

O-264-08

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No. 2423192  
BY LOUISE COOPER TO REGISTER THE TRADE MARK  
SNOTEEZE IN CLASSES 5 AND 16**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 95002 BY PASSION FOR LIFE HEALTHCARE LIMITED**

## BACKGROUND

1. On 31 May 2006, Louise Cooper applied to register the trade mark **SNOTEEZE** for the following goods:

**Class 5:** Tissues impregnated with medicated preparations.

**Class 16:** Tissues.

Following examination, the application was accepted and published for opposition purposes on 1 December 2006 in Trade Marks Journal No.6661.

2. On 23 February 2007, Passion for Life Healthcare Limited (hereafter Passion), filed a notice of opposition. This consists of a single ground based upon section 5(2)(b) of the Trade Marks Act 1994 (as amended) (the Act). Passion are the owners of the following trade mark:

<b>Trade Mark:</b>	<b>No.</b>	<b>Application date</b>	<b>Registration date</b>	<b>Goods</b>
SNOREEZE	E1582592	29.3.2000	30.7.2001	<b>5</b> -Pharmaceutical products, preparations and substances; homeopathic and naturopathic products, preparations and substances.  <b>10</b> - Apparatus and instruments for minimising, inhibiting or preventing snoring.  <b>20</b> - Pillows; cushions; mattresses; bolsters; mattress covers; bedding; parts and fittings for all the aforesaid goods.

3. I note that in their statement of grounds, Passion say:

“The goods upon which [Passion] relies, are only those goods in class 5...No reliance is placed upon classes 10 and 20 of the Earlier Mark.”

4. Commenting on the respective parties’ trade marks from the visual standpoint, Passion say:

“..In fact only a very close inspection would reveal any slight variation, and a consumer of average attentiveness is not going to make that close inspection.”

In relation to conceptual similarity Passion say:

“...[Passion’s ] mark is for use on preparations relating to sleep disorders, notably snoring. [Passion’s ] products come in three variations, one of which is a nasal decongestant. We say that the public would associate the mark in suit with [Passion’s] mark because they are both relating to the nose. Moreover, one aspect that could improve sleeping patterns, aiding a restful night sleep, the purpose of SNOREEZE, is a clear nasal tract. Further, or in the alternative customers could see [Passion’s ] SNOREEZE as a nasal decongestant, thereby achieving the same purpose as SNOTEEZE. Since nasal mucus, or snot, needs to be removed, a tissue to deal with this is likely to be of interest to [Passion’s] customers. Since the same syncopation exists between the marks SNOTEEZE and SNOREEZE we say that the public will associate the removal of nasal mucus as perhaps a precursor to the use of [Passion’s] nasal decongestant, therefore drawing the conclusion that the mark in suit is associated with [Passion]. Or in the alternative that SNOREEZE and SNOTEEZE perform essentially the same role, to clear the nasal tract. Thus a consumer of average awareness and attentiveness could easily conclude that SNOTEEZE and SNOREEZE came from the same source.”

5. Insofar as the respective goods and services are concerned Passion say:

“Furthermore, the mark in suit covers identical or similar goods, to those covered by [Passion’s] earlier mark...Whilst different words are used between the specifications, since [Passion’s] earlier mark covers “pharmaceutical products, preparations and substances” those could be delivered by any method, including being impregnate on a tissue or other like material.”

6. On 24 May 2007 Ms Cooper filed a counterstatement. This consists, in essence, of a denial of the ground on which the opposition is based. I note that Passion are asked to provide proof of use in relation to: “Pharmaceutical products, preparations and substances”. In relation to the nature of the average consumer for Ms Cooper’s goods she says:

“..Especially in the case of the medicated goods of class 5 the average consumer is likely to take great care to ensure that the correct goods are selected in order to avoid the dangers associated with administering the wrong medication. Consequently, the average consumer is likely to inspect the marks very closely and to take note of quite small differences between them..”

7. In relation to Passion’s arguments relating to conceptual similarity between the respective trade marks, Ms Cooper says:

“Even if, as suggested by [Passion], the public understands [Passion’s] mark to mean that the goods will reduce snoring, [Ms Cooper] does not accept that:

a. the average consumer is aware of the supposed link between nasal congestion and snoring, or that

b. even if aware of that link, the average consumer would link SNOREEZE with the relief of nasal congestion, rather than merely with the relief of snoring in general, or that

c. the average consumer would view SNOTEEZE as being for use as an accessory to a snoring remedy, or that

d. even in all of the above circumstances a consumer of average awareness and attentiveness could easily conclude that SNOTEEZE and SNOREEZE came from the same source..”

8. Both parties filed evidence in these proceedings and both seek an award of costs in their favour. The matter came to be heard on 13 August 2008. At the hearing Passion were represented by Mr Duncan Welch of Joshi & Welch LLP, and Ms Cooper by Mr Simon Coles of Graham Coles & Co, the parties’ respective professional representatives in these proceedings.

## **EVIDENCE**

### **Passion’s evidence-in-chief**

9. This consists of two witness statements. The first, dated 5 October 2007, is from Duncan Welch, a trade mark attorney and partner at Joshi & Welch LLP. Mr Welch confirms that he is authorised to speak on Passion’s behalf, adding that the information in his statement comes from either his own personal knowledge or from the records of Passion or his firm.

10. Exhibit DAW1 consists of photocopies of packaging bearing the trade mark snoreeze (in lower case with the letters “snore” shown in pale blue and the letters “eze” shown in white), together with the trade mark Snoreeze shown in normal type face; I also note what appears to be a device of a moon which appears on the packaging. The product is described as a throat or nasal spray or oral strips for long lasting snoring relief. While it is not possible to date the photocopies, where they can be read I note they bear the following text: “LOT: 0307 EXP: 2010/4 (throat spray) and LOT: 702 EXP: 2010/04 (nasal spray). In his statement Mr Welch says:

“..I can advise that the SNOREEZE product is on sale in the United Kingdom and has been so for a number of years. Sales are currently via mail order, from my client’s web site, it can also be purchased in high street stores such as Boots....”

11. Exhibit DAW2 consists of pages downloaded on 4 October 2007 from the website [www.snoreeze.com](http://www.snoreeze.com) which shows the trade marks and goods mentioned in paragraph 10 above.

12. Exhibit DAW4 consists of a undated extract from Passion’s website in relation to Passion’s nasal spray which Mr Welch notes contains the following text in answer to the question: “What causes snoring?”

Snoring can be caused by congestion in the nasal passages, which can limit airflow through the nose.”

And, under the heading: “The following factors and conditions are known to increase snoring:

**Nasal congestion** due to a cold, allergies or deviated septum can limit airflow through the nose.”

13. When sold in, for example Boots, Mr Welch states that the goods will be sold from a self-service shelf. He adds that for the sake of convenience other preparations lotions and materials relating to sleep and sleeping disorders (including snoring) will be grouped together. Exhibit DAW6 consists of three photographs taken at a Boots store in central London on 26 January 2006, showing a range of sleep related products grouped together.

14. Mr Welch goes on to say that the respective parties’ goods could be placed side-by-side on the same shelf, adding that it is possible the average consumer would expect the products to come from the same source, particularly if they are for related or complementary goods. He adds:

“It is possible that the average consumer would make the assumption that one product loosens the mucus in the nasal passages and the other is to remove that mucus. Since these are not products dispensed by a trained Pharmacist, but are available on self-service shelves, confusion could easily arise. As an alternative with an impregnated tissue the average consumer might think this is an alternative from the same stable.”

15. Exhibit DAW7 consists of the results of a Google Internet search conducted by Mr Welch on 2 October 2007. He notes that the search term he entered “snotteeze” retrieved results for Snoreeze, with the search engine querying:

“Did you mean: *snoreeze*”.

16. The remainder of Mr Welch’s statement consists of submissions. It is not necessary or appropriate for me to summarise them here, but I will keep them in mind when reaching a decision.

17. The second witness statement, dated 4 October 2007, is from Alexander Duggan. Mr Duggan explains that he is the Managing Director of Passion, a position he has held since 1996. He confirms that the information in his statement comes from his own personal knowledge or from company records and that he is authorised to speak on Passion’s behalf.

18. Mr Duggan explains that the SNOREEZE product has been sold in the United Kingdom since May 2000. It has, he adds, been in continuous use since that date, and has been sold throughout the United Kingdom in both the high street from stores such as Boots, and by mail order through his company’s website, as well as through a dedicated website [www.snoreeze.com](http://www.snoreeze.com).

19. There are, he states, three types of SNOREEZE products available; a throat spray, an oral strip and a nasal spray. Exhibit AD1 consists of examples of the product in its packaging and are,

it would appear, the actual packaging represented in the photocopies provided as exhibit DAW1 to the witness statement of Mr Welch.

20. Sales of the SNOREEZE products in the United Kingdom in the period 2003 to 2007 have been as follows:

<b>Year</b>	<b>Approx Turnover (£)</b>	<b>Volume in units</b>
2003	640,000	147,000
2004	590,000	124,000
2005	730,000	225,000
2006	690,000	228,000
2007	670,000 (estimate)	228,000 (estimate)

21. Given the material date in these proceedings i.e. 31 May 2006, I can only take account of a portion of the sales figures for 2006 and none of the figures for 2007. Mr Duggan also provides figures for international sales, these are as follows:

<b>Year</b>	<b>Approx Turnover (£)</b>	<b>Volume in units</b>
2003	2.3m	1,075,000
2004	1.8m	1,075,000
2005	3.4m	1,295,000
2006	2.7m	1,182,000
2007	3.9m (estimate)	1,768,000 (estimate)

22. Passion, explains Mr Duggan, were awarded The Queen's Award for Enterprise in the International Trade category in 2003 for the global success of the SNOREEZE product. Exhibit AD2 consists of a letter to Passion from The Department of Trade and Industry dated 1 May 2003, but as far as I can tell, the letter does not mention the SNOREEZE trade mark. Exhibit AD3 consists of a copy of a certificate naming Passion as the winner in 2006 (but not when in 2006) of an OTC Marketing Award for their Snoreeze Oral Strips in the "Most Innovative New OTC Product" category.

23. Mr Duggan explains that the SNOREEZE products have been actively marketed. Amounts spend on advertising and promotion of the SNOREEZE brand in the United Kingdom in the period 2000 to 2007 have been as follows:

<b>Year</b>	<b>(£)</b>
2000	150,000
2001	150,000
2002	100,000
2003	450,000
2004	75,000
2005	400,000
2006	150,000
2007	250,000

My comments in relation to the figures for 2006 and 2007 at paragraph 21 above, also apply to Passion’s advertising and promotional spend.

24. Mr Duggan states that Passion have taken advantage of the promotional benefits of the web, and exhibit AD4 consists of web statistics for Passion’s website [www.snoreeze.com](http://www.snoreeze.com) for the years 2003 to 2006. The figures for unique visitors to the website are as follows: 4129 (July to December 2003), 13327 in 2004, 20317 in 2005 and 5607 for January to March 2006.

25. Passion, explains Mr Duggan, utilise television and radio advertising as well as advertisements in the press and “other such like promotional material”. Exhibit AD5 consists of a number of tables showing the promotions that Passion have utilised over a number of years. In 2000 this appears to have taken the form of national radio advertising, in 2001 in a range of national magazines, in 2003 television advertising on Channel 4 and a number of satellite channels and in 2005, a combination of outdoor, press and radio advertising. Exhibit AD6 consists of a range of marketing and promotional material used by Passion, in the majority of which the SNOREEZE brand appears, and the majority of which, where dated, appear to be before the material date in these proceedings.

**Ms Cooper’s evidence-in-chief**

26. This consists of a statutory declaration, dated 26 February 2008, from Louise Cooper who confirms that the information in her statement comes from her own personal knowledge.

27. In response to the results of Mr Welch’s Google Internet search (paragraph 15 above), Ms Cooper exhibits at LC01 a page taken from the Google Web Search Help Center which provides information on how the suggestions provided in “Did you mean?” are arrived at. I note that it says:

“Google uses spell checking software to check queries against common spellings of each word. When we determine an alternative spelling suggestion that we think might improve the search results you’ll see “Did you mean: (more common spelling)” at the top of your search results page.”

28. Ms Cooper explains that if one enters the following terms, Google responds in the following manner:

<b>Term Searched</b>	<b>Did You Mean? Term Generated</b>
SNOFEEZE	SNEEZE
SNOUEEZE	SQUEEZE
SNOPEEZE	SNOPE
SNOGEEZE	SNOREEZE

Of these results, Ms Cooper says:

“It is clear that the fact that a Google search for SNOTEEZE brings up a Did You Mean...? prompt for SNOREEZE merely demonstrates that the words share common letter combinations and that SNOREEZE currently appears more commonly on the Internet than does SNOTEEZE....”

29. Ms Cooper states that to test Passion’s claims that the respective parties’ goods may (as Mr Welch claims) be sold from the same shelf, on 24 and 25 February 2008, she visited the stores of a number of major retailers selling both snoring remedies and/or nasal decongestants and tissues. Exhibits LC02 to LC06 consist of a photograph or a series of photographs taken at the following locations: the Burnham branch of Sainsburys (LC02), the Maidenhead branch of Waitrose (LC03), the Maidenhead branch of Boots (LC04), the Virginia Water branch of Budgen (LC05), and the Virginia Water branch of Lloydspharmacy (LC06). Commenting on the results of these investigations, Ms Cooper says:

“None of these had placed tissues of any kind on shelves anywhere near to their displays of snoring remedies (or to nasal decongestants).”

And:

“...major retailers clearly do not customarily place tissues and preparations for the alleviation of snoring next to, or even close to each other on their shelves, and they therefore do not appear to recognise any association between such goods in the mind of the average consumer...”

30. Finally, exhibit LC07 consists of an undated handwritten note (but possibly from 26 February 2008) on a Tesco headed compliment slip which reads as follows:

“Dear Louise, as requested the Tissues are in Aisle 5 and the snore-eze can be located opposite the pharmacy on the health and beauty section. Sue”

31. In response to Passion’s argument that the respective parties’ goods are not dispensed by pharmacists, Ms Cooper, at exhibit LC08, provides a photograph (also taken on 25 February 2008 at the Virginia Water branch of Lloydspharmacy) which shows goods for the alleviation of snoring displayed in a section marked “Supervised Sales Only Please ask for assistance”. Ms Cooper also refers to the packaging exhibited by Mr Welch at exhibit DAW1 which she notes contains, inter alia, the following wording:

“Cautions - If pregnant, consult your doctor before use”,

and to the following wording which appears in the material provided by Mr Duggan at exhibit AD6:

“Snoreeze is suitable for most people, however it is always recommended to check the ingredients first for possible allergies....”

Commenting on these documents, Ms Cooper says:

“It is clear that both [Passion] and Lloydspharmacy consider that preparations for the alleviation of snoring should be selected with more than the average level of attentiveness on the part of the consumer”.

32. Ms Cooper concludes her statement in the following terms:

“Despite [Passion’s] attempts to establish a link between tissues, impregnated tissues and preparations for the alleviation of snoring, all of the evidence points to the fact that there is no association between such goods in the mind of the public, (or of the retail trade) and furthermore that the public is likely to take great care in the selection of snoring remedies..”

33. That concludes my summary of the evidence filed in these proceedings, insofar as I consider it necessary.

## **DECISION**

34. The sole ground of opposition is based upon section 5(2)(b) of the Act. This reads as follows:

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

(a).....

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

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

An earlier trade mark is defined in section 6 of the Act, 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), Community trade mark or international trade mark (EC) 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,”

35. In these proceedings Passion is relying on the registered trade mark shown in paragraph 2 above, which has an application date prior to that of the application for registration; as such it clearly qualifies as an earlier trade mark under the above provisions. The application for registration was published for opposition purposes on 1 December 2006, and as a result, Passion’s earlier trade mark is subject to The Trade Marks (Proof of Use, etc) Regulations 2004.

These read as follows:

**“6A Raising of relative grounds in opposition proceedings in case of non-use**

(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark in relation to which the conditions set out in section 5(1),(2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(7) Nothing in this section affects –

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

### **Proof of use**

36. In reaching a conclusion on this point, I must apply the same factors as I would if I were determining an application for revocation based on the grounds of non-use; the relevant period for present purposes is the five year period ending with the date of publication of the application for registration i.e. 2 December 2001 to 1 December 2006. The leading authorities on the principles to be applied when determining whether there has been genuine use of a trade mark are *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer Trade Mark* [2006] F.S.R. 5. From these cases I derive the following principles:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be ‘on the market’ and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);
- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);
- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);
- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- an act of importation could constitute putting goods on the market (*Laboratoire de la Mer*, paragraph 25 referring to the earlier reasoned order of the ECJ);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);
- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);

- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

37. I must also keep in mind the guidance in *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 in relation to determining what constitutes a fair specification, namely:

“29 I have no doubt that Pumfrey J. was correct to reject the approach advocated in the Premier Brands case. His reasoning in paras [22] and [24] of his judgment is correct. Because of s.10(2), fairness to the proprietor does not require a wide specification of goods or services nor the incentive to apply for a general description of goods and services. As Mr Bloch pointed out, to continue to allow a wide specification can impinge unfairly upon the rights of the public. Take, for instance, a registration for "motor vehicles" only used by the proprietor for motor cars. The registration would provide a right against a user of the trade mark for motor bikes under s.10(1). That might be understandable having regard to the similarity of goods. However, the vice of allowing such a wide specification becomes apparent when it is envisaged that the proprietor seeks to enforce his trade mark against use in relation to pedal cycles. His chances of success under s.10(2) would be considerably increased if the specification of goods included both motor cars and motor bicycles. That would be unfair when the only use was in relation to motor cars. In my view the court is required in the words of Jacob J. to "dig deeper". But the crucial question is--how deep?

30 Pumfrey J. was, I believe, correct that the starting point must be for the court to find as a fact what use has been made of the trade mark. The next task is to decide how the goods or services should be described. For example, if the trade mark has only been used in relation to a specific variety of apples, say Cox's Orange Pippins, should the registration be for fruit, apples, eating apples, or Cox's Orange Pippins?

31 Pumfrey J. in *Decon* suggested that the court's task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under s.10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use.”

38. The comments of Mr Justice Jacob (as he then was) in *Animal Trade Mark* [2004] FSR 19 are also relevant.

“20 The reason for bringing the public perception in this way is because it is the public which uses and relies upon trade marks. I do not think there is anything technical about

this: the consumer is not expected to think in a pernicky way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. Thus, for instance, if there has only been use for threeholed razor blades imported from Venezuela (Mr T.A. Blanco White's brilliant and memorable example of a narrow specification) "three-holed razor blades imported from Venezuela" is an accurate description of the goods. But it is not one which an average consumer would pick for trade mark purposes. He would surely say "razor blades" or just "razors". Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods--are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made."

39. In these proceedings, Passion are relying on an earlier Community trade mark. I note that in his witness statement Mr Duggan says:

"...and I believe that on the basis of the material attached, it clearly shows that my Company has established itself as a European market leader for such products..."

40. Although Mr Duggan provides turnover figures for international sales, he does not say to which countries these international sales were made. That said, I note (with my emphasis) the following comments contained in the OHIM guidelines in relation to proof of use i.e.

*"3.2. CTMs: Use in the European Community*

If the earlier mark is a Community mark, it must be used "in the Community" (Article 15(1) and Article 43(2) CTMR).

**Genuine use within the meaning of Article 15 CTMR may be found also when the criteria of that article have been complied with in only one part of the Community, such as in a single Member State or in a part thereof.** In territorial terms, the appropriate approach is not that of political boundaries but of market(s). Above, any other rule would discriminate between small and big enterprises, and thus be contrary to the aim pursued by the CTM system which should be open to businesses of all kinds and sizes.

The sufficiency of use in only a part of the Community is reflected in the Joint Statements by the Council and the Commission entered in the minutes of the Council meeting at which the CTMR was adopted (Joint Statements by the Council and the Commission of 20.10.1995, No B. 10 to 15, OJ OHIM 1996, 615). According to these

statements, “The Council and the Commission consider that *use which is genuine within the meaning of Article 15* in one country constitutes genuine use in the Community”. While these statements only have an interpretative value and are not legally binding, they have been applied by Office.

It must in any event be underlined that it is the European requirements or standards which must be complied with and not the national standards. It may be that European quantity standards could be different than the respective national criteria in some cases.”

41. And by analogy to the OHIM guidelines regarding revocation (again with my emphasis) on the grounds of non-use i.e.

“3.1.3. *Geographical extent of use*

**Genuine use may be found also when the mark has been used in only one part of the Community, such as in a single Member State or in a part thereof.** Any other rule would discriminate between small and big enterprises, and thus be contrary to the aim pursued by the CTM system which should be open to businesses of all kinds and sizes.

....”

42. It is clear from the above that to comply with the proof of use provisions, use of a community trade mark in the United Kingdom (assuming it is considered genuine) ought to be considered sufficient. I note that a similar view (albeit in the context of in which jurisdiction a community trade mark must be used to establish a reputation for the purposes of Article 9(1)(c)), was reached by Mr Geoffrey Hobbs QC sitting as a Deputy High Court Judge in *Whirlpool Corporation et al and Kenwood Limited* [2008] EWHC 1930 (Ch), (paragraph 76 of his decision refers). In my view the evidence provided by Passion establishes that they have used their SNOREEZE trade mark in the United Kingdom since May 2000 in a manner which, in my view, does not alter the distinctive character of the trade mark in the form in which it was registered. Turnover in the United Kingdom from 2003 to the date of the application for registration has been approximately £2.2m, with in the order of 591,000 units being sold and some £1.4m spent on marketing and promotion.

43. I now need to decide as a matter of fact on what goods the trade mark has actually been used. In response to the question:

“Statement of use – if the earlier mark has been registered for five years or more... state on which goods...the mark has been used in that time...”

appearing on the form TM7, I note that Passion said:

“Preparations for alleviation of snoring”.

However in paragraph 3 of the accompanying statement of grounds, they say:

“Whilst different words are used between the specifications, since [Passion’s] earlier mark covers “pharmaceutical products, preparations and substances...”

In his skeleton argument Mr Cole said of this apparent anomaly:

“None of the evidence subsequently filed by [Passion] appears to relate to any goods other than “*Preparations for the alleviation of snoring*” and it is submitted that the comparison of goods in the Opposition should be made only in respect of such goods of [Passion’s] mark, to the extent that the required proof of use of the mark is considered to have been made.”

44. Passion’s trade mark is registered in class 5 for a specification reading:

“Pharmaceutical products, preparations and substances; homeopathic and naturopathic products, preparations and substances”.

In his witness statement I note that Mr Duggan describes Passion’s goods in the following terms:

“..This is a niche product...”

At the hearing Mr Welch said:

“..our client uses a series of preparations that are for use in relation to the alleviation of the problems associated with snoring.”

45. In my view that comment accurately reflects the position. It appears to accord with not only Mr Coles’ view of the matter (see above), but also with my own. However, despite that, as these goods all fall within the broad specification mentioned above, I should, Mr Welch argued, construe Passion’s use (for the purpose of the proof of use test) as relating to all of the goods for which the trade mark was registered in class 5.

46. Not surprisingly, Mr Coles disagreed, drawing my attention to the comments of the Court of First Instance in *Reckitt Benckiser (España), SL v OHIM*, Case T- 126/03 where it held that:

“45 It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or subcategories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.”

47. In my view, Mr Coles’ view of the matter (which is consistent with the above authority) is to be preferred. Class 5 contains a wide range of preparations for a multiplicity of different uses. Preparations for the alleviation of snoring are, in my view, an independent and clearly defined sub-category of the broader terms for which the trade mark is registered. **I therefore find that as a matter of fact, Passion have used their SNOREEZE trade mark on “Preparations for the alleviation of snoring.”**

48. Applying the guidance provided in the authorities mentioned above, I have no hesitation in concluding that Passion have made genuine use of their SNOREEZE trade mark within the relevant period, **and that a fair specification which both reflects that use and is consistent with the manner in which the average consumer would describe the goods on which Passion have used their SNOREEZE trade mark is: “Preparations for the alleviation of snoring.”**

49. Having determined what I consider to be a fair specification of goods, I now return to the objection based on section 5(2)(b) of the Act with that specification of goods in mind. When reaching my decision I will take into account the guidance provided by the European Court of Justice (“ECJ”) in a number of judgments relevant to this issue, notably: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05).

It is clear from all these cases that:

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

(b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and circumspect and observant – but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect

picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;

(e) when considering composite marks, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element; *Shaker di L. Laudato & Co. Sas* (C-334/05), paragraph 42;

(f) an element of a mark may play an independent distinctive role within it without necessarily constituting the dominant element; *Medion AG V Thomson multimedia Sales Germany & Austria GmbH*, paragraph 30;

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;

(h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;

(i) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;

(j) 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 + Adidas Benelux BV*, paragraph 41;

(k) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

### **The average consumer and the nature of the purchasing decision**

50. As the case law above indicates, it is necessary for me to determine who is the average consumer for the respective parties' goods and to establish the manner in which the respective goods are likely to be encountered in trade. The evidence shows that for the most part, Passion's goods will be purchased by self selection off a shelf, or from a website, although there is some evidence to suggest that on occasion (exhibit LC08 to Ms Cooper's witness statement for example) Passion's goods (or similar types of goods) will be displayed in locked cabinets, or (as

in the Budgen store at Virginia Water), in a secure area behind a service counter. Although oral requests for Passion’s goods will therefore play a part in the selection process, as inevitably will word-of-mouth recommendations and telephone ordering, for the purposes of comparison, in my view, the visual and conceptual aspects of Passion’s trade mark are those likely to be the most important.

51. Passion’s goods are preparations for the alleviation of snoring which, in my view, are most likely to be purchased only by adults seeking a remedy for this particular ailment. The average consumer for these goods given their nature is likely, in my view, to pay an above average degree of attention to their purchase. I say this not only because the goods are products for internal use and for which any potential purchaser would need to check, for example, they are suitable (see for example the packaging at exhibit AD1 which contains the text: “Cautions, if pregnant consult your doctor before use”) but also in light of the evidence provided (at exhibit DAW6 for example which shows Passion’s throat spray retailing at £12.99) because of the inherent cost of the goods.

52. Insofar as Ms Cooper’s goods are concerned, these fall into two distinct categories; the medicated tissues in class 5 and the non-medicated tissues in class 16. From my own experience and the evidence provided, it is most likely that Ms Cooper’s goods (certainly in class 16) and absent evidence to the contrary also those in class 5, will be bought by self selection off a shelf or from a website. Once again while oral requests, word-of-mouth recommendations and telephone ordering may play a part in the selection process, the visual and conceptual aspects of Ms Cooper’s trade mark are those likely to be the most important.

53. I have no evidence as to the nature of Ms Cooper’s goods in class 5, but as they are medicated, I think it is fair to assume that they are most likely, as with the goods of Passion, to be bought primarily by adults displaying many of the same traits as the purchasers of Passion’s goods. The same is not true of the goods in class 16, which are ordinary tissues (for the face, toilet etc.) capable of being bought by any member of the public. Although once again it is, in my view, adults who are the major purchaser of such goods, the degree of attention likely to be paid to what is a relatively low cost routine purchase is, in my view, likely to be significantly reduced from that of the purchase of a snoring remedy or a medicated tissue.

**Comparison of goods**

54. The respective goods at issue in these proceedings are as follows:

<b>Ms Cooper’s goods</b>	<b>Passion’s goods</b>
<b>5</b> - Tissues impregnated with medicated preparations.	<b>5</b> – Preparations for the alleviation of snoring.
<b>16</b> - Tissues.	

55. The leading authorities on how to determine similarity between goods and services are considered to be the *Canon* case (supra) and *British Sugar Plc v James Robertson & Sons Ltd*

(*Treat*) [1996] R.P.C. 281. In the first of these cases the ECJ accepted that all relevant factors should be taken into account including the nature of the goods/services, their intended purpose, their method of use and whether they are in competition with each other or are complementary. The criteria identified in the *Treat* case were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market.
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

56. Having considered the parties' submission at the hearing (including the average consumer's awareness, or not as the case may be, at the material date of the link between snoring and nasal congestion) and having applied the above criteria to the circumstances of this case, I have come to the conclusion that Ms Cooper's tissues (impregnated as they are with medicated preparations) could be the same as, or are at the very least similar goods to those of Passion's preparations for the alleviation of snoring. While this may seem a somewhat surprising result, I see no reason why, in principle, the method of delivery of Passion's goods (which at the date of the application for registration was orally via either a throat spray or a strip), could not also be achieved by inhalation on a medicated tissue. In reaching this conclusion, I note that while it would appear that Passion's nasal spray was not introduced until after the material date in these proceedings, the fact of its introduction merely confirms the potential for Passion's goods to be delivered via the nose either in the form of a spray or by inhalation. If one then applies the *Treat* criteria to these findings, one would have identical uses (to alleviate snoring) and users (those seeking relief from snoring), the same trade channels and in respect of goods sold on the same shelves; the respective goods could either be in direct competition with one another or be complementary. In reaching this conclusion I am of course mindful of the results of Ms Cooper's investigations into the manner in which the respective goods as she saw them (i.e. tissues and preparations for the alleviation of snoring/nasal decongestants) were displayed in the stores that she visited (paragraph 29 above refers). However, while these investigations did not reveal any use on the kind of goods I have described above, the potential for use on such goods cannot, in my view, be ruled out as far fetched or fanciful.

57. If I am right so far, how does one then treat Ms Cooper's goods in class 16? At the hearing Mr Welch said:

“Then if we draw the class 5 analogy, that impregnated tissues are goods of a similar description to the goods covered by the opponent's rights, as you perceive them, sir, that in actual fact tissues are then so complementary they are the same thing. It is just whether you get one that has got something on it or one that has not got something on it..”

Mr Coles' position was that:

“Mr Welch has rightly said that tissues not impregnated with any medication are in the distance in the classification system and he seems to be arguing essentially that there is a similarity between ordinary tissues and snoring remedies simply because they are similar to a product i.e. medicated tissues, that he says, and we dispute, are also similar to snoring remedies. It seems to me that even on Mr Welch's argument tissues in class 16 are at least two steps away from being similar directly to snoring remedies...”

58. Having already concluded that Passion's preparations for snoring could be delivered in the form of a medicated tissue, I now need to decide how similar those goods in class 5 would be to their non-medicated counterparts in class 16. I see no reason why the uses and users of the goods could not be the same, as may their physical nature. In addition, they may come, in my view, from the same manufacturer, make their way to the market via the same trade channels and may be considered complementary goods to their medicated counterparts in class 5. That said, tissues proper to class 16 are, in my view, most likely to be sold (in the main) in different parts of, for example, a supermarket. However, taking all of the above factors into consideration, I consider there to be a relatively high degree of similarity between the respective goods.

### **Comparison of trade marks**

59. It is well established that the average consumer is considered to be someone who is reasonably well informed, circumspect and observant, who perceives trade marks as a whole and does not pause to analyse their various details; in addition, he/she rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he/she has kept in his or her mind. I have also to bear in mind the distinctive and dominant components of the respective trade marks. The respective trade marks consist of the words SNOT and SNORE combined with/elided to, in my view, the same misspelling of the word EASE. Appearing as they do at the beginning of the respective trade marks, the words SNOT and SNORE inevitably have a degree of dominance; that said, these elements are not, in my view, distinctive as they describe the ailments which the goods sold under the respective trade marks will be used to remedy. Similarly the word EASE is a word which, in my view, the average consumer is, in the context of the goods at issue in these proceedings, likely to be familiar with. That being the case, the distinctive character of the respective trade marks lies, in my view, in a descriptive word combined with/elided to a misspelling of the word EASE.

For the sake of convenience the trade marks to be compared are as follows:

<b>Ms Cooper's trade mark</b>	<b>Passion's trade mark</b>
SNOTEEZE	SNOREEZE

### **Visual similarity**

60. In their statement of grounds Passion say of the visual comparison:

“...In fact only a very close inspection would reveal any slight variation, and a consumer of average attentiveness is not going to make that close inspection.”

In his skeleton argument, Mr Coles said of the visual comparison:

“..The prominent positioning of these letters [the letters T and R] of very different and distinctive shapes gives rise to a plainly obvious distinction between the marks that is unlikely to be missed even if the mark are not closely inspected.”

61. Now my own view. It is self evident that both trade marks consist of eight letters presented as one word in upper case, and have the first three and last four letters in common; they differ only in respect of the letter T appearing in Ms Cooper's trade mark as opposed to the letter R appearing in Passion's. **Overall, I consider there to be a high degree of visual similarity between the respective trade marks.**

### **Aural similarity**

62. In their statement of grounds Passion say of the phonetic comparison:

“The mark in suit is a single word phonetically very similar to SNOREEZE...The only letter difference is in the middle of the mark and is the substitution of the letter R for a T; both of which are close in the alphabet. We say that the marks are phonetically very similar both on a mere comparison, but also because they both consist of the same type of mark. The syncopation of the marks SNOTEEZE and SNOREEZE are such that we say that the public will draw the conclusion that the mark in suit and [Passion's] mark are from a common source..”

In his skeleton argument Mr Coles said of the phonetic comparison:

“...The alphabet is not arranged in order of phonetic similarity and the letters “R” and “T” not only sound entirely different to each other, but lend a significant aural difference to the respective trade marks. In particular these letters have a significant impact on the pronunciation of the letter “O”, “SNOR” being pronounced “snoar” and the “O” of “SNOT” producing a much harder and more abrupt sound, thus giving the marks as a whole differing syncopations.”

63. Now my own view. Both trade marks consist of single words consisting of two syllables i.e. SNORE EZE and SNOT EEZE. Although I accept Mr Coles' comments above, **overall I still consider there to be a significant degree of aural similarity between the respective trade marks.**

### **Conceptual similarity**

64. In their statement of grounds (reproduced below for ease of reference), Passion say of the conceptual comparison:

“..[Passion's] mark is for use on preparations relating to sleep disorders, notably snoring. [Passion's] products come in three variations, one of which is a nasal decongestant. We say that the public would associate the mark in suit with [Passion's] mark because they are both relating to the nose. Moreover, one aspect that could improve sleeping patterns, aiding a restful night's sleep, the purpose of SNOREEZE is a clear nasal tract. Further or in the alternative customers could see [Passion's] SNOREEZE as a nasal decongestant, thereby achieving the same purpose as SNOTEEZE. Since nasal mucus, or snot, needs to be removed, a tissue to deal with this is likely to be of interest to [Passion's] customers. Since the same syncopation exists between the marks SNOTEEZE and SNOREEZE we say that the public will associate the removal of nasal mucus as perhaps a precursor to use of [Passion's] nasal decongestant, therefore drawing the conclusion that the mark in suit is associated with [Passion]. Or in the alternative that SNOREEZE and SNOTEEZE perform essentially the same role, to clear the nasal tract..”

In his skeleton argument Mr Coles, in relation to conceptual comparison, repeated the points I summarised at paragraph 7 above.

65. Now my own view. The words SNOT and SNORE are defined in Collins English Dictionary (5<sup>th</sup> Edition 2000) respectively as: “nasal mucus or discharge” and “to breathe through the mouth and nose while asleep with snorting sounds caused by the soft palate vibrating”. They appear as the first element of the respective trade marks and are likely, in my view, to be so well known to the average consumer that the average consumer is likely, in my view, to “pick out” each of these elements from them. The remainder of the respective trade marks i.e. the letters EZE and EEZE are likely, in my view, to be seen by the average consumer as a reference to the word EASE; the most relevant meanings of which are, in the context of the goods at issue in these proceedings: “freedom from discomfort”, “to make or become less burdensome”, “to make comfortable or give rest to” and “to lessen or cause to lessen in severity, pressure tension or strain; slacken, loosen or abate” (Collins English Dictionary 5<sup>th</sup> Edition 2000).

66. At the hearing, Mr Welch very fairly accepted that at the material date in these proceedings nasal congestion as a contributory factor to snoring was something that the average consumer was unlikely to be aware of. That said, I note that the dictionary definitions of the words SNOT and SNORE both refer to the nose and these meanings are, in my view, also likely to be known to the average consumer. In addition, in my view both trade marks send similar conceptual messages, in the sense that they both relate to the relief (or easing) of a particular ailment. While in my view the average consumer will recognise the difference between the words SNOT and

SNORE they are likely, in my view, and given the role that the nose plays in snoring (and regardless of any argument as to nasal congestion), to make a conceptual connection between the words SNOT and SNORE for this reason. This conceptual connection when combined with the conceptual similarity resulting from the use of the same misspelling of the word EASE, **results overall, in my view, in a significant degree of conceptual similarity.**

### **Likelihood of confusion**

67. When determining whether there is a likelihood of confusion, a number of factors need to be considered. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the goods and vice versa. It is also necessary for me to consider the distinctive character of the earlier trade mark as the more distinctive the earlier trade mark (either inherently or as a result of any use that has been made of it) the greater the likelihood of confusion; I must also keep in mind the average consumer for the goods and the nature of the purchasing decision (my conclusions on which can be found in paragraphs 50-53 above). The distinctive character of the earlier trade mark must be appraised by reference to the goods in respect of which it is registered and also by reference to the way it will be perceived by the average consumer. At the hearing Mr Welch said of Passion's trade mark:

“..So I do not believe for one moment that it is a weak mark and actually as a result their rights are in some way limited or restricted because it is of a very, very weak nature...I think it is a perfectly registrable and acceptable mark”

He added, that the use made of it had, to use his words “cemented its position”. In response to the following question from me at the hearing:

“Would it be fair for me to say that you take the view that the [Passion's] mark is a relatively weak mark, just about capable of prima facie registration? Given the absence of context, market share and so forth, it is not a mark that has been improved in any way to any significant extent.”

Mr Coles said:

“On the basis of the evidence that we have, I would say that would be a fair summary, yes.”

68. In practice while there was a little distance between the parties on the issue of the distinctive character of Passion's trade mark, in reality both parties felt the mark was capable of prima facie registration. In my view that is correct; Passion's trade mark alludes to rather than describes goods which will ease one's snoring. Absent use it is, in my view, a mark which has a modest degree of distinctive character. Insofar as the use that has been made of it is concerned, as my question above suggests, Passion's use is not put into context. For example, I don't know the size of the market for snoring products or the position Passion holds in that market. While I note the totality of the use that has been made of Passion's trade mark (see paragraph 42 above), absent

context, I am not in position to conclude it has improved its distinctive character to any appreciable extent.

69. In summary, I have concluded that: (i) there is a high degree of similarity between the goods on which Passion have established use and Ms Cooper's goods in classes 5 and 16, (ii) that given the nature of the goods, the average consumer is likely to pay an above average degree of attention to the purchase of Passion's and Ms Cooper's goods in class 5, and a lower degree of attention to the purchase of Ms Cooper's goods in class 16, (iii) that there is a high degree of visual similarity, (iv) a significant degree of aural similarity, (v), a significant degree of conceptual similarity, and (vi) that Passion's use of their trade mark has not improved its distinctive character to any appreciable extent. I have also concluded, given the nature of the goods at issue and the traits of the average consumer when purchasing such goods, that the visual and conceptual aspects of the comparison are likely to be the most important.

70. I must now apply the global approach advocated to these findings (including, as argued by Mr Welch at the hearing, the principle of imperfect recollection and the possibility of both direct and indirect confusion). Having done so, I have concluded that the proximity of the goods at issue, together with the significant visual, aural and conceptual similarities arising from the use of the words SNOT and SNORE, combined with the use of the same misspelling of the word EASE, would, when considered in the context of the nature of the goods at issue and keeping in mind the traits that the average consumer is likely to display when selecting such goods, result in a likelihood of confusion. In my view direct confusion i.e. that goods sold under Passion's trade mark will be mistaken for goods sold under that of Ms Cooper's trade mark is a real possibility. It is also, in my view, highly likely that goods sold under Ms Cooper's trade mark will, given the above, be considered by the average consumer to be goods emanating from Passion or an undertaking linked to them; Ms Cooper's goods are likely, in my view, to be seen as a progression in trade from the goods on which Passion have established use. **As a result of these conclusions, the opposition succeeds and the application will be refused in its entirety.**

## **COSTS**

71. The Opposition has succeeded and Passion are entitled to a contribution towards their costs. At the hearing both parties agreed there were no special circumstances that I should be aware of, and costs should follow the event and be from the Trade Marks Registry's published scale. That being the case, I award costs to Passion on the following basis:

Notice of Opposition and accompanying statement: £300

Statutory fee: £200

Considering statement of case in reply: £200

Preparing and filing evidence: £500

Considering Ms Cooper's evidence: £250

Preparation for and attendance at the hearing: £500

**Total £1, 950**

72. I order Ms Cooper to pay to Passion the sum of £1,950. 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 30<sup>th</sup> day of September 2008**

**C J BOWEN  
For the Registrar  
The Comptroller-General**