

O-151-11

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2456826

BY

BATH ALES LIMITED

TO REGISTER THE TRADE MARK:

SPA

IN CLASS 32

AND

THE OPPOSITION THERETO

UNDER NO 95838

BY

**SA SPA MONOPOLE, COMPANGNIE FERMIERE DE SPA TRADING AS SA
SPA MONOPOLE NV**

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In the matter of application no 2456826

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by SA Spa Monopole, Compagnie Fermière de Spa, trading as SA Spa Monopole NV

1) On 29 May 2007 Bath Ales Limited (BAL) filed an application to register the trade mark **SPA** (the trade mark). The trade mark was published in the *Trade Marks Journal*, for opposition purposes, on 26 October 2007 with the following specification:

beers, ales and porters.

The above good are in class 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 4 January 2008 SA Spa Monopole, Compagnie Fermière de Spa, trading as SA Spa Monopole NV (Monopole) filed a notice of opposition to the registration of the trade mark. Monopole relies upon sections 5(2)(b), 5(3), 5(4)(a) and 56 of the Trade Marks Act 1994 (the Act).

3) Section 5(2)(b) of the Act states:

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

(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.”

Section 5(3) of the Act states:

“(3) A trade mark which –

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC) in the European Community) and the use of

the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

Section 5(4)(a) of the Act states:

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

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

The principles of the law of passing-off were summarised by Lord Oliver in *Reckitt & Colman Products Ltd v. Borden Inc* [1990] RPC 341 at page 406:

“The law of passing off can be summarised in one short, general proposition: no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Thirdly he must demonstrate that he suffers, or in a *quia timet* action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”

Section 56 of the Act states:

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

(a) is a national of a Convention country, or

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

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

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

(2) The proprietor of a trade mark which is entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark is entitled to restrain by injunction the use in the United Kingdom of a trade mark which, or the essential part of which, is identical or similar to his mark, in relation to identical or similar goods or services, where the use is likely to cause confusion. This right is subject to section 48 (effect of acquiescence by proprietor of earlier trade mark).

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

The tribunal does not have powers of injunctive relief; consequently, section 56 of the Act is not a ground of opposition. An opponent may rely upon a well-known trade mark in proceedings before the tribunal as an earlier trade mark, as per section 6(1)(c) of the Act.

4) In relation to the grounds of opposition under sections 5(2) and 5(3) of the Act Monopole relies upon the following trade marks:

United Kingdom trade mark no 1263376:



The application for registration of the trade mark was filed on 25 March 1986 with an international priority date of 17 January 1986. The registration process was completed on 23 March 2001. The registration expired on 17 January 2007. It had been registered for:

natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

Under section 6(3) of the Act:

“A trade mark within subsection (1)(a) or (b) whose registration expires shall continue to be taken into account in determining the registrability of a later mark for a period of one year after the expiry unless the registrar is satisfied that there was no bona fide use of the mark during the two years immediately preceding the expiry.”

The registration is subject to proof of genuine useⁱ for the period from 27 October 2002 to 26 October 2007. Monopole claims that during this period, genuine use of the trade mark had been made in respect of *natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters*. The application was published with the following clause:

“Proceeding because of prior rights in Registration No 1446727 (6047,6605).”

United Kingdom registration no 1263377:



The application for registration was filed on 25 March 1986 with an international priority date of 17 January 1986. The registration process was completed on 23 March 2001. The registration expired on 17 January 2007. It had been registered for:

natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

The registration is subject to proof of genuine use for the period from 27 October 2002 to 26 October 2007. Monopole claims that during this period, genuine use of the trade mark had been made in respect of *natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters*. The application was published with the following clause:

“Proceeding because of prior rights in Registration No 1446727 (6047,6605).”

United Kingdom registration no 1481846:



The application for registration was made on 5 November 1991 with an international priority claim of 14 June 1991. The registration process was completed on 16 March 2001. The registration expired on 14 June 2008. It had been registered for:

natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

The registration is subject to proof of genuine use for the period from 27 October 2002 to 26 October 2007. Monopole claims that during this period, genuine use of the trade mark had been made in respect of *natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters*. The application was published with the following clause:

“Proceeding because of prior rights in Registration No 1446727 (6047,6605).”

United Kingdom registration no 2348781 of the trade mark **SPA**. The application for registration was filed on 12 November 2003 and the registration process was completed on 24 December 2004 for the following goods:

natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; soda water, bitter lemon, dry ginger ale, cola, quinine tonic water, ginger beer, grapefruit crush, orange crush, lemonade, drinks containing mixtures of lime and lemon juice, American ginger ale, lime juice cordial, blackcurrant flavour cordial, orange squash, peppermint cordial, all being non-alcoholic drinks for sale in the Counties of West Glamorgan, Mid Glamorgan, South-Glamorgan, and Gwent.

The above good are in class 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended. In these proceedings Monopole relies upon the following goods:

natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters.

The application was published with the following notification:

“Proceeding because of distinctiveness acquired through use.”

United Kingdom registration no 1446727 of the trade mark **SPA**. The application for registration was filed on 8 November 1990. It was registered on 11 August 1995 for the following goods:

natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

The registration is subject to proof of genuine use for the period from 27 October 2002 to 26 October 2007. Monopole claims that during this period, genuine use of the trade mark had been made in respect of *natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters*. The application was published with the following clauses:

“Use claimed from the year 1973. Section 12(2).”

“Advertised before acceptance by reason of use and trade evidence. Section 18(1) (proviso).”

“It is a condition of registration that in the event of the proprietors of this mark ceasing to have the exclusive right to sell natural mineral water the produce of Spa, they will voluntarily cancel this registration.”

5) Under section 5(4)(a) of the Act Monopole relies upon all five trade marks that are shown in paragraph 4. It claims that the trade marks have been applied to goods and packaging and used in advertisements. Monopole claims that its goods, *natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters*, have been sold throughout the United Kingdom. Monopole claims that it, or its predecessors in business, have used trade marks consisting of or containing the word SPA in the United Kingdom for hundreds of years. Monopole states that it, itself, has used such trade marks in the United Kingdom since 1971.

6) Monopole claims that owing to its extensive use of trade marks consisting of or containing the word SPA in the United Kingdom, SPA has acquired a secondary meaning for mineral waters so that it is a very well-known trade mark in the United Kingdom. Monopole claims that its trade mark SPA is entitled to protection as a well-known trade mark and is also entitled to protection from dilution by the use of similar trade marks that would take unfair advantage of, or be detrimental to, the distinctive character or the repute of its trade mark.

7) BAL filed a counterstatement. It required proof of use of the earlier trade marks that are subject to this requirement. It denies that the respective goods are similar. BAL denies that SPA has acquired a secondary meaning in the United Kingdom. It accepts that the SPA only trade marks of Monopole are identical to its trade mark but denies and/or puts Monopole to proof in respect of the other claims that it makes. BAL states that it has used its trade mark since 2001 in the United Kingdom in relation to alcoholic beverages.

8) Both parties filed evidence.

9) A hearing was held on 14 April 2011. Monopole was represented by Mr Simon Malynicz of counsel, instructed by Marks & Clerk LLP. BAL was represented by Mr Jon Sutton of Stevens Hewlett & Perkins.

First evidence for Monopole

10) This consists of a witness statement made by Marc du Bois. Mr du Bois is the managing director of Monopole.

11) Mr du Bois states that Monopole has used the trade mark SPA in the United Kingdom in respect of mineral water since 1971. The predecessors in business to Monopole have exported to the United Kingdom for hundreds of years. Below is a table of sales in the United Kingdom and amounts spent on advertising:

Year	Bottles	Value of sales £	Advertising £expenditure
1973	39,840	13,900	
1974	49,020	17,200	
1975	24,420	8,500	
1976	24,000	3,800	
1977	26,400	7,500	
1978	1,440	500	30,000
1979	212,064	23,200	100,000
1980	858,768	96,628	150,000
1981	1,872,168	243,294	170,000
1982	2,794,000	296,263	n/a
1983	3,167,388	453,218	n/a
1984	2,741,676	409,340	n/a
1985	2,511,384	364,948	n/a
1986	2,571,468	423,037	n/a
1987	4,350,984	806,779	n/a
1988	6,911,256	1,346,842	48,000
1989	13,956,072	3,109,569	84,000
1990	15,133,656	3,588,238	119,000
1991	14,608,860	3,475,821	88,000
1992	16,124,281	3,711,000	397,000
1993	16,943,132	4,004,000	123,000
1994	13,740,911	3,355,000	168,000
1995	14,010,903	3,355,000	100,000
1996	10,722,685	2,546,000	77,000
1997	13,986,024	3,079,000	243,000
1998	10,263,424	2,381,000	456,000
1999	12,188,815	2,728,000	598,000
2000	14,847,350	2,892,000	513,000
2001	15,288,400	2,963,000	510,000

2002	15,397,398	2,888,489	83,000
2003	12,874,374	2,342,361	77,000
2004	8,613,093	1,678,578	115,000
2005	8,685,816	1,431,725	19,000
2006	5,744,415	1,172,125	20,000
2007	4,354,011	931,881	28,000

12) Mr du Bois exhibits at SPA 1 what he describes as “specimen labels showing how the trade mark has been used in relation to these goods [mineral waters] over the years”. On all but one of the labels the device of a Pierrot as per the word and device trade marks appears.

13) Mr du Bois states that advertisements have appeared in various trade journals and other printed publications published and circulated in the United Kingdom. At SPA 2 are copies of advertisements that have appeared in the United Kingdom:

- Advertisements from *She, Company* and *Cosmopolitan* of July 1996 for a Eurostar offer. A picture of a bottle of mineral water appears, upon which the device referred to above is present, it is also predominant in the advertisement. The advertisement refers to visiting the town of Spa.
- A promotion from *Vogue* of March 1997 showing and describing five mineral waters, including that of Monopole.
- A joint promotion for SPA and Nivea from *Essentials* of October 1997.
- An advertisement for SPA REINE from *Independent Retail News* for 24 April – 7 May 1998. The advertisement advises that the bottled water market is worth £400 million and rising.
- Advertisements from *Independent Retail News* for 25 April – 8 May 1997 for SPA BARISART mineral water and a product combining carbonated water and fruit juices.
- An advertisement from *Convenience Store* of 1 May 1998 for SPA REINE.

14) Monopole has also produced leaflets and other publicity materials. Copies of specimens of these are exhibited at SPA 3. Most of the material lacks any indication of date. A promotion for “Water for Life” includes a coupon which is valid from 1 July 1992 to 30 September 1992 and a promotion for the Eurostar has a closing date of 31 October 1996.

15) Mr du Boise gives a list of locations of the principal customers of Monopole. Locations in the North, South, East and West of England, the Midlands, Wales and Scotland are listed. Exhibited at SPA 4 are copies of what Mr du Bois describes as some typical orders from customers in the United Kingdom. The earliest order is from 21 February 1991. The orders within the material period for proof of use have the following invoice dates and relate to the goods identified:

18 March 2005 SPA REINE
18 March 2005 SPA ORANGE, SPA EXOTIC
24 March 2005 SPA EXOTIC, SPA BARISAT, SPA REINE
8 April 2005 SPA BARISART, SPA REINE, SPA MARIE-HENRIETTE
13 May 2005 SPA REINE, SPA BARISART, SPA ORANGE, SPA APPLE
10 June 2005 SPA REINE, SPA BARISART
15 July 2005 SPA REINE
12 August 2005 SPA REINE
9 September 2005 SPA APPLE, EXOTIC, ORANGE, SPA REINE, SPA
BARISART
16 December 2005 SPA REINE
13 January 2006 SPA REINE
17 March 2006 SPA REINE, SPA BARISART
13 April 2006 SPA REINE, SPA BARISART
12 May 2006 SPA REINE
26 May 2006 SPA REINE, SPA BARISART
23 June 2006 SPA REINE
11 August 2006 SPA REINE
15 September 2006 (Jersey) SPA REINE
13 October 2006 SPA BARISART
10 November 2006 SPA REINE
22 December 2006 SPA REINE
12 January 2007 SPA REINE, SPA BARISART
9 March 2007 SPA REINE
23 April 2007 SPA REINE, SPA BARISART
31 May 2007 SPA REINE, SPA BARISART
20 July 2007 SPA REINE
10 August 2007 SPA REINE, SPA BARISART
7 September 2007 SPA REINE, SPA BARISART
12 October 2007 SPA REINE, SPA BARISART

The invoices, where there is an indication of the supplier, identify the supplier as Spadel. Some of the delivery notes identify Brecon Carreg. Material exhibited at SPA 1, 2 and 3 also identifies Spadel as the supplier of the goods. There is also mention of Brecon Carreg in some of this material.

16) Mr du Bois states that Monopole attends and participates at exhibitions in the United Kingdom "from time to time" at which goods bearing Monopole's SPA trade mark is displayed. He gives the following examples:

Belgian food promotion days in 1973/4/5/6, 1978/9, 1980 and 1982.

Hotel Olympia, London in 1978 and 1980.

International Food Exhibition in 1979, 1981/3/5/7/9, 1991/3/5/7/9 and 2001.

European Trade Day, London in 1999, 2000 and 2001.

Palmer & Harvey Customer Trade Show in 2001/2/3/4/5.

The Baby Show in 2006.

Total Sandwich Show in 2006.
Walk the Walk in 2006.
Channel 4 Taste Festival in 2007.
Taste of London, Regent's Park in 2008.

17) Exhibited at SPA 5 is a schedule of trade mark registrations and applications owned by Monopole in respect of the trade mark SPA across the world. Mr du Bois gives the annual values of sales of SPA mineral water worldwide.

18) Mr du Bois states that Monopole has the exclusive right to extract and commercially exploit the mineral waters produced from the springs around the Belgian town of Spa. He states that Monopole and its predecessors have been exploiting the mineral waters from around the Belgian town of Spa since the seventeenth century. Mr du Bois states that the town of Spa has a strong association with motor racing.

Evidence for BAL

19) This consists of a witness statement by Roger Jones, who is the managing director of BAL.

20) Mr Jones refers to state of the register evidence in relation to trade marks including the word SPA. None of the registrations are for beverages, although one does include the provision of foods and drink. There is no evidence of use of trade marks containing the word SPAⁱⁱ and so it is not necessary to say any more about this evidence.

21) Exhibited at RJ2 are pages downloaded from the website of the British Bottled Water Producers on 12 March 2010. Figures for the consumption of bottled water are given (including water coolers). It is stated that the "[t]he UK bottled water market is worth almost £1.5 billion". From other matter in the printouts, it appears that this figure relates to 2008.

22) Mr Jones states that BAL has been using the trade mark since 1997 and that he has not encountered any instances of confusion between BAL's SPA beer product with the water product of Monopole. Exhibited at RJ4 is the following material:

- A flyer for "bath ales". As well as "bath ales" the flier bears a device of a stylised hare. Seven public houses where the products can be bought are shown, five in Bristol and two in Bath. Amongst the beers shown is SPA, which is described as a special pale ale. It is one of six beers shown.
- A price list for Bath Ales effective from 26 March 2007. Amongst the beers shown is Bath Ales SPA. In other material SPA appears below a stylised hare and above "bath ales". SPA beer is available in casks, micro-casks and 20 litre beer boxes.

- A copy of *totalcask* for June 2007. Amongst various breweries shown is “Bath of Bristol”. A picture shows SPA below a stylised hare and above “bath ales”. The section promoting the product is headed “Bath of Bristol SPA 3.7%”.
- An undated flyer for bath ales which shows the SPA special pale ale. As well as SPA there is use of the stylised hare and bath ales.
- A sticker for SPA special pale ale. As well as SPA there is use of the stylised hare and bath ales.
- A label for 40 litres of SPA special pale ale with a best before date of 25 December 2007 upon it. The stylised hare and bath ales appear upon the label, these are the dominant elements on the label. A product description on the label reads: “Special Pale Ale. A full flavoured golden bitter with a dry hoppy finish and a citrus aroma. The top of the label reads “9gls SPA 3.7% 40Ltr”.
- A purchase order from Jury Inns to BAL for SPA and GEM beers. The beer is to be delivered to Jurys Bristol Hotel.
- Two purchase orders from Carlsberg UK Ltd for 40 and 46 casks of “FC Bath SPA” dated 19 and 26 July 2007 respectively.
- A point of sale badge for SPA bath ales, a stylised hare appears above SPA and the wording “Golden Special Pale Ale”.

23) Exhibited at RJ5 is a copy of an extract from *Good Beer Guide 1998*. Under a heading BATH, three beers are identified, one of which is SPA.

24) The majority of the statement consists of submission and commentary upon the evidence of Monopole, rather than evidence of fact. Consequently, it has not been summarised here, although these elements are kept in mind in the decision.

Second round of evidence for Monopole

25) This consists of a further statement by Mr du Bois. Mr du Bois reaffirms all of the statements in his first statement. Much of what Mr du Bois states is submission and comment upon the evidence of Mr Jones; these elements of the statement are considered in the same manner as the similar elements of the statement of Mr Jones.

26) Exhibited at SPA 6 is a copy of an extract from *The Good Water Guide*, published in 1994, relating to SPA mineral water. SPA REINE is described as one of the world’s best known light mineral waters. Exhibited at SPA 7 is a translation of an extract from *The Water Drinkers Guide* which relates to the history of SPA mineral waters. Exhibited at SPA 8 is a book entitled *The extraordinary History of the Waters of Spa*, it was published in 1989 by Monopole. As the title of the book indicates it is about the history of the waters of Spa, it is not illuminating as to the position of the SPA trade mark in the United Kingdom at the date of the application for BAL’s SPA trade mark, the material date. Mr du Bois draws attention to a statement on page 71 which reads:

“In Britain during the last three years, Spa Monopole has taken root and has established itself as the second imported brand. This market is dominated by the combined strength of TV media and of the five integrated food distributors who control 70% of the market for table water.”

(In his first statement Mr du Bois makes no reference to any television advertising.) The publication does give details of the Spadel Group. The reader is advised that Monopole accounts for 90% of the turnover of the group. The rest of the turnover emanates from Bru/Chevron, Spontin and Brecon.

27) Mr du Bois states that “a great deal of the growth has been in locally produced waters and the cheaper spring waters, rather than the natural mineral waters as produced by Spa Monopole and which represent a market within a market”. Mr du Bois states that SPA mineral water now occupies a “more niche market”. Exhibited at SPA 9 are pages downloaded from the website of British Bottled Water Producers on 15 October 2010. Mr du Bois highlights the statement in the download that sales of locally produced water account for an enormous proportion of the sales of bottled water in the United Kingdom. Included in this exhibit is an article from January 2001 headed *Bottled Water Market Assessment* which advises that the market has “switched from being split equally sparkling and still water, to substantially still”. The article also states that the supply of water has moved from being supplied by imported water to local water. Mr du Bois underlines that the article states:

“This has led to the spring (and “table”) water segment increasing at the expense of natural mineral water.”

Exhibited at SPA10 is a copy of an article from *The Independent* of 1 April 1994 about the decline in sales of Perrier water. The article states that in 1974 5 million bottles of Perrier were sold, which rose to 100 million bottles in the late 1980s. The article states that in three years sales dropped to 50 million bottles. The main rivals to Perrier are identified as Buxton and Highland Spring.

28) Exhibited at SPA 11 is a review on a website by a visitor to the Guinness-Hopstore in Dublin. The writer writes that “[c]ontrary to popular opinion, the water used in the process is not water from the Liffey!” Exhibited at SPA 12 are pages downloaded from the website of Loch Lomond Distillery. Mr du Bois notes that for whisky the water has a significant effect of the taste of the final product.

Limitation of rights relied upon

29) Mr Malynicz, in relation to section 5(2)(b) and 5(3), focused upon United Kingdom registration nos 2348781 and 1446727, which are for the trade mark SPA on its own. In relation to registration no 1446727 he relied upon *natural mineral waters in class 32* only. Mr Sutton accepted that use in the material period had been shown in relation to such goods. The section 5(4)(a) ground also focused on use of the word only SPA trade mark. Mr Malynicz did not rely upon the section 56 ground at the hearing as he considered that it did not add anything materially to the case under section 5(3) of the Act.

Material dates

30) In relation to the claim to reputation under section 5(3) of the Act the material date is the date of the application for registration, 29 May 2007.

31) A similar provision to section 5(4)(a) of the Act is to be found in Article 8(4) of Council Regulation 40/94 of December 20, 1993. This was the subject of consideration by the General Court (GC) in *Last Minute Network Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined Cases T-114/07 and T-115/07, in which the GC stated:

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

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

The reasoning of the GC, *mutatis mutandis*, is followed in relation to the Act; so Monopole must establish a protectable goodwill as of the date of application. It is well established that the material date for passing-off is the date of the behaviour complained ofⁱⁱⁱ; this may be prior to the date of application. In this case BAL has claimed use of the trade mark SPA on its own but with a variety of other matter eg the stylised hare, the words bath ales and special pale ale. Consequently, the nature of the use cannot be considered to equate to the trade mark for which the application has been made. So the behaviour complained of is the application for the trade mark and the material date, the date of that application.

Average consumer, nature of purchasing decision and standard for likelihood of confusion

32) The average consumer “is deemed to be reasonably well informed and reasonably circumspect and observant”^{iv}. The average consumer of the goods of the earlier trade marks will be the public at large. There is nothing to suggest that the average consumer somehow distinguishes between “natural mineral water” and spring water and table water, which in exhibit SPA 9 are the three types of bottled water identified. The description of SPA REINE exhibited at SPA 6 makes no such distinction:

“Spa Reine is among the world’s best-known light mineral waters, a **table water** harmless even to those on a salt-free diet.”

(emphasis added)

The average consumer is the consumer of bottled water and the case must be considered on the basis of bottled water at large. The average consumer of the goods of the application will also be the public at large. However, in relation to goods with an alcohol content above 0.5% the average consumer will be over the age of 18^v.

Findings of fact

33) To benefit from the provisions of section 5(3) of the Act the trade mark must be known by a significant part of the public concerned by the products covered^{vi}. The Court of Justice of the European Union (CJEU) in *General Motors Corporation v Yplon SA* stated how a party would establish this reputation:

“27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.”

It is to be borne in mind that the reputation has to be established at the material date. Trade marks rise and fall and recognition of them rises and falls. The examples of material relating to the advertising and marketing are extremely sparse. The latest exhibit is from 1 May 1998. Monopole has exhibited at various shows, however, there is no indication as to how many average consumers of its products will have attended these shows. Mr du Bois makes no reference to any promotion by means of television, radio or the Internet.

34) In the advertisement for SPA REINE from *Independent Retail News* for 24 April – 7 May 1998 the reader is advised that the bottled water market is worth

£400 million and rising. This would mean that in 1998, according to Monopole's figures, it would have had 0.59% of the market. Exhibit RJ2 gives details of the size of the market for bottled water (including water coolers) in 2008 as £1.5 billion. There are no figures for Monopole for 2008. However, if its turnover figure for 2007 is compared to the size of the market in 2008, this would give a market share of 0.04%. Mr du Bois tries to make comparison with the position of Perrier. In the article at SPA10 a figure of 100 million bottles of Perrier being sold in the United Kingdom in the late 1980s is given. In 1988 and 1989 respectively, Monopole had sales of 6,911,256 and 13,956,072 bottles.

35) Mr du Bois refers to Monopole beginning to inhabit a niche market. There is no clear indication of there being particular segments of the bottled water market, other than for water coolers (see paragraph 32). For the average consumer bottled water is bottled water, the main distinction being between still and fizzy; both of which waters Monopole supplies. Anyone who has a small market share can describe that share as being niche and Monopole has never had a particularly large share of the bottled water market in the United Kingdom. By the material date for section 5(3) of the Act, it is fair to say that Monopole's position in the market was miniscule. Mr du Bois refers to the long period of time that Monopole has sold water, just because something has been sold for a long time does not mean that it will be known by a significant part of the relevant public. The basis of Monopole's claim to reputation for section 5(3) is based on assertion rather than fact. The evidence of Monopole points to the opposite of what it claims, that at the material date it would not be known to a significant part of the public concerned. Mr Malynicz submitted that it was necessary to take into account that the bottled water market was fragmented and so there were a large number of brands. Consequently, a trade mark with a small market share could have the requisite reputation, according to Mr Malynicz. Equally, in a highly fragmented market, with many brands, a trade mark with a small market share could go unnoticed. Mr du Bois, at paragraph 18 of his second witness statement, states that the advertising of recent years has concentrated on the buying department of large supermarket chains, so advertising has not been put before the average consumer. With such a small market share at the material date, with an absence of evidence of advertising directly to the average consumer, there is no data that substantiates Monopole's claim to a reputation. **Monopole has signally failed to establish the reputation that it claims and, therefore, the claim under section 5(3) of the Act must be dismissed.**

36) It is to be noted that Monopole has furnished no evidence to show that any advantage that it claims BAL would have acquired would have been unfair as per *Whirlpool Corporations and others v Kenwood Limited* [2009] EWCA Civ and *Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2010] EWHC 2035 (Ch). Mr Malynicz submitted that the unfairness resided in the feeding off the reputation of Monopole. If being unfair would arise purely from feeding off the reputation of the earlier trade mark, on Mr Malynicz's submission unfair becomes redundant as it becomes an automatic sequitur; all that would

need to be established if that there would be advantage. This submission runs directly contrary to the case law. Monopole has furnished no evidence in relation to its claims as per the judgment of the CJEU in *Intel Corporation Inc v CPM United Kingdom Ltd* Case C-252/07 at paragraph 37. It is difficult to see, on the facts of this case, that the qualification in paragraph 38 could be applied in this case. The word SPA is an ordinary, commonly used word with a concrete meaning. The average consumer in the United Kingdom will know of it from spa baths, from places such as Bath, Cheltenham and Harrogate and products such as foot spas. To establish a link for the purposes of section 5(3), Monopole would need to show that in relation to the respective goods the ordinary meaning of the word had, for the relevant public, been supplanted by its trade mark significance; that it would bring to mind the trade mark of Monopole rather than just spa as a word, so returning to the issue of the reputation at the material date. This is a tall order and something that the evidence of Monopole has signally failed to establish.

37) Mr Sutton accepted that Monopole had established a goodwill in relation to natural mineral water by reference to the sign SPA. The evidence in relation to other goods is very sparse and does not establish that at the date of BAL's application Monopole enjoyed a reputation in relation to other goods.

Section 5(2)(b) of the Act – likelihood of confusion

Comparison of trade marks

38) The trade marks to be compared are identical. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public^{vii}. Mr Sutton submitted that the trade marks are visually identical but neither aurally nor conceptually identical. He submitted that the average consumer for beers would know of the acronym IPA, for Indian pale ale. Knowing of IPA, this average consumer would not view SPA as a word but as an acronym and pronounce the letters separately and not perceive the word as being spa, despite the absence of full stops between the letters. There is no evidence that the average consumer would know of a beer called IPA, this is not a matter within judicial notice. Even if a consumer knew of this there is no reason that the average consumer, seeing the ordinary word spa, would perceive it as an acronym for special pale ale, as submitted by Mr Sutton. There is no mention of this in Mr Jones's evidence. There is no reference to this in the counterstatement. The first time that this argument was raised was at the hearing. There is a total absence of evidence to support the submission of Mr Sutton. IPA is not a word, consequently, it may lend itself to being pronounced as three separate letters. SPA is a common word and the normal reaction can be expected to be viewed and perceived as such. There is nothing to suggest that the average consumer for the goods of the application would perceive SPA as anything other than the common word, whether for all of the goods of the

application or pale ale alone. **The trade marks are visually, aurally and conceptually identical.**

Comparison of goods

39) In “construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade^{viii}”. Words should be given their natural meaning within the context in which they are used, they cannot be given an unnaturally narrow meaning^{ix}. Consideration should be given as to how the average consumer would view the goods^x. The class of the goods in which they are placed may be relevant in determining the nature of the goods^{xi}. In assessing the similarity of goods it is necessary to take into account, inter alia, their nature, their intended purpose, their method of use and whether they are in competition with each other or are complementary^{xii}. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T- 325/06* the General Court (GC) explained when goods were complementary:

“82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J also gave guidance as to how similarity should be assessed^{xiii}. The goods of the earlier trade marks are: *natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters*. (The punctuation, as submitted by Mr Malynicz, means that the geographical limitation of the goods of 2348781 relates only to the goods listed after and/or mineral waters. This interpretation also reflects that the specification is a result of the combination of the specifications for registration nos 1446727 and 1113217.^{xiv}) The goods of the application are: *beers, ales and porters*.

40) Both parties have prayed in aid a number of decisions in relation to the similarity of beverages. The findings in these decisions turn upon their own facts and are not binding. The decisions have all been considered, however, the decision as to similarity will be made within the parameters of the binding case law and the tests arising therefrom.

41) The respective goods are all beverages. They are all beverages that will normally be served cold. They are also all beverages that will normally be consumed in long measures. The goods of the application can include non-alcoholic beverages as well as alcoholic beverages. They are goods that can all be marketed in bottles, tins or from mass dispensers at a bar. The goods of the application are the subject of a brewing process, the earlier goods are not; they differ in this aspect. Overall, the goods have a similar, if not identical, nature.

42) Mr Sutton argued that water was drunk to quench the thirst whilst beer was not. It is difficult to accept this argument. None of these beverages are on a par with wines or spirits, which would not normally be drunk to quench the thirst. If one is thirsty beer, whether alcoholic or non-alcoholic, water or a soft drink can all be imbibed to slake the thirst. All of the beverages could be drunk before, after or during a meal. All of the beverages could be purchased in a public house. All of the goods could have the same end use, to slake the thirst, or to give a pleasurable drinking experience. The goods could have the same end users and be for the same purpose. The consequence of this is that the average consumer may choose a beer or a soft drink to slake the thirst and so there is a degree of competition between them.

43) Mr Malynicz submitted that the respective goods could be found in the same areas of retail premises. In supermarkets beers, alcoholic and non-alcoholic, are found in discrete areas. Water is found in a discrete area, as are soft drinks. In bars, beer will be in a separate area to water and soft drinks. Mr Malynicz submitted that in a convenience store with limited space the goods could be in proximity in a cold cabinet. Even where the goods are sold in shops with limited space they are normally sold in discrete areas. In the terms of *British Sugar Plc v James Robertson & Sons Limited* the respective goods are likely to be found on different shelves.

44) Water is essential to beer as an ingredient. It is also essential to spirits. There is nothing to suggest that there is a complementary relationship as per *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*. Being an ingredient or part does not give rise per se to similarity^{xv}. Monopole has tried to advance the argument that the source of water is an important factor in relation to beer production. Its case is based on whisky distilling, which is a totally different process and has completely different traditions to brewing. It also relies upon the comments of a visitor to the Guinness brewery in Dublin who is surprised that the water used in the production of the beer does not come from the Liffey. Monopole has failed to establish its claim that there is a link between breweries and the water they use to brew.

45) Mr Malynicz considered it was of significance that the goods of the parties are in the same class. The classification system is for administrative purposes only, that goods are in the same class is not indicative of similarity. Mr Malynicz

referred to *Altecnic Ltd's Trade Mark Application*. This case was about the class affecting the definition of the goods not about whether goods are similar because of class.

46) Mr Sutton accepted that all of the goods could be distributed through the same channels of trade.

47) Mr Sutton stated that BAL would consider limiting the goods of the application to pale ale. It is not considered that such a limitation would change the analysis of the similarity of the goods.

48) Consequent upon the above considerations, there is a reasonable degree of similarity between the respective goods.

Conclusion

49) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa^{xvi}. In this case the respective trade marks are identical. There is a reasonable degree of distinctiveness.

50) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark the greater the likelihood of confusion^{xvii}. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public^{xviii}. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings^{xix}. The earlier trade mark describes a characteristic of the goods in relation to which it is used, beverages containing or being spa water. The matter of distinctiveness must be considered at the date of the application for BAL's trade mark. As decided above, at this time the trade mark did not enjoy a reputation of any note. The evidence does not establish that the normal meaning of the word will have been supplanted at the material date for the average consumer. Use may have added distinctiveness to the earlier trade mark at one point in time but not at the material time for these proceedings. Owing to its descriptive nature, Monopole's trade mark has an extremely limited degree of distinctiveness. (The judgment of the CJEU at paragraph 42 of *L'Oréal SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-235/05 P*:

“42 It follows that the distinctive character of the earlier mark cannot have the significance which the applicant argues it should be given in the

comparison of the signs in question, as it is not a factor which influences the perception which the consumer has of the similarity of the signs.”

relates to the issue of similarity of signs and not the likelihood of confusion.)

51) Mr Sutton referred to a lack of confusion in the market place. There is a tranche of case law to the effect that lack of confusion in the market place is indicative of very little: *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283, *Rousselon Freres et Cie v Horwood Homewares Limited* [2008] EWHC 881 (Ch), *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 and *Aceites del Sur-Coosur SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-498/07 P*. In *The European Limited v The Economist Newspaper Ltd* Millet LJ stated:

“Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark.”

In this case the trade mark of BAL has been used with other matter. It has been used in such a fashion that it could be seen as an acronym for special pale ale. (This does not gainsay the finding that the average consumer will see the trade mark as the word spa; that finding is based upon the trade mark as filed, not as used.) There is also an absence of detail as to the extent of the use. There is no evidence that the trade marks of the parties have been used in the same places. Consequently, the absence of confusion in the market place does not have a bearing upon the findings in this case.

52) Mr Sutton also referred to how BAL markets the product sold under its trade mark. The GC stated in *NHL Enterprises BV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-414/05*:

“71 The Court considers, first, that that assessment by the Board of Appeal is not called in question by the particular conditions in which the applicant's goods are marketed, since only the objective marketing conditions of the goods in question are to be taken into account when determining the respective importance to be given to visual, phonetic or conceptual aspects of the marks at issue. Since the particular circumstances in which the goods covered by the marks at issue are marketed may vary in time and depending on the wishes of the proprietors of those marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, namely that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions of the trade mark proprietors – whether carried out or not – which are naturally subjective (see, to that effect, *NLSPORT*, *NLJEANS*, *NLACTIVE* and *NLCollection*, cited at paragraph 61 above,

paragraph 49, and Case T-147/03 *Devinlec v OHIM – TIME ART (QUANTUM)* [2006] ECR II-11, paragraphs 103 to 105, upheld on appeal by the Court by judgment of 15 March 2007 in Case C-171/06 P *TIME ART v OHIM*, not published in the ECR, paragraph 59).”

The same reasoning can be seen in *Phildar SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-99/06, *Oakley, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-116/06, *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 147/03, *Sadas SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-346/04 and *Daimlerchrysler AG v Office for Harmonization In the Internal Market (Trade Marks and Designs) Case T-358/00*. The current marketing strategies of BAL cannot have a bearing upon the outcome of the case.

53) The extremely limited distinctiveness of the earlier trade mark must be considered against the identity of the trade marks; allowing the average consumer nothing with which to distinguish the trade marks. **It has also been decided that there a reasonable degree of similarity in relation to the goods. Taking these factors into account there is a likelihood of confusion and the application is to be refused in its entirety.** (A limitation of the specification to pale ale would not affect this finding.)

Section 5(4)(a) of the Act – passing-off

54) Monopole is in no better position in relation to this ground of opposition than it is under section 5(2)(b) of the Act. Consequently, it is not necessary to give a decision under this ground of opposition.

Costs

55) Monopole having been successful it is entitled to a contribution towards its costs. Costs are awarded upon the following basis:

Opposition fee:	£200
Preparing a statement and considering the statement of BAL:	£400
Preparing evidence and considering the evidence of BAL:	£700
Preparation for and attendance at hearing:	£700
Total:	£2,000

Bath Ales Limited is to pay SA Spa Monopole, Compagnie Fermière de Spa, trading as SA Spa Monopole NV the sum of £2,000. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 5 day of May 2011

**David Landau
For the Registrar
the Comptroller-General**

ⁱ Section 6A of the Act reads:

“(1) This section applies where –

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

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

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

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

(3) The use conditions are met if –

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

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

(4) For these purposes –

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

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

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

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

(7) Nothing in this section affects –

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

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

Under Section 100 of the Act the onus is upon the proprietor of the earlier trade mark(s) to show genuine use:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

ⁱⁱ The state of the register does not indicate whether there will be confusion in the market place in relation to the respective trade marks. Jacob J in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 and the GC in *Zero Industry Srl v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-400/06* and *GfK AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-135/04* have both rejected arguments based upon state of the register evidence. In *GfK AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-135/04* GC stated:

“68. As regards the search of the Cedex database, the mere fact that a number of trade marks relating to Class 35 contain the word ‘bus’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned. Firstly, the search in question does not provide any information on the trade marks actually used in relation to the services concerned. Secondly, it includes a number of trade marks in which the word ‘bus’ is used descriptively by public transport businesses.”

It is to be noted that the two GC cases are relative grounds cases, showing that the rejection of this type of evidence relates to both relative and absolute grounds.

ⁱⁱⁱ *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 and *Inter Lotto (UK) Ltd v Camelot Group PLC* [2004] RPC 8 and 9.

^{iv} *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* Case C-342/97.

^v As per the definition of alcohol in section 191 of the Licensing Act 2003.

^{vi} *General Motors Corporation v Yplon SA* Case C-375/97.

^{vii} *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02.

^{viii} *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281.

^{ix} *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267.

^x *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 dealt with a non-use issue but are still pertinent to the consideration of the meaning and effect of specifications:

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

^{xi} *Altecnic Ltd's Trade Mark Application* [2002] RPC 34.

^{xii} *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* Case C-39/97.

^{xiii} He considered that the following should be taken into account when assessing the similarity of goods and/or services:

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

^{xiv} The specification of 1446727 is:

Natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

The specification of 1113217 is:

Soda water, bitter lemon, dry ginger ale, cola, quinine tonic water, ginger beer, grapefruit crush, orange crush, lemonade, drinks containing mixtures of lime and lemon juice, American ginger ale, lime juice cordial, blackcurrant flavour cordial, orange squash, peppermint cordial, all being non-alcoholic drinks for sale in the Counties of West Glamorgan, Mid Glamorgan, South-Glamorgan, and Gwent.

^{xv} See *Les Editions Albert René v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-336/03* and *Promat GmbH c Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) Case T-71/08*.

^{xvi} *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc Case C-39/97*.

^{xvii} *Sabel BV v Puma AG Case C-251/95*.

^{xviii} *Rewe Zentral AG v OHIM (LITE) Case T-79/00*.

^{xix} *Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97*.