentorn). LLC state that a television programme was made under the title *ROBOT WARS*, it was televised on a Friday night on BBC2 at 18.00. In 1999 there were 19 episodes, in 2000 24 episodes, 2001 32 episodes and in 2002 there were 32 episodes. A ROBOT WARS club was started in 1998 in the United Kingdom, which had a £10 membership fee. By 2000 the club had 40,000 members. LLC state that they licensed use of the trade mark, under the licence contract there was shared merchandising control between Mentorn and the BBC. LLC state that the ROBOT WARS trade mark was used in relation to toys, magazines, books, videos, Game Boys, stationery, nightwear, greetings cards, stickers, posters, clocks, bedding, t-shirts, key chains, robes, socks, mobile phone accessories, shoes, jigsaws, watches, calendars, toolkits and interactive format programmes. LLC state that a ROBOT WARS live event was staged in one venue with 500 seats per show. LLC state that by 2001 there were 8 venues, giving 35 performances with 4,000 seats per performance. They state that ROBOT WARS live events drew 100,000 people and made £1.2 million in 4 weeks, with each member of the audience spending approximately £4.20 each on merchandise. LLC claim that the trade mark ROBOT WARS also gained a reputation in Germany, Sweden, the Netherlands, and Italy; countries where the programme was televised.

6) LLC state that in all agreements between the parties involved in the production and exploitation of the ROBOT WAR series, the BBC and Mentorn recognised that all logos and trade marks belonged to LLC. LLC claim that considerable goodwill has been built up in the United Kingdom by the “ROBOT WARS companies” in relation to arranging and organising sports competitions and exhibits featuring robots, producing programmes regarding robotic sports and various merchandising bearing the trade mark ROBOT WARS. LLC claim that the trade mark ROBOT WARS has built up a reputation in the United Kingdom and “also may have done so in other territories of the European Union”.

7) LLC state that Mr Thorpe was a promoter of the ROBOT WARS live competitions that were run under the “brands” belonging to them. LLC state that at the beginning of 2008 they discovered that Mr Thorpe was using the trade mark ROBOT WARS. They state that it was only after a letter was sent complaining of this use that they were advised that Mr Thorpe owned the trade mark the subject of these proceedings.

8) LLC state that Mr Thorpe was aware of the significant goodwill that they owned at the date of the application for registration and, consequently, registration of the trade mark was contrary to section 3(6) of the Act which states:

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

LLC seek the invalidation of the registration in its entirety.

9) Mr Thorpe filed a counterstatement. Mr Thorpe denies that he knew of the significant goodwill in relation to the trade mark that LLC claim and claims that he acted in the best of faith when filing the application for registration. Mr Thorpe states that for a number of years he has promoted robot fighting events under a different brand name, ROBOT RUMBLE (United Kingdom trade mark registration no 2298144). He states that he had not been a promoter for the *ROBOT WARS* television programme. Mr Thorpe states that in his work promoting robot fighting events, and being in contact with many of the former contestants from that show, he was well aware that the television programme had not been produced for many years. Mr Thorpe states that he understood from other members of the Fighting Robots Association (FRA) that there were no plans underway to restore the show in the United Kingdom. Mr Thorpe states that the FRA was set up after the *ROBOT WARS* television show ended so that previous contestants and other people wanting to participate in robot fighting events could organise competitions under suitable conditions. Mr Thorpe states that he and members of the FRA do not hold the companies behind the television show in high regard, as they feel they were abandoned when the show stopped being produced.

10) Mr Thorpe states that Robot Wars LLC were proprietors of Community trade mark application no 2225241 for the trade mark ROBOT WARS in classes 9, 16,

28 and 41, which was filed on 18 May 2001. He states that the trade mark was published on 20 May 2002 but was noted as withdrawn on 3 June 2003, as a result of non-payment of the registration fee. Mr Thorpe states that when deciding to register the trade mark he undertook a search and became aware of the Community trade mark application and noted that it had been withdrawn. He contacted the representatives who were noted as the address for service, Clifford Chance, on two occasions to state that he intended to file an application for the trade mark, asking for their comments or objections. Acknowledgment of receipt of these letters was received, one advising that they would be contacting their clients. Mr Thorpe received no further correspondence from Clifford Chance. Consequently, Mr Thorpe believed at the time of filing the application that LLC had ceased to have any interest in the trade mark ROBOT WARS and, due to the inactivity of LLC and due to the companies responsible for the television show having "let down" the former contestants, had lost any goodwill that may have existed prior to then. Mr Thorpe states that robot fighting events have since been carried out by him and others clearly not related to the television show so that he does not believe that there was any chance of confusion and deception in the minds of the public. Mr Thorpe states that due to the inactivity of LLC since the television show stopped, bar a few repeats on a minor satellite channel, there is no possibility of detriment to LLC.

11) Mr Thorpe requires LLC to prove the existence and ownership of goodwill, as claimed by LLC, at the "relevant time". They are specifically required to show that the use of the trade mark by Mentorn and the BBC was under licence from LLC and that the alleged goodwill is owned by one or both of them. Mr Thorpe requires proof of the use of the trade mark in relation to live events in 2000 and 2001. Mr Thorpe states that filming of the television show *ROBOT WARS* ceased in 2002 and although repeats were shown, this was on a rarely watched satellite channel.

12) The grounds for invalidation are denied.

13) Both parties filed evidence. A hearing took place on 28 February 2011. LLC was represented by Mr Ben Longstaff of counsel, instructed by Kilburn & Strode LLP. Mr Thorpe represented himself, with the assistance of his daughter.

EVIDENCE

Witness statement of David Leach

14) Mr Leach is director of commercial and business affairs for Mentorn Media Limited (Mentorn).

Mr Leach states that Mentorn under its former names of Mentorn Barraclough Carey Productions Limited and Mentorn Films Limited entered into a series of agreements relating to the intellectual property under the brand ROBOT WARS.

He states that in those agreements it was acknowledged that Robot Wars Limited, and subsequently Robot Wars Inc, was the owner of all rights in the trade mark and goodwill for the trade mark ROBOT WARS. Mentorn was successful in securing commissions from the BBC for the production and broadcast of a series of programmes under the trade mark ROBOT WARS and rights from LLC to exploit the ROBOT WARS trade mark.

15) Mr Leach states that the initial written agreement was made on 15 March 1995. It was made between Robot Wars Limited and Mentorn Films. He states that there were subsequent agreements, dated 30 August 1999, between Mentorn and Robot Wars Limited and, dated 1 September 1999, between the BBC, Mentorn, Robot Wars Limited and Robot Wars Inc. Exhibited at DL1 are the first, second, third, fourteenth and signature pages of the former agreement. DL1 includes a description of the "Robot Wars Property" which "refers to all titles, logos, trademarks, copyrights, owned and/or controlled by Owner [Robot Wars Limited], the U.K. program format of the weekly entertainment television series which was produced by Producer [Mentorn], funded by BBC and first broadcast during the course of 1998 (the "Format")...." At page 11 of the exhibit the clause reserving the rights to Owner can be found. Exhibited at DL2 are the first page and the signature page of the latter agreement. Mr Leach states these agreements were to allow the use of the ROBOT WARS property, which included the trade mark, in respect of the commission from the BBC to produce and broadcast programmes entitled *ROBOT WARS* and to exploit the programmes by way of merchandising ROBOT WARS products.

16) The *ROBOT WARS* television pilot was made in 1995. In late 1997 the BBC ordered the initial six episodes. The first series was filmed in November 1997 before a live audience. It aired on BBC2 on a Friday night. Approximately 4 million British viewers watched the first series which was transmitted at either 18.30 or 18.45. The BBC commissioned a further 18 episodes. The first presenter of the show was Jeremy Clarkson. Thereafter, the main presenter was Craig Charles, additional presenters were Philippa Forrester and Jane Middlemiss from the second series onwards. Exhibited at DL3 is an article describing the history and format of *ROBOT WARS* from the website fightingrobots.co.uk. The article was downloaded on 5 March 2009. It begins by stating:

"Unfortunately, the makers of Robot Wars have decided not to make any more series of Robot Wars. However, repeats of the programme will still be shown at various times on various TV channels all across the world."

The television programme involved home made robots fighting each other; the aim was to immobilise the other robot. The article gives details, in some depth, of series six. Jonathan Pearce is identified as a commentator. The article states that the sixth series was transmitted between 2002 and 2003. Mr Leach states that the first series was watched by 4 million viewers and that the second series

had an audience of 6 million viewers. He states that by 2001 the television programme enjoyed a 16% share of total terrestrial television ratings, a 27% share of viewers aged 16-34 and a 34% share of all children watching.

17) Mr Leach states that scale models of the programme's house robots were sold as toys. He states that in 2001 and 2002 the remote controlled versions of these became one of the top three selling boys' toys in Toys 'r' Us stores in the United Kingdom. After the first season approximately 3,500 people joined a ROBOT WARS mailing list on the Internet. Mr Leach states that after six series on BBC2 the programme moved to Channel 5. Exhibited at DL4 is a copy of the publicity magazine issued by Channel 5 in relation to *ROBOT WARS: THE SEVENTH WARS*. Included in the magazine is an application form to join the ROBOT WARS club. Mr Leach states that the club started in 1998, in 2000 the club had 2,000 members. There is an advertisement for a ROBOT WARS toy which was to be available in Toys 'r' Us and Argos Extra. There is also a domain name for an online store. Merchandising licences were granted to use the ROBOT WARS trade mark to a number of companies in relation to: stationery, t-shirts, nightwear, a board game, a jigsaw, greetings cards, toys, die-cast collections, sticker albums, mobile phone accessories, skateboards, posters, a 2001 calendar, bookmarks, clocks, bedding, lunch boxes, footwear, socks, a record deal, a video, books, a computer game and a monthly magazine. Mr Leach states that LLC had licensed use of the ROBOT WARS brand to Mentorn and BBC Worldwide was appointed licensing agent, granting most of the licences on behalf of LLC and Mentorn.

18) Exhibited at DL6 are further pages from the website fightingrobots.co.uk, downloaded on 3 August 2009. The top of the page advises that the merchandise has become extremely rare and very hard to find. The merchandise includes toys, a board game, DVDs and videos, t-shirts, a card game, computer games, books, a wallet, baseball caps, notepads, a multi-headed tool, badges, a poster, a duvet, a valance and curtains, clocks and watches, nightwear, sweatshirts, anoraks, caps, phone covers, toiletries, a key ring and replica jackets to those worn by Mr Charles and Ms Forrester in the sixth series. Exhibited at DL7 is a photograph of the ROBOT WARS *Smash and Crash Stage* toy sold by Logistix Kids Retail. Details of the owners of the rights are included in the packaging. ROBOT WARS is described as a registered trade mark of Robot Wars LLC. Robot Wars LLC are identified as the owners of the ROBOT WARS logo copyright. The product is identified as being licensed by BBC Worldwide Ltd to Logistix Kids Retail.

19) Mr Leach states that a survey of the top ten children's characters, carried out in 2001, show that ROBOT WARS was "the number one character for boys aged between seven and nine above The Simpsons, Harry Potter and even Pokemon".

Mr Leach states that the first ROBOT WARS live competition was staged in 2000. He states that in 2001 there were 8 venues, giving 35 performances with

4,000 seats per performance. He states that the ROBOT WARS live events drew 100,000 people and made £1.2 million in 4 weeks with each member of the audience spending approximately £4.20 each on merchandise.

20) Mr Leach states that the programme was broadcast to 45 countries. Exhibited at DL8 is a marketing presentation drawn up by Mentorn, setting out details of the promotion and merchandising of ROBOT WARS. Mr Leach states that a ROBOT WARS style guide was provided to all licensees, it was issued by BBC Worldwide, whom Mr Leach describes as the licensing agent, for merchandise for use in respect of any goods upon which the trade mark ROBOT WARS appears. Exhibited at DL9 is a copy of the front box of the style guide. BBC Worldwide also produced a flyer in relation to merchandising, which is exhibited at DL10.

21) Exhibited at DL11 is a ratings summary of series 2 programmes 1-15. The grand final of the series was seen by a combined audience of just under 7 million, the programme was shown on 5 and 7 March 1999. The grand final had a youth audience of 4.75 million. 65% of the audience was under 34 and only 7% over the age of 55. The audience consisted of 34% children, 35% male and 31% female.

22) Exhibited at DL12 are pages downloaded from Wikipedia on 7 July 2009 in relation to ROBOT WARS, the entry is 10 pages long. Exhibited at DL13 are pages downloaded from eBay on 8 July 2009 showing various ROBOT WARS products. Exhibited at DL14 are pages downloaded from Amazon on 8 July 2009 showing various products that can be purchased. Exhibited at DL15 are pages from the website toysereyours.co.uk, downloaded on 3 August 2009. Various ROBOT WARS toys are listed.

23) Throughout exhibits DL4, DL5, DL6, DL7, DL8, DL9, DL10, DL12 and DL14 use of ROBOT WARS includes use of the name with a partial cog device.

First witness statement of Carrollanne Lindley

24) Ms Lindley is a partner at Kilburn & Strode LLP. Her statement consists of submissions rather than evidence of fact and so no more will be said about it here, although the comments are noted.

Witness statement of Alan Johnson

25) Mr Johnson has been company secretary of Robot Wars Limited since its formation on 27 February 1995. He states that as licensor of the trade mark ROBOT WARS the income derived from the brand came via the royalties from various merchandising deals. He states that on 31 December 2003 a statement was received from Mentorn whereby Robot Wars Limited received approximately

£315,000 of royalty from the licensing of the trade mark in the following categories:

- Logistics merchandise
- Merchandising Robot Wars Club
- Merchandising BBC Worldwide
- Videos
- Magazines
- Books
- Licence fees
- Production fees
- Multi-media royalties

Mr Johnson states that income derived from the merchandising of goods and services under the trade mark was split between Mentorn and the BBC. Robot War Limited's share was approximately 50%. Mr Johnson states that usually 5-10% of the gross wholesale monies is the rate derived by the licensor. He estimates from this that the wholesale turnover derived from the trade mark for this royalty period would have been between £6 and £12 million. He expects that retailers would have made a further mark up of between 25 and 50% for sale to the end consumer.

Witness statement of Tom Gutteridge

26) Mr Gutteridge is the chairman of Standing Stone Productions. He was previously the chief executive officer of Mentorn, the chief creative officer of The Television Corporation plc and chief executive officer of FreemantleMedia North America Inc. He states that the last named company is the production company which owns and controls "such international brands" as *American Idol*, *America's Got Talent*, *The Price Is Right* and *Family Feud/Family Fortunes*. Mr Gutteridge states that in these rôles he has had extensive experience of the value of long running television brands and international television formats and franchises. Mr Gutteridge is also the visiting professor of media at the University of Teeside and a fellow of the Royal Television Society. Mr Gutteridge has been a television producer since 1976. He was the executive producer of the *ROBOT WARS* television pilot in 1995 and executive producer of the series made by Mentorn for BBC2 and for Five. Mr Gutteridge was also executive producer of the *ROBOT WARS Live UK* tours. Exhibited at TG1 are copies of the front and back covers and pages 160 to 168 of *Gear Heads The Turbulent Rise of Robotic Sports* by Brad Stone. The book was published by Simon & Schuster of New York. The extract describes a live performance of *ROBOT WARS* in the summer of 2001. It states that more than 5,000 8-12 year old boys and girls attended in London Docklands. It refers to *ROBOT WARS* t-shirts, caps and sweatshirts. The extract describes the beginning of the *ROBOT WARS* television programme in the United Kingdom and Mentorn's rôle in it.

27) Mr Gutteridge states that in his opinion *ROBOT WARS* is one of the most famous programmes in the United Kingdom that has appeared and since gone off the air. He states that it obtained nearly 4 million viewers each week on BBC2 and quickly became part of Britain's popular culture. He states that the programme was hugely popular amongst children, young people and adults and became what can be described as a cult. Mr Gutteridge states that the success of the television series lasted many years; he states that "today's teenagers grew up with Robot Wars and many still refer to the show and its robots with affection". Mr Gutteridge states that the television series extended into a national merchandising brand with books, magazines, toys and merchandising. He states that interest in bringing about a new *ROBOT WARS* "deal" has not ceased. Mr Gutteridge states that many successful television brands are capable of being reintroduced every few years. He states that it is common for broadcasters to "rest" successful brands (to avoid them going stale) and then revive them again some years later. Mr Gutteridge states that this is one of the reasons why programme brands and trade marks are so valuable and can have such longevity.

28) Mr Gutteridge states that acting on behalf of LLC he has had periodic discussions with various television companies regarding producing a new *ROBOT WARS* programme. He states that it is intended that Standing Stone Productions will produce a number of *ROBOT WARS* programmes under licence from LLC. In January 2008 Mr Gutteridge had discussions with commissioning editors of Sky Television. He states that within the previous twelve months he has had discussions with representatives from BBC2, BBC3, ITV1 and ITV4 and is currently preparing a proposal for a new *ROBOT WARS* series for submission to Channel 4. In the previous 12 months Mr Gutteridge has had discussions with Adam McDonald, controller of daytime at ITV1, regarding the possibility of a *ROBOT WARS* television series scheduled for early Sunday evenings. Mr Gutteridge states that although ITV decided not to proceed, the various approaches that he receives indicate to him how great the interest in the trade mark *ROBOT WARS* and the *ROBOT WARS* television programmes still is and highlights their potential for merchandising and international transmission. Mr Gutteridge is convinced that within the next year or two the time will be right to reintroduce *ROBOT WARS* to British television.

Second witness statement of Carrollanne Lindley Vass

29) Ms Lindley Vass states that on 2 August 2010 the television channel Dave started showing the "*ROBOT WARS Extreme* series one". She states that the programme has been shown subsequently for the weeks in August 2010 to date (6 August 2010). Exhibited at CHALV1 is a copy of the front cover of *Radio Times* for 7-13 August 2010 and copies of the page for 9, 12 and 13 August 2010. These show *ROBOT WARS Extreme* being broadcast three times on each of these days. Exhibited at CHALV2 are pages from tvguide.co.uk which give information of the broadcasting of *ROBOT WARS Extreme* on Dave and

Dave ja vu on 5, 6, 9,10 and 11 August 2010. Ms Lindley Vass states that the BBC is entitled to license rights to transmission of the *ROBOT WARS* television programme and that this is with the knowledge of LLC. Exhibited at CHALV3 is the comments page from uktv.co.uk upon which the writers express their pleasure on the return of the television programme. The first comment was made on 23 July 2010 and the last one on 3 August 2010.

First witness statement of Geoffrey Thorpe

30) Mr Thorpe states that he used to watch robot fighting events both live and on television many years previously and became involved in the competitions through a robot called *Prize Fighter* which was owned by business acquaintances of his, the Allcock brothers. Mr Thorpe states that he and his daughter used to go to recording studios to watch whole series of shows being recorded.

31) Mr Thorpe states that an event called the *Debenham Robot Rumble* was first organised by the Allcock brothers in 1998 and he and his daughter were involved from the beginning in helping to organise the running of this live event and subsequent *Robot Rumble* shows. After several years of running the show with the Allcock brothers Mr Thorpe bought the *Robot Rumble* totally in 2004 and has continued to promote live shows since then.

32) Mr Thorpe states that he was in contact with people who took part in robot fighting events, whom he describes as roboteers. He states that he “was well aware that the television programme previously called “Robot Wars” had totally ceased production in 2002”. Mr Thorpe states:

“After 4 years when no events took place I was interested in using the trade mark ROBOT WARS to complement my trade mark ROBOT RUMBLE. Therefore, I instructed Dummett Copp, Patent and Trade Mark Attorneys, to investigate the possibility of using and protecting this mark. They reported to me that there were no registrations covering services in class 41 nor were there any covering any other similar goods or services. They identified that the Robot Wars LLC had previously filed an application for the mark covering class 41 in 2001, but this had been abandoned some three years previously prior to registration.”

Mr Thorpe states that Dummett Copp wrote on 25 May 2006 to Clifford Chance, the listed representative of Robot Wars LLC. A brief acknowledgment of the letter was received on 31 May 2006 in which it was stated that Clifford Chance had forwarded the letter to its client and would revert to Dummett Copp in due course. Mr Thorpe states that no further response was received and so a reminder was sent on 9 June 2006. Exhibited at GT1 are copies of the correspondence. The letter from Dummett Copp states:

“We represent a Mr Geoffrey Thorpe in trade mark matters. Mr Thorpe has noted that your client has allowed the above-mentioned UK Trade Mark Registration to lapse through their failure to pay the renewal fee and Mr Thorpe therefore wonders whether your client has lost interest in the ROBOT WARS trade mark.

Mr Thorpe is interested in using the trade mark ROBOT WARS in the UK to promote events relating to remote control vehicle/robots. He would therefore like confirmation from your client that they would have no objections to this proposed use of the mark. Furthermore, if we do not hear from you within 2 weeks of the date of this letter, we are instructed to file an application in the UK for the trade mark ROBOT WARS in Class 41 on behalf of Mr Thorpe.”

33) The letter relates to United Kingdom trade mark registration no 2011403 for the trade mark ROBOT WARS in classes 9, 16, 28 and 41.

Mr Thorpe states:

“Whilst I was aware of the Robot Wars television programme, this has ceased for over 4 years prior to filing the contested registration and the good will dissipated. 8 years have now passed since the mark was used for live events by the applicants for invalidity. It was apparent to all those involved in robot combat that use of the mark had ceased some years back. When that is coupled to the fact that I did not receive any indication that Robot Wars LLC were even interested in a mark, despite repeated invitations for them to comment, and that they had abandoned their application, it led me to quite reasonably conclude that the mark was available for my registration and use.”

34) Mr Thorpe states that since registering the trade mark he has made use of it and has accrued a substantial amount of goodwill as a result of his shows. Exhibited at GT2 are examples of promotional material and press cuttings:

- A programme, poster, postcard and flyer for Robot Rumble on 9 and 10 December 2006 at Wood Green Animal Shelter, Godmanchester. There are references to “the TV series “ROBOT WARS”™” and use of a cog device. The publicity material refers to the event being produced and directed by Geoff Thorpe.
- A programme, poster, flyer and 2 press advertisements for Robot Rumble on 15 and 16 April 2006 at Colchester Leisure World. There are references to “the TV series “ROBOT WARS”™” and use of a cog device. There is also a press article relating to the event. Included in the press article are the following:

“Favourites from the hit TV series *Robot Wars* were at the event”.

“Event organiser, John Findlay, said: “It’s taken over from *Robot Wars*. It’s two years since it was on TV, there’s still a fan base out there and we’re trying to capture it.””

The publicity material refers to the event being produced and directed by Geoff Thorpe.

- A poster and flyer for a Robot Rumble on 26 and 27 March 2005 at Debenham Leisure Centre, Suffolk. There is use of a cog device and a reference to the robots seen on television. The publicity material refers to the event being produced and directed by Geoff Thorpe.
- A poster, flyer and programme for a Robot Rumble on 7 and 8 April 2007 at Colchester Leisure Centre. The flyer and poster advertise that many robots from *ROBOT WARS* will be present. The programme advises that Robot Rumble is presenting *ROBOT WARS*. The programme refers to “the TV series *ROBOT WARS*®”. There is use of a cog device. The publicity material refers to the event being produced and directed by Geoff Thorpe.
- A flyer for Robot Rumble presenting Robot Wars at Colchester Leisure World on 22 and 23 March 2008.
- A flyer for Roaming Robots presenting “*ROBOT WARS*™” on 15 June 2008 at Guildford Spectrum.
- Two press advertisements for a Robot Rumble on 7 and 8 April 2007 at Colchester Leisure Centre. The publicity material refers to the event being produced and directed by Geoff Thorpe. The advertisement advises that many robots from *ROBOT WARS* will be present. There is use of a cog device.
- A poster for Roaming Robots presenting “*ROBOT WARS*™” at Maidstone Leisure Centre on 22 November 2008.
- An undated programme for “Robot wars!”. There is use of *ROBOT WARS* and a cog device. In the inside cover of the programme the following appears:

“A number of years ago ‘Robot Wars’ the TV series disappeared from normal viewing but although the series ended interest did not. This is your opportunity to see many of the Robots from the TV series live and up close”.

The programme gives details of a *ROBOT WARS* website from which merchandise can be purchased. T-shirts, hats, drinking receptacles, a soft toy, a mouse pad and a clock can be seen.

- A flyer, a poster and 2 press advertisements for a *ROBOT WARS* event on 2 and 3 May 2009 in Brentwood. There is use of a cog device.
- A flyer for *ROBOT WARS* and the Fighting Robot Association (FRA).

- A copy of a press article from *Gazette* of 25 March 2008. It is headed “It’s robo wars!”. It refers to the “Robot Wars Rumble” and robots from the “popular TV show Robot Wars”.

35) Mr Thorpe states that the FRA is an association of roboteers which was set up after the televised events ceased. Mr Thorpe states that he is on very good terms with the FRA and the roboteers who are member of the FRA. He states that they have competed in his live events for many years. Exhibited at GT3 is a letter from the president and chairman of the FRA dated 24 April 2010. The letter states that roboteers have been and are competing in the United Kingdom and the rest of the world. They state that they have worked with a number of event organisers to ensure the safety of roboteers and the public by providing rules and guidelines. They state that they have never been contacted by LLC. The letter ends with the following:

“Despite the setup of the Robot Wars club and Robot Wars forum back when the TV series was running this was ended with the TV series and many of the forum members at the time moved to the FRA forum to continue discussions such as the Fanfic areas. These forums have remained an active part of our community and become the new home for the now defunct robotwars.co.uk and robotwars.com domain names.

As roboteers we understand that without events we could not have our sport and so would be keen to promote any return to the TV. While there have been rumours nothing to date has materialised other than the recent shoot with the Gadget Shoe on Five. To this end the popular live events such as your Robot Rumble solely form the active competition in the UK.”

Exhibited at GT4 are the WHOIS entries for robotwars.co.uk and robotwars.com. The registrant of the former is Mr Denys Ostashko and of the latter, Mrs Jello LLC.

Second witness statement of Geoffrey Thorpe

36) Mr Thorpe exhibits a further letter from the FRA, dated 14 August 2010, in which the chairman writes that it was established in 2003 and oversees the safety of the sport particularly in the United Kingdom but also in Europe and other parts of the world. The chairman writes that FRA holds professional indemnity insurance and works with a number of robotic event organisers such as Roaming Robots, Robots Live, RoboChallenge and Mr Thorpe. The constitution and build rules of FRA are exhibited.

DECISION

37) The Act implements, inter alia, Directive 2008/95/EC of the European Parliament and the Council of 22 October 2008 (the Directive) (as it is now). Consequently, interpretation of the Act is made on the basis of judgments of the Court of Justice of the European Union (CJEU) and the General Court (GC), both with their seats in Luxembourg, as well as those of the courts of England and Wales. All of the judgments of the GC (previously the Court of First Instance) and the CJEU can be found at the url:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>

Decisions of the appointed persons, who are one of the two fora for appeal from decisions of the registrar, can be found on the website of the Intellectual Property Office at the url:

<http://www.ipo.gov.uk/types/tm/t-os/t-find/t-challenge-decision-results.htm>

In this decision the decisions of the appointed persons can be identified by the prefix BL.

Material dates

Bad faith

38) The material date for bad faith is the date of the filing of the application for registrationⁱⁱ; in this case 17 June 2006. Bad faith cannot be cured by some action after the date of the applicationⁱⁱⁱ. Consequently, the issue of bad faith must be considered solely at the date of application, although action after the date of application may cast light upon the application. Bad faith is specifically excluded from the acquiescence provisions under section 48 of the Act. (Acquiescence cannot come into play in relation to the grounds of invalidation as the trade mark had not been registered for 5 years at the date of the filing of the application^{iv}.)

Passing-off

39) A similar provision to section 5(4)(a) of the Act is to be found in Article 8(4) of Council Regulation 40/94 of December 20, 1993 (the regulation relating to the Community trade mark). This was the subject of consideration by the GC in *Last Minute Network Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined Cases T-114/07 and T-115/07, in which the GC stated:

“50 First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up.

In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

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

The reasoning of the GC, *mutatis mutandis*, is followed in relation to the Act. Consequently, the first thing that LLC must establish is that there was a protectable goodwill at the date of the filing of Mr Thorpe’s trade mark, 17 June 2006.

40) However, under the law of passing-off it is necessary to consider what the position was as of the earliest date of the behaviour complained of^v. In this case the evidence shows that Mr Thorpe was running an event he described as *ROBOT WARS* on 7 April 2007 at Colchester Leisure Centre. Prior to this Mr Thorpe had publicised robot fighting events by reference to machines from *ROBOT WARS* rather than describing the events as *ROBOT WARS*. The publicity would have been issued prior to this date and so the behaviour complained of would have first occurred prior to this date but it is not possible to ascertain how much earlier. Whatever the date it will have been well after the date of application, 17 June 2006, so the first date of the behaviour complained of is the date of the application for registration.

41) This is an application for invalidation which gives rise to further matters for consideration. Professor Annand, sitting as the appointed person, in BL O/227/05 stated:

“36. My own view is that the starting point for assessing relative invalidity under section 47(2) is the date of the application for registration of the attacked mark. This is because Article 4 of the Directive: (i) defines “earlier trade marks” for the purposes of relative invalidity as trade marks with a date of application for registration which is earlier than the date of application for registration of the attacked mark; and (ii) requires other earlier rights to have been acquired before the date of the application for registration of the attacked mark. However, I believe the wording of Article 4 (section 47(2)) may allow the tribunal to take into account at the date when invalidation is sought, matters subsequently affecting the earlier trade mark or other earlier right, such as, revocation for some or all of the goods or services, or loss of distinctiveness or reputation. I do not find the fact that the Directive specifically provides for defences to invalidation of non-use, consent and acquiescence indicative either way. A further

question concerns the cut-off date for taking into account subsequent events. Is this the date of the application for a declaration of invalidity or the date when the invalidity action or any appeal is heard? The Opinion of Advocate General Colomer in Joined Cases C-456/01 P and C-457/01P Procter & Gamble v. OHIM, 6 November 2003, paragraphs 43 – 44, and the Court of First Instance decision in Case T-308/01 Henkel KGaA v. OHIM (KLEENCARE), 23 September 2003, paragraph 26, although concerned with registrability and opposition respectively, indicate the latter. There are indications that timing issues under the harmonised European trade marks law are beginning to be brought to the attention of the ECJ (see, for example, the questions referred in Case C-145/05 Levi Strauss & Co. v. Casucci SPA).”

In *Levi Strauss & Co v Casucci SpA* Case C-145/05 the CJEU stated:

“17 The proprietor’s right to protection of his mark from infringement is neither genuine nor effective if account may not be taken of the perception of the public concerned at the time when the sign, the use of which infringes the mark in question, began to be used.

18 If the likelihood of confusion were assessed at a time after the sign in question began to be used, the user of that sign might take undue advantage of his own unlawful behaviour by alleging that the product had become less renowned, a matter for which he himself was responsible or to which he himself contributed.

19 Article 12(2)(a) of Directive 89/104 provides that a trade mark is liable to revocation if, after the date on which it was registered, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service in respect of which it is registered. Thus, by balancing the interests of the proprietor against those of his competitors in the availability of signs, the legislator considered, in adopting this provision, that the loss of that mark’s distinctive character can be relied on against the proprietor thereof only where that loss is due to his action or inaction. Therefore, as long as this is not the case, and particularly when the loss of the distinctive character is linked to the activity of a third party using a sign which infringes the mark, the proprietor must continue to enjoy protection.

20 In the light of all the foregoing, the answer to the first and second questions must be that Article 5(1) of Directive 89/104 must be interpreted as meaning that, in order to determine the scope of protection of a trade mark which has been lawfully acquired on the basis of its distinctive character, the national court must take into account the perception of the public concerned at the time when the sign, the use of which infringes that trade mark, began to be used.....

36 Accordingly, after revocation in the particular case has been established, the competent national court cannot order cessation of the use of the sign in question, even if, at the time when that sign began to be used, there was a likelihood of confusion between the sign and the mark concerned.

37 Consequently, the answer to the fourth question must be that it is not appropriate to order cessation of the use of the sign in question if it has been established that the trade mark has lost its distinctive character, in consequence of acts or inactivity of the proprietor, so that it has become a common name within the meaning of Article 12(2) of Directive 89/104 and the trade mark has therefore been revoked.”

The House of Lords considered at what date the question to be decided was to be considered in relation to section 46(1)(d) of the Act in *Scandecor Development AB v Scandecor Marketing AB* [2002] FSR 7. In that judgment Lord Nicholls stated:

“49 The claim in these proceedings is that, in consequence of the use made of the marks by Scandecor Marketing and Scandecor Ltd with the consent of Scandecor International, the marks are "liable to mislead the public". That is essentially a question of fact. That question of fact must be answered having regard to matters as they now are, not as they were at some time in the past. In deciding this issue of fact the court must have due regard, as I have been at pains to emphasise, to the message which a trade mark conveys. But since the question is whether the marks are currently liable to mislead, the message which is relevant is the message which use of the marks conveys today, not the message it would have conveyed to the public in the past.”

42) The decision of Professor Annand and the judgments of the CJEU and the House of Lords give rise to the conclusion that in an application for invalidation it is necessary to consider whether at a date after the filing of the application for registration it is appropriate to invalidate a registration. The considerations are not the same as those in relation to an opposition to registration. If a different approach was adopted one could, for example, arrive at the situation that an application for invalidation could succeed on the basis of an earlier trade mark that was registered at the date of the application for registration but which had expired ten years prior to the date of application for invalidation. In the absence of establishing acquiescence by the respondent, the registration would have to be invalidated. If a claim was made under the law of passing-off if the respondent had used the trade mark for 6 years then the Limitations Act 1980 might come into play. This was a matter considered by Pumfrey J in *Daimlerchrysler AG v Javid Alavi (T/A Merc)* [2001] RPC 42:

“67 Against these findings of fact, it is possible to deal with the complaint of passing-off shortly. It must fail. Mr Alavi has been trading under the style complained of since at least 1985. He had entered the market by 1978. He did not make any relevant misrepresentation then and he had not, down to 1997 essentially changed the manner of his trading. As Oliver L.J. (as he then was) said in Budweiser (Anheuser-Busch v. Budejovicky Budvar [1984] F.S.R. 413 at 462):

"The plaintiffs' primary submission is that the learned judge was wrong in regarding the material point of time at which he should consider the matter as the date of the writ. Obviously the plaintiffs must, to succeed, have a cause of action at that date, but Mr Kentridge submits, and Mr Jeffs does not contest, that it cannot be right to look simply at that date to see whether a passing off is established. In particular to test by reference to that date whether plaintiff and defendant have concurrent reputations would simply mean that no remedy lay against a defendant who had successfully passed off his goods as the plaintiffs', so as to establish a reputation for himself."

This is consistent with what was said by Lord Scarman, giving the opinion of the Board in Cadbury-Schweppes Pty Ltd v. The Pub Squash Co. Pty Ltd [1981] R.P.C. 429 at 494: the relevant date in law is the date of the commencement of the conduct complained of. I should just add that there must come a time after which the court would not interfere with a continued course of trading which might have involved passing off at its inception but no longer did so: logically, this point would come six years after it could safely be said that there was no deception and independent goodwill had been established in the market by the protagonists. There must also be doubt as to the availability of injunctive relief if there is no passing-off at the date the action is commenced.”

43) Taking these matters into account, the position in relation to section 5(4)(a) of the Act must also be considered at the date of the filing of the application for invalidation. At that date could the respondent be prevented from using the trade mark under the law of passing-off?

44) To summarise, in relation to the claim under the law of passing-off LLC must establish that there was a protectable goodwill at both of the following dates:

- The date of application for registration (which in this case is also the date of the behaviour complained of) : 17 June 2006.
- The date of the filing of the application for invalidation: 22 April 2009.

If LLC fails to establish a protectable goodwill at either of these dates its case under section 5(4)(a) will fail.

Cross-examination

45) Mr Gutteridge and Mr Thorpe were cross-examined.

46) Mr Gutteridge was a helpful and informative witness. He clearly explained his position in relation to *ROBOT WARS*, the television programme, and the general position in relation to the “pitching” and production of television programmes and the reintroduction of television programmes.

47) Mr Thorpe was not always frank in his answers, he was reluctant to accept facts that were injurious to his position. He, for instance, only reluctantly accepted that there was “some goodwill” in relation to the television programme. However, some of his answers were highly illuminative.

Findings of fact in relation section 5(4)(a) of the Act

48) At neither material date was the television programme being broadcast and neither were live events being produced within the United Kingdom by LLC or their licensees. There is no evidence that LLC was producing recordings relating to the television series, as of either date, for sale in the United Kingdom. One thrust of Mr Thorpe’s argument is that the silence following the letter to Clifford Chance, and the reminder letter, and the absence of activity indicates that LLC had abandoned any goodwill it had in relation to the sign *ROBOT WARS*. The abandonment of goodwill was dealt with by Arnold J in *Pavel Maslyukov v Diageo Distilling Ltd And Diageo Scotland Ltd* [2010] EWHC 443(Ch)^{vi}:

“74. As can be seen from paragraph 132 of the decision, the hearing officer cited Wadlow, *The Law of Passing Off* (3rd ed) at 3-178. Counsel for Diageo drew attention to the fact that this issue is considered further in the Supplement to the 3rd edition, where the author quotes the following passage from the judgment of Lewison J in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch):

“1877. It is clear that, as a matter of law, goodwill can be abandoned. A common case in which abandonment is held to have taken place is where a business is discontinued, with no prospect of restarting, and its assets are broken up and sold: *Pink v. Sharwood* (1913) 30 RPC 725. Mr Purvis submitted that goodwill cannot be abandoned unless the person alleged to have abandoned it knew that he had it and intended to abandon it. However, the requirement of an intention to abandon was rejected in *Norman Kark Publications Ltd v Odhams Press Ltd* [1962] RPC 163. Mr Wadlow says in his book *The Law of Passing Off* (3rd ed. para. 3-178):

'The better view is that if a business is deliberately abandoned in circumstances which are inconsistent with its ever being recommenced then the goodwill in it is destroyed unless contemporaneously assigned to a new owner.'

1878. I agree. In my judgment when QCL went into liquidation, without any attempt being made to sell any of its assets (still less sell the business and goodwill as a going concern), its goodwill was destroyed."

75. The author also quotes a passage from the decision of Geoffrey Hobbs QC sitting as the Appointed Person in *Mary Wilson Enterprises Inc's Trade Mark Application* [2003] EMLR 14. That case concerned the well-known pop group The Supremes, which had performed with a varying membership between 1961 and 1977. Each of the members of the group, one of whom was Mary Wilson, had a recording contract with Motown Record Corporation. Mr Hobbs found that, as between Mary Wilson and Motown, it had been agreed in 1974 that the worldwide rights in the name THE SUPREMES were owned by Motown, but that the position with regard to other members of the group was far less clear (see [32]-[33]). Professor Wadlow reads the decision as finding that all the goodwill in the name as at 1977 was owned by Motown. I am not sure that this is right, but it does not matter for present purposes. What does matter is that the hearing officer in that case had concluded that the goodwill in the name had been abandoned between 1977 and 1985, and in consequence that the opponents and a third singer, former members of the group who had reformed the group in 1985, had acquired a fresh goodwill under the name thereafter.

76. Mr Hobbs upheld the applicant's appeal on this point, saying:

"62. The goodwill attaching to THE SUPREMES name by virtue of the performances of the various Motown recording artists who had performed together under that name between 1961 and 1977 was a valuable asset. It remained a valuable asset on the basis that sales of Motown recordings of their performances as THE SUPREMES had continued without interruption. The marketing of live and recorded performances delivered by the new group concurrently with the marketing of recorded performances delivered by the old group, all being presented as performances of THE SUPREMES, was apt to augment the pre-existing goodwill because the live and recorded performances were likely to be attributed to a single, continuing business undertaking in the perceptions and recollections of the average consumer. The pre-existing goodwill could not, in the context of the claims raised in the present proceedings, be regarded as the property of the members of the

new group without evidence (which might be evidence of release, waiver or abandonment) sufficient to justify a finding that they became successors in title thereto.

63. The evidence on file is not sufficient to justify such a finding...."

77. Mr Hobbs went on to conclude at [68] that the new group had not acquired an independent or concurrent goodwill in the name THE SUPREMES, but instead had "perpetuated and extended the pre-existing goodwill attaching to THE SUPREMES name in a manner that has merged their contribution to the economic value of it with the contributions of their predecessors".

78. Professor Wadlow comments:

"It is implicit in the decision of the Appointed Person that the Motown-owned goodwill had neither been abandoned in 1977, nor extinguished by 198[5]. This seems correct. In the present case it would be inappropriate to attempt to distinguish between goodwill arising from live performances, and that arising from recordings and broadcasts. Sales of Supremes records continued, there was a loyal fan base, and the name was recognised by the general public. It need make no difference that the then members of the Supremes resolved in 1977 to split up and go their separate ways: they were not in law the owners of the goodwill and their collective state of mind could not prejudice Motown's rights."

79. As I read his decision, Mr Hobbs' reasoning did not depend on any finding that the goodwill generated from 1961 to 1977 was owned by Motown. Subject to that, I agree with Professor Wadlow's analysis. As Mr Hobbs said later in the decision:

"86. The applicant appealed to an Appointed Person under s.76 of the 1994 Act contending in substance that:

...

(2) the hearing officer had mistakenly equated cessation of use with abandonment of goodwill and wrongly concluded that the goodwill in THE SUPREMES name had been abandoned when the old group disbanded in 1977;

(3) the hearing officer wrongly concluded that the activities of the new group between 1985 and 1995 had supplanted the whole of the goodwill attaching to THE SUPREMES name by virtue of the performances of the various Motown recording artists who had performed together under that name between 1961 and 1977;

..."

49) LLC continued to exist. (The BBC and Mentorn continue to exist.) The fact that Robot Wars LLC did not respond to the letter sent to Clifford Chance is not indicative of any decision to abandon goodwill. Clifford Chance, in the normal course of events, would have had to forward the letter on to the lawyers for Robot Wars LLC in the United States who then might have forwarded it on. There is no evidence that the letter was received by Robot Wars LLC. Even if it did receive the letter, it could have made the decision that it did not want to go to the expense of instructing lawyers to respond. An absence of action cannot be seen as an act of abandonment. Television shows and their formats are often revived. The evidence of Mr Gutteridge deals with this, it is also a matter that can be taken on the basis of judicial notice. Taking into account the norms of the trade, to assume that there had been abandonment would require some definite action by LLC rather than an absence of action. It is also to be noted that the letter sent to Clifford Chance solely related to the trade mark of Robot Wars LLC, it did not refer to Robot Wars Limited. There is nothing to indicate that Robot Wars Limited was advised of the intentions of Mr Thorpe. Robot Wars clearly had an interest in the goodwill of the business, and was based in the jurisdiction. It is not considered that either Robot Wars LLC or Robot Wars Limited abandoned any goodwill that they had in a business conducted by reference to the sign ROBOT WARS. In relation to the goodwill of the business it would also seem to have been relevant to have made enquiries of those who were responsible for the television programme in the United Kingdom: the BBC, Mentorn and Channel 5. Mr Thorpe stated under cross-examination that he identified the programme with Mentorn. There is nothing to indicate that any of these undertakings was contacted. Mr Gutteridge, under cross-examination, made it clear that he had continued to look for opportunities to reintroduce the "brand". He stated that the reintroduction of television brands normally happened after between 8 and 10 years. Taking into account the nature of the trade, the tradition in that trade of reviving brands, the continuing existence of all of the undertakings involved in the television programme and the success of the television programme, there was no abandonment of the goodwill in relation to the television programme and the live events related to it.

50) Goodwill does not immediately disappear following the end of use of a sign. In *Ad-Lib Club Limited v Granville* [1971] FSR Pennycuik VC considered the issue of residual goodwill:

"In support of that statement there is cited the case of *Norman Kark Publications Ltd. v. Odhams Press Ltd.*, [1962] 1 All E.R. 636; [1962] R.P.C. 163 in which the first paragraph of the headnote reads:

"In an action to restrain the use of a magazine or newspaper title on the ground of passing off the plaintiff must establish that, at the date of the user by the defendant of which the plaintiff complains, he has a proprietary right in the goodwill of the name, viz., that the name remains distinctive of

some product of his, so that the use of the name by the defendant is calculated to deceive; but a mere intention on the part of the plaintiff not to abandon a name is not enough".

Wilberforce, J. went at length into the principles underlying proprietary right in goodwill and annexation of a name to goodwill and the laws of the right to protection of a name and on the facts of that particular case he held that the plaintiff company had lost its right in respect of the name TODAY as part of the title of a magazine.

It seems to me clear on principle and on authority that where a trader ceases to carry on his business he may nonetheless retain for at any rate some period of time the goodwill attached to that business. Indeed it is obvious. He may wish to reopen the business or he may wish to sell it. It further seems to me clear in principle and on authority that so long as he does retain the goodwill in connection with his business he must also be able to enforce his rights in respect of any name which is attached to that goodwill. It must be a question of fact and degree at what point in time a trader who has either temporarily or permanently closed down his business should be treated as no longer having any goodwill in that business or in any name attached to it which he is entitled to have protected by law.

In the present case, it is quite true that the plaintiff company has no longer carried on the business of a club, so far as I know, for five years. On the other hand, it is said that the plaintiff company on the evidence continues to be regarded as still possessing goodwill to which this name AD-LIB CLUB is attached. It does, indeed, appear firstly that the defendant must have chosen the name AD-LIB CLUB by reason of the reputation which the plaintiff company's AD-LIB acquired. He has not filed any evidence giving any other reason for the selection of that name and the inference is overwhelming that he has only selected that name because it has a reputation. In the second place, it appears from the newspaper cuttings which have been exhibited that members of the public are likely to regard the new club as a continuation of the plaintiff company's club. The two things are linked up. That is no doubt the reason why the defendant has selected this name."

The television programme was watched by many people. It will also have been known by many others, who saw trailers for it or references to it in listings. The main demographic age profile was of children and people under the age of 55, so the viewers will for the most part be alive. It was a popular programme both by way of viewing figures, the merchandising of products and the production of live events. Mr Thorpe's own evidence testifies to the currency of the programme. The press article in relation to the Robot Rumble on 15 and 16 April 2006 at Colchester Leisure World includes the following:

“Favourites from the hit TV series *Robot Wars* were at the event”.

“Event organiser, John Findlay, said: “It’s taken over from *Robot Wars*. It’s two years since it was on TV, there’s still a fan base out there and we’re trying to capture it.””

The undated programme for “Robot wars!” includes the following

“A number of years ago ‘Robot Wars’ the TV series disappeared from normal viewing but although the series ended interest did not. This is your opportunity to see many of the Robots from the TV series live and up close”.

The letter from the FRA includes the following:

“Despite the setup of the Robot Wars club and Robot Wars forum back when the TV series was running this was ended with the TV series and many of the forum members at the time moved to the FRA forum to continue discussions such as the Fanfic areas. These forums have remained an active part of our community and become the new home for the now defunct robotwars.co.uk and robotwars.com domain names.”

At both material dates there was still a reputation in respect of the television programme *ROBOT WARS*. It is also difficult to see why Mr Thorpe started using *ROBOT WARS* himself, when he had been using *ROBOT RUMBLE*, if he did not think that the programme was still remembered and that he would benefit from use of its name. Mr Thorpe’s answers to questions re this matter were unconvincing. He held that the name of the programme had become tainted as the programme makers had let down roboteers and because of the health and safety record of the programme. It is difficult to understand why he would adopt a name that had become tainted. He had also been trading by reference to *ROBOT RUMBLE*; unless he considered that there was some advantage to be gained it is not possible to understand why he started to use the name *ROBOT WARS*. The only reason to adopt the name was to take advantage of its reputation, the very adoption of the name is evidence of the reputation. His attitude as to why he had applied for the trade mark registration is highly illuminative. He stated that as Robot Wars LLC had not renewed its United Kingdom trade mark registration, the trade mark was “up for grabs” and “free for anyone to take”.

51) The licensing agreements, with the reversion rights, and the witness statement of Mr Leach show that the goodwill in the business identified by use of the sign *ROBOT WARS* and the format of the show was owned by LLC. Mr Leach’s evidence has not been challenged and there is no reason to doubt its contents^{vii}. (Owing to the date of the publication for opposition purposes of the trade mark there is no requirement for the applicants to have a locus standi

anyway.) This goodwill relates to a television programme and live events identified by the sign ROBOT WARS in which model vehicles fight with each other. In relation to the television programme at both material dates this was a substantial goodwill, and still is.

52) The nature of the services of the registration and the identity of the trade mark with the sign used by LLC in relation to its goodwill, means that misrepresentation is inevitable.

53) Damage in passing-off can take a number of forms^{viii}. In this case, taking into account the reputation of the earlier sign and the services, damage is likely to occur as possible:

- ❖ By the injury which is inherently likely to be suffered by any business when on frequent occasions it is confused by customers or potential customers with a business owned by another proprietor or is wrongly regarded as being connected with that business.
- ❖ Erosion of the distinctiveness of LLC's sign.
- ❖ By the restriction of the ability to exploit the goodwill. (Mr Gutteridge stated that until the ownership of the trade mark rights was clear he would not be able to successfully "pitch" for a return of the programme.)
- ❖ The nature of the events for which the trade mark is registered means that there is a danger of injury to participants and the audience. If there was such an injury, or even death, irreparable harm would be done to the image of the brand^{ix}.

The grounds of invalidation under section 5(4)(a) of the Act are made out. The registration of the trade mark was contrary to section 5(4)(a) of the Act.

Section 3(6) – bad faith

54) Bad faith includes dishonesty and "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular field being examined^x". Certain behaviour might have become prevalent but this does not mean that it can be deemed to be acceptable^{xi}. It is necessary to apply what is referred to as the "combined test". It is necessary to decide what Mr Thorpe knew at the time of making the application and then, in the light of that knowledge, whether his behaviour fell short of acceptable commercial behaviour^{xii}. Bad faith impugns the character of an individual or collective character of a business, as such it is a serious allegation^{xiii}. The more serious the allegation the more cogent must be the

evidence to support it^{xiv}. However, the matter still has to be decided upon the balance of probabilities.

55) Mr Thorpe knew of the television programme. He knew of its popularity. He knew of those who had continued to participate and organise events where model vehicles fought each other. He had originally used the name ROBOT RUMBLE. (When he was using this name he used the device of a cog, a device of a partial cog had been used in relation to the television programme and the merchandising relating to it.) He chose to begin using the name ROBOT WARS in relation to the events he was organising. The defence of Mr Thorpe to the claim of bad faith revolves around the belief that the goodwill of LLC had been abandoned or dissipated and that a letter was written to the United Kingdom representatives of Robot Wars LLC. The comments made in relation to passing-off also apply in relation to this claim. It is also to be noted that the letter to Clifford Chance was dated 25 May 2006 and the application was made on 17 June 2006. This period would be unlikely to be enough time for a United States undertaking to respond, if it wished so to do. There is no explanation as to the apparent urgency in filing the application after the sending of the letter. It is to be expected that reasonable and experience business persons, if intending to register a trade mark in relation to services that they knew had been used by another undertaking(s) for the self-same or very close services would make enquiries of those who had been responsible for the services and seek permission. It is to be expected that enquiries would be made of the BBC, Channel 5 and Mentorn as to their positions re this matter. Such enquiries could have also given rise to knowledge of the licensors, one of which is Robot Wars LLC. By registering the trade mark and using it, Mr Thorpe was seeking to take advantage of the reputation that had been built up in relation to it and in relation to which he had no rights. Mr Thorpe knew of the enduring reputation of the television show. He made reference to the programme in his publicity. His own evidence makes reference to it.

56) Mr Thorpe states that he took legal advice before making the application for registration. The evidence exhibited shows the letter that was sent to Clifford Chance. All this letter shows is that he noticed that the trade mark had not been renewed and in his own words, if there was no response from Clifford Chance, it was *“up for grabs”* and *“free for anyone to take”*. The letter does not deal with the issue of goodwill and there is no indication as to the legal advice in relation to this. There was no effort to contact the producers and broadcasters of the television programme. Under cross-examination Mr Thorpe was asked what he would have expected Robot Wars LLC to have replied if he had asked it directly

for consent to register. He replied that he thought that it would be refused. In *Jules Rimet Cup Ltd v Football Association Ltd* [2007] EWHC 2376 (Ch)^{xv} Roger Wyand QC, sitting as a deputy judge of the High Court stated:

“97 If a defence is going to be run on the basis that legal advice has been sought and followed I think it is incumbent on the party running that defence to disclose all the relevant facts including the instructions given and the full advice received. In the absence of that, the fact of legal advice having been sought is relevant but cannot be conclusive in a case such as this.”

To file such evidence would waive legal privilege. However, if legal advice is a basis for a defence it is the natural quid pro quo that that privilege would be waived and the full advice given.

57) At the hearing Mr Thorpe and his daughter, who also spoke on his behalf, portrayed him as a roborator who whose sole interest was in the sport of robot fighting and keeping the sport going. No doubt he is an enthusiast of the sport. However, he has also has a commercial interest, the events which he has promoted charge spectators and he sells merchandise. By registering the trade mark he was claiming a right to stop others using the sign in relation to the services for which it is registered; including those who had built up the brand and owned the goodwill. He was also claiming the right to sell the trade mark, if he so wished. He was making commercial decisions and seeking commercial rights through the ownership of the trade mark, a piece of property. He chose to enter the commercial arena and must be judged by the standards appropriate to that arena.

58) Mr Thorpe is using the trade mark registration to appropriate the reputation of the television programme. A programme that others developed and risked their money in producing. A reputation that still has considerable value. He clearly has no rights to that reputation. There is no doubt that reasonable and experienced persons of business would consider that the filing of the application falls short of the standards of acceptable commercial behaviour.

59) The application was made in bad faith.

Conclusion

60) The registration was made in contravention of sections 3(6) and section 5(4)(a) of the Act and in accordance with section 47(6) of the Act the registration is deemed never to have been made.

COSTS

61) Mr Thorpe wanted a letter sent by Kilburn & Strode to him on 20 December 2010, in which he was told that LLC would pursue him for costs and damages, taken into account. He was advised that costs were currently estimated at £24,000. He was advised that in the MUSIC CHOICE case the registrar had awarded costs in the sum of £112,000. He was advised that he could assign the registration to LLC and pay their out of pocket expenses to date. Tribunal Practice Notice 4/2007^{xvi} includes the following:

“5. TPN 2/2000 recognises that it is vital that the Comptroller has the ability to award costs off the scale, approaching full compensation, to deal proportionately with wider breaches of rules, delaying tactics or other unreasonable behaviour. Whilst TPN 2/2000 provides some examples of unreasonable behaviour, which could lead to an off scale award of costs, it acknowledges that it would be impossible to indicate all the circumstances in which a Hearing Officer could or should depart from the published scale of costs. The overriding factor was and remains that the Hearing Officer should act judicially in all the facts of a case. It is worth clarifying that just because a party has lost, this in itself is not indicative of unreasonable behaviour.

6. TPN 2/2000 gives no guidance as to the basis on which the amount would be assessed to deal proportionately with unreasonable behaviour. In several cases since the publication of TPN 2/2000 Hearing Officers have stated that the amount should be commensurate with the extra expenditure a party has incurred as the result of unreasonable behaviour on the part of the other side. This "extra costs" principle is one which Hearing Officers will take into account in assessing costs in the face of unreasonable behaviour.”

The letter from Kilburn & Strode was sent to Mr Thorpe directly, it was not put into the proceedings by LLC but by Mr Thorpe. There will often be correspondence between the parties which takes place “off stage”, it is not the registrar’s practice to look at it. It is not the case that the letter would have put Mr Thorpe to any more expense. It is not considered appropriate to adjust the costs award because of the letter.

62) Mr Longstaff sought an award at the top of the scale. There is nothing unusual about this case. Mr Thorpe has not filed a large amount of evidence.

LLC has filed effective evidence but not evidence that would have taken, from the face of it, a large amount of time in research and compilation.

62) LLC having been successful is entitled to a contribution towards its costs. Costs are awarded on the following basis:

Application fee:	£200
Preparing a statement of case and considering the counterstatement of Mr Thorpe:	£400
Preparing evidence and considering the evidence of Mr Thorpe:	£1,000
Preparation for and attending the hearing:	£1,500
Total	£3,100

63) Mr Geoffrey Thorpe is to pay Robot Wars LLC and Robert Wars Limited the sum of £3,100. 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 02 day of March 2011

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

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

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

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

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

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

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

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration, (b) the registration procedure for the earlier trade mark was not completed before that date, or (c) the use conditions are met.

(2B) The use conditions are met if –

(a) within the period of five years ending with the date of the application for the declaration the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or (b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

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

(2D) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Community. (2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(3) An application for a declaration of invalidity 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.

(4) In the case of bad faith in the registration of a trade mark, the registrar himself may apply to the court for a declaration of the invalidity of the registration.

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made:

Provided that this shall not affect transactions past and closed.”

(The transitional provisions of The Trade marks (Relative Grounds) Order 2007 mean that that Order does not have effect in this case:

“(2) Article 5 shall not apply to an application for a declaration of invalidity which relates to a trade mark the application for the registration of which was published before the coming into force of this Order.”

The order came into force on 1 October 2007.)

ii *Hotpicks Trade Mark* [2004] RPC 42 and *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* Case C-529/07 paragraph 35.

iii *Nonogram Trade Mark* BL O/367/00.

iv “48. - (1) Where the proprietor of an earlier trade mark or other earlier right has acquiesced for continuous period of five years in the use of a registered trade mark in the United Kingdom, being aware of that use, there shall cease to be any entitlement on the basis of that earlier trade mark or other right-

(a) to apply for a declaration that the registration of the later trade mark is invalid, or

(b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used,

unless the registration of the later trade mark was applied for in bad faith.

(2) Where subsection (1) applies, the proprietor of the later trade mark is not entitled to oppose the use of the earlier trade mark or, as the case may be, the exploitation of the earlier right, notwithstanding that the earlier trade mark or right may no longer be invoked against his later trade mark.”

Sunrider Corporation t/a Sunrider International v Vitasoy International Holdings Limited [2007] RPC 29 Warren J:

“102 Returning, then, to the 1994 Act and construing it in the light of the Directive, section 40(3) does not, I consider, lead to the result that the 5 year period specified in section 48 can run at any time prior to actual registration of the later mark. In my judgment, reference in section 48 to the use of a registered trade mark means use whilst the mark is actually registered and not use of a mark which is actually not registered but one the date of registration of which is deemed to be the date of application for registration.”

This judgment can be found at the url:

<http://www.bailii.org/ew/cases/EWHC/Ch/2007/37.html>

^v 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. The *Inter Lotto* judgments can be found at the following urls:

<http://www.bailii.org/ew/cases/EWHC/Ch/2003/1256.html>

<http://www.bailii.org/ew/cases/EWCA/Civ/2003/1132.html>

^{vi} To be found at the url:

<http://www.bailii.org/ew/cases/EWHC/Ch/2010/443.html>

^{vii} Mr Richard Arnold QC, sitting as the appointed person in *Tripp Limited v Pan World Brands Limited* BL O/161/07, commented on evidence in proceedings:

“33. *Phillips on Evidence* (16th ed) states at paragraph 12-12:

In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position.

This rule [sic] serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.

However the rule is not an inflexible one...

34. The authority cited in support of this statement of the law is the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67. The relevant passages from the speeches are set out in the judgment of Hunt J in *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607, the material parts of which are quoted in the judgment of the Court of Appeal in *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31 at [59]-[60].

35. In my judgment the learned editors of *Phillips* are correct to say that the rule is not an inflexible one. There are at least two well-established exceptions to it. The first is that, as the speech of Lord Herschell LC in *Browne v Dunn* makes clear, it may not be necessary to cross-examine on a point if the witness has been given full notice of it before making his statement. As I pointed out in *BRUTT Trade Marks* [2007] RPC 19 at [23], this may be significant in registry proceedings where evidence is given sequentially. The second is that a court is not obliged to accept a witness's evidence in the absence of cross-examination if it is obviously incredible: see *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453.

36. Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence.”

^{viii} See *Sir Robert McAlpine Limited v Alfred McAlpine Plc* [2004] EWHC 630 (Ch) Mann J:

“20 When it comes to considering damage, the law is not so naïve as to confine the damage to directly provable losses of sales, or "direct sale for sale substitution". The law recognises that damage from wrongful association can be wider than that. Thus in *Ewing –v- Buttercup Margarine Limited* (1917) 34 RPC 232 Warrington L.J. said:

"To induce the belief that my business is a branch of another man's business may do that other man damage in all kinds of ways. The quality of the goods I sell; the kind of business I do; the credit or otherwise which I might enjoy. All those things may immensely injure the other man, who is assumed wrongly to be associated with me."

In so saying, he was not limiting the kinds of potential damage to those listed by him. Rather, he was indicating that the subtleties of the effect of passing off extend into effects that are more subtle than merely sales lost to a passing off competitor.

In *Associated Newspapers Limited –v- Express Newspapers* [2003] FSR 909 Page 929. Laddie J cited this passage, referred to other cases and went on to say:

"In all these cases [that is to say, the *Clock Limited* case referred to above and *Harrods –v- Harroldian School* [1996] RPC 679], direct sale for sale substitution is unlikely or impossible. Nevertheless the damage to the Claimant can be substantial and invidious since the Defendant's activities may remove from the Claimant his ability to control and develop as he wishes the reputation in his mark. Thus, for a long time, the common law has protected a trader from the risk of false association as it has against the risk of more conventional goods for goods confusion."

The same Judge expressed himself more picturesquely, but equally helpfully, in *Irvine –v- Talksport Limited* [2002] 1 WLR 2355 at page 2366. Having pointed out the more familiar, and easier, case of a Defendant selling inferior goods in substitution for the Claimant's and the consequential damage, he went on to say:

"But goodwill will be protected even if there is no immediate damage in the above sense. For example, it has long been recognised that a Defendant cannot avoid a finding of passing off by showing that his goods or services are of as good or better quality than the Claimant's. In such a case, although the Defendant may not damage the goodwill as such, what he does is damage the value of the goodwill to the Claimant because, instead of benefiting from exclusive rights to his property, the latter now finds that someone else is squatting on it. It is for the owner of goodwill to maintain, raise or lower the quality of his reputation or decide who, if anyone, can use it alongside him. The ability to do that is compromised if another can use the reputation or goodwill without his permission and as he likes. Thus Fortnum and Mason is no more entitled to use the name FW Woolworth than FW Woolworth is entitled to use the name Fortnum and Mason ...

"The law will vindicate the Claimant's exclusive right to the reputation or goodwill. It will not allow others so to use goodwill as to reduce, blur or diminish its exclusivity." (at p 2368)

In *Taittinger SA –v- Allbev Limited* [1994] 4 All ER 75 Page 88, Peter Gibson L.J. acknowledged that:

"Erosion of the distinctiveness of the name champagne in this country is a form of damage to the goodwill of the business of the champagne houses."

The same view was expressed by Sir Thomas Bingham M.R. at page 93.

21 The damage which results must be as a result of a misrepresentation to a relevant part or section of the public. In the *Jif Lemon* case the relevant people were described as "prospective customers or ultimate consumers of the goods or services in question" by Lord Diplock and as the "purchasing public" by Lord Oliver. Mr Thorley realistically accepted that in this case the relevant public was not confined to people who are at the moment actually customers of Robert and Alfred. In doing so he acknowledged the possibility, which in my view exists in this case, that the misrepresentation, if any, would or might be received by a wider class than that. However, for Robert to succeed there must be people whose dealings in respect of Robert would somehow be affected by the alleged misrepresentation. Such people must be assumed to be "reasonably well informed and reasonably observant and circumspect". Per Chadwick L.J. in *Bach –v- Bach Flour Remedies Trademarks* [2000] RPC 513 and 534."

The full judgment can be found at the url:

<http://www.bailii.org/ew/cases/EWHC/Ch/2004/630.html>

^{ix} See by analogy the decision of the Company Names Tribunal in BL O/106/10, to be found at the url:

<http://www.ipo.gov.uk/o10610.pdf>

“54) Mr Ross emphasises the safety record of MB and that the safety record of an undertaking is of paramount importance in the rope access business. His statement re MB’s safety record is supported by the certificate from The Royal Society for the Prevention of Accidents. As noted above, there is no limitation to the business of HRL. It is possible for the company name to be used in relation to rope access services; even if this risks action for passing-off and trade mark infringement. Any failure in safety in relation to the use of the company name will tarnish the reputation of MB, owing to the association of the name Hi-Rope with it. If the company name is used in relation to walking/tourism services on the west coast of Scotland, as Mr Ross states, such services could involve the use of ropes or can readily be associated with the use of ropes, if the services are provided in mountainous areas. In this connection, it is noted that although Mr MacDonald states that his plans for the company are related to a business organising walking holidays, he also says that the name was chosen because it was an appropriate name for the business. This suggests that the business in prospect involves the use of ropes or heights, eg mountaineering, or both. The evidence of MB shows that there are areas where climbing and rope access cross, Edinburgh International Climbing Arena provides rope access training. Any health and safety failure in relation to such services could readily damage the reputation of MB, owing to its association with the name Hi-Rope. Customers and potential customers are likely to make the link with MB, even if MB is no longer using the name; for the business that is potentially very serious, the perception of the compromising of safety will have an adverse effect.”

^x *Gromax Plasticulture Limited v Don and Low Nonwovens Ltd* [1999] RPC 367.

^{xi} *Harrison v Teton Valley Trading Co* [2005] FSR 10. Full judgment to be found at the url:

<http://www.bailii.org/ew/cases/EWCA/Civ/2004/1028.html>

^{xii} (1) *Barlow Clowes International Ltd. (in liquidation)* (2) *Nigel James Hamilton and (3) Michael Anthony Jordon v (1) Eurotrust International Limited (2) Peter Stephen William Henwood and (3) Andrew George Sebastian* [2005] UKPC 37 to be found at the url:

<http://www.bailii.org/uk/cases/UKPC/2005/37.html>

and *Ajit Weekly Trade Mark* BL O/004/06.

^{xiii} See *Royal Enfield Trade Marks* BL O/363/01.

^{xiv} *Re H (minors)* [1996] AC 563.

^{xv} Full judgment to be found at the url:

<http://www.bailii.org/ew/cases/EWHC/Ch/2007/2376.html>

^{xvi} To be found at the url:

<http://www.ipo.gov.uk/pro-types/pro-tm/t-law/t-tpn/t-tpn-2007/t-tpn-42007.htm>