

O-318-10

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO 2386274

IN THE NAME OF

VOIPAFONE LTD

OF THE TRADE MARK:

The logo for Voipafone, featuring the word "Voipafone" in a white, sans-serif font, centered within a solid red rectangular background.

IN CLASS 38

AND

THE APPLICATION FOR A DECLARATION

OF INVALIDITY THERETO

UNDER NO 83366

BY

VODAFONE GROUP PLC

Trade Marks Act 1994

**In the matter of registration no 2386274
in the name of Voipafone Ltd
of the trade mark:**



**in class 38
and the application for a declaration of invalidity
thereto under no 83366
by Vodafone Group Plc**

INTRODUCTION

1) On 5 March 2005 Lothian Communications Ltd (Lothian) applied to register the above trade mark. The application was signed by Mr W Douglas Lothian. On 6 May 2005 the application was published for opposition purposes with the following specification:

providing user access to the Internet and other telecommunications data networks (service provider), voice over Internet protocol services.

The above services are in class 38 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended. The registration procedure for the trade mark was completed on 19 August 2005.

2) On 29 September 2005 the trade mark was assigned to 3id Ltd. Mr Lothian signed form TM16, giving notice of the assignment, as a director on behalf of both the assignee and the assignor. On 5 October 2007 the trade mark was assigned back to Lothian Communications Ltd. Mr Henry McGuire signed form TM16 for 3id Ltd, as a director, and for Lothian Communications Ltd, as its representative.

3) On 8 September 2008 Vodafone Group Plc (Group) wrote to Mr Lothian as director of Lothian. The letter advised that Group had recently become aware of Lothian's trade mark registration of Voipafone. The letter advised that Group had also become aware of the company Voipafone Limited, of which Mr Lothian was a director and which had the same registered address as Lothian. Group advised that it was not aware of any use of Voipafone other than as part of the company name of Voipafone Limited. It encouraged Lothian, if it were not using the trade mark, to surrender the trade mark registration immediately, change the name of Voipafone Limited so that it did not include Voipafone, and to confirm

that this had been done. On 15 September 2008 Mr Lothian, acting as director of Voipafone Limited, wrote to Group. He stated that “Voipafone has a strategic value to me. It may have a strategic value to Vodafone. It may have a strategic value to others. I am advised that we are free to deal with anyone. There is additional value in me not exploring this with anyone else. Therefore it is in my interest to give you two weeks from today to make your best offer. After that I will review my options.” On 18 September a request to record the assignment of the trade mark to Voipafone Ltd (VL) was received, the request stated that the effective date of assignment was 1 September 2008. On 20 October 2008 Group responded to Mr Lothian’s letter. It advised that Group had considered its options and was minded to pursue an invalidity action against the Voipafone trade mark. The letter enclosed the requisite draft papers which had been prepared in readiness for the filing of the application. Group advised that it hoped that it would not be necessary to file the action. Group advised that it was prepared not to file the papers if Mr Lothian complied with the undertakings set out in an annex to the letter. Group stated that it had expended significant time and resources in dealing with the matter but, as a sign of goodwill, would be willing to reimburse the application fee that was paid in respect of the registration (£200). The annex required that Mr Lothian, as director of Lothian and Voipafone Limited and any other company of which he was a director:

- to cease immediately all use of the Voipafone trade mark and any similar trade marks;
- to surrender the trade mark registration;
- not to register, seek to register or use the word Voipafone or any trade marks registered or owned by Group or any other Group entity or any similar trade marks;
- to change the name of Voipafone Limited so that it does not include the word Voipafone or a similar word;
- not to register or seek to register or use any domain name or company name that is identical or similar to the trade mark Voipafone;
- to take all steps necessary to recall from the public domain any documentation and materials which bear or refer to the disputed trade mark;
- to destroy or to deliver to Group, all documentation and materials which bear or refer to the disputed trade mark;
- to keep the matter confidential.

On 22 October 2008 Mr Lothian sent an e-mail to Group. In this e-mail Mr Lothian wrote:

“Further to our telephone conversation today regarding the attached correspondence from Mel Jones.

Lets start with a little background information. Back in 2005 we decided to become involved in Voice Over Internet Protocol technology and chose a

name for our venture which adequately described our activities VOIP a Fone. (I understand back in 2006 Vodafone had no interest in VOIP and if rumours are to be believed, actively blocked the technology). We legally registered our company in Scotland as VOIPAFONE LTD and applied to the UK Intellectual Property Office on 5 May 2006 to Trade Mark our company name, much the same as others have done in the past. The whole process took 3-4 months to complete and included trade mark journal publication which is aimed at soliciting any objections from concerned parties. None were lodged. Registration and legal ownership of the trade mark was granted on 19 August 2005.

Since registering our unique trade mark, which after all is a made-up word not found in any dictionary, we have acted entirely ethically. We did not contact Vodafone with a view to extort payment for our IPR quite the contrary. It was your solicitor who contacted us demanding we surrender our intellectual property or else. His reasoning seems to be that Vodafone and Voipafone are similar despite the fact that you are in mobile phones and we are in land line VOIP technology. Cocoa Cola, Pepsi Cola, Virgin Cola now that's what I call similar but you don't hear them complaining or is it the case, they can't be bullied. Well being an ex Vodafone SP neither can we.

Lets be honest there are several ways this situation can be handled some to Vodafone's benefit but all to ours. Headlines such as "David v Goliath" etc. would not damage our case but lets not go there. As I tried to explain to Mel Jones if Vodafone wishes to purchase our IPR then make a sensible offer or license it and avoid all this unpleasantness.

When Martin Dawes wanted to buy Nationwide Cellular Telephones they negotiated a price we sold out. In turn when Vodafone wanted to buy Martin Dawes they agree a price and the rest is history. For any deal to succeed all you need is a willing seller and a willing buyer so lets talk."

4) On 30 October 2008 Group filed an application for the invalidation of the registration. In its application Group relies upon sections 3(6), 5(2)(b), 5(3), 5(4)(a) and 56 of the Trade Marks Act 1994 (the Act). In relation to sections 5(2)(b) and 5(3) of the Act it relies upon a number of trade mark registrations for VODAFONE on its own, for stylised versions of VODAFONE and for VODAFONE with other elements. Certain of the registrations had been registered for five years or more at the date of the filing of the application for invalidation. VL has not requested proof of use in relation to any of these trade marks. In relation to the grounds under section 5(4)(a) and 56 of the Act Group relies upon the sign VODAFONE. Group states that it and its group of companies is the world's leading mobile telecommunications company and, as a result of extensive use, has acquired a substantial reputation and goodwill in its VODAFONE brand in the United Kingdom, Europe and worldwide.

5) Taking into account the findings later in this decision it is only necessary to consider the grounds of opposition under section 5(2)(b). According to section 5(2)(b) of the Act a trade mark shall not be registered if because:

“it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

It is only necessary to consider the class 38 element of Community trade mark registration no 134890. This registration is for the trade mark VODAFONE. It is registered in class 38 for the following services:

telecommunications, telephone, telegraph, radio telephone, radio facsimile, radio paging and radio communication services; message sending, receiving and forwarding; transmission and receiving by radio; rental of telephone, radio, radio telephone and radio facsimile apparatus; communication of data by radio and by telecommunications; automatic telephone answering services; all included in Class 38.

6) VL filed a counterstatement. It states that it repudiates all of the allegations and statements made by Group and states that its trade mark was legally obtained and advertised in accordance with the regulations of the Intellectual Property Office. VL states that if Group values its name they had ample time to raised an objection when VL’s application was advertised. VL states that “it beggars belief that a firm of solicitors with the reputation of Baker & McKenzie could fail to notify their client of any perceived similarity between our respective trade marks despite being advertised in the Trade Mark Journal. Indeed this is a question we have asked Vodafone Group and Baker & McKenzie on several occasions but have had no answer to our requests”. VL states that Group “did not take any action at the appropriate time”.

7) VL states that in 2008 Group launched a new product, VoIP IP-Phone Pro and showed an interest in registering the name Voipafone. VL states that at this stage it was contacted by Group who “in typical “bullyboy fashion” demanded we handover over our IPR asset for the derisory sum of £200”. VL states Group threatened legal action if VL did not agree to its demands. VL states that, as per the recommendations of the Intellectual Property Office, it tried to negotiate with Group, including an appeal to the Group’s chairman, but to no avail. VL states that it was instructed to deal with Baker & McKenzie, who refuse to communicate with VL “because we have the audacity to represent ourselves”. VL states that wherever Group operates it uses Voda as part of its name and image and “so were does Voip fit in the equation”. VL states that despite aggressively opposing VoIP services in the past Group “now have their own offering and obviously want to call it “VOIPAFONE””.

8) VL states that it attaches several documents and a web link in support of its defence. These include a press release from Group's German subsidiary dated 22 January 2008 advising that it will be launching a service that combines VoIP and mobile phone functions. There are also copies of an e-mail to Ms Sarita Pandya of Baker & McKenzie, copied to Mr Gerry McTaggart of Group, from Mr Lothian dated 18 November 2008 and the response from Ms Pandya. The e-mail refers to Group as Voda. It makes references to the approach from Group re the trade mark of VL. It advises at the end that Ms Pandya will be advised of the trade mark counsel that VL will be appointing. Ms Pandya responded. She stated that her client was Vodafone Group Plc, not Voda. She confirmed the chronology of events given in Mr Lothian's e-mail. She has no other comments on the e-mail. Ms Pandya finishes by stating that as VL will be appointing a representative it would not be appropriate for her to correspond with Mr Lothian directly. She waits to hear from VL's representative.

9) Both parties filed evidence. A hearing was held on 1 September 2010. Mr Stewart Lothian represented VL. Group was represented by Mr Benet Brandreth of counsel, instructed by Baker & McKenzie.

Preliminary issue – correspondence between the parties.

10) Both parties have furnished copies of correspondence between them in relation to the dispute. This gives rise to a question as to whether the correspondence furnished falls within the without prejudice rule and if it does whether privilege has been waived. In *Framlington Group Limited and AXA Framlington Group Limited v Ian Barnetson* [2007] EWCA Civ 502 Auld LJ stated:

“22. Written or oral communications made as part of negotiations genuinely aimed at, but not resulting in, settlement of a dispute are not generally admissible in evidence in litigation between parties over that dispute. It is trite law that the use or non-use of the words "without prejudice" in such negotiations may indicate whether the communication(s) in question may attract the privilege, but is not necessarily determinative on the point; see *Phipson*, para 24-16 to 24-18.....

27. It follows that, for the "without prejudice" rule to give full effect to the public policy underlying it, a dispute may engage the rule, notwithstanding that litigation has not yet begun. If there were any doubt about that bare proposition, it is dispelled by the following authorities and applications of it.

28. In *Bradford & Bingley plc v Rashid* [2006] 1 WLR 2066, AC, the House of Lords proceeded upon the basis that exchanges some 21 months before the start of litigation could attract the rule in the same way as exchanges after the start of litigation. The issue there was whether

admissions by a mortgagor in default as to his liability to pay the amount outstanding, against whom his mortgagee had obtained possession, were admissible in subsequent proceedings by the mortgagee for the arrears. No point arose on the appeal as to the exchanges in question having taken place before commencement of the relevant litigation, the only question being whether an acknowledgement of debt, as distinct from an offer in negotiations with a view to compromise of a disputed liability, was caught by the rule. The House held that it was outside the rule, as not coming within the public policy interest of encouraging settlement of a dispute. It was implicit in all their Lordships' speeches that the rule, if applicable at all, included exchanges in negotiation before the start of the proceedings for the arrears. Lord Walker of Gestingthorpe, for example, described the public policy interest, at paragraph 37:

"in encouraging the settlement of disputes so as to avoid (or at least shorten) litigation"

Lord Mance, at paragraph 81, indicated the breadth of the policy, albeit obiter, by reference to Lord Griffiths's observations in *Rush v Tompkins*:

"The existence of a dispute and of an attempt to compromise it are at the heart of the rule whereby evidence may be excluded (or disclosure of material precluded) ... The rule does not of course depend upon disputants already being engaged in litigation. But there must as a matter of law be a real dispute capable of settlement in the sense of compromise (rather than in the sense of simple payment or satisfaction)".

See also per Lord Hoffmann, at paragraph 18, in his reference to the background for the ruling of Court of Appeal in *Unilever PLC v The Proctor & Gamble Co* [2000] WLR 2336.

29. A good instance of the working of the rule can be seen in the "opening shot" cases, in which an initial proposal in negotiations before commencement of proceedings may be protected by the privilege. Were it not so, a party to a dispute could never safely make, by way of negotiation, an initial offer in response to a claim; see *South Shropshire District Council v Amos* [1986] 1 WLR 1271, CA, a Lands Tribunal case, which concerned "without prejudice" negotiations in a dispute that arose long before reference to the Tribunal as to the amount of compensation payable in respect of a discontinuance of business use order made under section 51(1) of the Town and Country Planning Act 1971. Parker LJ, giving the judgment of the Court upheld, at 1276D-1278A, the ruling of Gatehouse J that "without prejudice" negotiations could begin with an "opening shot", that is, an initial offer from one party in dispute with another setting out his proposal for settlement of his or the other's claim

giving rise to the dispute, and could continue with the ensuing exchanges, all before the commencement of proceedings.

32. The question remains, how proximate, if at all, must unsuccessful negotiations in a dispute leading to litigation, be to the start of that litigation, to attract the "without prejudice" rule. Must there be, as Mr Oldham contended, an express or implied threat of litigation underlying the negotiations, or, failing any such threat, some proximity in time to the litigation eventually begun? In answering that question, the courts are logically driven back, as Mr Nicholls submitted, to the public policy interest behind the rule, of encouraging parties to settle their disputes without "resort" to litigation or without continuing it until the needless and bitter end. If the privilege were confined to settlement communications once litigation had been threatened or shortly before it is begun, there would be an incentive on both sides to escalate their dispute with threats of litigation and/or to move quickly to it, before they could safely start talking sensibly to each other. That would be a slippery slope to mutual hardening of positions and commencement of litigation – hardly the encouragement to settle their disputes without *resort* to litigation that Oliver J had in mind in *Cutts v Head*.

33. On the other hand, the ambit of the rule should not be extended any further than is necessary in the circumstances of any particular case to promote the public policy interest underlying it. The critical question for the court in such a case is where to draw the line between serving that interest and wrongly preventing one or other party to litigation when it comes from putting his case at its best. It is undoubtedly a highly case sensitive question, or put another way, the dividing line may not always be clear. The various judicial pronouncements in the leading cases to which I have referred do not provide any precise pointers, and there are seemingly no other authorities directly in point.

34. However, the claim to privilege cannot, in my view, turn on purely temporal considerations. The critical feature of proximity for this purpose, it seems to me, is one of the subject matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the Judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close before litigation, does not, with respect, fully serve the public policy interest underlying it of

discouraging recourse to litigation and encouraging genuine attempts to settle whenever made.”

11) The correspondence from Group cannot be categorised as being an attempt to compromise. It can be best described as being letters before action. It set out a course of action and did not offer anything in the way of negotiation or compromise. Indeed, Mr Lothian comments upon what he considers the intransigent attitude of Group and the fact that it will not negotiate. Before filing this action Group offered to refund the application fee of £200 and not to seek costs for its legal bill. It is difficult to see that this represents an attempt to compromise or something that should be hidden behind the veil of privilege. VL replied but there was no negotiation, Group was resolute in its position of not seeking negotiation. There has been no lowering of the guard or admissions against interest by either party. Consequently, the correspondence between the parties does not fall within the bounds of the without prejudice rule. If it is considered that the correspondence should be judged as being without prejudice, the use by both parties of parts of the correspondence in the proceedings means that the parties have waived privilege.

Evidence

First evidence of Group

12) This consists of a witness statement by Mr Stephen Scott. Mr Scott is Group General Counsel and Company Secretary of Group. He has held these positions since August 1991. Prior to this he was employed by the Racal Group from 24 March 1980.

13) Group was formed in 1984 as Racal Strategic Radio Limited, a subsidiary of Racal Electronics Plc. On 17 September 1985 Racal Strategic Radio Limited was renamed Racal Telecommunications Group Limited. On 5 September 1988 the company's name was changed to Racal Telecom Ltd and was subsequently re-registered as a public limited company, Racal Telecom Plc, on 14 September 1988. Group was demerged from Racal Electronics Plc and became an independent company on 16 September 1991 at which time it changed its name to Vodafone Group Plc.

14) As of 31 December 2008 Group had a customer base of approximately 289 million worldwide and 19.2 million registered customers in the United Kingdom for its mobile communications network. Group's network covers 99.7% of the population of the United Kingdom. The number of registered customers in the United Kingdom and proportionate customers across the Group is as follows:

Financial year (ending 31 March)	Registered customer numbers in the United Kingdom	Proportionate Customer Numbers across the Group
2003	13,300,000	119,700,000
2004	14,095,000	133,400,000
2005	15,324,000	154,800,000
2006	16,304,000	170,571,000
2007	17,411,000	206,393,000
2008	18,537,000	260,500,000

15) The table below shows Group's annual gross worldwide and United Kingdom turnovers in £GB:

Fiscal year	Worldwide gross turnover in millions	United Kingdom gross turnover in millions
2000	7,873	2,901
2001	15,004	3,444
2002	22,845	3,763
2003	30,375	4,026
2004	33,559	4,774
2005	34,133	5,065
2006	29,350	5,048
2007	31,104	5,443
2008	35,478	5,424

16) Group's promotes and advertises its VODAFONE brand in the following ways:

- retail outlets;
- outdoor poster advertising;
- websites and online advertising;
- sponsorship activities;
- attendance at exhibitions;
- brochures and information leaflets;
- newspaper and magazine advertising;
- television, cinema and radio advertising;
- in-game (computer games) advertising;
- music events
- direct response advertising.

Group, via its United Kingdom subsidiary, operates 367 stores throughout the United Kingdom branded under the VODAFONE name. Group and its national subsidiaries operate a number of websites.

17) Sponsorship is used by Group as a means of enhancing exposure to the VODAFONE brand and increasing brand awareness. Group began using sponsorship as a means of advertising its name when it sponsored the Virgin Challenger on its transatlantic crossing in 1985. Since 1995 Group has sponsored the Epsom Derby. In 2006 100,000 people attended the Epsom Derby and 4.1 million people watched in on television. In 1997 Group began sponsoring the England Cricket Team for all home and away test matches, one day internationals and overseas games. The team has been wearing Group's logo on its clothing at all test matches and one day internationals since the beginning of the 1998 season. A picture showing the England cricket team, exhibited at SS11, shows a device and the word VODAFONE prominently on one day shirts. There is no indication as to when the photograph was taken. From June 2000 until the end of 2005 Group sponsored Manchester United Football Club. Group is an official sponsor of the UEFA Champions League and is a past sponsor of the UEFA cup. Material exhibited at SS13 shows that the sponsorship of the Champions League commenced on 1 July 2007 (after the date of the filing of the application for registration). From 2002 until 2006 Group sponsored the Ferrari formula one racing team. The sponsorship deal involved the prominent placement of Group's branding on the cars. The VODAFONE brand also appeared on the helmets and overalls of the drivers and pit crew. In 2007 (after the date of application for registration) Group commenced sponsorship of the McLaren Mercedes formula one racing team. The agreement gives Group dominant sponsorship branding on the cars and the helmets and overalls of the drivers and pit crew. Group agreed a two year worldwide image rights deal in August 2002 with David Beckham. A new agreement was subsequently entered into for one year from 1 July 2004. The agreement allowed Group to use Mr Beckham in advertisements and to generate mobile content for customers and fans, including screen savers, mobile games and voicemail messages. From May 2002 until the end of 2006 Group was involved in an endorsement agreement image rights deal with MS Corporation (employer of Michael Schumacher) for the purpose of Mr Schumacher engaging in promotional activities for Group. Mr Schumacher appeared in national television advertisements for Groups VODAFONE LIVE service.

18) Group has publicised itself at trade fairs and exhibitions since the 1980s.

19) Mr Scott goes on to make various submissions, which are not evidence of fact. Consequently, no more will be said about this part of his statement.

20) Mr Scott states that on 22 October 2008 Mr Lothian telephoned Group's head office with the intention of speaking to the chief executive officer, Mr Colao. In Mr Colao's absence, Mr Lothian spoke to Mr Colao's personal assistant. Mr Lothian

subsequently sent Mr Colao's personal assistant an e-mail in which he reiterated the request for an offer to purchase the trade mark Voipafone. On 10 November 2008 Mr Lothian was advised that he should direct all future correspondence to Group's advisors, Baker & McKenzie LLP. However, Mr Lothian continued to correspond with Mr Jones, who sent the first letter from Group to Mr Lothian, and Mr Colao's personal assistant. Consequently, Ms Sarita Pandya, of Baker & McKenzie LLP, sent an e-mail to Mr Lothian advising that he should communicate with her in the future. On 18 November 2008 Mr Lothian sent a further e-mail to Ms Pandya requesting a response to his outstanding queries. On 25 November 2008 Ms Pandya advised him that the chronology of events was detailed in Group's application for invalidation. Mr Lothian had indicated that he would be appointing a representative. Consequently, Ms Pandya advised that it would be appropriate for her to discuss the matter with the representative and requested that he send her contact details. On 2 December 2008 Mr Lothian contacted Ms Pandya (with a copy to Mr Colao's personal assistant) advising that he would be representing VL and requesting what Mr Scott describes as "further spurious and irrelevant information". On 15 December 2008 Ms Pandya wrote to Mr Lothian, a copy of the letter is exhibited at SS29. In the letter Ms Pandya advises that Group were still willing to settle the matter in the terms of Group's letter of 20 October 2008 (see above). No further attempts have been made to contact Mr Lothian. On 2 December 2008 Mr Lothian sent another e-mail to Ms Pandya, advising that he would be representing VL. He asked various questions as to whom was responsible for monitoring the Trade Mark Journal for Group during 2005, whether Group were notified of the application when it was published, and were they notified of the publication of the registration and assignment of the trade mark. It asks what Group's response to the application and granting of the registration was as of 19 August 2005. It asks why Group waited three years before raising any objection to the trade mark. It asks when Group launched its VoIP IP Phone product.

Witness statement of James Stewart Lothian

21) Mr Lothian is the Managing Director and Company Secretary of VL. He states that VL is a non-trading company that was set up for the sole purpose of providing voice over Internet protocol (VoIP) services.

22) Mr Lothian states that VL did not contact Group but that Group contacted it, for the surrender of VL's trade mark. He states that prior to the application for invalidation Voipafone had never been advertised other than in the Trade Marks Journal and on the Intellectual Property Office's website. Much of Mr Lothian's statement consists of submission and comment upon the evidence of Mr Scott rather than evidence of fact. It is not appropriate, therefore, to refer to it here. However, his comments are borne in mind. Mr Lothian states that the VODAFONE brand is unique and instantly recognisable. Mr Lothian states that Group's "reputation for blocking **VoIP** in the UK is infamous, no one of sound mind would ever consider they had anything to do with the **VoIP** or the

“Respondent”.” Exhibited at SL6 are pages from a Google® search for the search term Vodafone voip. Various of the summaries refer to Vodafone discouraging the use of VoIP. Exhibited at SL7 is a page from the Internet dated 18 April 2007 in relation to Orange and Vodafone removing the VoIP function from a telephone. Vodafone denied that this was done to protect revenue but stated that the function was removed owing to the lack of reliability of VoIP services. At SL8 are pages from engadgetmobile.com, which were published on 2 May 2007. These refer to Vodafone blocking the use of VoIP on its network. At SL9, SL11 and SL20 are exhibits relating to Vodafone not allowing VoIP services on its network. Exhibited at SL19 are pages downloaded from the Vodafone.com website and the phones4u.co.uk web site relating to terms of use. The former advises that use of VoIP is not permitted within any of the Vodafone prepaid data roaming tariffs. The latter advises that the Vodafone mobile Internet tariff service “cannot be used for data usage abroad nor Voice over Internet Protocol (VoIP) services such as Skype or Peer-to-Peer services”.

23) Exhibited at SL10 is a document written by Elaine E Lothian BSc (Hons) Psych, Linda J Morrison BSc (Hons) Psych and Sue F Lyon B c (Hons) Math. The document was created for these proceedings. The document should, therefore, be in the form of evidence as prescribed by rule 64 of The Trade Marks Rules 2008. Rule 64 states:

“64.—(1) Subject to rule 62(2) and as follows, evidence filed in any proceedings under the Act or these Rules may be given—

(a) by witness statement, affidavit, statutory declaration; or

(b) in any other form which would be admissible as evidence in proceedings before the court.

(2) A witness statement may only be given in evidence if it includes a statement of truth.

(3) The general rule is that evidence at hearings is to be by witness statement unless the registrar or any enactment requires otherwise.

(4) For the purposes of these Rules, a statement of truth—

(a) means a statement that the person making the statement believes that the facts stated in a particular document are true; and

(b) shall be dated and signed by—

(i) in the case of a witness statement, the maker of the statement,

(ii) in any other case, the party or legal representative of such party.

(5) In these Rules, a witness statement is a written statement signed by a person that contains the evidence which that person would be allowed to give orally.

(6) Under these Rules, evidence shall only be considered filed when—

(a) it has been received by the registrar; and

(b) it has been sent to all other parties to the proceedings.”

This exhibit does not conform to the requirements for the form of evidence. The creators of the document do not give details of their professional capacities. It is not indicated how they were chosen or if they have any relationship with Voipafone or Mr Lothian.

24) The authors begin by stating that the argument put forward by Group is a “psychological one, as it hinged on confusion and mental manipulation, occurring as the result of something seen. It was agreed that confusion can only occur in the mind of the individual viewing the said material, and for that reason it was accepted that this is indeed a psychological argument”. This shows a misunderstanding of the issues in this case, these are legal issues, decided by statute and case law. The questions are for the tribunal to decide, placing the facts of the case within the context of the law. In *esure Insurance Ltd v Direct Line Insurance Plc* [2008] RPC 34 Arden LJ stated:

“56 In my judgment, Mr Hobbs is correct on this point. What the hearing officer had to determine was what the average consumer would have thought of the two marks and whether they would have confused him. The services sold by the parties were identical and were of a kind familiar to members of the public. In those circumstances, I see no reason why the hearing officer should not have decided the issue of similarity on his own in the absence of evidence apart from the marks themselves and evidence as to the goods or services to which they were, or, in the case of esure's mark, were to be applied. As Lord Diplock held in *Re GE Trade Mark* at 321:

“My Lords, where goods are of a kind which are not normally sold to the general public for consumption or domestic use but are sold in a specialised market consisting of persons engaged in a particular trade, evidence of persons accustomed to dealing in that market as to the likelihood of deception or confusion is essential. A judge, though he must use his common sense in assessing the credibility and probative value of that evidence is not entitled to supplement any deficiency in evidence of this kind by giving effect to his own subjective view as to whether or not he himself would be likely to be deceived or confused ... But where goods are sold to

the general public for consumption or domestic use, the question whether such buyers would be likely to be deceived or confused by the use of the trade mark is a “jury question”. By that I mean: that if the issue had now, as formerly, to be tried by a jury, who as members of the general public would themselves be potential buyers of the goods, they would be required not only to consider any evidence of other members of the public which had been adduced, but also to use their own common sense and to consider whether they would themselves be likely to be deceived or confused.

The question does not cease to be a “jury question” when the issue is tried by a judge alone or on appeal by a plurality of judges. The judge's approach to the question should be the same as that of a jury. He, too, would be a potential buyer of the goods. He should, of course, be alert to the danger of allowing his own idiosyncratic knowledge or temperament to influence his decision, but the whole of his training in the practice of the law should have accustomed him to this, and this should provide the safety which in the case of a jury is provided by their number. That in issues of this kind judges are entitled to give effect to their own opinions as to the likelihood of deception or confusion and, in doing so, are not confined to the evidence of witnesses called at the trial is well established by decisions of this House itself.”

In the same judgment Jacob LJ held:

“72 It will be noted that in my summary of the relevant evidence I have not referred to the “evidence” of the branding expert Mr Blackett. This was simply not of assistance. For instance he said in his first report:

“In my capacity as an expert on branding I think the Direct Line Telephone Device is both striking and original. It is my opinion that the Direct Line Telephone Device is now very well known and has achieved iconic status.”

Well you do not need an “expert” to tell you any of that. The facts speak for themselves. And if that had not been so, then an assertion to the contrary would have been wrong.

73 In essence Mr Blackett's “evidence” consisted essentially of a series of assertions of fact, including an assertion about the ultimate question, namely that which the court had to decide:

“It is my opinion that people would confuse the esure mouse on wheels with the Direct Line Telephone Device and the Direct Line company and business.”

74 His reasons for the assertion are simply argument. I repeat the whole of it as set out in his first report so its essentially assertive nature can be seen—and so as a guide as to what should be avoided in future cases:

“It is my opinion that people would confuse the esure mouse on wheels with the Direct Line Telephone Device and the Direct Line company and business. The use by esure of an object of a similar oblong, block-like shape, also on chunky wheels—which up to this time have been the ‘property’ of Direct Line—would lead a significant number of the public to think that the esure mouse on wheels was some how connected with Direct Line, particularly as both companies are involved in insurance. The fact that the esure mouse on wheels is also a desk top object could increase the confusion which I believe will arise. Confusion is especially likely to arise in the case of the esure mouse on wheels if used in the colour red, as at appendix 4 (“the red esure mouse on wheels”), as the colour red has also in my view become the ‘property’ of Direct Line and a major component of the Direct Line Telephone Device. It is not uncommon for companies to extend their brands to embrace new products and services using their well established brand device, or create similar devices as a ‘family’ of related devices. It is my opinion that the use by anyone, including esure, of a device similar to the Direct Line Telephone Device, such as the esure mouse on wheels, would cause confusion among members of the public.”

75 It is, of course, permissible for an expert to opine on the ultimate question if it is one of fact, not law, as I said in my judgment (with the concurrence of the other members of the Court) in *Technip France SA's Patent* [2004] EWCA Civ 381, [2004] R.P.C. 46 . I repeat part of it here:

“[13] But it also is permissible for an expert witness to opine on an ‘ultimate question’ which is not one of law. I so held in *Routestone Ltd v Minories Finance Ltd* [1997] B.C.C. 180 and see s.3 of the Civil Evidence Act 1972 .

[14] But just because the opinion is admissible, it by no means follows that the court must follow it. On its own (unless uncontested) it would be ‘a mere bit of empty rhetoric’ *Wigmore, Evidence (Chadbourn rev) para. 1920*. What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets

out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.”

76 Assertions of the sort I have set out seem to me to fall within that vivid phrase, “empty rhetoric” and are of no value.

77 There is another objection to this evidence. I do not think it is expert evidence at all. Mr Blackett’s experience is “brand development, brand management and brand evaluation.” None of these makes him an expert on confusion between trade marks, if indeed there can be such an expert, which I doubt. Actually I suspect a reasonably experienced Chancery judge would have more experience of that.”

25) The authors effectively try to place themselves in the position of the average consumer for the goods and services of Group and the services of VL, not something that they can do. Despite these caveats and deficiencies the document has been considered.

26) The authors comment upon Mr Scott stating that:

“The Respondent’s Mark reproduces the whole of the Applicant’s mark, the only difference being the replacement of the letter “D” with the letters “IP”.”

This could be expressed differently but it is a statement of fact, the value of which is to be considered. The authors of SL10 argue against this statement of fact. All that Mr Scott has effectively said is that where the letter D appears in VODAFONE, the letters IP appear in Voipafone.

27) The authors then comment upon Mr Scott’s stating that:

“the letters “IP” at first glance arguably resemble a “D” as they are similar in shape. It is not inconceivable that a customer upon viewing VOIPAFONE might think that it is VODAFONE they have seen, particularly given the powerful distinctive character of the VODAFONE mark which has a strong effect.”

This is a submission and a postulation. The authors of the exhibit spend some time commenting on the difference between the diphthong oi and the consonant d. It is difficult to see that this is to point, as the submission relates to visual confusion rather than aural confusion and the effects of imperfect recollection, a fundamental proposition in law. The authors also make reference to MY VODAFONE, however, Mr Scott’s submission relates to VODAFONE simpliciter (on its own). The authors then spend some time on perception of letters and the development aspects of that perception. It is difficult to see how this relates to the visual perception of the average consumer, or to the argument of Group, if it

were accepted, that owing to the fame of VODAFONE that the average consumer might simply assume that VL's trade mark is VODAFONE, seeing what he or she expects to see. Much of what is included in the exhibit at this point relates to dyslexia and errors that children make in relation to the written word, it is difficult to see how this has a bearing upon the matters before the tribunal.

28) The authors go on to comment on brand recognition. They comment that with sufficient exposure brands and their associated logos are recognised relatively easily. They go on to state that:

“Put simply not the right font or logo, then no association form within the mind”.

This is not particularly relevant as some of the trade marks upon which Group relies are word only trade marks ie they are not in a stylised font. VL's trade mark is not a particularly stylised font and is presented simply. It is also settled law that there is a greater likelihood of confusion where the earlier trade mark has a reputation. It is also settled law that the greater the reputation, the more likely that a plaintiff will succeed under section 5(3) of the Act.

29) The authors of the exhibit then spend some time on theories relating to branding and sponsorship, to come to the conclusion that “It was felt that Sports fans that see Vodafone brand on a regular basis would be highly unlikely to mistake anybody else's branding for that of Vodafone”. This is an opinion and an opinion that is not based on any empirical data in relation to the signs at issue in this case. It is also an opinion which would have the tribunal ignore settled law in relation to reputation in relation to trade marks.

30) The authors comment upon Mr Scott stating that the respective trade marks consist of almost the same number of letters (8 against 9) and have exactly the same number of syllables. The authors claim that Voipafone will be pronounced as four syllables: voi- pee- ay- fone. It is difficult to envisage how or why the average consumer would pronounce the sign in this manner. If the average consumer was aware of VoIP, he or she will naturally say voip-ar-phone. If he or she is not aware of VoIP, he or she can pronounce the sign in the same manner or as voi-par-phone. The authors state: “It would be orthographically illegal due to the syllabic bounders (start and finish) of each word to take the p from voip and the a and join them to make the syllable /pa/ as is suspected that Scott did in his argument”. Illegal or not, this is one of the two likely pronunciations. So Mr Scott is correct in stating that the two words have the same number of syllables and have one letter difference.

31) The authors then comment upon the stylisation that Group uses. This is not relevant for trade marks which are not stylised. It ignores non-stylised use and it also ignores oral use.

32) The authors then comment: “We asked people that we knew to *free recall* information about Vodafone”. No details of these persons are given. This is the vaguest and loosest form of survey evidence. Even the most carefully constructed and professionally administered surveys tend to suffer from many pitfalls, as per the judgment of the Court of Appeal in *esure Insurance Ltd v Direct Line Insurance Plc*. This *free recall* is without any merit.

33) The authors then decided that a fair comparison of trade marks would be between VL’s trade mark and trade mark no 2404612A. Trade mark no 2404612A has not been pleaded and so is without relevance to these proceedings. It is also in a format that has not been pleaded in relation to section 5(4)(a) of the Act.

34) The authors conclude by referring to the graphics within Group’s trade marks, so ignoring the word only trade marks. The authors come to the conclusion that:

“We can therefore say with a high degree of certainty that the average consumer would not make the catalogue of implausible errors when encountering the Voipafone trademark as suggested by Scott in his argument.”

Further evidence for Group

35) This consists of a witness statement by Mr Stephen Francis Jones. Mr Jones is a solicitor advocate with Baker & McKenzie LLP. The bulk of his statement is submission rather than evidence of fact and so no more needs to be said about it here. Exhibited at SFJ1 is a copy of a letter from VL, signed by Mr Lothian, to Ms Pandya at Baker & McKenzie LLP dated 31 August 2009. The following appears in the letter:

“However recent information would suggest that your clients were in negotiations to acquire Central Telecom, a VoIP specialist, during September 2008. This would explain why your client was on the IPO website looking to trademark a VoIP brand when they came across our IP.

As previously stated, we have no wish to obstruct your client’s transition from VoIP blocker to VoIP promoter and consequently are still willing to sell or licence the Voipafone brand for a reasonable sum based on the following recognised criteria:

Licence: 6% of annual turnover in VoIP traffic attributed to Central Telecom or their division of the Vodafone Group.

Outright purchase: Price by negotiation.”

Findings of fact

36) VL and Mr Lothian do not contest that Group has a reputation in the trade mark VODAFONE in relation to mobile telephone services. Mr Lothian in his evidence and at the hearing submitted that Group also has (or had) a reputation for being against VoIP. There is evidence that Group discouraged the use of VoIP on its network. However, there is nothing to suggest that the average consumer for telecommunication services, which is the public at large, would know of this. The evidence in relation to this emanates from a few articles on the Internet and from the small print of some of the terms and conditions. It is not considered that it has been established that the reputation of Group would specifically exclude VoIP services, and even less that for the average consumer Group would have a reputation for being against the use of VoIP. The reputation of Group in relation to mobile telephone services is enormous. It is difficult to envisage that this reputation would be restricted to mobile telephone services. The VODAFONE reputation, owing to the extent of the fame and promotion, will extend to all telecommunication services. The reputation is such that the VODAFONE trade mark enjoys an exceptionally high degree of distinctiveness in relation to telecommunicationsⁱ.

Likelihood of confusion – section 5(2)(b) of the Act

Average consumer and purchasing process

37) As indicated above the average consumer for the services of Group and those of VL is the public at large. The average consumer “is deemed to be reasonably well informed and reasonably circumspect and observant”ⁱⁱ. In purchasing the services, owing to the nature of service plans and choice of handsets, the average consumer is likely to make a careful and educated decision. Consequently, the effects of imperfect recollection will be diminished.

Comparison of services

38) In his evidence Mr Lothian commented that Group’s specifications do not specify the services of VL’s registrations. It is not necessary for a specification to specify a particular service to encompass it. Group’s specification includes *telecommunications* at large, which will encompass all of the services of the registration, which are all telecommunication services. **The respective services are identical.**

Comparison of trade marks

39) The trade marks to be compared are:

VODAFONE



40) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various detailsⁱⁱⁱ. The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components^{iv}. Consequently, there cannot be an artificial dissection of the trade marks, although it is necessary to take into account any distinctive and dominant components. The average consumer rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he/she has kept in his/her mind and he/she is deemed to be reasonably well informed and reasonably circumspect and observant^v. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public^{vi}.

41) There is no separable distinctive and dominant component in the trade mark of Group. The distinctiveness lies in the trade mark as a whole. The coloured rectangle of VL's trade mark is a background, it is the word element of the trade mark that is the distinctive and dominant component. It is to be taken into account, however, that the background is alien to the trade mark of Group. It is not considered that the fact that the trade mark of Group is in upper case and that of VL is in title case will have any effect on the average consumer. They are both in the form of a standard script. Both trade marks commence with the letters VO and end with the letters AFONE. They differ in length by one letter. The only visual difference is that in one, after the letters VO the letter D appears and in the other the letters IP appear. Considering the respective trade marks in their entireties they are visually similar.

42) Consideration of the pronunciation of VL's trade mark has been given in paragraph 30 in relation to exhibit SL10:

"30)The authors claim that VOIPAFONE will be pronounced as four syllables: voi- pee- ay- fone. It is difficult to envisage how or why the average consumer would pronounce the sign in this manner. If the average consumer was aware of VoIP, he or she will naturally say voip-ar-phone. If he she is not aware of VoIP, he or she can pronounce the sign in the same manner or as voi-par-phone. The authors state: "It would be orthographically illegal due to the syllabic bounders (start and finish) or

each word to take the p from voip and the a and join them to make the syllable /pa/ as is suspected that Scott did in his argument". Illegal or not, this is one of the two likely pronunciations. So Mr Scott is correct in stating that the two words have the same number of syllables and have one letter difference.

Group's trade mark is likely to be pronounced as VOE-DAR-PHONE. The first consonant and final two syllables (to the person with a knowledge of VoIP) of the respective trade marks will be pronounced in the same manner. The emphasis falling on the syllables will also be the same. The respective trade marks have a degree of phonetic similarity.

43) Both trade marks are invented words and so have no meaning in themselves. However, the ends of both trade marks, taking into account the services in question, have a conceptual connection with telephones. For some consumers VOIP in the trade mark of VL will have a meaning, a meaning which is alien to the conceptual significance(s) of Group's trade mark. Consequently, there is a conceptual similarity and a conceptual dissimilarity. However, the effect of this conceptual dissimilarity is likely to be limited owing to the descriptive nature of the VOIP element in relation to the respective services.

44) Considering the respective trade marks in their entirety, it is considered that they are similar. The reputation of Group's trade mark has **not** been taken into account in considering the issue of similarity^{vii}.

Conclusion

45) In *Calvin Klein Trademark Trust v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) C-254/09 P* the ECJ stated:

"44 According to the settled case-law of the Court, the existence of a likelihood of confusion on the part of the public must be appreciated globally, taking into account all factors relevant to the circumstances of the case (see, inter alia, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 22; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 18; Case C-120/04 *Medion* [2005] ECR I-8551, paragraph 27; Case C-334/05 P *OHIM v Shaker* [2007] ECR I-4529, paragraph 34; and Case C-498/07 P *Aceites del Sur-Coosur v Koipe* [2009] ECR I-0000, paragraph 46).

45 It is also apparent from settled case-law that the global assessment of the likelihood of confusion, in relation to the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive

role in the global appreciation of that likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see, inter alia, *SABEL*, paragraph 23; *Lloyd Schuhfabrik Meyer*, paragraph 25; *Medion*, paragraph 28; *OHIM v Shaker*, paragraph 35; and Case C-206/04 P *Mülhens v OHIM* [2006] ECR I-2717, paragraph 19).”

46) In considering whether there is a likelihood of confusion the principle of interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa^{viii}. In this case the respective services are identical. It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark the greater the likelihood of confusion^{ix}. As decided above, owing to the enormous reputation of Group, the VODAFONE trade mark enjoys an exceptionally high degree of distinctiveness in relation to telecommunications.

47) In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined cases T-117/03 to T-119/03 and T-171/03 the General Court stated:

“49 However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

In this case the purchasing decision is most likely to be made through accessing websites, catalogues or visiting shops. Visual similarity is, therefore, more important than aural similarity.

48) Taking into account all the above factors, there can be no doubt that the average consumer seeing the trade mark of VL will believe that it is a trade mark of Group. There is a likelihood of confusion. The registration was made in contravention of section 5(2)(b) of the Act and in accordance with section 47(6) of the Act the registration is deemed never to have been made.

49) Mr Lothian in his evidence has referred to what he considers the bullying attitude of Group and questions its motivation in filing an application for invalidation when it did not file an opposition. The question of motivation of the applicant is not relevant, what is relevant is whether the grounds of invalidation are well founded. They clearly are. If it had been necessary to consider the grounds under sections 5(3) and 5(4)(a) of the Act, Group would have succeeded in relation to them also. There is a statutory right to file applications for invalidation and Group has merely exercised that right. It is difficult to see that Group's attitude can be described as bullying. It is a large undertaking but being a large undertaking does not mean that its actions towards smaller undertakings can be categorised as bullying simply because the difference in the sizes of the undertakings. Large undertakings also have rights. In this case Group gave VL every opportunity to cancel its registration. It clearly set out the grounds upon which it would seek invalidation prior to filing the application. Even after filing its application Group offered VL the opportunity to surrender its registration on the terms that it had offered prior to the filing of the application. Mr Lothian expressed unhappiness that Group did not wish to negotiate about the matter. It is difficult to see why Group should or would wish to negotiate in relation to a clearly infringing trade mark. Group did not file an unreasonable amount of evidence, it does not seek costs outwith the scale. Despite VL being a non-trading company it did not make a request for security for costs. Group's behaviour has been proportionate and reasonable; there has been nothing oppressive about it.

Costs

50) Group having been successful is entitled to a contribution towards its costs. Costs are awarded on the following basis:

Application fee:	£200
Preparing statements and considering the statements of VL:	£600
Preparing evidence and considering the evidence of VL:	£1000
Preparing for and attending the hearing:	£1000
Total:	£2800

Voipafone Ltd is ordered to pay Vodafone Group PLC the sum of £2,800. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 14th day of September 2010

**David Landau
For the Registrar
the Comptroller-General**

ⁱ The trade mark registration is a Community registration. The evidence mainly relates to the reputation in the United Kingdom or the world at large, rather than the European Union in particular. In *PAGO International GmbH v Tirol Milch registrierte Genossenschaft mbH* Case C-302/07 the European Court of Justice (ECJ) considered the requirements for establishing a reputation in respect of a Community trade mark:

“30 The answer to the first question referred is therefore that Article 9(1)(c) of the regulation must be interpreted as meaning that, in order to benefit from the protection afforded in that provision, a Community trade mark must be known by a significant part of

the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of the facts of the main proceedings, the territory of the Member State in question may be considered to constitute a substantial part of the territory of the Community.”

Owing to the size of the reputation in the United Kingdom and the size of the market in the United Kingdom there can be no doubt that the VODAFONE Community trade mark registration has a reputation for the purposes of both section 5(2)(b) of the Act, in increasing the likelihood of confusion, and section 5(3) of the Act.

ⁱⁱ *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* [2000] FSR 77.

ⁱⁱⁱ *Sabel BV v Puma AG* [1998] RPC 199.

^{iv} *Sabel BV v Puma AG* [1998] RPC 199.

^v *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* [2000] FSR 77.

^{vi} *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02.

^{vii} See *Ravensburger AG v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-243/08:

“27 It is appropriate at the outset to reject that complaint as unfounded. The reputation of an earlier mark or its particular distinctive character must be taken into consideration for the purposes of assessing the likelihood of confusion, and not for the purposes of assessing the similarity of the marks in question, which is an assessment made prior to that of the likelihood of confusion (see, to that effect, judgment of 27 November 2007 in Case T-434/05 *Gateway v OHIM – Fujitsu Siemens Computers (ACTIVY Media Gateway)*, not published in the ECR, paragraphs 50 and 51).”

^{viii} *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117.

^{ix} *Sabel BV v Puma AG* [1998] RPC 199.