

O-252-04

TRADE MARKS ACT 1994  
IN THE MATTER OF APPLICATION No 81269  
BY ADAM SELLS  
FOR A DECLARATION OF INVALIDITY

IN RESPECT OF TRADE MARK No 2292564  
STANDING IN THE NAME OF  
SPORTS SUPPLIES LIMITED

## BACKGROUND

1) Trade mark registration No 2292564 **SGP** is registered for the following goods:

In Class 25: “Goalkeepers clothing specifically produced for goalkeepers for casual wear, training and playing football at all standards, professional, semi-professional and non-professional and of all age groups. ”

In Class 28: “Goalkeepers' gloves; shin pads and knee pads. ”


2) The mark was placed on the Register on 18 October 2002, in the name of Sports Supplies Limited with an effective date of 13 February 2002 (the application date).

3) By an application dated 1 May 2003 Adam Sells applied for a Declaration of Invalidity under the provisions of Section 47(1) and 47(2) of the Act. The grounds are:

i) The applicant was previously a director of the registered proprietor company, until November 2001. The applicant set up a company Sells Goalkeeper Products Ltd in December 2001. In January 2002 the applicant began marketing a soccer goal keeping glove using the mark SGP thereon. The applicant describes the mark as the surname of the applicant and the first three letters of the applicant’s company name. On 18 January 2002 the applicant sought registration of the trade mark detailed below, the mark being registered on 3 January 2003. The mark in suit therefore offends against Section 5(2)(b) of the Act. The applicant also made prior usage of the trade mark in what is a very specialised industry and had accrued a significant reputation and goodwill in its SGP mark as at the date of the proprietor’s application. The mark therefore offends against Section 5(4)(a) as it is liable to be prevented by the law of passing off.

ii) The applicant claims that by virtue of the previous business relationship the registered proprietor was aware of the applicant’s usage and interest in the trademark SGP. The registered proprietor made the application in bad faith contrary to Section 3(6) of the Act. The applicant claims to have correspondence which will confirm this allegation.

iii) The applicant also contends that the mark in suit is in breach of Section 3 of the Trade Marks Act 1994.

Trade Mark	Number	Effective Date	Class	Specification
	2290407	18.01.02	25	Clothing, footwear, headgear.
			28	Sporting and gymnastic apparatus and equipment; parts and fittings for all the aforesaid goods.

4) The registered proprietor filed a counterstatement defending the registration and denying the applicant's claims. The registered proprietor also claims that:

- In or around January 2002 SSL filed a police report in respect of around 4,000 goalkeeping gloves retailing at around £200,000 which were missing from its stock.
- Many goalkeepers who were sponsored by SSL began promoting the applicant's products.
- The applicant had not sold any products under the SGP mark prior to the relevant date.
- That the proprietor launched its own Selsport Goalkeeping Products in 1998.

5) Both sides ask for an award of costs. Both sides filed evidence in these proceedings and the matter came to be heard on 20 April 2004 when the applicants were represented by Mr Marsh of Messrs Wilson Gunn M'Caw. The Registered Proprietor was represented by Mr Jones of Messrs Sceptre.

#### APPLICANT'S EVIDENCE

6) This consists of a witness statement, dated 14 August 2003, by Adam David Sells the applicant and Managing Director of Sells Goalkeeper Products Limited. Mr Sells states that he was a director of Sports Supplies Limited (SSL), the registered proprietor, joining the company in mid-1999. He states that prior to this time SSL sold "VALSPORT" branded football related goods. SSL was originally incorporated as Valsport Ltd changing its name to Sports Supplies Ltd in January 1998.

7) Mr Sells states that SSL never sold goods under "Selsport Goalkeeping Products" nor the letters "SGP" but only under the "VALSPORT" brand. Mr Sells states that shortly after he joined SSL he suggested that products should be sold under the brand "SELSPORT". He claims that this idea was taken up and SSL sold goods under this mark since mid 1999.

8) Mr Sells states that on 18 July 2000 he applied to register the mark "S SELSPORT & logo". He claims that this logo mark and the word mark "SELSPORT" were the only marks used by SSL. Mr Sells states that he left SSL on 22 November 2001 as he had never been paid and had not received any shares as he had been promised. He assigned the Selsport logo mark to SSL in December 2001. He then decided to set up his own company "Sells Goalkeeper Products Ltd" in order to manufacture and sell specialist goalkeeper products and other related products for goalkeepers. The company was incorporated in December 2001. Around the same time he created a logo based on the company initials "SGP" which was subsequently registered as a trade mark under number 2290407.

9) In January 2002 a promotional flyer, exhibit ADS8, was sent out which had the registered trade mark and the company name, Sells Goalkeeper Products, prominently displayed. It also used the letters "SGP" to refer to the company thus:

“I’m pleased to announce the launch of my new brand; Sells Goalkeeper Products. My aim is to establish SGP as the leading brand for goalkeepers, everywhere.”

10) The document then mentioned goalkeepers who had endorsed the product. Mr Sells states that on Friday 1 February he received a phone call from Mr Forzoni the Managing Director of SSL, which he described as threatening. Mr Sells states that, on 3 February 2002, a number of professional football league goalkeepers wore his branded gloves in matches which were shown on Sky TV.

11) Mr Sells states that he then found out that SSL had, on 13 February 2002, applied for two trade marks “SGP” and “SELLS”. Mr Sells states that in his view the applications were made in bad faith in order to affect his business as SSL had never traded under these marks previously. He comments that SSL subsequently withdrew the application for the trade mark “SELLS” following his opposition. Mr Sells states that he only became aware that SSL had registered the trade mark “SGP” when he received a letter from lawyers acting on behalf of SSL alleging that he was infringing SSL’s registered trade mark.

12) At exhibits ADS9 and ADS10 he provides two letters. The first (ADS9), dated 12 August 2003, from “Football Mad Cardiff” a company which has been involved in the sports supplies business for over ten years. The Managing Director, Mr Neil Bainbridge, states that he received the promotional flyer in January 2002. He states that he is not aware that the registered proprietor has ever been known as SGP or known as Selsport Goalkeeper Products with a single exception of a goal keeping glove on sale since March 2003 which has the letters SGP on the wristband. Exhibit ADS10 consists of two letters from the same person, Colin Hardman, a director of Peradventure Ltd. In both he confirms receipt of the flyer from the applicant, however the year differs stating 2001 in one version and 2002 in the other. In the fuller version of the letter he states that he was informed by the applicant that he was setting up a new company in December 2001 and that he received the flyer in 2002.

13) Mr Sells states that SSL’s lawyers wrote on 18 March 2003 admitting that their client’s range of goal keeping gloves was launched in August 2002. At exhibit ADS12 and ADS13 he provides copies of SSL’s brochures for 2001/02 and 2003/04 which show that SSL uses the “Selsport” trade mark and not the letters “SGP”. Mr Sells provides examples of use of his logo mark and the letters “SGP” at exhibits ADS14, ADS16-ADS18. Included in these exhibits are brochures, for the 2002/03 season, produced by his company and third parties which show use of the applicant’s logo mark but also refer to the company by use of the letters “SGP” and print outs from the applicant’s website dated August 2003.

14) Lastly, Mr Sells denies that there was a police investigation and states that no criminal charges were ever brought against any third party.

#### REGISTERED PROPRIETOR’S EVIDENCE

15) This consists of a witness statement, dated 15 October 2003, by Roberto Forzoni the Managing Director of Sports Supplies Limited (SSL).

16) Mr Forzoni states that he has reviewed the counterstatement and that he adopts it in full. He repeats that the applicant has shown no use of its trade mark or the letters “SGP” on products prior to the relevant date. He states that the applicant uses the letters “SGP” on the flyer as an abbreviation of its company name whereas the product has the SELLS logo mark. In relation to the letters provided by the applicant from customers regarding receipt of the flyer Mr Forzoni states that he questions the credibility of this evidence because versions of the letters are similar in format and legally worded. One version is in draft form and contains the text “[insert date]” but was swapped when Adam Sells revised his exhibits and another version appears without the author’s letterhead.

17) Mr Forzoni states that soon after the applicant launched its range in August 2002 he encountered numerous instances of confusion between the brands SELSPORT and SELLS. At exhibit RF1 he provides a letter, dated 2 September 2002, from Ken Dullaway, a goalkeeper coach at the Southern Association Football Academy in Australia. The copy of the letter filed in evidence is very poor but it appears that the writer purchased a pair of gloves marks “Sels” in the belief that they were made by SSL, although by the time of writing the letter he is aware that SSL did not manufacture the product. Also at exhibit RF1 is an e-mail from an Australian company who were looking to distribute SSL’s range of products. The writer states that he has seen a third party catalogue and clearly believes that the applicant’s products to be those of the proprietor.

18) Mr Forzoni denies that SSL has ever sold goods under the VALSPORT name. Products under this brand were, he states, sold by another company owned by him. Mr Forzoni also provides copies of correspondence between himself and Mr Sells. It is clear that there were allegations of theft levelled by the proprietor against Mr Sells and clearly some bad feeling on behalf of Mr Forzoni who it is clear believes that Mr Sells has let him down. In a letter dated 28 November 2001 (at exhibit RF2) Mr Forzoni writes:

“Despite your assurances over the two years I financed and guaranteed all payments for the business that you would not leave me with a debt or any problems, it appears that your intentions may not be as honourable as you wish to make out. On top of recently losing a £200,000 investment following Adam Heaslewood’s actions, you must excuse my cynicism, although your timing is impeccable.

You stated that you are resigning because of health reasons but went on to say you may start another brand in the future, although this is not something you’ve really considered. As with Adam Heaslewood, only time will tell your true intentions. I would hope that your own intentions do not conflict with mine and you will not take the route taken by Adam Heaslewood.”

#### APPLICANT’S EVIDENCE IN REPLY

19) The applicant filed a witness statement, dated 26 November 2003, by Adam Sells who has provided evidence previously in this case.

20) Mr Sells states that following his departure from SSL he began working on product development for his new company. He states that it takes time to develop such products and so they were not ready until shortly after the company launch. Mr Sells states that in December 2001 he had the logo design finalised.

21) Mr Sells states that he believes that Mr Forzoni was aware of the trading names “SGP” and “SELLS” as a result of seeing his promotional flyer. He claims that Mr Forzoni made reference to these marks during a phone conversation on 1 February 2002. He also feels that the subsequent TV coverage of his products and the fact that Mr Sells had been showing samples of his products to various retailers and mutual customers prompted SSL’s subsequent applications to register the marks “SELLS” and “SGP”. He also states that this action was taken to prevent him using or registering any marks relating to himself or the name of his company.

22) Mr Sells repeats his claim that the proprietor has never traded under the marks “Selsport Goalkeeper Products” or “SGP”. The only marks used by SSL, he claims, are “Selsport” and “S Selsport”. He again denies the allegations regarding theft.

23) That concludes my review of the evidence. I now turn to the decision.

## **DECISION**

24) The request for the declaration of invalidity is made under the provisions of Sections 47(1) & (2) of the Act which state:

“47.-(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

(2) The registration of a trade mark may be declared invalid on the ground -

- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
- (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

25) The application is based upon Section 3(6), Section 5(2)(b) and Section 5(4)(a). I shall deal firstly with the ground 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.”

26) An earlier right is defined in Section 6, the relevant parts of which state:

“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;”

27) In determining the question under section 5(2), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel Bv v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R 723. It is clear from these cases that:

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel Bv v Puma AG*;
- (b) the matter must be judged through the eyes of the average consumer, of the goods / services in question; *Sabel Bv v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel Bv v Puma AG*;
- (d) 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; *Sabel Bv v Puma AG*;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.*;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel Bv v Puma AG*;

(g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel Bv v Puma AG*;

(h) further, 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; *Marca Mode CV v Adidas AG*;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Meyer Inc.*.

28) I have to consider the issues before me as of the relevant date, which is the date of the filing of the registered proprietor's mark, 13 February 2002. The applicant has to demonstrate that he had a valid case at this date.

29) Clearly, the reputation of a trade mark can assist where it is not particularly inherently distinctive or where there is a low degree of similarity between the respective goods or services. I must consider whether the applicant's mark is inherently distinctive or whether it has acquired distinctiveness through use.

30) The applicant's mark consists of a device which is claimed to be the letters "SGP" and the word "SELLS". To my mind the device does not consist of the letters "SGP", at the very best it might be said to be a highly stylised version of the letter "G" within a letter "S", although I do not believe the average consumer would view it thus without being informed that this was the intended message. As to the word "SELLS", this would probably be seen as a surname, although it is an English word its use on a product would not be seen as a reference to the standard word as it is out of context. The overall combination of the device and surname imbues considerable inherent distinctiveness.

31) The applicant has provided evidence of a flyer sent to a number of sports retailers and also claimed that the mark was seen on gloves used by various professional goalkeepers on Sky TV on 3 February 2002. However, no evidence of sales in the UK prior to the relevant date has been filed.

32) From the evidence before me I do not consider that the applicant can claim an enhanced distinctive character based on use, although the mark is inherently distinctive. In respect of section 5(2)(b) the issue before me is a simple comparison of the respective trade marks and goods on the basis of notional and fair use.




33) The specifications of the two parties are as follows:

Registered Proprietor's specification	Applicant's specification
Class 25: "Goalkeepers' clothing specifically produced for casual wear, training and playing football at all standards, professional, semi-professional and non-professional and of all age groups."	Class 25: "Clothing, footwear, headgear."
Class 28 "Goalkeepers' gloves; shin pads and knee pads."	Class 28: "Sporting and gymnastic apparatus and equipment; parts and fittings for all the aforesaid goods."

34) The European Court of Justice held in *Canon* in relation to the assessment of the similarity of goods and/or services that the following factors, inter alia, should be taken into account: their nature, their end users and their method of use and whether they are in competition with each other or are complementary.

35) Neither party made any comments regarding the similarity of the goods at the hearing or in submissions. To my mind the specifications in both classes overlap and the registered proprietor's goods are encompassed by the applicant's specification, therefore identical goods are involved.

36) I now turn to compare the marks. For ease of reference the signs of both parties are reproduced below:

Registered Proprietor's mark	Applicant's mark
SGP	

37) In my opinion, it is clear that the marks are not similar, visually aurally or conceptually.

38) Despite the applicant's mark being inherently distinctive and the fact that the specifications are identical I have no hesitation in finding that there is no likelihood of confusion. Consequently, the invalidity under Section 5(2)(b) fails.

39) I now turn to the ground under Section 5(4)(a) which reads:

"5. (4) 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.”

40) To succeed under this ground the applicant must show that he enjoyed goodwill at the relevant date. The relevant date for passing off purposes relates to the commencement of the behaviour complained of. This will normally be the date of the filing of the application. In relation to passing off the applicant needs to establish that at the relevant date, 13 February 2002, he enjoyed goodwill/reputation.

41) In *South Cone Inc. v. Jack Bessant, Dominic Greensmith, Kenwy House, Gary Stringer (a partnership)* [2002] RPC 19 Pumrey J. in considering an appeal from a decision of the Registrar to reject an opposition under Section 5(4)(a) said:

“There is one major problem in assessing a passing off 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 Section 11 of the 1938 Act (see *Smith Hayden (OVAX)* [1946] 63 RPC 97 as qualified by *BALI* [1969] RPC 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. 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.”

42) This cannot be interpreted in a prescriptive fashion. There will be occasions when the evidence does not fall within the above parameters but still establishes goodwill for passing off purposes - see the decision of Professor Annand, sitting as the Appointed Person, in *Loaded* BL 0/191/02.

43) I have found earlier in this decision that the applicant had not shown evidence of goodwill or reputation in its trade mark and that the marks are not similar. There can therefore be no misrepresentation. The ground of invalidity under Section 5(4)(a) therefore fails.

44) Lastly, I turn to the ground of invalidity under 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.”

45) Section 3(6) has its origins in Article 3(2)(d) of the Directive the Act 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.”

46) The Directive gives no more clue as to the meaning of “bad faith” than the Act. Subsequent case law has avoided explicit definition, but has not shirked from indicating its characteristics. In *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367, Lindsay J stated at page 379:

“I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes 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. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.”

47) In the Privy Council judgement *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, Nicholls LJ described dishonesty as “..to be equated with conscious impropriety”. This was in the context of accessory liability in the misapplication of trust assets to the detriment of a beneficiary. However, I think the same general principles would apply in trade mark law. He added:

“In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others’ property..... The individual is expected to attain the standard which would be observed by an honest person in those circumstances. It is impossible to be more specific. Knox J captured the flavour of this, in a case with a commercial setting, when he referred to a person who is “guilty of commercially unacceptable conduct in the particular context involved”: see *Cowan de Groot Properties Ltd v Eagle Trust Plc* [1992] 4 All ER 700 at 761. Acting in reckless disregard of others’ rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt ....Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.”

48) Thus dishonest behaviour is characterised by intention and/or recklessness. Such conduct would clearly be bad faith. It is also obvious, however, from the *Gromax* judgement, that bad faith also describes business dealings which, though not actually dishonest, still fall short of the standards of acceptable commercial behaviour. This includes conduct that is not knowingly fraudulent or illegal, but may be regarded as unacceptable or less than moral in a particular business context and on a particular set of facts. In *Demon Ale Trade Mark* [2000] RPC 355, the Appointed Person said:

“I do not think that Section 3(6) requires applicants to submit to an open-ended assessment of their commercial morality. However, the observations of Lord Nicholls on the subject of dishonesty in *Royal Brunei Airlines Sdn Bhd v Phillip Tan* [1995] 2 AC 378 (PC) at page 389 do seem to me to provide strong support for the view that a finding of bad faith may be fully justified even in a case where the applicant sees nothing wrong in his own behaviour.”

49) I also take into account the comments by Mr Simon Thorley Q.C. acting as the Appointed Person in *R. v. Royal Enfield Trade Marks* [2002] RPC 24 at paragraph 31 where he said:

“An allegation that a trade mark has been applied for in bad faith is a serious allegation. It is an allegation of a form of commercial fraud. A plea of fraud should not lightly be made (see Lord Denning M.R. in *Associated Leisure v Associated Newspapers* [1970] 2 Q.B. 450 at 456) and if made should be distinctly alleged and distinctly proved. It is not permissible to leave fraud to be inferred from the facts (see *Davy v. Garrett* (1877-78) L.R. 7Ch.D 473 at 489). In my judgement precisely the same considerations apply to an allegation of lack of good faith made under section 3(6). It should not be made unless it can be fully and properly pleaded and should not be upheld unless it is distinctly proved and this will rarely be possible by a process of inference.”

50) The relevant facts before me are as follows:

- The applicant, Mr Sells was a Director of SSL, the registered proprietor, until his acrimonious departure in November 2001 amid unproven allegations of theft. He states that SSL sold goods under the brand name “SELSPORT”.
- In December 2001 Mr Sells set up Sells Goalkeeper Products Ltd.
- In January 2002 a promotional flyer was distributed which had the logo mark (2290407) and also referred to his company by use of the letters “SGP”.
- On 1 February 2002 Mr Forzoni, the Managing Director of SSL, phoned Mr Sells. Clearly SSL were aware that Mr Sells was a competitor and felt that he had “poached” some of the goalkeepers who they sponsored. It was also alleged, and not refuted, that during the conversation Mr Forzoni made reference to the promotional flyer.
- On 13 February 2002 SSL applied for the mark in suit “SGP” and also the mark “SELLS”, although the latter was withdrawn after Mr Sells opposed the mark. It was claimed in the proprietor’s evidence that the mark “SGP” is an abbreviation of “Selsport Goalkeeping Products” although no use of such a name prior to the application date was provided.
- In their counterstatement, which was adopted in full by Mr Forzoni, it was claimed that the proprietor had no knowledge of use of or interest in SGP by Mr Sells at the time of making the application.

51) At the hearing it was stated that the mark “Sells” had been applied for by the proprietor to protect his “Selsport” mark.

52) Taking all of the above into consideration I have come to the conclusion that the registered proprietor acted in bad faith when applying for the trade mark. They were fully aware of the applicant’s business, and knew that he was trading under the logo mark and using the abbreviation of SGP when referring to his company. Mr Forzoni’s silence in the face of the direct accusation that he referred to the applicant’s flyer in a telephone conversation prior to the relevant date and the attempt to register the applicant’s surname when according to the registered proprietor’s own Counsel confusion was “plainly foreseeable” is to my mind conduct which falls short of the standards of acceptable commercial behaviour. The ground of invalidity under Section 3(6) succeeds.

53) The application for invalidity having succeeded the applicant is entitled to a contribution towards costs. An application which succeeds under Section 3(6) normally attracts a higher level of costs, over and above the Registrar’s normal scale. I see no reason to deviate from this practice in this instance. I therefore order the proprietor to pay the applicant the sum of £4000. This sum 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 16<sup>th</sup> day of August 2004

George W Salthouse  
For the Registrar  
The Comptroller-General