

TRADE MARKS ACT 1994

IN THE MATTER OF:

OPPOSITION No. 94002

IN THE NAME OF SIMON BUXTON TRADING AS THE SACRED TRUST

TO TRADE MARK APPLICATION No. 2395188

IN THE NAME OF ROSS HEAVEN

DECISION

Application No. 2395188

1. On 25 June 2005 Mr. Ross Heaven applied to register the denomination **DARKNESS VISIBLE** in the form of a series of 3 trade marks for use in relation to the following services: '*Arranging and conducting workshops*' in Class 41 and '*Spiritual and lifestyle counselling*' in Class 45. The marks in the series were:

Darkness Visible
darkness visible
DARKNESS VISIBLE

Opposition No. 94002

2. The application for registration was opposed by Mr. Simon Buxton trading as The Sacred Trust. In his Amended Notice and Statement of Grounds filed on 17 January 2006, he claimed an ‘*earlier right*’¹ by virtue of the law of passing off to prevent the Applicant from using the trade mark in issue for services of the kind specified in the opposed application for registration. In support of his objection he stated as follows:

Simon Buxton trading as ‘The Sacred Trust’ owns an unregistered trademark which is exactly the same as the applicants potential trademark and is applied by Simon Buxton to similar services as those described by the applicant.

Thus The Sacred Trust programme of events, which is published twice yearly, promotes a workshop called ‘Darkness Visible’ and offers private work where darkness is involved.

These workshops and services are carried out, administered and organised through The Sacred Trust under the unregistered trademark ‘Darkness Visible’.

In response to the question on the Form TM7 ‘*When was the earlier right first used on goods or services you have listed?*’ he stated: ‘*First used January 2003*’. There is solid support for these averments in the evidence and materials on file. It is necessary for me now to identify the main supporting evidence and materials.

3. In paragraph 1 of his first witness statement dated 16 May 2006 Mr. Buxton confirmed that he is the sole proprietor of The Sacred Trust; that The Sacred Trust organises, promotes, administers, designs and teaches seminars on alternative healing

¹ Under Section 5(4)(a) of the Trade Marks Act 1994.

methods and shamanism; and that he first commenced trading under the name The Sacred Trust in January 1995. His evidence to that effect was not controverted.

4. The business of The Sacred Trust has been based at Wyld Hive House, St. Mary's Place, Penzance since 17 January 2003². There are examples of and extracts from the published programmes of The Sacred Trust among the papers on file. From these it can be seen as follows:

2003

The programme for 2003³ announced new contact details for The Sacred Trust resulting from the relocation of the business to Wyld Hive House and it contained a one-page promotional presentation for a **DARKNESS VISIBLE** residential workshop to be conducted by Mr. Buxton and Mr. Heaven in Lamorna, Cornwall from 6 to 10 April 2003. The booking form required completed forms to be sent (and payment of the fees for the residential workshop to be made) to The Sacred Trust.

2004

The programme for 2004⁴ contained a one-page promotional presentation for a **DARKNESS VISIBLE** residential workshop to be conducted by Mr. Buxton and Mr. Heaven in Wimborne, Dorset from 6 to 10 April 2004. The booking form

² Response 1 to the requests raised in my Notice under Rules 57 and 65(4) of the Trade Mark Rules 2000 issued on 13 December 2007.

³ Exhibit 2 to the Witness Statement of Simon Buxton dated 16 May 2006.

⁴ Exhibit 3 to the Witness Statement of Simon Buxton dated 16 May 2006.

required completed forms to be sent (and payment of the fees for the residential workshop to be made) to The Sacred Trust. On page 1 of the programme under the heading **THE SACRED TRUST FACULTY 2004** there were photographs of four individuals (including Mr. Buxton and Mr. Heaven) with short accompanying biographical details. There was a one-page promotional presentation on page 5 of the programme for a residential workshop entitled **THE SPIRIT OF THE DRUM** to be conducted by Mr. Buxton and Mr. Heaven in Tavistock, Devon from 21 to 24 November 2004. The booking and payment requirements were as for the **DARKNESS VISIBLE** workshop. Both workshops were featured in a one-page advertisement which appeared under the heading **THE SACRED TRUST. WORKSHOPS AND TRAININGS 2004** in the Winter 2003 issue of Sacred Hoop magazine⁵ and the Summer 2004 issue of Sacred Hoop magazine.⁶

2005

The programme for 2005⁷ contained a half-page promotional presentation for a **DARKNESS VISIBLE** residential workshop to be conducted by Mr. Buxton and Mr. Heaven at a venue in Tavistock, Devon from 26 to 30 May 2005. The workshop was featured in a one-page advertisement which appeared under the banner of **THE SACRED TRUST** in the Spring 2005 issue of Sacred Hoop magazine.⁸

⁵ Exhibit TC6 to the Witness Statement of Phillip Johnston dated 15 May 2006.

⁶ Exhibit TC8 to the Witness Statement of Phillip Johnston dated 15 May 2006.

⁷ Exhibit TC3 to the Witness Statement of Phillip Johnston dated 15 May 2006.

⁸ Exhibit TC9 to the Witness Statement of Phillip Johnston dated 15 May 2006.

2005 Update

An example of the Autumn 2005-Spring 2006 programme was attached to the Notice and Statement of Grounds of Opposition initially filed by Mr. Buxton⁹ prior to filing¹⁰ the Amended Notice and Statement of Grounds on which the opposition thereafter proceeded. The members of **THE SACRED TRUST FACULTY 2005-2006** whose photographs and short biographical details appeared on page 1 of that programme did not include Mr. Heaven. There was a half-page promotional presentation on page 4 for a **DARKNESS VISIBLE** residential workshop to be conducted by Mr. Buxton and his colleague Naomi Lewis in Tavistock, Devon from 18 to 20 November 2005. The programme appears to have been revised and reissued in early July 2005¹¹ to reflect her involvement in this workshop and perhaps also to reflect other changes consequent upon a parting of the ways between Mr. Buxton and Mr. Heaven.¹² The booking form for the November workshop required completed forms to be sent (and payment of the fees for the residential workshop to be made) to The Sacred Trust. The workshop was featured in a one-page advertisement which appeared under the banner of **THE SACRED TRUST** in the Autumn 2005 issue of Sacred Hoop magazine.¹³

⁹ On 21 December 2005.

¹⁰ On 17 January 2006.

¹¹ Exhibit TC4 to the Witness Statement of Phillip Johnston dated 15 May 2006.

¹² The opposed application for registration was filed on 25 June 2005. A parallel application for registration was filed in the United States on 24 June 2005 with a claim to first use in commerce in April 2001: Exhibit 2 to the Witness Statement of Ross Heaven filed (in the form of a letter) on 5 December 2006.

¹³ Exhibit TC10 to the Witness Statement of Phillip Johnston dated 15 May 2006.

The 2005 Book

The only reference to Mr. Heaven in the revised and reissued programme for 2005 was on page 12 under the heading **NEW BOOK BY ROSS HEAVEN AND SIMON BUXTON**. This was a half-page promotional announcement for their book entitled **DARKNESS VISIBLE. AWAKENING SPIRITUAL LIGHT THROUGH DARKNESS MEDITATION**. It was stated in the announcement that the book would be published in December 2005.

2006

The programme for 2006¹⁴ contained a half-page promotional presentation for **DARKNESS VISIBLE** residential workshops to be conducted by Mr. Buxton and Ms. Lewis in Tavistock, Devon from 6 to 10 May 2006 and from 17 to 21 November 2006. The workshops were featured in a one-page advertisement which appeared under the banner of **THE SACRED TRUST** in the Spring 2006 issue of Sacred Hoop magazine.¹⁵

5. At the hearing before me Mr. Heaven confirmed¹⁶ that his involvement in the **DARKNESS VISIBLE** residential workshops was not upon the basis of any purse sharing arrangement with Mr. Buxton: he was not called upon to contribute to the costs of preparing or mounting the workshops; he was paid a single sum per workshop which

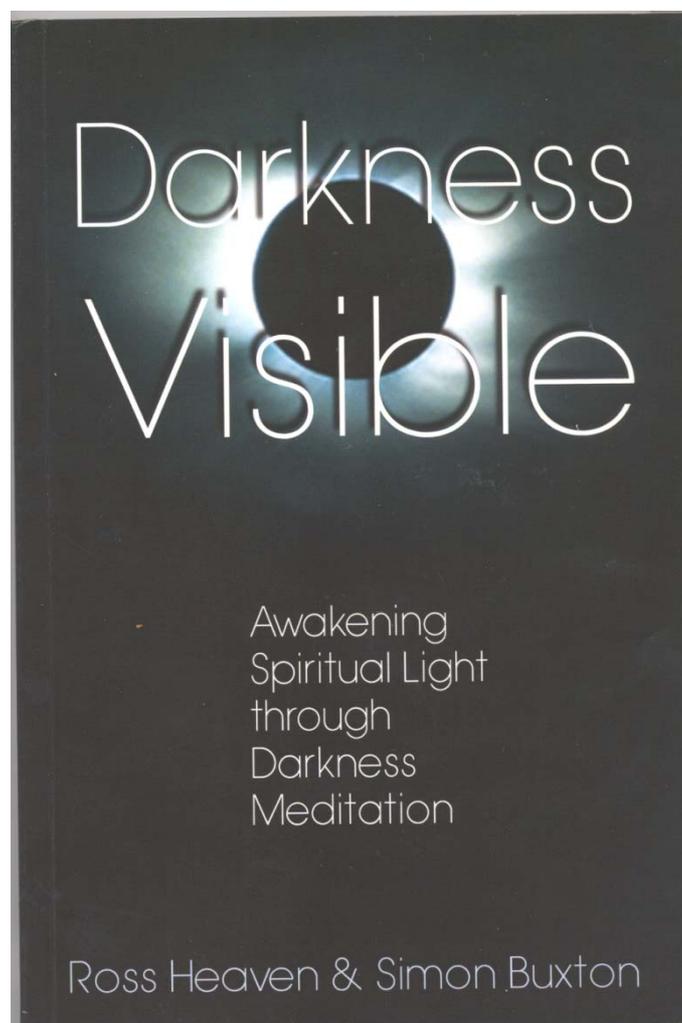
¹⁴ Exhibit TC5 to the Witness Statement of Phillip Johnston dated 15 May 2006.

¹⁵ Exhibit TC11 to the Witness Statement of Phillip Johnson dated 15 May 2006.

¹⁶ Transcript p.36 line 7 to p.37 line 3.

varied according to the number of fee-paying participants. All of the course fees were paid to The Sacred Trust and he was paid for his services after the course had ended.¹⁷

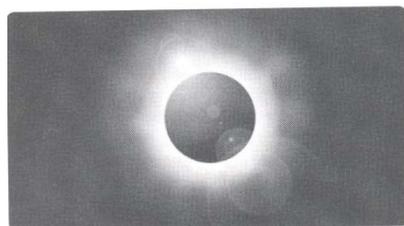
6. I shall refer to the book entitled **DARKNESS VISIBLE. AWAKENING SPIRITUAL LIGHT THROUGH DARKNESS MEDITATION** as '*the 2005 Book*'. Examples of it have been put in evidence.¹⁸ It was published in paperback by Destiny Books of Rochester, Vermont in December 2005. It carried the copyright line: *Copyright © 2005 by Ross Heaven and Simon Buxton*. This is the front cover:



¹⁷ Transcript p.30 line 16 to p.31 line 5.

¹⁸ Exhibit 1 to the Witness Statement of Simon Buxton dated 16 May 2006 and Exhibit 9 to the Witness Statement of Ross Heaven dated 15 June 2006.

The image of an eclipse of the sun on the cover of the 2005 Book chimed with the image of an eclipse of the sun which had since the beginning of 2003 been used in juxtaposition with the denomination **DARKNESS VISIBLE** as part of the promotional presentation of The Sacred Trust residential workshops:



7. The organisation of the **DARKNESS VISIBLE** workshops and the writing of the 2005 Book were linked activities. Individuals who participated in the **DARKNESS VISIBLE** workshops were asked to complete a post-course questionnaire recounting their experiences. The introduction to the questionnaire issued to those who attended the first workshop at Lamorna in April 2003¹⁹ stated as follows:

Dear Friend,

As some of you may already know, we have been asked by our publishers to undertake a book on the application of physical darkness as a spiritual tool.

We are therefore writing to all those people who have undertaken the *Darkness Visible* workshop, seeking your feedback about your experience of the course and of darkness itself. As you may know, although darkness work is found cross-culturally within shamanic cultures, you are one of a small group of people who have pioneered its revival in the modern western world.

¹⁹ See the documentation referred to in Responses 4 and 5 to the requests raised in my Notice under Rules 57 and 65(4) of the Trade Marks Rules 2000 issued on 13 December 2007.

Should you wish to participate in completing the following questionnaire please use the questions as your guide and answer them in your own words, giving as much information as you can so we are able to understand your meaning in each case. We would be most grateful if they could be returned to us within the next three weeks and full acknowledgment of your contributions to the work will feature within the pages of the book, which is due for publication in latter part of next year.

We are very grateful for the feedback you give us and send you our warm greetings.

Ross Heaven and Simon Buxton

The book that Mr. Buxton and Mr. Heaven were, from the outset, aiming to produce became the 2005 Book. It is replete with quotations from the responses of those who participated in the first and subsequent workshops. It seeks both to validate and to gain validity from the exercises carried out at the **DARKNESS VISIBLE** workshops which the authors had conducted under the auspices of The Sacred Trust. The text promotes the message²⁰ that *'For a number of years, we have run Darkness Visible workshops in which participants live in total blackout for a period of five days or more'*. The authors' profiles at the end of the 2005 Book reinforced that message.

8. With regard to direct promotion of the **DARKNESS VISIBLE** workshops, Mr. Buxton gave evidence²¹ as follows:

The Darkness Visible seminar description was written by myself and the seminars themselves were promoted, advertised and administered by The Sacred Trust. Regular full-page advertisements in the name of The Sacred Trust appeared every three months within the magazines 'Sacred Hoop' and 'Kindred

²⁰ As stated in so many words on page 23.

²¹ In paragraph 6 of his Witness Statement dated 16 May 2006.

Spirit' which advertised these and other seminars offered by The Sacred Trust, together with a bi-annual programme that was dispatched to those on our mailing list (circa 8,000 people) as well as those who received an electronic copy (circa 2,000 e-mail addresses). Our websites (www.sacredtrust.org and www.sacredtrust.co.uk) also promoted these seminars ... The enclosed witness statement from Philip Johnson of the graphic design company Twocan, details the design work undertaken on behalf of The Sacred Trust ... All of these Sacred Trust documents and sites used the term Darkness Visible clearly as a means of distinguishing the darkness workshops from other versions of this type of work that might exist.

His evidence as to the extent of The Sacred Trust's advertising and promotion was not controverted.

The Defence and Counterstatement

9. Mr. Heaven filed his Defence and Counterstatement on 10 February 2006. He maintained that he was the proprietor of the trade mark **DARKNESS VISIBLE** having acquired an independent right to it through use in relation to services of the kind specified in the opposed application for registration since the late 1990's and that:

Simon Buxton/The Sacred Trust's involvement with Darkness Visible began only in 2003 and lasted for three workshops when he was invited by me to assist my work and to promote my courses in his brochure.

These averments were hotly contested. The battle over their truth and accuracy dominated the Opposition, with the witnesses on each side accusing the witnesses on the other side of lying in their written evidence. There were serious problems with the evidence as I shall go on to explain below. However, before doing so I shall refer to certain aspects of

the Defence and Counterstatement which confirm me in the view that there was a substantial degree of revisionism in the case that Mr. Heaven was putting forward.

Exhibit 1

10. Mr. Heaven attached 8 items as Exhibits to his Counterstatement in support of his claim to proprietorship of the unregistered trade mark **DARKNESS VISIBLE**. Exhibit 1 was a copy of an article entitled **EMBRACING THE POWERS OF DARKNESS** by **Ross Heaven**. It carried the copyright line ©*Ross Heaven 2006*.

11. He referred to this Exhibit in the following passage in the body of his February 2006 Counterstatement:

The process I refer to in my application was developed by and has been taught by me in public workshops since the late 1990s. It has also been the subject of articles written by me which have appeared in various magazines since 2001/2002 and on my own website, which has been running since 2001 (see the article attached as Exhibit 1).

This was the first of two references to Exhibit 1. In a later paragraph of the same Counterstatement he said:

I have also previously sent you by way of validation for my claim (see my letter and enclosures of January 4 2006):

- Printouts from Amazon.co.uk, showing all of my books and publication dates.
- The article on Darkness Visible I refer to in paragraph three above, which has appeared in numerous magazines and is still up at my website (www.vodoushaman.com/darknessvisible.html), a

web space that has been active since 2001. This is attached again as Exhibit 1

- A printout from my website detailing my Darkness Visible courses (www.vodoushaman.com/darkness.html). This is attached again as Exhibit 3
- Advertisements for my Darkness Visible courses which are current and which have also appeared previously to promote these workshops and my book of the same name

You will have all of this material on file but if you need me to resend it, I can.

12. The paragraphs I have just quoted sought to re-affirm the contents of the material on file that had previously been sent by way of validation for his claim under cover of his letter of 4 January 2006. However, on referring to the letter and enclosures of 4 January 2006 it can be seen that Exhibit 1 to the Counterstatement filed on 10 February 2006 was not a copy of the article that Mr. Heaven had previously sent to the Registry.

The letter and enclosures of 4 January 2006

13. The letter and enclosures of 4 January 2006 had been sent to the Registry by Mr. Heaven in response to an initial Notice and Statement of Grounds of Opposition filed by Mr. Buxton on 21 December 2005. The initial Notice and Statement of Grounds were superseded by the Amended Notice and Statement of Grounds that Mr. Buxton had filed on 17 January 2006. Following receipt of Mr. Heaven's letter and enclosures of 4 January 2006, the Registry replied on 9 January 2006 advising him to wait for the Registrar's direction as to the time for filing a Defence and Counterstatement.

14. In the third paragraph of his letter dated 4 January 2006, Mr. Heaven had stated:

The process I refer to in my application was developed and has been taught by me in public workshop since the mid-1990s. It has also been the subject of articles written by me which have appeared in various magazines since 2002, including Prediction and Psychic Reader.

He then went on to say:

I enclose by way of validation:

- Printouts from Amazon.co.uk, showing all of my books and publication dates.
- The article on Darkness Visible I refer to in paragraph three, which has appeared in numerous magazines.
- A printout from my website detailing this course.
- Advertisements of mine which are current and which have previously appeared to promote this course and the book of the same name.

These statements were the forerunners of those I have quoted in paragraph 11 above.

The fourth enclosure

15. The fourth of the four enclosures sent to the Registry on 4 January 2005 consisted of copies of advertisements from pages 46 and 47 of the Autumn 2005 issue of Sacred Hoop magazine. The advertisement on page 46 showed an image of the front cover of the 2005 Book. The image appeared beneath the heading **DARKNESS VISIBLE. The New Book From Ross Heaven.** The tag line beneath the image was: **Awakening Spiritual Light through Darkness Meditation.** The advertisement adopted a one-sided approach to the promotion of the book. The image of the front cover in the Sacred Hoop advertisement was incomplete. It did not show (and nor did the text of the advertisement

mention) that it was a book by *Ross Heaven and Simon Buxton*. I regard the advertisement and the sending of it to the Registry on 4 January 2006 as instances of Mr. Heaven cutting Mr. Buxton out of the picture with regard to exploitation of the **DARKNESS VISIBLE** trade mark. More instances of this are referred to below.²²

The second enclosure

16. The second of the four enclosures sent to the Registry on 4 January 2005 was a copy of the *'article on Darkness Visible'* which was said by Mr. Heaven to have appeared in numerous magazines including *Prediction* and *Psychic Reader* since 2002. This was in the form of a typescript entitled **EMBRACING THE POWERS OF DARKNESS by Ross Heaven**. It was dated *February 2003*. I shall refer to it as *'the February 2003 Article'*. It was not a copy of the article subsequently attached as Exhibit 1 to the Counterstatement filed on 10 February 2006 and that Counterstatement should not have stated: *'I have also previously sent you by way of validation for my claim (see my letter and enclosures of January 4 2006): ... The Article on Darkness Visible I refer to in paragraph three above, which has appeared in numerous magazines ... This is attached again as Exhibit 1'*. Exhibit 1 was a copy of a different article with a copyright line for 2006. It had not previously been sent to the Registry.

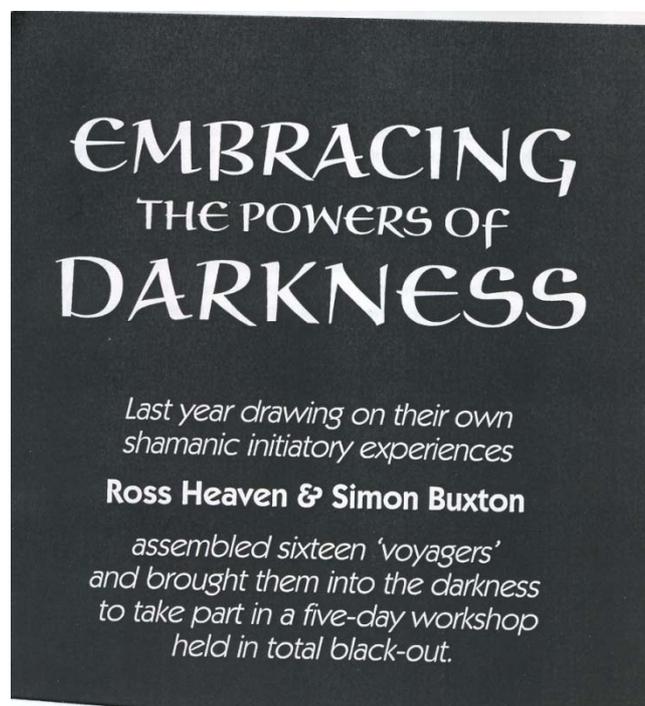
The February 2003 Article

17. The February 2003 Article enclosed with the letter of 4 January 2006 was, as I have said, in typescript form. The typescript was almost entirely replicated in the text of

²² See paragraphs 23 to 27 below.

an article published in the Summer 2003 issue of Sacred Hoop magazine²³. So much so that the typescript version contained a typographical error²⁴ which was also present on page 19 of the article as published in Sacred Hoop magazine.

18. The February 2003 Article was published and presented in that magazine as the work of Mr. Heaven and Mr. Buxton. Thus, on page 16 the title to the published article is prominently displayed in the following manner:



At the end of the published article, on page 19, the following publicity statements appeared:

Simon Buxton is founder of The Sacred Trust, and UK teaching faculty for the Foundation for Shamanic Studies. He is currently completing his first book 'The Way of the

²³ Viewable online at www.sacredhoop.org.

²⁴ '... like making a drink a or going to the toilet ...'.

Bee' which focuses on little-known aspects of European shamanism.

www.sacredtrust.org

Ross Heaven is author of, 'The Journey to You', 'Spirit in The City' and the forthcoming 'Vodou Shaman'. He runs workshops in shamanic and spiritual healing and has a web site at: www.BeautifulMutants.com.

'Darkness Visible' is a five-day residential workshop run by Simon and Ross, the next of which takes place in February 2004.

For details contact: The Sacred Trust at www.sacredtrust.org
mail@sacredtrust.co.uk
or phone (01736) 331 825

19. Three of the '*sixteen voyagers*' who took part in the '*five-day workshop*' referred to in the title are quoted verbatim with regard to their experiences of being '*in total black-out*'. They are named and quoted as Lisa, Christina and Robert. These individuals are also named and quoted in the same terms in the typescript version of the February 2003 Article. In addition, the typescript named and quoted the observations of three more of the '*sixteen voyagers*': Rozanna, Trish and Alison.

20. It is clear²⁵ that the '*five-day workshop*' was the **DARKNESS VISIBLE** residential workshop conducted by Mr. Buxton and Mr. Heaven under the auspices of The Sacred Trust in April 2003 at Lamorna. That workshop was indeed attended by '*sixteen voyagers*' (including Lisa, Christina, Robert, Rozanna, Trish and Alison). Their quoted observations were obviously taken from the post-course questionnaires they had completed.

²⁵ From the information and documentation provided in response to my Notice under Rules 57 and 65(4) of the Trade Marks Rules 2000 issued on 13 December 2007.

21. Therefore, the typescript version of the February 2003 Article sent to the Registry on 4 January 2006 could not have been written (as it purported to have been written) in February 2003. At the hearing before me Mr. Heaven said²⁶ that he was puzzled by the mismatch between the date of the February 2003 Article and the date of the five-day workshop to which it related (April 2003). He suggested that it was an expansion of an article which had originally been written prior to the workshop: more text had been added to the original article after the workshop had taken place and *'for some reason, it has retained an earlier date of February 2003'*.

22. His suggestion that the typescript version of the February 2003 Article sent to the Registry on 4 January 2006 was an expansion of the text of an article written prior to the April 2003 workshop gains support from a comparison of that typescript with the text of an article published under the title **ARE YOU AFRAID OF THE DARK** in the April 2003 issue of Prediction magazine²⁷ which in its own turn appears to have been an abridged version of an article published under the title **EMBRACING THE DARK** in the February 2003 issue of the Psychic Reader Newspaper²⁸. There are passages and paragraphs in the latter two articles which also appear in the typescript version of the February 2003 Article and in that article as published in the Summer 2003 issue of Sacred Hoop magazine.

Omitted references

²⁶ Transcript p.27 line 9 to p.29 line 24.

²⁷ Exhibit 9B to the Witness Statement of Simon Buxton dated 16 October 2006.

²⁸ Viewable online at www.psychicreadernewspaper.com

23. The typescript version of the February 2003 Article sent to the Registry on 4 January 2006 omitted all references to Mr. Buxton and the conduct of **DARKNESS VISIBLE** workshops under the auspices of his organisation, The Sacred Trust. Thus, the February 2003 Article as published in Sacred Hoop magazine contained the references to Mr. Buxton and The Sacred Trust shown in paragraph 18 above, whereas the title of the typescript version sent to the Registry on 4 February 2006 was simply **EMBRACING THE POWERS OF DARKNESS by Ross Heaven** and the publicity statements simply recorded:

ROSS HEAVEN is author of the books, *The Journey To You, Spirit In The City* and the forthcoming *Vodou Shaman*. He runs workshops in shamanic and spiritual healing and has a web site at www.BeautifulMutants.com.

DARKNESS VISIBLE is a four-day residential workshop, the next of which takes place in February 2004.

24. Similar omissions are observable on comparing the typescript version of the February 2003 Article sent to the Registry with the articles published in the February 2003 issue of the Psychic Reader Newspaper and the April 2003 issue of Prediction magazine. The former article was published and presented as the work of Mr. Heaven and Mr. Buxton and included the following publicity statements:

Ross Heaven is author of the books, *The Journey To You* and *Spirit In The City*. He runs workshops in shamanic and spiritual healing and has a web site at www.BeautifulMutants.com.

Simon Buxton is founder of *The Sacred Trust*, and UK faculty for Dr. Michael Harner's Foundation for Shamanic Studies. He runs workshops in shamanism and has a web site at www.sacredtrust.org.

DARKNESS VISIBLE is a four-day residential workshop run by Simon and Ross, the next of which takes place in April 2003. For full details contact: The Sacred Trust, PO Box 603, Bath BA1 2ZU Tel: 01225 852615 mail@sacredtrust.co.uk.

The latter article was likewise published and presented as the work of Mr. Heaven and Mr. Buxton and included the following publicity statement:

DARKNESS VISIBLE is a four-day residential workshop run by Simon and Ross, the next of which takes place in April 2003. For full details contact: The Sacred Trust, Wyld Hive House, St. Mary's Place, Penzance, Cornwall TR18 4EE. T: 01736 331825. mail@sacredtrust.co.uk

These articles as published (and the February 2003 Article as published in Sacred Hoop magazine) specifically pointed to the **DARKNESS VISIBLE** trade mark being commercialised under the auspices of Mr. Buxton's organisation, The Sacred Trust. That clearly appears to have been the true position.

25. However, the true position was further obscured in the text on page 2 of the typescript version of the February 2003 Article sent to the Registry on 4 January 2006 which stated:

Last year ... Ross Heaven assembled 16 voyagers ... to take part in ... a five-day workshop held in total black-out.

whereas the corresponding text in the title to the article as published in Sacred Hoop magazine (see paragraph 18 above) correctly stated:

Last year ... Ross Heaven and Simon Buxton assembled sixteen voyagers ... to take part in a five-day workshop held in total black-out.

Since both texts were referring to the same *'five-day workshop'* involving *'sixteen voyagers'* conducted by Mr. Heaven and Mr. Buxton in April 2003 at Lamorna, there ought to have been no discrepancy between them on that point.

26. The contents of the typescript version of the article and the article as published in Sacred Hoop magazine reveal that they were both completed after the April 2003 **DARKNESS VISIBLE** workshop to which they referred and prior to *'the next'* **DARKNESS VISIBLE** workshop *'in February 2004'* to which they also referred. They were therefore completed during the period when Mr. Heaven and Mr. Buxton were working together under the auspices of The Sacred Trust.²⁹ The fact that the April 2003 workshop was in each text identified as having take place *'Last year'* suggests that both texts were prepared in the course of working towards publication of the 2005 Book at a time when it was still thought possible (as recorded in the introduction to the questionnaire issued to those who attended the April 2003 workshop at Lamorna) that the book would be published *'in the latter part of next year'* (ie. 2004).

27. It appears to me in the light of the matters summarised in paragraphs 17 to 26 above that the typescript version of the February 2003 Article sent to the Registry on 4 January 2006 was an edited text submitted by Mr. Heaven for the purpose of indicating that he was, when in fact he was not, individually responsible for commercialising the

²⁹ See paragraphs 3 to 8, 18 and 24 above.

DARKNESS VISIBLE trade mark in relation to the five-day workshop specifically discussed in that typescript.

28. That, together with the doubts raised in relation to the reliability of the evidence put forward in defence of his application for registration, leads me to regard Mr. Heaven as a witness whose evidence in support of his own position needed to be scrutinised with care.

The first round of evidence: resort to the Path of Pollen

29. The evidence in support of the Opposition took the form of witness statements from Mr. Buxton and four other witnesses.³⁰ Their evidence was variously directed to the proposition that Mr. Buxton co-opted Mr. Heaven into working with him on the **DARKNESS VISIBLE** workshops they conducted in and after 2003 and that the impetus for this came from Mr. Buxton's own prior knowledge and experience of the practice of **DARKNESS VISIBLE** techniques. In particular Mr. Buxton said in his evidence³¹ that in December 1986 he had been formally inducted into a small, private shamanic group of bee-keepers known as The Path of Pollen; that the induction experience included spending a number of days in darkness; and that this aspect of the work had been introduced to him as having the name **DARKNESS VISIBLE** which had itself been inspired by the book Paradise Lost by John Milton (1608-1674), specifically the passage '*Yet from those flames no light, but rather darkness visible*'.

³⁰ Professor Stuart Harrop, Kenneth Smith p.k.a. Ken Eagle Feather, Philip Johnson and Lisa Tolland.

³¹ Paragraph 1 of his first Witness Statement dated 16 May 2006.

30. The papers on file include hardback and paperback copies of his book entitled **THE SHAMANIC WAY OF THE BEE. Ancient Wisdom and Healing Practices of the Bee Masters**.³² In The Sacred Trust programme for 2006 it is recorded that this book was the winner of the 2005 Canizares Book Award for Non-Fiction.³³ The book purports to describe a process of induction during which Mr. Buxton came to perceive that *'I was myself Apis Mellifera, a male drone, surrounded by forty thousand female workers and, somewhere, our queen, our regent. ...I was no longer human, but a member of a completely different genus'*.³⁴ It goes on to describe a period of readjustment. *'The Bee Master eventually placed me in what appeared to be an oversized, six-sided dog basket and threw a blanket over the top of it. I curled up tight, instinct telling me that the chamber offered a safe holding, and for a moment at least, I felt the dark shadows of madness begin to diffuse and dissipate'*.³⁵ This was subsequently said by Mr. Buxton³⁶ to have been when he entered the prolonged period of darkness known within the bee shamanic tradition as **DARKNESS VISIBLE**. However, his book **THE SHAMANIC WAY OF THE BEE** said nothing about that. It contained no references to **DARKNESS VISIBLE** or to John Milton's Paradise Lost.

31. The hardback version of **THE SHAMANIC WAY OF THE BEE** published in 2004 contained a Foreword written by Mr. Heaven.³⁷ Mr. Heaven praised the book in generous terms. He referred to it as a fine and unique book about a European shamanic

³² Published by Destiny Books of Rochester, Vermont in hardback in 2004 and in paperback in 2006.

³³ No information is given as to the source or status of this Book Award.

³⁴ Pages 56 to 59.

³⁵ Page 62.

³⁶ At pages xix to xxiii in the preface he wrote to the 2005 Book.

³⁷ In the paperback version published in 2006 this was replaced with a Foreword written by Professor Harrop, Chairman of the Department of Anthropology at the University of Kent.

tradition. Having provided a short synopsis of what he characterised as Mr. Buxton's true adventure story of initiation into the ancient order of bee shamanism, he went on to say:

As fantastic as all this sounds, I will vouch for every word of it. I have known Simon Buxton for many years and have had the pleasure and privilege of teaching with him on occasion. I have also been his student and know him as a fine teacher, an intelligent and ethical man, and a person of complete integrity. He has genuine miracles to impart.

32. Mr. Buxton responded with warm words of his own in the inscription he subsequently wrote at the front of the copy of the book exhibited³⁸ by Mr. Heaven for the purposes of the present Opposition:

For My Dear Friend Ross Heaven, Who Does A Fine Dance
at The Threshold of The Opposites. Well Met. 21/7 04.
Simon Buxton.

I understand that this echoed references in The Sacred Trust's promotional materials to shamans as individuals trained in the art of equilibrium, moving with poise and surety on the threshold of the opposites.

33. When **THE SHAMANIC WAY OF THE BEE** was subjected to critical examination in an editorial essay published in Issue No. 67 of the journal **SHAMANS DRUM** in 2004, Mr. Heaven wrote a response³⁹ in defence of the book. The response (sent by email on 29 November 2004) strongly defended the authenticity of the book. The following extracts are sufficient to show Mr. Heaven's stance at that time:

³⁸ Exhibit 1 to the first Witness Statement of Ross Heaven 15 June 2006.

³⁹ Exhibit 3B to the second Witness Statement of Simon Buxton dated 16 October 2006.

I also wrote the foreword to Simon's book, which I could do with full trust in Simon's integrity. He also shared large sections of his book with me during its writing and supplied a great deal of background evidence which he has not covered in the book itself because of the private nature of his tradition. I have absolutely no doubts about the veracity of everything he has written in his book.

We have to remember that.....the bee cultus itself continues to remain hidden. Simon's book is the first time it has been written of at all....

I have seen a lot of the evidence you ask for in your article: the Nightshade Isle...is exactly as Simon described it: a small island five miles off the coast of the English mainland, I have seen photographs of Simon with his mentor, Bridge, and other members of the Path of Pollen, I have met some of the Melissae, I have used some of the tools of the Path, and I have taught some of its practices.

...I have seen many photographs of Simon with various members of the bee cultus, I have met others in person and...they are real, flesh-and-blood people with normal careers and interests outside the Path. Perhaps it is the conflict of these normal careers with their spiritual callings, in fact, which continue to keep the tradition private in nature. Some of them are doctors, lawyers, and other professionals, for example. Bridge himself, prior to his own apprenticeship within the Path, served in the British Royal Air Force.

Bridge is the name given in the book to the 'Bee Master' who reportedly placed Mr. Buxton in what appeared to be an oversized, six-sided dog basket and threw a blanket over the top of it as noted in paragraph 30 above.

34. All of this is in stark contrast to Mr. Heaven's witness statement in answer⁴⁰. He there states that **THE SHAMANIC WAY OF THE BEE** was, in fact, ghost-written by him and '*As the author of this book, I avow that it was conceived and written as a work of fiction and that the 'path of pollen' does not exist*'. He further maintained that the

⁴⁰ The Witness Statement of Ross Heaven dated 15 June 2006.

process of induction referred to in the fictional book bears no resemblance to the exercises carried out at the **DARKNESS VISIBLE** workshops. As part of his attack on Mr. Buxton and The Sacred Trust he exhibited downloads from the NAFPS (New Age Fraud and Plastic Shamans) website at www.newagefraud.org from www.enwikipedia.org on the subject of 'plastic shamans' and from www.amazon.com setting out comments posted in respect of **THE SHAMANIC WAY OF THE BEE**. These materials were exhibited with a view to presenting Mr. Buxton and The Sacred Trust as purveyors of false claims in the fields of spirituality and healing.

35. In furtherance of his pleaded case⁴¹ Mr. Heaven gave evidence of having studied and experienced practices involving darkness and silence since 1984 when he graduated from Nene College, University of Leicester (now University College Northampton) with a combined degree which had included modules in psychology, comparative religion/anthropology, sociology and philosophy. He maintained that Mr. Buxton had contributed nothing of any substance or significance to the writing of the 2005 Book. He referred to running workshops involving darkness techniques from 1994 onwards. In particular he said:

I began running workshops in 2001 where students were in darkness for some days. These were called Darkness Visible, after a passage from John Milton's *Paradise Lost*. I provide witness statements from students and assistants who undertook this work with me in 2002.

The supporting witness statements were from Tania Ahsan (dated 10 June 2006), Donna Maree Waugh (dated 1 June 2006) and Patricia Peters professionally known as Leticia

⁴¹ See paragraph 9 above.

Parmer (dated 1 June 2006). In their witness statements these witnesses cross-related the techniques described in the 2005 Book to those which they said they had experienced or heard about at **DARKNESS VISIBLE** workshops conducted by Mr. Heaven in 2001 (in Kent) and 2002 (in Sussex).

36. Tania Ahsan was from July 2002 to April 2006 the editor of Prediction magazine. In addition she had since 2002 acted as Mr. Heaven's website designer. In paragraph 9 of her witness statement she referred to attending part of a workshop conducted by Mr. Heaven in Sussex in 2002. She said that she went with her father, a Sufi teacher, who had been invited to give a guest lecture. Since English was his second language, she went to interpret and translate for him. *'During my attendance I heard from Mr. Heaven's assistant, Leticia Parmer, and from his students about a Darkness Visible course they had undertaken with Mr. Heaven... .'*

37. She also referred to Mr. Buxton's book **THE SHAMANIC WAY OF THE BEE**. Her evidence in that connection was as follows:

At around this same time Mr. Heaven also showed me chapters from another book (later to be called The Shamanic Way of the Bee and published in late 2004), which he was ghost-writing for, or with, Mr. Buxton and which talked about the path of pollen. These chapters did not vary in content or style from the finished book and, having seen them, I am convinced that Mr. Heaven is the author of this book. Mr. Heaven explained this book to me as a work of fiction and the path of pollen as something that had been made up for the purpose.

That is to be contrasted with the mini-review of the book, which she provided prior to publication, to be featured (as it was) in the book as published. This stated:

Simon Buxton's much awaited debut is set to revolutionise the way we see European native traditions. This is a compulsive read, with elegantly chosen words that convey complex spiritual truths in a beautifully simple way. *The Shamanic Way of the Bee* promises to become a shamanic classic.

Also, according to Mr. Buxton⁴², Ms. Ahsan wrote an effusive review of the book in the pages of Prediction magazine and elected it as the Prediction 'Book of the Month' when it was published.

The situation in mid-June 2006

38. At this point I think it is appropriate to summarise the situation in which the parties to the Opposition had placed themselves as at mid-June 2006. Mr. Heaven was maintaining his pleaded case⁴³ and was, in support of it, endeavouring to establish a claim to commercialisation of the **DARKNESS VISIBLE** trade mark on his own account in 2001 and 2002. He no doubt hoped that by establishing that claim he would be able to gain priority over the rival claim that Mr. Buxton was advancing on the basis of commercialisation of the trade mark by his organisation, The Sacred Trust, in and after 2003. Mr. Buxton could not claim to have commercialised the trade mark prior to January 2003 so, in an effort to strengthen his claim, he was attempting to establish provenance for his commercialisation of the trade mark in his antecedents as an adept of the so-called Path of Pollen into which he had self-proclaimedly been initiated as described in **THE SHAMANIC WAY OF THE BEE**. Mr. Heaven had seized upon that attempt as an opportunity to discredit Mr. Buxton by claiming that he, not Mr. Buxton,

⁴² Witness Statement dated 16 October 2006 at paragraph 11.

⁴³ See paragraph 9 above.

had written the book and that it was nothing more than a work of fiction. By doing so he was exposing himself to the criticism that he had brazenly engaged in the perpetration of what was, on his current evidence, an elaborate hoax. That was a price he nevertheless seemed willing to pay in order to wrongfoot Mr. Buxton.

The second round of evidence: counter-attack and character assassination

39. In his second witness statement dated 16 October 2006 Mr. Buxton rejected the allegations that Mr. Heaven had made with regard to authorship and authenticity of **THE SHAMANIC WAY OF THE BEE**. He emphasised that Mr. Heaven's current evidence as to authorship and authenticity was, on both counts, at variance with his past endorsements of the book. He rejected the suggestion that he was not co-author of the 2005 Book and insisted that the copyright line correctly indicated that he and Mr. Heaven were joint and equal holders of the copyright in the text. In addition he attacked Mr. Heaven's claim that he (Mr. Heaven) had conducted **DARKNESS VISIBLE** workshops on his own account in 2001 and 2002. The attack was based on: (1) documentary materials suggesting that the workshops Mr. Heaven had conducted were not **DARKNESS VISIBLE** workshops and did not have **DARKNESS VISIBLE** components to them; (2) witness statements from participants in the **DARKNESS VISIBLE** workshop conducted by Mr. Buxton and Mr. Heaven at Lamorna in April 2003 confirming that Mr. Heaven had made it clear to them that it was the first **DARKNESS VISIBLE** workshop he had conducted; and (3) witness statements from three individuals contradicting the witness statements of Tania Ahsan, Donna Maree Waugh and Patricia

Peters (p.k.a Leticia Parmer) which had been filed in support of Mr. Heaven's claimed commercialisation of the **DARKNESS VISIBLE** trade mark prior to 2003.

40. The witness statements supporting the second branch of the attack were provided by: Marius Hansson (*'Simon Buxton and Ross Heaven told us that it was the very first Darkness Visible workshop ever to have been presented anywhere'*); Dr. Patricia Coates (*'both Mr. Heaven and Mr. Buxton made it clear to us on several occasions that this was the first time this workshop had ever been offered'*). Lisa Tolland (*'it was made clear to all of us attending that this was the very first opportunity to undertake this type of workshop'*); Christina Mahler (*'both Mr. Heaven and Mr. Buxton made it clear to us, on several occasion that this was the first time this workshop had ever been offered and that, in fact, we the participants were conducting pioneer work in this area'*); Allison Brown (*'I was informed before the seminar by The Sacred Trust that this was the first ever Darkness Visible course and this was mentioned again by both seminar leaders Buxton and Heaven during the event itself'*); and Naomi Lewis (*'it was made clear to me on several occasions by both Mr. Buxton and Mr. heaven that the workshop...was the very first Darkness Visible workshop that had been offered – anywhere by anyone'*).

41. The witness statements supporting the third branch of the attack were provided by Avalon Lau, Saffron McCaughna and Susan Stoddart. Tania Ahsan is consistently referred to in all three witness statements (and in Mr. Buxton's witness statement) as Tania 'Ashan'. I regard that as an indication of co-ordination in the drafting of the statements.

42. Ms. Lau said that she had participated in the same training course conducted by Mr. Heaven as Donna Maree Waugh. She said that the course had not started in March 2002 as Ms. Waugh had suggested, but a year later in March 2003. She further stated that there was no mention of **DARKNESS VISIBLE** during the course which Mr. Heaven had conducted in 2003. She referred to the witness statement of Patricia Peters (p.k.a. Leticia Parmer). She confirmed that Leticia Parmer had been Mr. Heaven's assistant on the course and had indicated that it was the first time she had assisted Mr. Heaven in his work. However, the course had taken place in 2003, not in 2002 as Ms. Parmer had suggested. With reference to the witness statement of Tania Ahsan, she recalled Ms. Ahsan attending the course as a guest with her father on the final day of the August meeting in 2003 (not 2002). She added that Ms. Ahsan was not present when her father delivered his talk *'indeed his English was fluent and there was absolutely no need for a translator to be present'*.

43. Ms. McCaughna said that she also had participated in the same training course conducted by Mr. Heaven as Donna Maree Waugh. She stated that the training course had commenced in March 2003, not March 2002 as Ms. Waugh had suggested. She referred to the witness statement of Patricia Peters (p.k.a. Leticia Parmer). She refuted it on the same basis as Ms. Lau had refuted it. With reference to the witness statement of Tania Ahsan she said that Ms. Ahsan's father had given a talk *'in perfect and fluent English, at which Ms. Ashan (sic) was not present'* and that this had been in August 2003, not 2002 as Ms. Ahsan had suggested.

44. Ms. Stoddart was also a participant in the training course conducted by Mr. Heaven which Donna Maree Waugh had attended. She said this was in 2003, not 2002 as Ms. Waugh had suggested. She gave evidence to the same effect as the evidence given by Ms. Lau and Ms. McCaughna in contradiction of what Ms. Waugh, Ms. Parmer and Ms. Ahsan had said in relation to their involvement in the course.

45. Mr. Heaven launched a fierce counter-attack in his second witness statement filed (in the form of a letter) on 5 December 2006. He steadfastly maintained that he was the author of **THE SHAMANIC WAY OF THE BEE**, that it was a work of fiction and that it had been critically recognised as such by others who had written about it. However, his principal aim was to counter the contention that he had not been involved in any commercialisation of the **DARKNESS VISIBLE** trade mark prior to 2003. To that end he challenged the reliability of the witnesses whose evidence I have referred to in paragraphs 40 to 44 above. He said they had ulterior motives for providing their witness statements and that he was currently involved in other legal actions with some of them. He cast aspersions on each of them for the purpose of discrediting them and their evidence. In doing so, he displayed strong animosity towards them.

46. In one instance, he sought to impugn the witness by reference to deeply personal matters which had arisen for consideration in certain family law proceedings. That led to a formal complaint from solicitors acting in the family proceedings. The complaint resulted in the imposition of an order for confidentiality in relation to the particular matters by reference to which Mr. Heaven was seeking to discredit the witness in question. However, that did not stop him from asking the Registry to confirm (which it

did) that the confidential matters would be taken into account as part of his written testimony against that witness.

47. He accused another witness of contacting his students by email and telephoning to tell them that he had 'black magic altars' in his house on which he had placed the pubic hair of women so he could perform black magic spells on them. He said the witness had been put on notice that further contacts of that nature would result in prosecution for harassment. He supported his accusation by reference to a letter dated 11 November 2006 from Tania Ahsan reporting on the circulation of rumours about him. The witness in question subsequently made a statement⁴⁴ exhibiting a warning letter from Mr. Heaven dated 11 November 2006. The warning letter was written in stern terms. It contained what the witness identified as a series of unsubstantiated accusations which '*are entirely baseless*'.

48. In several instances Mr. Heaven sought to discredit individual witnesses by reference to their private and personal relationships, upon the premise that these will have affected their ability to give true and fair evidence in the present proceedings.

49. However, no witness statements were provided by Tania Ahsan, Donna Maree Waugh or Patricia Peters (p.k.a. Leticia Parmer) in response to the witness statements of Avalon Lau, Saffron McCaughna and Susan Stoddart referred to in paragraphs 41 to 44 above.

The third round of evidence: more character assassination

⁴⁴ In the form of a letter 'To Whom It May Concern' dated 5 January 2007.

50. As attachments to his third witness statement dated 5 January 2007, Mr. Buxton produced ‘open’ letters of record from seven of the individuals whose integrity Mr. Heaven had impugned in his second witness statement. Each of these individuals objected to the personal attacks by means of which they had (as they maintained) been falsely maligned by Mr. Heaven.

51. Mr. Heaven returned to the fray with a letter to the Registry dated 17 January 2007 in which he attacked the ‘open’ letters of record as *‘evidence only of Mr. Buxton’s ability to share confidential material with them and thereby to brief his witnesses to say anything he asks them to’*. He then commented further in relation to each of the witnesses in adverse terms.

The fourth round of evidence: forgery and perjury

52. Under cover of a letter to the Registry dated 1 May 2007, Mr. Buxton filed a witness statement of Patricia Peters (p.k.a. Leticia Parmer) dated 28 April 2007. In that witness statement she referred to the witness statement in her name which had previously been tendered in evidence by Mr. Heaven (see paragraph 35 above). She denounced it as a forgery containing a false account of the events to which it related. She said:

I am a workshop facilitator and author, working under the professional name Leticia Parmer.

This is my first statement in this regard. Any statement earlier than 27th April 2007 is not valid and was not written by me. I first made contact by email with Mr. Heaven in February 2003. I first met him on March 1st 2003 and first worked with him on his workshop on 15/16th March 2003 (not 2002). I assisted (co-facilitated with) him on a series of workshops entitled Beautiful Mutants. This series ran from

March 2003 to September 2003. On the first workshop in March students were taken on a walk of attention which involved walking outdoors wearing blindfolds for a short period of time – maximum half an hour. There was no long term blindfolded experience until the August workshop of that year, when students were kept blindfolded (some using Mindfolds) for 2 nights. Subsequent to this blindfolds were ritually removed. I did not at the time understand this to be called Darkness Visible, and only remember it being referred to as ‘being kept in the darkness of the Djevo’ as a vision quest. It had been explained to me at the time by Mr. Heaven that this was a ritual he had learned during his studies of Voodoo Shamanism in Africa.

The only recent contact I have had with Mr. Heaven was when he asked for my support in a custody case over his son (March 20th 2006). For this purpose I provided him with a signed statement, the first lines of which were identical [to] the forged statement about the Darkness Visible dated June 1, 2006. That was not my statement and I had no knowledge of it until yesterday when Mr. Buxton informed me it had been submitted in an application by Mr. Heaven for a trademark. Mr. Heaven at no time asked for a statement from me in this regard, nor received one.

53. Under cover of a letter to the Registry dated 3 May 2007, Mr. Heaven filed a second witness statement of Donna Maree Waugh dated 3 May 2007 in which she responded as follows:

This statement is in response to a statement shown to me by Mr. Heaven, written by Leticia Parmer (aka Patricia Peters) dated 28/4/07.

Ms. Parmer, in her statement of 28/4/07 retracts her previous statement for Mr. Heaven, dated June 1 2006, claiming it to be “forged” and that she had no knowledge of it before being shown it by Mr. Buxton. She says that Mr. Heaven “at no time asked for a statement from me in this regard, nor received one”.

My statement in this matter is simple and refutes Ms. Parmer’s absolutely. It is that I personally witnessed

Ms. Parmer sign her statement of June 1 and pass it to Mr. Heaven.

Mr. Heaven, Ms. Parmer, and I met together on June 1 2006, the date both of our statements were signed, at a pub close to Ms Parmer's house in Arundel called, I believe, The Black Rabbit.

We sat together for approximately 3 hours, ate lunch in each other's company, and discussed, amongst other things, recent developments in Mr. Heaven's trademark application and Mr. Buxton's opposition to it. Ms. Parmer and I then signed our statements together and handed them to Mr. Heaven.

I have remained in contact with Ms. Parmer since this date, met up with her at events that she runs, and she has enquired about Mr. Heaven. It is impossible that she was not aware of her statement in this matter and inconceivable that it was forged or that she did not sign it. It was signed by her on the table right in front of me, less than two feet from where I was sitting, on June 1 2006, and she even borrowed my pen to do so.

54. In relation to the suggestion that the first witness statement of Donna Maree Waugh (dated 1 June 2006) and the disputed witness statement of Patricia Peters p.k.a. Leticia Parmer (also dated 1 June 2006) were signed '*together*' at the Black Rabbit pub in Arundel, with the latter being:

signed by her on the table right in front of me, less than two feet from where I was sitting...and she even borrowed my pen to do so.

I note that the signatures on the witness statements filed at the Registry are written in different coloured inks, the signature on Ms. Waugh's witness statement being written in black ink and the signature on the disputed witness statement of Patricia Peters p.k.a. Leticia Parmer being written in blue ink.

55. On any view of the fourth round of evidence, it confirmed that the search for truth in the evidence on file would be a demanding task.

The Hearing Officer's decision

56. There was no Case Management Conference under Rule 36 of the Trade Marks Rules 2000 at any stage of the proceedings. In addition the Opposition went forward for determination on the basis of the papers on file without recourse to a hearing. The provisions relating to the filing of evidence under Rule 13(C) were not adhered to. The net effect of having the parties conduct the Opposition as they saw fit was to present the Registrar's Hearing Officer with a mess of conflicting evidence which was: (1) untested either by disclosure or cross-examination; and (2) untrammelled by normal considerations either of relevance or of probative value. It was open to the Registrar under Rule 57 to direct that such documents, information or evidence as he might reasonably require should be filed within such period as he might specify. This power could usefully have been exercised so as to obtain clarification of specific aspects of events that were undisputed on the evidence as filed, but not sufficiently particularised to be properly understood. No directions were given.

57. The Opposition was rejected for the reasons given in a written decision issued by Dr. Trott on behalf of the Registrar of Trade Marks under reference BL O-164-07 on 11 June 2007. Mr. Buxton was ordered to pay £1,000 to Mr. Heaven as a contribution towards his costs of the proceedings in the Registry.

58. The Hearing Officer referred to the decision of Mr. Richard Arnold QC sitting as the Appointed Person in BRUTT Trade Marks [2007] RPC 19, p.462. At paragraph 24 of that decision Mr. Arnold said:

In a well-known passage in *The Ocean Frost* [1985] 1 Lloyd's Rep. 1 at 57 Robert Goff L.J. (as he then was) said:

“Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the independent facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses’ motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.”

Thus before addressing the conflicts of evidence the fact-finding tribunal should first consider what is common ground, what is asserted by one party and not contested by the other and vice versa and what is shown by the documentary evidence. Once these matters have been ascertained and put into chronological order, it is frequently much easier to resolve the remaining conflicts. In resolving such conflicts it is of assistance to consider which version of events is the more likely.

The adoption of that approach in the present case would inevitably have led to the rejection of evidence in relation to the conflicting claims to proprietorship of the unregistered trade mark **DARKNESS VISIBLE**.

59. However, the Hearing Officer preferred to narrow the scope of his assessment by not coming to any considered conclusions as to the relative reliability of the witness statements that were before him and basing his findings upon the written testimony to the extent only that it was substantiated by supporting material evidence. His stated approach was as follows⁴⁵:

I do not consider that I have to base my findings on any particular statement or group of statements. In particular, without cross-examination of these witnesses it is difficult – and dangerous – to come to any considered conclusions that might lead to some sort of ‘league table’ as representative of their relative reliability. As a consequence, it seems to me that it is entirely sensible to rely on that within the various witness statements that are substantiated in some manner by supporting material evidence.

On that basis, he proceeded to set out⁴⁶ *‘an inventory of corroborated facts in this matter, as gleaned from the evidence of the parties, that are directly relevant to the issue of passing off’*. The inventory was as follows:

- Simon Buxton is the sole proprietor of The Sacred Trust (See Exhibit 3; page 1; where he is described as ‘Founder/Director’).
- The book *Darkness Visible*, published in the same year of the application, is in the name of both parties to this dispute. Within the book, both also share, equally, involvement in darkness therapy.
- The course ‘Enlightenment through Ceremonial Darkness’ is offered, before the relevant date, ‘with Simon Buxton and Ross Heaven’. It is promoted in very close association with both parties, whose names

⁴⁵ Decision, paragraph 44.

⁴⁶ Decision, paragraph 61.

significantly figure in all advertising associated with the course including CVs and prominent photographs.

- Before the relevant date, there is no material evidence that either Mr. Buxton or Mr. Heaven used the name DARKNESS VISIBLE in relation to the retreats without mention of the other.
- None of Mr. Buxton's witnesses state that darkness therapy courses were promoted and conducted by Mr. Buxton alone under the name in suit before the relevant date.
- Before the relevant date the retreats were promoted through the auspices of The Sacred Trust (see Exhibits 2 and 3 to Mr. Buxton's first statement); it is clear from the application form for the course – see page 20 of Exhibit 2 and page 16 of Exhibit 3 – that all monies accruing are to be paid to this organisation.
- Though 'The Trust' is clearly the originator of a range of 'spiritual' workshops and retreats, it also promotes and facilitates courses on behalf of others; for instance on page 6 of Exhibit 3 the course taught by a 'Sandra Ingerman' called MEDICINE FOR THE EARTH. It is clear that this course has an existence outside that of The Sacred Trust: the accompanying text states '... this five day training ... will combine two of the key MEDICINE FOR THE EARTH trainings taught in the United States'. The monies for this course are also collected by the Trust but – one might reasonably infer – on behalf of Ms. Ingerman.
- Mr. Buxton and The Sacred Trust, before the relevant date, taught darkness therapy without reference to the mark in suit (see the inside cover page of Exhibit 2⁴⁷ to his declaration dated 16th May 2006). The course SHAMANIC HEALING WITH THE SACRED TRUST is offered, an element of which is:
 - **Shamanic Darkness Therapy.** Darkness therapy is a potent shamanic-based tool for deepening ones connection with life and spirit and seeking clarity on life issues in the form of a vision quest to the core of the self. The

⁴⁷

The Sacred Trust programme for 2003.

therapy consists of a pre-determined number of days and nights spent in total darkness, with daily guidance from Simon Buxton. See www.sacredtrust.org for an article on shamanic darkness work.

It is quite clear that ‘darkness work’ has an existence of its own outside that of the name DARKNESS VISIBLE;

- There is no evidence from the parties as to the turnover under the name, or even as to the numbers of individuals who attended the training.

60. He found that the mark **DARKNESS VISIBLE** had been used in commerce prior to 25 June 2005 so as to generate a small, but none the less protectable goodwill within the areas of trading activity covered by the contested application for registration in Classes 41 and 45.⁴⁸ His evaluation of the evidence led him to the view that the mark **DARKNESS VISIBLE** ‘*must have been associated with both Mr. Buxton and Mr. Heaven and, possibly, with The Sacred Trust also*’.⁴⁹ He regarded ‘*the providers of the services in question*’ as ‘*Mr. Buxton, Mr. Heaven and, possibly, The Sacred Trust*’⁵⁰ with the result that in June 2005 the mark was ‘*distinctive of the combined efforts of both Mr. Buxton’s and Mr. Heaven’s*’⁵¹ on the basis that ‘*the DARKNESS VISIBLE teachings were of a co-operative nature*’.⁵² It is noticeable that in these observations the Hearing Officer appears to have been thinking of The Sacred Trust as something apart from Mr. Buxton.

⁴⁸ Decision, paragraphs 63 and 64.

⁴⁹ Decision, paragraph 65.

⁵⁰ Decision, paragraph 69.

⁵¹ Decision, paragraph 70.

⁵² Decision, paragraph 76.

61. He considered and rejected the possibility that they had worked together in partnership.⁵³ He thought that although the mark had become distinctive as a result of their '*combined efforts*', they had each '*developed – and therefore possessed – a goodwill in the name for the conduct of workshops and in spiritual and lifestyle counselling, under the indicium DARKNESS VISIBLE*'.⁵⁴ On the basis that they had collaborated on certain undertakings '*whilst continuing their own projects at the same time*',⁵⁵ he held that '*the goodwill shared between the parties ... is severable and separate*'.⁵⁶ He rejected the opposition on the ground that Mr. Heaven was just as much entitled as Mr. Buxton to claim proprietorship of the mark **DARKNESS VISIBLE** at the date of the contested application for registration.

62. Mr. Buxton appealed to an Appointed Person under Section 76 of the Trade Marks Act 1994 contending, in substance, that he (trading as The Sacred Trust) was fully entitled under Section 5(4)(a) of the Act to prevent Mr. Heaven from registering the trade mark **DARKNESS VISIBLE** and that the Hearing Officer's decision to the contrary was wrong. Mr. Heaven contended that the Hearing Officer should have held that he (Mr. Heaven) was solely entitled to the rights acquired through use of the trade mark **DARKNESS VISIBLE**. He renewed his attack on the credibility of Mr. Buxton and his witnesses. On 13 December 2007 I exercised my powers under Rules 57 and 65(4) of the Trade Marks Rules 2000 so as to require Mr. Buxton to provide the following information:

⁵³ Decision, paragraphs 73 and 74.

⁵⁴ Decision, paragraph 70.

⁵⁵ Decision, paragraph 76.

⁵⁶ Decision, paragraph 76.

- (1) the date on which The Sacred Trust moved to Wyld Hive House, St. Mary's Place, Penzance, Cornwall TR18 4EE;
- (2) the name and address of the venue at which the **DARKNESS VISIBLE** residential course took place in April 2003;
- (3) a full list of the names of the persons who attended that residential course;

and also to provide me with true copies of the following documents:

- (4) the post-course questionnaire which those who attended that residential course were asked to complete;
- (5) the written responses to the post-course questionnaire of those who attended that residential course.

The information and documents provided in response to this request were copied to Mr. Heaven and have been taken into account in my review of the facts.⁵⁷

63. At the hearing of the appeal, the argument on behalf of Mr. Buxton digressed into a number of fallback positions. It was contended that neither party would be entitled to apply for registration of the trade mark **DARKNESS VISIBLE** independently of the other if the mark had become distinctive as a result of their combined efforts and they were co-owners of the associated goodwill. The suggestion was that Mr. Heaven would by filing for registration in his own name:

⁵⁷ As noted in footnotes 2, 19 and 25 above.

- (1) be guilty of acting in breach of an ad hoc partnership arrangement by virtue of which the jointly developed goodwill came to be co-owned;
- (2) be guilty of representing that he alone was entitled to the trade mark **DARKNESS VISIBLE** and that this was both false and actionable in passing off;
- (3) be guilty of applying for registration in bad faith contrary to Section 3(6) of the Act.

These points were not foreshadowed by the pleadings filed for the purposes of the proceedings in the Registry. Moreover they were developed by reference to findings in the Hearing Officer's decision that were, in connection with the primary case for the appellant, under attack for being wrong. I do not think that it is appropriate to consider them on their merits in this decision.

64. In relation to the primary case of the appellant, I am satisfied that the Hearing Officer adopted a selective approach to the evidence⁵⁸ which yielded '*an inventory of corroborated facts*'⁵⁹ that lacked the breadth and depth required for the purpose of determining the dispute as to proprietorship of the unregistered trade mark **DARKNESS VISIBLE**. This was a case in which the structured approach to assessment outlined in the BRUTT Trade Marks case⁶⁰ needed to be applied with close attention to detail. It appears to me that an assessment conducted on that basis would necessarily have resulted in the rejection of Mr. Heaven's claim to proprietorship in favour of Mr. Buxton's claim to

⁵⁸ See paragraph 59 above.

⁵⁹ See paragraph 59 above.

⁶⁰ See paragraph 58 above.

proprietorship. That is because Mr. Buxton (trading as The Sacred Trust) was entitled to claim that the trade mark was his on the basis of use in commerce by his organisation since January 2003⁶¹ and the evidence put forward in support of Mr. Heaven's claim to proprietorship was so seriously open to doubt as to provide no reliable basis for a finding in his favour⁶² (and none the less so because it pointed strongly to the conclusion that they had both been involved in an elaborate hoax intended to portray Mr. Buxton as an initiate of a group of shamanic bee-keepers known as The Path of Pollen).⁶³ I had the advantage (which the Hearing Officer did not) of receiving oral submissions from Mr. Heaven. He confirmed as follows⁶⁴ in relation to the period prior to January 2003:

THE APPOINTED PERSON: The Hearing Officer, if I remember his decision correctly, made no findings about any activities on your part prior to January 2003.

MR. HEAVEN: Yes, I think that is correct. To be honest and fair and with integrity in this case, I do not have, I do not think, any materials I can possibly provide you with which predate the course with Mr. Buxton which would point to me running DARKNESS VISIBLE courses before that.

THE APPOINTED PERSON: There are narrative statements about it but there are no actual materials, as far as I can see.

MR. HEAVEN: Correct, yes. That is my position too.

With that as the anchor point for a structured assessment of the evidence as a whole, I think it is clear that the Hearing Officer's decision was wrong and must be reversed.

⁶¹ See paragraphs 3 to 8, 18 and 24 above.

⁶² See paragraphs 10 to 28, 45 to 49 and 51 to 55 above.

⁶³ See paragraphs 29 to 34 and 37 above.

⁶⁴ Transcript, p.26 lines 7 to 17.

65. For the reasons I have given the appeal is allowed, the opposition succeeds and the application for registration is refused. The Hearing Officer's order for costs is set aside. Mr. Heaven is responsible for burdening the proceedings with a considerable amount of unsatisfactory and irrelevant evidence. Mr. Buxton has for his part insisted upon using the proceedings as a vehicle for unimpressive evidence about his self-proclaimed initiation into the so-called Path of Pollen. It appears that Mr. Buxton undertook the task of evidence gathering on his side of the dispute without professional assistance. On weighing the conduct of both sides in the context of my decision on the merits, I consider that the unsuccessful applicant (Mr. Heaven) should pay the successful opponent (Mr. Buxton) the sum of £1,750 as a contribution towards his costs of the proceedings in the Registry and on appeal. That sum is to be paid within 21 days of the date of this decision.

66. The allegations of forgery and perjury and their implications for the administration of justice in Registry proceedings have troubled me considerably. I indicated at the hearing that I might decide to refer the matter to the Director of Public Prosecutions. Mr. Buxton indicated through Counsel that he was neither for nor against referral. Mr. Heaven maintained that there had been no forgery and that the allegations made in the witness statement of Patricia Peters p.k.a. Leticia Parmer dated 28 April 2007 were false. In the end I have decided to let the matter rest on the basis that I do not think the public interest requires more public resources to be devoted to the further unmasking of bad behaviour in the context of what has plainly been an over-emotional dispute that ran out of control.

Geoffrey Hobbs Q.C.

10 February 2009

Mr. Michael Edenborough instructed by Steele Raymond LLP appeared as Counsel for Mr. Buxton.

Mr. Heaven represented himself.

The Registrar was not represented.