

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No 2148956
BY FLIGHTBOOKERS PLC TO REGISTER A TRADE MARK
IN CLASS 39**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER No 49020
BY THOMSON HOLIDAYS LIMITED**

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No 2148956
by Flightbookers PLC to register a Trade Mark
in Class 39**

and

**IN THE MATTER OF Opposition thereto under No 49020
by Thomson Holidays Limited**

DECISION

1. On 23 October 1997 Flightbookers PLC applied to register the trade mark TRAVELLING FREESTYLE in Class 39 for "Arranging of flights, cruises and tours; booking agency services for travel; ticket reservation services; tour operating; tour organising; tourist office services; tourist agency services; travel agency; travel reservation services."
2. The application numbered 2148956 was published for opposition purposes on the basis of distinctiveness acquired through use and honest concurrent use.
3. On 24 September 1998 Thomson Holidays Limited filed notice of opposition. At the opponents' request all grounds were later deleted with the exception of the following, which is in summary:
 - Under Section 5(2) of the Act in that it is similar to the registered trade mark for the opponents and registration is sought for services which are similar or identical to those for which the opponents' earlier trade mark is registered and there is a likelihood of confusion on the part of the public, which includes the likelihood of association.
4. The opponents also say they are the largest operator for air - inclusive holidays from the UK and are the proprietors of a number of marks in the UK in which the opponents have made extensive use and which comprise FREESTYLE and CLUB FREESTYLE. They include, in particular, Registration No. 1288949 for the mark FREESTYLE in Class 39 on which the opponents will rely. (See later in decision).
5. The applicants filed a counterstatement in which the ground of opposition is denied. They added that they would rely on use by other tour operators in various combinations of the word FREESTYLE to demonstrate that the scope of protection for registration B1288949 (FREESTYLE) is limited.

6. Both sides ask for an award of costs in their favour. Both sides filed evidence in these proceedings and the matter came to be heard on 28 February 2000 when the applicants were represented by Mr Smith of Field Fisher Waterhouse. The opponents were represented by Mr Acland of Counsel instructed by Trade Mark Owners Association Ltd.

OPPONENTS' EVIDENCE

7. This consists of two statutory declarations. The first is dated 17 February 1999 by Ms Anna Rutherford who says she is the CLUB FREESTYLE Brand Manager of Thomson Holidays Limited. Ms Rutherford says she has been with the opponents' company since 1995 and has held her present position since 1997. The second is also dated 17 February 1999 and is by Mr Russell Amerasekera, Group Corporate Communications Director of the opponents' company.
8. Turning to Ms Rutherford's declaration first, she confirms that her company is the registered proprietor of a number of marks in the UK consisting of or including the word FREESTYLE. These are listed as Exhibit AR1 to the declaration, together with copies of registration and renewal certificates. It was also confirmed that Thomson Tour Operations Limited is the former name of the opponents and an application to record the change of name has been recorded at the UK Trade Marks Registry. Ms Rutherford also goes on to say that the opponents are well known in the travel industry, are the largest operator of air-inclusive holidays in the UK and provides, at Exhibit AR2, copies of various awards from the travel industry received by the opponents.
9. Exhibit AR3 provides copies of brochures showing use of FREESTYLE and CLUB FREESTYLE both in the UK and overseas.
10. Ms Rutherford says the marks FREESTYLE and CLUB FREESTYLE have been used in relation to the arranging and booking of holidays, travel, tours, cruises, car hire and excursions, escorting of travellers, the provision of tourist office services, the provision of facilities for entertainment and recreation and arranging courses of instruction for tourists since 1985 - aimed mainly at the youth market ie. aged between 18 and 30 years. Ms Rutherford goes on to say that FREESTYLE was launched in 1985 and widespread use as a major brand continued until 1988. Exhibit AR4 is a copy of a product review for the years 1985-88. After 1988 the product was still used but with a "lower profile", and from 1989-1994 in connection with the opponents' "Discover Turkey" option being holiday excursions on Turkish sailing boats (gulets). Ms Rutherford then says that FREESTYLE appeared in 1993 and 1994 as a flag mast on the gulets and that in 1993 the FREESTYLE programme was revamped for use in Greece and Turkey and promoted under the mark CLUB FREESTYLE (also featuring a stylised FREESTYLE word and device mark), being incorporated under their Skytours Greece and Turkey holiday programme. In 1995 the Skytours Summer 1996 brochure was launched, introducing CLUB FREESTYLE into its main summer programme with allocated accommodation in six resorts. Later brochures feature CLUB FREESTYLE more prominently and show an expansion in the number of resorts covered by this service. Exhibit AR3 includes brochures from 1985 to 1998.
11. Ms Rutherford says that although there has been a move away from the FREESTYLE mark into the CLUB FREESTYLE programme, "the FREESTYLE element nevertheless continues

to be used as a trade mark per se in relation to the services provided" and refers to Exhibits AR3 to AR7, referring especially to Exhibit AR5 where, she says, such use appears in promotional materials and the opponents' in-house newsletters and magazines.

12. Ms Rutherford goes on to say that use of FREESTYLE, together with use of a splash wave device or in combination with CLUB establishes a precedent for the opponents of the creation and maintenance of a family of FREESTYLE marks which further increases the likelihood of confusion with the applicants' mark or by any other providers of services in the holiday field who use FREESTYLE.
13. Ms Rutherford goes on to say that she understands that the applicants make reference to use by others of FREESTYLE and claim that it is not distinctive of the opponents, in particular reference is made to use by TWA. Ms Rutherford says that had the opponents been aware of such use she believed action would have been taken to alert them of the opponents' registrations.
14. Reference is then made to sales of goods and services under FREESTYLE and CLUB FREESTYLE marks throughout the UK. Details of sales between 1985 and 1988 are provided in Mr Amerasekera's declaration (see later). Ms Rutherford says that sales figures for 1988 to 1997 are difficult to quantify as the services are generally sold in conjunction with other holiday options which would be attributed to "major brand descriptors" e.g. the "Discover Turkey" programme. However, the following figures are provided:

Year	Amount (£)	No. of Passengers
1997	400,000	35,000
1998	1,000,000	80,000
1999	2,000,000	100,000

NB. Most of the above figures relate to a period after the relevant date of October 1997.

15. Exhibit AR6 provides examples of various advertisements, promotional and support materials showing use between 1985 to 1998. The mark has also been promoted in conjunction with other well known brands such as Budweiser, Miss Selfridge or Ford Motors.
16. Exhibit AR7 provides copies of customer interview summaries from a customer research survey conducted in 1998 together with internal memos and reports on the planning and outcome of research materials. (It should be noted that this is after the relevant date of October 1997). Figures were provided for advertising and promoting goods and services under the mark CLUB FREESTYLE. However these were for the years 1998 and 1999 ie. again after the relevant date.
17. Ms Rutherford says that she believes the marks FREESTYLE and CLUB FREESTYLE are wholly distinctive of the opponents because of the use made of them and goes on to say that use of TRAVELLING FREESTYLE is likely to cause confusion. Ms Rutherford also comments that the use of TRAVELLING FREESTYLE by the applicants has more recently

moved towards FREESTYLE being the prominent element, which, she says, is likely to increase the likelihood of confusion.

18. Ms Rutherford says that the opponents did not intend to abandon its registered marks but that any lack of confusion with the applicant's mark may result from the lower profile attributed to it in the interim period. Ms Rutherford goes on to say that CLUB FREESTYLE, in particular, has become a major focus of the opponents' branding strategy. This, together with prominent use of the FREESTYLE element by the applicants is likely to lead to increased confusion.
19. Ms Rutherford concludes by saying that the applicants' use of the mark is not in the form applied for, other than in the earlier years when used as a "tagline" in support of its main brand FLIGHTBOOKERS.
20. Turning to the statutory declaration of 17 February 1999 by Mr Amerasekara, he says that he joined the opponents' company in 1984 and in summer 1986 joined the FREESTYLE programme and worked overseas as a FREESTYLE representative. He then says that he returned in summer 1987 and took up the position of Sales and Promotions Manager for the FREESTYLE brand, being part of its marketing team until 1988 when the programme took a lower profile, becoming a sub-brand used in conjunction with other holiday options offered.
21. Much of the evidence repeats or elaborates the points made in Ms Rutherford's declaration above, emphasising that when the mark was first introduced a significant marketing strategy was built around the mark FREESTYLE including a "multi-million pound television advertising campaign" for summer 1986. The following figures were provided for sales of goods and services under the marks FREESTYLE and CLUB FREESTYLE:

Year	Amount (£)	No of Passengers
1985	3,122,000	14,000
1986	5,525,000	25,000
1987	7,452,000	27,000
1988	5,454,000	18,000

and for advertising:

Year	Amount (£)
1985	944,100
1986	335,500
1987	636,400

22. Mr Amerasekera also says that sales of holidays and supplementary services and merchandise peaked in 1987, that there was a downturn in summer 1988 and that "the FREESTYLE mark lost its way somewhat". Nevertheless, he says, it was used as a sub-brand and that CLUB FREESTYLE was launched and increased from 1993 to become a major brand. (See Exhibit AR6 of Ms Rutherford's declaration).

Applicants' Evidence

23. This consists of a statutory declaration dated 30 September 1999 by Mr Dinesh Dhamija. He says he is the Chairman of Flightbookers PLC, a position held since the company's incorporation in 1983.
24. Mr Dhamija provides Exhibit DD1 which is a statutory declaration by him dated 11 May 1998, with exhibits, filed in support of their trade mark application during its Examination and he confirms that the facts and submissions made then were still true and relevant. (I will refer to this more fully later in the decision). Mr Dhamija also says that the exhibit "illustrates that there is and has been no confusion of their application and the opponents' FREESTYLE marks."
25. Mr Dhamija then argues that the CLUB FREESTYLE and DEVICE registration (1517664) is not similar to their mark and that all but one of the other registrations - FREESTYLE or FREESTYLE and DEVICE are not similar. The remaining registration is 1288949, FREESTYLE, for the same or similar services. However, he says, the applicants have used their mark since 1990 without any instances of confusion and there is, therefore, unlikely to be any future confusion.
26. Mr Dhamija further submits that "FREESTYLE (alone) has a particular meaning in the travel industry, to denote independently assembled package components and that the scope of protection of the FREESTYLE registrations in the name of Thomson Holidays Limited (if valid at all) is limited". Exhibit DD2 comprises an Alta Vista search index page, use of FREESTYLE by Loma Travel Limited and by Passage Tours, all obtained from the Internet.

Opponents' Evidence in Reply

27. This consists of a statutory declaration dated 17 February 1999, again by Mr Amerasekera, in which he challenges the evidence filed as Exhibit DD1. He says that Mr Dhamija, when supporting his view that there is and has been no confusion, does not give "adequate consideration to the actual circumstances in which the respective uses of FREESTYLE....." have been made to date, nor to the potential for future confusion. Mr Amerasekera says the exhibits show use of FLIGHTBOOKERS TRAVELLING FREESTYLE and not the mark applied for. Exhibits DD1 and DD2 of Mr Dhamija's earlier declaration, he says, show such use and also includes an aeroplane device. Furthermore, he says, the words applied for represent a de minimis element of the majority of items shown in Exhibits DD1 and DD2 of the earlier declaration, and would not be regarded as a stand alone element. Mr Amerasekera goes on to say that where use can be considered to be as a stand alone trade mark e.g. items 12-15 in (earlier) Exhibit DD1, the use gives greater prominence to the FREESTYLE element and would bring the mark into greater conflict with the opponents' marks.
28. Mr Amerasekera then refers to the honest concurrent use filed and says "I do not believe that the Applicant's use is sufficient to protect its mark under the honest concurrent user provisions of Section 7 of the Trade Marks Act 1994. I do not believe its use of the mark has been consistent, or that such use has been in relation to the mark TRAVELLING FREESTYLE as applied for. Furthermore, I believe that in recent years the Applicant's use of the mark

TRAVELLING FREESTYLE has moved more and more towards a similar representation of that of my company in contrast to the earlier de minimis use of the words "travelling freestyle" in a non-capitalised format as a small tag-line to the more prominent mark FLIGHTBOOKERS". He also reiterates that "to the best of my knowledge, my Company has at no time acquiesced to the Applicant's use of the alleged mark TRAVELLING FREESTYLE."

29. Mr Amerasekera also refutes the claim that FREESTYLE has any particular meaning in relation to the travel industry and that the Internet evidence provided by the applicants does not assist them.
30. That concludes my summary of the evidence.

DECISION

31. At the hearing, Mr Acland raised two preliminary points. Both were, he said, relating to issues he considered were raised for the first time in skeleton arguments provided by Mr Smith prior to the hearing. The issues raised were "honest concurrent use" and "acquiescence" and he argued that the applicants should have applied to amend the pleadings.
32. Taking honest concurrent use first, Mr Acland said that this was not raised as a matter on which the applicants would rely in their Counterstatement or evidence. However, Mr Smith pointed out that the matter was recognised and addressed in the opponents' Evidence in Reply - see paragraph 9 of Mr Amerasekera's declaration, dated 21 December 1999, where he says "I further understand that the Applicant has claimed honest concurrent use under Section 7 of the same Act". Mr Smith also argued that the proceedings had commenced prior to the Woolf proposals being implemented and some leniency should be granted to any shortcomings in the pleadings. He said it was clear from paragraph 4 of the applicants' counterstatement accompanying Form TM8 that the applicants had indicated they had used the mark since 1990 and this had been addressed in the evidence rounds. Furthermore, the mark had proceeded to publication in the Trade Marks Journal by reason of honest concurrent use.
33. On balance, I conclude that the matter of concurrent use should be considered. However, in doing so I advised both parties that I would be following the guidance provided in the recent Registry decision on CODAS, now reported as 2001 RPC240 which states at paragraph 25, on page 248 of that decision:

"..... the mere fact that there has been honest concurrent use is not a defence, which in itself will save an application, but it is one of the "relevant" factors which should be taken into account in determining whether there is a likelihood of confusion."
34. Turning to "acquiescence", Mr Acland again stated that no mention had been made of this in the Counterstatement and was not referred to in the evidence. He also said that if this is to be relied upon the opponents should have an opportunity to investigate the matter and file a response. Mr Smith pointed out that reference had been made to a "cease and desist" letter

dated 17 October 1990, in paragraph 11 of Mr Dhamija's statutory declaration of 11 May 1998, filed as honest concurrent use in support of the application during the Examination stage and adopted to Mr Dhamija's declaration of 30 September 1999.

35. I consider this to be an unpleaded point. The reference to the opponents' letter of 17 October 1990 is obscure and at no time is it raised in the Counterstatement or in Mr Dhamija's declaration of 30 September 1999 as an issue to be addressed. However, I would comment that Exhibits relevant to the early years are few, therefore it is not clear what mark may have been objected to by the opponents or what use was being made of it by the applicants. It would appear from their exhibited Winter 1990/91 brochure that the use was largely as a de minimis element, with the applicants' FLIGHTBOOKERS element given far greater prominence. From the exhibits filed, the use of the mark appears to have changed after 1990, in some instances, to the versions giving far greater prominence to FREESTYLE such as in the brochures for later years shown in Exhibits within DD2 of the original declaration (Exhibit DD1 to the present case). Having reviewed this evidence again I consider that it was unlikely to support a defence of acquiescence.
36. I also bear in mind the comments made in an unreported recent Registry decision on TIMBERWEAR - SRIS 0/042/01, dated 29 January 2001 (Rodeo International Limited v The Timberland Co.) -
- "19. On the question of acquiescence as an equitable defence, the authors of Kerly's observe (at 13-156) that the relevant test is as set out in *Habib Bank v Habib Bank* 1982 RPC1. They conclude that "mere failure to sue, however, without some positive act of encouragement, is not in general enough to file a defence." This broadly coincides with the view expressed in Wadlow's *Law of Passing Off* (second edition at 7.23) that "the irreducible minimum of the defence is that the defendant must have altered his position on the basis of an act, omission or representation of the plaintiff in such circumstances as to make it inequitable for the plaintiff to enforce his rights." This also accords with the position taken by Pumfrey J. in a recent trade mark case to which Mr Morcom drew to my attention: *Decon Laboratories Limited v Fred Baker Scientific Limited and Another*, 13 November 2000. In that case the judge, in dismissing a claim of acquiescence, observed that "reliance is an essential ingredient of any species of estoppel.""
37. I can find nothing in the evidence which could support a claim that the applicants relied upon acts or omissions by the opponents or that the applicants altered their position as a result of the opponents' failure to follow up their alleged approach in 1990. Therefore, I do not believe that the applicants' evidence presents a prima facie defence of estoppel because of acquiescence.
38. Turning to the hearing itself, Mr Acland confirmed that the grounds of opposition to be pursued were confined to Section 5(2)(b). He also advised that he would restrict his submissions to the opponents' registered mark 1288949 only, which he considered as representing their best case. He also advised that they would not be relying on arguments that the use made of this mark has significantly enhanced its distinctiveness. The details of the opponents' mark are as follows:

No.	Mark	Specification
1288949	FREESTYLE	Arrangement and booking of travel, tours and cruises; escorting travellers and arranging the escorting of travellers; providing tourist office services; all included in Class 39.

39. Section 5(2)(b) reads as follows:

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

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

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

40. An earlier right is defined in Section 6, the relevant parts of which state:

6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v. Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG* [2000] E.T.M.R. 723.

It is clear from these cases that:-

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v. Puma AG*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to

analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;
- (g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;
- (h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v. Adidas AG*, paragraph 41;
- (i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

- 41. The respective specifications are set out earlier in the decision and it is common ground before me that identical and closely similar services are involved.
- 42. Turning to the marks themselves I find that while they are not identical they are undoubtedly very similar. The addition of the word TRAVELLING does little, in my view, to distinguish the marks given the descriptive nature of that word in relation to the services. Any distinctiveness rests in the word FREESTYLE and in so far as it is distinctive - and it is a registered trade mark which proceeded without the necessity for filing use - the later mark "captures the distinctiveness of the opponents' mark." (See Geoffrey Hobbs QC's comments in his decision sitting as the Appointed Person in Raleigh International Trade Mark, 2001 RPC 202).
- 43. Mr Smith urged me to consider that FREESTYLE is a weak mark which is entitled to limited protection. He referred to the examples of use by others exhibited in their evidence at Exhibit DD2 of the later evidence and at Exhibit DD4 of the original evidence. With the exception of the use by TWA the examples are after the relevant date and are, arguably, use as trade marks. In my view this is not sufficient evidence to demonstrate that the word FREESTYLE is common to the trade. Mr Smith also argued that the word in its everyday meaning would convey to the public, in the context of the services at issue, holidays for the more adventurous which are not pre-packaged and are individually tailored.

44. From my own knowledge of the word and its dictionary meaning I find that I agree with Mr Acland's view, as expressed to me at the hearing, that the word FREESTYLE is exclusively used in connection with sport or competitions eg. freestyle swimming, and in the absence of any significant evidence to the contrary, I do not deduce an obviously descriptive meaning in the context of holiday services as set out by Mr Smith. I noted that the applicants' mark had proceeded by reason of distinctiveness acquired through use. I do not understand the examiner's requirement for evidence, especially in the knowledge that the opponents' marks had proceeded to registration without the need for such use to be filed, and I do not consider it supports the applicants' argument that the mark FREESTYLE is descriptive and therefore a weak mark. In any event the validity of the opponent's mark has not been put at issue. It is, therefore, to be regarded as validly registered - Section 72 of the Act refers.
45. Turning now to the evidence filed in support of the applicants' mark, as indicated earlier, honest concurrent use is not a defence but is a factor which may be taken into account. Mr Dhamija's evidence shows that turnover under the mark grew from £11.8 million in 1991 to £47 million in 1997 and advertising turnover from £730,000 to £1.3 million over the same period. It also shows that the way the applicants use the mark can be separated into two styles - the majority of the examples provided show use as a strap - line to FLIGHTBOOKERS (with or without an aeroplane logo) an example is attached as Annex A to this decision. The remainder consists of use on brochures and magazines. In these examples the use consists mainly of TRAVELLING FREESTYLE being shown as separate from the housemark and with FREESTYLE used very prominently. An example is attached as Annex B. Mr Dhamija says in his evidence that the magazines are distributed to customers and contacts and the print run ranged from 40,000 to 160,000 per issue during 1992 to 1997. He also goes on to say "I believe that the trade mark appears on more than 90% of all my company's advertising material. I regard it as a major part of my company's brand identity and it is also recognised as an independent badge of origin particularly in relation to the magazine use."
46. It is clear that the applicants' mark has been used on a substantial scale. However, I consider that use as a strap-line, especially in the form shown in Annex A, cannot easily separate the identity of the mark as applied for from the housemark. Therefore such evidence does not, in my view support the mark TRAVELLING FREESTYLE (alone). Conversely, the use shown on brochures and magazines in the evidence filed seems to reinforce the confusibility with the opponents' mark, given the prominence of FREESTYLE. Such actual use of the mark in this way seems to me to be an example of "normal and fair" use (see comments in Court of Appeal decision on OPEN COUNTRY, 2000 RPC 477) and taking account of imperfect recollection and comparing the marks in a sequential way rather than side by side I consider confusion by the relevant public is highly likely. I do not say that sub-brands cannot be protected but use with a housemark creates a greater onus on the owner of the mark to demonstrate that the relevant public recognise it as a stand-alone mark and one which can be distinguished from similar marks in the market place.
47. With regard to concurrent use by the applicants I note that no evidence of confusion has been demonstrated. Mr Acland argued that this is not the test but, using the language of the Act, is there a likelihood of confusion? Furthermore, he outlined three circumstances where the fact that no apparent confusion has been demonstrated did not mean that no confusion existed:

- where the public are confused but did not raise it.
- where they are genuinely confused they would not know that there was an issue to complain about in the first place.
- where the purchaser would not have known of the earlier mark. (Mr Acland stressed this possibility, in particular, because of the opponents' minimal use of FREESTYLE during the period 1990-1997)

I find that I agree with Mr Acland's conclusion that under Section 5(2)(b) of the Act the matter comes down to a straightforward comparison of the mark assuming normal and fair use in this particular case, given the limited use of the opponents' mark during the period at issue.

48. As previously indicated I consider the marks are confusingly similar and use such as that indicated in Annex B, being "normal and fair" use of the mark applied for, can only increase the likelihood of confusion. Where, as here, the services are identical and the marks very similar there is likely to be a considerable burden on an applicant to establish that his honest concurrent use should be a significant factor in determining the likelihood of confusion. For the reasons given, and making what allowance I can for the applicants' use, I consider there is a real likelihood of confusion. Therefore the opposition succeeds under the only remaining ground, Section 5(2)(b).
49. The opposition having succeeded the opponents are entitled to a contribution towards their costs. I order the applicants to pay them the sum of £835. 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 19 day of April 2001

**R A JONES
For the Registrar
the Comptroller-General**

Annex A & B only available in paper format