

O-295-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION 2540073
BY VINTAGE AT LTD TO REGISTER THE TRADE MARK**

The logo for 'VINTAGE' is rendered in a bold, stylized, black and white font. The letter 'V' is a solid black triangle with horizontal lines on its left side. The letter 'I' is a vertical bar with horizontal lines on its left side. The letter 'N' is a solid black shape with horizontal lines on its left side. The letter 'T' is a solid black shape with horizontal lines on its left side. The letter 'A' is a solid black shape with horizontal lines on its left side. The letter 'G' is a solid black shape with horizontal lines on its left side. The letter 'E' is a solid black shape with horizontal lines on its left side.

IN CLASSES 6, 9, 14, 16, 18, 20, 21, 24, 25, 26, 28, 35, 38, 41, AND 43

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 100735
BY ARTHOUSE LTD**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No 2540073
By Vintage At Ltd to register the trade mark**



and

IN THE MATTER OF opposition thereto under No 100735 by Arthouse Ltd

BACKGROUND AND PLEADINGS

1. On 24th February 2010, Vintage At Ltd of Goodwood House, Goodwood, Chichester, West Sussex, PO18 0PX (hereafter, "Goodwood") applied to register the above mark in a number of classes. The relevant goods for the purposes of this opposition are as follows:

Class 20

Furniture, mirrors, picture frames; articles made of wood, cork, reed, cane, wicker, horn, bone, ivory, whale bone, shell, amber, mother of pearl, meerschaum or plastic which are not included in other classes; garden furniture; pillows and cushions.

Class 24

Textiles and textile goods; bed and table covers; travellers' rugs, textiles for making articles of clothing; duvets; covers for pillows, cushions or duvets.

2. The application was allocated number 2540073 and was published in the Trade Marks Journal on 16th April 2010 and on 15th July 2010 Arthouse Ltd of St James Church, Bacup Road, Waterfoot, Rossendale BB4 7JU (hereafter, "Arthouse") lodged an opposition against the goods specified above.
3. Arthouse has opposed on the sole basis of section 5(2)(b), citing the following earlier mark:

Mark. Filing and registration dates	Goods and services relied upon under section 5(2)(b)
<p>2387171</p> <p>ARTHOUSE VINTAGE</p> <p>16th March 2005 30th September 2005</p>	<p>Class 20: Furniture; cushions and pillows; jewellery boxes; cutlery boxes; coat hangers and coat-stands; figurines; wall plaques; picture frames; mirrors; baskets; boxes; clothes hooks; curtain holders; curtain hooks, curtain rails, curtain rings, curtain rods, curtain rollers, curtain tiebacks; cushions, mouldings for picture frames; seashells and other shells; picture frame brackets; decorative wall plaques.</p> <p>Class 24: Textile piece goods</p>

4. Arthouse say the dominant element of Goodwood's mark is the word 'VINTAGE' which is contained in its mark in its entirety. This renders the marks visually and phonetically very similar. In addition, the marks are conceptually identical or extremely similar, with both alluding to goods designed in a particular historic style. The respective goods in both opposed classes are identical or extremely similar. Taking all factors into account under a global assessment there is a likelihood of confusion.
5. Goodwood filed a counterstatement denying the likelihood of confusion. It says the word 'VINTAGE' is a descriptive term, and thus of negligible distinctive character and incapable of being the 'dominant' element. The 'dominant element' of its mark are those, collective, graphic elements comprising the stylised lettering and colouring of the letters. Visually, the marks are not similar as its mark features highly distinctive art deco style lettering, chosen to evoke an era recognised for its bold and individual style.
6. Goodwood continues by saying the word 'ARTHOUSE' will be the dominant element in Arthouse's mark as it appears at the beginning and is syntactically unusual, thus making it distinctive, unlike the word 'VINTAGE' which is descriptive. Based upon 'imperfect recollection', the public will recall the distinctive lettering in its mark, enhancing perception of the word 'VINTAGE', in contrast to Arthouse's mark which will be recalled as simply, 'ARTHOUSE'.

7. Goodwood submits that, aurally, the marks are not similar as the word 'ARTHOUSE' is present and, being the first word, will be dominant. The word 'VINTAGE' is simply a qualifying adjective of 'ARTHOUSE', and thus there is no conceptual similarity either as between the respective marks. Alternatively, if there is conceptual similarity, it is confined to the fact the word 'VINTAGE' describes a quality of the goods offered.
8. Goodwood says further, as far as the goods are concerned, its goods are offered in connection with its 'VINTAGE AT GOODWOOD' festival, an annual celebration of five decades of fashion and music, focused on the 1940's – 1980's. It accepts that, "furniture", "mirrors", "picture frames", "pillows and cushions" are identical in class 20. However, it denies similarity of its other goods, in both classes, based purely on the fact they may be made out of the materials specified by Arthouse. Equally, it says, such goods may *not* be made out of those materials.
9. Further points of difference in relation to the goods are highlighted, in that the opponent's goods are 'home decoration' products, specifically, wallcoverings, available through, FOCUS, B & Q, and HOMEBASE. They have been featured in, HOMES AND GARDENS, IDEAL HOME, OK and YOU magazines and so forth, all of which may be regarded as 'home improvements' retail channels or media.
10. Its own goods, in contrast, are 'fashion' items, promoted at a well-known festival, subject to extensive media coverage. In terms of their respective channels of trade, the goods are not similar.
11. Overall, Goodwood denies the likelihood of confusion, noting also that Arthouse's website describes it as a, "supplier of home decoration products", specifying these as, "tiles, wallcoverings, art and covings". The public would not draw any association between such a supplier and the promoter of a fashion festival 200 miles away.
12. Evidence was filed by both parties which insofar as it is factually relevant I shall summarise below. Also submissions have been received which I shall take into account below. No hearing was requested by either party and so I give my decision based upon a careful reading of the papers.

Opponent's evidence

13. This takes the form of a witness statement dated 14th December 2010 by Gillian Carruthers, the Finance Operations Manager of Arthouse.
14. She details the turnover of goods branded 'ARTHOUSE VINTAGE' as follows:

Month/Year	Turnover
March 2005 - Dec 2005	£337,337
Jan 2006 – Dec 2006	£986,076
Jan 2007 – Dec 2007	£4,537,496
Jan 2008 – Dec 2008	£5,173,443
Jan 2009 – Dec 2009	£5,168,727
Jan 2010 – present	£ 3,150,200
	Total - £19,353,279

15. Exhibit GC1 comprises an article published in 'AT HOME' magazine dated August 2007 which features the trade mark 'ARTHOUSE VINTAGE' used in relation to wallpaper. Exhibit GC2 is an article featured in 'HOME DÉCOR' in August/Sept 2009 also showing the 'ARTHOUSE VINTAGE' trade mark.

16. Ms Carruthers give the advertising spend for Arthouse Ltd as follows:

Year	Spend
2000	£1,859
2001	£8,185
2002	£12,581
2003	£14,100
2004	£9,440
2005	£3,979
2006	£5,700
2007	£11,239
2008	£45,224
2009	£44,851
2010	£26,316
Total	£183,465

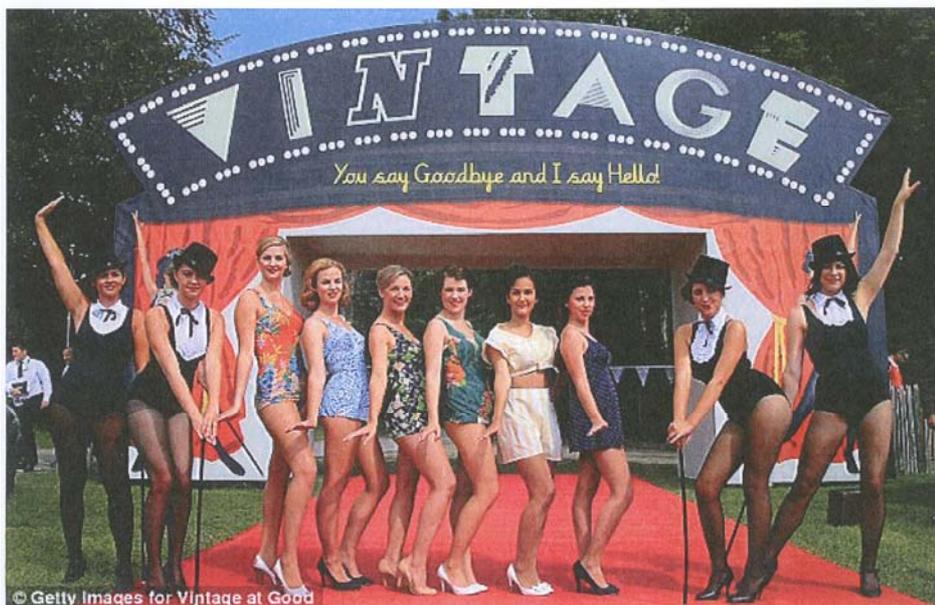
17. She says it is not possible to extract the advertising spend solely for 'ARTHOUSE VINTAGE' goods. However, during the period 2009 – 2010 this comprised approximately 32% of the total advertising spend.

18. Ms Carruthers concludes by saying the companies' products can be purchased from www.arthouse.com/vintage. Exhibit GC3 comprises a print out from this website showing rolls of wallpaper described as, "Classic designs for fashionable walls". Part of this print out is shown below.



Applicant's evidence

19. This takes the form of a witness statement dated 17th March 2011 from Alex Williamson, Chief Financial Officer at Goodwood. He explains that the first 'VINTAGE AT GOODWOOD' festival was held over 3 days from 13-15 August 2010. Exhibit AW1 includes press articles covering the event. The BBC, for example, explains the event was launched by designer Wayne Hemingway, his wife Geraldine and landowner Lord March. The festival unites music, fashion and culture and featured acts such as: The Buzzcocks, Heaven 17, The Faces and Sophie Ellis Bextor. The singer Lily Allen launched her own fashion label at the event which Wayne Hemingway likened to the Festival of Britain in 1951. Photos appearing in the MAIL ONLINE show models in retro swimwear from the '50s and vintage cars. An '80s roller disco and Mecca Ballroom also featured. An example of Goodwood's use of its mark, included in Exhibit AW1 is shown below:



20. In 2010, 27,476 tickets were sold, generating revenue of £1,042,704. Investment and promotion spend is detailed as follows:

Launch costs	£126,338
Marketing and promotion	£329,532
Build	£1,200,000
Content	£2,100,000
Total	£3,755,870

21. Initial launch took place at the Goodwood Revival Meeting in September 2009. Most of the promotional and advertising spend was online and on digital and non-digital boards in railway stations across East and West Sussex, Surrey and parts of Kent as well as the London Underground. Advertisements were placed also on buses. Flyers were sent out and the event was also promoted on radio stations across the South Coast. E-Newsletters were also sent out.

22. 'VINTAGE' goods in classes 20 and 24 are sold via the applicant's website at www.vintageatgoodwood.co.uk, as well as at the festival itself and the Goodwood Revival Meeting. Items such as, T-shirts, annuals, totebags and accessories are shown on the website. To date, net turnover attributable to class 20 and 24 goods is put at £14,563.

23. There is also a witness statement dated 16th March 2011 from Sophie Ashcroft, a solicitor at Blake Laphorn, acting for the applicant. She exhibits copies of searches of the Trade Marks Register for marks including the verbal

element 'VINTAGE' in class 20, as well as searches on the internet to evaluate common law rights in the sign 'VINTAGE' in the relevant classes. These are intended to show the non-distinctive nature of the word 'VINTAGE', and the fact that other traders use the word in respect of signs such as: VINTAGE HOME (furniture, gifts), RUBY TUESDAY'S VINTAGE HOME (retro 'vintage' goods of all descriptions), LULU BOOP VINTAGE (textiles), BETTY BEE VINTAGE (gifts, clothing) and VINTAGE AMETHYST (gifts).

DECISION

Section 5(2)(b)

24. The opposition is founded upon Section 5(2) (b) of The Trade Marks Act 1994 ("the Act"). This reads:

"(2) A trade mark shall not be registered if because –

(a).....

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

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

25. Arthouse's mark was filed on 16th March 2005 and registered on 30th September 2005. It is therefore an earlier mark in accordance with Section 6 of the Act. Moreover, given its date of registration is within 5 years of the publication of the application, it is not subject to proof of use requirements.

26. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the Court of Justice of the European Union ("CJEU") in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either *per se* or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.

The average consumer and nature of the purchase

27. The average end consumer for both parties' products, in a notional sense, will be the furniture and 'homeware' buying general public. The average consumers for the respective marks will thus be identical.
28. Being personal items, such items are generally purchased with some circumspection. High value furniture items especially are purchased with more than an average degree of circumspection. These observations will be factored into my considerations below, as and when appropriate.

Comparison of marks

29. The case law makes it clear I must undertake a full comparison, taking account of visual, phonetic and conceptual similarities and dissimilarities, from the perspective of the average consumer. Marks need to be considered in their totalities and taking account of overall impression (see authorities (c), (e) and (f) above in para 26), giving recognition to distinctive and dominant elements.

Visual comparison

30. Arthouse's mark comprises two words, 'ARTHOUSE' and 'VINTAGE' in normal type. There is no other matter in its mark and nor are the words separated, beyond a normal typographical space. Goodwood's mark comprises one recognisable word, 'VINTAGE', in stylised type face, each individual letter adopting a different style presentation. Overall however, the effect could be said, although this can by no means necessarily be assumed on the part of the average consumer, to be redolent of the art deco style, possessed of bold and clean lines. The mark is not in colour. Taking the similarities and dissimilarities into account, I find that visually the respective marks are similar to a moderate degree.

Phonetic comparison

31. Arthouse's mark will be pronounced 'ART – HOWSE VIN-TAGE'. Goodwood's mark will be pronounced 'VIN-TAGE'. Taking the similarities and dissimilarities into account I find the respective marks are similar to a moderate degree.

Conceptual comparison

32. The conceptual comparison is based upon semantic similarity. Plainly both marks share the same word 'vintage', meaning 'old' or pertaining to a particular (possibly, classic) age or time. Although the word may have other meanings, in the context of its respective usage in relation to the goods of the

specifications, in my view the 'age related' meaning will be conveyed. As I have said, there is nothing, visually, in Arthouse's mark to suggest the words 'Arthouse' and 'Vintage' are separated, unlike the presentation shown in the photo at para 18 above.

33. The word 'arthouse' also has a meaning, being that of a cinema or theatre which shows films or shows of an artistic or experimental nature, in contrast to being purely commercial. There is no obvious connection between that meaning and the goods of Arhouses's specification. In purely linguistic terms, whether or not the average consumer knows the actual meaning of 'arthouse', I believe the average consumer will view see that word as a noun, being adjectivally qualified by the more familiar word, 'vintage'.
34. In contrast, Goodwood's mark is just the word 'vintage'. Although it is stylised and Goodwood say in a style redolent of art deco, not all average consumers would perceive such a reference, and I cannot with any certainty say the stylisation imparts any particular period or style to the average consumer.
35. On that basis the respective marks are conceptually similar only to the extent they share the same word, 'vintage'. Accordingly I find the respective marks are conceptually similar, but only to a low degree.

Overall similarity of marks

36. At this point I need to bring my individual findings above together in an overall finding of similarity of marks, bearing in mind their distinctive and dominant elements.
37. It is at least questionable that, on its own, and given its descriptive meaning, the word 'vintage' would convey any distinctive character at all in relation to these goods. Of course, neither mark comprises the word 'vintage' on its own. Goodwood's version is heavily stylised and Arthouse's mark contains the word only in conjunction with another, more distinctive and linguistically dominant word. On that basis, taking my earlier findings into account, I find that the respective marks are similar, but only to a low degree.

Comparison of the goods

38. In assessing the similarity of the goods, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at para 23 of the Judgment:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services

themselves should be taken into account. Those factors include, *inter alia*, their nature and their method of use and whether they are in competition with each other or are complementary.’

39. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.
40. It is important to recognise that even though the factual evidence on similarity may be non-existent, I nevertheless have the statements of case, submissions and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the Appointed Person, said in *Raleigh International trade mark* [2001] R.P.C. 11, at para 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items, evidence may not be necessary.
41. It is worthwhile mentioning a further case of the European Court of First Instance (“CFI”) in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (“Meric”)* Case T-133/05, where, at para 29, it is stated:

‘In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).’

42. The relevant goods to be compared are:

Goodwood’s goods	Arthouse’s goods
Class 20 Furniture, mirrors, picture frames; articles made of wood, cork, reed, cane, wicker, horn, bone, ivory, whale	Class 20: Furniture; cushions and pillows; jewellery boxes; cutlery boxes; coat hangers and coat-stands; figurines;

<p>bone, shell, amber, mother of pearl, meerschaum or plastic which are not included in other classes; garden furniture; pillows and cushions.</p> <p>Class 24</p> <p>Textiles and textile goods; bed and table covers; travellers' rugs, textiles for making articles of clothing; duvets; covers for pillows, cushions or duvets.</p>	<p>wall plaques; picture frames; mirrors; baskets; boxes; clothes hooks; curtain holders; curtain hooks, curtain rails, curtain rings, curtain rods, curtain rollers, curtain tiebacks; cushions, mouldings for picture frames; seashells and other shells; picture frame brackets; decorative wall plaques.</p> <p>Class 24:</p> <p>Textile piece goods</p>
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Class 20

43. Plainly, Goodwood's "furniture", "mirrors", "picture frames", "pillows and cushions" are identical to the goods of the same description in Arthouse's specification. Its, "garden furniture" would be classed as contained within the more general category of "furniture", and on the basis of the principle in *Meric*, would be considered identical also.

44. Goodwood's, "articles made of wood, cork, reed, cane, wicker, horn, bone, ivory, whale bone, shell, amber, mother of pearl, meerschaum or plastic which are not included in other classes", are a general but unspecific category of goods. Arthouse's: "jewellery boxes", "cutlery boxes", "figurines", "mirrors", "baskets", "boxes", "seashells and other shells" may all be made out of one or more of the materials listed by Goodwood. It is irrelevant that individual and specific products may *not* be made of the materials covered by Arthouse. Again, applying the principle in the *Meric* case, these goods also are identical to the goods in Arthouse's specification.

Class 24

45. Goodwood has: "textiles and textile goods; bed and table covers; travellers' rugs, textiles for making articles of clothing; duvets; covers for pillows, cushions or duvets". Arthouse has "textile piece goods". Piece goods are goods sold in standard lengths. This description could cover all Goodwood's goods, most of which may be sold in finished form and in standard lengths. Exceptionally, "textiles for making articles of clothing" are in unfinished form; that said, whether finished or unfinished, such goods are still textiles and may be sold in standard lengths for the consumer, for example, to make up their

own clothes. On that basis, Goodwood's goods in class 24 are also identical to Arthouse's.

Likelihood of confusion

46. Before proceeding to bring all my findings together in an overall global assessment, I need to make an assessment of the distinctive character of the earlier mark. An invented word having no derivation from known words is, in its inherent characteristics, very high on the scale of distinctiveness, KODAK being the prime example.
47. The earlier mark comprises the words, 'ARTHOUSE VINTAGE'. Neither word is invented but the combination is unusual in relation to these goods. On that basis I find it to have a moderate level of inherent distinctiveness. Although there is evidence of use prior to the date of filing the application, it is not explained exactly what, for example, market share Arthouse holds or how geographically widespread its sales are, and I cannot then find that the level of inherent distinctiveness has been enhanced through use.
48. At this point I need to remind myself of my various findings and bring them together in a global assessment taking, of course, into account, the doctrine of imperfect recollection, namely that consumers rarely have the opportunity to compare marks side by side.
49. I have found that the respective goods are identical. I have made observations on the respective average consumers, namely that they are also identical and I have found the purchasing process to involve circumspection, especially where high value items are concerned. Finally, I have found the respective marks to share a low degree of overall similarity. Needless to say that in making a global assessment, it is not a 'tick box' exercise, whereby if I find more factors in one party's favour, it inevitably wins. All factors must be weighed in the evaluation of likelihood of confusion.
50. Nonetheless, in all the circumstances **I find there is no likelihood of confusion in this case and the opposition fails in its entirety.** Whilst I stress, of course, that global assessment is a multifactorial exercise, it is especially telling in this case that the word 'VINTAGE' would, questionably, not be possessed of any distinctive character at all in respect of either parties' goods and thus, the differences in the parties' marks tend to be accentuated. Accordingly, it is my comparison of marks that has been of particular importance in my overall analysis, not of course forgetting or downplaying my obligation to undertake a global assessment and apply the relevant case law principles.
51. I should just say that Goodwood's arguments about the actual nature of the respective parties' goods are concerned, ie that Arthouse produces 'home

decoration products' whereas it is, primarily at least, a festival promoter, do not figure in my analysis which is based on a notional assessment of marks and goods specified. Similarly, I have not taken into account the fact that the opponent has furnished me with a copy of an opposition lodged at OHIM (after the date of filing this opposition on 15th March 2011) where the roles are reversed, and the applicant has opposed the opponent's 'ARTHOUSE VINTAGE' mark, based on its own (ie this)' VINTAGE' application.

Costs

52. Goodwood has been totally successful in defending against the opposition. Accordingly, it is entitled to a contribution towards its costs and neither party sought costs off the normal scale. In the circumstances I award Vintage At Ltd the sum of £800 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

1. Filing counterstatement and considering statement of case- £ 200
2. Filing and considering evidence - £300
3. Filing submissions - £300

Total £800

53. I order Arthouse Ltd to pay Vintage At Ltd the sum of £800. The sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 18th day of August 2011

**Edward Smith
For the Registrar,
the Comptroller-General**