

O-583-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 3060993
BY GRUNTING GROWLER LIMITED
TO REGISTER THE TRADE MARK
GRUNTING GROWLER
IN CLASSES 32 & 35
AND**

**IN THE MATTER OF OPPOSITION
THERE TO UNDER No. 403271 BY
GROWLER BEERS UK LIMITED**

BACKGROUND


1) On 23 June 2014, Grunting Growler Ltd (hereinafter the applicant) applied to register the trade mark Grunting Growler in respect of the following goods and services:

In Class 32: Beer.

In Class 35: Retail services connected with the sale of beer, beer jugs, beer mugs.

2) The applications were examined and accepted, and subsequently published for opposition purposes on 22 August 2014 in Trade Marks Journal No.2014/035.

3) On 21 November 2014 Growler Beers UK Ltd (hereinafter the opponent) filed a notice of opposition, subsequently amended. The opponent is the proprietor of the following trade mark:

Mark	Number	Date of application / registration	Class	Specification relied upon
	3037227	09.01.14 02.05.14	21	Beer jugs; beer mugs; glasses [drinking vessels]; bottles; glass bottles.
			35	Retail services connected with the sale of beer, beer jugs, beer mugs, glasses [drinking vessels], bottles, glass bottles, clothing, footwear and headgear

- a) The opponent contends that its mark and the mark applied for are similar. It also contends that the goods and services for which its mark is registered in classes 21 & 35 are identical and/or similar to the goods and services applied for under classes 32 & 35. The application therefore offends against Section 5(2)(b) of the Act.
- b) The opponent contends that as a result of use of its mark since 30 July 2013 which amounts to £120,000 in the 16 months of use, and the advertising and marketing of its goods and services it has generated considerable goodwill such that use of the mark in suit would offend against Section 5(4)(a) of the Act.
- c) The opponent notified the applicant of the existence of its prior rights and goodwill in a letter dated 15 July 2014. The applicant was therefore aware of the use the opponent had made of its mark and its reputation and goodwill. The application was therefore made in bad faith and offends against section 3(6) of the Act.
- 4) On 26 January 2015 the applicant filed a counterstatement. It basically denies the ground of opposition (other than accepting that the goods and services in classes 21 & 35 have a degree of similarity). It claims that where the opponent uses a bear paw print it uses an image of a wild boar (although this does not form part of the mark applied for). It contends that the term “growler” is a generic, common term in the UK and is used by other similar businesses. It also contends that its use of its mark began on 21 March 2013, prior to the first use by the opponent.

5) Both parties filed evidence. Both parties seek an award of costs in their favour. Neither side wished to be heard but both sides provided written submissions.

OPPONENT'S EVIDENCE

6) The opponent filed five witness statements. The first, dated 16 April 2015, is by Stuart Dinning the founder and a Director of the opponent company. He states:

“2. I first came across the concept of a draught beer takeaway shop in December 2011 whilst on holiday in Atlanta, USA, where a number of these shops exist. As far as I was aware the concept had not taken off in the UK and I felt I had spotted a niche in the market to sell craft beer, ale and cider to those who like to drink at home.

3. The concept behind the shop is that customers pay a deposit for a refillable glass bottle which contains one, two or three litres of liquid. The customer then has their own bottle filled with the chosen drink, which they take away to enjoy in the comfort of their own home. Once finished, they can wash the bottle and have it refilled in the shop or they can return the bottle in exchange for their deposit.”

7) He stated that he set up a shop in Edinburgh in October 2013. From this date to 5 April 2014 the shop had a turnover of £53,914. In the subsequent year (April 14–April 15) the turnover was £110,000. He states that he is unaware of any other business similar to his using the term “GROWLER” and that he had his mark created by a design company in March 2013. He states that prior to the shop opening the *Edinburgh Evening News* ran an article about the shop and that the company has a twitter and Facebook account as well as a website. On 11 January 2015 the *Scotland on Sunday* newspaper also ran an article about the shop stating that it had a customer base of 3,500 people and was looking to set up a second shop in Glasgow, and is in the middle of a crowd-funding operation, having so far raised £45,850. He also states that his company have won prizes for its enterprise. He states that he has been in discussions with potential franchisees about opening shops in the north of England and also the Midlands.

8) Mr Dinning states that when he filed his application he was made aware of other companies using similar marks. These were “Growler Brewery” registered for brewing beers in class 40; “Old Growler” registered in class 32 for beers etc; and “Growler Flask” for hip flasks in class 21. None of these raised any objection to his registration and he even discussed a tie-in with the brewery company which may still occur. He states that in the UK the term “growler” is not generic. He provides the following exhibits:

- GB-SD14: A copy of an article from the *Edinburgh Evening News* dated May 2013 referring to the business as Growler Beers.
- GB-SD16: A copy of an article from the *Scotland on Sunday* newspaper dated January 2015 which refers to it as Growler UK.
- GB-SD17: screen prints of the crowd-funding operation showing use of the opponent's registered mark.

9) The second witness statement, dated 15 June 2015, is by David Kaye a partner in the company representing the opponent. He describes telephoning the applicant and advising him that his business

in Glasgow was infringing on the rights of the opponent. He recalls that the applicant disagreed with this view.

10) The third witness statement, dated 16 April 2015, is by Simon Rajgopaul the opponent's Trade Mark Attorney. He states that following the conversation recounted at paragraph 9 above, he wrote to the applicant setting out the opponent's position and stating that, if the term "Growler" were removed from the application then no further action would be taken. He states that the applicant responded that the term "Growler" is a commonly used word. This was disputed by Mr Rajgopaul in a further letter. He states that he carried out an Internet search for the term "growler beers" and also the word "growler". The first search returned results showing the first three results relating to the opponent. The other results appear to refer to the container/bottle for the beer being known as a growler, a term which seems to be imported from the USA. He also points out that the term "growler" has a slang meaning of a scatological nature and also refers to a hairy or badly kempt vagina as was made popular by the comedy series "Bo>Selecta".

11) The fourth witness statement, dated 6 April 2015, is by Stephanie Woods who states that she has purchased beer from the opponent's shop in Edinburgh. She states that she had never heard the word "growler" used in relation to beer until she shopped at the opponent's establishment.

12) The fifth witness statement, dated 3 April 2015, is by Mark Wilson who states that he has purchased beer from the opponent's shop in Edinburgh. He states that he had never heard the word "growler" used in relation to beer until he shopped at the opponent's establishment.

APPLICANT'S EVIDENCE

13) The applicant filed a witness statement, dated 4 August 2015, by Jahad Ali Nasser Hatu a Director of the applicant company. He provides his opinions regarding the dominant features of the opponent's mark and its similarity to the mark in suit. He also comments on his use of a Boar device instead of a Bear although neither such devices feature in the marks being considered. He provides the names of a number of companies which are registered with Companies House, have the term "Growler" as part of their name and in some cases appear to be registered for the sale of beer. I note that the registration of a company name is an entirely different regime to the use and registration of a trade mark. Without accurate information as to the activities of these companies including any trade marks they may have used, good or services provided and sales figures etc this is of no assistance to my decision. He contends that the term "Growler" is in common use in the beer industry and he provides a number of exhibits which he claims support this view. These exhibits show:

- GG-JH1: a dictionary definition from the 1989 Oxford English dictionary which has as its fourth meaning "A vessel in which beer is fetched" and identifies it as US slang.
- GG-JH7: A screen-print, dated June 2008, from the website for Lovibonds Brewery in Henley offering Growler containers to take beer home.
- GG-JH8: A screen-print, dated June 2010, from the website for BrewDog in Aberdeen stating that they will be open soon and offering "growler fills"
- GG-JH9: Another screen-print from the website of BrewDog, dated June 2011, stating that their growlers will be available in three weeks. It also shows pictures of the growler.
- GG-JH10: A screen-print, undated, from the website for Webrew.co which offers reusable growlers to take beer home.

- GG-JH11: Screen-prints from the Beeradvocate blog. A number of people have posted comments, dated between 10 January 2013 and 13 January 2013, stating that they are aware of establishments offering growlers to facilitate taking beer home to drink.
- GG-JH12: A copy of The Beercast blog, dated 6 July 2012, written by a reputable writer who has, according to the applicant, won prizes for his work. This has a title “Growler fills – now at the Beerhive”. This refers to a shop in Edinburgh which is offering growler containers to take draught beer home. It also states: “The Brewdog bars have been offering growler fills for almost a year now, of course.”
- GG-JH13: A screen-print, dated November 2012, from “The Homebrew forum” website which is discussing growlers and their availability.
- GG-JH14: A screen-print, dated December 2012, from the website for George’s Brewery in Essex which offers growlers.
- GG-JH15: A screen-print, dated June 2013, from the website for Malt the Brewery in Bucks, offering growlers for sale.
- GG-JH 16: An article, dated 14 August 2013 from Difford’s Guide. It has the headline “Growlers: the US trend hits London” and goes onto explain what a growler is and how it is used. It refers to a number of outlets in the UK offering these items.
- GG-JH 17: A screen-print, dated January 2014, from “The Homebrew forum” website which has a discussion on growlers.
- GG-JH 18: A screen-print, dated June 2014, from “The Beercast” website. This mentions a visit to a small brewery in Edinburgh which has installed a multi tapped growler station.
- GG-JH 19: A screen-print, dated 29 May 2014, from the London Evening Standard website. This has a headline of “Fill up your growler: a bring your own beer bottle revolution is underway in London. It provides information on the background and states that growlers were first offered in the UK in 2011 and listing other outlets offering growlers.
- GG-JH 20: A screen-print, dated July 2014, from the “grunt work” website which states that the first shop in Glasgow proper (it ignores an establishment called Whole Foods just outside Glasgow) to do growler refills was Maxwells which appears to have started its service in January 2014. He also mentions the applicant and another establishment called Valhalla’s Goat also in Glasgow.
- GG-JH 21: A screen-print, dated August 2014, from “The Beercast” website. This refers to potential issues of growlers exploding or gushing.
- GG-JH 22: A screen-print, undated, from “CraftBeer Growlers Ltd” website. This company offers growlers for sale in various sizes.
- GG-JH 23: A screen-print, undated, from “CraftBeer Growlers Ltd” website, showing prices for pallets of its growlers in different sizes clearly aimed at the industry.

- GG-JH 24: A screen-print, undated, from “CraftBeer Growlers Ltd” website, showing “filling stations” for its growlers in the UK and Eire.
- GG-JH 26: A screen-print, undated, from “Croxtons” website based in London. This company offers a range of different sizes growlers, aimed at the trade.
- GG-JH 27: A screen-print, dated 26 August 2014, from Time Out, London. This has the headline “Growlers: the next big thing on London’s beer scene. The article mentions a number of businesses offering beer in growlers to the public, one of which began in London in August 2013.
- GG-JH 28: A copy of an article from the Evening Times dated 23 June 2014 about the applicant explaining his background and stating that his business is launching in July 2014.
- GG-JH 29: A copy of an article from the Herald Scotland, dated December 2014, which states that the applicant has opened a third temporary outlet in Glasgow.
- GG-JH 31: A copy of a screen, dated March 2013 showing use of the mark in suit.

14) Mr Hatu points out that most of these exhibits pre-date the formation of the opponent company which was incorporated on 30 July 2013. He also points out that the applicant began using the mark in suit on Facebook on 21 March 2013.

15) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

16) The first ground of opposition is under section 5(2)(b) which reads:

“5.-(2) A trade mark shall not be registered if because -

- (a)
- (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

17) An “earlier trade mark” is defined in section 6, the relevant part of which states:

“6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

18) The opponent is relying upon its trade mark listed in paragraph 3 above. Given the interplay between the date that the opponent's mark was applied for and the dates that the applicant's marks were published, the opponent's mark is not subject to proof of use.

19) When considering the issue under section 5(2)(b) I take into account the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The average consumer and the nature of the purchasing decision

20) As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

21) Although technically anyone could purchase a beer jug or glass, and they could be sold through any retail outlet, it is reasonable (for the purposes of this decision) to assume that they would be sold along with the alcoholic contents. As such the average consumer for both parties goods and services would be those members of the general public who are eighteen years of age or older and who consume alcohol. This encompasses much of the adult UK population.

22) Considering the applicant's class 32 goods. Beers come in a number of different forms which have very different tastes and the average consumer is usually likely to have a distinct preference. Such goods will not be purchased or selected without a degree of care. The applicant's beer could be sold in supermarkets, public houses, off licences or online. The visual aspect is likely to be the most important, whether self selecting in a supermarket or when ordering in a pub as most beers are sold either “on tap” in which case they have a marker on the tap facing the consumer or if sold in bottle form will be displayed behind the bar with the labels on display. In the case of ordering in a pub or restaurant I also accept that aural issues have a part to play and so must be considered but these would be of secondary importance given that the consumer will still see the marks on e.g. (drinks) menus.

23) I next move onto considering the class 35 retail services of both parties (I also including the class 21 goods of the opponent in with these services). The opponent contends that word of mouth recommendations play an important part in the selection of retail outlet. To my mind, retail outlets tend to be chosen by the sign displayed outside the premises or perhaps from advertising literature or even after an online search. As such the visual aspect is the most important, although I accept that word of mouth recommendations also affect the selection and so aural issues must be considered but again would be of secondary importance.

24) When considering which retail outlet to purchase beer from the average consumer will pay an average level of attention as it is likely that a range of beers of all descriptions will be on offer. More attention will be paid to the beer rather than to the outlet, but the selection of beers on offer, the manner in which they are kept etc. will be taken into account by the average consumer. **Overall the average consumer for these types of goods and services is likely to pay an average degree of attention to the selection of these goods and services.**

Comparison of goods and services

25) In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

26) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

27) I also take into account the comments in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, where the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

28) In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.

29) Further, I take into consideration the comments in *Oakley, Inc v OHIM*, Case T-116/06 where, at paragraphs 46-57, the General Court held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

30) I note that in *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent’s earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are ‘similar’ to goods are not clear cut.”

31) However, on the basis of the European courts’ judgments in *Sanco SA v OHIM* Case C-411/13P, and *Assembled Investments (Proprietary) Ltd v. OHIM* Case T-105/05, at paragraphs [30] to [35] of the judgment, upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd* Case T-105/05, at paragraphs [30] to [35] of the judgment, Mr Hobbs concluded that:

- i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer’s point of view, they are unlikely to be offered by one and the same undertaking;
- ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent’s goods and then to compare the opponent’s goods with the retail services covered by the applicant’s trade mark;
- iii) It is not permissible to treat a mark registered for ‘retail services for goods X’ as though the mark was registered for goods X;
- iv) The General Court’s findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party’s trade mark was registered (or proposed to be registered).

32) The goods and services of the two parties are:

Applicant's goods and services	Opponents' goods and services
In Class 32: Beer.	In Class 21: Beer jugs; beer mugs; glasses [drinking vessels]; bottles; glass bottles.
In Class 35: Retail services connected with the sale of beer, beer jugs, beer mugs.	In Class 35: Retail services connected with the sale of beer, beer jugs, beer mugs, glasses [drinking vessels], bottles, glass bottles, clothing, footwear and headgear


33) It is clear that the class 35 services of the applicant are encompassed within the class 35 services of the opponent and use identical wording. **As such the services in class 35 must be regarded as identical. As the class 35 services of the opponent include the retailing of beer these services must be considered to be highly similar to the applicant's class 32 goods.**

Comparison of trade marks

34) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

35) It would be wrong, therefore, artificially to dissect the trade marks, although, it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by them. The trade marks to be compared are:

Opponent's trade mark	Applicant's trade mark
	GRUNTING GROWLER

36) Visually the opponent's mark consists of two words, a term and a device, whereas the applicant's mark has just two words. The first word of the opponent's mark and the second word of the applicant's mark are identical, other than that the marks are different. Visually there is a low degree of similarity. Aurally the marks share the word "Growler" but it is the initial word in the opponent's mark and is followed by the word "Beers" and the term "UK". The applicant's mark has "Grunting" as its first word followed by "Growler". There is a low degree of aural similarity. Conceptually, the opponent's mark suggests a connection to a bear as the paw print chimes with the word growler as bears are known for growling. To my mind, grunting is associated more with pigs than bears. Conceptually there

may be a minor link in that both suggest “animal sounds” but nothing more. I do not believe that there is anything other than marginal conceptual similarity. **Overall the marks have a low degree of similarity based solely around the word “growler”.**

Distinctive character of the earlier trade marks

37) In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

38) In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.’

40. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out”.

39) The opponent contends:

“11. The dominant part of the opponent’s mark is the word “Growler”. The elements “UK” and “Beers” add little by way of distinctiveness. Consumers will remember the element “Growler”, and are likely to discard the “UK” and “Beers” elements. The dominant element of the applicant’s

mark is the word “growler”. The element of the applicant’s mark “grunting” is descriptive and secondary to the dominant element “growler”, as without the dominant element “growler” being present, this secondary element makes little sense grammatically.”

40) Interestingly the opponent makes no comment regarding the device element. To my mind, whilst the device element is not the dominant element it is distinctive and independent. It is the first thing that the average consumer will see. I agree that the term “UK” will largely go unnoticed by the average consumer as it simply implies that the originating company is based or incorporated in the UK. Similarly, when used on a retail outlet selling beer, the term “BEERS” is not distinctive. This leaves the device element and the word “GROWLER” as the dominant elements of the opponent’s mark. Having said this I cannot overlook completely the presence of the aspects “Beers” and “UK” in the opponent’s mark.

41) I do not understand the opponent’s reasoning in stating that the word “Grunting” will be ignored as it is merely descriptive. The word “grunting” in and of itself is distinctive for beers and the retail services sought to be registered. I do not believe that the two words form a unit with a meaning different to the two individual words.

42) I must turn to consider the issue of whether the term “growler” is distinctive when used in respect of retailing beers. The opponent sought to exclude much of the applicant’s evidence on the basis that although it had a date within the print out it did not show the date it was downloaded. I do not accept this view. Nor do I accept that certain of the exhibits such as GG-JH 19, which is an article which appeared in the *London Evening Standard* should be excluded as it is dated after the relevant date even though within the body of the article reference is made to events prior to the relevant date. I do accept that certain of the exhibits are undated or dated after the relevant date and do not contain any references to events prior to the relevant date. I therefore do not take this latter group into account in my decision.

43) Taking into account the exhibits which are eligible it appears that the term “growler” is commonly used in the trade to refer to the container in which the beers are sold. The term is, like so much in the UK, an American import. Clearly, with the demise of many local public houses and traditional off-licences the market for micro breweries has increased significantly. The problem for these brewers is how to best present their wares to the public. The idea of using a pressurised container is not new, and, given the changes in the retailing of beers, the presence on the market of companies using tried and tested methods used for many years in America is hardly surprising. The opponent contends that its customers’ witness statements show that they know its retail outlet as the “growler shop”. This is understandable given that it is called “growler beers” and it sells its beers in growlers. As to the “evidence” of confusion, we have Mr Dinning stating that he has been asked if he has set up another shop in Glasgow. Given that, in Scotland at least, the use and knowledge of growlers seems to be in its infancy this is not surprising. This does not detract from the fact that the term “growlers” is descriptive of the vessels in which the beers are sold and as such it is not distinctive for beers sold in a growler container. **To my mind, the word elements of the opponent’s mark are not inherently distinctive. The distinctive and dominant element of the opponent’s mark is the device element. The opponent cannot benefit from enhanced distinctiveness as the opponent has not shown that it has accrued a significant reputation in the UK through the use of the mark.**

Likelihood of confusion

44) In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the

respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponents' trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision, I concluded that:

- the average consumer for both parties' goods and services would be those members of the general public who are eighteen years of age or older and who consume alcohol. This encompasses much of the adult UK population (including businesses). Overall the average consumer for the types of goods and services of both parties is likely to pay an average degree of attention to the selection of these goods and services.
- the services in class 35 are identical, whilst the applicant's goods in class 32 are highly similar to the opponent's class 35 services.
- the word elements of the opponent's mark are not inherently distinctive. The distinctive and dominant element of the opponent's mark is the device element. The opponent cannot benefit from enhanced distinctiveness as the opponent has not shown that it has a significant reputation in the UK.
- overall the marks have a low degree of similarity based solely around the word "growler". Otherwise the marks are not similar.

45) In view of the above and even allowing for the concept of imperfect recollection, there is no likelihood of consumers being confused into believing that the goods and services provided by the applicant are those of the opponent or provided by some undertaking linked to them. **The opposition under Section 5(2) (b) therefore fails in relation to all the goods and services for which registration is sought.**

46) I next turn to the ground of opposition under Section 5(4)(a) which states:

"A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or
- (b)...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark."

47) In determining the issue I take into account Halsbury's Laws of England (4th Edition) Vol. 48 (1995 reissue) which at paragraph 165 provides the following analysis of the law of passing off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

"The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

- (1) that the plaintiff's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and
- (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant's misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House's previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House."

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

"To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

48) I must next determine the relevant date. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC as the Appointed Person considered the relevant date for the purposes of s.5(4)(a) of the Act and concluded as follows:

“39. In *Last Minute*, the General Court....said:

‘50. First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51. However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-registered national mark before the date of filing, in this case 11 March 2000.’

40. Paragraph 51 of that judgment and the context in which the decision was made on the facts could therefore be interpreted as saying that events prior to the filing date were irrelevant to whether, at that date, the use of the mark applied for was liable to be prevented for the purpose of Article 8(4) of the CTM Regulation. Indeed, in a recent case before the Registrar, *J Sainsbury plc v. Active: 4Life Ltd* O-393-10 [2011] ETMR 36 it was argued that *Last Minute* had effected a fundamental change in the approach required before the Registrar to the date for assessment in a s.5(4)(a) case. In my view, that would be to read too much into paragraph [51] of *Last Minute* and neither party has advanced that radical argument in this case. If the General Court had meant to say that the relevant authority should take no account of well-established principles of English law in deciding whether use of a mark could be prevented at the application date, it would have said so in clear terms. It is unlikely that this is what the General Court can have meant in the light of its observation a few paragraphs earlier at [49] that account had to be taken of national case law and judicial authorities. In my judgment, the better interpretation of *Last Minute*, is that the General Court was doing no more than emphasising that, in an Article 8(4) case, the *prima facie* date for determination of the opponent’s goodwill was the date of the application. Thus interpreted, the approach of the General Court is no different from that of Floyd J in *Minimax*. However, given the consensus between the parties in this case, which I believe to be correct, that a date prior to the application date is relevant, it is not necessary to express a concluded view on that issue here.

41. There are at least three ways in which such use may have an impact. The underlying principles were summarised by Geoffrey Hobbs Q.C. sitting as the Appointed Person in *Croom’s TM* [2005] RPC 2 at [46] (omitting case references):

- (a) The right to protection conferred upon senior users at common law;
- (b) The common law rule that the legitimacy of the junior user’s mark in issue must normally be determined as of the date of its inception;
- (c) The potential for co-existence to be permitted in accordance with equitable principles.

42. As to (b), it is well-established in English law in cases going back 30 years that the date for assessing whether a claimant has sufficient goodwill to maintain an action for passing off is the time of the first actual or threatened act of passing off: *J.C. Penney Inc. v. Penneys Ltd.* [1975] FSR 367; *Cadbury-Schweppes Pty Ltd v. The Pub Squash Co. Ltd* [1981] RPC 429 (PC); *Barnsley Brewery Company Ltd. v. RBNB* [1997] FSR 462; *Inter Lotto (UK) Ltd. v. Camelot Group plc* [2003] EWCA Civ 1132 [2004] 1 WLR 955: “date of commencement of the conduct complained of”. If there was no right to prevent passing off at that date, ordinarily there will be no right to do so at the later date of application.

43. In *SWORDERS TMO-212-06* Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’ ”

49) The applicant in its counterstatement claimed that its use preceded that of the opponent. He provides copies of screen prints date March 2013 showing the mark. He also mentions that he was using the mark in suit on Facebook in March 2013. Both the website and facebook mention the business under the name Grunting Growler, but it is not clear that it is actual use of the mark in relation to the goods and services concerned in this case. However, at exhibit GG-JH28 a newspaper article gives the launch date of his business as July 2014. Given the discrepancy (or lack of certainty) over the date of first use, I shall regard the application date, 23 June 2014, as the relevant date.

50) In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

51) However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

52) I must first consider whether the opponent had, at the relevant date, any goodwill in the retail services claimed. I am willing to accept that, prior to the relevant date, the opponent had a turnover in the business (albeit low) and that the local paper ran a story about the venture. **Therefore at the relevant date the opponent had goodwill in its sign shown at paragraph 3.**

53) I now move onto the issue of misrepresentation. In *Neutrogena Corporation and Another v Golden Limited and Another*, [1996] RPC 473, Morritt L.J. stated that:

“There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175 ; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

And later in the same judgment:

“.... for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

54) Earlier in this decision I found that use of the mark in suit, actual or on a fair and notional basis would not result in confusion with the opponent's mark. Accordingly, it seems to me that the necessary misrepresentation required by the tort of passing off will not occur. **The opposition under Section 5(4)(a) of the Act must fail.**

55) I turn to the last ground of opposition which is based upon section 3(6) which reads:

“3.(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

56) Section 3(6) has its origins in Article 3(2)(d) of the Directive, which implements Council Directive No. 89/104/EEC of 21 December 1988 which states:

“Any Member State may provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where and to the extent that....

(c) the application for registration of the trade mark was made in bad faith by the applicant.”

57) The law in relation to section 3(6) of the Act (“bad faith”) was summarised by Arnold J. in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch):

“130. A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, "Bad faith in European trade mark law" [2011] IPQ 229.)

131. First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see *Case C- 529/07 Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132. Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. *Case C-259/02 La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and *Case C-192/03 Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133. Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134. Fourthly, bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined": see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135. Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136. Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137. Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138. Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

58) It is well established (paragraph 33 sub section 131 above refers) that the relevant date for consideration of a bad faith claim is the application's filing date or at least a date no later than that. In the instant case the relevant date is 23 June 2014.

59) In asserting that the mark was applied for in bad faith, the onus rests with the opponent to make a prima facie case. A claim that a mark was applied for in bad faith implies some action by the applicant which a reasonable person would consider to be unacceptable behaviour or, as put by Lindsay J. in the *Gromax* trade mark case [1999] RPC 10:

"includes some dealings which fall short of the standards of acceptable commercial behaviour".

60) The issue must be determined on the balance of probabilities. On the basis of these authorities it is clear that a finding of bad faith may be made in circumstances which do not involve actual dishonesty. Furthermore, it is not necessary for me to reach a view on the applicant's state of mind regarding the application for registration if I am satisfied that its actions in applying for the mark in the light of all the surrounding circumstances would have been considered contrary to normally accepted standards of honest conduct.

61) In the instant case, it is contended that the applicant was aware of the opponent's registered mark and business as the opponent's legal representatives had written to the applicant pointing out their

registered mark. I note that this letter is said to have been sent on 15 July 2014, after the relevant date. However, even if the applicant were aware of the opponent's registered mark and business prior to submitting his application, it does not show of itself that the application was made in bad faith. Even if I had found that the marks were similar my finding on bad faith would remain the same. **The application was not filed in bad faith and so the ground of opposition under section 3(6) fails.**

CONCLUSION

62) As the applicant has been successful it is entitled to a contribution towards its costs.

Preparing a statement and considering the other side's statement	£200
Preparing evidence and considering the evidence of the other party	£900
Preparing submissions	£600
TOTAL	£1,700

63) I order Growler Beers UK Limited to pay Grunting Growler Limited the sum of £1700. This sum to be paid within fourteen days of the expiry of the appeal period, or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 9th day of December 2015

**George W Salthouse
For the Registrar,
the Comptroller-General**