

O-205-11

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION

No. 2484424

BY ANTHONY STANTON-PRECIOUS AND MARTIN ZILLWOOD-HUNT

T/A HOGS BACK BREWERY

TO REGISTER THE TRADE MARK

HOP GARDEN GOLD

IN CLASS 32

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER No. 97798 BY

BRANDBREW S.A

BACKGROUND

1) On 8 April 2008 Mr Anthony Stanton-Precious and Mr Martin Zillwood-Hunt t/a Hogs Back brewery (hereinafter the applicants), applied to register the trade mark HOP GARDEN GOLD in respect of “Real Ales” in Class 32.

2) The application was examined and accepted, and subsequently published for opposition purposes on 23 May 2008 in Trade Marks Journal No.6736.

3) On 21 August 2008 Brandbrew S.A. (hereinafter the opponent) filed a notice of opposition. The grounds of opposition are in summary:

a) The opponent is the proprietor of the following trade marks:

Number	Mark	Filing and Registration Date	Class	Specification
E4669156	HOEGAARDEN	05.10.2005 / 10.10.2006	32	Beers
			43	Bar, cafe, restaurant services
1453599	HOEGAARDEN It is a condition of registration that the mark shall be used in relation only to goods produced in the Hoegaarden Brewery/Brasserie.	25.01.1991 / 26.08.1994	32	Beer included in Class 32
1480746	HOEGAARDEN WHITE It is a condition of registration that the mark shall be used in relation only to goods produced in the Hoegaarden Brewery/Brasserie.	26.10.1991 / 17.05.1996	32	White beer, included in Class 32

b) The opponent states that the marks are visually, aurally and conceptually similar and that both parties' goods in Class 32 are identical. The opponent claims that it has reputation and goodwill in the UK through use of its marks. The opponent relies upon all three marks in each of the three grounds of opposition. They state that the application offends against Sections 5(2)(b), 5(3) & 5(4)(a) as the marks and goods are similar and/or identical and that there will be confusion/misrepresentation. They also claim the mark in suit will take unfair advantage of their marks as the average consumer will assume the goods of the two parties are related, and that use of the mark in suit will dilute the uniqueness of the opponent's marks and therefore be detrimental to the opponent.

4) On 27 November 2008, the applicants filed a counterstatement which basically denied the opponent's claims. They state that they have used their mark since 1994 in relation to golden ale. They do not put the opponent to proof of use.

5) Both parties filed evidence, and both seek an award of costs in their favour. The matter came to be heard on 23 May 2011. At the hearing, the opponent was represented by Mr Lipman of Messrs Humphreys & Co.; Mr Stanton-Precious represented the two applicants.

OPPONENT'S EVIDENCE

6) The opponent chose not to file evidence at this stage but simply filed submissions. These were dated 5 March 2009. The opponent points out that in the counterstatement the applicants did not contest that the opponent had reputation or goodwill and that no proof of use was requested. They also claim that the applicants did not challenge the opponent's claims regarding how the opponent's marks would be pronounced. They also point out that throughout the counterstatement the applicants refer to the opponent's marks as HOEGARRDEN when in fact they are spelt HOEGAARDEN. They request that all the applicants' submissions be disregarded. The opponent attaches to its submissions various exhibits, however as they have not been filed along with a witness statement they are not regarded as evidence and have not been admitted into the proceedings.

APPLICANTS' EVIDENCE

7) The applicants filed a witness statement, dated 18 August 2009, by Charles Henry Edward Jennings, the applicants' Trade Mark Attorney. He states that the applicants have been selling beer under the mark in suit since 1994 and that the use has been continuous up to and including the present time. At exhibit A he provides copies of price lists dated April 1994, April 1995 and May 1995. He states that over the past seven years average sales have been approximately £400,000 per annum. The goods are available throughout the UK via outlets such as Weatherspoons, Enterprise Pub Group, Chef and Brewer and independent outlets such as pubs, clubs, hotels and wholesalers. The applicants have exhibited their beers under the mark in suit at every Great British Beer Festival held in London from 1995 to 2008. He also contests most of the submissions made by the opponent.

OPPONENT'S SUBMISSIONS IN REPLY AND FURTHER EVIDENCE

8) The opponent filed further submissions dated 3 December 2009. Much of this is a repeat of its previous submissions. The opponent states that as the applicants have not sought proof of use the opponent does not have to provide evidence of reputation or goodwill. The opponent also seeks to rely upon attachments to the previous submissions as though these were filed as evidence. Most of the submissions relate to the opponent contesting claims made by the applicants as to the applicants' use of the mark in suit, and stating that no corroborating evidence has been supplied. They also make numerous submissions, most made previously regarding the similarity of the marks.

9) The opponent also filed a witness statement, dated 1 March 2010, by Tristan Matthew Morse the opponent's Trade Mark Attorney. He states that he is authorised to make the statement and that he has been supplied with documents by his client. He repeats much of that contained in the submissions regarding the applicants accepting by default claims made by the opponent in their statement of grounds. He files at exhibit TM1 the same pages as attached to the earlier

submissions. These include a printout from the website www.beerintheevening.com, which it states claims to be the biggest and busiest pub, bar and club guide with over 1.3 million unique visitors to the site each month. The website has comments from the public posted upon it which provide information to others regarding pubs and clubs. One posting, dated 23 August 2005 states:

“The Happy Man, Englefield Green

Has had a period of terrible managemnet [sic] and chavroach [sic] infestation, but return of previous mamagement [sic] has seen the place restored.

Quality and price of ale first class (Hogsback on currently devine![sic]) including Hoegaarden at around 3.20. Food also excellent. Will be rammed solid during term time, so get in early!”

10) Also attached are copies from the opponent’s website which lists places where the opponent’s product can be purchased in the UK. On the page marked “History of Hoegaarden” it states that, “There is now regular exports of the drink into Britain and it is rising in popularity greatly, with more and more pubs taking up the drink to sell.” Other pages list awards that the beer has won around the world. These include the Supreme Champion at UK International Food Exhibition 1997, the only award from the UK. These pages are all dated 5 March 2009, after the application date. The opponent contends that the simple Google search shown at paragraph nine above, shows that the opponent’s mark is confused as being one brewed by the applicants. In the light of this the opponent contends it must succeed under its Section 5(3) and 5(4)(a) grounds whilst maintaining that the 5(2)(b) ground has been satisfied.

APPLICANTS’ FURTHER EVIDENCE

11) The applicants filed a further witness statement, dated 14 July 2010, by Mr Jennings who has supplied evidence earlier in this case. This repeats much of the previous evidence and submissions.

12) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

13) At the hearing the opponent withdrew their ground of opposition under Section 5(3) and agreed that the ground of opposition under Section 5(4)(a) could not succeed if they failed under Section 5(2)(b).

14) Section 5(2)(b) of the Act reads:

“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.”

15) An “earlier trade mark” is defined in section 6, the relevant part of which states:

“6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

16) The opponent is relying upon its trade marks listed in paragraph 3 which are clearly earlier trade marks. They were registered on 26 August 1994 (1453599), 17 May 1996 (1480746) and 10 October 2006 (E4669156). The first two marks are subject to The Trade Marks (Proof of Use, etc) Regulations 2004, whilst the third mark is not. However, the applicants did not put the opponent to proof of use.

17) The opponent referred me to two cases they wished taken into account in my deliberations. These were *Sandow Limited's trade mark application* 1914 RPC 196 at 20 page 205 lines 13 to 18 and *Wagamama Limited v City Centre Restaurants Plc.* 1995 FSR 713 at page 733. However I would rather refer to more recent cases. Therefore, when considering whether there is a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). 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*,
- (b) the matter must be judged through the eyes of the average consumer of the goods/ services in question; *Sabel BV v Puma AG*, 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.*,
- (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*,

(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*,

(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.*,

(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*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) 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*,

(i) 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 and Adidas Benelux BV*,

(j) 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.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

18) In essence the test under section 5(2)(b) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgments mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the

importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the applicant's mark and the marks relied upon by the opponent on the basis of their inherent characteristics, assuming normal and fair use of the marks on the goods previously outlined.

19) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was considered by David Kitchin Q.C. (as he was then) sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). The opponent contended that, "The Opponent's Mark is inherently very distinctive. It is a famous, very well-known mark that will be in the Hearing Officer's own judicial knowledge." Regrettably for the opponent they are completely wrong in believing that I have any knowledge of their mark. In any event, it is not for me to impose my personal knowledge upon cases. The onus is upon them to make their case. I also note that the applicants in their counter-statement were neutral on this point simply stating that, "The opponent may well have acquired a very significant reputation and goodwill in its trade marks". However, I do not regard this as an admission that the opponent actually has such a reputation. The opponent has singularly failed to show that it has a significant reputation in the goods for which it claims its marks have been used. The opponent has failed to provide turnover figures, evidence of market share or any independent trade evidence. As such the opponent is not, in my opinion, able to enjoy enhanced protection because of reputation. However, I accept that the opponent's marks are registered and that they have a high degree of inherent distinctiveness.

20) As the case law in paragraph 17 above indicates I must determine the average consumer for the goods of the parties. I must then determine the manner in which these goods are likely to be selected by the said average consumer. The goods of the two parties are beers. The opponent contends:

".. that the average consumer in these circumstances is a person drinking alcohol (which can dull the senses including that of hearing) in a noisy pub or bar, having to raise their voice to order a pint of beer. The Applicant suggests that it is "blinker" for the Opponent to state that the average consumer may mispronounce the Applicant's mark, but again does not explain or support this statement."

21) I accept that this is one scenario which could play out, but there are of course more which involve sober individuals in relatively quiet surroundings. I do not accept that the average consumer would necessarily be an inebriated individual in a nightclub. Further, it is the hearing of the bar tender that needs to be sharp and he/she is unlikely to be intoxicated. When consumers reach a point of intoxication that their speech is very slurred and they are in a very noisy environment such as that envisaged by the opponent then it is my experience that such consumers simply point at what they want, rather than attempting to make oral contact. To my mind the average consumer will be the drinking public at large (over the age of eighteen) and who are sober. I also take into account that beer is sold through a range of channels, including retail premises such as supermarkets, off-licences, bars and restaurants. In the first two outlets the goods are normally displayed on shelves and are obtained by self selection. In the last two outlets they will again be displayed on shelves behind the bar as well as having the trade mark on

dispensers on the bar and listed in menus. When beers are sold in bars and restaurants the selection process will be made orally, although they will have been subject to a visual inspection initially. The Court of First Instance (now the General Court) in *Simmons Farsons Cisk plc v Spa Monopole* (Case T-3/04) said:

“In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant’s goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

22) Therefore, whilst I accept that the goods may be ordered orally in bars and restaurants, it is likely to be after a visual inspection of the bottle or trade mark on the dispenser or menu. Overall, whilst aural considerations must be taken into account the selection process is likely to be predominantly a visual one. Regarding the level of attention paid by the average consumer the opponent contends:

“Given the nature of the goods being sold under the respective marks (e.g. their low value), the level of attention of the average consumer will be very slight whether the marks are being considered visually (the act of selecting a beer in a supermarket is a very quick act) or aurally (ordering a beer over a bar counter is also a very quick act).”

23) I do not agree with this contention. There are a huge range of beers available in the marketplace. They differ enormously in taste, strength and flavour. They are made from a range of ingredients such as hops, barley and wheat and their prices also vary considerably. In making a choice based on all these factors, it is my opinion that beers are not purchased without a reasonable amount of attention by the average consumer.

24) I shall now consider the goods of the two parties. For ease of reference, I set out the relevant goods of both parties below:

Applicants’ specification	Opponent’s specification
Real Ales” in Class 32.	Class 32: Beers (4669156)
	Beer included in Class 32 (1453599)
	White beers, included in Class 32 (1480746)

25) Clearly, the goods are identical. This was accepted by both parties at the hearing.

26) I now turn to consider the marks of the two parties. For ease of reference these are reproduced below:

Applicants’ Trade Mark	Opponent’s Trade Marks
	HOEGAARDEN (4669156)

HOP GARDEN GOLD	HOEGAARDEN	(1453599)
	HOEGAARDEN WHITE	(1480746)

27) The opponent accepted that its strongest case is under its marks 4669156 and 1453599 for the word HOEGAARDEN solus. I shall therefore make the comparison on this basis. The opponent contends:

“11. The Applicant suggests that the word GOLD adds distinctive meaning to its mark on the basis that it describes the product to which the mark relates. The Applicant thereby admits and accept that the word GOLD is descriptive of the product. The word GOLD therefore cannot be distinctive in character. This supports the Opponent’s case that the word GOLD is descriptive, non-distinctive, and should therefore be ignored when assessing the similarity between the marks and the likelihood of confusion (which reinforces all of the points made by the Opponent above). The word GOLD does not detract from the overall impression left when the Application is considered as a whole, namely that the goods the subject of the Application are associated with the Opponent.”

28) I do not fully accept the opponent’s contention regarding the word “GOLD” in the applicants’ mark. The first two words of the applicants’ mark “HOP GARDEN” are a well known term for a field of hops. When the word “GOLD” is added to these words it describes the product of the field of hops in a semi descriptive and laudatory manner. Clearly, a field of hops does not yield actual gold, but it can yield a product, hops, which are used to produce beer which can be, but is not necessarily golden in colour. The term could also be seen as alluding to the quality of the product, i.e. a gold medal winner. In any event I must consider the marks of both parties as wholes. I accept that the words HOP GARDEN are more distinctive and together form the dominant element of the applicant’s mark, but that the word GOLD is by no means negligible.

29) I will first consider the visual aspects. The opponent contends:

“6. Further at paragraph 2, the Applicant challenges the Opponent’s case that the Applicant’s mark is highly visually similar to the Opponent’s marks. The Applicant merely refers to the fact that the Opponent’s mark consists of 1 word, compared to the Applicant’s mark, which consists of 3.

7. The Applicant does not challenge or supply counter-arguments against any of the specific points raised by the Opponent in its statement of case, namely that when the marks are appreciated visually, due to the similarity as regards lettering and structuring between HOP GARDEN and HOEGAARDEN, in particular in consideration of the dominant letters and sounds “h” and “o” at the start of both marks and the almost identical use of the “garden” (an extra letter “a” in the Opponent’s mark will not have any significant impact on the overall visual appearance), the average consumer at a quick glance may well perceive the Applicant’s mark to be one of the Opponent’s marks.”

And:

“Further, these goods are often sold in cans or bottles. The manner in which such cans or bottles are displayed in outlets such as supermarkets or off-licences is such that often not

all of the label bearing the mark is visible. This makes it more likely that consumers would not appreciate the visual differences between the marks.

30) I disagree with the opponent that the number of words in each mark does not make a difference visually, to my mind it will affect the way the marks are viewed and remembered by the average consumer. Regarding the issue of whether the whole label will be visible, considering there are difference at the start, the middle and the end, it would not appear to matter whether the whole of the label was visible. I do not agree with the contention of the opponent that the letters “H” and “O” at the start of each of the marks are somehow dominant letters. The first word in the applicant’s mark “HOP” is a very well-known English word; I do not believe that any UK consumer would see the word and simply extract the first two letters. Similarly, the other two words in the applicant’s mark “GARDEN” and “GOLD” are well-known English words. I fully agree with the opponent’s view that their mark would be seen as a foreign word, and would be remembered as such. It would have no meaning for the average UK consumer who is unlikely to have knowledge of any other language. I accept that the marks do share a number of letters. However, in my opinion, the visual differences are very significant.

31) Moving onto the aural considerations, the opponent contends:

“2. The applicant does not challenge or supply counter-arguments against any of the specific points raised by the Opponent in its statement of case, namely that when the Applicant’s mark is appreciated aurally, the average consumer may well pronounce it as “HO-GARDEN”, missing or slurring the middle plosive “p”. In any event, due to the similarity as regards the soft “ho” at the start of both marks and the identical sound of the dominant element “garden” (with its hard “g” sound), lack of phonetical and visual difference between the respective marks is likely to cause confusion, especially when the well-established principle of imperfect recollection is taken into consideration, together with the fact that the average English consumer may well mispronounce the foreign name that is the Opponent’s mark.”

And:

“5. Further, any suggestion by the Applicant that the differences in the number of words in the respective marks contributes to aural differences, is a nonsense.”

And:

“9. At paragraph 8, the Applicant suggests that there is no likelihood of confusion on the basis that the Applicant’s mark is *only ever* spoken of as HOP GARDEN GOLD and *never* shortened to HOP GARDEN. The Opponent puts the Applicant to strict proof on this point. The Opponent notes that the Applicant does not have a separate product named simply HOP GARDEN, which might cause the average consumer to use the name HOP GARDEN GOLD in full so as to differentiate it from a different product.”

32) Far from being nonsense, the fact that the applicants’ mark consists of three words is significant. Being well known words they are more likely to be pronounced in the correct manner; indeed I would venture to suggest that they are words which are not easy to mispronounce. The opponent’s contention regarding whether the mark is ever shortened is not relevant, I have to consider the mark as applied for. The opponent contends that the first word in the applicants’ mark will be pronounced “HO” with the letter “p” being slurred or missed. I find

this contention completely untenable. The word “HOP” is a very short, well known word which has an explosive ending. Quite why the average UK consumer would miss the letter “p” off this word is not explained, and is to my mind wholly unlikely. The words in the applicants’ mark are well-known easily pronounced words. The opponent’s mark is obviously a foreign word and its pronunciation is uncertain. No evidence was filed as to how the mark will be pronounced but there are a number of possibilities such as, *inter alia*, “Ho-garden”, “Hoeg-aarden”, “Hog-aarden” and “Ho-egg-arden”. No matter which of these is used, it is my view, that the aural differences far outweigh any similarities.

33) Conceptually, the opponent’s mark is meaningless, other than being a foreign word. The applicants’ mark alludes to a field of hops and the product from it. The average consumer in the UK is well used to phrases such as “amber nectar” to describe beers.

34) Lastly, the Opponent contends:

“Further, the Opponent’s Marks are a family of marks which render them even more distinctive. They are constructed in the same way as the Applicant’s Mark, i.e. H/GARDEN + colour. It is therefore likely that the average consumer would consider the Applicant’s mark to denote a variation on the particular type of beer produced by the Opponent i.e. HOEGAARDEN GOLD or in the same family of marks (especially given the visual, aural and conceptual similarities noted above) (*Il Ponte*).”

35) In the case of *The Infamous Nut Company v Percy Dalton (Holdings) Ltd* [2003] RPC 7, Professor Annand sitting as the Appointed Person said:

“It is impermissible for Section 5(2) (b) collectively to group together several earlier trade marks in the proprietorship of the opponents.

Section 5(2)(b) speaks of registration being refused on the basis of an earlier trade mark (as defined by Section 6). This where the opponent relies on proprietorship of more than one earlier trade mark, the registrability of the applicant’s mark must be considered against each of the opponent’s earlier trade marks separately (ENER-CAP trade mark [1999]RPC 362).

In some circumstances it may be possible for the opponent to argue that an element in the earlier trade mark has achieved enhanced distinctiveness in the eyes of the public because it is common to a “family of marks” in the proprietorship and use of the opponent (AMOR, Decision No 189/1999 of the Opposition Division, OHIM OJ 2/2000 p235). However, that has not been shown by the evidence to exist in the present opposition and cannot, as contended by Mr Walters on behalf of the opponent, be presumed from the state of the register in Classes 29 and 31.”

36) In the instant case the opponent has not shown that an element of its marks has achieved enhanced distinctiveness in the eyes of the public.

37) When determining whether there is a likelihood of confusion I have to take a number of factors into consideration. There is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. I must consider the distinctive nature of the opponent's trade mark, the average consumer for the goods, the nature of the purchasing process and the issue of imperfect recollection. In the instant case the opponent's mark is inherently very distinctive and the goods are identical. I accept that there is a low degree of similarity in the marks. However, in my opinion the differences in the marks far outweigh any similarities to such an extent that there is no likelihood of confusion on the part of the public, nor is there any likelihood of association with the earlier trade marks.

38) The ground of opposition under Section 5(2)(b) fails. This also determines the result of the Section 5(4)(a) ground, as this has been accepted by the opponent.

COSTS

39) The applicants have been successful and they are therefore entitled to a contribution towards their costs. The applicant was originally professionally represented but represented themselves at the hearing. The Registrar's practice on costs does not specifically relate to litigants in person but it is standard practice to award 50% of the costs that would have been awarded had the party been professionally represented.

Preparing a statement and considering the other side's statement	£350
Preparing evidence and considering and commenting on the other side's evidence	£900
Preparing for and attending a hearing	£800
TOTAL	£2050

40) I order the opponent to pay the applicants the sum of £2050. 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 15 day of June 2011

**George W Salthouse
For the Registrar,
the Comptroller-General**