

O-109-07

TRADE MARKS ACT 1994

IN THE MATTER OF AN APPLICATION UNDER NO. 2380718
BY JEAN-MARC DELACOURT

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO 93522
BY THE NAIL AND BEAUTY ZONE LIMITED

TRADE MARKS ACT 1994

IN THE MATTER of an application
under No. 2380718 by Jean-Marc
Delacourt and opposition thereto
under No. 93522 by The Nail and
Beauty Zone Limited

Background

1. Application No 2380718 for the trade mark PURE MASSAGE has a filing date of 18 December 2004 and stands in the name of Jean-Marc Delacourt. The application seeks registration of the following services in class 44:

Massage services; massage parlours; health care relating to therapeutic massage

2. On 1 July 2005, notice of opposition was filed on behalf of The Nail and Beauty Zone Ltd. There is a single ground of opposition under section 5(4)(a) based on the use of the following mark:

PURE

which the opponent says has been used since “early to mid 2002”.

3. In its notice of opposition, the opponent states that the above mark is “merely illustrative of one form in which the Trade Mark is used but the Trade Mark is also used in a word only format”. It does not, however, provide any further information to explain what other forms or format of the claimed earlier right it might have used. If the opponent wished to rely on a mark other than that represented above, it should have provided the relevant information. Absent such information, I proceed on the basis that the objection under section 5(4) is based solely on use of the mark as represented above.

4. The applicant filed a counter-statement essentially denying the ground of opposition. Both parties filed evidence but neither party requested a hearing. In lieu of attendance at a hearing, both parties filed written submissions, however, in my opinion, what was filed by each party went further than mere submissions. This is because both sought to introduce new information or material. If a party wishes to introduce new evidence into proceedings, it should make the appropriate application. No such applications have been made and I have not taken the new information or material into account in reaching my decision. That said, I do not consider the new information or material would have made any difference to my decision. Insofar as what was filed are submissions and after a careful study of all relevant papers, I give this decision.

Opponent’s evidence

5. Four witness statements have been provided by the opponent. The first is that of Becky Woodhouse and is dated 10 December 2005.

6. Ms Woodhouse says that she is the Managing Director of the opponent company, and has held that position since 2001. She confirms that the information comes from her personal knowledge or the records of her company and that she is authorised to speak on behalf of the opponent.

7. Ms Woodhouse states that the trade mark PURE was first used by the opponent in the UK no later than May 2002 on the following services:

“Beauty salons; beauty salon services; beauty treatment services; facial beauty treatment services; beauty therapy services and beauty therapy treatment; beauty consultation services; manicuring and manicuring services; pedicure and pedicuring services; massage and massage services; body therapy services; beauty services for the care of the face, the hands, the feet, the body, the scalp, the eyes, the bust, the nails and the skin; waxing (hair removal) services; cosmetic make-up services; eyelash and eyebrow tinting services; eyebrow shaping services; aromatherapy services; head massage services; nail repair services; fitting of artificial nails, overlays and nail extensions; facial cleansing; tanning services; treatment of skin and nail disorders; relaxation services; provision of advice and information in relation to the aforesaid services.

8. Ms Woodhouse says that since August 2002 the opponent has run a beauty salon in Edinburgh where the above services are offered and which trades under the name PURE. At BW7 she exhibits a copy of a photograph of the front of the premises which shows the mark relied upon features as part of the shop’s façade. At BW8 she exhibits a map showing the location of the premises. She goes on to say that the company makes wide use of its logo which was developed no later than April 2002. Ms Woodhouse explains that one of the treatments offered to clients is known as the PURE MASSAGE and was first offered in August 2002. It accounts for not less than 10% of the company’s turnover. At BW1 and BW2 Ms Woodhouse exhibits “treatment menus”. The exhibits take the form of leaflets providing details of and price lists for the various services offered. They are undated but are said to have been first published in July 2002 and June 2004 respectively.

9. Ms Woodhouse gives the following details of sales and promotional costs relating to the mark relied on:

Year	£ Sales	£ Promotional costs
2002	40,000	4,800
2003	161,000	9,700
2004	195,000	11,200

and says that massage services account for not less than 10 per cent of the sales figures. She also confirms that the 2004 figures relate to the period prior to the filing date of the application. The promotional costs are said to relate to advertisements on Google and in Yellow Pages as well as joint marketing events, charity promotions, posters and treatment menus. At BW3 Ms Woodhouse exhibits a copy of an advertisement which appeared in The Scotsman on 14 March 2003. At BW4 is a

copy of an undated advertisement said to have first appeared in the Yellow Pages in December 2002.

10. Ms Woodhouse says that the mark has been used to promote the opponent's salon and services across the UK with a particular focus on the local Edinburgh and Scottish market. As at December 2004, the opponent had a list of 9,500 clients on its database, though it gives no details of these clients, with 62% of them originating from Edinburgh and the surrounding regions and 38% from the rest of the UK. No information is given as to where specifically these clients are based nor what is meant by the term "the surrounding regions". Ms Woodhouse claims that the opponent had achieved national recognition prior to December 2004 through a number of partnerships the company had built. These involved beauty parties and relationships with hen party and stag party suppliers. In addition the opponent has undertaken joint marketing initiatives with marketing companies, promoting nationally the opponent's salon and mark along with other brands such as Nestle and Comfort, whereby massage and other services were provided on presentation of tokens or vouchers collected from the branded goods.

11. Ms Woodhouse explains that the opponent's salon was included in a book published in October 2004 which was a guide to the top 100 beauty salons and spas in the UK. The author initially made contact with the opponent no later than February 2004. At BW5 Ms Woodhouse exhibits a copy of the relevant entry in the book and, at BW6, a copy of a preparatory email from the author dated 25 February 2004.

12. The next witness statement is that of Ivan Woodhouse and is dated 10 December 2005. Mr Woodhouse states that he is the chairman of the opponent company, a position he has held since 2001. Again he states that the statement is made from his own knowledge or the records of his company and that he authorised to speak on its behalf.

13. Much of Mr Woodhouse's witness statement merely repeats the information provided by Ms Woodhouse in her evidence and for that reason I do not intend to summarise it fully. He does say, however, that not later than September 2002 he created the opponent's websites as part of a marketing campaign though no evidence to support this claim in made. He says that the website brings in considerable business from outside Edinburgh though again he provides no evidence to support this claim.

14. Mr Woodhouse goes on to say that since no later than October 2002 he has sent the following number of email newsletters to clients throughout the UK:

Year	No.
2002	180
2003	1360
2004	2495

The figure provided for 2004 is said to relate to those newsletters sent prior to the filing of the application now opposed. No details are provided to show specifically what the emails might have contained nor from what internet address they were sent.

15. Mr Woodhouse explains that since July 2002 he has worked with a graphic designer to promote the opponent's brand and services. This has been done through poster campaigns and treatment menus both in Edinburgh and throughout the UK.

16. A witness statement of Debbie Mason dated "9.12.5" explains that she is the salon manager at PURE, a position she has held since May 2004, having been assistant salon manager there since July 2002. Ms Mason also confirms that the statement is made from her own knowledge or the records of the opponent company and that she authorised to speak on its behalf. As with Mr Woodhouse's witness statement, Ms Mason repeats some of the information provided by Ms Woodhouse and I do not intend to summarise this but will set out the remainder of her evidence as is relevant to these proceedings.

17. Ms Mason says that her job included the design of beauty therapy treatments. The treatments covered the core areas of hands, feet, face, relaxation and massage services. The treatment began with a PURE treatment intended to be a core treatment to which a number of options could be added by the client. The treatments were incorporated into the treatment menu which was published in advance of the salon opening in August 2002.

18. Ms Mason says that since the opening of the salon the treatments provided have included elements of Swedish and Aromatherapy massage, full body massage, back, neck and shoulder massage, and foot, hand and scalp massage. In June 2003, other treatments were made available.

19. Lastly, there is a witness statement of Mike Woods dated "9/12/5". Mr Woods says he is the Managing Director of Freedom Ltd, a UK wide stag and hen party organiser. Mr Woods states that he first came across the opponent's beauty salon PURE in January 2003 and, in March of that same year, entered into an agreement with the opponent to supply massage, facials, manicure and pedicure treatments to parties arranged by Freedom Ltd.

20. Mr Woods states that Freedom Ltd promotes the opponent's business through its own website and via links with other companies. He confirms that "many" hen parties have been sent by his company to the opponent's salon from all over the UK. He provides no further details to explain or support his claim.

Applicant's evidence

21. The applicant's evidence takes the form of a statutory declaration by Jean-Marc Delacourt. The date of the statutory declaration is unclear but appears to me to be either the 7th or 9th of March 2006.

22. Mr Delacourt confirms he is the applicant in these proceedings and, with Beata Aleksandrowicz, is a director of Pure Massage Limited. Mr Delacourt states that Pure Massage Ltd was incorporated and registered for V.A.T. on 17 February 2000 when the trade mark PURE MASSAGE was first used. At JMD1, he exhibits copies of details of the company from Companies House along with its certificate of registration for VAT. These exhibits bear the company name Pure Massage Ltd.

23. Mr Delacourt states that Pure Massage Ltd commenced trading offering a mobile massage service in client's homes. The company is said to have a large client base from all across the UK. He provides the names of three people he says are clients of the company. At JMD2 he exhibits a copy of a printout of incomplete pages from the company's website along with articles about the three people he says are customers of the company. He goes on to explain that the company opened its first store in May 2002. Since that time, he says, the company has been the subject of many favourable reviews in various beauty publications and in the national press.

24. At JMD3 he provides copies of various articles said to date from August 2002 to June 2004. Not all of the copies bear printed dates or give an indication of the name of the publications concerned and some are incomplete copies. The earliest printed date is March 2003 in what I take to be SW magazine although there is a copy of an article which appears to be from "The Resident" magazine on which has been annotated "Aug 2002". In addition to these articles, Mr Delacourt indicates that Pure Massage Ltd has developed its own promotional material and at JMD4 exhibits a number of these. The exhibit includes promotional material, price lists and explanatory leaflets which, with the exception of one promotional birthday card bearing the legend Pure Massage Ltd and the year 2002, are undated.

25. At JMD5, Mr Delacourt exhibits printouts from various websites which he says provide links to the website of Pure Massage Ltd. As these all appear to have been printed on 7 March 2006, therefore after the relevant date in these proceedings, and do not refer to any anterior date, I do not intend to summarise them.

26. Mr Delacourt provides turnover figures as follows:

Period	Turnover
17.2.2000-1.5.2002	£5,972
May 2002-Feb 2003	£102,852
March 2003-Feb 2004	£180,351
March 2004-Feb 2005	£246,636

In relation to the latest figure given, no explanation is provided to show how much of this figure relates to the period prior to the application date.

27. At JMD6 Mr Delacourt exhibits copies of VAT returns covering the period 17 February 2000 to 30 November 2002 and correspondence from Her Majesty's Customs and Excise dated 29 July 2002. All make reference to Pure Massage Ltd.

28. Mr Delacourt says that Pure Massage Ltd is promoted via the press and by word of mouth in addition to internet advertising via its website. Advertising expenditure for the trade mark PURE MASSAGE is given as follows:

Period	Expenditure
To 28 February 2003	£16,796
Year ending February 2004	£16,900
Year ending February 2005	£14,386

Again, it is not made clear how much of this latter figure pre-dates the application date.

Opponent's evidence in reply

29. This takes the form of a second witness statement of Becky Woodhouse and is dated 13 June 2006. Some of what has been submitted by Ms Woodhouse is commentary which I do not intend to summarise but she also raises specific challenges to various parts of Mr Delacourt's evidence. I intend to set these challenges out in some detail.

30. Ms Woodhouse states that she is a Chartered Accountant. She states that Mr Delacourt's claim that Pure Massage Ltd registered for VAT on 17 February 2002 is incorrect and the evidence shows that it was in fact registered on 20 February 2002 with the date given by Mr Delacourt being the effective date for accounting. Ms Woodhouse compares the turnover figures provided for a period ending 1 May 2002 to the figures provided on the VAT return for the quarter ending 31 May 2002 and says that as these figures are identical, it suggests that the company was not trading in May 2002. This, she says, contradicts Mr Delacourt's claim that the company opened its first store in May 2002, a claim which, in any event, has not been supported by any independent evidence. Ms Woodhouse states that no evidence has been provided to support Mr Delacourt's claim that the store opened in May 2002.

31. Ms Woodhouse challenges Mr Delacourt's claim that the mark PURE MASSAGE was used prior to 7 November 2003 which she says is the earliest date shown on any of the articles which he exhibited. Ms Woodhouse acknowledges Mr Delacourt's claim that the other articles exhibited predate this date but asks that these be discounted as there is no actual evidence of the publication date. Ms Woodhouse goes on to state that some of the articles exhibited by Mr Delacourt bear no indication of the publication(s) in which they appeared nor their area of circulation. She states that some of the articles refer to facial treatments rather than massage services and should be discounted. In relation to an article published in "The Resident" magazine and annotated "Aug 2002" she exhibits, at BW10, a printout from the website of Metropolis Publishing which indicates that The Resident was started "10 years ago" and is a "magazine for Kensington and Chelsea". The printout is dated 13 June 2006.

32. Ms Woodhouse points out that Mr Delacourt provides no specific details of the number of clients Pure Massage Ltd had nor of the geographical location of those clients. She submits that it would be physically impossible for a single massage practitioner to provide any significant UK-wide service and says that Mr Delacourt's reported turnover to May 2002 equates to "barely two massages per week. She asserts this provides no evidence of a trading company. She submits that in any event the figures provided do not prove that the turnover was in respect of the trade mark PURE MASSAGE.

33. Ms Woodhouse also challenges Mr Delacourt's evidence relating to three named customers of Pure Massage Ltd on the basis that none of the evidence provided in any way connects those individuals to the company. In addition, no information is given as to when and how often they may have been clients. She notes that this exhibit shows that of the three, one is said to live in London and another had been born there.

At BW9 Ms Woodhouse exhibits a printout taken from a website entry to show that the third named individual also lives in London.

34. Ms Woodhouse asks that the applicant's evidence relating to Pure Massage Ltd's website also be discounted as it does not establish that the website was active prior to the application date. At BW11 Ms Woodhouse supports her claim by exhibiting printouts of Registry Data for the website referred to by Mr Delacourt and obtained from the relevant domain name registrar which shows a creation date of the domain of 15 January 2005. There is, she says, no evidence to show whether the Internet links referred to by Mr Delacourt were active prior to the date of his application. As to the advertising figures provided by Mr Delacourt, Ms Woodhouse submits that whilst these are said to relate to Pure Massage Ltd, there is no evidence to show that it was generated under the trade mark PURE MASSAGE.

35. In summary, Ms Woodhouse acknowledges use of Pure Massage Ltd's company name but denies that any of the evidence filed by the applicant shows there to have been any use of the trade mark as applied for which establishes the applicant has any right prior to the application date.

36. That completes my review of the evidence.

Decision

37. The single grounds of opposition is brought under the provisions of section 5(4)(a) of the Act. This 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,”

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

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

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

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

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

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

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

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

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

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

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

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

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

39. The first matter to be determined is the material date. It is well established that the material date for passing-off is the date of the behaviour complained of (see *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 and *Inter Lotto (UK) Ltd v Camelot Group PLC* [2004] RPC 8 and 9). Section 5(4)(a) is derived

from article 4(4)(b) of First Council Directive 89/104 of 21 December 1998 which states:

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

40. Thus, the material date cannot be a date later than the date of the application for registration which was 18 December 2004. Mr Delacourt claims that the mark in suit was first used on 17 February 2000, i.e. before the date of the application. Mr Delacourt’s evidence does not show, or indeed claim, there to have been any prior use by him of the mark. The claims to prior use of the mark and the evidence filed refer to use of the mark by Pure Massage Ltd. Although Mr Delacourt is a co-director of Pure Massage Ltd, it is a company having its own separate legal existence. I have no explanation or evidence to show why the application has been made in the name of Mr Delacourt when use of the mark is claimed to have been made by Pure Massage Ltd but any goodwill accrued by a company is an asset of that company. The basic fact is that the application stands in the name of Mr Delacourt and opposition has been filed against the application as it stands. The behaviour complained of must relate to Mr Delacourt himself. There is no evidence before me to show that Mr Delacourt, as the applicant, has used the mark in suit prior to the date of the application for registration. Absent such evidence, I take the material date in these proceedings to be the filing date of the application, i.e. 18 December 2004.

41. In *Reef Trade Mark*, [2002] RPC 19, Pumfrey J observed:

“There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent’s reputation extends to the goods comprised in the applicant’s specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd’s Application (OVAX)* (1946) 63 RPC 97 as qualified by *BALI Trade Mark* [1969] RPC 472. Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

42. Professor Annand, sitting as the Appointed Person in *Loaded Trade Mark* BL 0/191/02 determined that the *Reef* guidance should not be read in too prescriptive a manner and that regard must be had to the totality of the evidence.

43. In its evidence, the opponent does not identify a particular date on which its mark was first used, however, by the witness statement of Ms Woodhouse dated 10 December 2005, and supported by three other witness statements it claims that the mark was developed not later than April 2002, was first used no later than May 2002 and has been used prominently since then via both publicity material available since July 2002 and the opponent's salon which was opened in August 2002. Sales under the mark are said to range from £40,000 in 2002, increasing to £195,000 in 2004 (to the date of the application in suit), with not less than 10% of these figures relating to the provision of massage services and with promotional costs under the mark ranging from £4000 to £11,200 for the same periods. The opponent has provided copies of advertising features from 14 March 2003 (BW3), phone book entries from December 2002 (BW4) and a guidebook published in October 2004 (BW5). All show use of the mark relied on and in relation to the opponent and its claimed range of services including massage services.


44. National recognition of the opponent's mark is claimed via a UK wide customer base, the entry in the 2004 guidebook to the top 100 UK beauty salons and spas, its website presence and via national marketing campaigns. 38% of the opponent's client base (as at December 2004) are said to be from across the UK in locations outside of Edinburgh and surrounding areas. Whilst the evidence is somewhat short in detail in this regard, the applicant has not sought to challenge or cast doubt on any of the opponent's claims. I also take into account the writing of Christopher Wadlow in "The Law of Passing-Off" (Third edition) where he says, at 9-93:

"it should be borne in mind that user which has been relatively localised or otherwise limited has still been found to justify an injunction covering an area much wider than that in which the claimant has actually traded".

In addition, I bear in mind that the registration of a trade mark is a national registration.

45. In all the circumstances, I find that the opponent enjoys goodwill in relation to the services it provides including massage services under the mark it relies upon. The applicant has not established an earlier goodwill to act as a defence.

46. I therefore go on to consider whether there is misrepresentation. For ease of reference I set out below the parties' respective marks:

Applicant's mark	Opponent's mark
PURE MASSAGE	
Massage services; massage parlours; health care relating to therapeutic massage	<i>Beauty salons; beauty salon services; beauty treatment services; facial beauty treatment services; beauty therapy services and beauty therapy treatment; beauty consultation services; manicuring and manicuring services; pedicure and pedicuring services; massage and</i>

	<p><i>massage services; body therapy services; beauty services for the care of the face, the hands, the feet, the body, the scalp, the eyes, the bust, the nails and the skin; waxing (hair removal) services; cosmetic make-up services; eyelash and eyebrow tinting services; eyebrow shaping services; aromatherapy services; head massage services; nail repair services; fitting of artificial nails, overlays and nail extensions; facial cleansing; tanning services; treatment of skin and nail disorders; relaxation services; provision of advice and information in relation to the aforesaid services.</i></p>
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47. The evidence shows the opponent to have provided a number of varied massage services. There is therefore commonality with the services for which registration is sought. In respect of these services, the word MASSAGE appearing in the applicant's mark is clearly descriptive. Each of the respective marks begin with the same three upper case letters. Whereas the fourth letter of the applicant's mark is a standard letter E, making the word PURE, the fourth character of the opponent's mark consists merely of three horizontal lines of equal length. Strictly speaking, these lines do not constitute a letter E because the vertical down stroke is missing, however I consider that the average consumer is well used to such graphic idiosyncrasies, would "fill in the gaps" in the path between eye and brain, would recognise the character as a stylised letter E and would pronounce the mark as the word PURE.

48. Whilst there are some visual and aural differences between the respective marks the differences do not outweigh the similarities. Conceptually, both marks suggest services which are unadulterated or wholesome.

49. As the applicant in these proceedings, Mr Delacourt has made no claim to have used the mark himself. For reasons set out above, any dispute about the use of the mark PURE MASSAGE by Pure Massage Ltd, do not form part of these proceedings. In the context of these proceedings, the lack of use of the mark by the applicant suggests that the opponent has carried on business untroubled by him, however were he to start using the mark it would, in my view, amount to a misrepresentation with obvious damage to the opponent's established business.

50. In all the circumstances, I find that the opposition based on Section 5(4)(a) of the Act succeeds, The application for registration is refused.

Costs

51. The opponent having succeeded is entitled to an award of costs in its favour. Subsequent to the filing of its notice of opposition, the opponent has not been professionally represented in these proceedings and is, in effect, in the position of a litigant in person. It is appropriate to reflect this in the award of costs on the basis of Simon Thorley QC's observations in *Adrenalin Trade Mark O/040/02* where he said:

“It is correct to point out that the Registrar’s practice on costs does not specifically relate to litigants in person but in my judgement it could not be that a litigant in person before the Trade Mark Registry could be placed in any more favourable position than a litigant in person before the High Court as governed by the CPR. The correct approach to making an award of costs in the case of a litigant in person is considered in CPR Part 48.6.”

52. Part 48.6 of the Civil Procedure Rules referred to in the above passage provides as follows:

“48.6 – (1) This rule applies where the court orders (whether by summary assessment or detailed assessment) that costs of a litigant in person are to be paid by any other person.

(2) The costs allowed under this Rule must not exceed, except in the case of a disbursement, two-thirds of the amount which would have been allowed if the litigant in person had been represented by a legal representative.”

53. I therefore award costs on the following basis:

Filing Form TM7	£300
Statutory Fee	£200
Considering statement of case in reply	£200
Filing of evidence	£400
Considering applicant’s evidence	£200
Written submissions	£200
Total	£1500

54. Bearing in mind the two thirds rule set out above, I order Mr Delacourt to pay The Nail and Beauty Zone Ltd the sum of £1000. 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 20th day of April 2007

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