

TRADE MARKS ACT 1994

IN THE MATTER OF:

OPPOSITION No. 95502

IN THE NAMES OF JOHN WILLIAMS AND BARBARA WILLIAMS

TO TRADE MARK APPLICATION No. 2459772

IN THE NAME OF CANARIES SEASCHOOL SLU

DECISION

Trade Mark Application 2459772

1. Canaries Seaschool SLU (*'the Applicant'*) was incorporated in Spain on 8 May 2007. It is the proprietor of trade mark application number 2459772 filed on 27 June 2007 for registration of a series of two signs as trade marks for use in relation to the following services:

Class 39: yacht charter: skippered and bareboat

Class 41: yacht sailing school and training centre; powerboat school and training centre; associated sailing related shorebased courses.

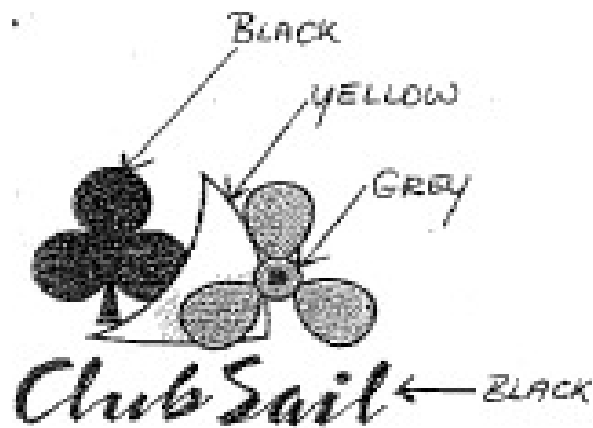
The signs in the series were graphically represented as follows:



Opposition 95502

2. The application for registration was opposed by Mr. and Mrs. John and Barbara Williams (*'the Opponents'*) on 17 September 2007. In their Notice and Grounds of Opposition they contended that the application should be refused in its entirety: (1) under Section 3(6) of the Trade Marks Act 1994, on the ground that the application had been filed in bad faith; (2) under Section 5(4)(a) of the Act, on the ground that the Opponents were entitled to an earlier right by virtue of the law of passing off to prevent the Applicant from offering and supplying services of the kind specified under and by reference to the signs in issue; and (3) under Section 5(4)(b) of the Act, on the ground that the Applicant was liable to be prevented from using the signs in question by virtue of the law of copyright.

3. The pleadings filed by the Opponents were diffuse. In summary, they claimed to have acquired an earlier right through use of the trading name **CLUB SAIL SEA SCHOOL** together with the following logo introduced in 1998:



which was a variant of a logo introduced in 1987. The later variant differed from the earlier logo in only two respects: (1) in the variant, the device of a propeller was superimposed on the earlier logo; (2) in the earlier logo, the words **SEA SCHOOL** appeared in block lettering beneath the cursive representation of the words **CLUB SAIL**. Both logos were alleged to be original artistic works designed by Mr. John Williams. The propeller was added to the earlier logo for the purpose of signifying that the Opponent's business activities included not only yacht, but also powerboat, charter services and training courses.

4. The Opponents' son, Andrew Williams, was alleged to have entered into collaborative arrangements with them which enabled him to participate in the operation of their **CLUB SAIL SEA SCHOOL** business from 1998 to 2006/2007. It was alleged that in 2006/2007 Andrew Williams began operating autonomously of the Opponents, using their trading name, logo and domain names without their consent. The Applicant company was alleged to be a vehicle through which he was competing unfairly with the Opponents. The opposed application for registration was alleged to have been made for

the purpose of assisting the Applicant to steal the benefit of the Opponents' goodwill and reputation built up and acquired through use of the trading name **CLUB SAIL SEA SCHOOL** and the version of their logo introduced in 1998.

5. The Applicant joined issue with the Opponents on their Grounds of Opposition. In its Counterstatement it repeatedly stated with reference to the Grounds of Opposition that *'the Opponents are put to strict proof as to the allegations therein'*. No attempt was made to state how or why the Applicant claimed to be lawfully entitled to register itself as the proprietor of the signs in question.

The evidence

6. The Opponents filed evidence in the form of witness statements made by themselves and their younger son David Williams. The Applicant filed evidence in the form of a witness statement made by their elder son, Andrew Williams.

7. John Williams gave evidence in his witness statement dated 27 February 2008 to the effect that he designed the earlier of the two logos referred to in paragraph 3 above in 1987/88, that he designed the later version shown in paragraph 3 above in 1994 (although it was not introduced until 1998) and that he owned the copyright in both logos: paragraphs 1 to 3, 13 and 14. He also gave evidence to the effect that on 6 August 1998 he registered the domain name www.clubsail.com and designed the associated website promoting **CLUB SAIL & POWERBOATS**, mainly using photographs that were his copyright: paragraph 39. In addition he designed the brochures and advertisements used for the purpose of promoting **CLUB SAIL** services over the years since 1987: paragraphs

3, 14 and 40 to 44. In her witness statement dated 27 February 2008, Barbara Williams confirmed her husband's evidence and additionally confirmed that he was a fully trained and accomplished photographer: paragraphs 1 to 3, 13, 14 and 39 to 44.

8. Andrew Williams did not question or contradict any of this in his witness statement on behalf of the Applicant dated 30 June 2008. There can be no doubt that the version of the logo shown in paragraph 3 above was replicated in the signs which the Applicant had applied to register. That involved replication of the elements carried forward from the earlier logo. The Applicant would therefore not be entitled to use the signs in question without being the owner or authorised by the owner of any copyright the logos. Since there was no evidence to set against the claims made by the Opponents with regard to subsistence and ownership of copyright, the Applicant needed a defence to infringement. The defence advanced by Andrew Williams in paragraphs 44 and 57 of his witness statement on behalf of the Applicant was that he had made an agreement with the Opponents which left him free to deal with the logos as trade marks as he saw fit.

9. The Opponents evidence established that the **CLUB SAIL SEA SCHOOL** was founded by John Williams in 1986, since when he and his wife had gone on to promote the use of the **CLUB SAIL SEA SCHOOL** trading name by and through a succession of companies and a partnership:

Club Sail Ltd (registered in England, number 2217578)

incorporated 4 February 1988, ceased trading 3 May 1998

CB Club Sail (registered in Spain, number E 38.208.737)

incorporated on 15 November 1988, ceased trading on 31 December 1998

Club Sail Canaries (a partnership between John and Barbara Williams)

traded continuously since being formed on 1 October 1993

Club Sail & Powerboats SL (registered in Spain, number B-38.506.200)

incorporated 13 July 1998, ceased trading on 28 February 2003

Club Sail & Powerboats (Jersey) Ltd (registered in Jersey, number 72779)

incorporated 16 October 1998, ceased trading on 31 December 2003

The business activities of these undertakings appear to have been conducted substantially with a view to generating bookings in the United Kingdom for the supply of yacht and (since 1998) powerboat charter services and training course based in Tenerife. In 1987 the **CLUB SAIL SEA SCHOOL** in Tenerife became the first Royal Yachting Association approved overseas training centre.

10. Exhibit AW11 to the witness statement of Andrew Williams contains '*a series of advertisements my company*' (ie the Applicant) '*has placed or are due to place in Sailing Today*'. These promote the **CLUB SAIL SEA SCHOOL** and relate it to the website at www.clubsail.com. Exhibits JHW59 and JHW60 to the witness statement of John Williams dated 27 February 2008 show pages downloaded from that website on 16 and 17 July 2007. These refer to Andrew Williams as the Principal of the school who '*carries out the majority of the advanced tuition assisted by the rest of his team*'. Exhibit AW3 indicated that the domain name www.clubsail.com was registered to the Applicant at

some point subsequent to its incorporation on 8 May 2007. In paragraph 14 of his witness statement Andrew Williams confirmed that he was responsible for instructing Tenerife Ideas (identified as sometime registrant of the domain name) to design and create the website as it could be seen at the time of his statement.

11. Andrew Williams offered the following explanation of the steps by which the Applicant came to be holding itself out as proprietor of the **CLUB SAIL SEA SCHOOL** business:

‘Prior to ... 2007 I was a sole trader’ (paragraph 1)

‘My company is a successor in business to Club Sail Limited (registered no. 02217578) which was dissolved in 1998. The predecessor was originally founded in 1986 and ceased to trade in 2000. With the full knowledge of the Opponents I re-established the business in 2004 and have been successfully running the business ever since’ (paragraph 5)

‘The trade marks were first used by my company [the Applicant] in the United Kingdom in January 2004 and have been used continuously since then’ (paragraph 10)

‘There was an agreement that I would resurrect the company [Company No. 02217578] being free to deal with the trade marks as I saw fit’ (paragraph 44)

‘The Opponents could not be excluded from a business they were not included in’ (paragraph 47)

This explanation was evidently intended to show a chain of title which bridged the gap between the date on which Club Sail Ltd (Company No. 2217578) ceased trading, that being 3 May 1998, and the date on which the Applicant was incorporated, that being 8 May 2007.

12. The Applicant produced no written record of any transaction by virtue of which it might be said to have acquired, with the full knowledge and agreement of the Opponents, an independent right to use the signs it had applied to register. The Opponents for their part drew attention to a variety of facts and matters upon which they relied for the purpose of demonstrating the falsity of the Applicant's position.

The Hearing Officer's Decision

13. The parties elected to proceed on the basis that the Registrar would determine the Opposition on the basis of the papers on file, without recourse to a hearing. Both sides filed written submissions for consideration by the allocated Hearing Officer, Mr. Mark Bryant. He refused the application for registration for the reasons he gave in a written decision issued under reference BL O-010-09 on 13 January 2009. He ordered the Applicant to pay the sum of £733 to the Opponents as a contribution towards their costs of the proceedings in the Registry.

14. The Hearing Officer's findings, as summarised by me, were as follows:

- (1) A goodwill protectable in the United Kingdom had been built up and acquired by means of the activities of *'both past and present Club Sail businesses'*: paragraph [35].
- (2) *'The current Club Sail business clearly takes full advantage of the previous goodwill, built up by [the Opponents] in its promotion of itself to potential customers'*: paragraph [37].

- (3) The parties' evidence was contradictory and inconclusive with regard to the existence and terms of the agreement by virtue of which the Applicant claimed to have become entitled to exploit the goodwill and trade marks of Club Sail Limited (Company No. 02217578) with the result that there was *'insufficient evidence'* to support either side's version of events: paragraph [38].
- (4) Therefore, any assessment of the Opponents' entitlement to goodwill prior to 2004 was *'rendered irrelevant by the fact that it is unclear what conditions, if any, were placed upon [Andrew Williams] when exploiting the goodwill residing in the previous Club Sail businesses'*: paragraph [38].
- (5) The goodwill that existed in the business after 2004 was shared between John Williams and Andrew Williams, with John Williams jointly holding a goodwill in the business from at least April 2006: paragraphs [39] to [43].
- (6) On the basis that John Williams owned a share in the goodwill of the Club Sail business *'the application to register and use the trade mark on behalf of the applicant company alone was a misrepresentation contrary to the law of passing off'*: paragraphs [43] and [44].
- (7) In view of the fact that Andrew Williams was fully aware of the history of the logo in issue and its longstanding association with the Opponents' businesses, the action of the Applicant in applying to register it to the

exclusion of the Opponents amounted to an act of bad faith: paragraph [51].

15. The Opponents' objection based on copyright was dismissed in paragraph [45]:

The ground of opposition under Section 5(4)(b) of the Act is based upon [John Williams'] alleged copyright in both the original logo (without the propeller device) and the later logo (incorporating the propeller device). He has been put to proof on this point by [Andrew Williams], but no evidence has been forthcoming to substantiate this claim. In light of this, I am unable to conclude that the copyright of either logo resides with [John Williams] and accordingly the opposition is not successful on this ground.

The Appeal

16. The Applicant appealed to an Appointed Person under Section 76 of the Trade Marks Act 1994 contending, in substance, that: (1) the objection under Section 5(4) (a) should have been dismissed on the basis that neither of the Opponents had any right to invoke the law of passing off against the Applicant for the purpose of preventing it from using the signs in issue in relation to services of the kind specified in the opposed application for registration; (2) the objection under Section 3(6) should have been dismissed for lack of any sufficient basis either for not applying the presumption of innocence in favour of the Applicant or for disbelieving the evidence filed on its behalf; (3) the order for costs should in any event be set aside for lack of due process in relation to the quantification of the award. These contentions were developed in the Applicant's written and oral submissions at the hearing before me. It was, in particular, submitted on behalf of the Applicant that the Opponents had simply abandoned the goodwill built up

and acquired by means of any and all **CLUB SAIL SEA SCHOOL** business activities carried out by them or under their control prior to 2004. I should say at once that this is not a finding that could possibly be made on the basis of the evidence on file.

17. The Opponents did not appeal against the dismissal of their objection under Section 5(4)(b), nor did they file a Respondent's Notice under Rules 71(4) to (6) of the Trade Marks Rules 2008. They filed written submissions in lieu of attendance at the hearing of the appeal. In their written submissions they re-asserted the case they had put forward for consideration in the Registry and maintained that the outcome of the Opposition should be the same on appeal as in the tribunal below. This was subject to the caveat that they did not agree with all of the findings the Hearing Officer had made in the decision under appeal. On the question of costs they maintained that the Hearing Officer was entitled to make an award in the way that he did, on the basis of experience and with reference to the Registry's published scale fees.

18. In the run up to the hearing of the appeal the Applicant sought to amend its Grounds of Appeal, principally for the purpose of adding an express averment to the effect that the Hearing Officer ought to have found that any and all goodwill appertaining to the signs in issue belonged solely and exclusively to Andrew Williams and/or to such companies as he had established to run the **CLUB SAIL SEA SCHOOL** business. At the hearing of the appeal I gave permission for the requested amendments.

19. Shortly before the hearing of the appeal I gave directions in the exercise of the powers conferred upon me by Rules 62(1)(a) and 73(4) of the Trade Marks Rules 2008 requiring clarification with regard to the evidence given in paragraphs 11 and 13 to 15 of

the witness statement of Andrew Williams concerning the content and creation of the website at www.clubsail.com. I directed the Applicant to provide a copy of the full registration history of the domain name www.clubsail.com showing:

- (1) the name of the first registrant in August 1998;
- (2) the date with effect from which the domain name was registered in the name of the Applicant;
- (3) the names of all intermediate registrants and the dates with effect from which the domain name was registered in their names.

In response I was informed that Answerable.com (the ICANN listed registrar for the domain name) had advised the Applicant to seek the requested information from Verisign (a provider of internet infrastructure services) which in turn had stated that it did not produce records of the information requested and referred the enquiry back to Answerable.com. The information provided by the Applicant's representatives in the absence of a print out of the registration history was that: (1) the first registrant of the domain name in 1998 was an organisation known as "Online Canarias"; (2) from there it was transferred to an organisation known as "Tenerife Ideas" in 2004 or 2005; (3) from there it was transferred to the Applicant in or around January 2008.

20. The transfer of the domain name www.clubsail.com to Tenerife Ideas in 2004/2005 does not appear to have resulted in or been the result of any discontinuity in the operation of the **CLUB SAIL SEA SCHOOL** business. In this connection I note that

the last 2 pages of Exhibit AW9 to the witness statement of Andrew Williams are booking confirmations for sailing courses at the **CLUB SAIL SEA SCHOOL** in 2005. Both refer to the website at www.clubsail.com in the letterhead (below the **CLUB SAIL SEA SCHOOL** trading name and beneath a representation of one of the logos in issue). The booking confirmation dated 9 May 2005 was issued by Barbara Williams with an email address for communications identified as barbara@clubsail.com and the booking confirmation dated 13 June 2005 was issued by David Williams with an email address for communications identified as info@clubsail.com.

Decision

21. I think it is necessary to begin by emphasising that a decision taker should not resort to the burden of proof for the purpose of determining the rights of the parties in civil proceedings unless he or she cannot reasonably make a finding in relation to the disputed issue or issues on the basis of the available evidence, notwithstanding that he or she has striven to do so: Stephens v. Cannon [2005] EWCA Civ. 222 (14 March 2005).

22. The parties' evidence certainly was contradictory with regard to the existence of the agreement by virtue of which the Applicant claimed to have become entitled to exploit the goodwill and trade marks of Club Sail Limited (Company No. 02217578). However, that did not relieve the Hearing Officer of his duty to assess the evidence with a view to determining whether the Opponents were precluded by agreement from objecting to the Applicant's activities as alleged in the witness statement of Andrew Williams. Although the Hearing Officer was required to give due weight to the fact that none of the witnesses had been cross-examined on their witness statements, that did not prevent him

from deriving such assistance as he properly could from admitted or undisputed facts when considering the quality of evidence which either contradicted or was contradicted by other evidence.

23. When he ultimately found himself unable to determine, on the balance of probabilities, that there was an agreement to the effect alleged by Andrew Williams, he had no alternative but to proceed on the basis that the Opponents' right to object to the activities of the Applicant was unaffected by the existence of any such agreement. From that perspective it is clear that the finding I have identified at point (3) in paragraph [14] above should have led to the Opposition being determined on the basis that the activities of the Applicant were neither validated nor invalidated by the alleged but unproven agreement.

24. On that basis there would have been no apparent defence to the prima facie case of copyright infringement I have referred to in paragraphs [7] and [8] above. I am bound to say that the Hearing Officer's treatment of the copyright objection was cursory: see paragraph [15] above. In the context of his refusal to find that there was an agreement to the effect alleged by Andrew Williams, it was not sufficient to dispose of the Opponents' objection under Section 5(4)(b). However, that is as far as I am prepared to go in the absence of any appeal against the dismissal of the copyright objection.

25. The Applicant necessarily (for its purposes) attacks the Hearing Officer's findings I have identified at points (3) to (7) in paragraph [14] above. It does so substantially without challenging the findings I have identified at points (1) and (2) of that paragraph. I can to some extent simplify matters by making it clear at this juncture that I agree with

the Applicant in thinking that the Hearing Officer wrongly decided that the goodwill generated by the business activities of the **CLUB SAIL SEA SCHOOL** was co-owned by John Williams and Andrew Williams from at least as early as 2006. Neither side claimed co-ownership of the goodwill and I am satisfied, having read and re-read the evidence on file, that the Hearing Officer's finding with regard to co-ownership essentially amounted to the imposition of a solution ex post facto on a very untidy state of affairs.

26. This opens up the appeal to the extent that I am now required to determine the competing claims of the parties to proprietorship of the goodwill of the business appertaining to the signs in issue. Before doing so, I make the general observation that goodwill can be and frequently is built up and acquired by means of economic activities carried out collectively. By using the word 'collectively' I am intending to refer to all of the various ways in which alliances may be formed between and among individuals or corporate bodies in pursuit of shared interests and objectives. It is appropriate in this connection to refer to the following observations in the judgment of the Court of Appeal delivered by Hughes LJ in R v. L(R) and F(J) [2008] EWCA Crim. 1970; [2009] 1 Cr. App. R 16:

Unincorporated associations

11. There are probably almost as many different types of unincorporated association as there are forms of human activity. This particular one was a club with 900-odd members, substantial land, buildings and other assets, and it had no doubt stood as an entity in every sense except the legal for many years. But the legal description "unincorporated association" applies equally to any collection of individuals linked by agreement into a group.

Some may be solid and permanent; others may be fleeting, and/or without assets. A village football team, with no constitution and a casual fluctuating membership, meeting on a Saturday morning on a rented pitch, is an unincorporated association, but so are a number of learned societies with large fixed assets and detailed constitutional structures. So too is a fishing association and a trade union. And a partnership, of which there are hundreds of thousands, some very large indeed, is a particular type of unincorporated association, where the object of the association is the carrying on of business with a view to profit.

12. At common law, an unincorporated association is to be distinguished from a corporation, which has a legal personality separate from those who have formed it, or who manage it or belong to it. The most numerous species of corporation is the limited liability company, but there are of course other types, such as chartered professional associations, local government bodies and indeed bishops. At common law, as the judge succinctly held, an unincorporated association has no legal identity separate from its members. It is simply a group of individuals linked together by contract. By contrast, the corporation, of whatever type, is a legal person separate from the natural persons connected with it.

13. This is an apparently simple legal dichotomy duly learned by every law student in his first year. But its simplicity is deceptive. It conceals a significantly more complicated factual and legal position.

14. As to fact, many unincorporated associations have in reality a substantial existence which is treated by all who deal with them as distinct from the mere sum of those who are for the time being members. Those who have business dealings with an unincorporated partnership of accountants, with hundreds of partners world-wide, do not generally regard themselves as contracting with each partner personally; they look to the partnership as if it were an entity. The same is true of those who have dealings with a learned society, or a trade union, or for that matter with a large established golf club. Frequently, as Lord Phillips of Worth Matravers C.J. pointed out in R. v. W. Stevenson & Sons (a partnership and others) [2008] EWCA Crim. 273; [2008] 2 Cr. App. R. 14 (p.187) (at [23]) third parties will

simply not know whether the organisation being dealt with is a company or some form of unincorporated association.

15. As to the law, it no longer treats every unincorporated association as simply a collective expression for its members and has not done so for well over a hundred years. A great array of varying provisions has been made by statute to endow different unincorporated associations with many of the characteristics of legal personality. Examples selected at random include the following. The detailed special rules for partnerships contained in the Partnership Act 1890 scrupulously preserve the personal joint and several liability of the partners (see ss.5-12), and the Law Commission recommendation in November 2003 (Law Com. No. 283) that a firm should have legal personality has not been implemented, but the partnership can sue or be sued in its firm name: see CPR 7.2A and 7PD5A.3, repeating a rule which has existed for more than a century. A trade union is, by statute, not a corporation: s.10(1) of the Trade Union and Labour Relations (Consolidation) Act 1992. But by the same section it can make contracts, sue and be sued in its own name, and commit a criminal offence. In the case of learned societies and institutions, their property (if not vested in trustees) is by s.20 of the Literary and Scientific Institutions Act 1854 vested in their governing body, albeit that neither the institution nor the governing body is a corporation. Nor are these developments confined to the statutory. As long ago as 1901 the House of Lords held in Taff Vale Railway v. Amalgamated Society of Railway Servants [1901] A.C. 426 that a trade union (unincorporated) could be sued in its own name despite the absence of any statutory provision permitting it. Lord Lindley observed (at 442) that the problem of how to adapt legal proceedings to unincorporated societies consisting of many members was by no means new, and that the rules of common law had had to be altered to meet them. Those several examples relate largely to civil liability, but as will be seen, there is a similar variety of provision dealing with criminal liability in the case of unincorporated associations.

The judgment in that case related to the operation of the general rule that in any enactment passed after 1889 the word '*person*' includes '*a body of persons corporate or*

unincorporate' unless the contrary intention appears: Section 5 and Sch. 1, Interpretation Act 1978.

27. I consider that the starting point for the purposes of analysis in the present case is the general proposition that the goodwill accrued and accruing to the members of an alliance such as I have described is collectively owned by the members for the time being, subject to the terms of any contractual arrangements between them: Artistic Upholstery Ltd v. Art Forma (Furniture) Ltd [2000] FSR 311 at paragraphs 31 to 40 (Mr. Lawrence Collins Q.C. sitting as a Deputy High Court Judge). When members cease to be members of an ongoing alliance they cease to have any interest in the collectively owned goodwill, again subject to the terms of any contractual arrangements between them; see, for example, Byford v. Oliver (SAXON Trade Mark) [2003] EWHC 295 (Ch); [2003] FSR 39 (Laddie J.); Mary Wilson Enterprises Inc's Trade Mark Application (THE SUPREMES Trade Mark) BL O-478-02 (20 November 2002); [2003] EMLR 14 (Appointed Person); Dawnay Day & Co Ltd v. Cantor Fitzgerald International [2000] RPC 669 (CA); and note also the observations of Lord Nicholls of Birkenhead in Scandecor Development AB v. Scandecor Marketing AB [2001] UKHL 21; [2002] FSR 7 (HL) at paragraphs [42] to [44]. This allows the collectively owned goodwill to devolve by succession upon continuing members of the alliance down to the point at which the membership falls below two, when 'the last man standing' becomes solely entitled to it in default of any other entitlement in remainder: see, for example, VIPER Trade Mark (BL O-130-09; 13 May 2009) (Appointed Person, Professor Ruth Annand).

28. These principles were fully analysed and explained in the context of a claim concerning the distribution of the assets of an unincorporated association in the judgment of Lewison J. in Hanchett-Stamford v. Attorney General [2008] EWHC 330 (Ch.); [2009] Ch. 173 at paragraphs [28] to [50]. At paragraph [47] he provided the following summary:

47. The thread that runs through all these cases is that the property of an unincorporated association is the property of its members, but that they are contractually precluded from severing their share except in accordance with the rules of the association; and that, on its dissolution, those who are members at the time are entitled to the assets free from any such contractual restrictions. It is true that this is not a joint tenancy according to the classical model; but since any collective ownership of property must be a species of joint tenancy or tenancy in common, this kind of collective ownership must, in my judgment, be a subspecies of joint tenancy, albeit taking effect subject to any contractual restrictions applicable as between members. In some cases (such as *Cunnack v. Edwards* [1895] 1 Ch. 1 489; [1896] 2 Ch. 679) those contractual restrictions may be such as to exclude any possibility of a future claim. In others they may not. The cases are united in saying that on a dissolution the members of a dissolved association have a beneficial interest in its assets, and Lord Denning MR goes as far as to say that it is a “beneficial equitable joint tenancy”. I cannot see why the legal principle should be any different if the reason for the dissolution is the permanent cessation of the association’s activities or the fall in its membership to below two. The same principle ought also to hold if the contractual restrictions are abrogated or varied by agreement of the members. ...

I believe that this reasoning helps to clarify some of the obscurities in the case law relating to the acquisition, retention and elimination of interests in collectively owned goodwill noted and discussed in Wadlow The Law of Passing Off (3rd Edn, 2004) paragraphs 3-104 to 3-185.

29. It appears to be open to any of the existing members of an alliance to bring proceedings in passing off against a third party for the protection of their proprietary interest in the collectively owned goodwill. In Scott v. Tuff-Kote (Australia) Pty Ltd [1975] 1 NSWLR 537 it was held that an underwriter at Lloyds (that is to say a person who was a member of the Society of Lloyds incorporated by statute and who, with other members, joining in syndicates, underwrote insurance risks) was entitled to proceed in his own name for injunctive relief against misuse to his detriment of the name **LLOYD'S OF LONDON**, without joining the Society or all members, or any other member of the syndicate of which he was a member and which, as he did, suffered detriment from the misuse of the name. That case was mentioned with approval by Lord Fraser of Tullybelton in Erven Warnink BV v. J Townend & Sons (Hull) Ltd [1980] RPC 31 (HL) at p. 106. In Dawnay Day & Co Ltd v. Cantor Fitzgerald International (above) at p. 705 the Court of Appeal observed per Sir Richard Scott V-C:

It is not, in my judgment, necessary to analyse the ownership of the “Dawnay Day” name for the purpose of deciding whether the goodwill in the name belongs to the holding company, or is shared by all the members of the group or whether the goodwill is jointly or severally owned by the group members. Each of the group members that trades under a style which includes the name “Dawnay Day”, has, in my judgment, a legitimate interest, for passing-off purposes, in complaining of a deceptive use of the Dawnay Day style by CFI. The deceptive use by CFI of the “Dawnay Day Securities” trading style represents in respect of each Dawnay Day group member that the proprietor of Dawnay Day Securities is an associate with that member in the Dawnay Day group. Each is, in my judgment, entitled to complain of that misrepresentation. In my judgment, DDCL and DDI are entitled to sue CFI for passing-off and DDI is entitled to sue also on behalf of all other group members who trade under a style that includes “Dawnay Day”.

That was the approach applied in Artistic Upholstery Ltd (above). It does not enable a claim in passing off to be maintained by a person who has no proprietary interest of his own in the goodwill he seeks to protect: Chocosuisse Union des Fabricants Suisse de Chocolat v. Cadbury Ltd [1999] RPC 826 (CA) at pp. 843, 844 per Chadwick LJ. The net effect of these considerations is that an earlier right to prevent the use of a trade mark by virtue of the law of passing off can be asserted under Section 5(4)(a) of the 1994 Act by a person who is entitled, either alone or with others, to a proprietary interest in the goodwill to which the earlier right relates.

30. The general rule with regard to the position of former members is as stated by Plowman J. in Pompadour Laboratories Ltd v. Stanley Frazer [1966] RPC 7 at p.10:

As I understand the law it is clearly settled that a defendant who formerly had a connection with the plaintiffs business, but has ceased to do so, although entitled to inform the world that he formerly had that connection, is not entitled to state that he still has such a connection if that in fact is not the case.

The rights of a former member should therefore be distinguished from the rights of the existing members of an ongoing alliance with regard to proprietorship of the collectively owned goodwill. That was the approach adopted by the Court of Appeal in Dawnay Day & Co. Ltd v. Cantor Fitzgerald International (above) at pp.703, 704. Former members may nonetheless have continuing rights in relation to the use of a trade mark based on apportionment or consent, within the ambit of what is achievable without practising a deception on the public: see, for example, Habib Bank Ltd v. Habib Bank AG [1982]

RPC 1 (CA); Anderson & Lembke Ltd v. Anderson & Lembke Inc. [1989] RPC 124 (Hoffmann J.).

31. Complex issues can arise in the application of these principles to the facts of a given case. Where, as here, there is a dispute as to whether and, if so, by whom rights of proprietorship have been held and exercised collectively in relation to the goodwill of a business with plural participants, it will usually be helpful for the decision taker to be provided with copies of the participants' business accounts and documentary evidence of the exercise of financial control in relation to relevant income and expenditure. By 'following the money' it ought to be possible to see where control over the operation of the business has actually been located. It is, however, quite common for the parties to Registry proceedings to provide the Registrar with no evidence of this kind in relation to disputes of that nature. And that was largely the position in the present case.

32. The Opponents' objections under Sections 5(4)(a) and 3(6) are premised upon the allegation that the Application is engaged in a process of misappropriating the goodwill of their **CLUB SAIL SEA SCHOOL** business. The Applicant's defence to both objections is premised upon its claim to have become independently entitled to the goodwill of that business as a result of Andrew Williams having '*resurrected*' the business of Club Sail Ltd (Company No. 2217578) for his own benefit with the full agreement of the Opponents. The conflict between the written evidence of the parties leads unavoidably to the conclusion that it is not possible for both sides to be giving a truthful account of events.

33. The Applicant maintains, correctly, that the Opponents' objections to registration must be considered with due regard for: (1) the seriousness of the allegation of misappropriation; (2) the rebuttable presumption of innocence of wrongdoing; (3) the fact that none of the witnesses were cross-examined on their witness statements.

34. These considerations relate to the well-understood requirement for allegations of wrongdoing to be substantiated by evidence sufficient to satisfy the applicable standard of proof. As to that, it must be remembered that the purpose of Registry proceedings is not to punish or deter, but to deal with issues arising in relation to the registration of trade marks. Such proceedings are civil proceedings. And in civil proceedings the standard of proof with regard to things which are alleged to have been said and done is proof on the balance of probabilities. *'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not'*: In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 (HL) at p. 586 per Lord Nicholls of Birkenhead.

35. The standard of proof in civil proceedings does not vary according to the seriousness of the allegations that may have been made. The practical operation of that principle was considered in two decisions of the House of Lords from which the following observations are drawn:

- (1) *'...the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred.'*: In re H (Minors) (above) at p.586 per Lord Nicholls of Birkenhead.

- (2) ‘I think the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not...There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities...It would be absurd to suggest that the tribunal must in all cases assume that serious conduct is unlikely to have occurred. In many cases, the other evidence will show that it was all too likely...’: In re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35; [2009] 1 AC 11 (HL) at paragraphs [13] and [15] per Lord Hoffmann.
- (3) ‘Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies. ...As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent’s Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions’ enclosure when the door is open, then it may well be more likely to be a lion than a dog’: In re B (Children) (Care Proceedings: Standard of Proof) (above) at paragraphs [70] and [72] per Baroness Hale of Richmond.

These principles were recently re-affirmed by the Supreme Court in Re S-B (Children) (non-accidental injury) [2009] UKSC 17 at paragraphs [8] to [14] per Lady Hale SCJ.

They are the basis on which I must assess the evidence when dealing with the Applicant's appeal under Sections 5(4)(a) and Section 3(6).

36. In this case (as in too many other proceedings in the Registry where the conflict between the written evidence of the parties leads unavoidably to the conclusion that they cannot both be giving a truthful account of events) there was, as I have said, no cross-examination of any of the witnesses on their witness statements. Cross-examination might well have provided the Hearing Officer with the benefit of a better understanding of the reliability of the witness statements. So might a focused order for disclosure of financial records (see paragraph 31 above). Although the parties must be taken to have accepted the consequences of proceeding without cross-examination or disclosure, it remains to be specified what those consequences are for the purposes of the present appeal.

37. Firstly, the contested objections to registration cannot be rejected automatically upon the basis that the witness who sought to refute them was not cross-examined upon his witness statement. It would be unjudicial to adopt such a mechanical approach to the evidence on file. It would also be incongruous to do so in circumstances where the absence of cross-examination is an established or even inescapable feature of proceedings for the determination of objections to registration under the Trade Marks Directive and the Community Trade mark Regulation elsewhere in the European Union.

38. Secondly, it is not obligatory to regard the written evidence of any particular witness as sufficient, in the absence of cross-examination, to establish the fact or matter (s)he was seeking to establish. That is brought out by the following observations of

Mann J. in Matsushita Electric Industrial Co. v. Comptroller-General of Patents [2008]

EWHC 2071 (Pat).

24. As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

39. Thirdly, when assessing the evidence in the witness statements it is appropriate to do so from the perspective identified by Lord Bingham of Cornhill in Fairchild v. Glenhaven Funeral Services Ltd [2002] UKHL 22; [2003] 1 AC 32 (HL) at paragraph [13]:

...And I think it is salutary to bear in mind Lord Mansfield's aphorism in *Blatch v. Archer* (1774) 1 Cowp 63 at 65, 98 ER 969 at 970 quoted with approval by the Supreme Court of Canada in *Snell v. Farrell*:

'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'

40. Fourthly, by proceeding as they did the parties effectively required the decision taker to consider the plausibility of the positions they had adopted in the context of the evidence as a whole and thus accepted that the evidence of one witness might be found to have been disproved or displaced by the evidence of another, even though neither of the witnesses concerned were cross-examined on their witness statements. As happened in DAAWAT Trade Mark [2003] RPC 11 (see paragraphs 30 to 32 and 60 to 69).

41. Fifthly, the veracity of the evidence in the witness statements could not be taken to have been challenged on the basis of any contention which the witness had not had a fair opportunity to consider and address as best (s)he could: Pan World Brands Ltd v. Tripp Ltd (EXTREME Trade Mark) [2008] RPC 2 at paragraphs [33] to [37] (Appointed Person, Mr. Richard Arnold QC).

42. The evidence on file indicates that there has to all outward appearances been a single homogenous **CLUB SAIL SEA SCHOOL** business operating continuously under and by reference to that name and the logos associated with it over the years since 1986. The business of the **CLUB SAIL SEA SCHOOL** has been conducted by a succession of companies and individuals working together in permutations which varied from time to time as different participants came and went. The companies identified in paragraph [9] above appear to have joined and left the operation of the **CLUB SAIL SEA SCHOOL** within the timeframes mentioned in that paragraph. John Williams and Barbara Williams appear to have orchestrated the operation of the **CLUB SAIL SEA SCHOOL** from 1986/1987 onwards. Other individuals were involved from time to time. Their son David Williams appears to have been involved from some time prior to 2003 until 2006 and

their son Andrew Williams appears to have been involved from about 1998 to 2006/2007. From June 2001 to December 2003 Dominic Lonsdale was involved on the basis of a sailing school franchise agreement granted by Club Sail & Powerboats (Jersey) Ltd.

43. The goodwill accrued and accruing to the operators of the **CLUB SAIL SEA SCHOOL** business appears to me to have been a collective goodwill, in the sense I have referred to above, from about 1988 onwards. Of the participants I have mentioned, the Opponents appear to have been the only continuing members of the alliance at the date of the opposed application for registration (27 June 2007). By that time David Williams was no longer involved in the business. Andrew Williams had by then independently embarked on the competitive activities which led to the rift with the Opponents. He, not the Opponents, left the alliance he had previously joined. He was not thereafter entitled to claim rights of proprietorship in relation to the collectively owned goodwill of the **CLUB SAIL SEA SCHOOL**. And he could not validly authorise the Applicant to claim rights of proprietorship in relation to that goodwill.

44. The version of events put forward by Andrew Williams (see paragraph 11 above) appears to me to be both implausible and unavailing in the light of the established facts. The assertion that he operated the **CLUB SAIL SEA SCHOOL** as a sole trader prior to 2007 is not substantiated by any documentary evidence. Moreover the documentary evidence he has produced accords with the evidence of the Opponents to the effect that he was one of a number of people (the Opponents among them) participating in the operation of the **CLUB SAIL SEA SCHOOL** business during that period. The continuity of the business was overtly confirmed by the presentation and promotion of the **CLUB SAIL**

SEA SCHOOL during that period as '*Est. 1986*', with '*20th Anniversary*' special offers advertised for 2006 and a '*21st birthday*' celebration cruise advertised for 2007, the address for emails requesting details being '*21birthday@clubsail.com*'.

45. The assertion that he was somehow engaged in a process of '*resurrecting*' the business of the defunct Club Sail Ltd (Company No. 2217578) and the further assertion that this somehow led to the Applicant becoming the '*the successor in business to Club Sail Limited (registration no. 02217578) which was dissolved in 1998*' cannot withstand scrutiny. There is no evidence that he or anyone else actually took any legal or administrative steps to '*resurrect*' the company. There is also no evidence (and no reason to believe on the basis of the evidence on file) that the defunct company was independently entitled either to the goodwill of the **CLUB SAIL SEA SCHOOL** business or any interest in it which Andrew Williams could or did '*resurrect*' for his own benefit to the exclusion of everyone else including the Opponents.

46. I am satisfied on the evidence as a whole that Andrew Williams has mischaracterised his participation in the operation of the **CLUB SAIL SEA SCHOOL** business in an attempt to portray it as a process of consensual '*resurrection*' of the business of Club Sail Ltd (Company No. 2217578) by himself as a sole trader and further that he has done so for the purpose of providing the Applicant with a semblance of justification for claiming to be a successor in title to the '*resurrected*' business of that company.

47. For the reasons I have given above, I consider that in June 2007: (1) the Opponents had a proprietary interest in the goodwill appertaining to the verbal and non-

verbal elements of the signs in issue, which they were entitled to protect in proceedings for passing off and therefore in Registry proceedings under Section 5(4)(a) of the 1994 Act; and (2) the Applicant had no defence to the contention that the Opponents were entitled to an earlier right by virtue of the law of passing off to prevent it from using the signs in issue as trade marks for services of the kind specified in the opposed application for registration.

48. That leads me to the objection under Section 3(6) of the Act. I considered the scope and effect of Section 3(6) in Melly's Trade Mark Applications (FIANNA FAIL and FINE GAEL Trade Marks) [2008] RPC 20 at paragraphs [49] to [53]. At paragraph [51] I expressed the view that bad faith invalidates applications for registration in accordance with the well-established principle that national legislation implementing Community legislation should be interpreted and applied so as to confer no legitimacy on improper behaviour. I regarded that as a reason for approaching objections under Section 3(6) from the perspective identified in Case C-16/05 The Queen (on the applications of Veli Tum and Mehmet Dari) v. Secretary of State for the Home Department [2007] ECR I-7415 at paragraph [64]:

... it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (Case C-255/02 *Halifax and Others* [2006] E.C.R. I-1609, paragraph 68) and that the national courts may, case by case, take account—on the basis of objective evidence—of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely (see inter alia case C-212/97 *Centros* [1999] E.C.R. I-1459, paragraph 25).

49. I note that the Second Board of Appeal at the Community Trade Marks Office has approached the corresponding objection to registration under the Community Trade Mark Regulation on this basis: Case R-633/2007-2 J. Choo Limited v. Soochi Limited (“CHOOSI”) at paragraphs [20] and [21]. I also note that in paragraph [46] of his Opinion in Joined Cases C-456/01P and C-457/01P Henkel v. OHIM [2004] ECR I-5089 Advocate General Ruiz Jarabo Colomer referred to the corresponding objection as recognising ‘*the general principle of law proscribing acts committed in bad faith*’ and that Advocate General Trstenjak has adopted essentially the same approach in the analogous context of Article 21 of Commission Regulation (EC) No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

50. Article 21 addresses the problem of speculative and abusive registrations of .eu domain names. In paragraph 113 of her Opinion delivered on 10 February 2010 in Case C-569/08 Internetportal and Marketing GmbH v. Richard Schlicht she stated with reference to conduct of the kind commonly condemned as ‘domain grabbing’:

113. All those circumstances inevitably bring to mind the principle of ‘abuse of rights’, with regard to which the Court has already held that evidence of an abusive practice requires, first, a combination of objective circumstances in which, despite formal compliance with the conditions laid down by the Community rules, the purpose behind those rules has not been achieved and, secondly, a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining that advantage.

These observations reinforce me in the view that it is correct to interpret and apply Section 3(6) so as to give effect to what has become known as the principle of prohibition of abuse of law. The general observations of the Court of Justice in Case C-529/07 Chocoladefabriken Lindt & Sprüngli AG v. Franz Hauswirth GmbH [2009] ECR I-00000 do not appear to me to suggest or imply otherwise.

51. It seems to have been a matter of administrative convenience that the opposed application for registration was filed in the name of Andrew Williams' partner, Janet Wills, before being assigned to the Applicant. No argument to the contrary has been raised on its behalf. On the basis of the evidence on file, the knowledge, intentions and motives of Andrew Williams can properly be attributed to the Applicant. They are amply sufficient to invalidate the opposed application in accordance with the principle of prohibition of abuse of law as reflected in the objection to registration on the ground of bad faith provided by Section 3(6) of the 1994 Act. The behaviour of Andrew Williams hence the behaviour of the Applicant towards the Opponents in connection with the filing of the opposed application for registration was, on the view I take of the evidence, tainted by a desire to deprive them of their entitlement to the goodwill appertaining to the verbal and non-verbal elements of the signs in issue. That appears to me to be unacceptable on any view of what can constitute applying for registration in bad faith.

52. The preparation and presentation of the Applicant's independent appeal on costs seems likely to have consumed a disproportionate amount of time, effort and money relative to the sum of £733 which the Hearing Officer awarded to the Opponents. However, that is not a reason for declining to deal with the matter. In accordance with

the usual practice in Registry proceedings the parties were offered the opportunity of a hearing at which to argue their cases. The Applicant decided (as did the Opponents) to provide the Hearing Officer with written submissions in lieu of oral submissions. It could and should have put forward any particular points it wished the Hearing Officer to take into account when awarding costs as part of his final determination. All it said (in the concluding paragraph of its written submissions) was that ‘The Applicant respectfully requests that ... an award of costs be made in its favour’. There was no suggestion that detailed information as to the actual costs incurred by the Opponents should be made available for scrutiny prior to any award being made in their favour. It cannot fairly be said that the Hearing Officer denied the Applicant an opportunity to make written submissions to that effect.

53. Nevertheless the Hearing Officer omitted to apply the guidance provided Mr. Richard Arnold QC sitting as the Appointed Person in SOUTH BECK Trade Mark (BL O-160-08; 9 June 2008) and made the same error as the other hearing officer had made in that case. The error consisted of awarding an unrepresented litigant two-thirds of the scale costs that would have been awarded to a professionally represented litigant, without seeking any information as to the unrepresented litigant’s actual costs. Mr. Arnold dealt with the matter on appeal on the following basis:

36. In my judgment the approach which should be adopted when the Registrar is asked to make an award of costs in favour of a litigant in person is as follows. The hearing officer should direct the litigant in person pursuant to [r. 62(1)(a) of the 2008 Rules] to file a brief schedule or statement setting out (i) any disbursements which the litigant claimed he has incurred, (ii) any other financial losses claimed by the

litigant and (iii) a statement of the time spent by the litigant in dealing with the proceedings. The hearing officer should then make an assessment of the costs to be awarded applying by analogy the principles applicable under r. 48.6, but with a fairly broad brush. The objective should be to ensure that litigants in person are neither disadvantaged nor over-compensated by comparison with professionally represented litigants.

37. In the present case I directed the applicant to provide such a schedule. The applicant duly filed a schedule claiming in respect of the proceedings at first instance disbursements of £20 together with mileage of 310 miles. No specific mileage rate was claimed so I propose to apply a rate of 25p per mile, giving a figure of £77.50, making total disbursements of £97.50. The applicant also estimated that it had spent a total of 83 hours dealing with the first instance proceedings. While this seems quite a lot by professional standards, it is appropriate to allow a litigant in person more time for a particular task than a professional advisor would be allowed: *Mealing McLeod v. Common Professional examination Board* [2000] 2 Costs L.R. 223. At the rate of £9.25 an hour, 83 hours comes to £767.75. Accordingly, I shall set aside the hearing officer's costs order and substitute an order that the opponent pay the applicant the sum of £865.25 in respect of the first instance proceedings.
38. So far as the appeal is concerned, the applicant again claimed disbursements of £20 and mileage of 310 miles. It also estimated that it had spent 21 hours dealing with the appeal. Accordingly I shall order the opponent to pay the applicant the sum of £291.75 in respect of the appeal, making a total of £1,157.

54. I consider that the same procedure should be adopted in the present case. The Hearing Officer's decision as to costs will be set aside and I will give directions for the purpose of enabling an order for costs to be made by me with due regard for the actualities of the Opponents' work and expenditure in relation to the proceedings in the

Registry and on appeal. That order will be the subject of a supplementary decision to be issued following implementation of the directions set out below. I wish to make it clear for the avoidance of doubt that in assessing the amount to be awarded I intend to proceed upon the basis that an award of costs must reflect the effort and expenditure to which it relates. It cannot be or include an award of compensation to the Opponents for the general economic effects of the Applicant's decision to contest the proceedings at first instance and pursue the matter on appeal: Gregory v. Portsmouth City Council [2000] 2 WLR 306 (HL); Land Securities Plc v. Fladgate Fielder (A Firm) [2009] EWCA Civ. 1402 (18 December 2009).

Conclusion

55. The Applicant's appeal is dismissed in relation to the Opponents' objections to registration under Sections 5(4)(a) and 3(6) of the Trade Marks Act 1994. The Hearing Officer's order for costs is set aside. The following directions are given with a view to determination of the question how and by whom the costs of the proceedings in the Registry and on appeal are to be borne and paid:

- (1) the Opponents are directed to send me written representations in support of their claim for costs in respect of the proceedings in the Registry and on appeal containing a schedule or statement of the items of work and expenditure to which their claim relates, this to be done by 6.00pm on Wednesday 17 March 2010;

- (2) the Applicant is directed to send me any written representations it wishes to make in answer to those of the Opponents under paragraph (1) above, this to be done by 6.00pm on Wednesday 31st March 2010;
- (3) the Opponents are directed to send me any written representations they wish to make in reply to those of the Applicant under paragraph (2) above, this to be done by 6.00pm on Friday 9 April 2010.
- (4) any written representations sent to me under paragraphs (1) to (3) above must at the same time be copied to the opposite party and to the Treasury Solicitor's Department (Reference MT 9/0624C/MWD/4E).

If neither side informs me in writing by 6.00pm on Monday 19 April 2010 that they wish to be heard in relation to the claim for costs that remains to be determined I shall proceed to issue a supplementary decision dealing with that claim, taking account of the written representations I have received.

Geoffrey Hobbs QC

23 February 2010

Ian Silcock instructed by ip21 Limited appeared on behalf of the Applicant.

The Opponents submitted written representations on their own behalf.

The Registrar was not represented.