

TRADE MARKS ACT 1994

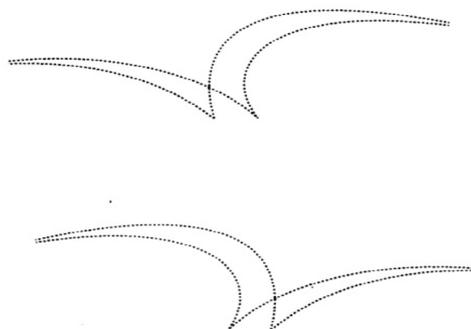
**IN THE MATTER OF Application No 2070715
by Vivat Holdings Limited to register a trade mark
in Class 25**

**AND IN THE MATTER OF Opposition thereto under
No 49694 by Levi Strauss & Co.**

Background

1. On the 8 May 1996, Vivat Holdings Limited made an application to register a series of two trade marks, as shown below, in Class 25 in respect of:

Articles of clothing; shirts, jumpers, skirts, blouses, coats, jackets, windcheaters, tracksuits, slacks, trousers, shorts, overalls, dungarees, sweaters, T-shirts, sweatshirts, blousons, jeans, belts and braces, ties scarves and gloves, hats, caps, berets, headband, hoods; articles of footwear; shoes, boots, sandals, slippers, trainers, sports shoes, hosiery, tights, socks and stockings.



2. On 27 April 1999, Levi Strauss & Co of California, USA., filed Notice of Opposition. The grounds of opposition are:

- i) under Section 5(2)(b) of the Trade Marks Act 1994 based upon the opponent's earlier UK trade mark registrations numbered 1012667, 1075350 and 1494113, which the opponent contends are similar marks to the marks in suit and which are registered for identical and similar goods to those listed in the application, with the result that there is a likelihood of confusion on the part of the public,

and

- ii) under Section 5(4)(a) of the Act because the opponent and its UK subsidiary, Levi Strauss (UK) Limited, have used the registered marks in the UK and built up a substantial goodwill and reputation thereunder, with the result that the use of the applicant's marks in respect of the goods listed in the application is liable to be prevented by the law of passing off.

3. The applicant denies the grounds of opposition.

4. Both sides seek an award of costs.

5. The matter came to be heard on 24 January 2002 when the applicant was represented by Mr C Morcom QC, instructed by Alexander Ramage Associates, and the opponent was represented by Mr R Wyand QC, instructed by Lloyd, Wise, Tregear & Co .

Section 5(2)(b)

The Law

6. Section 5(2)(b) is as follows:

"5.-(2) A trade mark shall not be registered if because -

(a)

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

7. I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v. Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG* [2000] E.T.M.R. 723.

8. It is clear from these cases that:-

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v. Puma AG*, paragraph 22;

- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;
- (g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;
- (h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v. Adidas AG*, paragraph 41;
- (i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

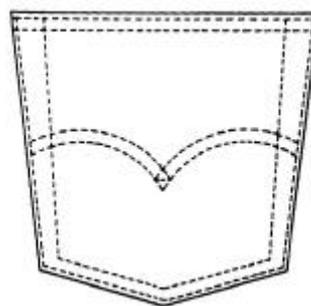
Opponent's Arguments and Evidence

8. The opponent has the following earlier trade marks registered in the UK:

Nos 1012667 & 1075350



No 1494113



9. Registration No 1012667 is limited to the colour orange. Registrations 1075350 and 1494113 are defined expressly as stitching applied to the external patch pockets of the goods. Registrations 1012667 and 1075350 are registered for “jeans being articles of clothing”. Registration No 1494113 covers “jeans and trousers included in Class 25”. The opponent argues, and indeed it is common ground, that registration Nos 1012667 and 1075350 cover identical goods to “jeans” in the applicant’s specification, and registration No 1494113 covers identical goods to “jeans”, “trousers” and “slacks”, in the applicant’s specification.

10. The opponent contends that the earlier trade marks have acquired a highly distinctive character in the UK through use and that this increases the likelihood of confusion with the later mark. In support of this claim the opponent filed evidence in the form of a statutory declaration by Colette Bonner, who is the Trade Mark Manager of Levi Strauss (UK) Ltd. Ms Bonner’s evidence indicates that the trade mark the subject of the opponent’s UK registrations, was first used in the UK in 1959. The device is applied to the back pocket of jeans and trousers in the form of a stitching pattern.

11. Substantial quantities of jeans and trousers bearing the mark (which the opponent calls the “arcuate stitching marks”) have been sold and promoted in the UK. Between 1993 and 1995 (the last full year before the relevant date in these proceedings), Levi Strauss (UK) Limited sold over 5 million garments bearing the arcuate stitching mark, and spent over £8m on promotion. The opponent further points out that the outline of its stitching mark forms the bottom line of the Levi’s logo, under which all its products are sold.

12. The opponent points out that it has policed the use of similar stitching device marks in the UK. It provides (as exhibits to a statutory declaration of Vincent De Sontis, who is a legal assistant employed by the opponent) examples of three marks it has successfully persuaded other parties to abandon.

13. The opponent argues that the nature of the goods is such that the average consumer will not spend a long time investigating the product on its source.

14. The opponent points out that the applicant's use of the marks applied for is, like its own, as stitching devices applied to the back pockets of jeans and trousers.

15. The opponent accepts that the respective marks are not identical, however, when encountered separately, the marks are likely to be confused because they create a very similar overall impression. This concern is not limited to confusion that may occur at the point of sale but extends to subsequent use of the goods, where other indications of source may be obscured and third parties will mistakenly believe that the applicant's jeans and trousers are those of the opponent, or that the applicant is economically connected to the opponent.

16. The opponent supports its claim that there is a likelihood of confusion between the trade marks of the parties with the results of a public survey conducted on its behalf by a company called Millward Brown (UK) Ltd. The results of the survey are introduced as evidence under a statutory declaration of David Chartney of Millward Brown (UK) Ltd, who is a Group Account Director with 10 years experience of market research.

17. Mr Chartney explains that the survey of 1008 persons over the age of 15 was carried out in January 2000 as part of a weekly face-to-face "omnibus" survey. The respondents were chosen to provide a representative sample of the UK population.

18. Respondents were shown a colour photograph of a pair of the applicant's jeans folded so that the back pocket on one side is visible revealing one of the applicant's stitch marks as applied for. A strip of orange tape was used to cover the waist band label carrying the applicant's LEE COOPER word trade mark, and a further strip of orange tape was applied to the left hand side of the back pocket to disguise the presence or absence of a protruding "tab" which is characteristic of the opponent's jeans.

19. The respondents were asked "*what is your first thought when you look at this picture?*" Mr Chartney records that 30% of those asked this question mentioned Levi's in their response, whereas only 1% mentioned the applicant's brand LEE COOPER. 7% mentioned other specific brands. Those that did not make any specific brand association as a result of question 1 were asked a further question "*what particular brand of jeans, if any, does this rear panel make you think of?*" 12% mentioned Levi's in response to this question, and 15% other specific brands. A further 4% mentioned Levi's when shown a list of jean manufacturers and specifically asked to attribute the jeans shown in the photograph to one of the brands listed.

20. Mr Wyand did not seek to persuade me to attach any great weight to the responses to the second question or third questions, but he argued that the unprompted response to the first question in the survey strongly supported the opponent's case.

21. The opponent accepts that there is no evidence of confusion despite substantial use of the applicant's marks, but it points out that all such use has been accompanied by the use of other trade marks, principally the name LEE COOPER, which forms no part of the marks in the

application. Further, the opponent points out that the sorts of confusion it is concerned about may not come to light because customers will not complain unless they are unhappy about the goods, and third parties observing the applicant's mark in use will have no reason to make their view known, even if they are confused.

Applicant's Arguments and Evidence

22. The applicant says that it adopted the stitch marks in the application in 1994 as a result of a perceived market driven need for simple streamlined device marks. The marks was adopted as part of an updating of the applicant's image. The stitching marks were to be applied to the applicant's jeans and other articles of clothing.

23. Exhibit DW7 to the statutory declaration of Duncan Wilson (the Managing Director of Lee Cooper International Ltd, a subsidiary of the applicant) consists of a copy of an article entitled "*Signed with a Thread*" that appeared in the publication Sportswear International in the Summer of 1994. The applicant relies upon this article to support its claims that stitching trade marks are common in the jeans market. The article contains photographs of some 16 different brands of jeans all bearing decorative stitching applied to the back pockets. Most of the stitching marks in question are very simple designs connecting the left side of the pocket with the right.

24. The applicant relies upon Mr Wilson's evidence that when creating the opposed marks, the applicant endeavoured to achieve trade marks that would be perceived as being distinctive relative to the other pocket stitch marks in the market, including the mark of the opponent.

25. The applicant contends that the overall effect created by the marks at issue is quite different to that created by the opponent's mark. In particular the opponent's marks is said to be "*symmetrical and comparatively shallow, forming a single point at the base*", whereas the marks sought to be registered are, in contrast, "*asymmetrical and the curves are deeper and more pronounced, forming two distinct points at the base.*"

26. The applicant further relies upon the evidence of Messrs Wilson and Farrington (the latter being the applicant's Company Secretary) which shows that the applicant has been selling jeans bearing the marks applied for since August 1994 without any evidence of confusion. Between 1994 and 1999 well over one million pairs of jeans bearing the marks were sold in the UK and Ireland, as a result of substantial promotion of the goods. The opponent has not previously objected to this use.

27. The applicant argues that purchasers of jeans are generally fashion conscious and therefore careful and observant customers.

28. The applicant criticises the opponent's survey evidence on a number of grounds, the main ones of which are:-

- a) The survey was one of six commissioned by the opponent and conducted at the same time, which may have influenced the result;
- b) The “photo prompt” used for question 1 included “an additional obscuring strip” along the left hand side of the pocket which, it is contended, would have had the effect of suggesting that the opponent’s red tab trade mark was underneath;
- c) The questions encourage the respondents to speculate about matters that they might not otherwise have bothered about.

29. The applicant accepts that the opponent has a large share of the UK jeans market but because of the prominent and concurrent use of the LEVI’S name and red tab device, denies that the arcuate stitching device mark has acquired a highly distinctive character through use, being only a third level indication of source.

Decision

The Survey

30. I do not intend to attach any weight to the opponent’s survey evidence. I consider that the second and third questions put to respondents did, as Mr Morcom submitted, lead those people to engage in artificial speculation contrary to the guidance on survey evidence given by Whitford J in Imperial Group Plc v Philip Morris Ltd [1984] RPC 293.

31. I believe that there is also considerable force in Mr Morcom’s criticism of the use of an obscuring strip down the left hand side of the pocket of the applicant’s jeans shown in the “photo prompt”. This was bound to have the effect of suggesting that there was a tab beneath it rather than the neutral objective of obscuring “whether or not” such a tab was present, as suggested by the opponent’s witness. The fact that the obscuring strip over the waist band label left the edge of that label visible would only have added to the suggestion that there was also something under the other obscuring strip down the left hand side of the jean pocket. In this connection, I note that Collette Bonner exhibits evidence she gave in earlier proceedings (exhibit CB3, paragraph 7) to the effect that the external tab of cloth sewn to the seam of the pocket of the opponent’s jeans has become the most famous externally visible identifying labels for the opponent’s jeans. The suggestion of the presence of such a tab on the jeans shown in the photo prompt is therefore a potentially powerful indicator as to the provenance of the jeans.

32. There is a further serious problem with the methodology of the survey. The apparent absence of some pages from the survey results exhibited to Mr Chantrey’s declaration prompted the applicant’s trade mark attorneys to write to the opponent’s trade mark attorneys on 18 October 2000. In their response, dated 24 October 2000, the opponent’s

representatives stated that the missing pages formed no part of the survey in evidence. They explained that the opponent had instructed Millward Brown to conduct a number of simultaneous surveys, and that as many as six different sets of questions were asked of respondents. No indication was given then or subsequently as to the ordering of the sets of questions asked of respondents or of the nature of the questions in the other five simultaneous surveys.

33. Given that all six surveys were commissioned by the opponent, it is reasonable to infer that at least some of the other five surveys would, like the survey in question, have included questions relating to the opponent and/or its goods. Mr Chantrey gives evidence that “*the first question (in the survey in evidence) was designed so that it deliberately did not point to the idea that there was a brand in the photo prompt*”. The laudable object of this approach would plainly be undermined if the respondent had just answered questions in several other surveys about the Levi’s brand.

34. The potential for simultaneous surveys conducted on behalf of the opponent to influence the answers given to the questions in all bar the first survey should have been apparent to the opponent and its advisors. In the interests of fairness the opponent should have disclosed that other surveys on its behalf had been included in the omnibus survey described in Mr Chantrey’s evidence. There is nothing to suggest that the opponent set about concealing this information from the applicant or this tribunal: the missing page numbers from the survey document are a sign that the omission was not intended to hide anything. And the opponent’s advisors promptly offered the missing information when questioned about the missing pages by the applicant’s advisors. Nevertheless, parties to proceedings are under a duty to ensure that any survey evidence they put forward has been obtained in a fair manner. This requires parties to disclose any circumstantial facts that may have had a significant bearing on the result of the survey. The opponent’s decision to conduct the survey in evidence alongside five other simultaneous surveys clearly falls into this category.

35. Mr Wyand submitted that it was for the applicant to seek to cross examine the opponent’s witnesses in order to bring out points such as these. I do not accept that. Cross examination is primarily intended to test what has been said, not simply to establish what has been left unsaid.

36. Even without these concerns, I do not consider the survey evidence to be of much assistance. Without direct evidence from at least some of the 298 respondents that are listed under the heading “*any mention Levi’s*” in response to question one, it is impossible to know whether the picture shown to the respondents prompted any more than the sort of “mere bringing to mind” type of association rejected by the ECJ in the Sabel and Marca Mode cases.

Enhanced Distinctiveness of the Earlier Trade Mark?

37. There is no dispute that the opponent has used its arcuate stitch mark in respect of a

substantial trade in jeans in the UK over a lengthy period. Mr Morcom reminded me that use does not necessarily equate with distinctiveness. Mr Wyand pointed out that the stitching mark is not used in close proximity to the word mark LEVI'S, which is true (although the same cannot be said of the opponent's tab mark).

38. I am satisfied that the opponent's use of its arcuate stitching mark is material - that is that it has been used as a trade mark. Further the article from Sportswear International that the applicant relies upon to show that stitch marks were commonly used on jeans by 1994 (in exhibit DW7 to Mr Wilson's declaration) identifies the Levi Strauss "Double Arcuate" stitch mark as the mark which started the trend and resulted in decorative stitching becoming "*the unique signature of a jeans brand.*" This article in the applicant's evidence rather supports the opponent's case in this respect.

39. I believe that the evidence is sufficient for me to find that the opponent's arcuate trade mark is distinctive to a significant proportion of the relevant public for jeans, albeit as a secondary means of identifying the opponent's goods. I have taken this into account in reaching the findings that follow.

Normal and Fair Use

40. As far as jeans and casual trousers are concerned, I should regard the paradigm use of the marks applied for as a stitching device applied to the back pockets of such garments, as per the evidence of the applicant's use since 1994.

41. The two marks in the series applied for are mirror images of each other which are applied to the right and left pockets of the applicant's jeans and trousers. Accordingly, Hereinafter, I do not need to distinguish between the applicant's marks. Hereinafter I will simply refer to the applicant's mark.

Average Consumer

42. There is little evidence to guide me on this point, but I believe that the average consumer for clothing is observant and circumspect; and the average consumer of jeans is unlikely to be any less careful than the average consumer for other types of clothing because jeans are mainly regarded as fashion items today, and the market for such goods tends to be highly conscious of brands.

Comparison of Marks

43. This is very much a matter of first impression. There is no doubt that the respective marks share similarities: they both comprise of two lines of stitching and they share the same basic flat "V" shape, but there are also differences. The applicant's mark is asymmetrical with one side of the "V" higher than the other (the opponent describes it as distorted); the

applicant's stitching lines join together at the ends of the device where it meets the seam of the pocket, and the lines of stitching overlap to form two points at the bottom of the device compared to the single point of the opponent's mark. In the end descriptions of this nature are of limited value. I find that the overall impression of the respective marks is similar - but there are differences which are apparent at first impression.

Other Stitch Marks in the Market

44. The opponent is correct in stating that the applicant has not demonstrated the number of other stitch marks in use in the UK market at the relevant date, or the extent of the use of these marks. However, Mr Wilson gives evidence to the effect that there exists an industry-wide practice of using stitch marks on pockets of jeans. The 1994 article from Sportswear International entitled "*Signed by a Thread*" supports this claim. The opponent filed no evidence in reply to this evidence. I am therefore prepared to accept the claim that the use of stitch marks was common at the relevant date in the jeans market.

Likelihood of Confusion

45. I will first consider the likelihood of confusion in respect of jeans and trousers (and slacks), which are identical to the goods for which the earlier mark is protected.

46. The marks of the parties are not so similar that they could be confused when seen side by side. The opponent's case turns mainly on the issue of imperfect recollection.

47. The opponent's mark is very simple and of low inherent distinctive character, particularly when applied to jeans and similar casual trousers as decorative stitching. The mark has acquired an enhanced distinctive character in relation to jeans, but this is at least partly offset, in my view, by the fact that the average consumer of such fashion goods is likely to be brand conscious and therefore likely to pay a relatively high degree of attention to the brand when selecting such goods. This reduces the risk of confusion through imperfect recollection of the earlier mark.

48. Taking all the relevant factors into account, I have come to the conclusion that the visual similarity between the marks is insufficient to give rise to a likelihood of confusion on behalf of the average consumer, despite the enhanced distinctive character of the earlier mark.

49. The marks have no aural or conceptual identities which present further points for consideration.

50. I accept that use of the later mark may bring the earlier mark to mind but I believe that the differences between the marks are sufficiently apparent that this would not give rise to consequences beyond a likelihood of association in the sense rejected by the ECJ in the Sabel and Marca Mode cases.

51. In reaching this conclusion I have not needed to place weight on the applicant's evidence of its substantial use of its mark in the UK since 1994 in relation to jeans, without confusion becoming apparent. There may, as the opponent suggests, be legitimate reasons why such confusion has not come to light. The absence of any evidence of confusion is, however, consistent with my own findings.

52. The opponent's case in respect of the remainder of the goods in the application cannot be any stronger than its case based upon jeans and trousers, where the respective goods are identical. Accordingly, the Section 5(2)(b) objection fails entirely.

Section 5(4)(a)

53. Section 5(4)(a) is as follows:

"5.-(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, or

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark."

54. Mr Wyand could not say that he had any stronger case under Section 5(4)(a) than he had under Section 5(2)(b). In at least one respect his case is weaker. Confusion as to trade source will suffice for Section 5(2) but misrepresentation is an essential component in the tort of passing off (along with goodwill and damage, or at least the likelihood thereof).

55. Even if it were likely, the sort of confusion that could occur from a third party casually mistaking the applicant's jeans for the opponent's jeans in use is unlikely to amount to a misrepresentation causing damage unless it is replicated in the process of purchasing the applicant's goods. BP Amoco Plc v John Kelly Ltd [2002] FSR 5. However, as I have found that neither form of confusion is likely, nothing turns on this point.

56. The objection under Section 5(4)(a) also fails because use of the applicant's mark at the material date did not constitute a misrepresentation.

Costs

57. The opposition having failed the applicant is entitled to an award of costs.

58. I indicated at the hearing that I wished to review the correspondence between the parties about the survey evidence before receiving submissions on costs. I have now done that and my conclusions are set out above.

59. I will give the parties a period of 21 days from the date of this decision to make any submissions they wish with regard to costs.

60. I will then issue a further decision covering the award of costs.

Dated this 03 Day of April 2002

**Allan James
For the Registrar**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No 2070715
by Vivat Holdings Limited to register a series of two
trade marks in Class 25**

**AND IN THE MATTER OF Opposition thereto
under No 49694 by Levi Strauss & Co.**

Introduction

1. On 3 April 2002 I issued a decision on behalf of the Registrar of Trade Marks rejecting an opposition by Levi Strauss & Co to the registration of a series of two trade marks in Class 25 in the name of Vivat Holdings Limited.
2. At paragraphs 32-34 of my decision, I identified what I considered to be a serious defect in the methodology used to collect public survey evidence on behalf of the opponent. The defect related to the fact that the survey supposed to objectively test respondents reaction to the applicant's trade mark was conducted at the same time as five other surveys on behalf of the opponent, which was liable to have influenced respondents answers in the survey in evidence. Whilst accepting that the opponent had not actively attempted to conceal the 'omnibus' nature of its survey from the applicant or this tribunal, I was critical of the opponent's failure to openly disclose that its survey was part of an 'omnibus' survey.
3. At the conclusion of my decision on the substance of the opposition, I invited the parties to make submissions on the question of costs.

The Applicant's Submissions

4. The applicant's trade mark attorneys, Alexander Ramage Associates, made written submissions on 19 April 2002 to the effect that:
 - i) The applicant was put to considerable inconvenience and cost in going through the opponent's survey evidence in detail, including a case conference with the applicant's counsel specifically on the survey evidence and the correspondence about it between the parties;
 - ii) An extra two hours of counsel's time was taken preparing the skeleton argument required for the hearing as a result of the opponent's survey evidence;
 - iii) No weight was given to the survey evidence in my decision;
 - iv) An award of costs off the Registrar's usual scale is justified in the circumstances.

The Opponent's Submissions

5. The opponent's trade mark attorneys, Lloyd Wise Tregear & Co, made written submissions on 23 April 2002 to the effect that:

- i) The opponent's evidence was not unduly voluminous;
- ii) Survey evidence is often subject to criticism and my decision not to attach any weight to it should not be reflected in an exceptional award of costs against the opponent;
- iii) There were no other exceptional circumstances which justified an award of costs off the usual scale.

Decision

6. The Registrar's practice on costs is set out in Tribunal Practice Notice TPN2/2000. Costs continue to be awarded off a scale, although the Registrar has some discretion within the scale and a wide discretion to award costs on a different basis: Rizla Limited's Application [1993] RPC 365. Additional costs may be awarded in a variety of circumstances. One such circumstance is where a party has acted unreasonably: Re: Anheuser-Busch Inc. [2001] All ER (D) 08 (Dec).

7. I do not consider that the opponent acted unreasonably in submitting public survey evidence to support its grounds of opposition. It was perfectly proper for the opponent to do so. The mere fact that I did not, in the end, attach any weight to this evidence does not justify a departure from the usual scale.

8. As I indicated in my earlier decision, I am more concerned about the opponent's failure to disclose that its survey evidence was collected as part of an 'omnibus' survey which featured five other surveys on behalf of the opponent. This approach had the obvious potential to influence respondents answers in the survey in evidence in the opponent's favour. In my view it was unreasonable for the opponent to fail to disclose this aspect of the method through which its survey evidence was collected.

9. If I had come to the view that the opponent had attempted to conceal the method that its survey evidence was collected I would have been inclined to award the opponent at least its full actual costs in the proceedings. As it is I intend to stick with the scale but to award the applicant an additional sum to contribute towards the cost of the enquiries they were required to undertake to establish that the opponent's survey was one of a number conducted at the same time, and the cost of preparing and elaborating upon this point for, and at, the hearing.

10. I doubt whether it would be practical for the applicant to isolate the actual cost of this activity from the other costs in the case, and in any event, I think the costs involved in doing so are likely to be disproportionate to the sum involved. I will therefore award the applicant an additional sum of £500 towards their costs. I would otherwise have awarded the applicant the sum of £1200. I therefore order the opponent to pay the applicant the sum of £1700 towards the cost of the proceedings. 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 24 Day of June 2002

**Allan James
For the Registrar**