

O/211/12

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NOS 2534064, 2534062 AND 2534067
(THE LATTER OF WHICH IS A SERIES OF TWO MARKS) BY PHILOSOPHY,
INC TO REGISTER THE TRADE MARKS**



IN CLASS 3

**AND IN THE MATTER OF CONSOLIDATED OPPOSITIONS
THERE TO UNDER NOS 100793, 100848 AND 100825
BY NIRVANA SPA & LEISURE LIMITED**

BACKGROUND

1) On 18 November 2009, Philosophy, Inc (“Philosophy”) applied under the Trade Marks Act 1994 (“the Act”) for registration of the following four three-dimensional marks (the latter two being a series of two marks covered by a single application):



2) All three applications include numerous representations of the respective marks reflecting views from other sides and from above and below. I do not show all these representations above, but rather, only the single image of each mark that shows the most relevant features and larger, clearer images of these are provided in an annex to this decision. When discussing the precise nature of the marks in more detail later, I will keep in mind all representations of each mark.

3) All three applications are in respect of the following identical list of Class 3 goods:

Body care products, three in one shampoo, bubble bath and body wash; bubble baths; bath and shower gels; bath salts; foaming shaving gel and creams; liquid soaps; soaps; body scrubs; body peels; body exfoliants; face and body moisturisers; body lotions; body creams; body butter; moisturising oil sprays for the body; hand and foot scrubs and exfoliators; hand and foot masks; hand and foot creams; cuticle creams; gift packs comprising combinations of the above products; shampoo; hair conditioner; hair treatment masks; hair styling products; perfumes; eau de toilette; essential oils; sun creams and sun blocks.

4) The three applications were published in the Trade Marks Journal on 7 May 2010, 21 May 2010 and 18 June 2010 respectively and on 2 August 2010, 10 August 2010 and 19 August 2010 respectively, Nirvana Spa & Leisure Limited (“Nirvana”) filed notice of opposition to the three applications. The grounds of opposition are identical in all three proceedings and, in summary, are:

- The marks do not satisfy the requirements of Section 1(1) of the Act and are, therefore, open to objection under Section 3(1)(a) of the Act. The bottles in question are not capable of distinguishing Philosophy's goods from those of numerous other undertakings in the cosmetics field who use bottles highly similar in appearance, containing the product name or scent followed by a recipe or poem. Further, Nirvana submits that the marks are not graphically represented with the requisite degree of certainty, namely that the statement that the printed font contains the word PHILOSOPHY (in the case of the VANILLA BIRTHDAY CAKE mark) and a recipe (or "a recipe or poem" in the case of the COCONUT FROSTING mark) is too imprecise;
- The marks are open to objection under Section 3(1)(b) of the Act because they are devoid of any distinctive character. It submits that the bottle shape is common in the trade and the additional material appearing on the bottle fails to inform the consumer as to the commercial origin of the product and does not depart significantly from the norms of the cosmetic sector. The words VANILLA BIRTHDAY CAKE, RASPBERRY SORBET and COCONUT FROSTING merely indicate the scent of the product. Similarly, the presence, in small type, of the word PHILOSOPHY (in the case of the VANILLA BIRTHDAY CAKE mark) is clearly *di minimis*, particularly when taking into account the low level of attention of the consumer when purchasing such products;
- The marks are open to objection under Section 3(1)(c) of the Act because all the elements of the marks are simply signs or indications that may serve in trade to designate the kind or other characteristics of the goods on offer. The signs in question are essentially a basic standard bottle, a basic scent name, and a recipe describing the contents that make up the product in question;
- The marks are open to objection under Section 3(1)(d) of the Act because they consist exclusively of signs that have become customary in the trade;
- The marks are open to objection under Section 3(2)(b) of the Act because they consist of a standard bottle shape, being the shape of the goods necessary to obtain a technical result. The additional elements are "positional elements" that do not add anything of trade mark significance to the mark.

5) The applicant subsequently filed a counterstatement denying the opponent's claims.

6) Both sides filed evidence in these proceedings. Both sides ask for an award of costs. Neither side requested to be heard but both filed written submissions and I make this decision based on the papers before me.

Opponent's Evidence

7) This takes the form of a witness statement, dated 30 November 2010, by Rob White, Trade Mark Attorney for HLBBshaw, Nirvana's representatives in these proceedings. At Exhibit RW1, Mr White provides a witness statement, dated 29 November 2010, by Simon Brown, Director of Nirvana. Mr White includes this as evidence that the marks at issue have become customary in the *bona fide* and established practices of the cosmetics and beauty trade.

8) Mr Brown explains that he provides evidence of a number of other traders using very closely similar combinations of a bottle shape with a black cap, food related fragrance name and wording on the bottle label consisting of a recipe or poem. Mr Brown provides exhibits in the form of printed matter illustrating such third party use and also exhibits in the form of physical versions of the bottles. I will not make specific reference to these physical examples, but I have considered them, particularly where they clarify the precise nature of a mark shown in a printed exhibit.

9) At Exhibit SB1, Mr Brown provides examples of Nirvana's own use of signs that he contends are very similar to Philosophy's contested marks. These take the form of extracts from its website www.nirvanaspa.co.uk, printed on 30 June or 1 July 2010, and include pictures of a number of product ranges such as a "Raspberry Milkshake trio", one of which is a shower and bath gel in a bottle that appears to be identical to that shown in Philosophy's marks bearing the fragrance name RASPBERRY MILKSHAKE in large letters, below which appears the words "Shower and Bath Gel" and below that, a poem in a block of small text. At the end of the poem, in letters similar to the size of the word "milkshake" in the fragrance name, is the mark N-SPA FRUIT. Similar exhibits also show a VANILLA CREME BRULEE and a COCONUT ICE CREAM shower and bath gel in containers with the same get-up as described above. Other types of containers are also shown containing similarly food-inspired fragranced products. Two relevant examples are shown below:



10) At Exhibit SB2 are print-outs from the “Treacle Moon” website that carries a 2009 copyright notice. The pages identify Treacle Moon as the registered trade mark of Blue Orange Brand Management Ltd. Five bath and shower gels are shown in bottles, as described by Mr Brown. These are for products called “That Vanilla Moment”, “The Raspberry Kiss”, “My Coconut Island”, “These Lemonade Days” and “One Ginger Morning”. All appear to also have a poem printed on the bottle.

11) The same exhibit also includes a copy of an article, dated 19 September 2008, from *The Guardian* newspaper, relating to ginger shower gels. Treacle Moon’s “One Ginger Morning” appears, together with the following text: “An obvious copy of the Philosophy range, but for a fraction of the price”.

12) Exhibit SB3 contains copies of pages from the “I Love...” website. The “Who We Are” page of the website explains that “I love... burst onto the scene in 2008”. Seven varieties of product are shown, once again, in the same type of bottle with a black cap. The seven varieties are “I love ... chocolate & oranges”, “I love ... lemons & limes”, “I love ... mango & papaya”, “I love ... raspberry & blackberry”, “I love ... coconut & cream”, “I love ... strawberries & milkshake” and “I love ... vanilla & ice cream”. A product description appears under these words.

13) Exhibit SB4 consists of printouts from the websites www.boots.com and www.detour.co.uk. These printouts were obtained on 19 October 2010. Both websites are promoting, for sale, a range of bath and shower gels branded as “The Pink Cow”. One illustration shows a bottle with a black neck and cap. Some of the words appearing on the bottle are indistinct but the words “COCONUT CREAM” dominate and above these words can just be made out, the words “The Pink Cow”. Two further illustrations, in a very similar get-up to the first, appear with the words “VANILLA BISCUIT” and “STRAWBERRY SUNDAE” respectively appearing prominently. The extract below shows these latter two examples:



14) Exhibit SB5 consists of pages from the website www.anethyst-consultancy.co.uk, printed on 10 October 2010, showing the same bottles as previous with the words “Possibility Strawberry Shortcake”, “Possibility Lemon Cheesecake”, “Possibility Raspberry Pavlova” and “Possibility Vanilla Crème brûlée” respectively appearing thereon and followed by a detailed recipe in a small font. An example is shown below:



15) Exhibit SB6 consists of extracts from www.kmibrands.com and www.beautifullydelicious.co.uk. Information about the products states that the range was launched in 2006. A number of different food-inspired fragrances are shown such as “strawberry & pomegranate”.

16) At Exhibit SB7 are extracts from www.thebodyshop.co.uk, carrying a copyright notice of 2010 and were printed on 1 July 2010, showing four different shower gels, in bottles similar to those of the applications, but with clear lids and necks. These all bear “The Body Shop” device mark and show the fragrances “raspberry”, “coconut”, “vanilla” and “passion fruit” respectively.

17) Mr Brown explains that the bottle, that forms part of the marks, is commonly used in the trade and is known as the “Boston round”. The black cap on these bottles is known as a “disc top cap”.

18) In support of his submission that it is common practice in the trade to use food or drink related scents in body and beauty products, Mr Brown provides numerous examples at Exhibit SB8, all printed in October or November 2010. This shows sixteen different traders advertising such products online. Whilst these are not presented in the type of bottle that features in Philosophy’s marks, some example fragrances include *Sainsbury’s* BLUEBERRY BURST and LEMON SORBET shower gels, *Gotcha Girls* seven different glitter shower gels available at *Debenhams*, the only one of which that is discernable is SUGARPLUM CUPCAKE GLITTER, *Dead Sea Source* INVIGORATING

COFFEE body wash, *Simple Pleasures Sweet Shop* products sold through *House of Fraser* including RASPBERRY SORBET and CANDY SWIRL shower gels and body lotions and *Yum's* CHOCOLATE SAUCE shower gel, VANILLA ICE CREAM, RHUBARB & CUSTARD and CHERRY PIE bath crystals. Many of the other examples in this exhibit illustrate products whose fragrances are based on the basic food ingredient such as ROSEMARY, LIME AND COCONUT, VANILLA CINNAMON, rather than a food product made from a recipe.

19) At Exhibit SB9, Mr Brown provides an undated extract from the website of the department store *House of Fraser* and illustrates a *Simple Pleasures* branded product with the fragrance name "Pink Sugar Frosting". Mr Brown draws a similarity to the name COCONUT FROSTING used in the second of Philosophy's marks.

20) Mr Brown also makes a number of submissions that I will bear in mind, but not detail here.

21) Mr White also provides, at Exhibit RW2, an article about the common nature of food fragranced products. This appeared on the trade magazine website www.cosmeticsbusiness.com in January 2007. An extract from this article reads:

"The use of food as an ingredient in bath and shower gels is not a new phenomenon but as R&D into this area increases, so does the number of food-inspired products on the shelves ... The links between food and beauty have become well understood and food-based bath and shower products also tap into the popular natural ingredients trend."

22) A second extract in the same exhibit is from www.thenibble.com. The article refers to a bi-annual show in New York where high-end beauty lines present their products and talks about "foodie fragrance" lines and that two-thirds to three quarters of the scented products are fruit and vegetable fragrances.

23) Mr White also makes a number of submissions that I will keep in mind but not detail here.

Applicant's Evidence

24) This takes the form of two witness statements by Sharon Kirby, Trade Mark Attorney at Kilburn & Strode LLP, Philosophy's representatives in these proceedings. At Exhibit SK1 to her first witness statement, Ms Kirby provides four bundles of press cuttings and Internet printouts relating to national and regional newspaper and magazine articles dated in 1996, 1998, 2005 and 2008 respectively. These illustrate at least eight shampoo, conditioner or body wash products in bottles that appear to be identical or very similar to Philosophy's current marks with, what appears to be, the same or very similar lay-out of text appearing thereon. The larger print on these bottles is visible in most of the

extracts and shows names such as “Cinnamon Buns”, “Chocolate Chip Cookie” and “Blueberry Muffin”. The six extracts provided in the 2008 bundle. There are no exhibits illustrating use of VANILLA BIRTHDAY CAKE but the exhibits taken from 2008 show one reference to the RASPBERRY SORBET bottle appearing on the website www.thegreenmag.co.uk in September of that year and also numerous references and photographs of the COCONUT FROSTING mark (but with the word PHILOSOPHY and a recipe appearing in small text in the blank space represented by the dotted line in the application). Further articles refer more generally to the introduction of a new range by Philosophy. An extract of an article that appeared in *Grazia* magazine on 28 February 2005 discusses three of Philosophy’s shower gels including CRUMB BERRY PIE and VANILLA CUPCAKES and comments “Tuberose and vetiver are sooo over when you could smell of crumb berry pie and vanilla cupcakes...”.

25) Ms Kirby’s second witness statement consists essentially of a critique of Mr White’s statement. I will not detail these criticisms here, but I will keep them in mind.

26) In addition, Ms Kirby provides, at a second Exhibit SK1, a witness statement by Robin White, Director of International Education and Global Press at Philosophy. Ms White states that Philosophy has been assisted in promoting its products in the UK by a public relations company since 1997. During the fifteen years it has paid £500,000 in retainer fees to this company with a further £200,000 spent on “disbursements” and £175,000 on product launches. Ms White states that, as a conservative estimate, Philosophy has achieved at least one hundred “pieces of editorial” each month on average in the UK.

27) Ms White, at Exhibit RW1, provides selected press cuttings. This exhibit mirrors that provided by Ms Kirby, at Exhibit SK1 to her first witness statement, but is augmented by similar examples from 1997. None of these show any of the marks the subject of the contested applications.

28) Ms White draws attention to the fact that “early on”, the uniqueness and distinctiveness of the packaging was remarked upon and noticed. To illustrate this, she refers to a number of articles including one in *Elle Decoration* in February 1997 where it said “*the packaging like the catalogue has an authenticity that makes it worth that bit extra...*”, “*philosophy is basically saying ‘beauty is skin deep’ with both a sense of irony and straightforward information*”. The Evening Standard, on 2 August 1996, described Philosophy’s products as having “*engaging packaging*”.

29) An article from *Travel Retailer International* in April 1997 referred to Philosophy’s products being distributed in the UK through retailers such as *Harrods, Liberty and Space NK*.

30) At Exhibit RW2, Ms White provides a selection of articles from UK publications illustrating the dress style of Philosophy's products, namely use of lower case font, applied to a clear bottle, with the product name appearing in a larger sized font below which is a block of smaller font text setting out a poem or recipe. These exhibits cover nine of the twelve years between 1999 and 2010. The product names include "heaven on earth", "curly head", "be somebody", "it's all in your head", "shear splendour" and "soul owner" to name but a few. The first article to illustrate food-themed product names appeared in a Newcastle local paper called *The Journal* on 26 September 2005 where "cafe au lait", "chocolate cream" and "white chocolate hazelnut" products are featured.

31) At Exhibit RW3, Ms White provides various examples of Philosophy's food-based products including press articles from UK national newspapers and magazines such as *The Times* and *The Sunday Telegraph Magazine*. These illustrate the launch, in 1998, of Philosophy's "The Cookbook" range of bath products that included scents such as cinnamon buns, banana nut bread, pumpkin pie and orange sherbet to list a few. Numerous further press articles for future years, up to and including 2010, are also provided illustrating Philosophy's continuing business involving food inspired scented bath products. Many of the products illustrated were packaged in the same type of bottle that forms part of the contested marks and with text appearing thereon in the same or similar layout.

32) Ms White states that Philosophy's most popular range in the UK is its "3-in-1 range" that includes both RASPBERRY SORBET and VANILLA BIRTHDAY CAKE products. The retail sales price is around £14 and the UK wholesale market in 2008 was about \$10.8 million, equating to about \$22 million of retail sales.

33) Ms White provides examples of, what she describes as, copycat or imitation products that have come on to the market "in recent times". This is supported by extracts from publications provided at Exhibit RW5. These are predominantly magazine articles from between 2007 and 2010 often identifying to the reader a premium product (being one of Philosophy's food-themed products) and a budget equivalent, also with a similar food-theme and with a similar get-up. There is some duplication with Nirvana's evidence in respect of the products featured. However, notable additions include an example of *Asda* selling a RASPBERRY MILKSHAKE (shown below, and appears to be a Nirvana product even though this cannot be confirmed as the part of the bottle where its N-SPA FRUIT mark appears is not visible in the picture) in an article that appeared in *Women* magazine on 26 March 2007 and a *Marks & Spencer* product fragranced as ORANGE SORBET as featured in *Choice* magazine in April 2007 (also shown below). Others, such as Nirvana's LEMON SOUFFLE bath and shower gel (*Daily Express Saturday* supplement on 14 April 2007) and ORANGE SMOOTHIE bath and shower gel (*Best* magazine, 22 May 2007). There are other similar examples. Use of Philosophy's VANILLA BIRTHDAY CAKE is shown in *Choice*

magazine in October 2007 and of its COCONUT FROSTING mark in the *HairFlair & Beauty* magazine, December 2008.



Opponent's Evidence in reply

34) This takes the form of two further witness statements by Mr White. In the first of these, dated 20 October 2011, the majority of his comments are in the form of a critique of Philosophy's evidence. I will keep these comments in mind.

35) Mr White submits that the "black capped Boston round clear bottles" are in common usage in the trade. In support of this, Mr White provides an example, at Exhibit RW3, of a third party, Lush Cosmetics, using such a bottle in October 2000. The exhibit shows a shampoo for sale in such a bottle, with a white cap. An undated copy of a photograph of another bottle with a black cap bearing the LUSH trade mark is provided with the label indicating that its contents are VANILLA DEE-LITE body lotion.

36) At Exhibit RW5, Mr White provides copies of photographs of a third party's products showing the black cap-topped bottle containing "Honey, Rhubarb & Mint" body wash that is currently (the print out is dated 22 September 2011) being sold at the *John Lewis* department store.

37) The final witness statement by Mr White introduces, at Exhibit RW6, copies of a further third party product, namely “warm vanilla” shower gel, body lotion and bubble bath. Once again, these are in the same type of bottle as shown in Philosophy’s marks and have the same or very similar black cap. Mr White states that these were spotted during a shopping trip to the retailer *TK Max* in December 2011.

DECISION

Section 3(1)(a)

38) Section 3(1)(a) of the Act reads:

3. - (1) The following shall not be registered -

(a) signs which do not satisfy the requirements of section 1(1),

And Section 1(1) reads:

1. - (1) In this Act a “trade mark” means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

39) In *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd* Case C-299/99 the Court of Justice of the European Union (“the CJEU”), when commenting upon Article 3(1)(a) of the Directive and upon which Section 3(1)(a) of the Act is derived, stated:

“36. It is true that Article 3(1)(a) of the Directive provides that signs which cannot constitute a trade mark are to be refused registration or if registered are liable to be declared invalid.

37. However, it is clear from the wording of Article 3(1)(a) and the structure of the Directive that that provision is intended essentially to exclude from registration signs which are not generally capable of being a trade mark and thus cannot be represented graphically and/or are not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

38. Accordingly, Article 3(1)(a) of the Directive, like the rule laid down by Article 3(1)(b), (c) and (d), precludes the registration of signs or indications which do not meet one of the two conditions imposed by Article 2 of the

Directive, that is to say, the condition requiring such signs to be capable of distinguishing the goods or services of one undertaking from those of other undertakings.

39. It follows that there is no class of marks having a distinctive character by their nature or by the use made of them which is not capable of distinguishing goods or services within the meaning of Article 2 of the Directive.

40. In the light of those considerations, the answer to the first question must be that there is no category of marks which is not excluded from registration by Article 3(1)(b), (c) and (d) and Article 3(3) of the Directive which is none the less excluded from registration by Article 3(1)(a) thereof on the ground that such marks are incapable of distinguishing the goods of the proprietor of the mark from those of other undertakings.”

40) Consequently, in order for a sign to fall foul of section 3(1)(a) of the Act, the marks concerned will not be capable of registration.

41) The decisions of the CJEU in *Dyson Ltd v Registrar of Trade Marks*, Case C-321/03 and *Heidelberger Bauchemie GmbH*, Case C-49/02 are also relevant in terms of the graphical representation issue. *Dyson* related to an application to register two marks consisting of a transparent bin or collection chamber as part of the outer surface of vacuum cleaners. When it became apparent that the marks were intended to protect the concept of a transparent bin or collecting chamber on a vacuum cleaner (as opposed to a fixed and particular application of the concept) the court found that such a mark did not constitute a sign because the concept could take many forms. It followed that the marks in question represented merely properties of the goods for which they were to be registered - vacuum cleaners. The court pointed out that the effect of registering marks of that kind could be to give their holders an unfair advantage over their competitors. Consequently, the marks were not ‘signs’ and did not satisfy the requirements for registration as marks.

42) The *Heidelberger Bauchemie* case concerned an application to register a colour combination consisting of defined shades of blue and yellow arranged “*in every conceivable form*”. The court was asked whether such a sign satisfied Article 2 of the Directive. The following extract from the CJEU’s judgment is the relevant part of the court’s analysis of, and answer to, the question asked of it.

“25. Moreover, it is clear from the Court’s case-law (Case C-273/00 *Sieckmann* [2002] ECR I-11737, paragraphs 46 to 55, and *Libertel*, paragraphs 28 and 29) that a graphic representation in terms of Article 2 of the Directive must enable the sign to be represented visually, particularly by means of images, lines or characters, so that it can be precisely identified.

26. Such an interpretation is necessary for the proper working of the trade mark registration system.
27. The function of the requirement of graphic representation is in particular to define the mark itself in order to determine the precise subject of the protection afforded by the registered mark to its proprietor.
28. The entry of the mark in a public register has the aim of making it accessible to the competent authorities and to the public, particularly to economic operators.
29. On the one hand, the competent authorities must know with clarity and precision the nature of the signs of which a mark consists in order to be able to fulfil their obligations in relation to the prior examination of applications for registration and the publication and maintenance of an appropriate and precise register of trade marks.
30. On the other hand, economic operators must be able to acquaint themselves, with clarity and precision, with registrations or applications for registration made by their actual or potential competitors, and thus to obtain relevant information about the rights of third parties.
31. In those circumstances, in order to fulfil its role as a registered trade mark, a sign must always be perceived unambiguously and uniformly, so that the function of mark as an indication of origin is guaranteed. In the light of the duration of a mark's registration and the fact that, as the Directive provides, it can be renewed for varying periods, the representation must also be durable.
32. It follows from the above that a graphic representation for the purpose of Article 2 of the Directive must be, in particular, precise and durable.
- [...]
35. Such representations would allow numerous different combinations, which would not permit the consumer to perceive and recall a particular combination, thereby enabling him to repeat with certainty the experience of a purchase, any more than they would allow the competent authorities and economic operators to know the scope of the protection afforded to the proprietor of the trade mark.”
- 43) There are two main thrusts to Nirvana's submissions. Firstly, it argues that the graphic representations submitted by the applicant are barely legible with the small font not being clear, precise and easily accessible and tangible. Consequently the applications are not represented graphically when taking into

account the guidance provided by the CJEU in *Ralf Sieckmann C-273/00*. Secondly, Mr White submits that the descriptions of the three contested marks are too broad and vague and are not sufficiently clear and precise.

Philosophy's 2534064 VANILLA BIRTHDAY CAKE and 2534067 RASBERRY SORBET marks

44) With regard to the first of the above arguments, whilst these two marks incorporate text that is small, it is nonetheless legible on the representation provided by the applicant and held on the application file (and included in the annex to this decision). Consequently, it cannot be said that these representations are not particular or precise. On the contrary, the representations are clear with every individual element clearly visible, even if some elements are very small when compared to the overall proportions of the marks applied for. Any issue of lack of clarity results from the quality of the copying, printing or screen upon which the mark is viewed rather than the graphical representation of the mark filed. Consequently, I reject the argument that the marks represented in these two applications are not graphically represented.

45) In his witness statement of 20 October 2011, paragraph 20, Mr White also makes the argument that a claim to “a recipe or a poem”, as it appears in the description of the COCONUT FROSTING mark, is too broad and vague. It is not clear whether Mr White considers this argument applies to all three applications. Therefore, for the sake of clarity, it is my view that Philosophy's descriptions accompanying its VANILLA BIRTHDAY CAKE and REASPBERRY SORBET marks accurately describe the marks as shown in the representations with no element of ambiguity. Consequently, if this argument was intended to apply to these marks, I dismiss it.

46) In summary, I reject the arguments that the marks 2534064 VANILLA BIRTHDAY CAKE and 2534067 RASBERRY SORBET are not graphically represented. It is my view that they are, with all elements of the marks being visible on the representation of the marks filed with the applications. Further, the descriptions that accompany these representations are clear and precise and accurately describe the respective marks.

Philosophy's 2534062 COCONUT FROSTING mark

47) Philosophy also makes the same criticisms in respect of this application, however, the representation of this mark does not contain any text other than the words COCONUT FROSTING and these words are a clearly visible element within the mark. As such, the clarity and precision of the representation of the mark is sufficient to overcome the hurdle set by Section 3(1)(a). However, this is not the end of the matter as the representation of the mark is only part of the picture with it also being accompanied by a description that reads as follows:

“The mark consists of a black-capped clear bottle (through which is visible the colour white, applied to the goods), onto which there is printed in black font "coconut frosting" and immediately underneath there follows text (in the form of a recipe or poem), filling the text block which is indicated by the dotted line.”

48) Mr White contends that the words “immediately underneath there follows text (in the form of a recipe or poem), filling the text block which is indicated by the dotted line” are too broad and vague. Ms Kirby, on behalf of Nirvana, submits that marks have been accepted where it is obvious that gaps have been left for text. She points to CTM registration 5384698 in the name of *Reckitt Benckiser N.V.* as one such example accepted for registration by OHIM. In response, Mr White relies upon the comments made in the *MADAME* case (1966) RPC page 545. These were re-stated by Mr Justice Jacob in *TREAT trade mark* (1996) RPC page 25:

“In particular the state of the Register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the Registrar to put the marks concerned on the Register. It has long been held under the old Act that comparison with other marks on the Register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *Madame TM* and the same must be true under the 1994 Act.”

49) With this guidance in mind, I disregard the earlier acceptances. That said, there are a number of differences between the marks identified by Ms Kirby and that being discussed here. Most notably, whilst there are spaces on the label shown in gaps of Reckitt Benckiser’s mark and it may be hypothesised that particular words may be inserted, there is, in fact, no claim by Reckitt Benckiser that the mark consists of additional unspecific words not present in the representation. Therefore, it cannot be taken that the mark registered incorporates any elements not present in the representation.

50) In contrast, the description of the current mark makes reference to “a recipe or poem” that is not shown in the representation. As Mr White points out at paragraph 25 of his witness statement of 20 October 2011, this description will include a recipe with only three or thirty ingredients, a three line Haiku poem or a prose poem with thirty long paragraphs. Mr White’s examples demonstrate the imprecise nature of the description and I fully accept his reasoning. The description of the mark lacks clarity and precision to the extent that it is not possible to ascertain the scope claimed in respect to the mark.

51) In light of the above, I find that Philosophy’s 2534062 COCONUT FROSTING mark does not meet the criteria set out in *Heidelberger Bauchemie* and is not graphically represented.

52) However, in case I am wrong in reaching this conclusion I will also go on to consider the merits of Nirvana's other grounds, as I must do anyway in respect of its other two applications.

Section 3(1)(b)

53) Section 3(1)(b) of the Act reads:

3. - (1) The following shall not be registered -
 - (a) [...]
 - (b) trade marks which are devoid of any distinctive character,
 - (c) [...]
 - (d) [...]

54) Anna Carboni, sitting as the Appointed Person in O-363-09 *COMBI STEAM Trade Mark*, conveniently summarised the leading case law in respect of this part of the Act:

7. It has been said that lack of distinctive character is the essence of any objection under section 3(1)(b), (c) or (d) of the Act and that, despite its position in the list, section 3(1)(b) performs "a residual or sweeping-up function", backing up the other two provisions, which contain specific and characteristic examples of types of marks that lack distinctive character: *Procter & Gamble Ltd's Trade Mark Application* [1999] RPC 673 (CA) per Robert Walker LJ at 679. If a trade mark is entirely descriptive of characteristics of goods or services (and thereby prohibited from registration under section 3(1)(c)), it will also be devoid of any distinctive character under section 3(1)(b): *Case C-363/99 Koninklijke KPN Nederland BV v Benelux-Merkenbureau (POSTKANTOOR)* [2004] ETMR 57 (ECJ) at [86]. However, the converse is not true: a mark which is not descriptive may nevertheless be devoid of distinctive character for other reasons (*ibid.*).

8. When a trade marks examiner assesses the distinctiveness of a trade mark within the meaning of section 3(1)(b), s/he must do so firstly by reference to the goods or services listed in the specification, and secondly by reference to the perception of the mark in relation to such goods or services by the relevant public, which consists of average consumers of the goods or services in question, who are deemed to be reasonably well informed, observant and circumspect: *Joined Cases C-53/01 to C- 55/01 Linde AG, Winward Industries Inc and Radio Uhren AG* [2003] ETMR 78 at [41].

9. It is not necessary to show that a mark has a particular level of creativity or originality in order to establish distinctive character: Case C-329/02P *SAT. 1 Satelliten Fernsehen GmbH v OHIM* [2005] ETMR 20 (ECJ) at [41]. While the Court of First Instance (“CFI”) has repeatedly referred to “a minimum degree of distinctive character” as being sufficient to avoid article 7(1)(b) of the CTMR/article 3(1)(b) of the Directive (for example, Case T-34/00 *Eurocool Logistik GmbH & Co. KG v OHIM* (“EUROCOOL”) [2003] ETMR 4 at [39]; Case T-128/01 *Daimler Chrysler Corp v OHIM* [2003] ETMR 87 at [33]; Case T-320/03 *Citicorp v OHIM* (“LIVE RICHLI”) at [68]), the ECJ has not adopted this wording and has deemed it unnecessary to give any more precise definition to the possible dividing line between lack of distinctiveness and the minimum distinctiveness to which the CFI refers: *Deutsche Krankenversicherung AG v OHIM* (“COMPANYLINE”) [2002] ECR I-7561 at [20].

10. The ECJ approaches the issue of distinctiveness by reference to the underlying purpose of article 3(1)(b) of the Directive / 7(1)(b) CTMR, which in the Court’s view is to preclude registration of trade marks that are incapable of performing the essential function of guaranteeing the identity of the origin of the marked product to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin: *SAT. 1 v OHIM* at [23]; Case C-37/03 P *BioID AG v OHIM* [2005] ECR I-7975 (ECJ) at [27].

55) I must, therefore, put myself in the place of someone who encounters Philosophy’s marks, used in relation to the various cosmetics, skin and hair cleaning products and determine how they would react. I will consider each application in turn.

Philosophy’s 2534064 VANILLA BIRTHDAY CAKE mark

56) The full mark details are shown below:

Image 1



Image 2

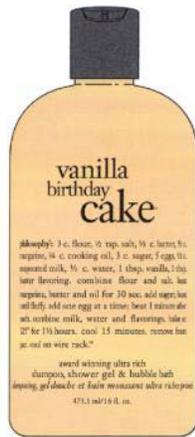
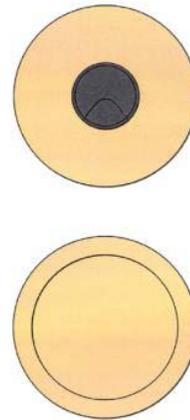


Image 3



Image 4



Description: The mark consists of a black-capped clear bottle onto which there is printed in black Jansen font "philosophy" followed by a recipe. The mark comprising the product name is applied centrally over the text box in black text on the front of the bottle.

57) When considering the question of whether Philosophy's mark is distinctive, I give full recognition to the guidance detailed above and consider whether the mark guarantees the identity of the origin of the goods to the consumer in order to distinguish the goods from others which have another origin. In this context, Nirvana has provided evidence of numerous third parties using the same or virtually the same bottle as that which forms part of Philosophy's mark and in respect of identical or highly similar goods. Mr Brown, on behalf of Nirvana, submits an unchallenged view that the bottle is commonly used in the trade and is known as the "Boston round" and that the cap is also commonly used and is known as a "disc top cap".

58) Mr Brown, in his evidence, has identified that Nirvana itself, together with a number of third parties are all promoting food themed scents as part of their ranges. As a preliminary comment, I note that Mr Brown makes no distinction between un-elaborated food ingredient inspired fragrance descriptions such as VANILLA and RASPBERRY and those that are inspired by foods obtained from a recipe and in order to make them sound more decadent and luxurious, such as is the case with Philosophy's mark and other third party use like VANILLA CRÈME BRULEE and COCONUT ICE CREAM. My firm view is that un-elaborated ingredient based descriptions will be perceived by the consumer as not indicating trade origin but rather, it will clearly describe the fragrance of the goods. The issue is less clear regarding recipe-based food descriptions (i.e. foods that is created from a recipe). In this respect, the evidence can be split into three distinct tranches, as follows:

a. Evidence, before the relevant date, that descriptions of foods created from recipes are used in the trade (in the same or similar get-up to Philosophy's marks) to describe fragrances of the goods at issue

- Nirvana itself selling, since 2007, shower and bath gels in bottles identical, or at least very similar to the "Boston round" type of bottle that features in Philosophy's mark featuring such fragrances as RASPBERRY MILKSHAKE, VANILLA CRÈME BRULEE and COCONUT ICE CREAM. Other products are also sold in these fragrance ranges, such as body scrubs and body creams, but these appear to be packaged in different shaped containers;
- The website www.ilovecosmetics.eu has sold a range of cosmetics since 2008. The get-up of its packaging is shown in paragraph 11 and is similar to that of Philosophy's mark and its range contains such flavours as I LOVE... STRAWBERRIES & MILKSHAKE and I LOVE... VANILLA & ICE CREAM;
- Examples of Asda selling a RASPBERRY MILKSHAKE in March 2007 and a Marks & Spencer product fragranced as ORANGE SORBET in April 2007 (albeit, the latter in different packaging to that featured in Philosophy's marks).

b. Evidence after the relevant date that descriptions of foods created from recipes are used in the trade to describe fragrances of the goods at issue and packaged in the same or similar bottle depicted in Philosophy's marks

- THE PINK COW range of products sold through the www.boots.com and www.detour.co.uk websites illustrates products presented in, what appears to be the "Boston round" bottle and in respect of fragrances such as COCONUT CRÈME, VANILLA BISCUIT and STRAWBERRY SUNDAE. However, the extracts are dated in 2010 and it is therefore not known if these goods were available at, or before, the relevant date;
- The only date indication on the exhibits illustrating the POSSIBILITY range of products is that they were printed on 19 October 2010, nearly a year after the relevant date. Therefore, the use of words such as POSSIBILITY STRAWBERRY SHORTCAKE, POSSIBILITY LEMON CHEESECAKE and POSSIBILITY RASPBERRY PAVOVA in respect of 3-in-1 shampoo, shower gel and bubble bath and presented in "Boston round" bottles is of reduced value in demonstrating that, at the relevant date, it was a common practice in the trade to use such food-inspired fragrance descriptions;
- Other examples taken from the websites of retailers such as Sainsbury's, Superdrug and Debenhams are either undated or dated 19 October 2010, being after the relevant date. Many of the examples shown are not on "all-fours" with Philosophy's mark because they include fragrance descriptions that are not elaborated in the way that Philosophy's descriptions are. However, some are more relevant, namely Sainsbury's

LEMON SORBET shower gel, *House of Fraser's* RASPBERRY SORBET, PINK SUGAR FROSTING and CANDY SWIRL, *Yum's* CHOCOLATE SAUCE shower gel and VANILLA ICE CREAM bath crystals, BANANA & CREAM bath crystals, RHUBARB & CUSTARD bath crystals and a RASPBERRY RIPPLE bath mallow.

- c. Evidence that illustrates (i) only food-based descriptions reflecting ingredients rather than food types created from recipes, or (ii) a phrase that goes beyond a mere description
- A range of products called BEAUTIFULLY DELICIOUS, whilst being sold since 2006, is not on “all-fours” with Philosophy’s because the fragrance descriptions do not include any form of elaboration that is present in Philosophy’s mark and are for fragrances such as “coconut & shea” and “strawberry & pomegranate” that describe a simple ingredient rather than a food type that is created from a recipe.
 - Exhibits showing THE BODY SHOP range of products presented in “Boston round” bottles are also dated after the relevant date. Again, the fragrance descriptions are of ingredients such as RASPBERRY, COCONUT, VANILLA and PASSION FRUIT rather than food types that are created from a recipe;
 - Blue Orange Brand Management Limited’s TREACLE MOON brand of bath and shower gels are shown on a website carrying a 2009 copyright notice. These are packaged in “Boston round” bottles, in a very similar presentation to that seen in Philosophy’s mark and bearing fragrance names such as “THAT VANILLA MOMENT”, “THE RASPBERRY KISS”, “MY COCONUT ISLAND” and “ONE GINGER MORNING”. The latter is also shown appearing in *The Guardian* newspaper on 19 September 2008.

59) The evidence identified in sub-paragraph c) above does not assist Philosophy in its arguments. This is because, in the first two cases, the food-based descriptions are of ingredients only rather than, as in the case in Philosophy’s marks, descriptions of foods that are created from a recipe and used to describe a fragrance. In the third case, the TREACLE MOON brand uses phrases that incorporate an ingredient, such as vanilla or raspberry, but the phrase, as a whole, requires different considerations to those that appear in Philosophy’s mark and there is a strong argument that these phrases are distinctive. Consequently, I will say no more about these exhibits.

60) Next, I need to consider the impact of the evidence that is either undated or is dated after the date of filing of the contested application. In this regard, I am mindful of the guidance of the CJEU in *L & D SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-488/06 P*, where it stated:

“71 In fact, as the Court of First Instance correctly recalled in paragraph 81 of the judgment under appeal, the case-law of the Court of Justice shows that account may be taken of evidence which, although subsequent to the date of filing the application, enables the drawing of conclusions on the situation as it was on that date (see order in Case C-192/03 P *Alcon v OHIM* [2004] ECR I-8993, paragraph 41).”

61) With this in mind, it is clear that, in appropriate circumstances, it is permissible to take account of evidence that relates to a period subsequent to the filing date of the application. In the current proceedings, such evidence illustrates that five third party traders used recipe-created foods as fragrance descriptions, of the same type used in Philosophy’s mark, at a point in time no more than eleven months after the relevant date. Taking account of the use of such fragrance descriptions by various traders for many years prior to the relevant date, it is my view that it is unlikely that all uses shown in the evidence actually commenced after the relevant date, and the probability is that some or all of them were in use before the relevant date.

62) Taking this into account, together with the use that specifically relates to a period before the relevant date, I find that the evidence is sufficient to demonstrate that, as of the relevant date, it was reasonably widespread in the relevant industry for products to be promoted as having fragrances that are inspired by foods created from recipes (and possibly perceived by the consumer as conveying a message of decadence and luxury). However, the consumer is unlikely to analyse the mark to ask himself, for example, what does milkshake smell like in a product described as being “strawberries & milkshake” or how does the smell of a vanilla birthday cake differ from any other vanilla cake. This is especially so when the consumer is regularly confronted by similar fragrance descriptions inspired by foods created from recipes, and provided by a variety of traders. Therefore, I conclude that the impact of such phrases upon the consumer is one of indicating the fragrance of the product contained in the bottle, even where that indication may, if carefully analysed by the consumer, be considered as somewhat elaborated.

63) Taking all of the above into account, I find that the term VANILLA BIRTHDAY CAKE, as it appears in Philosophy’s mark will be viewed by the consumer as an indication of the fragrance of the product contained in the bottle and will not endow the mark with any trade origin significance.

64) Having reached such a conclusion, it is necessary to go on to consider if the additional elements present in Philosophy’s mark, namely the bottle and the additional text in the form of a detailed recipe, preceded by the word PHILOSOPHY, endow the mark with distinctive character. It is argued on behalf of Philosophy that the consumer pays due care and attention and will therefore identify these elements, when combined with the words VANILLA BIRTHDAY CAKE, as identifying trade origin. It claims that the placing of text in this

distinctive way is something the customer will recognise and is, therefore, a memorable part of the get-up. On the other hand, Nirvana points to the fact that the get-up is also used by numerous other traders and that there is no evidence that, despite Philosophy's claim to the contrary, it is the originator of marks comprising sweet food treats being used in relation to bath and body gels or that they are the originator of the clear bottles with black caps.

65) It appears to me that the text of the recipe is in a standard font. This font is very small in relation to the mark as a whole and is only discernable with close scrutiny. A recipe performs the purpose of instructing a cook on what are the ingredients and methods for producing specific food items. In light of this, the consumer is very unlikely to attribute any other significance to it, such as trade origin. This perception will be further magnified by the length of the recipe in the mark. Generally, the longer a textual element, the less likely that it will be perceived as an indicator of origin.

66) Of course, the recipe is preceded by the word PHILOSOPHY, but this appears in the same very small font as the recipe and will go unnoticed by the consumer. Therefore, I find it is *de-minimus* when considering the mark as a whole. Even if the consumer were to be particularly attentive and partakes in a full reading of the text present in the mark, it is far from obvious to me that he will perceive the word PHILOSOPHY as indicating trade origin. The word is positioned directly before the recipe and is likely to be perceived as indicating, in some oblique way, that the recipe reflects some unstated philosophy behind the production of the product.

67) I have found that the bottle itself is commonly used in the trade and does not depart from the norms of the sector, the words VANILLA BIRTHDAY CAKE and the presence of a recipe preceded by the word PHILOSOPHY all fail to endow the mark applied for with any indicators of trade origin. However, I must consider if all these non-distinctive elements, when combined, result in the mark as a whole having the necessary distinctive character in order for it not to attract a Section 3(1)(b) objection.

68) My finding is that the combination of all these elements is insufficient to endow the mark with any distinctive character. The consumer is likely to be unable to attach any trade origin significance to the mark as a whole. There is nothing in its get-up that would lead the consumer to a different perception. This is particularly in contrast with the evidence illustrating use by third parties where the similar get-up to that seen in Philosophy's mark is used but invariably has an additional element indicating trade origin. For example, N-SPA FRUIT appears on Nirvana's bottles, THE PINK COW bottles feature these words prominently near the top of the bottle, and TREACLE MOON (and a device) appears prominently on Blue Orange Brand Management Limited's bottles.

69) Ms Kirby contends that Philosophy was the originator of this “trade dress” represented by the mark, but Mr White submits that merely being the first to use a non-distinctive combination does not give the right to protect the sign as a mark and that, further, that there is no evidence of this, but even if it were true, at the relevant date, there were so many traders using similar “trade dress” that it would not now be associated with Philosophy. In my view, the evidence does support the contention that it is common for body wash/shower gel type products to be packaged in a “Boston round” bottle with the fragrance shown in large text near the top of the bottle and a narrative appearing in small text appearing below it and for the fragrance description to be inspired by foodstuffs created from recipes (and not merely food ingredients). There are numerous traders marketing such goods.

70) Taking all of the above into account, together with the guidance, in *Cycling is...* [2002] RPC 37, that I must consider “whether the perceptions and recollections the signs would trigger in the mind of the average consumer of the specified goods would be origin specific or origin neutral”, I concur with Mr White’s submission that the elements do not combine to form an origin specific mark. The consumer is likely to merely perceive the mark as a bottle of bath or shower gel fragranced like vanilla cake and, with the overall get-up giving an impression of decadent and luxurious products. The words VANILLA BIRTHDAY CAKE are likely to be perceived as doing no more than indicating the fragrance and will not be seen to indicate trade origin. This finding is not changed when these words are incorporated into the mark at issue. The mark, when viewed as a whole, is devoid of any distinctive character in respect of all the goods claimed.

71) In summary, I find that Philosophy’s mark 2534064 VANILLA BIRTHDAY CAKE is devoid of any distinctive character and, therefore, is open to objection under Section 3(1)(b) of the Act.

Philosophy’s 2534067 RASBERRY SORBET mark

72) For ease of reference, the marks at issue are:

First mark in series



Second mark in series



Description: *The first mark consists of a black-capped clear bottle onto which is printed, in black Jansen font, "raspberry sorbet", under which there follows a block of text comprising a recipe. The second mark consists of a black-capped clear bottle through is visible the colour pink applied to the goods, with "raspberry sorbet" printed in black Jansen font on the front of the bottle, under which there follows a block of text comprising a recipe.*

73) The considerations in respect to these marks are very similar to those already discussed in respect to Philosophy's VANILLA BIRTHDAY CAKE mark.

There are two notable differences between this and its RASPBERRY SORBET marks. Firstly, the name of the fragrance is different and, secondly, the second mark in the series is in colour. I should comment that I do not believe that the considerations are materially affected by the colour forming part of the second mark in the series and my finding will apply equally to both marks.

74) The other difference is the description of the product fragrance. Nevertheless similar considerations apply. If anything, the phrase RASPBERRY SORBET is likely to be even more clearly understood by the consumer as the scent of raspberry sorbet is one that most consumers will be capable of imagining without any great level of ambiguity. Certainly, the effect of the phrase upon the perception of the consumer will be to indicate the fragrance of the product contained within the bottle. The phrase will not impart any information to the consumer regarding trade origin.

75) As with Philosophy's VANILLA BIRTHDAY CAKE mark, the use of the "Boston round" bottle and the appearance on the bottle of a recipe in a small font relative to the rest of the marks is insufficient to endow them with any distinctive character.

76) In summary, I find that these marks are also devoid of distinctive character and are open to objection under Section 3(1)(b) of the Act.

Philosophy's 2534062 COCONUT FROSTING mark

77) This mark is:



Description: *The mark consists of a black-capped clear bottle (through which is visible the colour white, applied to the goods), onto which there is printed in black*

font "coconut frosting" and immediately underneath there follows text (in the form of a recipe or poem), filling the text block which is indicated by the dotted line.

78) The considerations in respect to this mark are also very similar to those already discussed. The mark differs from the others discussed in that the name of the fragrance is different and, secondly, the mark has no additional text visible in the representation, but the description accompanying the mark refers to text in the form of a poem or recipe being added. I have already found that such a vague description renders the mark open to objection under Section 3(1)(a). However, if I am found to be wrong in that finding, I do not see how this mark is endowed with distinctive character when the marks discussed earlier are not.

79) The phrase COCONUT FROSTING is likely to be clearly understood by the consumer as the scent of coconut frosting and is a scent that most consumers will be capable of imagining without any great level of difficulty. The consumer will certainly only associate the phrase with an effort to describe the products fragrance in a way that increases the perception of decadence and luxury. Once again, I am of the view that the phrase will not impart any information to the consumer regarding trade origin.

80) Taking the above into account, together with the use, in the mark, of the "Boston round" bottle, I conclude that an element of a mark that is unspecified (such as the recipe or poem referred to in the description of the mark here) does not endow it with any distinctive character. There is nothing in the mark's constituent parts or its whole that indicates to the consumer any trade origin. Consequently, I find that if I am wrong in respect of my findings regarding Section 3(1)(a) then the mark would be devoid of any distinctive character and open to objection under Section 3(1)(b) of the Act.

Use of Philosophy's marks

81) Whilst not specifically pleaded by Philosophy, I will comment briefly upon the impact of Philosophy's activities going back to the 1990s. It claims that it first introduced a food-inspired range of products as early as 1998 with its "The Cookbook" range. However, the evidence fails to show that any fragrances forming part of that range were any of the three that form part of the marks at issue in these proceedings. Philosophy discloses promotional spend in the form of a retainer to a public relations company that has, since 1997, totalled £500,000 and turnover in 2008 being about \$10.8 million, equating to about \$22 million of retail sales. However, it is not clear how much, if any, of these amounts relate specifically to the marks in question.

82) Ms White does state that Philosophy's "3-in-1 range" is its most popular and turnover figures for this range are provided. It is also stated that this range includes its RASPBERRY SORBET and VANILLA BIRTHDAY CAKE products. Nevertheless, the scale of use of these specific marks is unknown, as is what

proportion of this range they represent and when they were first used (as part of the range, or otherwise). There is evidence that the VANILLA BIRTHDAY CAKE mark was used in 2007 and the COCONUT FROSTING mark used in 2008, but this is little more than two years and one year, respectively, prior to the relevant dates in these proceedings (the filing dates of the applications).

83) Taking all of this into account, there is insufficient information regarding the scale of use of the marks at issue to form a view on whether the consumer has been educated to recognise the marks as indicators of origin. Further, and as submitted by Nirvana, there are a number of third parties marketing similarly packaged products. This has the effect of diluting any impact of use by Philosophy of its marks (and as I have already found, the evidence fails to establish the scale of use of the marks at issue). Therefore, the Section 3(1) proviso does not assist Philosophy.

Summary

84) To summarise, I have found that the all four of Philosophy's marks are devoid of any distinctive character. Having reached such a conclusion, it is not necessary for me to go on to consider the remaining grounds.

COSTS

85) The oppositions having been successful, Nirvana is entitled to a contribution towards its costs. I take account of the fact that no hearing has taken place but that both parties filed evidence and written submissions in lieu of attendance. I award costs on the following basis:

Three opposition fees	£600
Preparing statements of case and considering other sides statements of case	£500
Preparing evidence & considering other side's evidence	£1200
TOTAL	£2300

86) I order Philosophy Inc to pay Nirvana Spa & Leisure Ltd the sum of £2300. 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 24th day of May 2012

**Mark Bryant
For the Registrar,
the Comptroller-General**

ANNEX

Application 2534064

FOR INFO.

