

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2016328 BY
MULTI-CORE AERATORS (AUST) PTY LTD**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER
NO 48135 BY MULTI CORE AERATORS LTD**

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Multi-Core Aerators (Aust) Pty Ltd**

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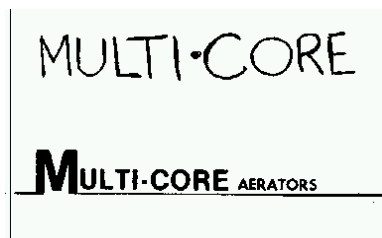
**IN THE MATTER OF Opposition thereto under
NO 48135 by Multi Core Aerators Ltd**

Background

1. On 3 April 1995 Multi-Core Aerators Pty Ltd applied under the Trade Marks Act 1994 to register a series of two trade marks shown below for a specification which reads:

Class 7

“Sports Turf Aerators.”



2. The application is numbered 2016328. The application was accepted and published and on 3 February 1998 Multi Core Aerators Ltd filed notice of opposition to the application. The grounds of opposition as set out in the accompanying statement of case are in summary:

- (a) That the opponents are the proprietors in the United Kingdom of the trade mark MULTI CORE and have applied in the United Kingdom to register the trade mark MULTI CORE (device) under Application No 2136220. The application is dated 18 June 1997 and is in Class 7 in respect of “Aerators; parts and fittings for Aerators; all included in Class 7.”
- (b) The opponents claim that the trade mark applied for under No 2016328 consists of the word MULTI CORE which so closely resembles the opponents' trade mark as to be likely to deceive or cause confusion. As such, the opponents claim that registration of the trade mark will offend the provisions of Section 5 of the Trade Marks Act 1994.
- (c) The opponents claim that their trade mark has been used continuously in the United Kingdom since 1991 upon and in relation to the goods covered by the opponents' trade mark.

3. I will deal with the statement of grounds at this point. The opponents' statement of grounds refers to an application for the trade mark MULTI CORE (device) in Class 7 filed on 18 June 1997 in their name. Reference is made to section 5 of the Trade Marks Act 1994. The filing date of the application in these proceedings is 3 April 1995. As such, the opponents' trade mark application is not an earlier trade mark within the terms of section 6 of the Trade Marks Act 1994 and can have no part in these proceedings.

4. In addition, the opponents refer to the fact that they have used the trade mark MULTI CORE in the United Kingdom since 1991 in relation to the goods for which registration is sought. I take this to be a reference to a passing off right under section 5(4)(a) of the Trade Marks Act 1994. It seems, from the skeleton argument filed by the applicants, that the applicants also took this to be a reference to section 5(4)(a). I note also that Mr Waddington in his first statutory declaration makes a specific reference to this section; see paragraph 14 of his declaration.

5. The opponents' statement of grounds also contains the following passage:

“The trade mark applied for, by reason of the pleadings herein, would not, if registration were granted, be distinctive of the applicants' goods within the meaning of the Act.”

6. It is not clear from a reading of this paragraph whether the opponents are seeking to refer to section 3 of the Act. By referring to the 'pleadings herein' I infer that they are seeking refusal of the application on the grounds that by reason of their use of the trade mark, the application would not be distinctive of the applicants' goods. As such, this is a relative ground of objection and will be dealt with as part of the opponents' ground of opposition under section 5(4)(a).

7. The applicants filed a counterstatement denying the grounds of opposition, both sides seek an award of costs. The matter came to be heard on 16 February 2001 when the applicants were represented by Ms Jessica Jones of Counsel instructed by Withers and Rogers, Trade Mark Attorneys. The opponents in a letter dated 1 February 2001 confirmed that they would not be represented at the hearing. No written submissions were received in lieu of attendance.

The Facts

8. Both sides filed evidence in the proceedings but many of the facts are not in dispute. The dispute centres around the sale of turf aerators, the sort used for aerating turf on sports grounds such as golf courses, bowling greens and football fields and the spare parts for such machines. The goods were originally manufactured in Australia by S. J Banks & Son and then by Multi-Core Aerators Pty Limited. They were sold in the United Kingdom through various distributors until 1991 when the opponents, Multi Core Aerators Limited, were appointed as UK distributors. The aerators continued to be supplied by Multi-Core Aerators Pty Ltd but there is a dispute as to the supply of spare parts for the machines which I will refer to later. It seems that Multi-Core Aerators Pty Ltd decided to enter an agreement with another UK company over sales in the UK and their commercial relationship with the opponents came to an end. Multi-Core Aerators Pty Limited filed an application for the trade mark and this has

now been opposed by the opponents.

9. The evidence filed by the opponents was in the form of a statutory declaration together with exhibits by Mr Ian Waddington, this is dated 25 August 1998. Mr Waddington is a Director of Multi Core Aerators Limited, the opponents in this matter. In addition, Mr Waddington filed a further statutory declaration together with exhibits dated 14 June 2000 in reply to the evidence filed by the applicants.

10. The applicants' filed four statutory declarations. One dated 26 October 1999 is by John Stanley Banks the Managing Director of Multi Core Aerators (Aust) Pty Ltd, the current applicants for registration. The applicants filed a statutory declaration from Mr Lundgren of Austrade, dated 29 April 1999. Austrade is an organisation established to assist Australian manufactures and service providers to market their products. A further statutory declaration dated 22 June 1999 is by Mr Peter McMaugh, Managing Director of Turfgrass Scientific Services Pty Ltd of New South Wales. Finally, the applicants filed a statutory declaration dated 26 November 1999 by Mr Albert Alan Holmes, the Course Manager of the Blairgowrie Golf Club in Perthshire. Mr Holmes, Mr Lundgren and Mr McMaugh give evidence as to their knowledge of the original applicant, Multi-Core Aerators Pty Ltd and their predecessor in title S J Banks & Son Ltd.

11. As stated above, from the evidence of both parties it is clear that much of the history of the trading in MULTI-CORE aerators in the United Kingdom is not in dispute. However, for the purpose of the decision it may be helpful to summarise the course of trading that has occurred.

12. In 1971 S J Banks & Son Pty Ltd (Banks & Son) commenced production of turf aerator machines in Australia. These early machines were sold under the name "Palmer MULTI-CORE" but they were named MULTI-CORE from approximately 1980; Mr Banks makes a statement to that effect in paragraph 4 of his statutory declaration. Although I do not find that anything turns on this point I should state that I note that exhibit JSB4 to Mr Banks' declaration shows that the name "Palmer Multi-Core" was still in use up until at least 1988; see "IOG Sports and Leisure Exhibition" Catalogue 1988.

13. In 1979 Banks & Son commenced sales of turf aerators in the United Kingdom. These sales were made through a distributor Lawn Mower Specialists Limited (LMS). This company continued to sell turf aerators manufactured by Banks & Son and later by Multi-Core Aerators Pty Limited until 1990 when LMS went into receivership. These turf aerators carried the trade mark MULTI-CORE. The pedestrian machines also carried a label which stated "Manufactured in Australia MULTI-CORE Aerators Pty Ltd". Multi-Core Aerators Pty Limited was incorporated in 1987 and acquired the business and trade mark MULTI-CORE, from Banks & Son. Mr Banks was a director of both companies.

14. Mr Waddington of the opponents was the Sales Manager with LMS from 1985 until it went into liquidation and he then became an Area Sales Manager with Open Sales Limited. Open Sales Limited trading as Multi-Core Europe, sold some four turf aerators in the period 1990-1991 until it too ceased to import these machines. In 1990 six turf aerators were sold through a new distributor, Golf and Turf Equipment Limited. Some 84 machines were sold

between the period November 1979 and October 1991. In October 1991 the opponents, Multi Core Aerators Ltd were appointed under a verbal agreement as sole UK distributors of Multi-Core Aerators Pty Limited. Multi Core Aerators Ltd was set up to import turf aerators manufactured by Multi-Core Aerators Pty Ltd. Mr Waddington, his wife and Mr Harding were sole directors and share holders. Later Mr Harding left the company and his shares were purchased by Mr & Mrs Waddington.

15. Multi-Core Aerators Pty Ltd filed the application in suit on the 3 April 1995 and it seems that the opponents were unaware of this and they continued to sell MULTI-CORE turf aerators supplied by Multi-Core Aerators Pty Ltd until December 1995 or February 1996 when the distribution agreement was terminated. During this four year period, when the opponents were selling the MULTI-CORE turf aerators, some 140 machines were sold including one sourced from a distributor in Holland. This increase in the number of sales is said by the applicants to be due to improvements in technology but I think that it is due in no small part to the energy and commitment of the opponents in marketing the product.

16. The opponents' evidence outlines the steps that they took to ensure that their business was a success this included advertising, attendance at exhibitions, demonstrating the product to potential customers and providing an after-sales service both for repairs and spare parts. Turnover for the company increased from around £184,564 in the first twelve months to £319,617 for the period August 1994 to July 1995. By April 1995 customers for the MULTI-CORE product were spread throughout the whole of the United Kingdom including inter alia; Carnoustie Golf Links, Royal Lytham & St Annes Golf Club, Blackburn Rovers, Norwich City, Rangers, Celtic, and Nottingham Forrest Football Clubs. All of this trade being carried out under the name Multi Core Aerators Limited. Although Mr Banks states in his declaration that some of the customers listed above were existing customers of MULTI-CORE products before the opponents were appointed as distributors.

17. Throughout the period from 1980 though to 1995 the various distributors of the MULTI-CORE aerators attended exhibitions at which the aerators were displayed. Mr Banks attended some of these exhibitions in the United Kingdom; details and photographs are attached as exhibits to his declaration. Whilst Mr Waddington disputes some of the dates given for the photographs, he does not dispute that Mr Banks attended some of these exhibitions at which the MULTI-CORE turf aerators were on show. Indeed, Mr Banks' attendance at these exhibitions seems to have continued during the time when the opponents were the UK distributors for the MULTI-CORE product. In addition, Mr Banks oversaw the delivery of certain machines to customers in the UK; see exhibit 19 which shows the delivery of a turf aerator to Sheffield University said to be in 1992.

18. The various distributors also advertised the products for sale in trade journals. Examples of an advertisement from the October 1991 edition of "Greenkeeper International" is shown at exhibit JSB3 to Mr Banks' declaration. This shows an advert for the MULTI-CORE aerator placed by Multi-Core Europe. The December 1991 edition of the same journal is also shown at exhibit JSB3 and shows a substantially identical advert but with the opponents shown as the contact address.

19. As stated above, the distributors of the product also attended various exhibitions such as

the Institute of Groundsmanship International Exhibition and SALTEX Exhibition. Catalogues from these exhibitions were submitted in evidence. In addition, various promotional material including brochures and video cassettes were supplied by S J Banks & Son and then by Multi-Core Aerators Pty Limited to LMS when they were its distributors in the UK. These brochures all referred to the fact that the products were “Made in Australia”. There is some dispute as to whether these brochures were actually used. Mr Waddington says that they were not as they were of “very poor quality”. Mr Banks states that examples of the brochures can be seen in use on the photographs of the exhibitions. Brochures can be seen in some of the photographs but I am unable to establish whether these are the brochures supplied by Mr Banks.

20. It seems that previous distributors of the MULTI-CORE product emphasised the fact that the products were imported. For example, the Catalogue from the “Institute of Groundsmanship International Exhibition” 1985 where Lawn Mower Specialists describe themselves as the “main distributors throughout the UK of the Palmer Multi-Core, imported from Australia”. In another catalogue, dated 1986, the same company describe themselves as “sole UK concessionaires for the Palmer Multicore range”. All at exhibit JSB4. At exhibit JSB33B the applicants exhibit a leaflet from Golf & Turf Equipment Ltd which is headed “Sole UK importers of the MULTI CORE hollow tining machine”.

21. As noted above, there is a dispute as to whether the opponents could obtain spare parts for these machines from Multi-Core Aerators Pty Ltd. Mr Waddington states that the spare parts were not available and so were sourced from within the UK and then supplied by the opponents under the trade mark, although no date is given for the first sales of these independently sourced spare parts under the trade mark. The assertion that spare parts could not be obtained is disputed by Mr Banks who states that spare parts were sold to the applicants. Mr Waddington states at paragraph 14 to his second statutory declaration:

“The statements made by Banks in paragraph 22 of his declaration are untrue, and attached as Exhibit IW1 is a bundle of faxes from my company to Banks’ company evidencing the fact that spare parts were not and would not be forthcoming from Banks’ company. This was especially so towards the end ie when Banks sold his rights to the machines and spare parts to John Deere by an Agreement dated 20th March 1995, the existence of this Agreement being unknown to myself and my company until after February 1996.”

22. The relevant date in these proceedings is 3 April 1995. The exhibits at IW1 are various faxes from Multi-Core Aerators Ltd to “John” at Multi-Core Aerators Pty Ltd, I assume this to be Mr John Banks. Those of the faxes that are dated, range from 15 October 1992 through to 10 September 1996. They relate to the supply of various spares for the turf aerators. I give some examples of the faxes at IW1. One dated 26.8.96, after the opponents say they became aware of the agreement between the applicants and John Deere states “I NEED A DEFINITE DELIVERY DATE AS I HAVE CUSTOMERS WAITING FOR THEM”. Another dated 23.3.94 reads:

“...WE ALSO NEED SENDING MORE 711004 MINI HOLLOW THE 150 YOU HAVE SENT ARE SOLD AND THEY HAVEN’T EVEN ARRIVED. WE ALSO

NEED TO KNOW APPROX ETA OF NEXT CONSIGNMENT & CONTENTS TO ADVISE CUSTOMERS WITH OUTSTANDING ORDERS, I PRESUME ALL OUTSTANDING SPARES ORDERS HAVE BEEN COMPLETED.”

A further fax dated 9.3.94 ends:

“THE FLEXI LINK BRACKETS ARE URGENT. WE HAVE A MACHINE IN BITS AND THE CUSTOMER IS GETTING RATHER IRATE!!”

23. What this seems to show to me is that despite difficulty in obtaining parts supplied from Multi-Core Aerators Pty Ltd, the opponents continued to look to them for the supply of spare parts for the machines. None of these documents show that the opponents were sourcing their own spare parts from another source. The opponents also make reference to them designing and manufacturing their own machines. I am given no date for this but Mr Waddington states at paragraph 16 of his second statutory declaration:

“Since Multi-Core Aerators Pty Limited.....unilaterally and wrongly terminated the Agreement between that company and my Company, without prior and reasonable notice, my Company was left with nothing to sell, despite having substantial goodwill and a very good reputation in the industry, such that in the circumstances I set about designing my own machines....Subsequently I began manufacturing my machines through an associate company and selling the new machines under the trade mark MULTI CORE....”

24. From this evidence I infer that these new machines were sold after the agreement between the two parties broke down and therefore outside the relevant period in these proceedings.

25. Following the filing of the notice of opposition and the counter-statement in these proceedings, the application filed in the name of Multi-Core Aerators Pty Ltd was subsequently assigned to Multi-Core Aerators (Aust) Pty Limited. Mr Banks is the Director of this company and he states in his evidence that the current applicant is the successor in title of the original applicant. I have no evidence to support that statement but I do not find that anything turns on this point. The relevant date is the date of the application and I must determine whether as at that date, the ground of opposition is made out. At that date, the applicants were Multi-Core Aerators Pty Ltd. The subsequent assignment of the application is not relevant to that test.

26. That concludes my review of the evidence.

Decision

27. As stated above, it seems to me that the opponents’ only ground of opposition is under section 5(4)(a) of the Trade Marks Act 1994. This reads:

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

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

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

28. The conventional test for determining whether the opponents have succeeded under this section has been restated many times and can be found in the decision of Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, in *WILD CHILD Trade Mark* [1998] RPC 455. Adapted to opposition proceedings, the three elements that must be present can be summarised as follows:

- (1) that the opponents’ goods have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the applicants (whether or not intentional) leading or likely to lead the public to believe that goods offered by the applicants are goods of the opponents; and
- (3) that the opponents have suffered or are likely to suffer damage as a result of the erroneous belief engendered by the applicants’ misrepresentation.

29. That said, this is not a conventional case. In my view the evidence submitted by both parties showing the sales, attendance at exhibitions and advertising allows me to find that there is a goodwill and reputation in the trade mark MULTI-CORE in the United Kingdom. However, in order to succeed in a passing off action, the opponents must show that MULTI-CORE is associated in the minds of a substantial number of the purchasing public specifically and exclusively with them; per Lord Oliver *Reckitt & Colman Products Ltd v. Borden Inc* [1990] 1 All ER 873. Therefore, the question to be resolved in these proceedings is to whom did that goodwill accrue.

30. Ms Jones referred me to the relevant passages of “*The Law of Passing Off*” by Christopher Wadlow. In addition, I made reference to two recent case dealing with the question of ownership of goodwill, that is the decision of the Court of Appeal in, *Scandecor Development AB v. Scandecor Marketing AB and another* [1999] F.S.R. 26 and the decision of the High Court in *MedGen Inc v. Passion for Life Products Ltd* (unreported). At the time of the hearing, the decision in *Scandecor* was before the House of Lords. Their Lordships have issued a judgment (4 April 2001) but certain issues are to be referred to the Court of Justice. Therefore, I have proceeded on the basis of the decision of the Court of Appeal. Before considering Ms Jones’ submissions, I note that the agreement between the parties was a verbal agreement and I note the comments of Mr Garnett QC sitting as a Deputy High Court judge in *MedGen* at paragraph 2 where he stated.

“Yet the Court of Appeal warned in *Scandecor Development AB v. Scandecor Marketing AB* at 39, where there is no agreement which regulates the parties rights, the problem:

‘...is ultimately soluble only by a factual inquiry [with] all the disadvantages of the length of its duration, the costs of its conduct and the uncertainty of its outcome’.”

31. Ms Jones referred to paragraph 2.53 of Wadlow where it states:

“Goodwill is created by trading activities, but it often happens that more than one business is involved in the sequence which results in goods or services being made available to the consuming public. If so, then the question arises of which of those businesses is the owner of goodwill.....The problem arises in two main contexts. One is where two or more businesses which have previously worked together fall out.....”

32. Ms Jones submitted that this was the situation here. I agree.

33. Relying on *Oertli v. Bowman* [1959] R.P.C. 1, Wadlow suggests that there are two questions that one should ask when seeking to determine the ownership of goodwill. One is to ask, who is in fact most responsible for the character or quality of the goods; the other is to ask who is perceived by the public as being responsible. The latter is said to be the more important of the two.

34. Ms Jones argued that the answer to both questions must be her clients, the applicants. Wadlow then goes on to expand on these two questions and poses the following questions; at page 103.

- “(a) Are the goods bought on the strength of the reputation of an identifiable trader?
- (b) Who does the public perceive as responsible for the character or quality of the goods? Who would be blamed if they were bad?
- (c) Who is most responsible in fact for the character or quality of the goods?
- (d) What circumstances support or contradict the claim of any particular trader to be the owner of the goodwill? For example. Goodwill is more likely to belong to the manufacturer if the goods are distributed through more than one dealer, either at once or in succession. If more than one manufacturer supplies goods to a dealer and they are indistinguishable, the dealer is more likely to own the goodwill.”

35. Again Ms Jones argues that the answer to all the above questions is the applicants. Ms Jones also referred to the section in Wadlow dealing with Foreign businesses and their representatives; at page 107. This states:

“A foreign business may have a goodwill in the jurisdiction even though it may not

trade here in its own right. It is sufficient that customers for its goods are to be found here, whether or not the foreign business is in direct contractual relations with them. In particular, if the foreign business is represented by a legally distinct person of whatever capacity then the goodwill will in general belong to the foreign business rather than its local representative **provided that the foreign business is recognised as the ultimate source of the goods.**”[my emphasis].

36. It seems to me that Wadlow and the decisions of the courts in *Scandecor* and *MedGen* indicate that the question of whether goodwill existed, and in respect of whose business, are questions to be decided on the particular facts of the case; *Scandecor* at page 41. I have already found that the necessary goodwill exists so I must now determine to whom that goodwill has accrued.

37. The first of the questions posed by Wadlow is to ask who is in fact most responsible for the character or quality of the goods?

38. From the evidence, it seems to me that the answer to that question must be the original applicants for the trade mark and their predecessor in title. They have been manufacturing turf aerators since 1971 and exporting them to the United Kingdom from 1979. As noted above, although the opponents claim to have manufactured their own machines this seems to have occurred after the breakdown of their commercial relationship with the original applicants. Spare parts were clearly ordered from the original applicants and although there appears to have been some difficulty in obtaining those spare parts the opponents continued to order spare parts from the original applicants.

39. What the opponents’ evidence does show, in my view, is that they themselves saw the applicants as responsible for the quality of the goods. A facsimile dated 15 October 1992 from the opponents to the original applicants identifies a problem with the machines and asks, “PLEASE REPLY WITH A SOLUTION ASAP”.

40. The second question is to ask who is perceived by the public as being responsible for the goods. In answering this question I should have regard to the nature of the relevant public. The relevant public are those responsible for the upkeep of sports pitches, golf courses and the like. As such, they would be fairly knowledgeable about the products on the market. Further, these are expensive machines and the decision to purchase them would not be taken lightly. This would seem to be a specialised market. As such, a purchaser would no doubt make enquiries as to the origin of the goods and the availability of spare parts.

41. The fact that the MULTI-CORE turf aerators were imported and that the products were obtained from Australia was emphasised by some of the previous distributors and the pedestrian machines carried a sticker to that effect. It seems to me that the fact that the goods were manufactured in Australia would be known to a large proportion of the relevant public. Mr Banks’ attendance at various exhibitions and his limited involvement in a small number of sales would have reinforced the link with the Australian manufacturer.

42. My view is supported by the opponents’ use of an advert substantially identical to the advert used by the previous distributor; see exhibit JSB3 referred to above. This would, in my

view, lead anyone familiar with these adverts to the conclusions that there had been a change in the distributor of the machine. A facsimile from one of the original applicants' customers, dated 18 November 1991, shortly after the opponents were appointed as distributors for the machines, at exhibit JSB38, indicates that this customer was aware of the "new distributor Ian Waddington".

43. The opponents say that they did not use the brochures provided by Multi-Core Aerators Pty Ltd but I am given no information from the opponents as to the sales brochures that they used during their time as the applicants' distributors. Without such information I cannot determine whether the opponents referred to themselves as manufacturer or whether they referred to the fact that the products were made by Multi-Core Aerators Pty Ltd in Australia.

44. The evidence of Mr Holmes is submitted by the applicants to support their contention that the goodwill went to them and not to the opponents. I take note of his evidence in so far as he indicates that he knew of the original supplier of these products S J Banks & Son and that he knew that they changed their name to Multi-Core Aerators Pty Limited. I note that he was aware of their products from 1986-7 and that he was aware that these products were distributed in the UK at that time by Lawn Mower Specialists. I do not place too much weight on this evidence since Mr Holmes is merely one of many customers, however, given the factors outlined above, I do not find his evidence surprising and its substance was not contradicted by the opponents. Mr McMaugh states that he was aware of the fact that the goods were originally produced by S J Banks & Son and of the subsequent change of name. I note that he states that he used slides showing MULTI-CORE turf aerators at presentations in the UK but that the details of such presentations are not given. I should state that I place less weight on the evidence of Mr Lundgren, from the Austrade, I note that he attended some of the exhibitions but he is not from the relevant public and I take no account of his views as to whom the public would associate the trade mark MULTI-CORE.

45. The facts in *MedGen* concerned a US manufacturer and a UK distributor. The court found that the goodwill went to the UK distributor. In seeking to distinguish the decision of the court in *MedGen*, Ms Jones noted that whilst that case concerned a US manufacturer and UK distributor, the facts showed that the UK distributor was introducing a new product onto the market in the UK and that the public were unaware of the US manufacturer. In her view that was not the case in the instant proceedings. I agree, the facts in this case can be distinguished from *MedGen* as the opponents were not starting from scratch and introducing a new product and trade mark onto the market. In 1991 when the opponents were appointed as distributors there was in my view an existing goodwill and reputation in the trade mark MULTI-CORE. This goodwill was associated in the minds of the relevant public originally with the company S J Banks & Son and subsequently Multi-Core Aerators Pty Limited.

46. The burden of proof in opposition proceedings is on the opponent and had they wished to show that the relevant public perceived them as being responsible for the goods then they should have filed evidence to show that was the case. In my view they have not filed such evidence. The opponents may well have acquired a goodwill and reputation for their services in obtaining and supplying the MULTI CORE machines and spare parts and in providing technical backup and servicing but I reach the view that all the evidence points to the goodwill for the turf aerators and the spare parts continuing to accrue to the Australian manufacturers

during the opponents' period as distributors of the MULTI-CORE products.

47. On the basis of the above, I find that the opponents have failed to show that at the relevant date MULTI-CORE was associated in the minds of a substantial number of the purchasing public specifically and exclusively with them. I find that at the relevant date the goodwill and reputation in the trade mark would have subsisted in Multi-Core Aerators Pty Limited, the Australian manufacturer and original applicant for the trade mark. As such, I find that the opponents have failed to make out their ground of opposition under section 5(4)(a) and therefore, the opposition is dismissed.

48. The applicants have been successful and are entitled to a contribution towards their costs. In making the award of costs I take into account the fact that the applicants filed detailed evidence. Given the complexity of these proceedings this was necessary. The applicants also attended the hearing and briefed counsel, a decision which was perfectly justifiable.

49. Therefore, I order that the opponents should pay the applicants the sum of £1300. This sum to be paid within seven days of the expiry of the appeal period or within 7 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 30TH day of April 2001

S ROWAN
For the Registrar
the Comptroller-General.