O-131-05

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No. 2334761
BY CROCO WORLDWIDE SOURCING LTD TO REGISTER
THE TRADE MARK SMELLY UNIVERSE IN CLASS 28**

**AND**

**IN THE MATTER OF APPLICATION No. 2342203
BY CROCO WORLDWIDE SOURCING LTD TO REGISTER
THE TRADE MARK SMELLY WORLD IN CLASS 28**

**AND**

**IN THE MATTER OF APPLICATION No. 2343027
BY CROCO WORLDWIDE SOURCING LTD TO REGISTER
THE TRADE MARK SMELLY PLANETS IN CLASS 28**

**AND**

**IN THE MATTER OF OPPOSITIONS Nos. 92127, 92251 and 92252
BY POINT 7 DESIGN 2000 LIMITED**

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**by Croco Worldwide Sourcing Ltd to register**
**the Trade Mark SMELLY PLANETS in Class 28**

**and**

**IN THE MATTER OF Oppositions Nos. 92127, 92251 and 92252**
**by Point 7 Design 2000 Limited**

**BACKGROUND**

1. On 11 June 2003 Croco Worldwide Sourcing Ltd (Croco Worldwide) applied to register the trade mark SMELLY UNIVERSE in respect of:

> "Toys, PVC toys, plush toys, styrene toys; trading cards; toys being promotional items" (Class 28).

The application is numbered 2334761.

2. On 2 September 2003 Croco Worldwide applied to register the trade mark SMELLY WORLD in respect of:

> "Plush toys, PVC figurines; toys being promotional items" (Class 28).

This application is numbered 2342203.

3. On 10 September 2003 Croco Worldwide applied to register the trade mark SMELLY PLANETS in respect of:

> "Toys, board games, plush toys, PVC figurines, styrene puzzles; toys being promotional items" (Class 28).

This application is numbered 2343027.

4. By notices dated 17 November 2003 and 16 January 2004 (two) respectively Point 7 Design 2000 Limited (Point 7) has opposed these applications.

5. The terms of the oppositions, counterstatements and evidence appear to be in substance the same but separate documents have been filed bearing on each of the actions. It seems to me that the cases could usefully have been consolidated. For whatever reason that has not happened, but I do not understand either side to suggest that materially different considerations or outcomes are likely to arise. Accordingly, I am issuing a composite decision.

6. Point 7 is the proprietor of registrations Nos. 2299371 and 2312234 for the marks SMELLY MONSTERS and SMELLY ALIENS, both in respect of toys. These registrations were originally applied for by a company called Croco Products (UK) Ltd (Croco Products) but were transferred to Point 7 by virtue of the agreement referred to below. Croco Products went into liquidation in Spring 2003. The current applicant is said to be successor in business to Croco Products. The directors of the applicant were officers or employees of Croco Products prior to its liquidation.

7. Croco Products had a business relationship with Point 7 involving the exploitation of certain concepts owned by the opponent and called SMELLY BEASTS. The agreement to transfer the above-mentioned marks to the opponent occurred as part of a negotiated replacement license agreement. That agreement, dated 24 December 2002, was terminated following the liquidation of Croco Products. No agreement exists between the opponent and the applicant.

8. It is said that the attempt by the applicant to register marks commencing with the prefix SMELLY was made in the full knowledge of the breakdown in relationships between the principals of the companies and of the earlier acquisition from Croco Products of the marks SMELLY MONSTERS and SMELLY ALIENS referred to above. It is suggested that the applicant, via the personal knowledge of its directors, was at all times fully aware of the ownership of the SMELLY BEASTS concept and its possible development and exploitation.

9. On the basis of these facts and circumstances Point 7 says that the applications were made in bad faith and should be refused under the provisions of Section 3(6).

10. Furthermore, it is said that the respective sets of marks are similar having regard to the presence of SMELLY as a principal feature such that there is a likelihood of confusion. Refusal is also requested under Section 5(2)(b).

11. The applicant filed counterstatements. In terms of the issues that are at the heart of this dispute Croco Worldwide takes the following position:

- it is admitted that Croco Products went into liquidation and that Croco Worldwide purchased certain assets and goodwill from the liquidator;

- it is admitted that some of Croco Worldwide's directors were officers or employees of Croco Products;

- it acknowledges that no written contract was ever executed between Croco Worldwide and Point 7 but it is said that the latter continued to transact business with it;

- it is said that the possibility of assigning to the applicant the benefit and burden of the agreement dated 24 December 2002 was agreed in principle;

- it is admitted that the applicant was aware of the arrangements between Point 7 and Croco Products relating to the exploitation of the designs referred to as SMELLY BEASTS;

- Croco Worldwide claims that it suggested to the opponent that the concept which had previously been applied to air fresheners for cars could be adapted for use with toys;

- it is said that Croco Products commissioned and paid for Point 7 to design such toys and that the resulting design rights belonged to the applicant. The design rights are said to have been assigned by the agreement of 24 December 2002 together with the trade marks;

- Croco Worldwide says that it informed Point 7 about the trade mark registrations (SMELLY MONSTERS and SMELLY ALIENS) which were intended to protect the proposed names of further concepts;

- the assignment of the marks to Point 7 was on the understanding that Point 7 would appoint Croco Products, or any other company which the individuals behind Croco Products set up, as its exclusive distributor;

- it is admitted that the agreement of 24 December 2002 was terminated;

- it is admitted that the directors of Croco Worldwide were aware that Point 7 was seeking licensees for toys to be named SMELLY BEASTS and that they owned the above mentioned marks;

- it is suggested that the applicant knows how to make scent impregnated toys and the opponent does not;

- bad faith is denied.

12. The counterstatement goes on to make a number of submissions in relation to what is seen as being the descriptive nature of the word SMELLY and claims there are other UK and CTM marks incorporating this element. Likelihood of confusion between the respective marks is denied.

13. Both sides have asked for an award of costs in excess of the standard scale.

14. Only the opponent filed evidence.

15. The parties were invited to say whether they wished to be heard. Neither has requested a hearing. Written submissions have been received from Gallafents representing Point 7 (that firm's letter of 25 April 2005).

**EVIDENCE**

**Opponent's evidence**

16. The opponent filed a witness statement by Richard Eric Gilchrist Walker, a Director of Point 7 and a related company Synapse Creative Ltd (Synapse).

17. Mr Walker says that in around 1999 Synapse created a series of characters called SMELLY BEASTS for use as novelty air fresheners e.g. for use in vehicles. An example is exhibited at Tab 1. The product was commercialised by Point 7.

18. Mr Walker says that he had been aware of Croco Products and its principal, Mr Jan Fabius, since about 1994 when Croco Products became a client of Synapse. The latter was responsible for designing and modelling premium products (such as giveaway items) for Croco Products.

19. In about 2001 Mr Fabius approached Synapse with a request for suggestions for anything suitable as collectable premium items for Coca-Cola in Mexico. The SMELLY BEASTS concept was advanced as a possibility by Synapse as it was felt there was potential for additional uses for the concept in the licensing field. In the event Coca-Cola Mexico did not wish to proceed with the idea but another major Mexican company called Bimbo expressed an interest and launched a promotion in October 2002. Tab 2 contains bundles of e-mail correspondence between Synapse or Point 7 and Croco Products relating to this project.

20. As Bimbo did not want to use the English language term SMELLY BEASTS, a made up name OLOROCOS was coined for the purpose.

21. An agreement between Croco Products and Synapse/Point 7 covering, inter alia, the Bimbo promotion was signed on 20/21 May 2002. The agreement document is exhibited at Tab 3. I note that it opens with the following:

> "It is understood by Croco that ownership of the intellectual property rights to the concept "Smelly Beasts" is in favour of Synapse Creative Ltd and/or Point 7 Design 2000 Ltd".

and contains:

> "Synapse agrees that they will use their best efforts to generate new ideas within the 'Smelly Beasts' concept and not be constrained by Croco's development budget. All new developments will fall within the scope of this agreement and attract Royalty payments to Synapse at the above rate."

The agreement is in other respects a fairly short document.

22. In relation to the above quoted paragraph, Mr Walker exhibits at Tab 4 bundles of e-mail correspondence relating to possible new developments and, at Tab 5, copies of other concept material including memoranda and art work relating to the SMELLY BEASTS project.

23. In October 2002 Mr Walker was advised by his trade mark attorney that the existing agreement (of May 2002) was inadequate to protect the interests of the parties, a view that was reinforced in discussions with a Mr Ronnie Cook, a licensing agent, with whom Mr Walker was in contact at the time.

24. A replacement agreement was drawn up and executed on 24 December 2002. A copy of the agreement, which was signed by Mr Walker and Mr Fabius, is exhibited at Tab 6. During the background work towards the replacement agreement, Mr Walker says it emerged that Croco Products had applied for two other trade marks, SMELLY MONSTERS and SMELLY ALIENS, without Synapse/Point 7's knowledge. SMELLY ALIENS was already an extension to SMELLY BEASTS that Synapse had been developing at the specific request of Bimbo and Croco Products for phase 2 of the OLOROCOS promotion. The agreement provided, inter alia, for the assignment of these two marks to Point 7. A form TM16 (the official form for assigning trade marks) was duly signed by Mr Fabius and Point 7 recorded as the new proprietor. Mr Walker also exhibits, at Tab 7, correspondence between the parties following the signing of the agreement showing that Croco Products wanted to extend exclusivity to cover promotional activity in Europe. This conflicted with Point 7's wish to appoint specific licensing agents for specific territories.

25. On 25 March 2003 Mr Walker says he learnt that Croco Products had gone into liquidation. As a result Point 7 decided to terminate the agreement of 24 December 2002. A copy of the termination letter is at Tab 8 and copies of e-mail correspondence following the termination of the license are at Tab 9.

26. Mr Walker's evidence is that Point 7 considered entering into an agreement with Croco Worldwide but, despite continuing discussions, did not do so. It is said that relations with Mr Fabius deteriorated during this period.

27. The final exhibit, Tab 10, consists of a bundle of materials reflecting an attempt by Croco Worldwide to claw back the marks assigned to Point 7 under the terms of the December 2002 agreement. The correspondence reveals that the rectification actions were ultimately withdrawn.

28. Mr Walker concludes his witness statements with observations on the consequences of the above mentioned events and circumstances. He is of the view that third parties would expect any "SMELLY something" promotional product to come from the same stable ie. Synapse/Point 7. In particular, having regard to the arrangement that existed between Point 7 and Croco Products, he suggests that use by Croco Worldwide would have led many people in the industry to believe that Croco Worldwide was operating under license from Point 7. Further, it is said that it was clear at the filing dates of the applications in suit that no future arrangements between Point 7 and Croco Worldwide were likely to be achievable. The filing of the applications is, therefore, seen as being with a view to cause confusion and damage to Point 7's legitimate commercial operations.

29. That concludes my review of the evidence.

**DECISION**

**Section 3(6)**

30. This reads:

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

31. The Act is to be construed consistently with the corresponding provision, Article 3(2)(d), in First Council Directive 89/104.

32. There is as yet no formal guidance from the European Court of Justice on what constitutes bad faith but I derive assistance from two cases that have come before the UK Courts. The first is *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 where Lindsay J. said:

> "I shall not attempt to define bad faith in this context. Plainly it concludes 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."

33. More recently the matter has been considered in the Court of Appeal in *Harrison's Trade Mark Application* [2005] FSR 177. Sir William Aldous' judgment in *Harrison* also considers the relevance of a further case, *Twinsectra Ltd v Yardley*, [2002] UKHL 12; [2002] 2 A.C. 164, which had been before The House of Lords. Consideration was given to the nature of the test to be applied in considering matters of dishonesty. I will quote the relevant passage in full:

> "23 In *Twinsectra*, the courts had had to consider whether a solicitor had acted dishonestly. Although the question for decision in that case was different, the reasoning in the speeches is relevant. The leading speech was made by Lord Hutton. At [27] he said:
>
> > "27 …. There are three possible standards which can be applied to determine whether a person has acted dishonestly. There is a purely subjective standard, whereby a person is only regarded as dishonest if he transgresses his own standard of honesty, even if that standard is contrary to that of reasonable and honest people. This has been termed the 'Robin Hood test' and has been rejected by the courts. As Sir Christopher Slade stated in *Walker v Stones* [2000] Lloyds Rep PN 864, 877 para. 164:
> >
> > > 'A person may in some cases act dishonestly, according to the ordinary use of language, even though he genuinely believes that his

> action is morally justified. The penniless thief, for example, who picks the pocket of the multi-millionaire is dishonest even though he genuinely considers that theft is morally justified as a fair redistribution of wealth and that he is not therefore being dishonest.'
>
> Secondly, there is a purely objective standard whereby a person acts dishonestly if his conduct is dishonest by the ordinary standards of reasonable and honest people, even if he does not realise this. Thirdly, there is a standard which combines an objective test and a subjective test, and which requires that before there can be a finding of dishonesty it must be established that the defendant's conduct was dishonest by the ordinary standards of reasonable and honest people and that he himself realised that by those standards his conduct was dishonest. I will term this 'the combined test'."

24 Clearly the court, when considering bad faith, cannot apply a purely subjective test, called by Lord Hutton "the Robin Hood test". The dishonest person or one with low standards cannot be permitted to obtain trade mark registrations in circumstances where a person abiding by a reasonable standard would not. The registration of a trade mark is designed to enable bona fide proprietors to protect their proprietary rights without having to prove unfair trading. Registration is not provided to help those with low moral standards.

25 Lord Hutton went on to conclude that the true test for dishonesty was the combined test. He said:

> "36 … Therefore I consider … that your Lordships should state that dishonesty requires knowledge by the defendant that what he was doing would be regarded as dishonest by honest people, although he should not escape a finding of dishonesty because he sets his own standards of honesty and does not regard as dishonest what he knows would offend the normally accepted standards of honest conduct."

26 For my part, I would accept the reasoning of Lord Hutton as applying to considerations of bad faith. The words "bad faith" suggest a mental state. Clearly when considering the question of whether an application to register is made in bad faith all the circumstances will be relevant. However, the court must decide whether the knowledge of the applicant was such that his decision to apply for registration would be regarded as in bad faith by persons adopting proper standards."

34. The underlying facts and circumstances in the cases before me are reasonably clear and are either undisputed or have not been the subject of countervailing evidence from the applicant. Synapse originated the SMELLY BEASTS concept in about 1999. Croco Products was already known to it at this point in time as it had been a client of Synapse since 1994. The first agreement between the parties (of May 2002) made it clear that intellectual property rights rested with Point 7/Synapse. The registrations that now stand in the name of Point 7 but which were originally filed for and obtained by Croco Products were applied for in April and October 2002, that is to say either side of the first agreement.

35. The replacement agreement between Point 7 and Croco Products provided further recognition of Point 7's claim to be the rightful proprietor of the SMELLY MONSTERS and SMELLY ALIENS marks. In particular paragraph 8 of the agreement provided as follows:

> "It is hereby agreed and acknowledged by Licensee [Croco Products] that copyright and all other intellectual property rights in the Products and all artwork and other materials produced by Licensee relating thereto (other than Licensee's own trademarks and logos) shall vest in the Licensor [Point 7] and the Licensee hereby assigns such rights, with full title guarantee, to the Licensor. This includes, in particular, the trade mark SMELLY ALIENS in Application 2312234 before the UK Trade Marks Registry for Registration thereof, and SMELLY MONSTERS registered under number 2299371 at the UK Trade Marks Registry together with the copyright and neighbouring rights associated with the designs produced by Synapse pursuant to an order from Licensee in [Summer] 2002."

36. Other provisions in the agreement deal with the rights and obligations of the parties including intellectual property rights (paragraph 9). The 'property' that is the subject of the rights is described as being:

> "The design lead property developed by Licensor and commercialised under the Trade Marks, including all secondary and ancilliary characters, spin-offs and derivatives".

37. Consistent with paragraph 8 of the agreement the trade mark registrations obtained by Croco Products were assigned to Point 7.

38. Plans for the further commercialisation of the SMELLY BEASTS concept is evident from Mr Walker's evidence. Thus, at least as early as January 2002 a SMELLY WORLD board game was under consideration. Art work, characters, storyline concepts are exhibited at Tab 5.

39. I, therefore, regard the evidence as establishing that, by the time Croco Products went into liquidation in early 2003, Point 7's right to the intellectual property rights in SMELLY BEASTS and the related SMELLY MONSTERS and SMELLY ALIENS trade marks had been clearly established as had its plans to further commercialise the underlying concept. The latter is evident at least from the time of the first agreement (and was in fact reflected in the terms of that agreement). Further, the email exchanges at Tab 7 also make it clear that Mr Cook (the licensing agent) "has been setting up agents successfully".

40. It is conceded that Croco Worldwide purchased certain assets and goodwill from the liquidator of Croco Products and that some of its directors were officers or employees of Croco Products. Croco Worldwide engaged in an ill-judged and ultimately abortive attempt to have the SMELLY MONSTERS and SMELLY ALIENS marks re-assigned to itself. Correspondence relating to this is at Tab 10 of Mr Walker's witness statement and took place over the period July to September 2003. The clear impression from the exhibited material is that Croco Worldwide was unhappy with Point 7's decision to terminate the 24 December 2002 agreement in the light of the appointment of a liquidator to Croco Products (Point 7 did so through Gallafent & Co on 3 April 2003 – see Tab 8). It seems that in the period immediately following the termination of the agreement Point 7 continued to work with Croco Worldwide but without any formal agreement being in place. The applicant's

counterstatements claim that the "possibility of assigning to the applicant the benefit and burden of the agreement dated 24 December 2002 between the opponent and Croco Products (UK) Limited was agreed in principle between the opponent and the applicant". In support of this the applicant relies on the following extract from an e-mail dated 21 March 2003 from Mr Walker to Mr Fabius:

> "Despite querying whether a new contract is still necessary, in principle we don't have any major issue re. transferring the contract re LA to your new company as long as the commitment ongoing works both ways."

41. No new agreement was ever entered into. In any case, I do not detect anything in the exchanges to suggest that, had a new agreement been signed with Croco Worldwide, it would have had any effect on the issue of ownership of the underlying intellectual property rights. Croco Worldwide may have felt frustrated that it was not appointed under a new agreement but, even had that happened, the fundamental relationship between the parties would have remained one of licensor (Point 7) and licensee (Croco Worldwide). Point 7 made no declared intention to alter that state of affairs and, given its ownership of the intellectual property rights, there would appear to be no reason why any change in the relationship between the parties would have been contemplated.

42. The above observations relate to the dealings between the parties in relation to the SMELLY BEASTS concept and the registered marks SMELLY MONSTERS and SMELLY ALIENS and the further commercialisation proposals relating thereto. I now turn to the issue of whether the three subject marks were applied for in bad faith. They were applied for in the period June to September 2003, that is to say at or about the same time as Croco Worldwide was trying unsuccessfully to regain ownership of the two registrations that were properly transferred to Point 7 as part of the December 2002 agreement.

43. The marks are SMELLY UNIVERSE, SMELLY WORLD and SMELLY PLANETS. They thus continue the SMELLY theme and do so in a way that might be said to build on the subject matter of the existing marks and concepts. The goods applied for (toys etc) are precisely the same as those which has been the subject of discussions between Point 7 and Croco Products. Furthermore, SMELLY WORLD products had already been the subject of discussion between Point 7 and Croco Products. It seems to me that nothing could have been more calculated to induce the belief that products sold under these marks were being offered by Croco Worldwide, as successor in business to Croco Products, under a license from Point 7. As the controlling minds behind Croco Worldwide were previously officers and employees of Croco Products and had wanted to be party to a new agreement with Point 7 it seems probable that this was an intended consequence.

44. Key personnel at Croco Worldwide would also have been aware that Point 7 had appointed a licensing agent, Mr Cook, to develop the brand (Mr Cook is a copy recipient of e-mail exchanges between Mr Walker and Mr Fabius at Tab 7). This further commercialisation of Point 7's SMELLY brand/concept would be compromised if Croco Worldwide entered the same marketplace and sought to engage in a competing trade under the marks at issue.

45. I conclude that Croco Worldwide's actions in applying for the marks in question fell below "the standards of acceptable commercial behaviour observed by reasonable and experienced men" and constituted an act of bad faith contrary to Section 3(6). The opposition succeeds on this basis.

**Section 5(2)(b)**

46. In the light of my decision under Section 3(6) I find it unnecessary to give full consideration to this ground. I will, however, give a brief view in case the matter goes to appeal.

47. Well established guidance on the issues raised by this Section has been provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer 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.

48. In essence, the test under section 5(2) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those differing elements, taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. I must compare the marks applied for and the opponent's registrations having regard to the distinctive character of each and assuming normal and fair use of the marks across the full range of the goods within their respective specifications. Strictly the matter must be approached on the basis of a mark for mark comparison of each of the applied for marks against each of the opponent's earlier trade marks. In practice neither side has suggested that the considerations and eventual outcomes are likely to be materially different in relation to the individual applications. That is also my view of the matter. Although, therefore, I deal with marks collectively below I have only done so after satisfying myself that the nature of the individual marks permits such an approach.

49. The applicant contends in its counterstatement that the prefix SMELLY is descriptive of objects which smell and that the applied for marks must be considered as wholes. The counterstatement goes on to say that "it is denied that the principal feature of the mark opposed is the word SMELLY. In fact, the words SMELLY and UNIVERSE are equally important within the mark and together distinctive notwithstanding the descriptive nature of the SMELLY component" (and likewise for the SMELLY WORLD and SMELLY PLANETS cases).

50. As regards the alleged descriptive nature of the element SMELLY, I bear in mind that the specification of goods of each of the applied for marks makes no mention of the toys and other goods having a smell. The marks can equally be used in an evocative rather than a literal sense in which case SMELLY cannot be said to be directly descriptive. Furthermore, the normal connotation of the word SMELLY is of an unpleasant or nasty small. It is a more unusual word to use than say, scented, or another more neutral term. Due weight must, therefore, be given to this element within the mark.

51. Both parties' marks here are constructed in ways that create fanciful ideas. The applied for marks, taken individually carry 'space' related connotations and to share a modicum of conceptual similarity with, particularly, the SMELLY ALIENS mark of the opponent and visual and aural similarity arising from the common first element. Nevertheless, the noun which is qualified by the word SMELLY in each case is different and I do not anticipate direct confusion with either of the opponent's marks. But the net effect of the similarities and differences between the marks, taken in the context of what are self-evidently identical and/or closely similar goods, leads me to the view that the average consumer (children, parents and other adults) would expect goods sold under each of the applied for marks to be developments in the trade conducted under either of the marks SMELLY ALIENS or SMELLY MONSTERS. In other words, that the applied for marks represented further commercialisation of the SMELLY 'concept' with which they were already familiar. For those reasons, briefly stated, I find that the opposition also succeeds under Section 5(2)(b).

**COSTS**

52. The applicant's counterstatement contained the following:

> "The applicant has refused to transfer the registration because it does not believe that the opponent has any right to it. The applicant has refused to surrender the mark because it considers that it should have the right to register marks relevant to the business which it carries on.
>
> The applicant considers that the opponent has brought this opposition simply to cause the applicant to incur costs. To the best of the applicant's knowledge, the opponent has not exploited the registered trade marks which were assigned to it by Croco Products (UK) Limited since the termination of the agreement between the opponent and Croco Products (UK) Limited. The opponent has no current business in the United Kingdom in toys. The applicant therefore asks that this opposition be dismissed, and that the applicant be awarded costs in excess of the standard scale."

53. The opponent's written submissions responded as follows:

> "It is convenient following the observations in the last two paragraphs of the counterstatements to deal with the question of costs. The offer to settle the matter by transfer of the applications was made in good faith by the opponents as being a rational and straightforward approach which would avoid proceedings. The opponent is entitled to continue to exploits its SMELLY beasts project including extension of the concept to other SMELLY identifiers, and to do so by way of agreements with third parties as appropriate. Naturally the existence of these proceedings makes developing the product range more difficult, but that can occur once these proceedings are out of the way.
>
> In these circumstances, and having regard to the underlying lack of good faith which has put the opponents in an impossible position for several months, we submit that the opponents should be awarded costs at least at the maximum levels indicated in the normal scale, and we invite the Registrar to increase the amount having regard to the behaviour of the applicants during the course of these proceedings, which is evident from the correspondence file."

54. In the light of my above findings I believe there is justification for an award at the upper end of the normal scale of costs. I also take into account the fact that separate oppositions had to be filed but that there have been economies of scale arising from the fact that the grounds and evidence are in substantially the same form and content and that the three cases could have been consolidated. I order the applicant to pay the opponent the sum of £3000 in total covering the three sets of proceedings. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 11th day of 2005**

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