

O-037-04
TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 2282384
BY INTRAPORT PLC TO REGISTER A TRADE MARK IN CLASS 25

AND

IN THE MATTER OF OPPOSITION THERETO UNDER No. 90283
BY L.L. BEAN INC

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 2282384
by Intraport PLC to register a Trade Mark in Class 25**

and

**IN THE MATTER OF Opposition thereto under No. 90283
by L.L. Bean Inc**

BACKGROUND

1. On 5 October 2001 Intraport Plc applied to register the following series of four trade marks in Class 25 of the register for a specification of “Articles of clothing, footwear”:



Mark claim / limit:

The applicant claims the colours red, purple, light green and dark green as an element of the first and second marks in the series.

2. The application was accepted by the Registrar and published in the Trade Marks Journal.
3. On 2 April 2002 L.L. Bean Inc filed a notice of opposition to the application on the ground that, under Section 5(2)(b) of the Act, the mark applied for is similar to the following earlier registered trade marks owned by the opponent which are registered for identical goods and there exists a likelihood of confusion on the part of the public –

NUMBER	MARK	REGISTRATION EFFECTIVE	SPECIFICATION OF GOODS
European Community Registration No. 1626712	L.L. BEAN	14 April 2000	<p>Class 18: Articles made of leather and imitations of leather; trunks and travelling bags; tote bags, carry-all bags; briefcases; sports bags, hunting bags, game bags, haversacks, rucksacks, backpacks.</p> <p>Class 25: Clothing; footwear; headgear; outerwear; sports clothing.</p> <p>Class 28: Sporting articles; fishing tackle; snow shoes; belt tackle pouches; decoy bags; game bags; fisherman's rod bags; fly books; saltwater spin rod cases; tackle bags and tackle cases.</p>
European Community Registration No. 1626514		14 April 2000	<p>Class 18: Articles made of leather and imitations of leather; trunks and travelling bags; tote bags, carry-all bags; briefcases; sports bags, hunting bags, game bags, haversacks, rucksacks, backpacks.</p> <p>Class 25: Clothing; footwear; headgear; outerwear; sports clothing.</p> <p>Class 28: Sporting articles; fishing tackle; snow shoes; belt tackle pouches; decoy bags; game bags; fisherman's rod bags; fly books; saltwater spin rod cases; tackle bags and tackle cases.</p>

UK Registration No. 2229457		14 April 2000	<p>Class 25: Clothing; footwear; headgear; outerwear; sports clothing.</p> <p>Class 28: Sporting articles; fishing tackle; snow shoes; belt tackle pouches; decoy bags; game bags; fisherman's rod bags; fly books; saltwater spin rod cases; tackle bags and tackle cases.</p>
UK Registration No. 1109686			<p>Class 13: Cases adapted for explosive cartridges for guns and for pistols, and cushions adapted for gun stocks.</p> <p>Class 18: Articles included in Class 18 made from leather.</p> <p>Class 20: Furniture.</p> <p>Class 25: Articles of clothing.</p> <p>Class 28: Sporting articles (other than clothing).</p>

4. The applicant filed a Counterstatement denying the grounds of opposition, in particular while it admitted that the goods are identical, it denied that the marks are similar.

5. Both sides filed evidence and asked for an award of costs in their favour. The parties are content for a decision to be taken without recourse to a hearing and their representatives have forwarded written submissions to assist the hearing officer in reaching a decision.

Opponent's Evidence

6. This consists of a witness statement by Pat Robles dated 27 January 2003. Ms Robles is the Senior Vice President for Emerging Business, which includes International Business and Corporate Sales, of L.L. Bean Inc (the opponent company).

7. Ms Robles explains that L.L. Bean Inc is a US company which, since 1973, has marketed its products continuously in the UK, firstly by mail order only, but now by mail order and the internet. The range of goods marketed by L.L. Bean in the UK includes clothing and footwear. Sales of clothing and footwear in the UK began in 1973.

8. Ms Robles states that the goods are sold under L.L. Bean trade mark, in all the forms registered. She adds that the trade mark L.L. BEAN is used prominently throughout the company's mail order catalogues, over their internet site, on the company's stationery and is applied to the goods themselves e.g. by means of labels. Ms Robles goes on to state that clothing and footwear form an important part of the range of products and that a wide range of clothing for men, women and children is sold under the L.L. Bean mark in the UK.

9. Ms Robles draws attention to examples of the use of the L.L. BEAN trade mark in the UK at Exhibit PR1 to her statement. This consists of "Early Spring 2003" clothing catalogues which contain UK order and customer service telephone numbers, hard copies taken from the L.L. BEAN website (www.llbean.com) on 30 January 2003 and labels bearing the trade mark L.L. BEAN. While the catalogues and website extracts are related to periods after the relevant date for those proceedings, Ms Robles states that the contents of Exhibit PR1 are representative of how the mark has been in use for at least the last thirty years.

10. Ms Robles states that the retail value of sales in the UK generated by mail order or on the internet are as follows:

Year	Amount (\$US)	Number of units sold
1998	1865078	42018
1999	1409450	32861
2000	1495000	27831
2001	1531983	20915
2002	1328209	31343

and she adds that approximately seventy-seven percent (77%) of the above sales figures relate to sales of clothing and footwear.

11. Turning to marketing, Ms Robles states that in the UK, L.L. Bean's products are advertised and promoted exclusively through the sending out of catalogues, and through the website. The amount spent by L.L. Bean on mailing catalogues to the UK (including the cost of production, processing and mailing), and the number of catalogues issued to the UK, is stated to be as follows:

Year	Expenditure (\$US)	No. of Catalogues
1998	181385	106697
1999	172526	100306
2000	260031	130669
2001	278592	121127

12. Ms Robles concludes that the L.L. BEAN Trade mark has acquired a strong reputation amongst customers in the UK.

Applicant's Evidence

13. This consists of a witness statement by Bill Tennant a trade mark agent employed by Jordans Limited, the applicant's professional advisors in these proceedings. Mr Tennant states the applicant has not yet used the mark in suit on any goods.

14. Mr Tennant contends that the respective marks are not similar. He states that the applicant chose the mark "bean" because it was felt to be an attractive name in relation to clothing for the children's market, the market of interest to the applicant. He adds that the bright colours in the first and second mark of the series enhance the mark's appeal and distinctiveness.

15. Mr Tennant states that the word "bean" is a common dictionary word with a well known meaning and he draws attention to the following Collins English Dictionary definition: "any of various papilionaceous plants of the widely cultivated genus Phaseolus producing edible seeds in pods". He submits that the applicant's mark will have the signification of a vegetable seed whereas the addition of the letters L L in the opponent's marks will be perceived as the initials of first names and the opponent's marks will therefore be perceived as a personal name and the identifier of the person or company using the name L.L. BEAN. Mr Tennant also points out that UK registration number 1109686 consists of a signature, which "emphasises the surnominal concept" and that the background vista contained in UK registration No. 2229457 and European Community Registration No. 1626514 further differentiates the marks. He states that this is important as it is widely accepted that the majority of the public rely primarily on visual means to identify the trade origin of clothing.

16. Turning to the opponent's evidence, Mr Tennant states that it is not clear whether the opponent's catalogues are sent to the UK on a random basis or to existing customers, but in any event this appears to be a specialised area of trading directed at a limited number of customers. He adds that as sales over the internet are likely to be to customers familiar with the L.L. BEAN trade mark and as the opponent's goods do not appear to be sold through retail outlets, the scope for confusion is further narrowed. This is especially so as it is not the applicant's intention to sell their products through the usual retail outlets.

17. Mr Tennant goes on to draw attention to Exhibit B2 to his statement, which comprises printouts of ten examples of marks containing the word "bean" or its phonetic equivalent, plural form or variations, which co-exist on the UK trade marks register in Class 25.

Opponent's Evidence in reply

18. The opponent's evidence in reply comprises two witness statements, one each by Pat Robles and Monica Anne Marshall, dated 22 October 2003 and 29 October 2003 respectively.

19. Pat Robles is the same individual who made the previous statement on behalf of the opponent in those proceedings.

20. Ms Robles explains that L.L. Bean maintains a client list and its catalogues are distributed in the UK to those on that list. The list is comprised of existing customers and new customers requesting catalogues. She denies that the opponent's UK business is in a specialised area and directed to a limited number of customers.

21. Monica Anne Marshall is a registered trade mark attorney and partner of JA Kemp & Co, the opponent's professional advisors in these proceedings.

22. Ms Marshall disputes Mr Tennant's submissions relating to the comparisons of the applicant's and opponent's trade marks. She states that customers could well see the word "bean" when used as a trade mark, as a personal name or surname. At Exhibit MAM, to her statement, Ms Marshall attaches a copy of a printout from the British Telecom online directory identifying forty-five individuals in Central London sharing the surname BEAN. She also mentions the actor Sean Bean. Ms Marshall submits that in the context of a trade mark, customers are just as used to seeing surnames used as designators of origin, as the name of vegetables or other dictionary words.

23. In relation to the opponent's earlier trade marks Ms Marshall points out that the opponent's earlier rights include European Community Registration No. 1626712 for the mark L.L. BEAN in block capitals, which contains no additional visual matter.

24. Turning to Mr Tennant's evidence on those other marks on the trade marks register, Ms Marshall states that the marks in question are further apart from the opponent's registrations than the mark in suit, with the possible exception of Registration No. B1552017 for Mr Bean, which she adds may be liable to cancellation on the grounds of non-use.

Opponent's submissions

25. The opponent's submissions are attached to a letter dated 16 January 2004 from J A Kemp & Co, the opponent's professional advisors. In summary, these submissions include the following points:

- (i) the respective goods are identical;
- (ii) the opponent's evidence demonstrates that the L.L. BEAN trade mark is well established and renowned in the UK market;
- (iii) the opponent's marks have a strong inherent and acquired distinctive character;
- (iv) the mark in suit and the opponent's registered marks are visually, aurally and conceptually similar, especially as the word BEAN is the dominant and distinctive component of the opponent's marks and the word "bean" is a distinctive component and indeed is the essential component of the applicant's mark;

- (v) many consumers will understand the mark BEAN to be a shortened version of the opponent's L.L. BEAN brand and also when "imperfect recollection" is taken into account, the average customer will fail to distinguish the marks; and
- (vi) confusion will result in relation to internet sales, from search engine searching, and some consumers will access the other party's website.

Applicant's submissions

26. The applicant's submissions are attached to a letter dated 23 December 2003 from Jordans Ltd, the applicant's professional advisors. In summary, those submissions make the following points:

- (i) The relevant guidance is that provided by the European Court of Justice in the cases of -

Sabel BV v Puma AG (1998),
 Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc. (1999) E.T.M.R. 1,
 Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV (2000) F.S.R. 77,
 Marca Mode CV v Adidas AG (2000) E.T.M.R. 723;

- (ii) the hearing officer's attention is drawn to a decision of Mr M Knight, the Registrar's Hearing Officer, in Opposition No. 44920 – Application No. 2006004 by Primus Telecommunications Inc and opposition by France Telecom. Lines 33 – 39 on page 7 of Mr Knight's decision suggest that "a word which is contained in many trade marks on the Register indicate common usage in the market place in respect of the services covered by the Applicant's and the Opponent's trade marks and leads to a fair assumption that customers are accustomed to using that word in respect of the services and can differentiate one trade mark from another through other elements." And in the present Opposition case the additional elements of the Opponent's mark ie. the initial letters "L.L." reinforce this view, when the goods are the same or similar;
- (iii) BEAN is an uncommon surname whereas the word is a common everyday household name for the many forms of vegetable covered by the general classification "bean";
- (iv) mail order sales by the opponent will be to customers who are already familiar with the trade mark L.L. BEAN;
- (v) the applicant disputes that the opponent has a substantial turnover under the L.L. BEAN trade mark in the UK and a strong reputation amongst customers in the UK has not been demonstrated.

27. This completes my summary of the evidence filed in this case and the written submissions of the parties. I now turn to the decision.

DECISION

28. Section 5(2) of the Act 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.”

29. 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,”

30. 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*, page 224;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG*, page 24, 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.* page 84 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*, page 224;

- (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*, page 224;
- (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*, page 132 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*, page 224;
- (g) account should be taken on the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it was registered; *Lloyd*, paragraph 29;
- (h) 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*, page 224;
- (i) 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;
- (j) 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*, page 333, paragraph 29.

31. The reputation of a trade mark is an element to which importance may be attached in Section 5(2) considerations in that it may enhance the distinctive character of the mark at issue and widen the penumbra of protection for such a mark. The opponent has filed evidence relating to the use of its trade marks. The evidence provides information on turnover, unit sales, and catalogues sent to customers, but it provides no indication of the opponent's market share or the extent of its reputation. While I have no evidence before me on the point, I am certain that the UK market for clothing and footwear must be an extremely large one. The goods are basic necessities as well as fashion items and every individual in the UK is a user of such goods. In light of this, it seems to me that the extent of the opponent's UK business is not sufficient to indicate a high market share and does not enable me to infer that the opponent has any great reputation under its marks in the UK. I would add that no supporting evidence from third parties or the trade has been filed.

32. While the opponent may have had a presence in the UK market place prior to the relevant date for these proceedings, the evidence does not demonstrate a reputation among the relevant

public in its earlier cited trade marks. The onus is upon the opponent to prove that its earlier marks enjoy a reputation or public recognition and on the basis of the evidence filed in this case I do not believe the opponent has discharged this onus. In *DUONEBS* (BLO/048/01) a decision of Simon Thorley QC sitting as the Appointed Person, it was said:

“In my judgement I believe what the ECJ had in mind was the sort of mark which by reason of extensive trade had become something of a household name so that the propensity of the public to associate other less similar marks with that mark would be enhanced. I do not believe that the ECJ was seeking to introduce into every comparison required by Section 5(2), a consideration of the reputation of a particular existing trade mark.”

33. I conclude that the opponent cannot claim an enhanced distinctive character for its marks. However, even if I am wrong in relation to reputation of the opponent’s marks I would point out that reputation is only one element which forms part of a global consideration under Section 5(2). It was held in *Marca Mode v Adidas AG* [2000] E.T.M.R. 723:

“The reputation of a mark, where it is demonstrated, is thus an element which, amongst others, may have a certain importance. To this end, it may be observed that marks with a highly distinctive character, in particular because of their reputation, enjoy broader protection than marks with a less distinctive character (*Canon*, paragraph 18). Nevertheless, the reputation of a mark does not give grounds for presuming the existence of a likelihood of confusion simply because of the existence of a likelihood of association in the strict sense.”

34. In essence the test under Section 5(2) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those differing elements, taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, in addition to making comparisons which take into account the actual use of the respective marks, I must compare the mark applied for and the opponent’s registrations on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods within the respective specifications. In relation to use of the applicant’s mark I note that the applicant has no use prior to the relevant date for these proceedings (5 October 2001).

35. The applicant points out that the opponent’s business in the UK is conducted by mail order or the internet and goes on to submit that this reduces the potential for confusion. However, even if this submission is correct, for the purposes of the current opposition normal and fair use of the respective marks would include sales of goods bearing the marks through all normal outlets for the goods, which would include sales via retailers in addition to mail order and internet sales.

36. I turn first to a consideration of the respective goods covered by the application in suit and the opponent’s earlier registrations. It is obvious that the mark applied for covers identical goods

to those encompassed in the opponent's earlier registrations, a point sensibly conceded by the applicant.

37. I now go on to a comparison of the mark in suit with the opponent's earlier registrations. In the evidence the applicant has drawn my attention to the state of the trade mark register in relation to marks containing the word "bean", or its phonetic equivalent, plural form or variations thereof. I am not assisted by such evidence and I am guided on this point by the following comments of Mr Justice Jacob in *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281:

"Both sides invite me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word "Treat". I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. In particular the state of the register does not tell you what the circumstances were which led the Registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *MADAM Trade Mark* and the same must be true under the 1994 Act. I disregard the state of the register evidence."

38. I would only add that I have no information on how the marks concerned were placed on the register or on whether or how these marks are used in the market place. My decision involves a comparison of the applicant's and opponent's particular marks and must be made on its own merits, taking into account any use of the marks and also fair and notional use of the respective marks across their specifications.

39. The application is for a series of four marks which all contain the well known dictionary word, or less well known surname "bean". The first and second marks in the series contain the following claim/limit: "The applicant claims the colours red, purple, light green and dark green as an element of the first and second marks in the series". I also note that the second and fourth mark in the series appear within a rectangular outline.

40. The opponent's prior registrations consist of the letters and words L.L. BEAN, which in my view is likely to be perceived as a personal name. One registration is in block capitals, another is in a stylised or signature format and two further registrations contain a background device of mountains, trees and a lake. For the purposes of this opposition I believe that the opponent's strongest case lies with European Community Registration No. 1626712 ie. the letters and word L.L. BEAN in upper case or block capitals, a registration particularly stressed out by Ms Marshall in her witness statement of 29 October 2003 on behalf of the opponent. I intend to concentrate on this registration in my comparisons with the mark in suit.

41. The respective marks must be compared as a whole and by reference to overall impression but, as recognised in *Sabel BV v Puma AG* (mentioned earlier in this decision) in any comparison reference will inevitably be made to the distinctiveness and dominance of individual elements. It is, of course, possible to over analyse marks and in doing so shift away from the real test which is how marks would be perceived by customers in the normal course and circumstances of trade.

The average customer 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 BV* page 84, paragraph 27). I must bear in mind this when reaching my conclusions.

42. On a visual comparison of the marks differences are apparent in that the opponent's mark contains the letters L.L. and two of the applicant's series of marks contain a colour claim/limit and/or appear in a rectangular outline. Notwithstanding, these differences they share a common element ie. the word BEAN, which although being a surname is by no means a common surname and is one which has an obvious other meaning. Accordingly, on the information before me, the word BEAN, given its prominence within the marks, must be regarded as both a distinctive and dominant component within the respective marks. In totality it seems to me that considerable visual similarity exists between the applicant's and opponent's marks.

43. Turning to an aural comparison of the marks, the applicant has submitted that in relation to clothing, the majority of the public rely primarily on visual means to identify the trade origin of the goods. This accords with the view expressed by the Registrar's Hearing Officer in the matter of application No. 2001040 by React Music Limited to register a trade mark in Class 25 and in the matter of opposition thereto by Update Clothing Limited under No. 45787):

'There is no evidence to support Ms Clarke's submission that, in the absence of any particular reputation, consumers select clothes by eye rather than by placing orders by word of mouth. Nevertheless, my own experience tells me it is true of most casual shopping. I have not overlooked the fact that catalogues and telephone orders play a significant role in this trade, but in my experience the initial selection of goods is still made by eye and subsequent order usually placed primarily by reference to a catalogue number. I am therefore prepared to accept that a majority of the public rely *primarily* on visual means to identify the trade origin of clothing, although I would not go so far as to say that aural means of identification are not relied upon.'

This view was supported on appeal to the Appointed Person (*REACT Trade Mark* [2000] 8 RPC 285, at 289 lines 22 to 26) and I believe it appropriate to the present case.

44. Going to the aural comparison itself, the presence of the letters L.L. in the opponent's mark will, once again, be apparent. However, it seems to me that the colour claim/limit and rectangular outline present in the applicant's series of marks will not be a factor in aural comparisons as these elements are unlikely to be referred to in oral use in the normal course and circumstances of trade. As in the visual comparison, the word BEAN is a dominant, distinctive and striking component of the marks. In totality there is aural similarity.

45. Next I turn to a conceptual comparison of the marks. I have little doubt that the opponent's mark will be perceived as a personal name or company name based on a personal name. The marks in suit could be perceived as referring to the word "bean" as a vegetable or to the surname. While the former may be more likely, I take the view that there is a degree of conceptual similarity, in particular in that the considerations relate to trade origin.

46. In assessing the degree of similarity between the respective marks and whether a likelihood of confusion exists, I must consider in relation to the goods at issue, who the average customer is and make due allowance for imperfect recollection.

47. Customers for clothing and footwear are the public in general. Such goods are necessities as well as being fashion items and are sold through a wide variety of outlets and at a wide range of prices. The goods are not necessarily expensive or sophisticated purchases but it seems to me that clothing and footwear are usually bought with a reasonable degree of care e.g. as to their size, colour, appearance, and after a visual reference. While this is not a “bag of sweets” case, imperfect recollection could nevertheless be a factor as clothing items and shoes are often purchased on an occasional rather than a regular basis.

CONCLUSION

48. Notwithstanding that there are differences in the marks, I must take into account my earlier finding that the common element, the word BEAN, comprises a distinctive, dominant and striking component of the respective marks. I would add to this that the average customer for the goods is the public at large who, while exercising a reasonable degree of care in their purchases, will often be an occasional purchaser of “everyday” garments etc. who will rely upon the imperfect picture of the trade mark kept in his/her mind. Taking into account the average customer for the goods, that identical goods are involved and that the marks share a major and striking component, it seems to me that the word BEAN will be retained in the mind of customers. It is my view that the applicant’s mark would capture the distinctiveness of the opponent’s L.L. BEAN trade mark in normal and fair use in the market place.

49. In reaching a decision in relation to the likelihood of confusion I have particularly borne in mind the following comments of the European Court of Justice in *Canon*:

“Accordingly, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, constitutes a likelihood of confusion within the meaning of Article 4(1)(b) of the Directive (see *SABEL*, paragraphs 16 to 18).”

50. The respective goods are identical and the respective marks are similar conceptually, visually and aurally in that the common element (BEAN) would suffice to lead the public to believe that the goods emanated from the same undertaking.

51. The opposition under Section 5(2)(b) of the Act is successful.

COSTS

52. The opponent has been successful and is entitled to a contribution towards costs. I order the applicant to pay the opponent the sum of £1000, which takes into account that no hearing took

place on this case. 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 6th day of February 2004

**JOHN MacGILLIVRAY
For the Registrar
the Comptroller-General**