

O-215-05

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2329898
BY WINEZ LIMITED
TO REGISTER THE TRADE MARK
MADARA ROCK
IN CLASS 33**

**AND IN THE MATTER OF OPPOSITION THERETO
UNDER No. 91989
BY INSTITUTO DO VINHO DA MADEIRA**

BACKGROUND

1) On 17 April 2003, Winez Limited applied under the Trade Marks Act 1994 for registration of the trade mark MADARA ROCK in respect of the following goods in Class 33: “Table wines, the produce of Bulgaria”.

2) On 15 September 2003 Instituto Do Vinho Da Madeira (hereinafter the Institute) of Rue 5 de Outubro 78, 9000 Fun chill, Madeira, Portugal filed notice of opposition to the application. The grounds of opposition are in summary:

a) The opponent is the proprietor of the Certification mark 1226128

MADEIRA

Certification Trade Mark

in respect of “wines” in Class 33. This mark was applied for on 11 September 1984 and registered on 30 January 1998.

b) The opponent contends that the goods included in the applicant’s specification are similar to those for which its mark is registered. The opponent contends that its mark has acquired goodwill and reputation in the UK. Therefore, the application offends against Sections 5(2)(b), 5(3), 5(4)(a) and 56 of the Trade Marks Act 1994.

3) The applicant subsequently filed a counterstatement denying the opponent’s claims. The applicant points out that its specification is limited to “produce of Bulgaria” and that the mark in suit is the name of a geological feature of cultural and historical importance in Bulgaria.

4) Both sides filed evidence and ask for an award of costs. Neither side wished to be heard although the opponent did provide written submissions which I will refer to as relevant in my decision.

OPPONENT’S EVIDENCE

5) The opponent filed three witness statements. The first, dated 6 July 2004, is by Joao Jose Ornelas Nunes the Vice President of the Institute. He states that the Institute was established in 1979 under a Portuguese Government decree for the control and management of the fortified wine known as Madeira. The wine takes its name from the island where it is produced and under Portuguese law only fortified wine produced on Madeira can be described as Madeira. He states that the fortified wine produced on the island has been sold in the UK under the Madeira name for approximately 600 years. He states that Madeira is very well known in the UK.

6) Mr Nunes provides sales figures for Madeira wine to the UK. He points out that the figures are in Euros and that there have been approximately 1.5 Euros to the pound sterling during the period covered. He also points out that the actual sale price taking into account taxes etc would add approximately 200% to the figures shown. With these factors in mind he states that the average retail sales in the last ten years has been approximately £3.3 million.

Year	Total in Euros
1994	1,171,876
1995	1,361,179
1996	1,372,106
1997	2,078,605
1998	1,996,936
1999	1,736,886
2000	1,717,477
2001	2,045,933
2002	1,615,629
2003	1,694,322

7) Mr Nunes states that the Institute has advertised and promoted Madeira in the UK spending approximately 167,000 Euros in the last ten years. He states that the Institute has participated each year in “The London International Wine & Spirits Trade Fare” which he states is “a major gathering of wine producers, wholesalers and retailers in the United Kingdom”. He provides at exhibits JJON1 and JJON2 two leaflets which have been circulated in the UK. The two brochures provide a history of the island and the fortified wine produced. There is only one illustration of bottles, which appears in both leaflets. This shows two green bottles with the word “MADEIRA” in large print stencilled in white across the front of the bottle in an unsophisticated manner. Underneath one bottle is the word “SERIAL” the other the word “VERDELHO” stencilled in white. From the printed matter it is clear that these words refer to the type of Madeira wine made from different varieties of grape.

8) He states that the Shorter Oxford English Dictionary, 2002 edition, shows as the primary meaning of the word “Madeira” the following: “a fortified wine made in Madeira; a drink of this”.

9) Mr Nunes states that the Institute was able to obtain its UK Certification trade mark registration because of the very substantial reputation of Madeira as a fortified wine. He states that the Institute believes that the mark in suit could be confused with its own certification mark as the island of Madeira is a rocky outcrop in the Atlantic Ocean and is well known for its steep and rocky terrain.

10) The second witness statement, dated 17 August 2004, is by Geoffrey Cole, who states that he has been involved in the wine trade for 23 years and is currently associated with a business called Bovey Wines in Cornwall. This business deals primarily in old and fortified wines, particularly Madeira wine throughout the UK. Mr Cole states that he has many years experience in the UK trade in Madeira and believes that he can speak with some authority about it.

11) Mr Cole states that Madeira as a fortified wine has been sold in the UK for centuries, and that in the 19th Century Madeira imports exceeded those of port and sherry combined. He claims that Madeira wine is a specialist part of the wine trade in the UK but is available at good wine merchants throughout the UK. He states that it is not a large volume selling wine but that there has always been a steady and appreciative market in the UK. He claims that the existence of Madeira wine is probably better known than its overall sales volume would suggest. He provides his opinion that Madeira wine is well known in the UK as a specialist and high quality fortified wine produced on, and only on, the island of Madeira. Mr Cole also provides his opinion that:

“An unsophisticated buyer looking for MADEIRA wine might in my view misread or confuse MADARA for MADEIRA – the words seem quite close and the script or typeface used could worsen that prospect. The presence of ROCK does not I think help. It is common to identify Madeira wine by putting the grape variety after Madeira e.g. as MADEIRA B(U)OAL. Again an unsophisticated prospective purchaser may assume such relevance to ROCK or simply not see ROCK as meaning something different, or extra.”

12) The third witness statement, dated 1 September 2004, is by John Dudbridge who states that he has been involved in the wine trade “for very many years” and is currently associated with two wine businesses, one in Hull the other in Banbury. He states that he has experience in the importation, wholesale and retail of wines and has particular knowledge in the field of fortified wines in which Madeira figures notably.

13) Mr Dudbridge confirms that Madeira has been imported into the UK for centuries and states that it is a wine that sells consistently. He claims that it is probably known by the wine purchasing public of the UK through occasional purchases to a greater degree than its mere sales figures would suggest. He states that:

“Wine buyers who wish to buy the wine will firstly identify their purchase as MADEIRA and secondly make their choice according to the identity of the grower, of course with price coming into it. I do not think that it is safe to assume that all persons wishing to try MADEIRA fortified wine will necessarily be aware of the names of the growers/producers and I can from my own experience see that the Institute would be most concerned at the possibility that purchasers misreading or confusing MADARA and MADEIRA, and thereby obtaining MADARA (ROCK) wines, would firstly not be getting what it is they intended to purchase and secondly may find their taste for MADEIRA wine disappointed or even removed by sampling MADARA (ROCK) wine. The presence of ROCK in MADARA ROCK does not to my mind mitigate that concern. It might for example be taken by a purchaser to indicate a producer/grower called “Rock” and therefore be discounted when wishing to purchase MADARA ROCK mistakenly for MADEIRA.”

APPLICANT’S EVIDENCE

14) The applicant filed a witness statement, dated 7 December 2004, by David Brian Lutkin the applicant’s Trade Mark Attorney. He accepts that Madeira wine has been sold in the UK for centuries. He also claims that he was aware of the existence of the

Madara Plain and the Madara Horseman from his schooldays. He states that the relief of a horseman and horse carved out of the rock at the edge of the Plain near Madara was akin in his mind to Stonehenge. No-one is certain who carved the horseman relief or why. At exhibit DBL1 he provides copies of searches carried out on the Internet which provide information about the Madara rock relief and the Madara site which includes various caves, and amongst other things states that it is included in the List of the World Cultural Heritage Sites of UNESCO.

15) Mr Lutkin disputes the opponent's claims regarding reputation. He states that he visited two local supermarkets on 4 December 2004 and that he "saw substantial shelf space dedicated to sherry but, in both cases, only two examples of bottles of Madeira". He also comments that fortified wines were separated from table wines on shelves and gondolas in the stores. He also states that the marks should be compared as a whole.

16) That concludes my review of the evidence. I now turn to the decision.

DECISION

17) I shall deal firstly with the ground of opposition under Section 5(2)(b) which 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."

18) An "earlier trade mark" is defined in Section 6, the relevant parts of which state:

"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,"

19) The opponent's certification mark 1226128 was registered on 30 January 1998 and is plainly an "earlier trade mark".

20) In determining the question under section 5(2)(b), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel Bv v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R 723. 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-Meyer 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) 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*;

(h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG*;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.*.

21) In essence the test under Section 5(2) is whether there are similarities in marks and goods and/or services 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 judgements of the European Court of Justice 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 mark applied for and the opponent's mark on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications.

22) The opponent's mark is not inherently distinctive, however, I must also consider the use of the mark and consider whether the mark has acquired distinctiveness as a result of this use. The opponent has provided sales figures for Madeira wine sold in the UK. However, the opponent provided no evidence of market share or the extent of the market for fortified wines or wines in general. The opponent has also claimed that as Madeira fortified wine has been sold in the UK for centuries it would be known by a greater percentage of the population as its product would be purchased only occasionally. As the word "Madeira" is a common dictionary word I am willing to accept that it would be known to the average consumer as the name of an island, a fortified wine, a cake or a combination of the three. I therefore accept that the opponent's trade mark has acquired a reputation.

23) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was recently considered by David Kitchin Q.C. sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchin concluded at paragraph 17 of his decision:

"The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr Thorley Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become more distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case."

24) I now turn to the comparison of the specifications of the two parties and take into account the factors referred to in the opinion of the Advocate General in *Canon*; page 127, paragraphs 45-48. In its judgement, the ECJ stated at paragraph 23:

"23. In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their end users and their method of use and whether they are in competition with each other or are complementary."

25) For ease of reference the specifications of the two parties are reproduced below:

Applicant's specification	Opponent's specification
Class 33: Table wines, the produce of Bulgaria	Wines included in Class 33.

26) Clearly, the opponent's specification encompasses the applicant's specification and the goods of the two parties must be considered identical.

27) I now turn to consider the marks of the two parties. These are reproduced below for ease of reference:

Applicant's mark	Opponent's mark
MADARA ROCK	MADEIRA <small>Certification Trade Mark</small>

28) Before making the comparison I should define who the average consumer for such goods would be. Neither side has commented on this issue, but to my mind, the average consumer for wines must be considered as being over eighteen years of age who is not teetotal. This would therefore encompass a very large percentage of the adult population of the UK.

29) Visually the marks share the first three letters, and both have the letters "RA" in them. However, the applicant's mark consists of two words and to my mind they are not, overall, visually similar. Phonetically, the opponent contends that "The respective pronunciations of MADEIRA and MADARA can vary with the speaker's personal view of the letters EI and "A" where they occur between MAD-RA. A common English pronunciation of MADEIRA is with the EI sounding like the initial "A" in AREA. The letter "A" in MADARA could be pronounced in a number of ways, one of which is as the initial "A" in AREA."

30) I found earlier that the opponent's mark had a significant reputation. It is a dictionary word and although there are a number of ways in which one could pronounce the word I believe that most consumers will be aware of the correct pronunciation which is Ma- dé - ra. In contrast the applicant's mark has not been shown to be well known by the average consumer. It may be a heritage site but this does not mean that it is well known amongst the average consumers of the UK. To my mind there are five ways of pronouncing the first part of the applicant's mark which are most likely to be chosen. These are:

- a) MAD-A-RA
- b) MAD-AR-A
- c) MA-DAR-A
- d) MA-DA-RA
- e) MADA-RA

31) Clearly, a, b and e give significantly different results to the opponent's mark. Whilst c and d offer results which are phonetically similar to the opponent's mark. However, I must not overlook the fact that the applicant's mark also has a second word, ROCK. The opponent referred me to the Judgment of the Court of First Instance (Second Chamber) in Case T-129/01 of Jose Alejandro, SL v Office for Harmonisation in the Internal Market (OHIM) where the marks BUD and BUDMEN were found to be similar and contended that:

“The application of that BUD/BUDMAN CFI decision here is essentially that the addition of ROCK to MADARA does not diminish the clear conflict between MADEIRA and MADARA as discussed above, with MADARA in MADARA ROCK being the first word of the mark claimed, corresponding closely to the only word of the sign constituting the earlier mark and that the second word, “ROCK” must be viewed as ancillary to the element “MADARA”, since it occupies second place in the sign. The second word of the opposed application is less audible than the first word, and the marks are in consequence phonetically similar. The first word of the mark claimed accentuates it and therefore is predominant in relation to the second word. Since the dominant element of the opposed mark is closely similar to the mark upon which the opposition is based, the marks in question are visually and phonetically similar.”

32) To my mind the above case is not on all fours with the instant case. It is easy to see how, in the above case, the Court found that the first part of the mark BUDMEN was dominant as it can be viewed as a way of describing men who drink Bud. In the instant case it is my opinion that the second word “fixes” the first word as an exact geographical location, as in Ayres Rock (aka Uluru). It has been suggested by the opponent that as it is common for their mark to be followed by another word, often the grape variety the word ROCK in the mark in suit would be viewed as a particular Madeira wine. I do not accept this contention. The word “rock” is a standard dictionary word which would be easily recognised by the average consumer and would not be confused as a type of grape.

33) The opponent also suggests that the island of Madeira is known to be a rocky outcrop and so the word ROCK in the mark in suit would not dissociate from Madeira and Madeira wine. I accept that if the mark in suit were used on lumps of stone or even confectionery then the average consumer would probably view the second word in the mark as being descriptive of the goods and the comparison between the marks of the two parties would effectively be reduced to the words MADARA and MADEIRA. However, the goods in question are table wines and so the word ROCK must be considered to be as distinctive as the word MADARA.

34) The average consumer views trade marks as a whole and does not analyse their details. The trade marks of the two parties have a degree of visual and aural similarity but these are far outweighed by the visual and aural differences. Conceptually, the opponent's mark has a very clear meaning being very well known as the name of a fortified wine which comes from an island of the same name, whereas the applicant's mark is merely suggestive of a specific geographical location which most consumers would not be able to locate on a map. To my mind, the marks must be regarded as not being similar.

35) Carrying out a global assessment and taking into account imperfect recollection and all of the factors outlined earlier in this decision, I consider that there is no likelihood of confusion between the marks of the two parties. The opposition under Section 5(2)(b) fails.

36) Next, I consider the ground of opposition under Section 5(4)(a) which reads:

“5. (4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

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

37) In deciding whether the mark in question “MADARA ROCK” offends against this section, I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC, in the *WILD CHILD* case [1998] 14 RPC 455. In that decision Mr Hobbs stated that:

“The question raised by the Grounds of Opposition is whether normal and fair use of the designation WILD CHILD for the purposes of distinguishing the goods of interest to the Applicant from those of other undertakings (see Section 1(1) of the Act) was liable to be prevented at the date of the application for registration (see Art.4(4)(b) of the Directive and Section 40 of the Act) by enforcement of rights which the opponent could then have asserted against the Applicant in accordance with the law of passing off.

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

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

- (1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and
- (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of "passing off", and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.'

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

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

- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

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

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

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

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

38) The date at which the matter must be judged is not entirely clear from Section 5(4)(a) of the Act. This provision is clearly intended to implement Article 4(4)(b) of Directive 89/104/EEC. It is now well settled that it is appropriate to look to the wording of the Directive in order to settle matters of doubt arising from the wording of equivalent provisions of the Act. It is clear from Article 4(4)(b) that the earlier right had to have been “acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed....”. The relevant date is therefore 17 April 2003, the date of the application.

39) With these considerations in mind I turn to assess the evidence filed on behalf of the parties in the present proceedings as set out earlier in this decision.

40) To succeed under this ground the opponent must show that it enjoyed goodwill at the relevant date. The opponent has shown that prior to the relevant date it had trade in the UK. Whilst the evidence of use was somewhat underwhelming I accepted earlier in this decision that the opponent enjoyed considerable reputation and goodwill under its mark.

41) Earlier in this decision I found use of the mark in suit, actual or on a fair and notional basis would not result in confusion with the opponent’s marks when used on table wines in Class 33. The restriction in the specification referring to “the produce of Bulgaria” made the possibility of confusion even more remote. Accordingly, it seems to me that the necessary misrepresentation required by the tort of passing off will not occur. The opposition under Section 5(4)(a) of the Act must fail.

42) Lastly, I turn to the ground of opposition based upon Section 56 of the Act which reads:

“56.-(1) References in this Act to a trade mark which is entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark are to a mark which is well-known in the United Kingdom as being the mark of a person who -

- (a) is a national of a Convention country, or
- (b) is domiciled in, or has a real and effective industrial or commercial establishment in, a Convention country,

whether or not that person carries on business, or has any goodwill, in the United Kingdom.

References to the proprietor of such a mark shall be construed accordingly.

(2) The proprietor of a trade mark which is entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark is entitled to restrain by injunction the use in the United Kingdom of a trade

mark which, or the essential part of which, is identical or similar to his mark, in relation to identical or similar goods or services, where the use is likely to cause confusion.

This right is subject to section 48 (effect of acquiescence by proprietor of earlier trade mark).

(3) Nothing in subsection (2) affects the continuation of any *bona fide* use of a trade mark begun before the commencement of this section.”

43) A likelihood of confusion is a pre-requisite under this ground and in view of my earlier findings in relation to the marks at issue, the opponent is in no stronger position on this ground. The opposition with regard to Section 56 of the Act also fails.

44) The opponent has failed on all the grounds of opposition. I order the opponent to pay the applicant the sum of £1000. 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 29th day of July 2005

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