

O-284-07

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2396662
BY CAVES VIDIGAL S.A. TO REGISTER THE TRADE MARK
NEXT STATION IN CLASS 33**

AND

**IN THE MATTER OF OPPOSITION NO. 93967
BY NEXT RETAIL LIMITED**

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By Caves Vidigal S.A. to register the Trade Mark
NEXT STATION in Class 33**

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**IN THE MATTER OF Opposition No. 93967 by
Next Retail Limited**

BACKGROUND

1. On 12 July 2005 Caves Vidigal S.A. applied to register the trade mark NEXT STATION for 'wines' in class 33 of the international classification system.
2. On 30 December 2005 Next Retail Limited (Next) filed notice of opposition to this application under Section 5(2)(b), 5(3) and 5(4)(a) of the Act. Next is the proprietor of the following registrations both of which are earlier trade marks for the purpose of this action:

NO	MARK	CLASS	GOODS/SERVICES
2371317 (UK)	NEXT	02	Paints, varnishes, lacquers.
		03	Soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices.
		04	Candles and wicks for lighting.
		08	Hand tools and implements (hand-operated); cutlery and razors.
		16	Paper, cardboard, stationery, adhesives for stationery, plastic materials for packaging.
		21	Household kitchen utensils and containers (not of precious metal or coated therewith); combs, sponges, brushes, (except paint brushes) articles for cleaning purposes; glassware, porcelain and earthenware.
		30	Coffee, tea, cocoa, artificial coffee, preparations made from cereals, bread, pastry and confectionery, salt, mustard, vinegar, sauces, spices.
		33	Alcoholic beverages (except beers).
35	Advertising, business management, business administration; office functions.		

15594 (CTM)	NEXT	03	Soaps; cosmetics; essential oils; perfumes; non-medicated toilet preparations; preparations for the hair; deodorants for use on the person; dentifrices.
		11	Installations for lighting; lamps; lamp bases; lampshades; light bulbs; parts and fittings for all the aforesaid goods.
		14	Precious metals and their alloys and goods made thereof or coated therewith; jewellery; precious stones; clocks, watches and chronometric instruments; watch straps; watch bracelets; parts and fittings for all the aforesaid goods.
		18	Leather and leather imitations and goods made thereof; skins and hides; travelling trunks and suitcases; bags; umbrellas, parasols and walking sticks; whips, harnesses and saddlery; parts and fittings for all the aforesaid goods.
		20	Furniture; beds; bed heads; sofas, sofa beds; chairs; armchairs; tables; pillows; duvets; cushions; mattresses; bedding; parts and fittings for all the aforesaid goods.
		24	Textiles; plastic material as a substitute for fabric; bed and table covers; bed linen; table linen; household linen; wall hangings; blankets; quilts; duvets and duvet covers; sheets; pillow cases; bed valances; bed-covers; table cloths; table mats; napkins; linen fabrics; fabric wall coverings; curtains; curtain tie-backs; cushion covers; pelmets; blinds; covers for chairs and sofas; towels and face cloths.
		25	Articles of clothing; footwear; headgear.
		27	Carpets; rugs; mats and matting; non-textile wall coverings; wall papers; wall paper borders.

3. Only the UK registration is relied on for Section 5(2)(b) purposes. Both registrations are relied on for Section 5(3) purposes. In relation to Section 5(4)(a) the opponent claims to have used the mark NEXT on a wide variety of goods, including “alcoholic beverages (except beers), wines”. It has also used the mark NEXT WINE SELECTION for ‘wines’. The earlier right is claimed from “since at least 2004”.

4. The applicant filed a counterstatement denying each of the grounds and noting that the CTM registration was subject to the requirement to show proof of use. The

counterstatement also contains a number of detailed submissions in relation to both marks and goods/services.

5. Both sides have filed evidence. In accordance with the normal practice the parties were offered the opportunity to be heard or to file written submissions. In the event both sides have filed written submissions. In the case of the applicant these are under cover of a letter from Kilburn & Strode dated 11 September 2007 and in the case of the opponent under cover of a letter from Marks & Clerk, also of 11 September 2007.

Opponent's evidence

6. Andrew John Robert McKinlay, the Company Secretary of Next Retail Limited has filed a witness statement. The opponent is a wholly owned subsidiary of Next Group Plc, a publicly listed company.

7. The opponent first adopted and used the trade mark NEXT in 1982 in the UK in relation to clothing sold through Next retail outlets. A mail order catalogue was launched in 1988 and on on-line shopping website in 1999. Exhibit AJRM 1 provides further information on the opponent's history.

8. The opponent sells a wide variety of goods under the mark NEXT, which include clothing, footwear, headgear for men, women and children; household goods and wine collectively referred to as "the said goods"). The trade mark NEXT is applied to the said goods, the stores, the mail order catalogue and the online shopping website. A selection of pages from the opponent's mail order catalogues from 2000 to date are included in Exhibit AJRM 2.

9. There are currently some 450 NEXT stores in the UK. A list of both UK and overseas stores is exhibited at AJRM 3.

10. Copies of the parent company's Annual Reports covering the years 2002 to 2004 are exhibited at AJRM 4. As might be expected these show very substantial sales. By way of example, turnover in 2004 was in excess of £2½ billion. Substantial sums have also been expended on advertising. A breakdown of advertising is given in Exhibit AJRM 5. A copy of a magazine advertising insert is exhibit at AJRM 6 along with a list of the publications that have included such inserts and the distribution figures for the magazines. A collection of photographs and materials showing how the mark is applied to goods and stores is exhibited at AJRM 7.

11. The opponent has sold wine under the mark NEXT since July 2004. A breakdown of sales is given as follows:

YEAR	SPRING/SUMMER £	AUTUMN/WINTER £	TOTAL £
2004	7,656	208,798	216,454
2005	128,807	263,896	392,704
2006	152,711		

(Given that the material date is 12 July 2005 only the figures up to and including Spring/Summer 2005 are relevant in this action).

12. Copies of pages from the opponent's NEXT Directory for Autumn/Winter 2004 and Spring/Summer 2005 showing use of the mark on or in relation to wine goods are exhibited at AJRM 8.

13. I note that the 2004 pages show use of both third party branded wine as well as two bottles branded as NEXT House Wine. The 2005 page shows only third party branded wine though the heading and one of the panels refers to 'NEXT WINE SELECTION'.

14. Publications containing advertisements for 'wine' goods are said to be distributed in the UK. Examples of advertisements that have appeared in various magazines and newspapers are exhibited at AJRM 9. However, the exhibit itself is almost exclusively concerned with offering flowers by post. A number of the pages also offer the opportunity to include a bottle of champagne as part of the flower gift. In each case the bottle shows a third party brand.

15. Finally, Exhibit AJRM 10 contains printouts from the opponent's electronic database showing sales of wine under the mark to a number of UK customers. It is not possible to say from, the material provided whether the wine that was supplied was under the mark NEXT or a third party brand. Exhibit AJRM 11 contains photographs of the mark NEXT on wine labels.

Applicant's Evidence

16. Sheila Figueiredo, a Trade Mark Assistant at Kilburn & Strode, has filed a witness statement. The purpose of her witness statement is to exhibit (SF1 to SF24) details of various marks which include the element NEXT identified in a search of the UK and OHIM databases which appear to co-exist with the opponent's registrations.

Opponent's evidence in reply

17. Shaun Nicholas Sherlock, a Trade Mark Assistant at Marks & Clerk has filed a witness statement. The first part of his witness statement deals with judicial comment on state of the register evidence by reference to *British Sugar Plc v James Robertson & Son Ltd* [1996] R.P.C. 281.

18. He goes on to offer the following evidence and observations in relation to the word STATION:

"The word STATION is particularly non-distinctive for "wine" and similar goods in Class 33. The word STATION has various meanings, which include a *place or position at which a thing or person stands or a building, depot etc with special equipment for some particular purpose*. Please find attached marked Exhibit SNS2 a printout from the Collins English Dictionary (Fifth Edition 2000) for the word STATION listing these definitions. I therefore suggest that the word STATION is not distinctive for wine or wine manufacture as it describes a place, location or address, where grapes are collected, processed and stored allowing the wine to mature. The word STATION is a commonly used word within the wine industry and is low in

distinctive character for such goods. Therefore, the word STATION should be given particularly low weight in the comparison of the marks NEXT and NEXT STATION and true comparison is between two NEXT marks.

19. Finally in the event that I am prepared, contrary to the opponent's submissions, to consider state of the register evidence he exhibits results of a UK and OHIM search for marks in Class 33 which include the word STATION. The results are said to show that 19 STATION-composite mark registrations co-exist for goods in Class 33.

20. That completes my review of the evidence.

DECISION

Section 5(2)(b)

The law

21. The relevant part of the statute reads:

“(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.”

The principal authorities

22. An objection under Section 5(2)(b) requires me to consider whether there are similarities in the marks and similarities in the goods and services that, cumulatively, lead to a likelihood of confusion. The leading guidance from the European Court of Justice is contained in *Sabel BV v Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG and Adidas Benelux BV* [2000] E.T.M.R. 723.

23. The opponent's case under Section 5(2)(b) is based on UK registration, No. 2371317. The application which resulted in the registration was filed on 23 August 2004. It is, therefore, an earlier trade mark within the meaning of Section 6(1) of the Act. Furthermore, it is not subject to the requirement to show proof of use pursuant to The Trade Marks (Proof of Use, etc) Regulations 2004.

Comparison of goods

24. The applicant's written submissions under this head suggest that, basing its case on its Class 33 specification, identical goods are involved. Paragraph 9 of the applicant's counterstatement concedes that there are identical goods so far as this Class of the earlier trade mark is concerned.

Comparison of marks

25. The comparison is between NEXT and NEXT STATION. The well established test requires me to consider visual, aural and conceptual similarity bearing in mind their distinctive and dominant components (*Sabel v Puma*, paragraph 23). The matter is to be considered through the eyes of the average consumer who rarely has the chance to make direct comparisons between the marks and must instead rely on imperfect recollection (*Lloyd Schuhfabrik v Klijsen Handel*, paragraph 27)).

26. The earlier trade mark is a single word. Its distinctive character must, therefore, reside in that word alone. Case C-120/04, *Medion AG v Thomson multimedia Sales Germany & Austria GmbH*, acknowledges that:

“29 In the context of consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see *Matratzen Concord*, paragraph 32).

30 However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element.

31 In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.”

27. Although the above guidance relates to a company name it is of wider relevance in the context of composite marks. The applied for mark takes the whole of the earlier trade mark as its first element. An issue, therefore, arises as to whether NEXT should be considered to have an independent distinctive character within the applicant's composite mark. The opponent's view is that it should for two reasons. Firstly, because it is at the beginning of the mark, it should be given more weight and secondly, because the word STATION is particularly non-distinctive for wine for the reasons quoted in the paragraph taken from Mr Sherlock's evidence above. In

particular, it is said that STATION describes “a place, location or address, where grapes are collected, processed and stored allowing the wine to mature”. On that basis Mr Sherlock says the word should be given low weight in the comparison of marks. If he is right then it would feed into the conceptual consideration of the respective marks and be a potentially powerful indication that the distinctive and dominant element of the mark is the first word and that that word has independent distinctive character.

28. The evidence on which this claim is based is the following extract from Collins English Dictionary (fifth Edition 2000) at Exhibit SNS2:

“**station**...n **1** the place or position at which a thing or person stands or is supposed to stand. **2a** a place along a route or line at which a bus, train, etc., stops for fuel or to pick up or let off passengers or goods, esp. one with ancillary buildings and services: *railway station*. **2b** (*as modifier*); *a station buffet*. **3a** the headquarters or local offices of an official organisation such as the police or fire services. **3b** (*as modifier*); *a station sergeant*. **See police station, fire station**. **4** a building depot, etc, with special equipment for some particular; purpose: *power station; petrol station; television station*. **5** *Military*, a place of duty; an action station. **6** *Navy*. **6a** a location to which a ship or fleet is assigned for duty. **6b** an assigned location for a member of a ship’s crew. **7** a radio or television channel. **8** a position or standing as in a particular society or organisation. **9** the type of one’s occupation; calling. **10** (in British India) a place where the British district officials or garrison officers resided. **11** *Biology* the type of habitat occupied by a particular animal or plant. **12** *Austral. and N.Z.* a large sheep or cattle farm. **13** *Surveying*, a point at which a reading is made or which is used as a point of reference. **14** (*often cap.*) R.C. Church. **14a** one of the Stations of the Cross. **14b** any of the churches (**station churches**) in Rome that have been used from ancient times as points of assembly for religious processions and ceremonies on particular days (**station days**). **15** (*pl*) (in rural Ireland) mass, preceded by confessions, held annually in a parishioner’s dwelling and attended by other parishioners. *vb* **16** (*tr*) to place in or assign to a station. [C14: via Old French from Latin *statiō* a standing still, from *stāre* to stand]”

29. Mr Sherlock relies in both his evidence and written submissions on meanings 1 and 4 from the above dictionary reference. However, these references do not support the very specific meaning in the wine production field that Mr Sherlock invites me to accept. Still less does it support the claim that “[t]he word STATION is a commonly used word within the wine industry”. There is no acknowledgement of that meaning in the dictionary extract. One of the meanings in Australia and New Zealand is “a large sheep or cattle farm” but there is no suggestion that by extension the word is now used as a synonym for a ‘vineyard’, ‘estate’ or other such words that are used in the context of wine.

30. If it has not been shown to be a term of art in the wine business then there is no reason to suppose that consumers will take the expression at anything other than face value when they encounter it used in relation to wines. The most natural meaning (drawing on definition 2a from the dictionary) is in the context of railways and in particular an announcement to passengers indicating what the ‘next station’ is.

31. In relation to conceptual considerations the European Courts have held that for conceptual considerations to counteract visual and aural similarity at least one of the marks must have a clear and specific meaning so that the public is capable of grasping it immediately (see *Phillips-Van Heusen Corp v Pash Textilvertrieb und Einzelhandel GmbH* Case T-292/01 and *Ruiz-Picasso and Others v OHIM* Case C-361/04P).

32. I find that the clear point of visual and aural similarity resulting from the common use of the word NEXT is more than counterbalanced by the clear and differentiating meaning of the expression NEXT STATION where NEXT is used as an adjectival qualifier to the word STATION. NEXT contributes to the composite expression rather than asserting independent distinctive characteristics of its own within the mark.

Distinctive character of the earlier trade mark

33. This is a matter that calls for independent assessment (see Case C-235/05P *L'Oreal SA v OHIM*). 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 v Puma*, paragraph 24).

34. NEXT is an ordinary word of the language meaning the 'immediately following' in terms of place, time or degree etc. Although it is not directly descriptive of wine it lends itself to usage in an advertising context to signify the next of something. Taken as an unused mark it is in my view of low to modest distinctive character.

35. The opponent claims that use has improved the position. Use of the mark in relation to wine commenced near enough exactly a year before the relevant date in these proceedings. The evidence shows sales under the mark of £216,454 in 2004 and £128,807 in the Spring/Summer of 2005. I have not been told what the size of the wine market is in the UK but these sums strike me as being relatively small. Furthermore, the figures do not distinguish between sales of goods under the NEXT mark and sales of wine under third party brands as part of NEXT's mail order operation (i.e. a retail operation). Most of the wine on offer in the NEXT Directory falls into the third party brand category though NEXT is used on a red and a white house wine. The Directory has a heading at the start of the wine selection NEXT WINE SELECTION. Registration No. 2371317 does not cover the retail sale of wine. In addition to the pages from the Directory and the labelling exhibit (AJRM 11) Mr McKinley has exhibited printouts from the opponent's database showing sales of wine (AJRM 10). Details of five individuals have been given but the exhibit does not disclose the branding of the wine purchased.

36. The small scale of the sales made combined with the fact that it is not clear whether the sales figures given relate to sales of wine marked NEXT or use of NEXT in relation to the retail sale of third party branded wines mean that the opponent has failed to establish its claim to an enhanced degree of protection arising from acquired distinctiveness.

The average consumer

37. This must encompass the generality of the adult population but will also include those in the trade such as wholesalers and retailers. In general, the latter are likely to be more knowledgeable about branding matters. So far as the public is concerned wines are normally selected from a range displayed on shelves in supermarkets, off-licences and other retail establishments. There will be some oral ordering in restaurants, bars etc but usually on the basis of a printed menu of what is available. Individuals are likely to apply varying degree of knowledge and discrimination in choosing wine. For some it will be an occasional purchase only. For this group imperfect recollection may have a particularly important part to play. In general some method of selection is needed according to whether the purchaser wants a red, white, rosé or sparkling wine, whether wine of a particular country is desired, whether a particular grape variety is preferred, or whether price is the overriding consideration etc. Some care but certainly not the utmost care is therefore, likely to be exercised even amongst those members of the public who would not consider themselves to be particularly well informed on the subject.

Likelihood of confusion

38. The applicant's evidence consists primarily of state of the register evidence intended to show that various third party marks incorporating the element NEXT exist in classes covered by the opponent's marks. Mr Sherlock's evidence for the opponent suggests that this evidence is irrelevant having regard to the following comments of Mr Justice Jacob, as he then was, in *British Sugar Plc v James Robertson & Son Ltd* (the *Treat* case):

“Both sides invited 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 is actually happening out in the market and in any event one has no idea what the circumstances were which led the Registrar to put the marks concerned on the Register.”

39. It is not altogether surprising that, where a party has chosen a common word of the language as a trade mark, others may wish to incorporate it in marks of their own devising. Exhibit SF1 contains details of third party 'NEXT' applications and registrations in the UK in Classes covered by the opponent's UK registration. Two of the three marks identified in Class 33 illustrate this point. They are NEXT GENERATION and THE NEXT STEP. Both predate No. 2371317 but have clear meanings of their own (the third mark is later filing). For the reasons given in *Treat* there is little to be said in favour of seeking to draw conclusions from state of the register evidence. That also applies to Exhibit SNS3 to Mr Sherlock's reply evidence which, as I understand it, is only offered in the event that I was prepared to give weight to the opponent's state of the register evidence.

40. To summarise, I have found that the goods in Class 33 are identical; that there is some visual and aural similarity but conceptual dissimilarity between the marks; that the opponent's mark is of low to modest distinctiveness; and that it is not entitled to

benefit from a wider penumbra of protection through use. In reaching a conclusion on the matter I also bear in mind the principle of interdependency whereby a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa (*Canon v MGM*, paragraph 17). In all the circumstances and allowing for irregular purchases and the likelihood of sequential rather than concurrent exposure to the marks and I find that there is no likelihood of confusion. In reaching that view I have also considered and rejected the possibility that the public might believe the goods came from a related undertaking or represented an extension or development of an existing line. I can see no reason for coming to such a view. The opponent's written submissions base its case on its Class 33 goods. The remaining goods in No. 2371317 do not offer it any better chance of success. The opposition fails under Section 5(2)(b).

Section 5(3)

41. As amended this reads:

“(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC), in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

42. A useful summary of the factors to be considered in relation to Section 5(3) can be found in *Mango Sport System S.R.L. Socio Unico Mangone Antonio Vincenzo v Diknah S.L.* [2005] E.T.M.R. 5.

43. The opponent bases its case on both its earlier trade marks. In each case a reputation is claimed across the full breadth of the specifications. As the opponent has not supplied any details to support a reputation in the Community (in relation to which see *Mobis Trade Mark* BL O/020/07) the issue of reputation falls to be considered in the context of UK registration No. 2371317.

44. A trade mark is considered to have the requisite reputation for Section 5(3) purposes when it is known by a significant part of the public concerned (*General Motors Corp v Yplon SA, Chevy*, [1999] E.T.M.R. 950).

45. It is not clear from the opponent's written submissions whether or not it intends its case under Section 5(3) to be limited to identical goods. Paragraph 18 of those submissions refers to the claim that “the opponent has built up a significant reputation in the mark NEXT across the United Kingdom which extents [sic] to the wide variety of goods and services provided by the opponent, including “alcoholic beverages (except beers) “and “wine”.” A second (mis-numbered) paragraph 18 starts “Given the identity of the goods”. If or to the extent that the opponent's case is limited to a reputation in relation to wines then it must fail on the evidence for the reason given above in relation to Section 5(2)(b).

46. If the opponent intends to rely upon its wider reputation in relation to retail services and sales of goods (other than wine) under the NEXT brand, then the issue for me to determine is firstly what is the nature and extent of the reputation and secondly would the use of NEXT STATION for wines take unfair advantage of or be detrimental to the distinctive character or the repute of the mark NEXT.

47. I consider that I am entitled to take judicial notice of the fact that NEXT is a prominent name on the high streets of this country. That reputation is in part as a retailer of goods. However, that reputation is not in itself relevant for present purposes as the earlier trade mark relied upon does not cover such services.

48. Mr McKinlay's evidence refers to a trade which includes, *inter alia*, clothing and household goods. I accept that the opponent's primary trade is in clothing and that these goods are branded NEXT. The extract from the NEXT Directory mail order catalogues confirm this to be the case. I also see from the index pages to those catalogues that under the heading 'Home' the opponent offers items under the sub-heads "bedroom, children's, bathroom, downstairs collection, kitchen, electrical, pets and outdoor" (Spring/Summer 2003). Unfortunately, the relevant pages have not been provided so I am unable to say what range of goods is on offer or how the goods are branded (the latter is important as it seems from the position in relation to wines that not all goods carry the NEXT brand).

49. I have been unable to resolve these uncertainties satisfactorily from the other items of evidence. As a result I can only consider a reputation that, within the scope of the specification, covers clothing (it is clear from the exhibits that the clothing is branded NEXT).

50. The test under Section 5(3) is based on unfair advantage and/or detriment to distinctive character or repute and does not require an opponent to show a likelihood of confusion. Nevertheless given that the opponent has failed to show a likelihood of confusion in relation to identical goods, it faces a more difficult task in showing unfair advantage or detriment when the goods are so widely different as clothing and wine. In the absence of a clearly identified basis for reaching such a finding the opponent's case is bound to fail.

Section 5(4)(a)

51. I infer that the claim under this head is based on the law of passing off.

52. It is well established that to succeed a party will need to establish goodwill, misrepresentation and damage (*Wild Child Trade Mark* [1998] R.P.C. 455). The opponent's case is potentially wider under this head because the action is not restricted to the ambit of the specification of the trade mark registrations or the mark in the precise form in which it is registered. Nevertheless, the statement of grounds refers to use of the mark NEXT on a wide variety of goods including "alcoholic beverages (except beers) wines". It also says that it has used the mark NEXT WINE SELECTION for wines. In response to the question "when was the earlier right first used on goods or services you have listed?" the opponent answered "Since at least 2004". That is consistent with the use position on wines which started in July 2004. The written submissions in relation to Section 5(4)(a) are brief and do not shed further

light on the nature of the passing off claim. I am not clear how the way in which the opponent appears to be approaching the question of goodwill sits with the position that it is the goodwill of the business as a whole under the sign that must be taken into account rather than a severable goodwill in relation to part of the business (in this case wine or the retail sale of wine).

53. Taking account of the whole of the opponent's goodwill arising from its overall trade in goods and services under the sign NEXT would give it a broader basis for its claim. But the opponent still fails to establish that use of the mark NEXT STATION for wine would constitute a misrepresentation. For these reasons the objection under Section 5(4)(a) also fails.

COSTS

54. The applicant has been successful and is entitled to a contribution towards its costs. I order the opponent to pay the applicant the sum of **£1300**. 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 27th day of September 2007

M REYNOLDS
For the Registrar
the Comptroller-General