

O-100-06

TRADE MARKS ACT 1994

**IN THE MATTER OF FOUR CONSOLIDATED APPLICATIONS
UNDER NOS 81521, 81760, 81761 AND 81762
BY BRUTT BETEILIGUNGSGESELLSCHAFT MBH,
DANIELA BRUTT, BRUTT SAVER GERMANY GMBH
AND BRUTT SAVER HUNGARY KFT
FOR A DECLARATION OF INVALIDITY IN RESPECT OF
TRADE MARK NOS 2237611, 2237614, 2237625 AND 2237628
IN THE NAME OF TARGET FIXINGS LIMITED**

TRADE MARKS ACT 1994

IN THE MATTER OF four consolidated applications

under nos 81521, 81760, 81761 and 81762

by Brutt Beteiligungsgesellschaft mbH, Daniela Brutt, Brutt Saver Germany GmbH and Brutt Saver Hungary Kft, for a declaration of invalidity in respect of

Trade mark nos 2237611, 2237614, 2237625 and 2237628

in the name of Target Fixings Limited

BACKGROUND

1. Trade Mark Nos 2237614, 2237611, 2237625 and 2237628 are registered in Class 6, 19 or both, in respect of the following goods:

- 2237611** **Class 06:** Metal building materials; pipes and tubes of metal; cladding, dormers, dovecotes, anti-vandal sheeting; glazing surrounds and frames; window frames; panels; brick ties, masonry ties, wall ties, composite building materials; small items of metal hardware; screws; nails, hooks, bolts, locks; steel fittings for posts; wire rope; metal supports for reinforcing building and/or masonry, metal rods for reinforcing buildings and/or masonry; metal supports for supporting buildings and/or masonry, metal rods for supporting buildings and/or masonry; parts and fittings for all the aforesaid goods.
- Class 19:** Building materials; wood, plastics, glass reinforced, and composite building materials; masonry reinforcing materials; concrete, shuttering for concrete, concrete building elements; grout, mortars for floors; bonding agents; edging strips; binding materials; resin floor finishes; walling and building blocks; insulation materials for buildings; fixings; brick ties, masonry ties, wall ties, plaster for use in building; rods and supports for supporting buildings and/or masonry; rods and supports for reinforcing buildings and/or masonry; parts and fittings for all the aforesaid goods.
- 2237614** **Class 06:** Metal building materials; pipes and tubes of metal; cladding, dormers, dovecotes, anti-vandal sheeting; glazing surrounds and frames; window frames; panels; brick ties, masonry ties, wall ties, composite building materials; small items of metal hardware; screws; nails, hooks, bolts, locks; steel fittings for posts; wire rope; metal supports for reinforcing building and/or masonry, metal rods for re-inforcing buildings and/or masonry; metal supports for supporting buildings and/or masonry, metal rods for supporting buildings and/or masonry; parts and fittings for all the aforesaid goods.

- Class 19:** Building materials; wood, plastics, glass reinforced, and composite building materials; masonry reinforcing materials; concrete, shuttering for concrete, concrete building elements; grout, mortars for floors; bonding agents; edging strips; binding materials; resin floor finishes; walling and building blocks; insulation materials for buildings; fixings; brick ties, masonry ties, wall ties, plaster for use in building; rods and supports for supporting building and/or masonry; rods and supports for reinforcing buildings and/or masonry; parts and fittings for all the aforesaid goods.
- 2237625 Class 06:** Metal building materials; pipes and tubes of metal; cladding, dormers, dove-cotes, anti-vandal sheeting; glazing surrounds and frames; window frames; panels; brick ties, masonry ties, wall ties, composite building materials; small items of metal hardware; screws; nails, hooks, bolts, locks; steel fittings for posts; wire rope; metal supports for reinforcing building and/or masonry, metal rods for reinforcing buildings and/or masonry; metal supports for supporting buildings and/or masonry, metal rods for supporting buildings and/or masonry; parts and fittings for all the aforesaid goods.
- 2237628 Class 19:** Building materials; wood, plastics, glass reinforced, and composite building materials; masonry reinforcing materials; concrete, shuttering for concrete, concrete building elements; grout, mortars for floors; bonding agents; edging strips; binding materials; resin floor finishes; walling and building blocks; insulation materials for buildings; fixings; brick ties, masonry ties, wall ties, plaster for use in building; rod and supports for supporting buildings and/or masonry; rods and supports for reinforcing buildings and/or masonry; parts and fittings for all the aforesaid goods.

2. Each is registered in respect of a series of two marks, BRUTT HELICAL/Brutt Helical, BRUTT/Brutt, BRUTT BAR/Brutt Bar and BRUTT BOND/Brutt Bond. The registrations currently stand in the name of Target Fixings Limited.

3. By applications dated 21 November 2003 and 11 June 2004, Brutt Beteiligungsgesellschaft mbH, Daniela Brutt, Brutt Saver Germany GmbH and Brutt Saver Hungary Kft applied for the registrations to be declared invalid. The applications are made on the following grounds:

- 1. Under Section 3(6)** because the registrations were made in bad faith.
- 2. Under Section 60(3)(a)** in view of the fact that the registered proprietors were the agents or representatives of the applicants for invalidation in the UK and acted in bad faith in applying to register the trade marks.

4. On 18 December 2003 and 6 July 2004, the registered proprietors filed Counterstatements in which they deny the grounds on which the applications are based.

5. The registered proprietors and the applicants for invalidity both ask for an award of costs in their favour.

6. Both sides filed evidence in these proceedings, which, insofar as it may be relevant I have summarised below. The matter came to be heard on 30 November 2005, when the applicants were represented by Mr Benet Brandreth of Counsel, instructed by Boulton Wade Tennant, their trade mark attorneys. The registered proprietors were represented by Mr Rowland Buehrlen of Beck Greener, their trade mark attorneys.

Applicants= evidence

7. This consists of three Witness Statements. The first is dated 25 March 2004, and comes from Daniela Brutt, a Director and shareholder of Brutt Beteiligungsgesellschaft mbH, the first applicant for invalidity.

8. Ms Brutt refers to the fact that Brutt is her family name, and forms part of the name of the companies formed by her family between June 1997 and September 1999. She states that sales of products bearing the BRUTT trade mark began in September 1997 by Brutt Helical Kft (Hungary), now called Brutt Saver Hungary Kft, and that she believes the Brutt group began to distribute advertising materials and sales literature around June 1997.

9. Ms Brutt refers to the International registration 768008, and the German registration upon which it is based, details of which are shown as exhibit DB1

10. Ms Brutt says that from May 1998 to August 2000, the Brutt Group and Target Fixings Limited were joint shareholders in a Hungarian company trading under the name Brutt Helical Kft, delivering twisted (helical) nails and bars for repairing and reinforcing walls and ceilings, to Brutt Saver Germany GmbH and also to Target Fixings Limited. She goes on to refer to the Statement made by Emma Jane Pitcher, and to confirm that although Target were allowed to use the BRUTT trade mark during their joint venture, they did not have permission to register it.

11. Ms Brutt goes on to refer to her company's distributors who have been selling BRUTT trade marked products, the UK distributor being noted as having commenced trade from a date after the relevant date. Exhibit DB2 consists of letters from various distributors in other jurisdictions confirming details of their relationship with the Brutt Group and that they obtain products from Brutt Saver Hungary Kft. The UK distributor states that this arrangement commenced in September 2001. Ms Brutt concludes her Statement by referring to proceedings launched by her company in OHIM, details of which are shown as exhibit DB3.

12. The next Witness Statement is dated 29 December 2003, from Emma Jane Pitcher, a trade mark attorney employed by Boulton Wade Tennant, the applicants' representatives in these proceedings.

13. Ms Pitcher refers to the trade mark applications and registrations owned by the respective parties, and to the UK examination report for the applicants' International registration, details of which are shown as exhibit EJP1. Ms Pitcher says it was only when this report was received did her clients become aware that Target had made applications to register her clients' marks at OHIM. Exhibit EJP2 consists of copies of the grounds of opposition filed by the applicants against Target's application to register the mark BRUTT HELICAL as a Community Trade Mark. Ms Pitcher says that they discovered another application by Target that had passed its opposition period, exhibit EJP3 being details of the resulting application for a declaration of invalidity, accompanied by various submissions and attachments consisting of:

Exhibit P1 - Minutes of a Shareholders Meeting of Brutt Helical Kft, held in August 2000, referring to Target Group Holdings Limited and Gunter Brutt as having declined to pay their share of some monies, to Target having offered shares to Gunter Brutt and Brutt Helical Kft, both declined the offer, and to the shares having been purchased by Daniella Brutt, Alexander Brutt and Andras Farkas as shareholders of Brutt Helical Systems Kft. The minutes also refer to Gunter Brutt having sold his shares to Brutt Helical Kft after Target had declined to purchase them.

Exhibit P2 consists of an invoice dated 19 July 1999, and documentation relating to the construction and contents of an Internet website for Brutt Helical GmbH, which shows Target Fastenings Ltd as the UK contact, and includes product details, inter alia, for Brutt Fast, Brutt Bar and Brutt Bond XL.

Exhibit P3 consists of a letter dated 5 October 2002, relating to a dispute between Brutt Saver GmbH and Desoi GmbH.

Exhibit P4 consists of a letter dated 4 November 2002, which appears to relate to another dispute, but as this is in German and no translation has been provided I am not able to consider its contents.

Exhibit P5 consists of a schedule, the translations showing this to be a Court document detailing various changes to the company, ie, name, structure.

Exhibit P6 consists of a collection of invoices from Brutt Helical GmbH, relating, inter alia, to the supply of BruttBar, BruttBond and Brutt Bond XL, and invoices from Brutt Saver Germany GmbH for the supply of Brutt Saver Grout. Translations of invoices for various BruttSaver powder and materials have also been provided.

Exhibit P7 consists of product literature for BruttBar available from Brutt Helical GmbH. This is in German with a translation provided.

Exhibit P8 consists of a Certificate of Registration for the International Registration of

BRUTT under the Madrid Agreement/Protocol.

Exhibit P9 consists of four invoices dating from 11 August 1998 through to 23 July 1999, originating from Target Fixings Ltd, for payment by Brutt Helical Kft, relating to the cost of an exhibition, and the design, printing and transportation of brochures.

Exhibit P10 consists of a copy of a Consultancy Agreement dated 27 February 1999, between Brutt Helical Kft and David Hall, a consultant, under which Mr Hall provided a range of consultancy services relating to the company's products, systems and operations.

Exhibits 11a and 11b consist of extracts from some publication, but as these are in German and as no translation has been provided. I am not able to consider or take the contents into account.

14. Exhibit EJP4 to Ms Pitcher's Statement consists of a copy of the decision in the *K Sabatier* trade mark rectification case [1993] R.P.C. 97.

15. The final Witness Statement is dated 2 April 2004, and comes from Gunter Brutt, a shareholder of Brutt Beteiligungsgesellschaft mbH, and the father of Daniela Brutt. Much of Mr Brutt's Statement consists of submissions on the contents of the Counterstatements. Whilst I do not consider it to be appropriate or necessary to summarise these, where facts are introduced I will do so. I will, of course take all of the Statement into account in reaching my decision.

16. Mr Brutt recounts that in June 1997, he formed his company Brutt Helical Kft in Hungary, with Andras Farkas, Exhibit GB1 being a copy of the Memorandum of Association dated 30 June 1997. Mr Brutt mentions that he was the majority shareholder and that Mr Farkas was appointed Managing Director. Exhibit GB2 consists of an Order of the Heves County Court in Hungary, ordering the registration of the company into the list of companies with effect from 1 September 1997, Mr Brutt referring to the fact that the order states the company to have been trading from 30 June 1997. Mr Brutt says that the company had been incorporated with the aim of cooperation with Target Fixings Limited, but Target had no involvement in the formation or selection of the company name. Mr Brutt says that Target became a 50% shareholder on 4 May 1998.

17. Mr Brutt says that Target's claim to have created the names BRUTT BAR, BRUTT BOND and BRUTT HELICAL in September 1997 must be factually incorrect, noting in particular that Brutt Helical Kft had already been incorporated and trading by that date, and as can be seen from exhibit GB3, had delivered goods under the name HELIBARS to Target. The exhibit confirms the delivery of these goods from Brutt Helical Kft to Target Fastenings Limited. Mr Brutt says that all Target did was to add the words BAR and BOND to the existing BRUTT name.

18. Mr Brutt says that he agreed to Target using BRUTT BAR for a bar delivered by his company, BRUTT BOND for a bonding mortar and to the use of the company name BRUTT HELICAL with the system distributed by his company. He says that at no time during the

cooperation with Target was his company asked for, or gave permission for Target to register the trade marks incorporating BRUTT. Mr Brutt says that the list at exhibit GB4 shows there to have been an active trade between Brutt Helical Kft and Target from 18 September 1997, and as can be seen from the balance sheet at exhibit GB5, the assertion that the company was no more than a profit sharing vehicle and created no costs must be wrong. Mr Brutt mentions specific amounts of money Target owed his company.

19. Mr Brutt says that he finds it surprising that Target claim that they are not in the business of distributors, going on to refer to exhibit GB6, which consists of a letter dated 7 October 2003, from Desoi GmbH to Mr Brutt's company solicitors, stating that their supplier, Target Fixings Ltd has granted us unlimited use of the names for our advertising purposes and marketing of their products on the German market.@ He refers to a download obtained from Target's website, (exhibits GB7 and GB8), drawing attention to the fact that the company is involved in the supply of structural fixing solutions sold under various trade marks, and to the company having exhibited at an engineering exhibition CIVILS held at the Birmingham NEC in 2004.

Registered proprietors= evidence

20. This consists of two Witness Statements. The first is dated 28 September 2004, and comes from Robert Stephen Hall, a Director of Target Fixings Limited, a position he has held for eight years.

21. Mr Hall refers to exhibit RSH.1, which consists of a copy of a Statutory Declaration dated 2 September 2003, filed in relation to opposition proceedings at OHIM. Mr Hall maintains that the contents of the Declaration apply to these proceedings. For convenience I will combine the earlier Statutory Declaration and the current Witness Statement into one summary.

22. Mr Hall says that his company provides engineering consultancy services in the field of masonry repair, which may involve the use of a range of products sold under various trade marks, inter alia, BRUTT FAST, BRUTT BAR, BRUTT BOND and BRUTT HELICAL POYESTER RESIN, the full range of products being shown in the brochure at exhibit RSH.2. Mr Hall refers to a helically shaped wire, such as that sold under the BRUTT BAR trade mark, saying that the product is the subject of a patent owned by Mr Ollis, copies of the patents being shown as exhibit RSH.3.

23. Mr Hall says that his company was dependant on supplies of these helical products from a company named Helifix Limited, which manufactured the product under brand names including HELIBAR, details of the relevant trade mark registration being shown as exhibit RSH.4. He says that this company had an exclusive licence to exploit the HELIBAR patent, exhibit RSH.5 being a copy of the licence dated 26 August 1986, which ran until December 1997 when the licence was varied. A copy of the variation licence is shown as exhibit RSH.6, but being unsigned it not clear whether it ever came into force. From this evidence, Mr Hall says it can be seen that only Helifix Limited was in a position to produce helically shaped wall fixings prior to December 1997.

24. Mr Hall says that following his company indicating a desire to obtain the wall fixings from other sources and possibly made from different materials, Mr Ollis introduced Target to Mr Gunter Brutt who at that time owned a manufacturing facility in Frankfurt under the name Thomas GmbH, producing stamped aluminium closures for aerosol cans and perfume bottles, and plastic components for the automotive industry, although none under the name BRUTT. Mr Hall says that Mr Brutt was already in contact with Mr Ollis, and that Target was instrumental in obtaining a licence to manufacture the wire to Targets=specifications. He states that Mr Brutt was interested in a joint venture for the purposes of wider distribution and sale of helical material, from which Mr Brutt and Target agreed to set up a joint venture with Target taking a share of Brutt Helical Kft, a Hungarian company that had been incorporated exclusively for that purpose. Mr Hall says that during a meeting with Mr Gunter Brutt in September 1997, it was agreed that Target would own a share of Brutt Helical Kft, and the Memorandum of Articles of Association were amended to reflect this (exhibit RH1). Mr Hall says that to the best of his knowledge Brutt Helical Kft did not trade until after Targets= purchase of the 50% stake.

25. Mr Hall recounts a discussion between himself, Barry Winson, a fellow Target Director, Scott Burns, a potential Canadian distributor, regarding the selection of names for new products. He says that it was decided to name the remedial tie products RETRO FLEX, RESI FLEX, DRI FLEX, new nail products as BRUTT FAST and SKEW FAST, and the reinforcing bars as BRUTT BAR, the name BRUTT being chosen to reflect the strength and description, from which he says it was logical to use a similar name for the bonding agent and system, resulting in the names BRUTT BOND and BRUTT HELICAL. He says that the first products under these names were sold in February 1998, which is consistent with the invoice shown as exhibit RH3. Mr Hall refers to exhibit RH2, which he says consists of a booklet printed during May 1998, noting that page 8 uses both BRUTT HELICAL and BRUTT BAR. He says that the booklet was distributed at the first ACivils & Pipelines@exhibition in Birmingham, although does not say when this was. Exhibit RH4 consists of an invoice for translating and printing the booklet in German for an exhibition in Munich in January 1999.

26. Mr Hall says that Mr Gunter Brutt provided a product from his Hungarian companies Napro Kft and Plasmontier Kft, the base round wire material being supplied by Target, the finished product being shipped to Targets=distribution customers, Brutt Helical Kft acting as distributor. Exhibit RSH7 consists of copies of invoices, the earliest dating from October 1997. These show that Target had been supplying wire and tube materials to Plasmontier Kft, and from March 1998, a cementitious grout under the name BRUTTBOND to Brutt Helical Kft. The exhibit includes various fax header sheets from Target to Brutt Helical Kft giving quotations for products and technical advice.

27. Mr Hall says that following disagreements on accounting and the manner in which the joint venture was being managed, Targets=parent company withdrew from the arrangement by selling its shares. Exhibit RSH.8 is a copy of a fax header, recording the transmission of a letter on 20 April 2004, referring to a meeting arranged for 4 July 2004. The letter expresses concerns at the running of Brutt Helical KFT, stating that Gunter Brutt had never been interested in the sales operation, having only ever wanted to manufacture, whereas Target had only been interested in the marketing, sales and engineering of the manufactured product. Reference is made to Mr Brutt being responsible for the manufacture through Napro and

Plasttool and not involved in the sales, and to Brutt Helical Kft having been formed as a partnership to act as a middleman. Mr Hall refers to exhibit RSH.9, which consists of two letters, the first dated 5 January 2000, from A Brutt of Brutt Helical Kft to Target, Mr Hall noting the reference to the company requesting to become Target's agent in the German and French markets, and a letter from A Brutt seeking assistance in obtaining venture capital. A copy of the proposed agency agreement is shown as exhibit RSH.10.

28. Mr Hall goes on to say that throughout, Target supplied Brutt Helical Kft with product literature and material to support its distribution agency activities, referring in particular to exhibits P1 to P11 and P12 to P15 forming part of exhibit RSH.2. Mr Hall says that this literature was written by him in late 1997, and contains technical information commissioned by Target. He makes particular reference to what he refers to as the BH logo that he says he created on his PC in late 1997. Exhibit RSH.11 consists of a fax header recording a letter sent by Robert Hall to Brutt Helical Kft on 11 October 2000, stating that Target is no longer a 50% shareholder of Brutt helical Kft and that they are removing any permissions to use Target's intellectual property, specifically, drawings, translated text and photographs, there being no mention of trade marks.

29. The second Witness Statement is dated 8 June 2005, and comes from Christian Rowland Buehrlen. He refers to exhibit CRB1 which consists of a copy of the observations filed in appeal proceedings at OHIM, and at CRB2, a copy of a letter dated 20 May 2004, from a firm of Hungarian lawyers, providing information on Brutt Helical Kft, and confirming its change of name to Brutt Saver Hungary Ipari Kft. The letter also confirms that Plastmontier Kft was dissolved in 2000.

Applicants= evidence in reply

30. This consists of a Witness Statement dated 23 December 2004, and comes from Emma Jane Pitcher. Ms Pitcher refers to exhibit EJP1, which consists of the submissions of Beyer & Jochem, the Applicant for Invalidity's trade mark attorneys in Germany, filed in reply during proceedings at OHIM. As these are submissions on the evidence rather than evidence in itself I do not consider it to be appropriate or necessary for me to summarise them, but I will take them fully into account in my determination of the case. The submissions are shown as being accompanied by translations of various invoices for the supply of BruttBar and BruttBond products August 1999 and June 2000, but are not included.

Applicants= further evidence

31. This consists of four Witness Statements. The first is dated 25 January 2005, and comes from Ms Pitcher, which, at EJP1, exhibits the decisions of OHIM in respect of opposition proceedings concerning the trade marks BRUTT BAR, BRUTT BOND and BRUTT HELICAL in the name of Target Fastenings Ltd. The oppositions were not successful and appeals have been lodged, the relevant documentation being shown as exhibit EJP2. The Witness Statement consists of no more than submissions on the relevance of these exhibits to the current proceedings.

32. The second Witness Statement is dated 11 February 2005, and also comes from Ms Pitcher. She refers to exhibit EJP1, which consists of the submissions of Beyer & Jochem, the Applicant for Invalidity's trade mark attorneys in Germany, filed in the appeal against the opposition decisions by OHIM in respect of applications to register the trade marks BRUTT BAR, BRUTT BOND and BRUTT HELICAL by Target Fastenings Ltd. As these are submissions on the evidence rather than evidence in itself I do not consider it to be appropriate or necessary for me to summarise them, but I will take them fully into account in my determination of the case.

33. The next Witness Statement is dated 15 July 2005, and comes from Daniela Brutt. This does no more than exhibit (DB1) copies of the evidence filed by Ms Brutt in earlier invalidity proceedings (No. 81521), which consists of copies of a Witness Statement dated 25 March 2004 made by Ms Brutt, and a Statutory Declaration dated 14 October 2002 from Robert Hall. The information contained within Ms Brutt's Witness Statement mirrors the evidence given in her Statement of 25 March 2004. The same is the case in respect of the Statutory Declaration from Mr Hall, the contents of which are covered by the Witness Statement dated 28 September 2004, and Statutory Declaration dated 2 September 2003 filed as exhibit RSH.1 thereto, also summarised above.

34. The final Witness Statement is dated 15 July 2005, and comes from Gunter Brutt, This does no more than exhibit (DB1) a copy of the evidence filed by Mr Brutt in earlier invalidity proceedings, which consists of a duplicate of the Witness Statement he made on 2 April 2004 which is summarised above.

35. That concludes my review of the evidence insofar as it is relevant to these proceedings.

DECISION

36. The application for a Declaration of Invalidity is made under the provisions of Section 47, which reads as follows:

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).@

37. The application is based on Section 3(6) of the Act, which reads as follows:

A3.-(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.@

38. In the case of *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367, Lindsay J put the position in relation to an allegation of bad faith as follows:

AI shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. Parliament has wisely not attempted to explain in

detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.@

39. In *R. v. Royal Enfield Trade Marks* [2002] RPC. 24. Mr Simon Thorley Q.C., sitting as the Appointed Person took the following view on an allegation that a party has acted in bad faith:

A31 An allegation that a trade mark has been applied for in bad faith is a serious allegation. It is an allegation of a form of commercial fraud. A plea of fraud should not lightly be made (see Lord Denning M.R. in *Associated Leisure v. Associated Newspapers* [1970] 2 Q.B. 450 at 456) and if made should be distinctly alleged and distinctly proved. It is not permissible to leave fraud to be inferred from the facts (see *Davy v. Garrett* (1877-78) L.R. 7 Ch.D. 473 at 489). In my judgment precisely the same considerations apply to an allegation of lack of bad faith made under section 3(6). It should not be made unless it can be fully and properly pleaded and should not be upheld unless it is distinctly proved and this will rarely be possible by a process of inference. Further I do not believe that it is right that an attack based upon section 3(6) should be relied on as an adjunct to a case raised under another section of the Act. If bad faith is being alleged, it should be alleged up front as a primary argument or not at all.

32 In the present case Mr. Edenborough invited the hearing officer to infer bad faith from incidents which allegedly took place in 1989, the bad faith being in 1992. No application was made to cross examine Mr. Narayan to challenge his rejection of Mr. Holder's evidence. Mr. Edenborough told me that no application was made to cross examine because it was the practice of the Registry to refuse such applications. I am unaware that there is such a practice and if there were to be, it would be wrong.

33. Where there is a conflict of evidence (and it is material for the purposes of the dispute for the hearing officer to resolve that conflict) and where it is thought that cross examination is either desirable or necessary to assist him in that task an application for cross examination must be made prior to the hearing before the registry. If the hearing officer wrongly declines to allow cross examination, that can be the subject of an appeal.

40. In the Court of Appeal decision in *Harrison's Trade Mark Application* [2005] FSR 10, Sir William Aldous-judgment considered the relevance of *Twinsectra Ltd v Yardley*, [2002] UKHL 12; [2002] 2 A.C. 164, which had been before The House of Lords. Consideration was given to the nature of the test to be applied in considering matters of dishonesty:

A23 In *Twinsectra*, the courts had had to consider whether a solicitor had acted dishonestly. Although the question for decision in that case was different, the reasoning in the speeches is relevant. The leading speech was made by Lord Hutton. At [27] he said:

A27 Y. There are three possible standards which can be applied to determine whether a person has acted dishonestly. There is a purely subjective standard, whereby a person is only regarded as dishonest if he transgresses his own standard of honesty, even if that standard is contrary to that of reasonable and honest people. This has been termed the 'Robin Hood test' and has been rejected by the courts. As Sir Christopher Slade stated in *Walker v Stones* [2000] Lloyds Rep PN 864, 877 para.164:

'A person may in some cases act dishonestly, according to the ordinary use of language, even though he genuinely believes that his action is morally justified. The penniless thief, for example, who picks the pocket of the multi-millionaire is dishonest even though he genuinely considers that theft is morally justified as a fair redistribution of wealth and that he is not therefore being dishonest.'

Secondly, there is a purely objective standard whereby a person acts dishonestly if his conduct is dishonest by the ordinary standards of reasonable and honest people, even if he does not realise this. Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'.

24 Clearly the court, when considering bad faith, cannot apply a purely subjective test, called by Lord Hutton 'the Robin Hood test'. The dishonest person or one with low standards cannot be permitted to obtain trade mark registrations in circumstances where a person abiding by a reasonable standard would not. The registration of a trade mark is designed to enable bona fide proprietors to protect their proprietary rights without having to prove unfair trading. Registration is not provided to help those with low moral standards.

25 Lord Hutton went on to conclude that the true test for dishonesty was the combined test. He said:

A36 Y Therefore I consider Y that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.

26 For my part, I would accept the reasoning of Lord Hutton as applying to considerations of bad faith. The words 'bad faith' suggest a mental state. Clearly when considering the question of whether an application to register is made in bad faith all the circumstances will be relevant. However, the court must decide whether the knowledge of the applicant was such that his decision to apply for registration

would be regarded as in bad faith by persons adopting proper standards.@

41. These earlier authorities were considered by the Privy Council in *Barlow Clowes International Ltd (in liquidation) & Others v Eurotrust International Limited & Others*, (Privy Council Appeal No 38 of 2004). In particular, their Lordships considered a submission from Counsel that an inquiry into the defendant's views about standards of honesty is required. The following passage from Lord Hoffman's judgment sets out the position as follows:-

A[Counsel for the defendant] relied upon a statement by Lord Hutton in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 174, with which the majority of their Lordships agreed:

A35. There is, in my opinion, a further consideration which supports the view that for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men. A finding by a judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law and not in a criminal context, I think that it would be less than just for the law to permit a finding that a defendant had been 'dishonest' in assisting in a breach of trust where he knew of the facts which created the trust and its breach but had not been aware that what he was doing would be regarded by honest men as being dishonest.

A36. Y. I consider that the courts should continue to apply that test and that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he set his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct.@

15. Their Lordships accept that there is an element of ambiguity in these remarks which may have encouraged a belief, expressed in some academic writing, that *Twinsectra* had departed from the law as previously understood and invited inquiry not merely into the defendant's mental state about the nature of the transaction in which he was participating but also into his views about generally acceptable standards of honesty. But they do not consider that this is what Lord Hutton meant. The reference to 'what he knows would offend normally accepted standards of honest conduct'@ meant only that his knowledge of the transaction had to be such as to render his participation contrary to normally acceptable standards of honest conduct. It did not require that he should have had reflections about what those normally acceptable standards were.

16. Similarly in the speech of Lord Hoffmann, the statement (in paragraph 20) that a dishonest state of mind meant 'consciousness that one is transgressing ordinary standards of honest behaviour'@ was in their Lordships' view, intended to require consciousness of those elements of the transaction which make participation transgress ordinary standards of honest behaviour. It did not also require him to have thought about those standards were.@

42. On the basis of these authorities, it is clear that a finding of bad faith may be made in

circumstances which do not involve actual dishonesty, and that it is not necessary for me to reach a view on the registered proprietors' state of mind if I am satisfied that, in all the surrounding circumstances, their actions in applying for the trade marks would have been considered contrary to normally accepted standards of honest conduct.

43. In his submissions, Mr Brandreth put the position as follows:

You are presented, in essence, with two different stories here and the question for you is, how do you determine which one is the correct one. We say there are two things, two factors that you should take into account here in helping you to determine which side is right. The first is, whose story is more inherently forceful. The second is, perhaps this is the thing that will combine with the first most effectively, it is the question of whose story is best supported by the contemporaneous documents that are before you in evidence. We say on both counts, both the inherent plausibility of the story and the support from contemporary documents, you will find that the applicants' position is the stronger. On the balance of probabilities, therefore, they establish the facts that justify the section 3(6) objection.

44. I am not entirely sure that Mr Brandreth's approach is the correct one. The determination of alleged bad faith is not a matter of which story is more forceful, is best supported, or a question of the balance of probabilities. As was stated in *Davy v. Garrett*, an allegation of bad faith must be distinctly proved and must not be inferred from the facts.

45. Mr Hall says that his company, Target Fixings Limited provides engineering consultancy services in the field of masonry repair, initially using a product sold under the name HELIBAR produced by Helifix Limited, a company for whom Mr Hall had been employed in the capacity of Sales Manager between 1989 to 1996. He explains that the helical shaped wire from which the HELIBAR product is made is the subject of a Patent owned by a Mr Ollis, and produced by Helifix under an exclusive licence, confirming that the same technology is used to make the BRUTT BAR product.

46. Mr Hall goes on to say that the licence held by Helifix Limited ceased to be exclusive in December 1997, his company bringing this about by telling Mr Ollis that they wished to obtain helically shaped wall fixings from other sources, and in other materials. He recounts Mr Ollis introducing Target to Mr Brutt, and to his attending a meeting with Mr Brutt in September 1997. There is no mention of any earlier contact between Target and Mr Brutt, but common sense would suggest that there must have been some form of communication before the meeting, but without the detail this does not, of itself, provide any assistance.

47. It was in the evening following a meeting with Mr Brutt, that Mr Hall says he, Barry Winson, a fellow Director of Target, and Scott Burns, a potential Canadian distributor, came up with the names BRUTT FAST, BRUTT BAR, BRUTT BOND and BRUTT HELICAL. I do not know why there is no corroborative evidence from these individuals, and particularly so in the case of Mr Winson from whom it should have been a simple matter to obtain. Mr Hall explains that the trade mark BRUTT BAR was chosen to reflect its use, strength and description, seemingly by it being seen as the ordinary English word BRUTE. I do not know whether the consumer would see BRUTT in the way intended by Mr Hall, but the explanation of why the word was chosen is

not so implausible as to be unbelievable, but if Mr Hall wanted to convey the image he says, why did he not use the actual English word, BRUTE?

4. Mr Brandreth reminded me of the significance of BRUTT to the applicants. He went on to submit that to claim the marks were devised by Mr Hall at a meeting that involved no member of the Brutt family, or that Mr. Gunter Brutt knew his family name was being used as a trade mark over which neither he or his family would have no control whatsoever is an inherently implausible suggestion, and is directly contradicted by Mr. Brutt's own evidence. Countering these assertions Mr Brutt says that he was aware that the Brutt marks were to be used as part of the overall venture, and was happy for that to be the case during the time that Target was acting as a consultant, agent, or distributor for Brutt Helical Kft, or one of its associated companies, but that it was never his understanding that Target was thereby the owner of those marks.

49. That BRUTT is not a word in the English language, and is the family name of the applicants leads me to the belief that, in the circumstances of this case, it is not unreasonable to infer that if Mr Hall did coin the disputed trade marks, the BRUTT element was adopted as a result of his contact with it either as a company name, or as is more likely, a family name. But this, of itself, does not amount to an act of bad faith.

50. Mr Hall says that having elected to use BRUTT BAR for one product, it was logical to use marks of a similar construction for connected products, again, not an unusual approach to the commercialisation of trade marks.

51. Mr Brandreth argued that what occurred is that Mr Hall, knowing all the facts from the Target perspective, believed that Brutt Helical sprung into existence on, or shortly before the date on which Target became involved, and plumped for a date in September 1997 that he thought was sufficiently early to ensure that it would look as if he was the originator of the name. He went on to submit that the contemporaneous documents show the BRUTT marks pre-existed under the control of the applicants, and that Target did not come to Mr Brutt telling him what they want. Target was not the party in command, but came to offer to act as agent, distributor or consultant, with Brutt Helical Kft remaining the controller of the marks. There is no evidence that BRUTT was being used as a trade mark prior to the meeting of September 1997, or indeed, the setting up of Brutt Helical Kft.

52. Mr Brutt does not dispute that this meeting in September 1997 took place, but strongly denies Mr Hall's version relating to the creation of the BRUTT trade marks. He says that as can be seen from the Memorandum of Association dated 30 June 1997 (exhibit GB1), by the time of the meeting with Mr Hall, the name Brutt Helical Kft had already been selected, a decision in which Target had no involvement. Whilst the evidence supports Mr Brutt insofar as it shows the company to have been in existence some two months prior to September 1997, this does not necessarily mean that Target did not have any involvement.

53. The Memorandum shows that the shares of Brutt Helical Kft were owned by Mr Brutt and Mr Farkas, and that Mr Farkas was to be Managing Director of the company. There is no mention of Target as would be expected if the company was set up with the sole purpose of being a vehicle for a joint venture or form of partnership, and if that was the intention, why did Target not take an allocation of the shares from the outset? The Memorandum gives that stated purpose

of the company as being to utilize better the possibilities of partnership, to join their economic means to exploit the advantages of joint activity and enforce more effectively their responsibility in economic life. The phrase is clearly a reference to Mr Brutt and Mr Farkas; again, there is no mention of Target. All of this could be interpreted as a company having been set up as the first step to finding a partner such as, but not specifically Target. However, both Mr Brutt and Mr Hall confirm that the Brutt Helical Kft was set up with the aim of enabling cooperation with Target, which would seem to suggest that there had been contact between the two parties prior to September, leaving open the possibility for Target to have participated in the incorporation of the vehicle that was to carry the joint venture, the choice of company name, and the trade marks the company was to use.

54. Even if the company was set up without any involvement from Target, there is nothing that shows that it was done so with the expressed intention of entering the UK market. The contact with Mr Ollis could suggest that that was the intention, but could just as easily mean that with Helifix Limited having the exclusive licence in the UK, Mr Brutt was looking to manufacture helically shaped goods for other markets.

55. Mr Hall asserts that until the cooperation with Target, Mr Brutt's companies had not had any connection with helically shaped wire products, or masonry repair services. He does mention that prior to Target becoming involved, Mr Brutt had been in contact with Mr Ollis, although he does not say to what end; he may not know. If Mr Brutt had been in negotiations to produce helical goods of the kind patented by Mr Ollis, it would have been a simple matter for him to say so, if not provide details, but Mr Brutt makes no mention of his prior contact with Mr Ollis, nor say that prior to the joint venture with Target he had been making preparations to manufacture helically shaped products. If, as the applicants claim, the company Brutt Helical Kft was set up before any talk of a joint venture, and with no stated involvement in helically shaped products, how did Mr Brutt/Mr Farkas arrive at a company name with such an obvious reference to goods with which they apparently have no interest.

56. In his Witness Statement of 28 September 2004, Mr Hall give a loose chronology of the events leading up to the incorporation of Brutt Helical Kft. He says that with the patent owners' agreement, Mr Brutt manufactured fixings, presumably helical, from his Hungarian owned manufacturing facilities and companies, Plasmontier Kft and Napro Kft, the first deliveries arriving at Target's premises in February/March 1998. Exhibit RSH.7 includes a number of invoices relating to the supply of wire and tube materials to these companies by Target, in the period October 1997 to February 1998. Mr Hall states that these relate to the base round wire material, being the semi-finished materials from which the helical wires were made, to be sold under the BRUTT trade mark. The invoices make no mention of BRUTT, but in any event, they post-date the formation of Brutt Helical Kft by several months so do not establish that prior to the formation of that company, Mr Brutt was supplying helical products from other manufacturing sources.

57. On close inspection there appears to be some questions raised by Mr Hall's account of events. He says that the first goods manufactured in accordance with the patent owners' helical manufacturing process were delivered to Target in February/March 1998, who subsequently labelled the goods, although interestingly he does not say that they were branded as BRUTT. Mr Hall goes on to say that the relationship between Target and Mr Brutt's Hungarian

manufacturers was so successful, a joint venture was proposed with the incorporation of the Hungarian company Brutt Helical Kft. It would seem logical that this success came after the first delivery in February/March 1998. Whilst I do not dispute that the cooperation was formalised in May 1998, how could it have been proposed that Brutt Helical Kft be incorporated when that company had already been constituted and registered some months previously? The evidence clearly shows that Target took shares in an existing company.

58. Mr Hall says that to the best of his knowledge, Brutt Helical Kft did not trade until after Target had purchased its 50% of the shares of the company. Exhibit GB2, which consists of the Order from the Heves County Court granting registration of Brutt Helical Kft, records the company as having been trading since 30 June 1997. There is no actual evidence of the company having been trading at that date, and nothing that establishes the source or accuracy of this information. It may well have been provided on an official form to register the company, or be a straightforward lift from the Memorandum of Association and transcribed by the registration authority. Whatever is the case, I do not consider that this reference proves that Brutt Helical Kft was carrying on business as of 30 June 1997.

59. The earliest evidence of any actual trading activity by Brutt Helical Kft is to be found in exhibit GB3, an invoice dated 18 September 1997, by which Brutt Helical Kft invoiced Target for 200 pieces of HELIBAR and something called a "Eur-Palette". I am unsure as to why Brutt Helical Kft were supplying Target with HELIBAR, which is a product manufactured by Helifix Limited who had already been supplying Target, and is the product that the BRUTT BAR was to replace. Taking this with the fact that until December 1997, Helifix Limited still owned an exclusive license to manufacture goods to Mr Ollis's patent, and that the first helical products to come from Mr Brutt's companies were delivered to Target in February/March 1998, I come to the view that at the date of these invoices there was no such product as BRUTT BAR.

60. Whatever is the answer to the origins of the company name, that the parties were involved in a commercial relationship prior to the filing of the applications to register the disputed trade marks means that when making the applications, the now registered proprietors would, in all probability, have been well aware of a potential rival claim to the use of the name. But simply knowing about another's use does not make adopting and registering it as your trade mark an act of bad faith, for as stated in *Harrods Ltd v Harrodian School Ltd*, [1996] R.P.C. 697, unless registered as a trade mark, no one has a monopoly in their brand name or get-up, however familiar these may be. The position is the same where, as in this case, the trade mark consists of, or is essentially a person's family name.

61. There has been use of the BRUTT trade marks, which, not surprisingly, both sides claim to be the beneficiary of. Mr Brutt says that the trade marks are those of his company, and that any use by Target has been as a distributor or agent. The registered proprietors claim the marks as their own and deny Mr Brutt's assertions regarding the nature of the commercial relationship.

62. The evidence (RSH.9) includes a letter dated 5 January 2000, from Alexander Brutt of Brutt Helical GmbH, to Target Fixings Limited. This refers, inter alia, to Target being "open to step on the German and French markets....we now agreed that Brutt Helical GmbH can work as an agent for you until some products of Brutt Helical GmbH will be registered in Germany." The final bullet point, numbered 19 and headed "Agent agreement with Brutt Helical GmbH" states

that Target should prepare as soon as possible an agent agreement for Brutt Helical GmbH to present Target in the German and French market. I take the word present to mean represent.

63. The letter goes on to refer to a Helical Pile stating that Target should prepare ...an agreement between Target and Brutt Helical KFT or GmbH or etc. for the licence and also marketing structure, going on to say that it was necessary to get some documentation of product information, how to use it, who should use it, how to market it, price structure, distributor price list and user price list with all necessary tools and test equipments.

64. Exhibit RSH.10 consists of a copy of an Agency Agreement drafted at some time in 2000, and is presumably the Agreement that bullet point 19 asks to be prepared. The Agreement is between Target Fixings Ltd as the Principal and Brutt Helical GmbH as the Agent. Under this Agreement, Brutt Helical GmbH were to promote Brutt Helical products in Germany and France, obtain the best possible price for materials sold on behalf of Target, for which they were to be paid a commission. The Agreement prohibits Brutt from offering a competing range of products. The invoicing for products was to be done by Target who would also provide technical and marketing support.

65. Taken at its face this would seem to be a reasonably clear indication of the roles within the partnership. However, the Agreement is not signed and is endorsed in three places as being a Proposal. The extracts from the letters that I have highlighted could be interpreted in a number of ways. Firstly, if Brutt Helical GmbH are holding Target's reins, why do they invite them into their home market and offer to be an agent? It may well be that until the Brutt Helical Bar was registered by Brutt Helical GmbH in Germany, the only option was to have Target as the supplier with Brutt Helical GmbH acting as the front man. It could just as easily be that as it is their home market, Brutt Helical GmbH are best placed to do this on Target's behalf, but that is not the case in respect of France. However, that Brutt Helical GmbH were to get the BRUTT BAR registered in Germany gives the impression that it is their product.

66. The reference to Target having to prepare ...an agreement between Target and Brutt Helical KFT or GmbH or etc. for the licence and also marketing structure of the Helical Pile, and going on to say that it was necessary for Target to prepare product information, instructions on use of the product, how it should be marketed and priced, etc, gives the impression that it is now Target that are holding the reins, which, of course, they are. As Mr Buehrlen confirmed, the helical of Heli Pile is a product of Target's invention, and accordingly, it would be natural that they should provide the technical back-up.

67. My attention was drawn to Exhibit RSH.7, which consists of a letter dated 2 November 1999, from Mr Hall of Target, to Alexander Brutt of Thomas GmbH, another of Gunter Brutt's companies. In this, Mr Hall says that a job in Feuchtwangen (Germany) is to go ahead and that Brutt Helical GmbH will sell the materials to PCP, who will perform the works and have a contract with the householder. Mr Hall continues saying that he needs a letter, in German, from Brutt Helical, headed to whom it may concern, and stating:

1. there is no other approved installer in Germany for BH products,
2. approved installer status takes time to obtain because supervision of several jobs is required after full training,
3. There is no German based installer who has the experience to install BH products,
4. PCP has 15 months experience in installing BH products especially in historic buildings in Prague; Tynsky Cathedral, Nostic Palace, many churches for the Archbishops office, and ordinary houses.®

68. Mr Brandreth took this letter as being from an agent to its principles®, and as saying that the customer wants to use a different contractor to ours and I need you to back me up because you are seen as being responsible for the goods. Mr Beuhrlen took the view that the letter is no more than a simple case of an Englishman requesting a German to do something that needs to be done in German. It strikes me that this is not a request, that it is an instruction; he is being told to do that.® If Mr Brandreth is correct, why is it that throughout the letter, Mr Hall refers to ABH® products, which can only mean Brutt Helical products. But if Mr Beuhrlen's version is the correct one, I have to ask why not have the letter translated, as it obviously needed to be, but then issue it in the name of Target? The answer could simply be that being German, Brutt Helical GmbH were known to the customer, whereas Target were not. In another letter dated 22 October 1999 on the same subject, Mr Hall refers to our German branch® which would not be the usual way to refer to refer to a principle®, it appears more like a reference to an agent. But given that this letter is crossing language barriers it could just be a simplification of words to avoid confusion to a non-native English speaker. Whatever is the case, none of the letters really provide any conclusive support for either party.

69. Mr Brandreth considered that if Target had obtained goods it wanted to sell from a third party, then it must follow that Target was, at all times, the controller of the marks, and would retain control of those marks. Whilst conceding that it was possible Target considered it had sufficient control of the marks because, if the marks were controlled by Brutt Helical Kft, and it had equal share in that company, it thereby, in effect, had control, Mr Brandreth argued that if that had been the case, you would expect to see that Target had considered the future use of the marks when it sold its shares. He went on to assert that the fact that Target had not made any provision for the future use of the BRUTT trade marks fits with the applicants' contention that the control of the marks belong to Brutt Helical Kft and the Brutt family. He referred me to the Agreement whereby the shareholding of Target had been sold to the other members of the Brutt family, highlighting the absence of any mention of trade mark rights, which supports the contention that control remained with Brutt Helical Kft.

70. Following Target's sale of its shareholding in Brutt Helical Kft, on 11 October 2000 Mr Hall sent a letter to Mr Alexander Brutt at Brutt Helical Kft, withdrawing permission to use Target's Intellectual Property (drawings, translated text and photographs) forthwith®, referring, in particular to a 12 page booklet, all of Target's product literature and your web site.® A further letter dated 12 February 2001 complaining about literature having been supplied by Brutt Helical GmbH to a third party, refers to discussions in November last year...you having given assurances that you would not be using any of our Property in future.® Mr Brandreth again pointed to the absence of any reference to the BRUTT trade marks, arguing that this was because Target were aware that Brutt Helical retained control and did not want to flag up the fact that it had been acting, as it were, in bad faith. He asked me to consider that if Target felt freely entitled

to control of those marks, why are they not specifically mentioned?

71. I put it to Mr Brandreth that we were not looking at the actions of an IP professional, but a businessman, to which he said that Mr Hall appeared to have sufficient awareness of the subject to assert his perceived rights in these letters. I cannot dispute that Mr Hall appears to be au fait with the term **Intellectual property**, and that it extends to copyright, but does that mean he knows exactly what intellectual property is? I do not know the answer to that, but even so, to take the lack of any mention of trade marks to mean that Target did not own the trade marks, and by registering them had acted in bad faith, is at best drawing an inference which, as I have already mentioned, I am not permitted to do, and at worst is no more than conjecture.

72. In my view this is a case where cross examination may have provided some clarity, but in the absence of this, I have to make the best that I can of what is before me.. The onus in establishing that, in making the applications to register the trade marks in suit, the now registered proprietors had acted in bad faith, rests firmly with the applicants for invalidation. As I have highlighted throughout this decision, the evidence is inconclusive and raises almost as many questions as it answers. At the end of what has been a rather difficult consideration of the facts, I do not consider that the applicants for invalidation have discharged their burden. The applications accordingly fail.

73. This leaves the ground founded under Section 60 of the Act. That section reads as follows:

60. - (1) The following provisions apply where an application for registration of a trade mark is made by a person who is an agent or representative of a person who is the proprietor of the mark in a Convention country.

(2) If the proprietor opposes the application, registration shall be refused.

(3) If the application (not being so opposed) is granted, the proprietor may-

(a) apply for a declaration of the invalidity of the registration, or

(b) apply for the rectification of the register so as to substitute his name as the proprietor of the registered trade mark.

(4) The proprietor may (notwithstanding the rights conferred by this Act in relation to a registered trade mark) by injunction restrain any use of the trade mark in the United Kingdom which is not authorised by him.

(5) Subsections (2), (3) and (4) do not apply if, or to the extent that, the agent or representative justifies his action.

(6) An application under subsection (3)(a) or (b) must be made within three years of the proprietor becoming aware of the registration; and no injunction shall be granted under subsection (4) in respect of a use in which the proprietor has acquiesced for a continuous period of three years or more.

74. Given my findings under Section 3(6), whereby I have concluded that it has not been proven that the registered proprietors were, at any time, and particularly at the time of making the applications to register the disputed trade marks, acting as agent for the applicants for invalidation, it must follow that this ground cannot be sustained and is dismissed accordingly.

COSTS

75. The applications for invalidation having failed on both grounds, I order the applicants to pay the registered proprietors the sum of , 3,250 as a contribution towards their costs. This sum 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 10th day of April 2006

**Mike Foley
for the Registrar
the Comptroller-General**