

O-283-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2463613 IN THE NAME OF
NEVER GIVE UP LTD TO REGISTER THE TRADE MARK JUICED UP
IN CLASS 43**

AND

**OPPOSITION THERETO UNDER NO. 96827 IN THE NAME OF
JONATHON OAG OF JUICED UP**

Trade Marks Act 1994

**IN THE MATTER OF application No. 2463613
in the name of Never Give Up Ltd
to register the trade mark JUICED UP in Class 43**

And

**Opposition thereto under No. 96827
in the name of Jonathon Oag of Juiced Up**

BACKGROUND

1. On 15 August 2007, Never Give Up Ltd made an application to register a series of eight trade marks as follow:

Juiced Up
Juiced up
juiced up
JUICED UP
Juiced Up!
Juiced up!
juiced up!
JUICED UP!

2. The application was made in Class 43 and was accepted for the following specification in that class:

Provision of food and drink; restaurant, café, bar and catering services, take away and restaurant services, juice bar, smoothie bar, shakes bar, providing mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices, sandwiches, healthy snacks, muffins, frozen yoghurt, muesli bars and nutritional supplements; information and advice relating to food and drink.

3. On 10 April 2008, Jonathon Oag of Juiced Up, 100 Bruntsfield Place, Edinburgh, EH10 4ES filed notice of opposition to the application, the grounds of opposition, in summary, being as follows:

Under Section 3(6)

because the application was made in bad faith. In the Statement of Case the opponent alleges that:

“Never Give Up Ltd (the applicant) has applied for trademark registration for 34 different juice related names, four of which are existing juice companies, which do not appear to be connected in any way to Never Give Up Ltd. There appear to be many other applications, which have subsequently been abandoned.

I was telephoned by John Blanchard of Never Give Up Ltd in [December 2007]. Mr Blanchard stated they owned the trade mark JUICED UP (which is my company’s name) and demanded that I either pay a licence fee for use of the trademark or purchase the trademark from Never Give Up Ltd. The price Mr Blanchard requested for the purchase of the trademark was tens of thousands of pounds. Mr Blanchard indicated that if I did not either pay a licence fee or purchase the trade mark my company would face court action.

There was no indication during the telephone call that Never Give Up Ltd used, or had any intention of using, the trade mark JUICED UP in respect of the goods and services for which the application was made. I believe Never Give Up Ltd is using the trade mark application as a means to try and extort money from companies such as my own by threatening that if my company does not pay a licence fee or purchase fee it will bring an action for trade mark infringement. It seems apparent that the applicant is simply trying to scare companies in parting with a lot of money.”

Under Section 5(4)(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. With this the opponent provides a chronology of his, and his company’s connection with JUICED UP.

4. The applicants filed a counterstatement in which they say the following:

“In December 2007 we were made aware of a company using our trade mark “JUICED UP” and we approached them and asked them not to use it anymore and Jonathon Oag said that they would stop using it once our application had been registered. I said I would contact him after it was registered.

We have never tried to extort money from companies. Mr Oag is making an allegation of commercial fraud which is very serious and we will be persuing him about this. “

5. The counterstatement goes on to refer to an extract from *Royal Enfiled* [2002] RPC 24, and to the opponent's Statement of case in which Mr Oag refers to an application to register a JUICED UP logo in July 2006, which was cancelled (officially abandoned for non-payment of fees), the reason given by Mr Oag was "wrong class". The applicants say that the fact that no further application was made "in the class that he now claims" shows that he [Mr Oag] is not the owner of the JUICED UP trade mark.

6. Originally only the opponent filed evidence in these proceedings. On 2 June 2009, the Registrar sent the customary letter informing the parties that the papers had been prepared for the hearing attaching indices that would be used by me during the hearing scheduled for 21 July 2009. On 17 July 2009 a fax was received from Mr Blanchard stating that he had not received the Witness Statement filed by the opponents, and making various comments about events that occurred during the application process. After making enquiries it was not possible to be sure that the evidence had reached Mr Blanchard. On 21 July 2009 he was sent a copy of the opponent's evidence under cover of a letter setting a date of 21 August 2009 in which to file any evidence in reply, stating that this must be copied to the opponents. The letter also informed Mr Blanchard that evidence filed in the application process was not on file as he had requested that it be returned to him. Accordingly, it could not be considered unless refiled in accordance with the guidelines (enclosed with the letter), and if filed otherwise would be rejected.

7. On 16 August 2009 a Witness Statement and covering letter was received from Mr Blanchard. Mr Blanchard's letter requested that two letters from registry officers and a copy of evidence filed prior to acceptance be added as exhibits and copied to the opponent. Mr Blanchard had copied the Witness Statement to the opponents, but as the opponent could not confirm having received it (despite it being signed for at one of his business addresses) a further copy was sent by the Registry.

8. Insofar as the evidence contains fact and/or is relevant I have summarised it below. The matter came to be heard on 14 April 2010 via a teleconference link, the opponent being represented by Mrs Carole Oag. The applicants were represented by Mr John Blanchard. After a careful study of the evidence and submissions made at the hearing, I now go on to give my decision.

Opponents' evidence in chief

9. This consists of a Witness Statement dated 18 November 2008, from Jonathon Oag, who describes himself as an "independent retailer".

10. Mr Oag says that the mark JUICED UP was first used in the UK in 2005 by Juiced Up (Scotland) Limited, in relation to three shops and the products that they sold, and in marketing materials, newspaper and magazine advertisements and articles, posters and invoices. Examples are shown as Exhibit A1, which Mr Oag says are indicative of use prior to 15 August 2007. The exhibit consists of the following:

A voucher offering 10% discount on purchases of fresh juices and smoothies. This contains the words “juiced up” in lower case placed above three coloured circles containing depictions of fruit. The reverse contains the addresses of three retail outlets, and the web address www.juiced-up.co.uk.

A leaflet advertising a delivery service for fresh fruit juice and smoothies, stating that sandwich platters and healthy snacks are available on request. The reverse gives details of various snacks such as paninis, bagels, wraps, sandwiches, soup, crisps, fruit salads and organic snacks. Under the heading “Winter warmers” they offer porridge, soup, coffees, herbal teas, and hot seasonal juices”. The leaflet is headed with the “juiced up” logo, and refers to “juiced up”, and the details of the three outlets.

Compliment slips and letter headed paper bearing the “juiced up” logo, details of an address in Edinburgh, and the website address www.juiced-up.co.uk.

A discount card bearing the “juiced up” logo, and the addresses of three outlets.

A leaflet or poster bearing the “juiced up” logo advertising “JUICED UP” juice, smoothies, and “hot and cold food” in the “Xmas Season” available at the Hanover Street branch.

Photographs of plastic drinking containers containing liquids, presumably juices, all but one bearing the “juiced up” logo.

Photographs of “juiced up” retail outlets and a wall mural endorsed “HANNOVER STREET JUL2007” and OCEAN TERMINAL NOV 2006”. The outlets have the “juiced up” logo on the counter front and/or signage. These have suspended signs listing a range of beverages that are available for purchase. One has a chilled cabinet displaying what appears to be a range of snacks, water and soft drinks – although this is not marked as being connected to “juiced up”, being in such close proximity it is reasonable to infer this.

Copies of e-mails forwarded by Jonny Oag to Carole Oag on 20 November 2008. The earliest dates from 9 December 2005, when Darryl Hutchinson (who from a later mail appears to be a graphic designer) sent Andrew Smith (of Ashford Property) several of Jonathon Oag’s “...most recent logo designs”, and a “simple artists’ impression of the interior as per his direction”. The mail and the attached documents refer to/depict the “juiced up” logo and an exterior of retail premises named “juiced up”. The attachments consist of a sketch of the interior and exterior of a retail establishment, the signage being “juiced up”, and depictions of “juiced up” logos. The second e-mail is dated 4 February 2006 and enclosed images for Mr Oag to consider. An accompanying invoice referred to “...work carried out up to week beginning 6th Feb 2006”, described as “interior/exterior mock ups, logo design and business card template”. The attachments consist of depictions of

“juiced up” shop fronts, each bearing the date 16 January 2006, consistent with the first e-mail and invoice.

Brochures and posters promoting “juiced up” beverages, listing outlets at the Ocean Terminal Shopping Centre, Hannover Street and Bruntsfield Place.

Photographs of the exterior of “juiced up” outlets which can be seen to be located in Hannover Street. The “juiced up” logo is on the front signage, the window advertises beverages (wheatgrass, juices, smoothies and coffee), soup and pannini’s.

11. Mr Oag gives the figures for annual sales of goods and services for the year March 2006 - February 2007 and for the period March 2007 to September 2007, which amount to £195,000 and £185,000, respectively.

12. Exhibit A2 consists of three invoices. Two are from “juiced up” to CCK Bars in Frederick Street, Edinburgh, for the supply of fresh bottled juices. The first is marked “Invoice No. 0003”, is dated 7 July 2006 and relates to the period 28 June to 7 July. The second is marked “Invoice No. 0009”, is dated 30 August 2006, and relates to the supply of beverages in the period 17 – 30 August. The final invoice is a duplicate of the invoice from Darrel Hutchinson referred to previously.

13. Mr Oag gives the figures for advertising expenditure for the year March 2006 - February 2007 and for the period March 2007 to September 2007, which amount to £11,000 and £5,000, respectively. He refers to Exhibit A3 which he says consists of advertising material dating from prior to 15 August 2007. The exhibit consists of:

Articles that appeared in the 29 May 2006 and 25 November 2006 editions of the Edinburgh News. Both mention “juiced up” and Mr Oag, the first being about the health benefits of the Acacia berry, the second being about Mr Oag and the development of the “juiced up” business, including a photograph of Mr Oag wearing a t-shirt bearing the “juiced up” logo.

Two articles from the 8 and 20 May 2006 editions of The Scotsman. The first under the heading “JUICED UP” mentions a “groovy new juice bar” advising readers to sample their healthy smoothies and energy drinks. The second refers to the origins of Mr Oag’s ideas for “juiced up”, the progress of the business and his plans for future expansion. At the bottom is a photograph of Mr Oag wearing a t-shirt bearing the “juiced up” logo.

Article from i-on-Edinburgh dating from June 2006 relating to Mr Oag and Juiced Up. The article refers to Mr Oag’s plans to operate mobile units, home/office delivery and further bars around the city. The article contains a photograph of a glass bearing the “juiced up” logo.

Article that appeared in the 13 May 2006 edition of the Daily Record, giving details of “new places to try out”. Among the establishments listed the article refers to a new juice bar in (Bruntsfield Place) Edinburgh.

Feature on Mr Oag from the 4 June 2006 edition of Scotland on Sunday. Beneath a photograph of Mr Oag (wearing a t-shirt bearing the “juiced up” logo), the article refers to Mr Oag as the owner of “Juiced Up” Bruntsfield Place, Edinburgh.

14. Mr Oag states that the mark has been used in relation to the production and sale of fresh juices and smoothies at three locations in Edinburgh, and at various locations via a “juiced up” trailer.

15. Exhibit A4 includes a repetition of the basis for the allegation of bad faith, and a chronology to support the claim to passing-off. The exhibit also includes a print from the BBC News website, which under the heading “Trademark scam targets businesses”, recounts the investigations by a journalist which included several discussions with Mr John Blanchard. The contents of the article support the allegations made by Mr Oag regarding Mr Blanchard having applied to register and subsequently tried to license or sell trade marks to businesses that were using the names.

Applicant’s evidence

16. This consists of a Witness Statement dated 19 August 2009 from John Blanchard. The Statement consists primarily of comments and submissions which it is neither appropriate nor necessary that I summarise. I will, of course take them fully into account in my determination of this case. As exhibits Mr Blanchard provides the following:

- A1 Copy of the Form TM8 and Counterstatement.
- A2 Copy of a letter from the Intellectual Property Office requesting confirmation of an intention to use.
- A3 Copy of a letter from the Intellectual Property Office confirming that following receipt of a Witness Statement the applications can proceed but advising that this had no bearing on any cases that may become opposed.
- A4 Photographs of 3 containers branded “Energy Juices” , a person wearing a t-shirt with “Energy Juices” on the front, a brochure and “mock-up” of an “Energy Juice” brochure and retail stand, none of which show or mention JUICED UP. Additionally, none are dated and Mr Blanchard does not give any details.

Opponent’s evidence in reply

17. This consists of a further (undated) Witness Statement from Jonathon Oag. Perhaps not surprisingly for Evidence in Reply the Statement consists of a mixture of submissions and evidence of fact. It is neither appropriate nor necessary that I summarise submissions but I will consider them in my determination of this case.

18. Mr Oag confirms that he did make an application to register JUICED UP in July 2006, explaining how he came to apply in the wrong class and the background to the application expiring. He refutes Mr Blanchard's assertion that "JUICED UP will never have been heard of, in support referring to Exhibit Appendix 2 which includes:

Copy of JUICED UP menu (undated)

JUICED UP BOOST CARD entitling the holder to a 15% discount.

Articles and features in printed form and contained on DVD's reporting the creation of the JUICED UP business, its selling of juice beverages, the Livewire awards. All refer to Mr Oag and JUICED UP. (BBC Reporting Scotland, 2 and 29 May 2006 editions of Evening News, 8 May 2006 edition of The Scotsman, 10 May 2006 edition Metro, 13 May 2006 edition of the Daily Record, 28 May 2006 edition of the Sunday Mail, 20 May 2006 edition of The Scotsman Magazine, i-on-Edinburgh dating from June 2006, 16 August 2006 edition of Edinburgh Evening News)

Leaflet from the Shell LiveWire Young Entrepreneur of the Year Awards 2007, Mr Oag of JUICED UP being amongst the 10 finalists.

Photographs of JUICED UP outlets, endorsed as "Ocean Terminal – November 2006" and "Hanover St – July 2007", and of containers of beverages bearing the JUICED UP logo.

19. Mr Oag mentions that JUICED UP had four stores operating in Edinburgh with a proven reputation and clear brand with a significant turnover, in the first year amounting to £195,250.85. He says that in 2006 the JUICED UP business was available at many festivals and sporting events outside of Edinburgh using a mobile unit although there is no specific information relating to this.

20. Mr Oag says that although he did not start trading as JUICED UP until April 2006, he took over a lease in December 2005 and through a sign in the window started advertising "JUICED UP – COMING SOON using the same brand currently in use. He later says that "Initial sales in Dec 2005 were purely outside catering as I used this as an opportunity to perfect my product before opening to the public." In support Mr Oag provides a confirmation email (Exhibit Appendix 5) from Kirsty Docherty of Progressive Partnership confirming that the business first used JUICED UP in December 2005 and has continued to do so for business meetings. Mr Oag refers to the lease to 100 Bruntsfield Place, Exhibit Appendix 3 showing this to be effective from 3 February 2006. He refers to the registration of the company Juiced Up (Scotland) Limited which from the

certificate of incorporation shown as part of Exhibit Appendix 4 can be seen to have taken place on 17 January 2006. The exhibit also includes a copy of the Memorandum of Association dated 16 January 2006. Mr Oag says that he did not start trading until April 2006 (which I take to be from premises) but prior to this he promoted the shop, in particular by dropping off flyers in the surrounding area.

21. Mr Oag says that the photograph of the Hanover Street premises (part of Exhibits A1 and Appendix 2) was taken on 31 July 2007, and as can be seen from the correspondence and documentation (Exhibit Appendix 6) Mr Oag took over the lease on 11 July 2007. Invoices show that rent was paid from 14 August 2007. As Exhibit Appendix 7 Mr Oag provides the results of a WHOIS enquiry that shows “jonnyoag” as the registrant of the domain name “juiced-up.co.uk, registered with effect from 11 January 2006.

22. As Exhibit Appendix 8 Mr Oag provides a collection of invoices that primarily relate to sales of foodstuffs such as rolls, fruit platters salads, muffins, etc, and beverages, dating from 15 June 2006 to 5 December 2007. This was provided as a catering service to clients in their own premises in Edinburgh. The invoices are mostly headed with the JUICED UP logo and show the contact details in Bruntsfield Place, Edinburgh.

23. A further collection of invoices shows expenditure attributed to JUICED UP and/or Mr Oag in relation to the supply and distribution of leaflets and other promotional material, signage and company business supplies. The earliest evidence dates from 22 May 2006 and consists of a letter from SNAPfax confirming payment for “...featuring “Juiced Up” in the forthcoming edition of the Edinburgh Student SNAPfax.” The letter also refers to promotions such as “2 for the price of 1” on smoothies, “Buy a full price Panini and get a free soup” and “£1 for take away coffee”. An invoice dated 2 June 2006 refers to “Leaflets”. A further invoice dated 12 June 2006 is addressed to JUICED UP and is for the supply of business cards, letter heads and stationery. Another invoice is for leaflet distribution on 6 July 2006, the supply of text for menus and vehicle signage in July and August 2007, signage for the Hanover Street premises on 7 August 2007 that would “utilise the same idea as Bruntsfield...”, advertising in “Instant” magazine in August/September 2007, promotional and display materials, etc.

24. Exhibit 10 consists of an e-mail dated 23 November 2009 sent by Callum Johnson to Carole Oag. The mail notes the subject as “JUICELING” and is headed “To Whom It May Concern”. The mail is an account of a contact that Mr Johnson says that he received from John Blanchard in June 2007. Mr Blanchard is stated to have said that JUICELING was his company’s registered trade mark, which he offered to sell or rent to Mr Johnson. The mail details the subsequent events, including Mr Johnson discussing the situation with Mark Daly, an investigative journalist from the BBC (responsible for the article shown as Exhibit A4 and also Appendix 13). Appendix 12 consists of an e-mail dated 27 August 2009 from Mark Daly to Mr Oag in which Mr Daly states that he had never met or spoken with Mr Oag before contacting him about the trade mark issue having heard about the situation through a third party. Mr Daly also confirms that he was not asked to entrap Mr Blanchard by anybody, and did not do so.

25. Exhibit Appendix 11 consists of an e-mail dating from 2 September 2009 from an individual who wishes to remain anonymous. In this the writer makes unsubstantiated statements as to the activities and character of Mr Blanchard. For the record I place no weight on this exhibit.

26. Mr Oag refers to Mr Blanchard's assertion that he falsely claimed having an outlet in the Newsroom Bar and Lounge" and that he believed this to be in the BBC building. Exhibit Appendix 14 consists of a letter dated 26 August 2009 from Julia Wallace of Duddington Leisure confirming that Juiced Up (Scotland) Limited trading as JUICED UP installed a mini juice bar within one of her outlets, the Newsroom Bar, in March 2007. Ms Wallace says that Jonathon Oag provided the consultancy, machinery and branding which included the business logos and menu options identical to that in the JUICED UP shops.

Further evidence

27. The hearing took place on 14 April 2010, with Mr Blanchard representing the applicants, and Mrs Carole Oag representing the opponent, both on the telephone. At the commencement of the hearing Mr Blanchard indicated that he did not believe that his request that evidence filed during the ex-parte consideration of the application be copied to these proceedings had been complied with. I explained that despite having been aware of the contents of the evidence for some time, at no point had he raised this issue. Mr Blanchard further claimed that prior to the hearing he had been told that he could not file further evidence and requested that the hearing be postponed to allow him to file this. I explained to Mr Blanchard that there was no record of him having made any request to file further evidence. When asked whether he had received the refusal in writing Mr Blanchard said that he did not. In the circumstances I refused the request for a postponement.

28. Notwithstanding this, in the interests of economy and fairness, and with the agreement of the opponent, Mrs Oag, I allowed Mr Blanchard 14 days from the conclusion of the hearing in which to file any evidence he believed would assist his case, directing that this must relate to the relevant date which is on or before the date of application. Mr Blanchard indicated that the evidence would include business plans etc which are "...all very large files" asking whether it would be acceptable to copy them onto a CD for submission. I confirmed that whilst I would prefer the original I would accept a CD accompanied by a print of the index files showing the date created and last modified, under cover of a witness statement. Mr Blanchard agreed to this. Mr Blanchard stated that he may redact some of the information that was of a sensitive commercial nature. I made it clear that I could only consider what I can see. I directed that the opponents would have 14 days from the date of receipt of this evidence, if any, in which to file any evidence in reply.

29. During the course of the hearing Mr Blanchard stated "If Jonathan Oag really wants the truth and he is in contact with the person at the BBC, why did he not just ask them for transcripts of everything that was said? The reason is, they do not want the truth to be

known.” This is a reference to the report from the BBC website shown as part of Exhibit A4 headed “Trademark scam targets businesses”. This recounts the investigations by Mark Daly, an investigative reporter with the BBC, a resulting interview with Mr Blanchard on 4th April 2008, and several reported discussions. On several occasions Mr Blanchard repeated his request that a full transcript be obtained. Mrs Oag agreed to make a request to the BBC. Mr Blanchard subsequently widened this to requiring a transcript of all contacts. I explained that I have no powers to direct the BBC to provide this information, which, in any event, is information that they may not have. More pertinently, I considered this to not only be an impractical request but also unreasonable and disproportionate, and I refused to make the direction sought by Mr Blanchard. Mrs Oag clearly made a request to the BBC but for the reasons that I have set out below (in my summary of Mrs Oag’s evidence) this resulted in a Witness Statement from the reporter, Mr Daly which includes a partial transcript from recordings he made. Mrs Oag shows the Witness Statement from Mr Daly as Exhibit Z1 to her evidence in reply. I have summarised this after her evidence.

30. Turning first to the evidence filed by Mr Blanchard after the hearing. This consists of a Witness Statement dated 16 April 2010 and exhibits. In this Mr Blanchard denies the allegation of bad faith and that he has no intention of using the mark JUICED UP, in support referring to Exhibit A5 consisting of a sample copy of a menu, Exhibit A6 consisting of a business card, Exhibit A7 consisting of a “Location Brochure” saying that all of these “...clearly show the use of our trademarks”. These items are undated and refer to the name ENERGY JUICES which is shown with the signification “TM”. Exhibits A9, A11 and A12 are stated to “...further show clearly our intent on using the trademarks we have applied for”. Exhibit 8 is the “branded CD” with A9, A10 and A11 being Word document and Adobe files contained on the CD. The CD also contains Exhibits A12 and A13. The files on the CD are as follows:

- A9 Word Document entitled “EJ – Business Plan Fundraising. The document is headed “Energy Juices TM – Strategic Business Plan 2007. This mentions an invitation to bid as 1 of just 6 Juice bar companies to the specialist retailer selection team for “Westfield’s” prestigious “Westfield London” development opening in 2008. The document contains depictions of an Energy Juice” unit, but unlike that shown in the Adobe files (Exhibit A12) has a different backdrop without the words “juice up on energy”. The footer states “Copyright 2006”. The file records that it was last modified on 16 April 2010.
- A10 Word Document consisting of a letter dated 2 July 2007 to Westfield Shoppingtowns Limited regarding a leasing proposal for Energy Juices in the Westfield shopping centre and stated as being “further to our recent discussions.” The footer states “Copyright 2007”. The system file record shows that it was last modified on 16 April 2010.
- A11 Powerpoint Presentation dated as August 2007 for Energy JuiceTM. Referring to the Westfield Shopping centre, slide 31 states: “Due to open

October 2008, we anticipate the decision being made by October 2007 and want to have our funding in place to strengthen our balance sheet in our proposal.” The system file record shows that it was created on 16 April 2010 and modified on that date also.

- A12 Adobe Acrobat files showing layout/design for Energy Juice™ retail units. The right-hand side contains Energy Juice™ above the words “juice up on energy”, or on one “juicie up...” One contains a box stating that it was drawn by Robert Booth on 24 November 2006. The system file record show that two were last modified on 1 December 2006 and one on 22 December 2006.
- A13 Word Document consisting of an unsigned Trade Mark Assignment by Never Give Up Ltd in favour of Valhelen Limited by which the trade mark JUICELING would be assigned on payment of the sum of £58,500 (plus VAT). The file records that it was last modified on 16 April 2010.

31. Mr Blanchard later says that he removed “some business sensitive information for example financials” from 3 of the files (A9, A10 and A11) which is why they show recent “last modified” dates. Whilst Mr Blanchard states that “nothing of material importance has been removed or changed” he has not, as agreed, provided the file print showing the date created and date last modified from before he made these redactions. I would add that I do not consider the documents to be of a size where it would have been impractical to have simply printed for filing.

32. Mr Blanchard states that this use of “juice up” (Exhibit A12), which was changed to “juiced up” because “this sounded better”, was some eight months (December 2006) prior to the application being made, and some 12 months before “...we became aware of the juice bar company “Juiced Up Scotland”. Mr Blanchard earlier stated that it was December 2007 (para 8 of W/S of 19 August 2008) “...before I was made aware of Mr Oag using the name Juiced Up Ltd.” whereupon he says that he phoned Mr Oag to inform him “we had applied for the trademark. At no time did we ask Mr J Oag for “tens of thousands of pounds” which is a repetition of his earlier denial.

33. Mr Blanchard sets out his version of the contacts with the BBC reporter that resulted in the article (Exhibit A4), stating that Mr Daly was sent the contracts shown as Exhibit A13 entitled Trade Mark Assignment. By this document the trade mark JUICELING was to be assigned on payment of the sum of £58,500 (plus VAT). He recounts contacting Mr Daly’s boss, marcus.ryder@bbc.co.uk when he became aware of the report to show him the branded materials, business plan, etc, stating that Mr Ryder refused.

34. The remainder of the Witness Statement consists of submissions including on the winding up of Juiced Up (Scotland) Limited, in support referring to the extract from the Companies House database. Mr Blanchard states that any rights the company may have had, including to a reputation in Edinburgh would have passed to the Crown. There is no evidence that an administrator considered or disposed of any goodwill and reputation in

JUICED UP as assets of the company, let alone that it was declared bona vacantia. Mr Blanchard makes further submissions in an attempt to have the opposition dismissed on the basis that the heading of the Witness Statement refer to the opposition being in the name of Juiced Up (Scotland) Limited, a now non-existent company. As I explained to Mr Blanchard at the hearing, the opposition was not filed in the name of that company, but in the name of Mr Jonathon Oag of Juiced Up, and as such the headings on all of the Witness Statements filed are incorrect but I was not going to determine a matter of public interest based on a formality.

35. The evidence in reply filed by Mrs Carole-Anne Oag consists of a Witness Statement dated 30 April 2010.

36. Mrs Oag first asks the question that if this evidence had been available at the dates claimed and is critical to Mr Blanchard's case, why has it been submitted at such a late stage? Mrs Oag accepts that Exhibits A5 – A7 shows use of Mr Blanchard's mark, but says that there is nothing by which to prove their age. Likewise, Mrs Oag says she can see the intent to use the trademarks in Exhibits A9, A11 and A12, and whilst she does not actually challenge their date of origin, refers me to Exhibit Z which she says "...raises concern over when these documents were actually originally created." Exhibit Z consists of a Witness Statement dated 30 April 2010 from Charles Moncrieff of Computer Troubleshooters, a computer service and data recovery company. Mr Moncrieff says that he had been commissioned by Mrs Oag "...to validate the date the documents..." shown on the CD provided as Exhibit 8 by Mr Blanchard. Mr Moncrieff does a document by document analysis of the files contained on the CD, in each case concluding that it is not possible to confirm the date on which they were originally created, and explaining how these could have been altered. He also gives details of how the original dates could have been retained when a document is altered.

37. Mrs Oag goes back to Exhibit A7, in particular to the fact that "...the back panel on the bottom picture is obviously quite different from the top picture (spaces in the top picture and filled in the bottom picture). Also the use of the TM is sporadic – included in some images and not in others."

38. In introducing the Witness Statement from Mark Daly, the BBC reporter referred to earlier, Mrs Oag says the following:

“Point 4 – JB's [John Blanchard's] insistence that the BBC presented a false report has been taken as a very serious accusation by the BBC and Mark Daly is adamant that his reporting was carried out with fairness and professionalism at all times. JB requested transcripts from the telephone conversations as well as the meeting and on completion of the hearing I immediately requested the copies. Given the comments made by JB during that hearing about the BBC Mark Daly was keen to provide us with the relevant material. That said he said that he would have to check with the BBC's Legal Department, who again agreed to start the formal process of releasing the transcripts. Unfortunately, the process involved requires the BBC having to go to court to request permission to release this

information. Given the timescale I have to respond as well as the cost involved it was agreed by the legal team that Mark Daly could transcribe the relevant conversations and provide the detail in a signed witness statement – see Exhibit Z1”

39. Mrs Oag comments on the contents of the transcribed conversation, stating that Mark Daly has asked her to inform the tribunal that he would make himself available to attend a hearing/ court of law to prove the accuracy of his report.

40. Mrs Oag next goes on to refer to Points 5 to 7 of Mr Blanchard’s statement, agreeing that Juiced Up predominantly traded in Edinburgh, but also attended many country fairs, music festivals and other events across the country. Mrs Oag notes that although Juiced Up (Scotland) Ltd is no longer in existence, prior to it being dissolved two new companies were formed and are trading as JUICED UP.

41. The remainder of Mrs Oag’s Witness Statement refers to the Witness Statement of Charles Moncrieff concerning the electronic exhibits and Mr Blanchard’s comments on the opponent’s standing.

42. As I have already mentioned, a Witness Statement from Mr Daly is provided as Exhibit Z1, and which is dated 27 April 2010. Rather than provide a summary I have included the body of the Statement in full so as to ensure that any comments are kept in context.

“I am a journalist, working and living in Glasgow. I am, and was in the period in question, BBC Scotland’s Investigations Correspondent.

In March 2008 I heard through a contact that two juice bar owners Callum Johnson, and Johnny Oag were having some problems with a trademark.

On speaking to both men it appeared that they had the same story to tell: that the previous year, they had both been approached by John Blanchard, who informed them that he'd bought the trademark to the names of their bars, namely Juiceling, and Juiced up, and that if they wanted to purchase the names back, they would have to spend tens of thousands of pounds. Both men told me they had been threatened by Mr Blanchard, along the lines that if they did not buy the trademark, and continued to trade under their respective names, his company would sue them.

Mr Blanchard claimed to be representing a company called Never Give Up, owned by millionaires who'd made their money in the hotel and property business over the years. I checked Companies House and found the directors were aged only 24 and 31, had only five directorships to their names and no accounts had been filed on any of them.

I thought this sounded unusual and starting investigating. I spoke to trademark expert John McKenzie from the legal firm Pinsent Masons, who informed me that Mr Blanchard's claims had no sound basis in law. So I decided to call Mr Blanchard up, and pose as a representative of Mr Johnson's firm.

I called up, and said I was interested in buying the trademark, and invited Mr Blanchard to give me a price. He asked to me offer him a price, and I suggested the price he'd already offered to Mr Johnson and Mr Oag, in the region of £25,000. He also warned me that if we did not settle, Juiceling would be taken to court and sued for damages.

In our next conversation, which I recorded, he told me that £25,000 would not be enough. The following is an accurate transcription of part of that recording, which I retain:

“Mark Daly: "Did you go back and speak to the people you represent?"

John Blanchard: "About what, about the 25?"

MD: "About, yeah, about the price."

JB: "Right, well the 25, I told you, they just laughed, shouted and put the phone down. There's no way they're going to be accepting that."

MD: "So in essence, just you tell me just how much this company want to allow Juiceling to continue trading under their own name."

JB: "It's not under their name. This is a preconception you carry that Juiceling is trading under their name when they're not."

MD: "It's just that they've been trading for the past three or four years under that name without any problems, but please continue, what is the figure that you're after."

JB: need to check a few things first. How many sites do you have at the moment?" There ensues a short discussion about how many sites Juiceling has

MD: "I'm keen to resolve this without too much hassle."

JB: "From our client's point of view, it's not that we want to sell this, you've come to us and said you want to buy this, which is a big difference between us having something for sale."

MD: "That was what you initially did, you came and asked if we wanted to lease or buy this from (you)."

JB: "That was last August."

MD: "It was September and then October."

JB: "Right ok As soon as we became aware of yourselves, then I said to the client lets at least offer it to them, cover the costs you've spent so far...now they're not so interested to sell it. If we can get to sell it, I said to you about the 30, they would never sell it for less than 30, then you seemed to take that as well, we can negotiate. They're not people to negotiate with."

MD: "Ok John, so they're not people to negotiate with. Just you tell me what they want, tell me what the people you're representing want for Juiceling to continue trading under the Juiceling name."

JB: "The figure they came out with was 65". MD: "55 thousands pounds?"

JB: "65."

MD: "65 now?"

JB: "That's the figure they came out with when I went back to them. 65 thousand and we'll agree it."

MD: "Obviously 65,000 is not that realistic, so give me a realistic figure. I'm keen to settle this."

JB: "I know they will take 65,000 providing it's all completed this week, if you come back with something getting close to that, then I'll try everything I can to get it agreed. If you're going to come back with 25,000, that will just annoy them. The more you try and get them to accept a ridiculously low figure, the less likely they are to sell it."

At the end of this conversation I said I would go and speak to my client. Of course, Mr Johnson had no intention of paying this money, and I had undertaken my investigation on the basis that Mr Blanchard was engaged in anti-social behaviour by threatening legal action when the legal advice I had received was that he had no sound basis in law.

There was never any suggestion of me pushing the price up. On the contrary, in an attempt to sound like a more convincing businessman, I kept trying to drive the price down, as the above conversation demonstrates.

Over the next few days, Mr Blanchard texted me several times, and told me that he had great pleasure in making me what he thought was a tremendous offer - £58,000, plus vat. He seemed in a great hurry to conclude the deal. In my role as undercover reporter posing as Mr Johnson's representative, I accepted. I then called him up to make arrangements. I also wanted to reaffirm what he had said to me and to Mr Johnson and Mr Oag, about what would happen if Juiceling

didn't buy or lease the trademark and continued trading. This was on 20/3/08. I recorded the conversation and this is an accurate transcript of part of that recording, which I retain.

Mark Daly: "There is no alternative for them, if they were to decide to continue trading under the name Juiceling you would take them to court, simple as that?"

John Blanchard: "Yeah. And not just for them trading now, but that they have been trading since we informed them."

MD: "And what do you think, it would be interesting for me to tell them, what do you think would happen to them?"

JB: "I don't know how much the award for damages would be, it's going to be up in the seven figure mark."

MD: "Right so we're talking over a hundred grand unless we..."

JB: "Sorry, seven zeros."

MD: "Oh sorry, I missed a zero! So we're talking in the millions?"

JB: "Yeah."

MD: "So what you're saying us paying this £58,000 is a bargain really?"

JB: "Yeah, that's what I've been trying to say."

I took this to be a threat, that if we didn't pay for the trademark, legal action would be launched.

I then went down to London to meet Mr Blanchard in a pre-arranged place. I was waiting with a camera man, and I unmasked myself as a BBC reporter and put the allegation to him that he was a conman.

Some days later, on April 4th, Reporting Scotland, the News Channel, and BBC Online broadcast and published the story.

<http://news.bbc.co.uk/1/hi/scotland/7330714.stm>

It should be noted, that despite claiming my story to be false, Mr Blanchard did not complain to the BBC, nor did he try and sue for defamation."

43. I have not included the final paragraph as this is clearly not relevant to the interview or the issues.

44. Whilst this completes my summary of the evidence insofar as it may be relevant to these proceedings, I mention that contrary to my directions, Mr Blanchard sought to file further evidence in reply to Mrs Oag, which sparked a response from the opponents in the form of a Witness Statement from Mrs Oag which included a Witness Statement from an anonymous source. Notwithstanding the fact that neither party had requested, let alone been given leave to file further evidence, what was sought to be filed was, in any event, nothing more than submissions. I therefore refused to admit these Statements as evidence but agreed to take them as written submissions. I refused to consider the anonymous Witness Statement.

Decision

45. Before going on to consider the evidence in the context of the grounds I wish to make it clear that I will be proceeding on the basis of the guidance provided by Mr Arnold Q.C. (as he was) when acting as the Appointed Person in *Extreme* O/161/07. In this Mr Arnold commented on the issue of unchallenged evidence and cross examination:

“Unchallenged evidence

33. *Phipson on Evidence* (16th ed) states at paragraph 12-12:

In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position. This rule [sic] serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficult in submitting that the evidence should be rejected.

However the rule is not an inflexible one...

34. The authority cited in support of this statement of the law is the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67. The relevant passages from the speeches are set out in the judgment of Hunt J in *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607, the material parts of which are quoted in the judgment of the Court of Appeal in *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31 at [59]-[60].

35. In my judgment the learned editors of *Phipson* are correct to say that the rule is not an inflexible one. There are at least two well-established exceptions to it. The first is that, as the speech of Lord Herschell LC in *Browne v Dunn* makes clear, it may not be necessary to cross-examine on a point if the witness has been given full notice of it before making his statement. As I pointed out in *BRUTT Trade Marks* [2007] RPC 19 at [23], this may be significant in registry proceedings where evidence is given sequentially. The second is that a court is not obliged to accept a witness's evidence in the absence of cross-examination if it is

obviously incredible: see *National Westminster Bank plc v Daniel* [1993] 1 WLR 1453.

36. Where, however, evidence is given in a witness statement filed on behalf of a party to registry proceedings which is not obviously incredible and the opposing party has neither given the witness advance notice that his evidence is to be challenged nor challenged his evidence in cross-examination nor adduced evidence to contradict the witness's evidence despite having had the opportunity to do so, then I consider that the rule in *Brown v Dunn* applies and it is not open to the opposing party to invite the tribunal to disbelieve the witness's evidence.

37. Despite this, it is not an uncommon experience to find parties in registry hearings making submissions about such unchallenged evidence which amount to cross-examination of the witness in his absence and an invitation to the hearing officer to disbelieve or discount his evidence. There have been a number of cases in which appeals have been allowed against the decisions of hearing officers who have accepted such submissions. Two recent examples where this appears to have happened which were cited by counsel for the proprietor are *Score Draw Ltd v Finch* [2007] EWHC 462 (Ch), [2007] BusLR 864 and *EINSTEIN Trade Mark* (O/068/07). Another recent example is *Scholl Ltd's Application* (O/199/06). I consider that hearing officers should guard themselves against being beguiled by such submissions (which is not, of course, to say that they should assess evidence uncritically)."

46. Effectively, where evidence is contested solely in submission in a way that does not give the witness a chance to answer the criticism it shall be regarded as being unchallenged. In such circumstances, unless a claim or statement made in relation to the facts is not obviously incredible, unreasonable or inconsistent, I will consider it as credible evidence. The proviso to this is that the claim must be relevant to the issue.

47. Turning first to the ground under Section 5(4)(a) of the Act. That section reads as follows:

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

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

(b)

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

48. The requirements for this ground of opposition have been restated many times and can be found in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *WILD CHILD Trade Mark* [1998] R.P.C. 455. Adapted to opposition proceedings, the three elements that must be present can be summarised as follows:

- (1) that the opponents' 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 applicant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the applicant are goods or services of the opponents; and
- (3) that the opponents have suffered or are likely to suffer damage as a result of the erroneous belief engendered by the applicant's misrepresentation."

49. The first issue to determine is the material date at which this objection must be judged. A similar provision to section 5(4)(a) of the Act is to be found in Article 8(4) of Council Regulation 40/94 of December 20, 1993. This was the subject of consideration by the General Court (GC) in *Last Minute Network Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* joined cases T-114/07 and T-115/07. In that judgment the GC stated:

"50 First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51 However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000"

50. The material date is therefore the date of the application for registration. However, if there has been use of the trade mark by the applicants prior to the date of application this must be taken into account as it could establish that it was the senior user. Additionally, it may show that there are circumstances that mean that the use of the subject mark would not be liable to be prevented by the law of passing-off. (See *Croom's Trade Mark Application* [2005] RPC 2 and *Daimlerchrysler AG v Javid Alavi (T/A Merc)* [2001] RPC 42.)

51. There is no evidence that the applicants have ever used the trade mark JUICED UP. The closest it gets is found in Exhibit A12 which consists of Adobe Acrobat files showing layout/design for Energy JuiceTM retail units. The right-hand side contains Energy JuiceTM above the words "juice up on energy" (or on one carelessly as "jucie

up....”) and not in the form “Juice Up... ” as stated by Mr Blanchard. Whilst a seemingly minor point, capitalization of the letters in the way quoted by Mr Blanchard suggests that here is something more than just a promotional script. Mr Blanchard says that this “...soon changed to the past tense as we felt it sounded better” although there is no evidence to support this. The system file records show that the Adobe files “energy2 copy” and “energy stand base copy” were both last modified on 1 December 2006. The third Adobe file “Energy juices stand layout clear (2)” records that it was last modified at 12.53 on 22 December 2006. Unlike the other two Adobe files this also contains a box recording that it was drawn by Robert Booth on 24 November 2006, yet Mr Blanchard makes no reference to Mr Booth, and more surprisingly, the date of creation.

52. Setting aside whether this use is as a trade mark (particularly as it is combined with a clearly stated trade mark), that it is not use in the market and is but one example, I am conscious of the evidence provided by Mr Moncrieff and the concern reiterated by Mrs Oag over when these documents were actually originally created. There is also the matter of the inconsistent use of “juice up on energy” highlighted by Mrs Oag, which Mr Blanchard states ...is because we are showing the landlords that we can build it with different looks depending on their requirements for example not blocking the lines of site [sight] of other retailers depending on location.” Having different looks for different scenarios is quite plausible, but each still has a panel where the “juice up on energy” had, could and would be shown if it was an important brand identifier.

53. Mr Blanchard criticises the evidence from Mr Moncrieff, stating that is says no more than he cannot confirm the date the documents were created and as such is “irrelevant”. Mr Blanchard did not comply with my direction and provide the record of the “date created” and date last modified” before making any changes, and as I have already said, I do not see why hard copies could not have been taken and the original dates retained. In any event, for the reasons I shall give I do not consider it will materially affect the outcome under Section 5(4)(a). This is because I have already found (at paragraph 52) that the applicant has made no use of JUICED UP in trade prior to the date of application.

54. . The chronology at Exhibit A4 contains the entry “July 2005 – Finalised Design of Logo (See attachment 1)”. The attachment is not provided as part of the exhibit but is included with the chronology provided with the Statement of Case. The attachment shows a greyscale version of the logo used in other parts of the evidence, for example, Mr Oag’s next Witness Statement, on company stationery, etc, with the exception that it only possible to see two of the four circular devices used beneath “juiced up”. To say that the logo was “finalised” seems at odds with the evidence Daryl Hutchinson, who appears to be a graphic designer or the like, who on 9 December 2005 sent an email enclosing several of Jonathon Oag’s “...most recent logo designs”, and a “simple artists’ impression of the interior as per his direction”. The attachments referred to are not specified. However, the subject of the mail is stated as “Jonathon Oag: ‘juiced up’”.

55. A later mail from Jonny Oag to Carole Oag included attachments referred to as “interior-sketch.gif;juicedup1.gif;juicedup2.gif;juicedup3.gif;juicedup4.gif”. Mr Oag does not say that these are the “attachments” referred to by Mr Hutchinson, but this is a

reasonable inference to make. They consist of a sketch of the interior and exterior of a retail establishment with the signage “juiced up”, and depictions of “juiced up” logos.

56. A further e-mail, sent by Mr Hutchinson to Mr Oag on 4 February 2006 with the subject heading “Shop variations and invoice” refers to attaching “a few images to browse over”. An accompanying invoice relates to “...work carried out up to week beginning 6th Feb 2006”, stating this to be “interior/exterior mock ups, logo design and business card template”. These attachments consist of depictions of “juiced up” shop fronts, each bearing the date 16 January 2006, consistent with the first e-mail and invoice.

57. It is clear is that Mr Oag was creating a “juiced up” name and logo prior to the application date and any date other that could be relied upon by the applicants. However, the act of creating a name does not, of itself, bring the inventor any rights. In the decision in *Harrods Limited v Harrodian School Limited* [1996] RPC 697, Millett LJ at paragraph 791 stated:

“It is well settled that (unless registered as a trade mark) no one has a monopoly in his brand name or get up, however familiar these may be. Passing off is a wrongful invasion of a right of property vested in the plaintiff; but the property which is protected by an action for passing off is not the plaintiff's proprietary right in the name or get up which the defendant has misappropriated but the goodwill and reputation of his business which is likely to be harmed by the defendant's misrepresentation.”

58. The question is whether, at the relevant date, the opponent had accrued goodwill in the name “JUICED UP”. In *IRC v Muller and Co's Margarine* [1901] AC 217 at 223, Lord Macnaughton explained what is meant by “goodwill” in the following terms:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

59. Although decided many years ago, no question has been raised as to the statement made. More recent cases such as the Court of Appeal in *Phones 4u Ltd v Phone4u.co.uk Internet Ltd*, [2007] R.P.C. 5 refer to this statement so it is reasonable to infer that Lord Mcnaughton's words hold good. To qualify for protection the goodwill must be of more than a trivial nature, see *Hart v Relentless Records* [2002] EWHC 1984 (“*Relentless*”) although very slight trading activities have been held to generate sufficient goodwill, for example, see *Jian Tools for Sales v Roderick Manhattan Group* [1995] F.S.R. 924.

60. In his first Witness Statement Mr Oag says that through his company Juiced Up (Scotland) Ltd, he first used “JUICED UP” in the UK in 2005. He does not say what “used” actually means, but if it is a claim to use in a trading sense this is inconsistent with the evidence. The extract from the Companies House website shows the company was not incorporated until 17 January 2006, with work to finalise the development of the name, logo and retail get-up taking place through December 2005 to February 2006. It is

of course possible that an earlier version was used but this cannot have been by the company. In fact on my reading of the evidence Juiced Up (Scotland) Limited has all but been invisible. The business has operated under the trading style Juiced Up under the highly visible control of Mr Oag. If there is any question about where the goodwill subsists, I consider this to be clearly with Mr Oag. He devised the Juiced Up name, first traded and continued to trade under Juiced Up. There is nothing to show that he ever divested himself of the ownership of the name and the connected goodwill to the limited company.

61. The position is clarified a little by Mr Oag in his second Witness Statement where he states that “initial sales in Dec 2005” were made through outside catering. Exhibit Appendix 8 to this Statement shows Juiced Up to have been engaged in providing an outside catering service since June 2006 to clients in Edinburgh. This is supported by the e-mail from Kirsty Docherty (Appendix 5) who confirms that her company Progressive Partnership “...first used Juiced Up in Dec 2005 and has continued to use them for meetings till the present day.” Progressive Partnership is amongst the companies invoiced for the provision of foodstuffs and beverages (Appendix 8). But whether I take the date of first use (and therefore the commencement of the opponent’s goodwill) as December 2005 or April 2006, both are well before any date on which the applicants can claim use, so nothing turns on this.

62. The first shop is stated to have opened for trading in Bruntsfield Place (Edinburgh) in April 2006, a date that fits with the development of the logo and retail identity and consistent with the figures provided for the sale of goods and services, which date from March 2006. This is said to have been followed by the opening of a kiosk in Rose Street (Edinburgh) in June 2006, an outlet in Ocean Terminal Shopping Centre (Edinburgh) in November 2006, a mini JUICED UP” in Newsroom Bar and Lounge in March 2007, and an outlet in Hanover Street (Edinburgh) in August 2007. Linked to the opening of the Rose Street Kiosk in June 2006, Mr Oag refers to trading at “festivals nationwide” although does not give any details on which to gauge this.

63. Not long after the launch of Juiced Up the opponent and his business received exposure in mainstream publications, mostly (but not exclusively) local to Edinburgh, but also in a magazine supplement to a newspaper published Scotland-wide. The first involves the claimed health benefits of the acacia berry, and details an invitation for the reporter to visit the “... JUICED UP bar in Bruntsfield – which has recently added acacia juices to its menu...” and to “...the manager Jonathon Oag...” Several are more focused on Mr Oag, how he came up with the idea and subsequently established the JUICED UP business. These will have added to the strength and geographical spread of the attractive force of the JUICED UP name.

64. The turnover figures provided are not massive, but neither are they anywhere near trivial, particularly if recognised as having been generated by a fledgling business operating in a narrow area. From this and the other evidence, I consider it reasonable to take the use to have established goodwill in the name JUICED UP, centred on Edinburgh, but also extending wider into other parts of Scotland. Although Mr Oag mentions use

nationwide, because of the lack of detail it is not reasonable to infer any reputation or goodwill to this extent.

65. Although the name has primarily been used in the form of a logo, the graphical elements are essentially “product related” in that they are either the colour of, and/or contain the depictions of fruit. As such I consider that the consumer will see the words “JUICED UP as the brand name and the graphics as emphasising the connection with fruit and juice. Even if this were not the case, the public have been exposed to the name “JUICED UP without any other matter. I am therefore satisfied that the opponents possessed goodwill in the name JUICED UP at the date of application.

66. This goodwill exists primarily in relation to juices and smoothies, including those with health-promoting properties, but as can be seen from the evidence the JUICED UP outlets have also sold bottled water, coffee and herbal teas. In the food line they have sold goods such as soup, pannini’s, bagels, wraps, sandwiches, muffins, crisps, fruit salads and porridge. There is a mention of organic snacks but there is no information as to what these are.

67. In summary, I consider the opponents to have a goodwill and reputation in the name JUICED UP, both in the logo form and as the words alone, in relation to the provision of juices and smoothies, particularly those with health-promoting properties, and also a number of hot and cold beverages, and a range of snack-type foodstuff such as soup, pannini’s, bagels, wraps, sandwiches, crisps, fruit salads and porridge.

68. As I have already said, this goodwill dates from before any of the possible relevant dates, and although only established in part of the UK this is of no consequence. It is not necessary to show a nationwide goodwill to receive nationwide protection from the law of passing off: it is only essential to show one existed prior to the relevant date. See *Chelsea Man Menswear Ltd. v Chelsea Girl Ltd.* [1987] RPC 189. In some circumstances it is possible for two businesses to have goodwill in the same sign that causes no damage to the other. See *Clouds Restaurant Ltd. v. Y Hotel Ltd.* (7 July 1982, unreported). In that case there was a distinction created (in part) by the geographical separation the businesses; that is not the case here. In applying for registration the applicants are making a claim to the right to use the sign throughout the area for which the registration will be valid, and as this will include the geographical area in which the opponents have an established goodwill the marks will collide.

69. This leads on to the question of misrepresentation. The general principle is that it is not permissible to represent one business in such a way that it will lead to the belief that it is connected to another in any way that is likely, in reality, to lead to damage to the other business. In *Harrods Ltd. v. Harrodian School Ltd.* case [1996] R.P.C. 687, Millet L.J. explained the position as follows:

“In its classic form the misrepresentation which gave rise to an action for passing off was an implied representation by the defendant that his goods were the goods of the plaintiff, but by the beginning of the present century the tort had been

extended beyond this. As Lord Diplock explained in the *Advocaat* case [1979] A.C. 732 at pages 741-2, it came to include the case ‘where although the plaintiff and the defendant were not competing traders in the same line of business, a false suggestion by the defendant that their businesses were connected with one another would damage the reputation and thus the goodwill of the plaintiff’s business.

70. Millet L.J. went on to say that it is not necessary to prove that the defendant’s (applicant’s) goods will actually be mistaken for those of the claimant (opponent) if the relevant public would take the defendant’s products as something for which the claimant had made himself responsible.

71. The mark applied for is the words JUICED UP in eight plain font versions, some in upper-case, some lower case, others being a mixture of the two, with four having a terminal exclamation mark. There can be little argument that all of these, and the signs in which the opponents have a goodwill are the same or so similar so as to be all but identical.

72. There is no requirement that the applicants be carrying on a business which competes with that of the opponent or any natural extension of the opponent’s business. However, the fields of activity are an important and highly relevant consideration in deciding whether there is a likelihood of confusion among the opponent’s customers.

73. The application seeks registration in respect of the provision of food and drink at large, in “juice bars”, “smoothie bars” and “shakes bars”. The types of food and drink mentioned includes mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices and a range of snack-type foods including “healthy snacks” and nutritional supplements and is practically a statement of the business operated by the opponent under the JUICED UP name. Given this and the other circumstances of this case, it seems self-evident that should the applicants use the mark applied for in relation to the stated services that this would amount to a misrepresentation.

74. Whilst the opponent does not have to prove actual damage to his goodwill in order to succeed in an action for passing off, there will be no cause of action where there is no damage or prospect of damage to the goodwill of the claimant’s business. As Buckley LJ stated in *Bulmer (HP) Ltd v J Bollinger SA* [1978] R.P.C. 79:

“It is well settled that the plaintiff in a passing-off action does not have to prove that he has actually suffered damage by loss of business or in any other way. A probability of damage is enough, but the actual or probable damage must be damage to him in his trade or business, that is to say, damage to the goodwill in respect of that trade or business”.

75. The circumstances of this case show that if the registration is granted and the applicant is free to use the name JUICED UP as intended by the application, the opponent will lose control of his goodwill. In these proceedings there is a further type of damage which may particularly occur as a result of the applicant’s misrepresentation.

76. Proceeding on the basis that the applicant intends to use the mark applied for in connection with the services listed (which is not an unreasonable assumption based on their declaration of intent to use) they will be in actual competition with the opponent. The applicant will be holding his goods out as those of the opponent's pre-existing business, based on which sales will be diverted "depriving [the opponent] of the profit he might have made by the sale of the goods which, ex hypothesi, the purchaser intended to buy." (Lord Cranworth LC in *Seixo v Provezende* [1866] 1 Ch. App. 192.

77. In my view the potential for damage to be caused to the opponent's goodwill under these two heads is clear and obvious, and in the circumstances of this case I consider the ground under Section 5(4)(a) to succeed.

78. Whilst my Finding under Section 5(4)(a) effectively decides the matter, I will, for completeness go on to consider the ground under Section 3(6) of the Act. That section reads as follows:

"3(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith."

79. In *Gromax Plastics Ltd v. Don & Low Nonwovens Ltd* [1999] RPC 367, Lindsay J. considered the meaning of "bad faith" in Section 3(6) of the Act and stated (at page 379):

"I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances."

80. In *Harrison v. Teton Valley Trading Co* [2005] FSR 10, the Court of Appeal confirmed that bad faith is to be judged according to the combined test set out by the House of Lords in *Twinsectra v Yardley* [2002] 2 AC 164. Paragraphs 25 and 26 of the Court of Appeal decision are of particular assistance and read as follows:

"25. Lord Hutton went on to conclude that the true test for dishonesty was the combined test. He said:

"36. Therefore I consider that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

26. For my part, I would accept the reasoning of Lord Hutton as applying to considerations of bad faith. The words “bad faith” suggest a mental state. Clearly when considering the question of whether an application to register is made in bad faith all the circumstances will be relevant. However the court must decide whether the knowledge of the applicant was such that his decision to apply for registration would be regarded as in bad faith by persons adopting proper standards.”

81. In the Privy Council judgment in *Barlow Clowes International Ltd v. Eurotrust International Ltd* [2005] UKPC 37, their Lordships took the opportunity to clarify the speculation that *Twinsectra* had changed the law. The judgment confirmed the House of Lords’ test for dishonesty that had been applied in *Twinsectra*, i.e. the combined test, and clarified their Lordships’ statement of that test by making it clear that an enquiry into a defendant’s views as regards normal standards of honesty is not part of the test.

82. Thus, in considering the actions of the applicants, the test is a combination of the subjective and objective. Furthermore, it is clear that bad faith in addition to dishonesty, may include business dealings which fall short of the standards of acceptable commercial behaviour i.e. unacceptable or reckless behaviour in a particular business context and on a particular set of facts.

83. In the case of *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* (Case C-529/07); [2009] WLR (D) 182, the General Court gave the following guidance on the application of Art 51(1)(b) of Regulation No 40/94 (which equates to Section 3(6) in establishing whether the applicant was acting in bad faith when he filed the application for the trade mark:

“In order to determine whether the applicant is acting in bad faith within the meaning of Article 51(1)(b) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, the national court must take into consideration all the relevant factors specific to the particular case which pertained at the time of filing the application for registration of the sign as a Community trade mark, in particular:

- the fact that the applicant knows or must know that a third party is using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought;
- the applicant’s intention to prevent that third party from continuing to use such a sign; and
- the degree of legal protection enjoyed by the third party’s sign and by the sign for which registration is sought.

84. Mr Blanchard is silent on how he came to apply to register trade marks consisting of the names of two existing businesses, both of which had been operating for several years prior to the applications being made. The names were not ordinary descriptive English words or commonplace phrases where their aptness for use created a likelihood of them being coincidentally adopted by a number of people. Even more coincidentally, Mr Blanchard was seeking registration of these names in the same area of trade.

85. Mr Blanchard claims that "...I was made aware of Mr J Oag using the name Juiced Up Ltd..." in December 2007 which is a few months after the date on which he made the application. He does not explain the circumstances that made him "aware", which would have been useful given that he is located in Basingstoke and the traders are centred on Edinburgh with limited exposure much beyond this area.

86. In his Witness Statement he says that "Before applying for the trade mark on 15 August 2007 I checked the Intellectual Property Office website ...I did a search for "Juiced Up" and found the application made by Mr J Oag in a different class..." In fact the application had been made in the name of Juiced Up (Scotland) Limited and not Mr Oag, and in Class 32 in respect of "fruit juices and smoothies", the self-same goods that the evidence shows that he intends to sell through the provision of his services.

87. So by his own words, Mr Blanchard was aware of Mr Oag/Juiced Up (Scotland) Limited some time before 15 August 2007. There was enough information available to alert the uniformed (let alone someone savvy enough to check the Intellectual Property Office website in the first place) that they need to make investigations into this other business before proceeding with the application.

88. Mr Oag asserts that in December 2007, John Blanchard of Never Give Up Ltd (the applicant) telephoned to inform him that his company owned the trade mark JUICED UP. Mr Oag says that Mr Blanchard demanded that he either pay a licence fee or purchase the trademark indicating that if he did not, his company would face court action. Mr Oag says that Mr Blanchard was asking for tens of thousands of pounds.

89. In the Counterstatement Mr Blanchard says that in December 2007 he was made aware of a company using his trade mark "JUICED UP" and approached them to ask them not to use it. This, at least confirms that a telephone call was made to Mr Oag, if not the content of the discussion. Mr Blanchard states that we (which I take to be either him or someone connected with Never Give Up Ltd) "...have never tried to extort money from companies." This is not quite the same as saying "I did not ask Mr Oag for any money"; I cannot imagine that Mr Blanchard would say that he was trying to obtain money through dubious means. Mr Blanchard says that Mr Oag is making an allegation of commercial fraud which is very serious and that "we will be persuing him about this." There is no evidence of Mr Blanchard or Never Give Up Limited doing anything.

90. One particular piece of evidence contested by Mr Blanchard is the extract from the website of BBC News 24 provided as part of Exhibits A4. Mr Blanchard refutes the version of events set out in the article, challenging the opponents to provide a full

transcript. He subsequently widened this to wanting a transcript of every communication, a request which I have already said was refused. From his responses and the shifting ground of his requests, I suspect that even had a transcript of every contact between the BBC (in which I include any employee) and Mr Blanchard been provided, Mr Blanchard would have asserted that they are incomplete or had been edited in some way.

91. Mrs Oag says that the BBC was prepared to obtain permission from the Court in order to release the transcripts, but this was not done because of time constraints and costs. Mr Blanchard responded saying that he "...sees no reason why the BBC would need to go to court to allow the transcripts to be released..." In the absence of evidence to the contrary I see no reason to doubt the veracity of what Mrs Oag says based on a personal belief. In her later submissions Mrs Oag changes this to say that it would not have been the BBC, but Mr Oag or herself that would have needed to apply to the court as the BBC does not, as a matter of course, release material that has not been broadcasted. She points out that the option of going to the court to obtain the transcript would have been open to Mr Blanchard.

92. Mrs Oag says that the BBC agreed that Mr Daly "...could transcribe the relevant conversations and provide the detail in a signed Witness Statement" without a court order because Mr Blanchard was making allegations about their story. This may, or may not be the case, but the only known fact is that Mr Daly did complete a Witness Statement in which he confirms that he had recorded conversations with Mr Blanchard and that that the text he provides is an "accurate transcription of part of that transcript of part of that recording..."

93. The article that resulted from Mr Daly's investigations primarily recounts an interview with Callum Johnson, the founder of a juice bar business trading under the name Juiceling, but also has quotes from Mr Oag. Mr Johnson is reported as saying that he had been contacted by Mr Blanchard who notified him that he represented a company that owns the trade mark Juiceling, and that if he did not pay either to licence or purchase the mark his company would face court action. He says that Mr Blanchard was asking for tens of thousands of pounds. The parallel with Mr Oag's version of events as set out in the article is plain to see.

94. In his Witness Statement Mr Blanchard states that Mr Daly approached him, which is confirmed by Mr Daly, but avoids the fact that this was as a result of Mr Blanchard having contacted Mr Johnson and Mr Oag. Mr Daly says that when he called Mr Blanchard to say he was interested in buying the Juiceling trademark, Mr Blanchard invited him to make an offer, upon which Mr Daly says he suggested the amount quoted to Mr Johnson, that is, in the region of £25,000. Mr Daly states that Mr Blanchard warned him that if he did not settle, Juiceling would be taken to court and sued for damages. I can see no inconsistencies so far.

95. Mr Daly recounts the next conversation which he says he recorded. He says that Mr Blanchard told him that £25,000 would not be enough and that the people he represents were now looking for £65,000. Mr Daly states that at the end of this conversation he said he would go and speak to his client. He says that Mr Blanchard sent him several

texts over the next few days making an offer of £58,000, plus vat, which Mr Daly says he accepted. On 20 March 2008 Mr Daly had another conversation with Mr Blanchard, during which Mr Blanchard confirmed that if Juiceling were to continue trading they would be taken to court "... not just for them trading now, but that they have been trading since we informed them" which could result in millions in damages. A meeting was arranged at which Mr Daly was to hand over the £58,000 (plus vat). The article reports that when Mr Daly "unmasked himself" as a reporter, Mr Blanchard is said to have denied any wrong doing claiming to have registered the trade marks in good faith, and denying having ever threatened the juice bars with court action.

96. Mr Blanchard took the opportunity to answer the evidence from Mr Daly through his Witness Statement of 12 May 2010. His main criticism is that the partial transcript in Mr Daly's Witness Statement distorts the true picture that a full transcript would give. In my opinion the part transcript leaves little scope for interpretation; Mr Blanchard sought money on threat of court action, and that is the case regardless of whatever else was said. In his Witness Statement (which I have taken as written submissions) Mr Blanchard states:

"Mr Daly's Statement does not show that I wanted £000's for the trade mark "Juiced Up" as Mark Daly had approached me to buy a different trade mark for a company and the "Juiced Up" trade mark was never discussed. Mr C Johnston never had a claim to the trademark in the report "Juiceling" which is why I had informed him that we had applied for the trademark he never opposed it."

97. From this there can be no doubt that Mr Blanchard contacted Mr Johnson and sought money on the terms mentioned, nor that he told Mr Johnson that he could be taken to court if he did not pay up, one way or another.

98. Whilst Mr Blanchard is correct when he says that he and Mr Daly never discussed the sale of Juiced Up, in what seems to be an example of his carefully chosen words Mr Blanchard avoids saying anything about whether he approached Mr Oag on the same terms in relation to Juiced Up, but there is no denial either. It does not seem unreasonable to take Mr Blanchard's behaviour in respect of the Juiceling trade mark to be indicative of his business ethics and what he is more likely to have done than not. In short, I consider there to be sufficient evidence to be able to infer, with some degree of certainty, that Mr Blanchard recognised the unregistered Juiced Up mark as an opportunity, and sought to register it with the intention of leveraging considerable financial gain from Mr Oag.

99. If the report is false or inaccurate Mr Blanchard had the option of filing a complaint with the BBC. Mr Blanchard says that when he became aware of the article he did speak with a person from the BBC "...and "...offered for them to see all of our business plans, bids on site locations and branded items but they refused". He does not say to who he spoke with or when. Mr Blanchard later says that he "contacted his [Mr Daly's] boss marcus.ryder@bbc.co.uk and offered for him to meet with me and look at all of our branded materials, business plan, presentation and leasing proposals etc but he refused." He does not say how he knows of Mr Ryder or that he would possibly oversee the work of Mr Daly, but I take judicial note that such information readily available via the BBC

website. Mr Blanchard lists the e-mail address for Mr Ryder from which it is reasonable to infer that he made contact by this means, and presumably how Mr Ryder would have responded. No emails have been provided raising the complaint. Likewise, no mail showing the refusal from Mr Ryder or the BBC has been provided.

100. Mr Daly states that Mr Blanchard did not complain to the BBC. It is of course possible that Mr Blanchard did so, and Mr Daly was not made aware of this. Given the seriousness of the allegation and possible legal consequences, the balance of probability suggests that an investigation involving Mr Daly would have been made. Significantly, Mrs Oag says in her Statement that “Mr Daly has asked me to let you know that he would make himself available to attend a hearing/court of law to prove the accuracy of his report...”. Mr Blanchard has either not seen this offer or has chosen to ignore it.

101. Earlier in this decision I concluded that at the relevant date the opponents possessed a goodwill and reputation in the name JUICED UP, both in the logo form and as the words alone, in relation to the provision of a range of beverages of beverages and foodstuffs.

102. I further stated that notwithstanding the applicant’s evidence of a plan to use Juice Up there is no evidence that they ever used that sign (or Juiced Up) in a trade in relation to any goods or services prior to the date of application, the consequence of which is that it enjoyed no legal protection at the relevant date. Accordingly the preparations relied upon are both irrelevant in that they relate to a different sign, and a sham because they are being used simply to cover up the applicants manifest bad faith.

103. On the balance of probabilities I am satisfied that at the time of making the application Mr Blanchard was fully aware of Mr Oag and his use of Juiced Up as a trade mark in connection with a business engaged in the sale of foodstuffs and beverages. There is sufficient evidence to also say that in all probability Mr Blanchard made the application with the intention of inducing Mr Oag to part with money in order to be able to continue the use of Juiced Up. In applying for the mark in the light of all the surrounding circumstances Mr Blanchard’s actions are clearly contrary to normally accepted standards of honest conduct by persons adopting proper standards. The ground of opposition under Section 3(6) therefore succeeds.

Costs

104. Mr Jonathon Oag having been successful in his opposition is entitled to a contribution towards his costs. He represented himself throughout the case although at the hearing was represented by his mother, Mrs Carol Ann Oag. As such I must consider costs due to a private litigant. In *Adrenalin Trade Mark*, BL O/040/02, Simon Thorley Q.C. sitting as the Appointed Person, observed that:

“6. Under section 68 of the Trade Marks Act 1994, the Registrar is given a wide discretion to award costs. The principles upon which the Registrar will exercise that discretion are set out in a Tribunal Practice Note (TPN 2/2000 – see *Kerly’s*

Law of Trade Marks 13th edition page 1009). In general the Registrar proceeds by reference to a scale of costs and it is a long established practice that costs in proceedings before the Registrar are not intended to compensate parties for the expense to which they may have been put. Mr. Knight expressed the policy behind the scale of costs in his decision in this case as follows:

‘That scale of costs is meant to be a reasonable scale based upon the policy that no one should be deterred from seeking to register their intellectual property rights or indeed defend their intellectual property rights so that, for example, if a litigant in person loses an action before the trade mark registry, he or she would know fairly clearly in advance the sum of money they may have to pay to the other side.’

7. Plainly however a pre-requisite of making an award of costs on the scale of costs is that the award should not exceed the costs incurred.

8. It is correct to point out that the Registrar’s practice on costs does not specifically relate to litigants in person but in my judgment it could not be that a litigant in person before the Trade Mark Registry could be placed in any more favourable position than a litigant in person before the High Court as governed by the CPR. The correct approach to making an award of costs in the case of a litigant in person is considered in CPR Part 48.6.

...

10. As indicated above, the Registrar is given a wide discretion as to costs. The practice note is, and is intended to be, merely guidance as to how the Registrar will, in general, exercise that discretion. It does not and cannot impose a fetter upon the overriding discretion.

11. Part 44.3 of the CPR sets out the circumstances which should be taken into account when a court exercises its discretion as to costs and in my judgment exactly the same principles apply to the Registrar.”

105. I also rely upon the comments of Richard Arnold QC, acting as the Appointed Person in *South Beck* BL O/160/08 where he commented:

“34. The Registrar is not bound by the CPR. On the other hand, the Registrar is entitled to, and does, have regard to the CPR in exercising his powers in circumstances where the Trade Marks Act 1994 and Trade Marks Rules 2000 do not make specific provision. Section 68 of the 1994 Act and rule 60 of the 2000 Rules give the registrar discretion to “award to any party such costs as she may consider reasonable”, but do not place any constraints upon the exercise of that discretion. I agree with Mr Thorley that (i) an award of costs should not exceed the costs incurred and (ii) a litigant in person should not be in any more favourable position in proceedings in the Registry than he would be in High Court

proceedings under CRP r. 48.6. So far as the first point is concerned I note that paragraph 8 of TPN 4/2007 now states:

“Depending on the circumstances the Comptroller may also award costs below the minimum indicated by the standard scale. For example, the Comptroller will not normally award costs which appear to him to exceed the reasonable costs incurred by a party.”

35. Turning to the second submission, I agree with counsel for the opponent that the hearing officer appears to have misapplied CPR r. 48.6 and to have awarded the applicant two-thirds of the scale costs he would have awarded a professionally represented litigant without reference to the applicant’s actual loss or any figure calculated in accordance with r. 48.6(4)(b).

36. In my judgment the approach which should be adopted when the Registrar is asked to make an award of costs in favour of a litigant in person is as follows. The hearing officer should direct the litigant in person pursuant to r. 57 of the 2000 Rules to file a brief schedule or statement setting out (i) any disbursements which the litigant claimed he has incurred, (ii) any other financial losses claimed by the litigant and (iii) a statement of the time spent by the litigant in dealing with the proceedings. The hearing officer should then make an assessment of the costs to be awarded applying by analogy the principles applicable under r. 48.6, but with a fairly broad brush. The objective should be to ensure that litigants in person are neither disadvantaged nor overcompensated by comparison with professionally represented litigants.

37. In the present case I directed the applicant to provide such a schedule. The applicant duly filed a schedule claiming in respect of the proceedings at first instance disbursements of £20 together with mileage of 310 miles. No specific mileage rate was claimed so I propose to apply a rate of 25p per mile, giving a figure of £77.50, making total disbursements of £97.50. The applicant also estimated that it had spent a total of 83 hours dealing with the first instance proceedings. While this seems quite a lot by professional standards, it is appropriate to allow a litigant in person more time for a particular task than a professional advisor would be allowed: *Mealing McLeod v Common Professional Examination Board* [2000] 2 Costs L.R. 223. At the rate of £9.25 an hour, 83 hours comes to £767.75. Accordingly, I shall set aside the hearing officer’s costs order and substitute an order that the opponent pay the applicant the sum of £865.25 in respect of the first instance proceedings.

38. So far as the appeal is concerned, the applicant again claimed disbursements of £20 and mileage of 310 miles. It also estimated that it had spent 21 hours dealing with the appeal. Accordingly I shall order the opponent to pay the applicant the sum of £291.75 in respect of the appeal, making a total of £1157.”

106. In accordance with these principles I direct Mr Jonathon Oag of Juiced Up to provide a brief schedule of costs setting out any disbursements incurred, any other financial losses claimed and a statement of the time spent in dealing with the proceedings. This should be submitted to the Registry, and copied to Never Give Up Limited, within one month of the date of issue of this decision. Never Give Up Limited will then have two weeks to provide comments on these costs. I shall then issue a supplementary decision concerning the costs.

Dated this 09 day of August 2010

**Mike Foley
for the Registrar
the Comptroller-General**