

**IN THE MATTER OF APPLICATION NUMBER 2133279  
IN THE NAME OF DESIGNER COSMETICS OF LONDON LIMITED  
TO REGISTER A TRADE MARK IN CLASS 3**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NUMBER 50195 BY THE GILLETTE COMPANY  
& GILLETTE GROUP UK LIMITED AS JOINT OPPONENTS**

**IN THE MATTER OF application number 2133279  
in the name of Designer Cosmetics of London Limited  
to register a trade mark in Class 3**

**And**

**In the matter of opposition thereto under number 50195  
by The Gillette Company & Gillette Group UK Limited as joint opponents**

**Background**

On 20 May 1997, Designer Cosmetics of London Limited filed an application to register the trade mark NATURESS PURE CARE in Class 3 in respect of the following goods:

Soaps, perfumery, essential oils, cosmetics, hair lotions.

On 23 September 1999, The Gillette Company & Gillette Group UK Limited, as joint opponents, filed notice of opposition to this application in which they say they are the proprietors of three trade mark registrations, details of which can be found as an annex to this decision. The grounds of opposition are in summary:

- 1. Under Section 5(2)(b)** because the mark applied for is similar to the opponent's NATREL trade marks and there exists a likelihood of confusion on the part of the public.
- 2. Under Section 5(4)** by virtue of the law of passing off.

The applicants filed a counterstatement in which they admit that there is a degree of overlap in the goods of the application and the opponent's registrations, but deny the grounds on which the opposition is based. Both sides requests that an award of costs be made in their favour.

Both sides filed evidence in these proceedings. The matter came to be heard on 23 April 2001, when the applicants were represented by Mr Ablett of Ablett & Stebbing, their trade mark attorneys, Mr Christopher Morcom of Her Majesty's Counsel, instructed by Gillette Management Inc. represented the opponents.

**Opponent's evidence**

This consists of a Statutory Declaration dated 25 February 2000, and comes from Andrew James Redpath, Assistant Secretary of The Gillette Company (a company incorporated in

the United States of America), and a Director of Gillette UK Limited and Gillette Group UK Limited who are responsible for the manufacture, export and/or marketing of various products including the products NATREL and NATREL PLUS in the United Kingdom. Mr Redpath confirms that he has been employed by United Kingdom subsidiaries of the company for 31 years, and that he is duly authorised to make the Declaration, the facts contained within being derived either from the records of the companies, or based on information provided to him.

Mr Redpath says that through his employment he has acquired extensive experience of toiletry and cosmetic products and the trade marks used on such products. He refers to his company's United Kingdom registrations for the trade mark NATREL and NATREL PLUS, details of which are contained in the registration documents shown as exhibit AJR1, and to the launch of a range of deodorants and anti-perspirant products under the NATREL PLUS trade mark in January 1988. Mr Redpath says that exhibit AJR2 contains samples of some of the products illustrating the manner in which the mark is used. The exhibit consists of sprays, gel stick and roll-on deodorant/anti-perspirant with the word NATREL running vertically with the word PLUS running horizontally above. It is not possible to date these exhibits.

Mr Redpath goes on to give the following figures for sales of NATREL PLUS since its launch:

	<b>Volume sales</b>	<b>Value sales £</b>
1997	14,873,000	14,915,000
1998	14,635,000	14,638,000
1999	11,646,000	11,786,000
2000 (projected)	11,080,000	10,765,000

Mr Redpath gives approximate figures for advertising expenditure for the years 1997 and 1998, which are £1,184,000 and £770,000 respectively, saying that figures for 1999 and 2000 are not available and that the projected spend for 2001 is £3,000,000. He says that sales have taken place throughout the United Kingdom and he goes on to list the principal towns where sales have taken place.

Mr Redpath next refers to exhibit AJR3, which he says comprises specimens of advertising and promotional materials for the NATREL PLUS products. The exhibit details the sales achievements of products released under NATREL PLUS and copies of advertisements, all of which show the mark as described in exhibit AJR2. The advertising materials refer to their launch of the NATREL range in 1988. He goes on to refer to exhibit AJR4 which consists of a sheet giving details of the point-of sale materials used to promote the NATREL products, all of which bear the mark as described earlier. Mr Redpath next refers to the promotion of a new fragrance that included the issue of a money-off coupon

shown as exhibit AJR5. The coupon bears the representation of an aerosol and roll-on anti-perspirant bearing the NATREL PLUS mark, showing a redemption date of 31 Jan 1999 which would seem to place it after the relevant date.

Mr Redpath refers to a promotion by his company in May and June 1990 in conjunction with the World Wide Fund for Nature that achieved a donation of £100,000 to that organisation's rainforest appeal, the money being raised based on purchases of NATREL PLUS products and sales of T-shirts. He also refers to another promotion in 1990 in which some £250,000 was spent, and goes on to say that since 1988 products in the NATREL PLUS range have been featured in promotional advertisements placed by wholesalers in trade magazines although does not give any specific information.

Mr Redpath goes to conduct an analysis of the mark applied for, saying that is essentially the ordinary English word NATURES with an additional letter "S", and means "from nature" in combination with two ordinary words PURE and CARE. He says that NATURE and NATURES are in common use in relation to toiletry and cosmetic goods and that many such products (including the opponent's NATREL PLUS range) are promoted on the basis that they are derived from nature or are natural, and as a result, that the mark applied for is entirely descriptive and non-distinctive for such products. Mr Redpath says that the mark applied for and his company's trade marks are similar and that he believes confusion will arise, inter alia, through the similarity of prefix, terminal letter, and unclear pronunciation, and he outlines circumstances that he considers will add to the likelihood of confusion. He concludes his Declaration by saying that he considers the opponents to have established their case, either to deny the registration in its entirety, or in the alternative, to allow it to proceed for a limited range of specified goods.

### Applicant's evidence

This consists of a Statutory Declaration dated 13 June 2000, and comes from Faisal Lalani, Managing Director of Designer Cosmetics of London Limited, a position he has held since 1999, having been with the company since 1997. Mr Lalani confirms that the information set out in his Declaration comes from his own personal knowledge of the company's activities or from relevant records or documents to which he has access.

Mr Lalani says that the trade mark NATURESS PURE CARE was first used in the United Kingdom in March 1997 in relation to cosmetics and toiletries. He refers to exhibits FL1 to FL4, which consist of:

- an undated copy of a sales leaflet for NATURESS products, NATURESS running vertically up the container, the words PURE CARE being used in conjunction with other descriptive terms, e.g., PURE **BODY** CARE.
- photographs of containers showing the mark as described above.

- details of trade mark registrations for marks incorporating the words NATURE, NATURE'S and NATURAL.
- a Statutory Declaration dated 20 April 2000 by Bimal Thakkar, a Director of Michael Margo Limited, in which Mr Thakkar claims a knowledge of the brands used in connection with toiletries and cosmetics in the United Kingdom dating from 1992, to having known of the applicant's mark in this connection since February 1997, to his awareness of the opponent's mark NATUREL PLUS, and his views on the lack of similarity of the opponent's and the applicant's trade marks.

Mr Lalani says that the wholesale turnover figures for sales of NATURESS toiletries and cosmetics shown in the exhibits amount to £990,170 for the year ending August 1999, which represents some 2.5 million units, and that these sales have taken place throughout the United Kingdom.

Mr Lalani refers to Mr Redpath's assertion regarding the lack of distinctiveness of NATURESS PURE CARE, refuting the suggestion that NATURESS is NATURES, and that the addition of the words PURE CARE further assists to distinguish. He refers to the registrations detailed in exhibit FL3 which he says support the contention that NAT and NATURE marks when augmented in some way are acceptable for registration.

He says that the exhibit shows that NAT prefixed marks are common in respect of toiletry and cosmetic products, and that NATURE is commonly used in respect of such goods, and consequently the respective marks share a generally available term. Mr Lalani goes on to conduct a comparison to establish why he considers the respective marks not to be similar, referring in particular to the NATREL part of the opponents mark which has two syllables whereas NATURESS has three, to the likely difference in the pronunciation and sound of the letter A in the first syllable and terminal letters, the significance of the letters TR in NATREL, and the additional elements. He also discounts the assertion that letters in the middle of words become obscured.

Mr Lalani goes on to look at the use that the opponents have made of their mark, noting in particular that the word PLUS is used in much smaller letters and at an angle to the word NATREL.

He refers to the Declaration of Bimal Thakkar, which he says supports his view that NATURESS PURE CARE is a distinctive mark and is not confusingly similar to the opponent's mark NATUREL PLUS. He comments that the opponent's registration and evidence of use for NATREL PLUS only covers deodorants, anti-perspirants, perfumery and perfumed body sprays, and it is in respect of these goods alone that they will have any goodwill.

### **Opponent's evidence in reply**

This consists of a second Statutory Declaration dated 4 August 2000 from Andrew James Redpath.

Mr Redpath comments on the significance of the turnover that the applicants attribute to sales under NATURESS PURE CARE. He accepts that the respective marks are not identical and goes on to refer to exhibits AJRa which consist of details of trade mark registrations for the words BODY MIST.

Mr Redpath says that the packaging for NATREL PLUS has five main graphical elements:

vertically orientated trade mark running from bottom to top, which in his experience is a feature distinctive of his company.

trade mark represented in upper and lower case, a feature when combined with the orientation is protected by registration No. 157888031.

extended upper graphics panel separated from a lower graphics panel by the products fragrance name in upper case.

He refers to exhibit AJRb which consists of a picture of NATREL PLUS along side NATURESS PURE CARE, Mr Redpath asserting that the NATURESS PURE CARE pack almost exactly replicates these five elements, the only difference being that a text box of similar proportions in the NATURESS PURE CARE imitates the lower graphics of the NATREL PLUS pack.

Mr Redpath refers to the Declaration of Mr Thakkar, exhibited by the applicants, and to a company report shown as exhibit AJRc that shows Mr Thakkar's company to be household goods, stationery, toys and fancy goods importer and wholesalers, from which Mr Redpath concludes that Mr Thakkar is unlikely to be a significant expert on matters relating to the cosmetics and toiletry business. Mr Redpath also refers to an apparent inaccuracy in Mr Thakkar's statement that he has a recollection of the NATURESS PURE CARE mark dating from February 1997 because this pre dates the date of the formation of the applicant's company (shown by exhibit AJRd to be 12 March 1997) and the launch of NATURESS PURE CARE. He concludes this Declaration by repeating his claim that the application should not be registered, or in the alternative, should be registered for a limited specification of goods.

That concludes my review of the evidence insofar as it is relevant to these proceedings.

## Decision

Turning first to the ground under Section 5(2)(b). That section reads as follows:

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

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

An earlier trade mark is defined in Section 6 of the Act as follows:

**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,

In my consideration of a likelihood of confusion or deception 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. 2, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schufabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] 45 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 Schufabrik 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; 15 (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 30 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.

The opponents rely on three earlier marks, one for the word NATREL, and two for the words NATREL PLUS, one of which is for a series including the word NATREL both on the horizontal, and running vertically from bottom to top (& vice versa) with the word PLUS at right angles to NATREL. The vertical positioning of the word is one of five features that the opponents say is distinctive to their mark.

Each of the opponent's earlier trade marks is registered in respect of goods that are identical to some of the goods of the application, and in respect of one, number 1312710 I would say in respect of the specification of the application it is identical in its entirety. Given this, I see no reason why the relevant consumers should not be one and the same, nor why there should be any differences in the channels of trade, be it at the manufacturing, wholesaling or retailing stage, and it seems most likely that the applicant's and the opponent's goods will be displayed alongside one another.

Goods such as toiletries are likely to be obtained by self selection, making visual similarity of greater significance. In my experience, perfumes will usually be kept behind a counter



and purchased by enquiry from a sales assistant, and although in such cases aural similarity will be of primary importance, visual similarity cannot be ignored.

Toiletries, soaps, shampoos, hair preparations and the like come in a wide range of versions, be it fragrance, the gender of the intended user, hair type for shampoos, colours for hair dyes, etc, all sold under the same brand name, and although some may be relatively inexpensive items, they will still attract a degree of care in their selection to ensure the required product is obtained. Perfumes on the other hand are relatively expensive and consequently will attract a high degree of care in the selection and purchase. The opponents case essentially relies upon imperfect recollection, but given the factors I have mentioned and taking into account that the word NATURE and NATURES are said to be commonly used in the trade in connection with such goods, I consider that the average consumer, who is deemed to be reasonably well informed, will be even more observant and circumspect.

Turning to the respective words. It is clear that marks should be compared as a whole, but with due regard paid to the dominance and distinctiveness of the elements, and the overall impression created by the mark. Both sides have conducted a detailed analysis of the respective marks, the opponents highlighting the similarity in their beginnings, that the applicant's mark is essentially the word NATURE, a word which they say is widely used, (including by themselves) to promote cosmetics and toiletries on the basis that they are derived from nature or are natural. The applicants in turn refer to the differences in the number and sound of the syllables, in particular, to the likely difference in the pronunciation of the letter A in the first syllable, the impact of the letters TR on the sound of NATREL, and to the additional words PURE and CARE..

Both sides accept that the words NATURE and NATURAL are commonly used in the promotion of toiletries, cosmetics, etc, to indicate that the product is natural or made of natural ingredients. Whilst there is no evidence that supports this (other than the trade mark registrations which do not establish use in the market), it seems to me quite likely that this is an association that traders in such products would wish customers to draw.

Both NATREL and NATURESS are in my view invented words, albeit with a not very covert or skilful allusion to their source. In *The Eastman Photographic Materials Company Ltd's application 15 RPC 476 (the Solio case)* Lord Herschel said:

“If the word be an “invented” one, I do not think the quantum of invention is at all material. An invented word is allowed to be registered as a trade mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases.”

The word NATREL is not that far away in spelling or sound from the word NATURAL, although the lack of a letter U between the letters T and R does make a difference in the

appearance and sound of the word, but if, as the opponents say, there is a tendency to slur the middle of words, this distinction in sound may become almost unnoticeable. The opponent's mark NATREL is clearly not regarded as being, or close to the word NATURAL, for if it were, by the opponent's own admission it would be devoid of the character necessary for registration (I do not consider that the word PLUS changes this). I believe it follows that NATREL should not necessarily be regarded as similar to other marks comprised of words derived from NATURAL. But it is, in my view a trade mark that, prima facie, warrants a narrow penumbra of protection, and as such, there will need to be a strong resemblance in the entirety of the later mark if there to be a finding that the two are similar.

The word NATURESS clearly contains the word NATURE or NATURES, with one or more additional letters S at the termination. That there are two letters S at the end of the mark makes a significant difference to the appearance of the word (as much so as the lack of a letter U does to the opponent's mark) and in my view has an even more significant impact on the pronunciation. It is well established that words are not spoken with regard to each and every letter and syllable, but even allowing for slurring of the middle to NATRESS, the termination of the word is clearly a strong element.

There are, of course other elements in each mark, PLUS in the case of the opponent's mark, and PURE CARE in respect of the mark applied for. The word PLUS is in my experience commonly used in trade marks to indicate that the goods have, or can give something extra, and this word cannot be regarded as being particularly distinctive. The words PURE CARE are individually wholly descriptive of the relevant goods, but in combination I would say less so. I am, however, conscious that these words are separated in the mark applied for, seemingly to enable another word to be placed in between, which is exactly what the evidence shows to be the case with the words "hair" or "body" being used in the space to form wholly descriptive expressions. In both cases, the additional words are obviously intended to convey a particular description or idea in relation to the goods, and are likely to be regarded as such by the consumer. I have little doubt that it will be the words NATREL or NATURESS that will be regarded and remembered as the name of the product, and that these words are the dominant distinctive component. However, it is clear that marks should be compared as a whole and the other elements cannot be ignored for they have some impact on the visual, oral and conceptual similarity of the respective marks.

With all of the above in mind, I have little difficulty in arriving at the view that NATREL and NATURESS are not similar, and that when the additional word elements are taken into account, that the marks are even farther apart.

The opponents say that they launched a range of deodorants and anti-perspirant products under the NATREL PLUS trade mark in January 1988, and although there is no specific evidence of this, exhibit AJR2 makes reference to this being the case. Figures relating to

turnover and volume sales of products sold under the NATREL mark are impressive, as is the expenditure on promotion, but they all date from 1997 and at best cover a period of approaching five months prior to the date of application, and consequently, it is not possible to gauge the likely extent of the reputation accrued at the relevant date. Given the scale of the figures it seems likely that sales prior to the relevant date may also have been significant, but in the absence of evidence I am not prepared assume that the mark warrants exceptional protection.

The opponents not only rely on what they see as the similarity in the respective words, but also the manner in which they may be used. They say that along with other features, the word NATREL running vertically from bottom to top, and particularly in upper and lower case, is a feature distinctive of them and protected in registration No.1578031. This brings in the question of whether the normal and fair use notionally assumed would encompass use of the mark applied for in such a manner. Although the application does not specify how the mark will be used, I do not consider that to assume that the applicants may use NATURESS in the same vertical style goes beyond the boundaries of normal and fair use, for their own evidence shows this to be the case, and what better illustration of normal and fair use can there be than actual use. However, even if this vertical representation of the word were to be accepted as a distinctive feature, this does not mean that any word represented in such a way would be found to be similar, but in my view may justify a broader interpretation of what would be considered similar. Beyond the claim made in the Statutory Declaration by Mr Redpath, there is no evidence that establishes this vertical orientation to be a feature distinctive of the opponents.

The opponents also refer to a number of other features, namely, an extended upper graphics panel separated from a lower graphics panel by the products fragrance name in upper case. Their earlier trade mark is not registered in respect of such features and notwithstanding the evidence of use I do not consider that this should be a material consideration, at least not under Section 5(2)(b).

Taking all of the above factors into account and adopting the “global” approach advocated, I come to the view that a person familiar with the opponent’s mark, may, on seeing the applicant’s mark in use, recall the mark that they already know, but will not be deceived into believing that they are seeing the same mark, a mark from the same stable, or from an undertaking linked to the opponents. Accordingly, the ground founded under Section 5(2)(b) fails.

Turning to the ground under Section 5(4)(a). That section reads as follows:

**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

The opponents contend that they would succeed in an action for passing off against the applicants should their mark be used in the United Kingdom. A helpful summary of the elements of an action for passing off can be found in Halsbury's Laws of England 4th Edition Vol. 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd - v - Borden Inc* [1990] RPC 341 and *Erven Warnik BV - v - J. Townend & Sons (Hull) Ltd* [1979] AC 731 is (with footnotes omitted) as follows:

The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

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

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of "passing off", and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that;

To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

- 0.2 that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”

The opponent's claim to goodwill suffers from the same defects that I have mentioned in regard to their reputation, in that they may well have been using NATREL since 1988, but there is little in the way of evidence prior to the relevant date that establishes the extent of any sales under the mark. Even if I were to accept that given the length of use, and the value of sales at the relevant date that it is likely that the opponents will have established significant goodwill in their mark, this will only be in relation to deodorants and anti-perspirants, but even so, this is the same area of trade as the applicants.

I have already found the marks NATREL and NATURESS not to be similar, and to be even less so when the additional words PLUS and PURE CARE are brought into the equation. However, the opponents claim other features that they say are distinctive of them, namely, the vertical orientation of the trade mark, particularly when represented in upper and lower case, and an extended upper graphics panel separated from a lower graphics panel by the products fragrance name in upper case.

There can be no getting away from the fact that both the applicants and the opponents use these features in the get-up of their packaging, but I would have to say that the similarity stops there. The applicants may well represent the name of their product vertically and in upper and lower case, but not the same nor a similar word. The evidence shows the upper extended graphics panel in the mark applied for is invariably a representation relating to the fragrance or ingredients, for example an item of fruit, a leaf or flower, whereas in the opponent's case it is a form of surreal landscape. The lower graphics panel on the applicant's packaging contains descriptive matter relating to the particular product, which compares to another surreal illustration on the opponent's goods. The words separating the graphics panels are also different, being an ordinary English words, for example, Caribbean Creme in the case of the applicants, and seemingly foreign or invented words in the case of the opponents.

All in all I would say that the applicants use a similar layout to the opponents, but perhaps with the exception of the vertical orientation of word NATURESS, not in a way that appears to be particularly surprising or novel. This is compared to the opponent's use which in my view shows a high degree of invention. Either way I come back to the position that there is nothing by way of evidence that supports the claim made by Mr Redpath, that these features, either singly or in combination are distinctive of the opponents, nor that establishes that they have come to be recognised as being so independent of the word NATREL

I have already expressed my concerns with regard to the opponent's goodwill. I have also arrived at the position where I have found the opponent's marks not to be similar, and consequently, that there can be no misrepresentation. I do not, therefore, see how I can reach the conclusion that the public will be deceived into believing that the applicant's goods or business are the same, from the same source or are connected. Accordingly the ground under Section 5(4)(a) fails.

The opposition having failed on all grounds I order the opponents to pay the applicants the sum of £635 as a contribution towards their costs. This sum 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 4<sup>th</sup> day of December 2001**

**Mike Foley  
for the Registrar  
The Comptroller General**

Number	Mark	Class	Specification
1312710	NATREL	3	Perfumes; cosmetics; non-medicated toilet preparations; soaps; shampoos; preparations for the hair; dentifrices; anti-perspirants; deodorants for personal use; all included in Class 3.
1489701	NATREL PLUS/Natrel Plus	3	Deodorants, anti-perspirants, perfumery and perfumed body sprays; al included in Class 3.
1578031		3	Deodorants, anti-perspirants, perfumery and perfumed body sprays; al included in Class 3.

