

O-045-09

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No 82901
BY STERITROX LIMITED FOR REVOCATION
OF REGISTRATION No 2217154 STANDING
IN THE NAME OF PURICORE, INC**

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BACKGROUND

1. Trade mark no. 2217154 is registered in respect of the following goods and services:

Class 1

Chemicals used in industry, agricultural and science; unprocessed artificial resins; tempering and soldering preparations; chemical substances for preserving foodstuffs; adhesives used in industry; polyurethane coatings; medical-grade polyurethane coatings; medical-grade polyurethane coatings for use in long term implants; medical-grade polyurethane for coating medical devices; detergents; detergents for use in manufacturing operations; degreasing agents and materials.

Class 2

Preservatives against corrosion; anti-corrosive coatings, preparations and products; anti-corrosive coatings, preparations and products for use in relation to sterilisation apparatus and medical devices.

Class 5

Pharmaceutical, veterinary and sanitary preparations; dietic substances adapted for medical use; preparations for destroying vermin; fungicides; herbicides; sterilising and disinfectant solutions; rinse waters; disinfectants; super-oxidised water; biocidal solutions; biocides for the sterilisation of instruments; sterilisation and disinfection chemicals for use with medical devices; detergents for use in cleaning medical devices; lubricating agents for medical use; lubricating agents for coating medical devices; chemicals used in decontamination; but not including sanitary tampons, sanitary napkins, cotton wool for medical and surgical purposes, plasters, materials for dressing, compresses, swabs, bandages and bands for medical use, filled first aid kits or filled first-aid boxes.

Class 9

Computer programs, computer software, computer hardware and computer firmware; computer programs, computer software, computer hardware and computer firmware for monitoring and maintaining local and remote

sterilisation systems; scientific, measuring and checking apparatus and instruments; scientific, measuring and checking apparatus and instruments for monitoring and maintaining local and remote sterilisation systems; telecommunication apparatus; modems; telephone cable connection apparatus; computer software and telecommunications apparatus to enable connection to database and the Internet; computer software to enable searching of data; apparatus, installations and devices for electro-chemical treatment of water-based solutions; parts and fittings for all of the aforesaid.

Class 10

Surgical, medical, dental and veterinary apparatus and instruments; sterilisation and disinfection apparatus and instruments; apparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water; parts and fittings for all of the aforesaid goods.

Class 37

Cleaning, repair and maintenance of surgical, medical, dental and veterinary apparatus and instruments; cleaning, repair and maintenance of sterilisation apparatus and instruments, disinfection apparatus and instruments and apparatus and instruments for producing sterilising and disinfection solutions, superoxidised water and rinse water; cleaning, repair and maintenance of apparatus, installations and devices for electro-chemical treatment of water-based solutions; rental, hire leasing of surgical, medical, dental and veterinary apparatus and instruments; rental, hire leasing of sterilisation apparatus and instruments, disinfection apparatus and instruments and apparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water; cleaning and degreasing of materials; cleaning and degreasing of implants and medical devices; consultancy, information and advisory services relating to all of the aforesaid.

Class 38

Telecommunication of information; telecommunication of information relating to the performance of local and remote sterilisation systems; provision of telecommunication access and links to computer database and the Internet; consultancy, information and advisory services relating to all of the aforesaid.

Class 40

Treatment of water; sterilisation and disinfection of materials; decontamination services; treatment of materials with anti-corrosive coatings, preparations and products; treatment of sterilisation apparatus and medical devices with anti-corrosive coatings, preparations and products; treatment of implants and medical devices; coating of implants and medical devices with medical-grade polyurethane coatings; rental, hire and leasing of apparatus, installations and devices for electro-chemical treatment of water-based solutions; consultancy, information and advisory services relating to all of the aforesaid.

Class 42

Providing access to and leasing access time to computer data bases; providing access to and leasing access time to computer data bases relating to the performance of local and remote sterilisation systems; consultancy, information and advisory services relating to all of the aforesaid.

2. The registration is in respect of a series of three marks, all being essentially the word STERILOX. Nothing appears to turn on the fact that it is a series. The registration stands in the name of PuriCore, Inc.

3. On 4 July 2007 Steritrox Limited applied for revocation of this registration under section 46(1)(a) and (b). The registration date of the mark under attack is 30 November 2001. Consistent with that the relevant period for section 46(1)(a) purposes is 1 December 2001 to 30 November 2006 and revocation is sought from 1 December 2006.

4. In relation to section 46(1)(b) the applicant has specified a five year period running from 14 June 2002 to 13 June 2007 with revocation sought from 14 June 2007.

5. The applicant's position is that its research has suggested that the mark STERILOX (the reference to STERITROX is accepted by the proprietor as being no more than a typographical error) has been used in respect of a machine for producing a sterilising liquid. Paragraph 4 of the statement of grounds sets out the applicant's claim as follows:

"Accordingly, it is accepted by the applicant that the mark has been used in respect of *either* "apparatus and instruments for producing sterilising and disinfection solutions" in class 10, *and/or* "rental, hire leasing of [...] instruments for producing sterilising and disinfection solutions", depending on whether the machines referred to in paragraph 2 above were sold, rented out, hired and/or leased to customers of the proprietor."

6. The registered proprietor filed a counterstatement admitting use on the goods and services identified in the above paragraph but denying that there has been no use outside the scope of the goods and services thus identified. It asks that the application for revocation be dismissed.

7. Both sides filed evidence as follows:

Registered proprietor's evidence of use – witness statement by Debbie Byrne and exhibits DB1-DB24

Applicant's evidence-in-chief – witness statement by Michael Downing and exhibits MPD1 and 2

Registered proprietor's evidence in support – witness statement by Alistair Robertson Gay and exhibit ARG1

8. Ms Byrne is Director of Human Resources and Administration at PuriCore International Limited, part of the PuriCore Group. Mr Gay is a partner in the firm of

Keltie, the registered proprietor's professional representative in this matter. Mr Downing is a partner in Fry Heath & Spence LLP, the applicant's professional representative.

9. Neither side has asked to be heard. Written submissions have been received from Keltie on behalf of the registered proprietor. The applicant for revocation did not file written submissions at the conclusion of the evidence rounds but I note that Mr Downing's evidence contains submissions.

The Law

10. Section 46 reads as follows:

“46.-(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that –

- (a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and
- (b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

- (a) the date of the application for revocation, or
- (b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

11. The onus is on the proprietor to show use when a challenge arises (Section 100).

The authorities on genuine use

12. The two leading authorities on the guiding principles to be applied in determining whether there has been genuine use of a mark are *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer Trade Marks* [2006] F.S.R. 5. From these I derive the following main points that are of particular relevance to the circumstances of this case:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be ‘on the market’ and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);
- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);

- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);
- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);
- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);
- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

Use by the proprietor or with its consent

13. The requirement under Section 46 is that genuine use must be shown by the proprietor or with his consent. The applicant's evidence includes submissions made in a parallel action before OHIM. I am asked to take these submissions into account. I note that one of the issues raised related to the fact that certain of the documentation in that case emanated from companies other than the proprietor of record. I have not been shown the actual documentation filed in Alicante but understand it corresponds in large measure with the evidence before me. Nevertheless, the applicant's pleaded case here does not in my view put in play issues to do with use with the proprietor's consent. Furthermore, Mr Gay's evidence which may have been filed in case the matter arose seems to me to dispose of any concern on this front when it is taken in conjunction with the information contained in, particularly, Exhibit AB3 which is referred to below.

The registered proprietor's evidence

14. Ms Byrne deals, firstly, with the organisational structure of the PuriCore Group. The registration stands in the name of PuriCore, Inc, a company that was previously called Sterilox Technologies, Inc. The proprietor of record is the principal subsidiary of PuriCore Plc. An organogram of the Group is exhibited at DB2. A subsequent witness statement by Mr Gay encloses a letter from Andrea Holtzman-Drucker, Senior Vice President and General Counsel of PuriCore confirming that the trademark, STERILOX, has been used with the consent of, and under the control of, PuriCore, Inc. This is said to include use by PuriCore Plc, PuriCore International Ltd, PuriCore Europe Ltd, Specialist Endoscopy Equipment Ltd, Enigma (UK) Ltd, Sterilox Medical (Europe) Ltd and Optident Ltd.

15. Turning to use of the mark the first piece of evidence (Exhibit DB3) consists of extracts from the Initial Public Offering (IPO) of PuriCore Plc onto the London Stock Exchange in mid 2006. The document was clearly a very lengthy one. Relevant passages from the document are reproduced in Ms Byrne's witness statement. I

should say before going any further that the document is heavily criticised by Mr Downing as being 'intrinsically irrelevant' because it does not emanate directly from the proprietor and is not exemplary of documents issued to the trade. Nevertheless, it is in my view a public statement inviting the public to purchase shares and, inter alia, describing the nature of the business that is the subject of the share offering. It is reasonable to start from the premise that it fairly reflects the business of the company. Indeed, the consequences of making statements that are inaccurate, unsupportable or (worse) misleading would presumably have been extremely serious. To the extent that it is not directly customer-facing material then Mr Downing's criticism is of some slight force but in this respect it is only part of the evidence filed. I have, therefore, given this document due weight and have found it to be of assistance in describing and explaining PuriCore's business activities and operational methods.

16. The following are relevant extracts shedding light on the company and its products.

Page 24 – "PuriCore's principal subsidiary, PuriCore, Inc., formerly known as Sterilox Technologies, Inc., markets a portfolio of branded systems (the "Sterilox Systems" or the "Systems") which produce a hypochlorous acid solution from water, electricity and common salt. The Sterilox Systems generate hypochlorous acid solutions at a range of concentrations and at a nearly neutral pH range similar to the human body. These solutions (the "Sterilox Solutions" or the "Solutions") are non-toxic, non-hazardous and yet effective at killing a wide range of pathogens."

"Commercial sales of the Company's current products began in 1999 following the successful completion of field trials in the UK undertaken by its Endoscopy division."

Page 26/27 – "Sterilox Solutions are highly effective biocides against a broad spectrum range of resistant pathogens, spores and biofilms, in particular, MRSA, Tuberculosis, Legionella, HIV, poliovirus, Helicobacter pylori and norovirus and the Directors anticipate similar efficacy against the avian influenza virus."

Page 27/28 – "Sterilox System – PuriCore has developed a range of proprietary Sterilox Systems to satisfy the specific requirements of its customers in each of its core markets: Endoscopy, Food Safety and Dental. The Sterilox Systems are connected to the mains electricity and water and the customers need only add common salt. The System produces Sterilox Solution and stores it for 24 hours after which the storage reservoir is automatically emptied to ensure only effective Solution is available for use."

"Each Sterilox System includes a combination of Sterilox Cell(s), proprietary software and control systems within a custom designed unit. These proprietary control systems are designed to ensure that the Sterilox Solutions are produced consistently and reliably within narrow specification tolerances, despite normal fluctuations in the electricity supply, changes in the characteristics of the feed

water (e.g. temperature, pressure of alkalinity due to geographic variations) and variation in the quality of input salt.”

17. The Group’s business is principally located in the US and UK. The products have been commercialised in the UK in the endoscopy (1999), dental (2003) and water safety (2000) markets.

18. It is noted that, in addition to the above, the document refers to evaluation studies and the Group’s intention to develop products for use in other areas such as wound care and water treatment. It is not clear what progress was made in these areas during the relevant periods.

19. UK revenues in the endoscopy area were running at approximately US \$10 million per annum in the years 2003 to 2005.

20. The other exhibits are as follows:

DB4 - an extract from the 2006 report of PuriCore Plc. Pages 5 and 6 set out use in relation to endoscopy systems. STERILOX systems are said to be a safe, effective and efficient alternative to traditional toxic disinfectants. The system produces hypochlorous acid, a liquid biocide suitable for room temperature high-level disinfection.

DB5 - an article from the UK-based magazine International Review of Modern Surgery detailing an award won by Sterilox Technologies.

DB6 - an article from the UK-based publication ‘Dentistry’ from 2 October 2003 discussing the Optident Sterilox disinfection system and Sterilox solution.

DB7 - a document entitled ‘Sterilox and Aqualox’ from circa 2005 circulated in the UK concerning water treatment applications. Although the article and featured equipment give primary emphasis to the Aqualox brand, I note that reference is also made to Sterilox Technologies. The products are said to be for bio-film and bacterial control.

DB8 - a single page concerning experiments carried out at Sea Cliff Company in connection with the disinfecting of food products.

DB9 - articles from UK-based scientific journals and publications concerning STERILOX products and systems. I note that STERILOX endoscopy equipment is also advertised.

DB10 - something appears to have gone wrong with the referencing here. Ms Byrne’s commentary refers to the exhibit as being a collection of invoices, collection and delivery notes. In fact the exhibit is a Sterilox endoscopy user manual. The introduction describes it as providing “important information on the correct use of Sterilox disinfectant and the Sterilox Generator System”.

DB11 - a listing of Sterilox machines installed by location including the UK (which

makes up the bulk of the entries).

DB12 - a copy of a Lloyds Register Certificate of Approval dated 5 December 2006. The certificate is in respect of:

‘design and management of manufacture of disinfecting machines for medical instruments. The services and repair of equipment at customer’s sites throughout the UK. The stockholding and modification of medical endoscopy related equipment and the associated training of customers. Provision of microbiological and compatibility analysis of Sterilox solutions’.

DB13 - said to be a Sterilox user manual. In fact it appears to be a promotional brochure.

DB14 - a catalogue for a disinfectant for use in a variety of environments including food processing lines, fruit and vegetable washing, chilled water treatment and surface cleaning. The catalogue gives heavy emphasis to the mark AQUALOX but also refers to Sterilox on the final page.

DB15 - a Sterilox product catalogue. I note that the front page indicates it is a 2007/08 catalogue for Sterilox endoscopy. The inside pages show a variety of marks.

DB16 - another Sterilox document, more technical in nature than DB15, said to have been distributed in the UK in the relevant period.

DB17 - safety data sheets clearly showing the Sterilox mark. Ms Byrne says that it covers disinfectants, sterilisers, chemicals and other products. The sheets are dated December 2002 and July 2005.

DB18 - again the description of the exhibit does not match the content. It is said to be a catalogue but is in fact a collection of invoices, collection notes, etc. (this is probably the exhibit that was intended to be DB10).

DB19 - a catalogue promoting the Sterilox E200 system (machine) and Sterilox Endoscopy Swift System.

DB20 - a ‘Sterilox – the safest solution’ catalogue.

DB21 - a brochure showing use of Sterilox in the context of disinfecting and sterilising dental equipment. I note that the document refers consistently to Optident Sterilox.

DB22 - a listing of what is said to be over 260 customers for Sterilox apparatus, solutions and services in the UK. The front page has two headings ‘great plains id’ and ‘location name’. Information under the latter heading has been blanked out for confidentiality reasons. The first column simply contains alphanumerical combinations or ‘unknown’.

DB23 - a spreadsheet showing tenders submitted in the UK in respect of disinfecting and sterilising products, solutions and services. Again, customer names have been blanked out.

DB24 - an installation and service handbook for the Microgen disinfecting/sterilising system which is said to be sold under the Sterilox brand and is used in the dental industry. Page 5 indicates that 'The Sterilox Microgen is a generator of oxidising biocides for use in the dental industry'.

The parties' written submissions

21. Mr Downing's submissions on behalf of the applicant refer me to evidence filed by the proprietor in corresponding proceedings in respect of PuriCore, Inc's CTM registration (no. 554105). That registration covers three Classes only (Classes 1, 5 and 10). Mr Downing has exhibited a copy of his letter of 7 January 2008 (enclosing detailed comments) on the evidence filed. The evidence is said to have been along essentially the same lines and it is possible to infer from the exhibit references that some of them correspond to Ms Byrne's evidence in the current proceedings. But I have not seen the evidence itself. I note that 26 exhibits are referred to (as opposed to 24 in this case). I assume the outcome of the OHIM proceedings is not yet known. It would not in any case relieve me of the need to reach a view on the position in the UK which may, of course, differ from that reached from a Community perspective. I have had, therefore, to approach the submissions with some caution.

22. Taken at a general level the following submissions and criticisms are made:

- the proprietor's evidence shows use in relation to the sale and/or leasing of a device for producing a hypochlorous acid solution. It does not support a registration in Classes 1, 2, 5, 9, 37, 38, 40 and 42. The Class 10 specification is much wider than the single item of apparatus shown in the evidence.
- the applicant challenges whether use has been shown by the proprietor (this issue appears to have arisen in the OHIM proceedings but does not appear to have been formally raised in the UK proceedings (see also paragraph 13 above).
- the applicant has been unable to verify redacted information.
- certain exhibits show use of other marks such as AQUALOX & MICROGEN rather than the mark in suit.

23. Keltie's submissions on behalf of the registered proprietor remind me that I must consider use with the consent of the proprietor and not just by the proprietor. The submissions invite me to reject the narrowness of the interpretation of use argued for by the applicant and indicate in relation to each exhibit the use shown and the Class to which the use relates. I bear these submissions in mind in my own analysis of the position. For convenience, I propose to deal with the matter on a Class by Class basis.

Class 1

24. The user manual at Exhibit DB10 gives information at 2.3 on the active ingredients of the disinfectant/sterilising solution that features in this case as follows:

“Sterilox disinfectant is produced by the electrolysis of brine (common salt solution). The active ingredients are:

Component		Maximum Level (% weight/vol)	Comments
Chemical Formula	Chemical Name		
HOCl and NaOCl	Hypochlorous acid/sodium hypochlorite	.022	Expressed as equivalent available free chlorine concentration

25. Paragraph 2.4 of the document also gives information on rinse water which is achieved by a percentage of Sterilox being added to the incoming potable water to render the water bacteria free.

26. The data sheets at DB17 and DB24 set out the composition of the Sterilox Solution in more detail. It does so by reference to ‘Cas’ and ‘EINECS’ numbers. I infer that these are referencing systems for chemical substances rather than the registered proprietor’s own cataloguing numbers.

27. The evidence is thin on detail as to whether the registered proprietor supplies the chemical ingredients to be added to water in the processing equipment in order to produce the required disinfecting/sterilising solution or whether it is for the customer to source these items. On the one hand, it is certainly not wholly improbable that the system provider should also provide the active ingredients. On the other hand, given the relatively straightforward nature of the active ingredients, it is by no means certain that supplier of the machine would be concerned with providing branded ingredients.

28. Exhibit DB18 contains invoices, delivery and collection notes suggesting that the registered proprietor is able to provide goods that would fall within Class1. Thus, there is water softener, salt tablets and salt crystals. There are also references to soap but without knowing more it is not possible to identify the Class to which it would relate. A number of the items in the documents in DB18 show trade marks. Some are those of the registered proprietor (a Sterilox generator and a Microgen installation kit for instance). Other brand names (or what I take to be brand names) appear (Aquavend, Polymax and Dosatron for instance) but it is not possible to say whether they belong to the registered proprietor or third parties. The water softener,

salt tablets and salt crystals are not referred to by brand. They may, therefore, be unbranded products, Sterilox branded or third party branded. The product catalogue at DB15 also contains references (on the final page) to salt crystals and salt tablet bags but again do not shed light on the branding. In the circumstances I do not think I can assume they are Sterilox branded. Even though a number of the documents bear the Sterilox device mark (with the O in the form of a water droplet) on the front cover it is not conclusive as to the branding of individual items particularly when one bears in mind the number of brand names appearing on the goods on offer (DB15 in particular includes what are clearly third party branded goods). I do not find any assistance in the other exhibits that would help to resolve the claim to a trade in Class 1 goods under the mark in issue.

Class 2

29. The registered proprietor's written submissions make frequent claims in relation to Class 1 (and various other Classes) but, barring the generality of the claim that the application for revocation should be rejected, are silent on the subject of Class 2 goods. The proprietor has not identified particular goods falling within Class 2 for which genuine use of the mark has been shown.

Class 5

30. In my view the most difficult issues in this case arise in the context of goods in this Class. There can be no doubt that the registered proprietor in its promotional and technical literature uses Sterilox in relation to the piece of apparatus that produces the disinfecting/sterilising solution and in relation to the solutions themselves. Thus, the user manual at Exhibit DB10 is concerned with the correct procedure for cleaning endoscopes (devices for examining interior organs and, therefore, requiring very high degrees of cleaning and disinfecting) but also deals with the composition, cleaning qualities and uses of the solutions produced by the Sterilox generator. In doing so it refers to either Sterilox disinfectant or simply Sterilox. Other examples can be found in DB17, a Sterilox data sheet which clearly relates to the composition and characteristics of the solutions rather than the generator; DB20, a promotional leaflet for 'Sterilox biocidal disinfectant'; and DB9 where it is referred to by name in scientific journals and publications. I will return to Exhibit DB9 later as it is of particular assistance in gauging how the mark is used and recognised in interested medical circles.

31. All that might suggest that the matter is fairly clear cut in the proprietor's favour at least for relevant parts of the Class 5 specification. Nevertheless, there are contrary indications that suggest the answer is less obvious. *Ansul* makes it clear that the commercial *raison d'être* of a mark is to create or preserve an outlet for the goods that bear the sign. The endoscopy revenue figures quoted above wrap up products and services and do not provide a breakdown within either category. The evidence does not suggest (with an exception that I will come to later) that the proprietor sells Sterilox solutions as opposed to the generators that produce the solutions. One view of the matter might, therefore, be that references to Sterilox solutions are no more than a shorthand way of referring to a solution made by a Sterilox generator rather than use of Sterilox in relation to the solutions themselves. On that basis the proprietor would not have demonstrated use in relation to Class 5 goods. That view

of the matter would be reinforced by the fact that on my reading of the evidence the proprietor sells or leases/hires machines to (mainly) hospitals but does not have any continuing interest in the volume of disinfectant solutions that is produced. The 'recurring revenue rental model' described on page 28 of DB3 confirms the rental agreements are independent of volume of solutions produced. (I note that certain of the invoices in DB18 refer to 'Sterilox minimum literage' but the point is not further explained).

32. How then can the proprietor be said to be creating or maintaining a market for Class 5 goods? After all it is somewhat counter-intuitive to regard the manufacturer or supplier of a piece of equipment to be used for the production of other goods to also be responsible for the goods so produced. The manufacturer of a bakery oven, for instance, would not be held responsible by consumers for the quality of the resulting bread. The consumer would hold the baker responsible and not the maker of the oven. But analogies can only go so far. They may point to relevant considerations but do not provide a point of comparison that is relevant in all circumstances.

33. At this point I need to say a little more about the nature of the proprietor's core product, the Sterilox generator, and the circumstances in which it is used. The following is taken from paragraph 2.0 of the User Manual at DB10:

"Sterilox is a fast acting disinfectant for disinfection of medical devices within the Intended Use described herein. Sterilox is generated, at the point of use, by electrochemical activation (electrolysis) of water using common salt. The generator has automatic closed loop control and monitoring to ensure that the Sterilox disinfectant produced is efficacious."

34. Similar points appear elsewhere in the promotional literature. Thus, the Sterilox biocidal disinfectant brochure at DB20 advertises:

"An on-demand solution
Sterilox is generated on-site, on-demand and is stored for up to 24 hours. Every Sterilox installation has a modem link directly to a central monitoring site where performance parameters are monitored, providing a 'virtual engineer' at the touch of a button. The Sterilox generator provides a printout to confirm the performance parameters of the system. This can then be used as part of the audit system within the hospital."

35. The reference to 24 hours storage appears to relate to the usable lifespan of the solutions (see paragraph 7.0 on page 12 of DB10).

36. These matters are relevant to the particular circumstances of trade and go some way to explaining why the proprietor does not itself sell the disinfecting solutions. The volumes required and relatively short shelf life of the solutions has resulted in a business model that has user organisations (principally hospitals) buying (or leasing, hiring) machines for on-site, on-demand production. The end users are akin to proxy producers of the solutions for the proprietor who is able to monitor the performance parameters of the machines and the quality of the solutions produced. It seems to me, therefore, that the absence of direct sales by the proprietor or any levy on

volumes of solutions produced is not in itself determinative of the case against the proprietor. The demands of the market have in effect dictated the proprietor's business model.

37. In other respects it seems to me that the overwhelming thrust of the proprietor's promotional literature is to advertise the system, by which I mean the generator and the solution generated, as Sterilox. The evidence is that the proprietor has taken steps to establish a market for Sterilox solution (as opposed to simply a solution produced by a Sterilox machine) and is at pains to emphasise the controlled nature of the production process and to provide instructions to users. The point can be demonstrated by reference to the User Manual at DB10 which covers content of the solution, storage conditions, handling and disposal and directions for use intimately linked to the brand itself. It would in my view be putting an artificial construction on the evidence to suggest that it does not demonstrate genuine use of Sterilox in relation to disinfectant etc. solutions.

38. That finding can also be tested from a third party perspective. Firstly, there are the articles from www.modern.surgery.com at DB5 and the article from Dentistry at DB6. Secondly, there are the articles from UK based scientific journals and publications at Exhibit DB9. These articles are overwhelmingly concerned with the clinical efficacy of Sterilox solutions rather than the means of production. A number of the articles give tables of germicides along with their brand names, manufacturer, active ingredients etc and give Sterilox Technologies as the manufacturer of the germicide Sterilox. The collective force of this material seems to me to point to a clear public perception that the proprietor is seen as holding itself responsible for the solutions produced using its machines and supports the claim to genuine use of the mark in issue.

39. I referred above to a possible exception to my general finding that the proprietor does not sell solutions itself. Exhibit DB21 is a brochure showing use of the mark in connection with dental equipment. The third page of the document shows a product pack containing "2 x 13 litre packs". The side panel indicates it is "Optident Sterilox quality controlled electrolyte solution". The brochure appears to be dated 11 February 2003. The article from Dentistry of 2 October 2003 at DB6 refers to what must be the same product. I note too that Optident is described as being "the independent materials and equipment supplier from Yorkshire". The presentation of this co-branding (see the bottom of the article and page 2 of DB21) strongly support the view that Optident Sterilox represents the "joint affixing of separate marks or indications on the same product" (per the CFI in Case T-29/04 *Castellblanch SA v OHIM*). I accept that there has to this limited extent been direct usage of Sterilox on or in relation to an electrolyte solution that is in turn used to produce a hypochlorous acid solution (page 36 of DB3). There is further information on this particular aspect of the business at paragraph 4.1.3 on page 129 of DB3.

40. My overall conclusion in relation to Class 5 is that genuine use has been shown in relation to sterilising and disinfecting solutions and electrolyte solutions but not the other items in the Class 5 specification. I deal below with what is a fair specification based on this use and having regard to the specification of the registration.

Class 9

41. The proprietor's written submissions identify a small number of exhibits as supporting the claim to use in relation to Class 9 goods. These are pages 4, 24 and 27 of DB3, DB4 (third page) and DB20. The particular goods concerned are certain proprietary software and process controls and the electrolysis cell that is described on page 27 of DB3.

42. The proprietor is in the business of selling or leasing/hiring complete machines for the production of disinfecting/sterilising solutions. The invoice evidence and collection and delivery notes in DB18 do not disclose any sales or other trade in the software, process controls or cells that form part of the machines though I accept that, if these goods were to be sold separately, they would be proper to Class 9. The proprietor nevertheless claims that its systems incorporate what it refers to as 'proprietary' items such as the electrolysing cell that is at the heart of the system along with certain software and process controls (see, for instance page 24 of DB3). That might suggest that such items are Sterilox branded. But I cannot see from the evidence that the point has been clearly established. The evidence does on the other hand refer to other brands of PuriCore as well as third party branding so it does not necessarily follow that any Class 9 goods would be Sterilox branded. In the circumstances I find that the proprietor has not shown genuine use of the mark in relation to Class 9 goods.

Class 10

43. The applicant has made the limited concession recorded at the outset. Clearly the mark has been used in relation to the sale of goods. The goods in question are accurately described as "apparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water". The evidence does not allow me to go beyond that save for the related parts and fittings. It is true that DB13 relates to a machine that undertakes the sterilisation process (as distinct from producing a sterilising/disinfecting solution) but it appears to be known primarily by the name or acronym S.A.F.E.R. To be fair to the proprietor I acknowledge that the acronym stands for Sterilox Automated Flexible Endoscope Reprocessor (see page 31 of DB3) but it is the acronym itself that is given prominence. The invoice evidence in DB18 further supports the view that this is the name by which the machine is known. The evidence is not strong enough to allow me to conclude that genuine use has been shown of the mark Sterilox in relation to this machine.

Class 37

44. Rental and hire leasing of machines is part of the proprietor's method of trading and is recognised as such in the applicant's statement of grounds. That state of affairs is also confirmed by the invoice evidence at DB18. The nature of the apparatus that is the subject of the rental/hiring process is relevant to the classification. The proprietor's specification shows rental, hire and leasing of various apparatus and instruments in two Classes. In Class 37 the specification covers:

"rental, hire leasing of surgical, medical, dental and veterinary apparatus and instruments; rental, hire leasing of sterilisation apparatus and instruments, disinfection apparatus and instruments and apparatus and instruments for

producing sterilising and disinfection solutions, super-oxidised water and rinse water;”

In Class 40 it covers:

“rental, hire and leasing of apparatus, installations and devices for electro-chemical treatment of water-based solutions;”

45. The machines that are shown in the evidence to be rented or hired under the mark Sterilox are for treatment of water so as to produce a solution that can be used for sterilising and disinfecting purposes. As I understand the position, these machines are not in themselves used for sterilising or disinfecting purposes though I accept that PuriCore also offers the S.A.F.E.R. machine that does perform this function. The rental of apparatus with a cleaning etc function is a Class 37 service because cleaning services themselves are in that Class (see also the Explanatory Note to the Nice Classification, 9th edition). By the same token the rental of apparatus for treatment of water is a Class 40 service because water treatment services are in that Class. I regard the use shown by the proprietor as being appropriate to Class 40 rather than Class 37.

46. Nevertheless, the applicant’s statement of grounds appears to concede that the mark has been used in relation to the part of the specification that covers “rental, hire leasing ofapparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water;”. These services should, therefore, be retained.

47. I can find no evidence of use of the more broadly based terms in the Class 37 specification covering cleaning, repair and maintenance of a wide range of apparatus and instruments. On the other hand the invoice evidence confirms that the provision of a maintenance service is, as one might expect, intimately linked to the rental or hiring of the particular machines offered by PuriCore. I find that genuine use has been shown in relation to the latter.

48. I have referred above to the S.A.F.E.R. machine that performs a cleaning/sterilising function (on endoscopes) but, for the reasons given, I am not persuaded that the evidence is strong enough to show that Sterilox has been used in relation to these machines or the rental or maintenance thereof.

Class 38

49. The proprietor’s written submissions direct me to Exhibit DB20 and page 27 of DB3. The former indicates that “Every Sterilox installation has a modem link directly to a central monitoring site where performance parameters are monitored ...”. DB3 expands on this somewhat by saying that “...the Company has the ability to monitor remotely the operation and performance of its Sterilox systems via telemetry. This enables it to provide data management, quality assurance and diagnostic services to its customers ...”.

50. It seems to me that what the proprietor is supplying is the monitoring service itself rather than the provision of a telecommunications service or access to such a

service. I am somewhat doubtful, therefore, whether PuriCore is offering the services in the terms in which they are described in the Class 38 specification. If it is the service would be of the kind described in the second item in the specification.

51. However, having the capability to perform a service is not the same as establishing that the service has actually been offered and taken up. It might have been expected that the provision of such a service was available at a charge. However, the invoice evidence does not disclose any separately identifiable sums in relation to such a service. Nor have I been able to find any statements to the effect that the remote monitoring service is, for instance, included in the price of the machines. In short the basis for the claim needed to be made clear and evidence provided in support if the Class 38 specification was to be preserved in some form.

Class 40

52. For the reasons given above in relation to the discussion of the Class 37 services I find that genuine use of the mark Sterilox has been shown in relation to “rental, hire and leasing of apparatus, installations and devices for electro-chemical treatment of water-based solutions;”.

53. The Class 40 specification also covers a range of ‘treatment’ and ‘coating’ services. The thrust of the evidence is that PuriCore is in the business of selling or renting/hiring machines to hospitals and other end users for them to produce sterilisation solutions and to undertake sterilisation and decontamination for themselves. It does not seem to be the case that PuriCore itself (or group companies) undertakes the services of treatment or coating.

54. The proprietor’s written submissions refer me particularly to Exhibits DB3 (pages 28, 127 to 129 and 132), DB12 and DB23 in support of the claim to genuine use of the mark in relation to services in this Class. My understanding of the position from page 128 of DB3 is that the solutions produced by the Sterilox generator can be dispensed to an endoscope reprocessor.

55. However, as noted above, the evidence suggests that this machine, which is described as a ‘water-disinfector’ is sold under the mark S.A.F.E.R. The invoice evidence of DB18 tends to support this view of how the machine is branded. It does not in any case show that any of the Class 40 services are being supplied under the mark.

56. Neither DB12 nor DB23 shed further light on the matter. The first of these documents is a certificate of approval which refers to quality management systems relating to the design, manufacture, service and repair of, inter alia, disinfecting machines. But the document is silent on branding, does not cover Class 40 services and is not in itself proof of use in relation to Class 40 services. DB23 shows tenders for generators and washer/disinfectors and supply and installation services. Most of the entries do not refer to a brand. There are a few exceptions which refer to SAFER, Maxigen and Midigen (other group brands). But I remain unconvinced that the evidence establishes genuine use of Sterilox in relation to the subject services.

Class 42

57. The specification essentially covers the provision of access to and leasing access to computer databases. In the case of the second item in this specification it is noted that these services relate to “the performance of local and remote sterilisation systems”. Nevertheless the essence of the services appears to be the provision of access to computer databases. My understanding is that the proprietor claims to provide a remote monitoring service but that does not appear to be the service described in the specification as formulated. The written submissions do not appear to make any particular claim in relation to Class 42 services. I am not satisfied that it is open to me on the evidence to find use of Sterilox in relation to the Class 42 services.

A fair specification

58. Based on my above findings in relation to goods and services in respect of which genuine use has been shown, what would be a fair specification? A number of authorities provide guidance on the principles to be followed in constructing a fair specification. The case law was usefully reviewed by Ms Anna Carboni, sitting as the Appointed Person, in the case of *Standard Life Insurance Company's opposition to an application by Cube Publishing Ltd*, O-208-08. The relevant paragraphs are as follows:

“23. The Hearing Officer’s citation of the *Ansul* and *Laboratoire de la Mer* cases indicates that he did intend to apply the same principles as in a revocation application based on non-use, since these are the leading authorities on what amounts to genuine use of a trade mark in the context of such an application. However, the real issue in this case is not what amounts to genuine use of a trade mark, but whether genuine use in relation to one type of service supports the maintenance of other related services or of a broader category of services in the specification of a mark being relied on in an opposition.

24. The Court of Appeal has dealt with this issue in the context of partial revocation applications based on non-use in *Thomson Holidays Ltd v Norwegian Cruise Line Ltd* [2002] EWCA Civ 1828, [2003] RPC 32 and *West v Fuller Smith & Turner plc* [2003] EWCA Civ 48, [2003] FSR 44. In the key paragraphs of the former decision, Aldous LJ stated the following:

29 ...Because of section 10(2), fairness to the proprietor does not require a wide specification of goods or services nor the incentive to apply for a general description of goods and services. As [counsel] pointed out to continue to allow a wide specification can impinge unfairly upon the rights of the public. Take for instance a registration for "motor vehicles" only used by the proprietor for motor cars. The registration would provide a right against a user of the trade mark for motor bikes under section 10(1). That might be understandable having regard to the similarity of the goods. However the vice of allowing such a wide specification becomes apparent when it is envisaged that the proprietor seeks to enforce his trade mark against use in relation to

pedal cycles. His chances of success under section 10(2) would be considerably increased if the specification of goods included both motor cars and motor bicycles. That would be unfair when the only use was in relation to motor cars. In my view the court is required in the words of Jacob J to "dig deeper". But the crucial question is – how deep?

30. Pumfrey J [in *Decon v Fred Baker* [2001] RPC 293] was, I believe, correct that the starting point must be for the court to find as a fact what use has been made of the trade mark. The next task is to decide how the goods or services should be described. For example, if the trade mark has only been used in relation to a specific variety of apples, say Cox's Orange Pippins, should the registration be for fruit, apples, eating apples, or Cox's Orange Pippins?

31 Pumfrey J in *Decon* suggested that the court's task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus the court should inform itself of the nature of [the] trade and then decide how the notional consumer would describe such use.

25. This approach was also adopted in the latter case, in which the Court emphasised the need to consider a fair description that would be used by the average reasonably informed consumer for the products on which the proprietor has demonstrated use of the mark. To that end, it was said to be relevant to enquire whether the specification of goods included commercially quite different sorts of articles from those in respect of which the proprietor had used the mark, and also whether non-use in respect of a significant and identifiable sub-set of the specification of goods was established.

26. The European Court of Justice ("ECJ") has not dealt with this issue, either in the context of revocation proceedings or in relation to article 11(2) of the Directive as applied to opposition proceedings. But the following guidance has been given by the Court of First Instance ("CFI") in relation to the parallel provision in article 43(2) of Regulation No. 40/94 on the Community trade mark ("the Regulation") in Case T-126/03 *Reckitt Benckiser (España), SL v OHIM (ALADIN)* [2006] ETMR 50:

42. The Court observes that the purpose of the requirement that the earlier mark must have been put to genuine use is to limit the likelihood of conflict between two marks by protecting only trademarks which

have actually been used, in so far as there is no sound economic reason for them not having been used. That interpretation is borne out by the ninth recital in the preamble to Regulation No 40/94, which expressly refers to that objective (see, to that effect, *Silk Cocoon*, cited at paragraph 27 above, paragraph 38). However, the purpose of Article 43(2) and (3) of Regulation No 40/94 is not to assess commercial success or to review the economic strategy of an undertaking, nor is it to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks (Case T-334/01 *MFE Marienfelde v OHIM – Vétoquinol (HIPOVITON)* [2004] ECR II-0000, paragraph 32, and Case T-203/02 *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)* [2004] ECR II-0000, paragraph 38).

43. Therefore, the objective pursued by the requirement is not so much to determine precisely the extent of the protection afforded to the earlier trade mark by reference to the actual goods or services using the mark at a given time as to ensure more generally that the earlier mark was actually used for the goods or services in respect of which it was registered.

44. With that in mind, it is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established.

45. It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

27. The Court added the following warning:

46. Although the principle of partial use operates to ensure that trademarks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

28. The ninth recital of the Regulation, which was the CFI's starting point in *ALADIN* reads as follows:

Whereas there is no justification for protecting Community trademarks or, as against them, any trade mark which has been registered before them, except where the trademarks are actually used.

29. A parallel, though slightly more convoluted, provision is found in the Directive at recital 8 (emphasis added):

Whereas in order to reduce the total number of trademarks registered and protected in the Community and, consequently, the number of conflicts which arise between them, it is essential to require that registered trademarks must actually be used or, if not used, be subject to revocation; **whereas it is necessary to provide that a trade mark cannot be invalidated on the basis of the existence of a non-used earlier trade mark, while the Member States remain free to apply the same principle in respect of the registration of a trade mark** or to provide that a trade mark may not be successfully invoked in infringement proceedings if it is established as a result of a plea that the trade mark could be revoked; whereas in all these cases it is up to the Member States to establish the applicable rules of procedure.

30. The rationale of limiting the number of conflicts between marks thus lies behind section 6A of the Act in the same way as it lies behind article 43(2) of the Regulation. It is therefore appropriate to apply the guidance given by the CFI in *ALADIN* in relation to Community trademarks, which corresponds closely with the guidance of the Court of Appeal in relation to domestic trade mark revocation applications.

31. It is not apparent from the Decision that the Hearing Officer took any of this guidance into account. I agree with the Applicant that the last sentence of paragraph 37 indicates that he made an erroneous assumption that proof of use in respect of a subset of services is sufficient to support a broader range

of services for the purpose of the deemed specification under section 6A(6), even where the services are not defined particularly precisely and narrowly. The combination of these two factors leads to a concern that the Hearing Officer made findings of use where none was actually demonstrated.”

59. Applying these principles I consider that a fair specification in this case would be as follows:

Class 5

Sterilising and disinfectant solutions; rinse waters; disinfectants; super-oxidised water; biocidal solutions; biocides for the sterilisation of instruments; electrolyte solutions.

Class 10

Apparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water; parts and fittings for all of the aforesaid goods.

Class 37

Cleaning, repair and maintenance of apparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water; cleaning, repair and maintenance of apparatus, installations and devices for electro-chemical treatment of water-based solutions; rental, hire leasing of apparatus and instruments for producing sterilising and disinfection solutions, super-oxidised water and rinse water.

Class 40

Rental, hire and leasing of apparatus, installations and devices for electro-chemical treatment of water-based solutions.

60. A few explanatory comments are called for in relation to the approach I have adopted in formulating the above specification. Firstly, it is apparent that the current specifications in the above Classes are constructed on the basis of broad, unrestricted statements of goods and services followed by a statement of goods or services that more closely parallels the actual goods and services in which the proprietor trades. Thus, the broad term “pharmaceutical, veterinary and sanitary preparations” is followed by more precise terms such as “sterilising and disinfectant solutions”. Consistent with the guidance in *Thomson Holidays* fairness to the proprietor does not require the preservation of a wide specification. On that basis, unnecessarily broad terms have been removed along with more specific items where no use has been shown.

61. Secondly, there is some duplication in the terminology that remains, particularly in Class 5. It may be said, for instance, that the term “sterilising and disinfectant

solutions” is in itself broad enough to cover the succeeding five items. However, that risks the sort of overly pedantic approach that was rejected by the CFI in *Reckitt Benckiser* (the *Aladin* case referred to above). In any case it is plain from the evidence that the proprietor uses various terminology to describe its goods depending on the circumstances, for example, disinfectant and sterilisation solutions, hypochlorous acid solutions, biocides, etc. No useful purpose would be served by denying the proprietor the right to retain a range of terms that fairly describe its goods.

62. Thirdly, I have not sought to restrict the first part of the Class 37 services to ‘maintenance’. ‘Cleaning and repair’ are or may be part of a maintenance function and the restriction to a particular type of apparatus in my view produces a suitably contextualised specification. Fairness to the proprietor does not require me to allow the proprietor to retain a specification for such services relating to a broader range of goods. On the other hand I consider it appropriate to allow retention of cleaning, repair and maintenance of both apparatus and instruments for producing sterilising and disinfection solutions etc and apparatus and instruments for electro-chemical treatment of water-based solutions. These forms of terminology seem to me to be no more than alternative ways of describing PuriCore’s machines, the first focussing on what is produced, the second on the process involved.

63. Finally, it is clear that the proprietor’s business to date has focused primarily on the endoscopy market and dental practices. I see no need to limit the specification further by reference to application areas. It is clear from the share offer document that the proprietor has aspirations in other application areas (food hygiene and water treatment being examples). In any case the essence of the goods and services is that they involve disinfectant/sterilising systems (goods and services) and that is how they are best characterised.

Conclusion

64. The registration falls to be revoked in respect of all goods and services save for those set out in paragraph 59 above. In accordance with section 46(6)(b) revocation will take effect from 1 December 2006 this being the earlier date requested by the applicant under section 46(1)(a).

Costs

65. The applicant has been largely successful bearing in mind the position adopted in its statement of grounds though the registered proprietor has succeeded in preserving a small number of goods and services that go beyond those conceded by the applicant. Allowing for the parties' relative success I order the registered proprietor to pay the applicant the sum of **£1000** as a contribution to its costs. 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 the case if any appeal against this decision is unsuccessful.

Dated this 16th day of February 2009

**M REYNOLDS
For the Registrar
The Comptroller-General**