

O-326-06

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2326324
BY
THE COCA-COLA COMPANY**

TO REGISTER THE TRADE MARK:

IPSEI

IN CLASS 32

AND

**OPPOSITION THERETO
UNDER NO 92350
BY
PEPSICO, INC.**

Trade Marks Act 1994

**IN THE MATTER OF Application No 2326324
by The Coca-Cola Company
to register the trade mark:
IPSEI in Class 32
and opposition thereto
under no 92350
by PepsiCo, Inc**

BACKGROUND

1. On 12 March 2003 The Coca-Cola Company, hereafter referred to as TCCC, applied to register the trade mark IPSEI (the trade mark). The application was published for opposition purposes in the Trade Marks Journal on 5 December 2003 with the following specification:

“Beverages; drinking waters, flavoured waters, mineral and aerated waters; non-alcoholic beverages, soft drinks, energy drinks and sports drinks; fruit drinks and juices; syrups, concentrates and powders for making beverages, namely mineral and aerated waters, soft drinks, energy drinks, sports drinks, fruit drinks and juices.”

The above goods are all in Class 32 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, hereafter the Nice Agreement.

2. PepsiCo, Inc., hereafter referred to as PCI, filed notice of opposition to the registration of this trade mark on 4 March 2004. PCI is the registered owner of a number of UK and Community trade mark registrations which consist of the word PEPSI, on its own or that word in combination with a device in various Classes, principally for present purposes Class 32 of the Nice Agreement. PCI has provided a list of 24 UK trade mark registrations and 17 Community trade mark registrations and I note that these fall generally into three groups - firstly, marks based on PEPSI only as text and in logo form in various Classes, for example UK No. 1103657 in Class 32 and CTM No.105247 in Classes 25 and 32; secondly, marks based on PEPSI-COLA in text or in logo form in various Classes, for example UK No. 978462 in class 32 and CTM No. 105825 in classes 25 and 32; and, thirdly, other word and logo marks including PEPSI, such as PEPSI MAX, PEPSI LIGHT, DIET PEPSI.

3. PCI requests refusal of the application for registration in its entirety and requests an award of costs. The opposition is based on grounds under section 3(6), section 5(2)(b), section 5(3) and section 5(4)(a) of the Trade Marks Act 1994, as amended, hereafter referred to as the Act. The opponent also claims that the mark PEPSI is entitled to protection in the UK as a well known mark under the provisions of section 56 and section 6(1)(c) of the Act.

4. PCI asserts in particular:

(i) “that PEPSI is well-known in the UK in relation to beverages of a non-alcoholic nature. In short the opponent asserts that the mark PEPSI is famous. The Opponent is therefore entitled to protection under the Paris Convention as provided under **Section 56(2)** of the Trademarks Act 1994 and is entitled to restrain by injunction the use in the UK of a trademark which or the essential part of which, is identical or similar to PEPSI, in relation to identical or similar goods where the use is likely to cause confusion”.

(ii) under the provisions of **s5(2)(b)** of the Act, the opponent asserts that the mark applied for is similar to the opponent’s mark(s) and is applied for in respect of identical and similar goods. As a result of the similarity of the marks and goods, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

(iii) under the provisions of **s5(3)** of the Act, the opponent asserts that the mark has been applied for in respect of goods which are not similar to those goods and services covered by its earlier trade marks. The opponent has a reputation and use of the mark by the applicant without due cause would take unfair advantage or, be detrimental to, the distinctive character of the opponent’s earlier trade marks. The opponent makes a similar claim in respect of the goods to the extent that they are identical or similar.

(iv) that the mark applied for should not be registered in accordance with the provisions of **s5(4)(a)** of the Act in particular the law of passing off; and

(v) “that application No. 2326324 was applied for in bad faith and therefore the application should be refused under the provisions of **s3(6)** of the Act”.

5. TCCC filed a counterstatement on 22 July 2004. While it acknowledges that PCI has made extensive use of the trade mark PEPSI in relation to certain non-alcoholic beverages in Class 32, it puts the opponent to proof that its reputation and goodwill in the PEPSI name has led to the brand being “consistently rated in the top ten most recognised trade marks worldwide”. It refutes all the grounds of the opposition and asks for an award of costs in its favour.

6. A hearing was held before me on 11 September 2006 when PCI was represented by Mr Geoffrey Hobbs of Her Majesty’s Counsel and Mr Guy Hollingworth of Counsel instructed by D Young & Co, trade mark attorneys. TCCC were represented by Mr Simon Thorley of Her Majesty’s Counsel instructed by Howrey LLP, solicitors.

Applicable date

7. The applicable date for this opposition is 12 March 2003, the date of application for the trade mark by TCCC.

EVIDENCE

8. A large volume of evidence has been filed by both parties in this case. In compiling this overview of the evidence, I propose to outline the principal elements in the evidence provided by both parties and, as an aide to understanding, I have organised the summary under a number of topic headings. Where Counsel relied on particular parts of the evidence in support of their case it will be considered in greater detail at the appropriate point in the body of the decision. For the sake of completeness a full listing of the evidence supplied by both parties is contained in Annex A to the decision.

PCI's evidence

Survey evidence

9. The witness statement of **Jason William David Rawkins**, a solicitor of Taylor Wessing, describes a series of surveys that he organised on behalf of PCI with the help of other colleagues employed at Taylor Wessing and D Young & Co. These surveys were carried out by pairs of Taylor Wessing employees at three locations in the South of England, two locations in London – central London and Croydon – and Southampton. Blank copies of the questionnaires used are provided as exhibits and copies of the questionnaires completed by each pair of interviewers are provided as exhibits with the respective statements. Mr Rawkins describes:

- (a) the methodology adopted to carry out a pilot survey, using 3 questionnaires identified as Questionnaire A, B and C;
- (b) how the pilots were used to develop and carry out a main survey using Questionnaire D (which was refined from Questionnaire B). This survey provided 119 valid responses from 120 questionnaires.
- (c) a control survey using Questionnaire E which was refined from Questionnaire C. This survey provided 30 valid responses from 30 questionnaires.

10. I note the following regarding the conduct of the main survey using Questionnaire D. Respondents were approached and asked, inter alia, what they thought of the word IPSEI as the name for a new soft drink. This word was shown to the respondents printed in black on a white card using an identical type-face and appearance to the mark applied for. The interviewer did not pronounce the word prior to the respondents doing so. The interviewer went on to ask the respondents how they would pronounce the word and recorded the result. The collected results of this latter exercise were provided in the form of dictaphone cassette or CD recordings.

11. Witness statements have been submitted by all those from Taylor Wessing involved in carrying out the survey, namely **Lorna-May Caddy, Adela Maria Solomon, Camilla Claire Smith, Lucy Rebecca Beard** and **Nada Masoud Jarnaz**. These statements describe how they prepared for the survey; what instructions they received; where, when and how they conducted the pilot and main survey; and any errors that needed correction or clarification. Copies of the questionnaires completed

by each pair during the survey are provided as exhibits with the appropriate witness statement.

12. **Gemma Hennesey** and **Helen Jane Cawley**, of D Young & Co, trade mark attorneys acting for PCI in the current opposition, carried out the survey on behalf of PCI in Southampton, and their witness statements are also included. They too describe how they prepared for the survey; what instructions they received; where, when and how they conducted the pilot and main surveys and any errors that needed correction or clarification. Copies of the questionnaires that they completed are provided as exhibits.

13. Following completion of the survey, a number of follow-up telephone interviews were conducted with a randomly selected group of the respondents to Questionnaire D who agreed to be contacted by telephone. Mr Rawkins' statement outlines how these follow-up interviews were organised and carried out. Witness statements were obtained from 10 of these respondents, namely **John Bergman, Tony Kyte, Raymond Jonker, Gary Stuart Attewell, Kerry Michelle Long, Sally Boston, Yvleen Walrond, Michael Stemp, Naoise Glover** and **Steve Gard**. The questionnaire that each of these respondents answered is attached as an exhibit to each statement, these are exhibits JB1, TK1, RJ1, GSA1, KML1, SB1, YW1, MS1, NG1 and SG1 respectively. Further witness statements are exhibited by Helen Cawley of D Young & Co. These are the statements of **Brent Cutler, Heather Matthews, John Taylor** and **Ben Anderson** along with one from **Trevor Pegrum** (who replaced a randomly chosen respondent who could not be contacted).

14. The respondents to the main survey conducted using Questionnaire D were also asked to pronounce the word IPSEI and a recording of the results is provided as exhibit JWDR-5.

Trading under the mark PEPSI in the UK

15. The witness statement of **John Bourke**, finance director of PCI, Cork, Ireland, provides evidence on the sales of concentrate for the manufacture of PEPSI to Britvic Soft Drinks Limited (hereafter Britvic) in the UK. Britvic have the exclusive right to manufacturer, sell and distribute beverages with the PEPSI, 7-UP and other PCI trade marks in the United Kingdom (excluding Northern Ireland). Figures are provided which show:

(a) the volume of sales of PEPSI Cola by Britvic in the UK (litres) (see paragraph 9)

(b) the revenue to Pepsi-Cola International from sales of concentrate for PEPSI cola to Britvic (see paragraph 7);

(c) the expenditure on advertising and promotion by Pepsi Cola International, Cork, Ireland and Britvic (see paragraph 11).

16. Figures are provided for 1999-2004, but as the figures for 2004 and most of 2003 apply after the applicable date, only those for 1999-2002 are relevant.

17. The witness statement of **Elizabeth N Bilus**, IP Counsel for PCI, describes the use that PCI have made of the PEPSI trade mark worldwide and in the UK. It gives examples of the type of advertising and promotional activities that PCI has undertaken to promote awareness of the PEPSI brand worldwide (see exhibit ENB5). PEPSI-COLA is one of the worlds most recognisable brands, considered to be within the top 50 brands worldwide (see for example exhibits ENB4, ENB6). A review by Superbrands Ltd (exhibit ENB7) in 2001 rated PEPSI-COLA as one of Britain's top 100 brands.

18. Some of the material filed as evidence by Ms Bilus relates to 2004 and is thus after the applicable date. This material has not been taken into account for the purposes of assessing the reputation of PEPSI in the UK market on 12 March 2003 (exhibits ENB8, ENB9, ENB11).

19. It is asserted that PEPSI has been used in connection with the advertising and sale of soft drinks in the UK since 1961.

20. Worldwide sales data are provided for all soft drinks products sold under the PEPSI trade mark from 1990 to 2004 but figures are not available for UK market (see paragraph 24). Figures for world wide advertising and promotion expenditure from 1990 to 2004 are also provided but no specific reference is made to UK advertising and promotion. Examples of television and newspaper advertisements have been provided in exhibits ENB 15 and 16 but are either undated or not obviously relevant in the context of the material date in these proceedings. Nevertheless it is not disputed that PEPSI enjoys a considerable reputation in the UK in relation to carbonated cola beverages.

Perceived impact of IPSEI

21. The witness statements provided by **Jeremy Bankes Pennant**, **Peter Knowland**, and **Nicole Kennedy** are all directed towards showing that registration of the trademark IPSEI would represent a significant problem for PEPSI.

22. The first witness statement by **Jeremy Bankes Pennant**, a trade mark attorney and partner in D Young & Co, who are the agents for PCI in this opposition, provides a list of all the current UK and Community trademarks held by PCI (exhibit JBP1). In his second witness statement (dated 11 May 2005), Mr Pennant provides a list of soft drink brands offered for sale to the public in the UK compiled by Canadean Limited, a beverage research company (exhibit JBP2) and states that, based on his experience as a trade mark attorney for 20 years, none of these are "regarded as particularly close to PEPSI" (see paragraph 6) but that IPSEI would be "closer to PEPSI in terms of similarity than any of the other marks" listed (see paragraph 7).

23. The witness statement of **Peter Knowland**, a director of Abbot Mead Vickers BBDO Limited, an advertising agency who are employed by PCI, argues that a brand of beverage with the name IPSEI would be a significant commercial problem for PEPSI.

24. The witness statement of **Nicole Kennedy**, an employee of a market research agency Millward Brown, employed by PCI to track the awareness of the PEPSI

COLA brand amongst the public, is directed at showing brand awareness of PEPSI particularly amongst the target audience in the under 40 age group. Her evidence is also intended to show how brand awareness responds positively to television advertising.

25. The witness statement of **Alistair Cunningham**, managing director of Morar Consulting and former director of the brand evaluation and strategy department of Interbrand, describes his evaluation of the PEPSI brand as a ‘famous brand with a high degree of uniqueness and singularity’. He also discusses the impact on this brand if a competitor was to adopt and use a similar name to PEPSI. It is averred that he has no connection with PCI or TCCC. Mr Cunningham refers in general to the issue of “piggy-backing on the reputation and success of PEPSI” in paragraph 12.

Academic commentary

26. The witness statement by **Professor Jane Raymond**, an academic working in the area of Experimental Consumer Psychology at the University of Wales, Bangor, UK, gives her views on the pronunciation of the word IPSEI and its phonetic, oral, aural and semantic characteristics.

TCCC’s evidence

27. In general terms TCCC’s evidence mirrors and is intended to answer PCI’s. Thus there is ‘matching’ survey evidence, evidence from marketing experts, academic commentary etc.

Survey Evidence

28. The Witness Statement by **David Angus Stone**, a partner with Howrey LLP, who are acting for TCCC in the present opposition, describes the survey devised and undertaken by Howreys on behalf of TCCC. These surveys were an attempt to “recreate the surveys conducted on behalf of PepsiCo, Inc (PCI) while attempting to correct the bias we identified in PCI’s surveys by using slightly different questions and methodology” (see paragraph 3).

29. The other employees of Howreys who were involved in these surveys have all provided witness statements. Copies of the questionnaires completed by each person while working in pairs at four different locations in central London are attached to the relevant witness statement. **Zena Bagshaw** with exhibit ZB-1; **Zoe Bent** with exhibits ZLB1 – 8; **Matthew Caton** with exhibits MRC1 – 4; **Shirley Black**; **Kristien Carbonez** with exhibits KC1 – 5; **Andrew Munro** with exhibits AM1 – 2; **Michael Chambers** with exhibits MC1 – 2; **Calum Smyth** with exhibits JWDR1 – 5; **Bruce Coughlin**; **Christine Hale**; **Nuala Shortt**; **Linda Maynard**; **Christopher Nanton** with exhibit CN1.

30. The second witness statement from **Zoe Bent** describes how follow-up telephone interviews were conducted with a selection of those who responded to the main survey and indicated they were happy to be contacted subsequently. When contacted all the respondents were made aware that they were being contacted because of the

opposition proceedings between PCI and TCCC. A signed statement from each of these respondents with a copy of the questionnaire that they completed is provided by **David Rundle** (exhibit DR1); **Peter Jackson** (exhibit PJ1); **John Ireland** (exhibit JI1); **Karen Hudson** (exhibit KH1); **Sarah Chopping** (exhibit SC1); **Adele Carson** (exhibit AC1); **Oliver Ashford** (exhibit OA1) .

31. The witness statement of **Philip Ian Malivoire**, the Director of NOP World Consumer Division, provides an analysis and comparison of the different surveys that were conducted by Taylor Wessing for PCI and by Howrey for TCCC. This examines in some detail how the surveys were run and examines closely the impact of how the questions were asked and the answers received.

Origin of IPSEI product and trade mark

32. The witness statement and the associated exhibits AAP1-13 of **Andrey Alexeyevich Petrov**, who is a marketing consultant (and the principal of R2H (UK) Limited) and who has offered consultancy services to TCCC since 2001, describes how the IPSEI brand name and product was developed.

33. Mr Petrov was involved in the project to develop a new non-alcoholic beverage product for the European adult market. He outlines the development of the product name, testing of the name, development of the packaging and market testing in the UK, Germany and the Netherlands. At paragraph 38 he lists the applications made for the IPSEI and another shortlisted mark, IPSE, in a number of European countries and at OHIM. I note that in paragraph 33 he states, in relation to the development of the product name, "IPSEI also does not have fruit flavour or other ingredient connotations. The name is a deliberate departure from generic names used for soft drinks and juices."

34. In paragraph 38, Mr Petrov indicates that IPSEI was launched in Germany in May 2004 and in the Netherlands in September 2004.

35. In AAP-10, Mr Petrov provides a translation of the results of a German telephone survey (see exhibit AAP-9) conducted by IPSOS GmbH, a German market research firm, using a sample size of 1000. With regard to Question 2b of this survey, of 942 people who said that they did not associate IPSEI with a particular manufacturer of beverages, 7% (66 people) picked PCI from a list of 15 manufacturers when given a prompt list. PCI was ranked equal seventh with Nestle.

36. The witness statement and related exhibits PAM1-3 of **Patricia Anne MacNamara**, New Beverages Director at TCCC in the UK, describes her role in the UK launch of IPSEI. The launch of IPSEI in the UK took place on 2 August 2005 in selected Boots the Chemist stores nationwide (see paragraph 3-15). Her involvement with IPSEI follows on closely from that of Mr Petrov, taking responsibility for the launch once the development work described by Mr Petrov was completed.

Comparison of PEPSI and IPSEI

37. The witness statement of **Adrian Michael Coleman**, a founding partner in Vallance Carruthers Coleman & Priest, an advertising agency, is principally aimed at

refuting the statements of Peter Knowland and Andrew Cunningham for the applicant. He suggests that the soft drinks market operates within categories such as juices, waters, flavoured waters, carbonated soft drinks (CSDs), and high-energy drinks. He indicates that PEPSI is a cola in the CSD category and that IPSEI is flavoured water (see paragraph 23). I note also his comments in paragraph 17 that there is “unlikely to be a significant problem if used with respect to a product in a different category [of beverage]”.

38. The witness statement of **Peter Robert Fisk**, an employee of The Foundation and former employee of Brand Finance Plc, is designed to counter the statement made by Alistair Cunningham on behalf of the Opponent. Brand Finance Plc is a brand and market valuation company which Mr Fisk says is a direct competitor of Interbrand, the former employer of Mr Cunningham. He contends that IPSEI is best considered to be a flavoured water or juice type drink and that PEPSI is a carbonated soft drink or cola. As a consequence he argues that there is a separate market, trade channels etc for IPSEI and PEPSI (see paragraph 17 and 24).

Academic Commentary

39. The witness statement of **Professor Stephen Lupker**, an academic working in the Psychology Department at the University of Western Ontario, is presented by the applicant as a counter to the views expressed by Professor Raymond

PCI’s evidence in reply

Analysis of the Surveys conducted by Taylor Wessing/PCI and Howrey/TCCC

40. The witness statement of **Professor Thomas Patrick Barwise**, chairman of the marketing faculty at the London Business School, gives his interpretation of the relevance and value of the two surveys in answer to the views of Mr Malivoire. He says that by using a bottle with the IPSEI label on it, either the mock-up version for the UK launch or the actual version used in Germany, the Howrey/TCCC survey is clearly suggesting or setting a context that will focus on flavoured water or fruit juice. In his view it was appropriate for Taylor Wessing/PCI to use word IPSEI and set the context by asking what the interviewees thought of IPSEI as the name for a soft drink.

Definition of a Soft Drink

41. The third witness statement of **Jeremy Bankes Pennant** dated 27 February 2006 (incorrectly headed second witness statement) includes 10 exhibits JBP2-12 (there is also a JBP2 attached to the second witness statement). In JBP-3, I take note of the definition of flavoured water in the printout from the website of the British Soft Drinks Association (BSDA) and also the definition of a carbonated drink.

42. The witness statements of **Graham Michael Robinson**, an investigator with Farncombe International Ltd, with exhibits GR1 – 2 and of **Holly Linnell Havers**, a trainee solicitor at Taylor Wessing, with exhibits HLH 1 - 3 deal, inter alia, with the positioning of the IPSEI product in an actual retail environment. The exhibits contain

photographs showing where IPSEI bottles have been positioned in Boots chiller cabinets following the launch of IPSEI in the UK in Boots Stores in 2005.

43. The witness statement of **Christopher Graeme Haskins**, Head of Category Insight at Britvic Soft Drinks Limited, deals with the classification of drinks categories by reference to the Britvic Annual Soft Drinks Report. On this basis IPSEI would not be considered to be a flavoured water because it is not a clear product.

Comparison of PEPSI and IPSEI

44. The Second Witness Statement by **Jason William David Rawkins** with exhibits JWDR6 provides a number of articles all taken from the internet commenting on TCCC's choice of mark. Most of these articles are dated on or after 2 August 2005 when IPSEI was launched in UK.

Academic Commentary

45. A second witness statement from **Professor Jane Raymond** provides a response to the analysis of Professor Lupker. I will deal with the views of the academics in my decision below.

Beverage Market Analysis

46. A second witness statement by **Peter Knowland** with exhibit PK1 counters the analysis of Adrian Michael Coleman. He suggest that Mr Coleman is looking through the eyes of the trade or the advertiser and not through the eyes of the consumer.

47. A second witness statement by **Alistair Cunningham** is to counter the statement of Peter Robert Fisk on behalf of the applicant as well as that of Adrian Michael Coleman. Again it is principally a statement that both Messrs Fisk and Coleman are not looking at things the way the consumer would.

48. The witness statement of **Carlos Ricardo**, Marketing Director for 7-up at PCI with exhibits CR1 – 2 is intended to show that drinks products can be co-branded and provides examples of a product which combines two PCI brands H2OH and 7-Up.

49. The witness statement of **Melanie Hardman**, Innovator Director of PepsiCo, Inc., with exhibits MH1 – 6, describes a number of other PEPSI products which have been launched containing different flavours in different markets worldwide.

TCCC's further evidence

Outcome of oppositions in the Netherlands and Germany

50. The second witness statement by **David Angus Stone** with exhibits DAS-17 to 22 provides original and translated versions of the decisions reached by the Dutch and German courts in actions by PCI against TCCC. I note that in Germany the decision was appealed but the court found that there was no confusion between PEPSI and IPSEI (with the latter presented in the get-up actually used for the product in Germany).

51. I note that in the Netherlands action surveys similar to those used in the UK were used by PCI. The Dutch court criticised these surveys for not asking a sufficiently non-biased first question. They also found that PEPSI and IPSEI were not likely to be confused.

Sales of IPSEI

52. A second witness statement by **Patricia Ann MacNamara** with exhibit PAM-4. provides sales figures for IPSEI in the UK. Since 2 August 2005, 100,000 bottles have been sold.

53. That completes my overview of the ground covered by the evidence. I will come on to the detail of the evidence at the appropriate points in my decision.

DECISION

Grounds Pursued

54. Shortly before the hearing the opponent indicated that it was relinquishing the ground under Section 3(6). Mr Hobbs' skeleton argument also indicated that Section 5(4)(a) was not considered to add materially to the objections under Section 5(2)(b) and 5(3). I do not propose to say anything more about it. Finally, the objection under Section 56 and 6(1)(c) based on PEPSI being a well known mark was not addressed separately. In reality it covers the same ground as Section 5(2)(b). It is accepted that the objections stand or fall together. Submissions at the hearing, therefore, concentrated on the grounds under Section 5(2)(b) and 5(3).

55. Accordingly, this decision will address the grounds in that order but before doing so there are a number of more general points or cross-cutting issues on which I should comment.

Status of the Preliminary Indication

56. The Trade Marks (Amendment) Rules 2004 made provision for a preliminary indication to be given where an opposition is based on Section 5(1) and/or Section 5(2) of the Act and the Registrar has not indicated to the parties that it is inappropriate for Rule 13B to apply.

57. In accordance with that provision a preliminary indication under Rule 13(B)(2) of the above Rules was given on 2 November 2004. Mr Thorley's skeleton argument noted that the Hearing Officer had been of the view that the marks in issue were not similar (in accordance with established practice different hearing officers are used for preliminary indications and substantive decisions where cases proceed beyond the preliminary indication stage). His submissions were framed in terms that suggested that the preliminary indication set up a prima facie case which the opponent's evidence needed to rebut. Mr Hobbs challenged the status that thus seemed to be accorded to the preliminary indication which, if accepted, would in his view, be antagonistic towards the applicant in this case and contrary to the requirement placed

on the tribunal by Article 6 of the European Convention on Human Rights to hold a fair hearing.

58. The operation of the system of preliminary indications was considered by Professor Annand, sitting as the Appointed Person, in *Applied Energy Products Ltd v Hansgrohe AG*, BL O/090/06. Hansgrohe, the opponent in that case, had taken the following position:

“10. Hansgrohe accept that a preliminary indication given by the Registrar pursuant to Rule 13B(1) and (2) is neither binding on the parties nor susceptible to appeal (statement of grounds of appeal – 1.2, skeleton argument – 4.3). Nevertheless, Hansgrohe argues in essence that for the exercise to have any meaning, a Hearing Officer should not depart from the preliminary indication in the absence of later compelling evidence or submissions (statement of grounds of appeal – 1.2, skeleton argument – 4.2).”

59. Professor Annand, having reviewed the provisions, concluded that:

“13. In short, I believe Mr Malynicz, AEPs counsel, correctly summed up the situation when he said that a preliminary indication is exactly what Rule 13B says it is: an early non-binding view of the merits of a Section 5(1)/(2) opposition, which the parties can either accept or ignore; an aid to settlement. There is nothing in the rule to signify that a hearing officer can only depart from a preliminary indication on the basis of compelling evidence or argument. Indeed as the discussions before me highlighted, such a rule would be impractical not least because the Registrar is under no obligation to give reasons for his view. Mr Knight assured me that the Registry strives for consistency and that in 40 per cent of cases the preliminary indication is the end of the matter. Nonetheless, as the present oppositions illustrate, it is inherent in the system that there will be differences. As Pumfrey J remarked in *LZB Properties v Ball* [2002] EWHC 26902 (Ch), 13 November 2002 at paragraph 36:

“There are very few trade mark cases where the marks are only similar but not identical, where it is not possible for reasonable tribunals on the same facts to come to different conclusions.” ”

60. On the basis of these findings she held that it was “unnecessary for me to consider Hansgrohe’s submissions concerning the alleged non-compelling nature of AEP’s evidence”

61. Accordingly, I do not propose to take any account of the preliminary indication in this case. Nor do I accept that the preliminary indication sets up a position that the opponent’s evidence must seek to displace.

Expert evidence

62. One of the issues that arises in relation to certain parts of the evidence filed in this case is how expert evidence is to be treated. I have expert evidence before me on the

orthography etc of the competing marks; on branding issues; and the likely impact of the applied for mark on PEPSI.

63. It is not disputed that there is or may be a role for expert evidence in trade mark cases. The issue is whether the expert's role is confined to the matter on which he/she is an expert or whether it can extend to expressing a view on the matter (in this case likelihood of confusion and unfair advantage/detriment) which is in the final analysis for the tribunal itself.

64. The following passage from Millett LJ's judgment in *The European Limited v The Economist Newspaper Limited* [1998] FSR 283 is often referred to as dealing with the position:

“The function of an expert witness is to instruct the judge of those matters which he would not otherwise know but which it is material for him to know in order to give an informed decision on the question which he is called on to determine. It is legitimate to call evidence from persons skilled in a particular market to explain any special features of that market of which the judge may otherwise be ignorant and which may be relevant to the likelihood of confusion. It is not legitimate to call such witnesses merely in order to give their opinions whether the two signs are confusingly similar. They are experts in the market, not on confusing similarity.”

65. That might be taken to indicate that it is in all cases impermissible for experts to give opinions on the issue before the tribunal though I am by no means sure that I read the above passage as going that far.

66. Mr Hobbs referred me to *Re M&R (minors)* [1996] 4 All ER 239 involving expert evidence in a child sex abuse case and, in particular, the following taken from the headnote:

“Per curiam. The practice of family law judges to receive expert opinion evidence as to the accuracy or truthfulness of child complainants is consistent with a Section 3c of the Civil Evidence Act 1972, which makes it clear that such evidence cannot be held to be inadmissible solely on the ground that it goes to the ultimate question to be determined by the court. The passing of the Act should not operate to force the court to listen to superfluous and cumbersome testimony, provided the judge never loses sight of the central truths, namely that the ultimate decision is for him, as are all questions of weight and relevance. If the expert's opinion is clearly irrelevant the judge will say so; if this opinion is arguably relevant, but in the judge's view ultimately unhelpful, he can generally prevent its reception by indicating that the expert's answer would carry little weight with him. The modern view is to regulate such matters by way of weight, rather than admissibility (see P 251 j, p 252 j and p 253 j to p 254 a, post).”

67. Accordingly, expert evidence is not to be considered inadmissible solely because it goes to the ultimate question to be determined by the tribunal but consideration needs to be given as to the weight to be accorded such evidence.

68. In *Guccio Gucci SpA v Paolo Gucci* [1991] FSR 89, a case that preceded the above authorities (and which would have to yield to *The European* case if the more restricted view adopted in the latter prevailed), the Vice Chancellor felt able to consider evidence going to the circumstances of the market (for designer label goods) and the likelihood of confusion amongst customers in that market and said:

“The trade witnesses also expressed the view that if Mr Paolo Gucci were to market in the way that he proposed, the average customer – or a substantial number of them – would be confused into thinking that the goods were of Gucci origin. This is the one point on which there is any issue of law. I find it a point of only subsidiary importance in this case. I am not myself a buyer of designer label goods; I do not know the habits of designer label buyers. I do not know what it is that influences them, or what they are looking for. It might be said that I ought to have knowledge of ordinary shopping for an ordinary product, but in the designer label field I do not myself actually have that knowledge. Plainly, it is my decision as to whether or not people will be confused but why I should be required to make that decision on the basis of my own lack of information, rather than on the basis of expert advice from those who can tell me what the experience in that market is, I do not understand.”

and

“If on the other hand you are in an area which requires specialist knowledge, it is the function of the expert to instruct and inform the court as to those things which the court would otherwise not know, and in the process of so doing the expert is frequently asked the very question which the court has to answer. In my judgment where you have a specific area of the market of which the judge is ignorant (such as I am in this case of the designer label market) it is legitimate to produce evidence from those who are skilled in that market and know of it, and likelihood of confusion amongst customers in the same market. For those reasons I think I am entitled to look at the evidence. For myself, I do not regard it in any sense as decisive, I would have reached the conclusion without it.”

69. Consistent with this approach I will consider what weight is to be given to the expert evidence in this case where it goes to the issues I have to decide at the appropriate point in the decision below. Generally, however, it seems to me that the capacity of a trade witness to give useful evidence in relation to a question such as whether there is or is not a likelihood of confusion is likely to turn in large measure on the witness’ proximity to the customer or familiarity with the reaction or likely reaction of customers. For instance, evidence from the shop assistant who serves customers on a daily basis may in this respect at least merit more attention than the view of the company chairman.

Duty to distinguish

70. Mr Hobbs’ skeleton argument, in considering the scheme of the Act and the Directive on which it is based, used the expression ‘duty to distinguish’ so far as Sections 5(1) to (3) and the equivalent infringement provisions are concerned. The

point was taken up by Mr Thorley whose concern was that such a duty might be seen as placing the onus on an applicant in opposition proceedings contrary to what is generally accepted to be the position. As I understand it Mr Hobbs denies that this was what was being suggested. Rather he was drawing on the duty to observe honest practices in commercial matters embodied in Article 10bis of the Paris Convention (strictly the term duty to distinguish does not itself appear in the relevant Article). In the circumstances I need do no more than flag up the point in case it should arise in the event of an appeal.

Section 5(2)

71. The relevant part of the statute reads:

“(2) A trade mark shall not be registered if because—

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

(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.”

72. The principles to be followed in applying these provisions (or their Directive equivalents) have been set out in a number of ECJ judgments. For convenience I will use the case relied on by Mr Hobbs which summarises the relevant considerations. The case is *L'Oréal SA v OHIM*, Case C-235/05P and the principles are:

“34 It is settled case-law that likelihood of confusion on the part of the public must be assessed globally, taking into account all factors relevant to the circumstances of the case (see, to that effect, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 22; Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 18; and order of 28 April 2004 in Case C-3/03 P *Matratzen Concord v OHIM* [2004] ECR I-3657, paragraph 28).

35 That global assessment implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between the goods or services covered. Thus, a lesser degree of similarity between those goods or services may be offset by a greater degree of similarity between the marks, and vice versa. Accordingly, it is necessary to give an interpretation of the concept of similarity in relation to the likelihood of confusion, the assessment of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services covered (see *Canon*, paragraph 17, and *Lloyd Schuhfabrik Meyer*, paragraph 19).

36 In that regard, as the more distinctive the earlier mark, the greater the risk of confusion (*SABEL*, paragraph 24), marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character (see *Canon*, paragraph 18, and *Lloyd Schuhfabrik Meyer*, paragraph 20).

37 It has therefore been held that there may be a likelihood of confusion, notwithstanding a low degree of similarity between the marks, where the similarity of the goods or services covered is high and the earlier mark possesses a strong distinctive character (see, to that effect, *Canon*, paragraph 19, and *Lloyd Schuhfabrik Meyer*, paragraph 21).

.....

40 it is settled case-law that in order to assess the degree of similarity between the marks concerned, it is necessary to determine the degree of visual, aural or conceptual similarity between them and, where appropriate, to determine the importance to be attached to those different elements, taking account of the category of goods or services in question and the circumstances in which they are marketed (see *Lloyd Schuhfabrik Meyer*, paragraph 27).

41 In addition, the global assessment of the likelihood of confusion must, as regards the visual, aural or conceptual similarity of the marks in question, be based on the overall impression created by them, bearing in mind, in particular, their distinctive and dominant components. The perception of the marks in the mind of the average consumer of the goods or services in question plays a decisive role in the global assessment of the likelihood of confusion (see *SABEL*, paragraph 23, *Lloyd Schuhfabrik Meyer*, paragraph 25, and the order in *Case C-3/03 P Matratzen Concord v OHIM*, paragraph 29).”

73. In the *L’Oréal* case, the ECJ also had to deal with a criticism by the applicant that the Court of First Instance had regard to the weak distinctive character of the earlier mark only when it assessed the likelihood of confusion between the marks and not when assessing the similarity of the signs in question. This led the court to make the following observations on the distinction to be drawn between the distinctive character of a mark (in terms of determining the protection to which it is entitled) and the make-up of the mark itself:

“43. It must therefore be held that the applicant has misconstrued the concepts which govern the determination of whether a likelihood of confusion between two marks exists, by failing to distinguish between the notion of the distinctive character of the earlier mark, which determines the protection afforded to that mark, and the notion of the distinctive character which an element of a complex mark possesses, which is concerned with its ability to dominate the overall impression created by the mark.

.....

45. The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

74. I do not understand the applicant to take issue on the points of law dealt with in the *L’Oréal* case and in particular the need to avoid conflating issues of the distinctiveness of a mark with the degree of similarity between marks.

Similarity of Goods

75. The opponent is content to rely on two of the registrations as being the most pertinent for these proceedings. They are UK No 1103657 and CTM No 105247. Taking the UK national mark for present purposes the parties’ respective specifications are:

Applicant’s goods	Opponent’s goods from No 1103657
Beverages; drinking waters, flavoured waters, mineral and aerated waters; non-alcoholic beverages, soft drinks, energy drinks and sports drinks; fruit drinks and juices; syrups, concentrates and powders for making beverages, namely mineral and aerated waters, soft drinks, energy drinks, sports drinks, fruit drinks and juices.	Non-alcoholic drinks and preparations for making such drinks, all included in Class 32.

76. The specifications are thus not cast in identical terms but it does not require extensive analysis to conclude that the applicant’s goods are simply particular examples of the goods that are broadly categorised in No 1103657 as non-alcoholic drinks and preparation for making such drinks (though I note that the applicant’s specification also includes the broad term non-alcoholic beverages). In these circumstances the goods must be held to be identical.

The goods on which TCCC has used its mark.

77. The proper starting point for the comparison of goods must be the full notional scope of the specification of both the applied for mark and the opponent’s earlier trade mark. However, a good deal of effort has been expended by the parties in considering

the product actually sold under the mark IPSEI, how that product should properly be described and where it sits in the non-alcoholic beverages market. The issue is of some importance for a number of reasons. It goes to the heart of the key questions addressed in the surveys conducted by the parties and in particular whether 'soft drink' or 'flavoured water' was the most appropriate term to use. It is also of relevance to the extent that, although the applicant has not offered a reduction in the scope of its specification, Mr Thorley suggested in his submissions that TCCC should at least be entitled to a registration for 'flavoured waters' and/or 'fruit drinks' even if I was against him in respect of the broader coverage sought.

78. Mr Coleman has given evidence for TCCC that the (non-alcoholic) beverage market includes sub-categories such as juices, water, flavoured waters, carbonated soft drinks (CSDs) and energy drinks. He claims that from the standpoint of the advertising industry products do not generally compete across as opposed to within sub-categories. He describes IPSEI as a flavoured water and places it in a different category to PEPSI, a cola. Mr Fisk is of a similar opinion in terms of beverage categories and the description to be applied to the IPSEI product.

79. This evidence is responded to by Mr Knowland for PCI who suggests that such rigid categorisations do not properly reflect the reality of the position from the consumer perspective. To similar effect Mr Cunningham says that "the beverage market as a whole is not a set of discrete segments. It is more like a continuum of competing products". His basis for expressing that view is that consumers do not confine their drinks purchases to one or other of the industry sub-categories but will drink, say, orange juice for breakfast, a carbonated drink for lunch and an energy drink after exercise.

80. All of the above individuals are in the branding or advertising business. Their views are to be given due weight in relation to product categorisation issues from an advertising and branding perspective. Their evidence is not necessarily mutually incompatible. Even PCI's evidence acknowledges that the non-alcoholic beverages market has natural sub-categories from a marketing and advertising point of view (see, for instance, the material exhibited to Mr Haskins' and Mr Pennant's evidence and in particular Exhibits CGHI and JBP5). Page 3 of JBP5 also suggests that there are degrees of sub-categorisation.

81. There is, in my view, force in the argument that, whilst the trade and those acting for the trade (brand and marketing people etc), find it convenient to categorise products not least to establish the relevant competition, consumers do not necessarily pause to have thoughts on the subject even if, were the matter put to them, they would recognise and accept the product categorisations concerned. The 'product continuum' concept seems to me to be a fair reflection of how consumers would approach the matter. The range and sub categories of non-alcoholic beverages to which the experts refer represent alternative choices for consumers. Individuals may consume different types of beverages at different times and for different purposes and according to the mood of the moment.

82. Turning to the particulars of this case, what view should I take of TCCC's IPSEI product and its position within the non-alcoholic beverages market? TCCC appears to suggest that it is in the nature of a flavoured water. That is countered by evidence

from Mr Pennant as to the meaning of that term taken from the British Soft Drinks Associations website:

“A flavoured water is not water but what is commonly known as a clear soft drink. Under the bottled water regulations nothing can be added to water (except carbon dioxide for carbonated bottled waters). As soon as an ingredient is added whether it be a colour, flavour or a sweetener the product becomes a soft drink.”

83. Mr Haskins of Britvic (PCI’s distributor) says that:

“Flavoured waters are understood by the trade, and by consumers, as being water to which an essence has been added, but which are clear in appearance. This is consistent with the products on the market which are marketed as flavoured waters. There are several of these including the Volvic “Touch of Fruit” range. In addition, all of the flavoured waters on the market of which I am aware use mineral or spring water as the base to which an essence has been added, and not non-mineral/spring water. The majority are marketed under a mineral/spring water brand name, such as Volvic and Highland Spring.”

84. He goes on to say that when he first saw the IPSEI product he categorised it as a fruit drink.

85. The IPSEI product has been on sale in this country since 2005. Ms MacNamara exhibits (PAM1) an example of the product or at least a bottle with label. The label describes the product as:

“Still fruit flavour soft drink with red grape (including natural antioxidants), rooibos extract and vitamins”

86. That is consistent with the view that it would not naturally fall within the term flavoured water because it is not clear and not based on mineral or spring water. It is in any case how the product is described and presented to consumers.

87. There is also evidence from Messrs Robinson and Pennant and Ms Havers as to the actual circumstances in trade. They exhibit material showing the positioning of the product in Boots chiller cabinets (Boots being the only outlet at this stage). It is not always possible to determine from the photographic material supplied what the neighbouring products are (above, below or to the side). However, in many instances IPSEI can be seen to be located adjacent to carbonated soft drinks, fruit juice flavoured drinks or energy drinks. There is thus no rigid pattern. It seems that individual stores will decide on product positioning. There is scope, therefore, for IPSEI to be co-located with a variety of non-alcoholic beverages. This is not surprising and reflects the fact that consumers of such goods are likely to be offered the choice of a range of such goods at the point of selection and purchase.

Pronunciation of IPSEI

88. I now turn to issues to do with the marks themselves. An issue arises as to how IPSEI is likely to be pronounced. Part of the survey evidence invited interviewees to speak the word. The results were recorded and I have listened to the CDs. Before turning to the results I should observe that, whilst it is for me to determine the matter, it is permissible for me to have regard to the reaction of interviewees to the mark. In *Wagamama Ltd v City Centre Restaurants PLC and Another*, [1995] F.S.R. 713 Mr Justice Laddie said:

“A judge brings to the assessment of marks his own, perhaps idiosyncratic, pronunciation and view or understanding of them. Although the issue of infringement is one eventually for the judge alone, in assessing the marks he must bear in mind the impact the marks make or are likely to make on the minds of those persons who are likely to be customers for goods or services under the marks. Not all customers are the same. It is therefore sometimes of assistance for the court to hear evidence from witnesses who will help him to assess the variety of ways in which members of the target market will pronounce the marks and what, to them, will be the visual or phonetic impact of the marks. When considering infringement it is also necessary to bear in mind the possible impact of imperfect recollection on the part of members of the target market.”

89. I have found the survey evidence to be of particular relevance and assistance in this case because my immediate reaction to the word IPSEI was that it was capable of more than one pronunciation. I would have been uncertain as to whether my own view on its pronunciation was necessarily representative of the wider population of consumers. It is, moreover, an invented word that does not readily bring to mind any reasonably well known dictionary word that might have suggested a ‘pronunciation by analogy’ as it were.

90. Mr Rawkins (first witness statement, paragraph 15) says his analysis shows that 58.1% of the interviewees pronounced the word IPSEI as ipsee (so as to rhyme with ‘gypsy’). The pronunciation ipsay was the next most favoured one though it is clear that a few people had difficulty with the word even to the point of declining to attempt to pronounce it. There is nothing implausible about these findings – indeed they accord with what I would have expected might be the position. Accordingly, I take due account of them in approaching issues of similarity between the parties’ marks.

The evidence of the academic experts on the orthography and semantic processing of the words IPSEI and PEPSI

91. Jane Raymond is Professor of Experimental Consumer Psychology at the University of Wales, Bangor. Her areas of expertise include research into the way consumers recognise and remember words and images for the purposes of brand identification. The first part of her witness statement deals with research findings in this area. She considers that the basis on which consumers approach marks as set out in the *Lloyd Schuhfabrik* case is consistent with widely accepted scientific knowledge.

92. She then moves on to the application of the principles thus identified to the names IPSEI and PEPSI. She concludes that the words have many shared orthographic features in particular a common word length, 100% overlap of letters used to make up the words, and both share the distinctive and diagnostic “PS” combination in the middle of the word. She predicts that “when a reader sees the word IPSEI and attempts to elucidate its meaning, he or she will likely derive a word meaning akin to PEPSI, if they are already familiar with the latter word.” This is because word meanings can be rapidly identified in the presence of ‘tolerable variations’ in spelling. The survey findings (effectively she is referring to the Taylor Wessing B & D surveys) are consistent with the prediction made from extant scientific findings. In her view the word IPSEI has a “higher than baseline likelihood of prompting associations with PEPSI. My interpretation of this is that IPSEI has a strong linkage with PEPSI in most people’s minds.”

93. Professor Raymond’s evidence is responded to by Stephen Lutker who is a Professor in the Department of Psychology at the University of Western Ontario, London, Canada. Like Professor Raymond he comments on the visual, aural and conceptual perception of marks. He accepts that ‘semantic processing’ takes place when people read letter strings but suggests that there is a low level of activation of this process where nonwords are concerned. Nonwords created by substituting a letter are much less effective at activating semantics than nonwords created by transposing letters. This has an effect on what Professor Raymond referred to as tolerable and intolerable variations in the spelling of words. He accepts that context influences word recognition. Contrary to Professor Raymond he considers it improbable that “PS” in IPSEI could be highly diagnostic of the word PEPSI. He refers to research suggesting that the order of letters in the middle of words is almost irrelevant and it is the first letter that is crucial. There is in his view nothing to suggest that when a reader sees the word IPSEI that a meaning will be activated that is associated with the word PEPSI. He suggests that the opponent’s survey is compromised by establishing a context that makes the respondent think mainly about drinks like COCA-COLA and PEPSI.

94. Professor Raymond has replied to Professor Lutker’s evidence. She points to certain limitations in the research relied on by Professor Lutker and reiterates her view that the marks at issue are word neighbours. In her view IPSEI activates the semantics of the word PEPSI by transposition and repetition of letters (in other words this is a case of transposing rather than substituting letters). She remains of the view that the orthography of IPSEI can be expected to automatically activate the orthographic representation and, hence, meaning of PEPSI.

95. There is a large measure of agreement between the two academics in terms of the way in which words are processed. Their evidence explains and supports the principles that I am in any case obliged by the European case law to follow. There is agreement too that context influences word recognition and that the identification process for brand names is essentially the same process as that involved in identifying words in general. Mr Thorley’s submissions sought to qualify the latter point to the extent that where an unfamiliar word appears in the middle of a sentence it will be ‘read for meaning’. Trade marks, on the other hand, do not necessarily have a meaning (as with the marks in this case they are often invented words) so the consumer will not engage in the same process as he or she would if the unfamiliar

word is presented in a sentence because there is no compelling need to ‘make sense’ of the trade mark. In particular the consumer would not engage in a process of thinking about other marks.

96. Nevertheless, it seems to me that context is provided in a trade mark sense by virtue of the fact that the mark is presented in relation to goods and not in the abstract. The survey evidence is a practical demonstration of context triggering association.

97. In general, whilst I find the expert evidence of the two academics to be of some assistance in explaining how we (the public at large) approach words, the survey evidence provides an empirical basis for testing the relevance and applicability of the general principles to the words before me.

The surveys

98. The surveys conducted on behalf of the parties play an important part in this dispute and have been the subject of analysis and comment by the expert witnesses (Mr Malivoire for TCCC and Professor Barwise for PCI). The witness statements from randomly selected interviewees who participated in the Taylor Wessing surveys for PCI were the subject of extensive submissions by Mr Thorley at the hearing. However, he prefaced this part of his case by noting certain general criticisms that can be made about surveys. In particular the very process of asking questions may have the undesirable effect of presuming that the interviewee had any thoughts on the matter in question at all. It is in any case well accepted that a survey, however well conducted, is by its nature an artificial exercise and may draw participants into speculating on matters that might not normally concern them. Some of the acknowledged pitfalls of surveys can be avoided if those conducting the surveys observe the guidance that the Courts have given particularly in *Imperial Group Plc and another v Philip Morris Ltd and Another* [1984] RPC 293:

“If a survey is to have validity (a) the interviewees must be selected so as to represent a relevant cross-section of the public, (b) the size must be statistically significant, (c) it must be conducted fairly, (d) all the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved, (e) the totality of the answers given must be disclosed and made available to the defendant, (f) the questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put, (h) the exact answers and not some abbreviated form must be recorded, (i) the instructions to the interviewers as to how to carry out the survey must be disclosed and (j) where the answers are coded for computer input, the coding instructions must be disclosed.” (From the Headnote to the case).

99. The surveys conducted for the purposes of these proceedings are not immune to criticism. It may reasonably be said that the numbers interviewed were relatively small and the field work took place in a limited number of geographical locations. Mr Malivoire suggests there is some evidence of possible interviewer influence in the Taylor Wessing surveys (paragraphs 19 and 20 of his witness statement) and some inconsistency in the age profile of those interviewed (paragraphs 22 et seq. of the

same witness statement). Nevertheless, these were not criticisms that were pursued at the hearing. I do not understand the applicant to suggest that the surveys were materially flawed on this account.

100. The main criticism of the opponent's surveys relates to the context of the key questions. To put the matter shortly did the Taylor Wessing survey which posed the key question

“Please could I ask you what you think of this [IPSEI] as a new name for a soft drink?”

unduly skew the survey by encouraging interviewees to think of a particular type of soft drink? Mr Malivoire says “In my opinion, there are reasons to suggest that the expression ‘a soft drink’ does, in fact, lead people to think of particular types of soft drinks and specifically colas, such as COCA-COLA and PEPSI.”

101. It was in the light of that perceived criticism that the Howrey surveys for TCCC changed the reference point of the question from ‘soft drink’ to ‘flavoured water’, the latter being considered reflective of the particular product of interest.

102. Having given the matter careful consideration I have concluded that the Taylor Wessing survey did not set an unfair context. I say this for the following main reasons:

- the applicant has made no attempt to reduce the scope of its specification. ‘Soft drinks’ is a term in its own right in the applied for specification. Furthermore, most of the other items in the specification would come under this umbrella term .
- the applicant's own product labelling describes IPSEI as a soft drink.

103. Nor do I accept that ‘soft drink’ comes freighted with the connotation ‘colas’ or, indeed, carbonated soft drinks generally. Mr Malivoire (paragraph 17) points to a number of questionnaire responses that suggest the individuals had colas or carbonated soft drinks in mind. In response to the Taylor Wessing survey questions “Do you drink or buy soft drinks?” and “Which do you drink or buy most frequently?” he cites the following responses:

Water, not Coke or anything
Sprite, I stopped drinking Coke
Not fizzy drinks
No, only fresh orange juice
No, just fruit juice
(and a few more in a similar vein)

104. I accept that some of the interviewees may have thought of carbonated drinks or even colas in response to the questions. But it is clear from the above responses that the interviewees were aware that the term soft drink included e.g. water, orange juice, other fruit juices etc. That is consistent with the evidence in Exhibit JBP2 to Mr Pennant's third witness statement in which Jill Ardagh from the British Soft Drinks

Association says that there is no definition in law of the term 'soft drink' but that it is taken as covering "all those non-alcoholic drinks covered by the Association, e.g. carbonates, still drinks, dilutables, sports and energy drinks and bottled waters and flavoured waters".

105. There are also indications that, contrary to Mr Malivoire's contention that the term soft drink led people to think of colas, respondents mentioned PEPSI despite the fact that they expected the IPSEI drink to be something other than a cola. Thus, to take examples from Annex B below (see paragraph 117 in relation to this document) :

I think it could be a herbal drink
Something fruity
Probably one of those Locozade, isotonic things
Some kind of tropical drink
Some sort of mineral spring water thing with flavour

106. Taking an overall view of the matter, some interviewees may well have been prompted to think of carbonated soft drinks but this was not necessarily to the exclusion of other types of soft drinks. It is also clear that other interviewees were not particularly minded to think of colas or carbonated soft drinks at all.

107. The market for soft drinks is a large one. Ms Macnamara's evidence on behalf of TCCC is that "carbonated soft drinks now represent approximately 8% of drinks consumption and non-carbonated soft drinks around 27%". Within the carbonated soft drinks sector COKE is said to have 32.3% of the market and PEPSI 11.2%. I am in no doubt that both are very significant players in the non-alcoholic beverages market but as the above figures show non-carbonated drinks have a considerably greater market share. Even if it is the case that no individual brands are quite so dominant in the non-carbonated drinks market I am not persuaded that use of the term 'soft drink' would have had the effect claimed by Mr Malivoire.

108. Before going on to consider the results of the Taylor Wessing B and D surveys I should comment briefly on the Howrey Surveys. To summarise the surveys invited participants to consider:

- | | |
|---------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Pilot 1 IPSEI | - as the name of a flavoured water. |
| Pilot 2 ípsei | - what they thought of this drink?
(interviewees were shown a copy of the bottle used in Germany with ípsei presented in white against a predominantly red label) |
| Pilot 3 IPSÉ | - as the name for a flavoured water |
| Pilot 4 IPSÉ | - as the name for a soft drink. |
| Main survey 5 ípsei | - as the name for a flavoured water
(actual German bottle as above) |

Main survey 6 ipsei - as the name for a flavoured water
(mock up bottle with ipsei in lower case in white
against a red background)

109. Given my findings in relation to how TCCC describes the IPSEI product on the label and the real doubt over whether it can or would be described as a flavoured water I regard the surveys as flawed to the extent that they use this term as a starting point. Furthermore, with the exception of Pilot 1 the surveys did not use the mark in the form applied for. Also surveys 5 and 6 used the additional external stimulus of a bottle which introduced elements of presentation and packaging into the mix.

110. Returning to the Taylor Wessing B and D surveys (copies of the questionnaires are attached at Annex C to this decision), Mr Malivoire accepted that 71% of interviewees responded by mentioning PEPSI though he notes that this result was obtained by aggregating mentions of PEPSI across four different questions. He suggests that to provide a more relevant comparison with the Howrey surveys it might be more appropriate to base oneself on the 55% response that was obtained from the first two questions.

111. Even adopting that approach it is still a powerful indication of the capacity of IPSEI to generate association with PEPSI. It must also be borne in mind that the question being asked did not invite the interviewees to express a view on anything other than IPSEI as the name for a new soft drink. So it is not altogether surprising that in some cases it was only the later questions that brought out the mention of PEPSI.

112. To sum up the position I have reached so far the key question posed in the B and D surveys was in my view fair, open, non-leading and contextually appropriate. It did not invite speculation and it did not invite interviewees to have thoughts about other brands. It simply invited interviewees to express a view on IPSEI as the name for a new soft drink. Many people did indeed express their view on the attractiveness or otherwise of the name. Nevertheless, a significant proportion of those interviewed were moved of their own volition to mention PEPSI. In short, the B and D survey evidence is persuasive in establishing that IPSEI, presented in the context of soft drinks, triggers an immediate and unprompted association with PEPSI.

113. A randomly selected group of interviewees have filed witness statements corroborating their involvement in the surveys and confirming the answers given. In some instances it seems to me that the individuals have gone slightly further in their follow-up witness statements than they did in the answers recorded verbatim on the questionnaire forms. Furthermore, for the purposes of the follow-up enquiries my understanding is that the interviewees were informed of the purpose of the survey and the parties involved. That may have influenced their reactions or caused them to adjust their views. In contrast interviewees were not informed of the purpose of the survey during the interview process (or only after the completion of the process if an enquiry was made). In these circumstances I prefer to rely on the questionnaires themselves rather than the witness statements. In any case as Mr Justice Rimer said in *Societe des Produits Nestle SA and Mars UK Limited* [2002] EWHC 2533 (Ch) (Have a Break):

“I would regard the immediate reactions of members of the public to a survey such as this as likely to be a good deal more helpful for the purposes of the factual inquiry with which the Hearing Officer was concerned than a collection of carefully drawn statutory declarations made by a small selection of those interviewees some time later (certain of which also appear to convey a rather different reaction from that shown at the original interview).”

114. However, I need to refer briefly to certain of the witness statements because Mr Thorley spent some time criticising some of the statements made. His main point, it seems to me, was that some of the witnesses were simply evidencing association. In other words they were not confused but were making a loose association or seeing IPSEI as a near anagram of PEPSI. A number of the explanations were also considered to be illogical or poorly explained. In one case (Mr Gard) Mr Thorley suggested there was reason to suppose the witness had been led by the survey (Mr Gard had told the interviewer he “knew what she was getting at”).

115. There is in my view no reason to suppose that a material number of these interviewed were led to speculate inwardly on the purpose of the survey so Mr Gard’s reaction is not typical even if one takes his words to signify what Mr Thorley suggests. Nor is it a criticism of the witnesses that, in the circumstances of a survey, they may not have been able to rationalise and explain their immediate reaction. It does not mean that the views expressed were not honestly held. I might just add that, somewhat surprisingly, in view of the effort expended by the parties on this case, there has been no request to cross-examine any of the witnesses.

116. The issue of the nature and extent of the association interviewees made with PEPSI is, on the other hand, a matter that is at the heart of this case. The question, for Section 5(2) purposes, is whether the association that is being made is indicative of a likelihood of origin confusion or whether it is an altogether shallower association, a bringing to mind or mere recognition of the potential for word play, for instance. It is well established in this respect that mere association, in the sense that the later mark brings the earlier mark to mind is not sufficient for the purpose of Section 5(2) (*Sabel v Puma*, paragraph 26).

117. As an aid to consideration of the totality of the responses to the B and D surveys I have prepared a summary of the references to PEPSI (the document does not purport to deal with other issues covered in the questionnaires). Although this is no more than a working document prepared for my own benefit, I consider that (exceptionally) it might be useful for the parties to have access to it in the interests of transparency and for ease of reference in case it is of assistance in the event that the matter goes to appeal. Accordingly, a copy of the document is at Annex B and, for ease of cross reference, copies of the B and D survey questionnaires themselves are at Annex C. The headline findings that appear in the summary at the end of the document are that:

Of the 140 people interviewed, 102 (72.9%) mentioned Pepsi; 69 (49.2%) mentioned Pepsi in response to question 1; 37 (26.4%) specifically said it looks like Pepsi and 10 (7.1%) specifically mentioned anagrams. In addition, 31 (22.1%) commented that this was “because of the letters” or similar (together, on occasions, with words such as “mixed around”, jumbled up”, “rearranged” and “moved around” ie suggestive of anagrams) as the basis for saying Pepsi.

118. I note that 72.9% is a slightly higher percentage than the opponent's own analysis suggested. I have not delved into the reasons for this slight discrepancy because I do not regard it as material. Some allowance is, in any case, appropriate even in well designed surveys for aberrant answers. Professor Barwise put this at 5% and suggests that on this basis one can have a high level of confidence in the Taylor Wessing surveys (paragraph 30 of his witness statement).

119. I have no doubt that it is right to approach with caution those answers that suggested IPSEI was a near anagram of PEPSI or used similar language. But even making some adjustment for this sub-set of interviewees I am left with a substantial number of people saying that the mark looks or sounds like PEPSI or that it made them think of PEPSI

120. The fact that almost 50 per cent of these interviewed gave this answer in response to the first question suggests that the association was spontaneous and immediate. That seems to me to be of particular relevance given that the question itself did not invite or require interviewees to have thoughts about other marks.

121. The opponent's control surveys (C and E) posed the same question but substituting SIPEI for IPSEI. This produced a materially different result with just 8% of interviewees referring to PEPSI. Mr Malivoire, TCCC's expert witness on surveys does not comment on this or offer any explanation as to why the control survey should have produced such a radically different result. This appears to provide added support for the view that it was the word IPSEI that prompted interviewees to mention PEPSI rather than it being the use of the term 'soft drink' that created a bias towards carbonated soft drinks/colas (and hence one of the leading colas on the market).

Similarity of marks

122. Mr Thorley submitted that the first syllable of a word is generally the most important and that the first syllable of the words PEPSI and ISPEI are some way apart. Furthermore, the vowel I appears twice in IPSEI in visually significant positions at the start and end of the word. Aurally too, he considered the first (and stressed) elements were quite different and that the two syllables of PEPSI do not rhyme in quite the same way as IPSEI. From a conceptual standpoint he noted that IPSEI (and the alternative choice mark IPSE) had resonances of the Latin word meaning self. On that basis he suggested it is conceptually different to PEPSI. His conclusion was that there was no sufficient similarity between the marks.

123. Mr Hobbs, for PCI, pointed to the fact that both words are of the same length and composed of the letters E, P, S and I and contain the distinctive and diagnostic 'PS' combination in the middle of the word. In addition to their visual and aural similarities he submitted that they were conceptually similar having the same structure and rhythm and being five letter words made up of the same letters. They are in his submission "coined words denominated in the same currency".

124. Counsel have, not surprisingly, identified relevant features of the marks for comparison purposes but place emphasis on different features and as a result draw opposite conclusions from the above-mentioned summary points. I accept that there

is well established case law that places emphasis on the first element of marks. If that were the only or defining criterion then that would be a strong indication against a finding of similarity here. However, the eye is capable of noting letter combinations. In short words of this kind the use of the same four letters is apt to produce a degree of visual similarity which is reinforced by the central PS combination.

125. Aurally, as I have indicated, I am prepared to be guided by the ‘real world’ findings of the surveys as to pronunciation. On that basis both IPSEI and PEPSI are two syllable words with the stress on the first syllable and ‘-see’ sounding endings. Variant pronunciations of the final syllable (principally to a ‘-say’ ending) may have some capacity to lessen the aural similarity but I find there is overall a material (but not a particularly high) degree of phonetic similarity arising from the fact that both marks are composed from the same letters, have the central PS combination and have similar sounding endings.

126. Conceptually, both marks are invented words with no obvious meaning. They simply share their inventedness. As to Mr Hobbs point that they are both based on the use of the same group of letters etc, that seems to me to be doing no more than re-visiting visual and aural issues under a different guise.

127. In reaching my own view on the degree of similarity between the marks I take into account Counsels’ submissions, the expert evidence and the survey results. The latter has been of particular assistance in informing me about spontaneous consumer reaction to the mark IPSEI. Without the benefit of the survey responses my inclination would have been to say that the marks are similar to a moderate extent only. Having considered the survey responses carefully I feel constrained to accept that my own initial impression underplayed the degree of similarity that in practice consumers found to exist.

Distinctive character of PEPSI/distinctiveness by proxy

128. It was common ground at the hearing that the mark PEPSI enjoys a reputation in this country. Mr Thorley invited me to find that the reputation was in relation to a cola drink but not in relation to any other product. I accept that as far as it goes. Mr Hobbs reminded me that reputation or knowledge (in the sense of what a mark is known for) is one thing but it must not be elided with the question of the distinctive character of the mark in the sense of the protection that is to be afforded to it.

129. The point is not a novel one. *Sabel* indicates that there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character. Highly distinctive marks thus enjoy broader protection than marks with less distinctive character.

130. In the present case I have no hesitation in finding that PEPSI is a mark that enjoys a very high distinctive character. The point can be amply demonstrated by considering what the effect would be if another soft drink was to be launched under that mark. To use Mr Hobbs’ words the carry-over effect is ‘distinctiveness by proxy’.

Other Issues

(i) The German and Dutch proceedings

131. Mr Stone has filed English translations of judgments in the German and Dutch courts where PepsiCo has failed to obtain a temporary injunction and interlocutory relief respectively to prevent the launch and distribution of the IPSEI product.

132. Mr Hobbs reminded me that the position adopted in other jurisdictions is not binding on me – Case C-218/01 *Henkel KGaA v Deutsches Patent-und-Markenamt* and *Zurich Private Banking Trade Mark*, O/201/04.

133. It is clear from the above-mentioned documents that the circumstances and considerations that underlay the judgments of the courts were different to those pertaining here notably in terms of the pronunciation of the marks, the particular form of presentation of TCCC's mark and the criticisms made of the parties' surveys in the Netherlands. Whilst I have considered this material I am unable to give it any weight in my decision.

(ii) The name generation process/market testing/German telephone survey

134. Mr Petrov's evidence is primarily directed at addressing the bad faith ground (not itself pursued) by explaining the process by which the name IPSEI was chosen. He also relies on evidence relating to the name generation process and the market testing of the IPSEI product as showing the lack of association with PEPSI.

135. The team charged with generating a name for the new product had a large number of names before it (Exhibit AAP-1 to Mr Petrov's witness statement). IPSEI was not in the group of 'top names' but Ipse was. IPSEI appears to have emerged as an alternative spelling of IPSE possibly at a late stage. I note that the Project Storyteller extracts at AAP-3 were still using Ipse (March 2003) but with IPSEI as one of 5 alternative names (ipsey, ipsei, ípsei, íppse, and ippsé). It is not clear, therefore, what level of attention had been given to the implications of using IPSEI.

136. The marks IPSÉ and IPSEI were market tested before launch in the UK, Germany and The Netherlands. The market testing in the UK and Germany involved the use of focus groups. The Netherlands research is simply said to have been undertaken with 300 respondents. Mr Petrov says that, during the process of market testing the name, no one suggested an association between IPSEI and PEPSI or otherwise brought up the name PEPSI in that context. Furthermore, no-one suggested PEPSI and IPSEI were similar.

137. The process of selecting and briefing focus group members in the UK and Germany has not been fully explained but I assume that participants would have received a brief explanation about the background and purpose of the process in which they had agreed to become involved. I note for instance from page 9 of the PowerPoint slides showing the results of the market testing in Germany (AAP-4) that the selection criteria included 'Non-rejecter of CCC products'. I take CCC to be a reference to The Coca-Cola Company. It seems therefore that the context within which the focus groups were operating was explained and that TCCC's part in

commissioning the work was made known. In those circumstances participants were unlikely to have been placed in a position where they might have had spontaneous thoughts about brand similarity issues.

138. The third point made by Mr Petrov is that in a third party survey of 1000 people aged over 14 in the German Republic only 1% of people said they associated the name IPSEI with a particular manufacturer. The 99% of people who did not associate IPSEI with a particular manufacturer were then read a list of manufacturers and asked who they thought was the most likely one. There is a fundamental problem in drawing meaningful conclusion from this material primarily because it was a telephone survey and there is no indication as to how the telephone interviewers presented the mark to interviewees. In particular there is no way of knowing how the interviewers pronounced the word or whether there was any control over the process (for instance were they told to spell the word out or use an agreed form of pronunciation). Furthermore, the impact of the word on a German speaking audience may be somewhat different to the position in the UK.

(iii) The third party statements

139. The opponent has filed a number of pieces of evidence showing that TCCC's IPSEI product had attracted the attention of third parties who had been moved to comment on the choice of mark. The evidence is primarily Exhibit JWDR6 to Mr Rawkins' second witness statement. JWDR6 includes the following: a short piece from Marketing Week in which the writer expresses his surprise at the use of a name reminiscent of PEPSI; a Guardian article which has clearly picked up on the fact that TCCC and PCI appeared to be "squaring up for a legal battle"; other material from the Guardian leader/letter pages; a Bevnet website piece that has also picked up on impending legal action; a private website comment applauding Coke's chutzpah and adding that "Pepsi is, somewhat understandably, claiming it looks and sounds too much like Pepsi"; a piece from themarketingblog.co.uk website which again refers to "Ipsei, which looks and sounds like Pepsi"; and finally another private website piece to similar effect which suggests the name IPSEI "does sound a bit suspicious".

140. A number of these pieces occurred in early August 2005 and refer to the possibility of a legal dispute. It appears, therefore, that journalistic interest was triggered by the launch of the IPSEI product through Boots on 2 August 2005. I am doubtful as to whether this material is necessarily a reliable indication of the unprompted reaction of the writers (let alone consumers) as opposed to journalists scenting a story.

141. Exhibit ENB18 is a letter to Ms Bilus from a UK company that, it would seem, had previously been in dispute with PepsiCo. The writer says "Just in case you were not aware that Coke are registering this [IPSEI] in the UK. I thought it sounds like PEPSI, and is virtually an anagram, it confused me". This does appear to be an unsolicited and unprompted comment though it must be borne in mind that the writer may be particularly brand aware having previously been in dispute with PepsiCo.

(iv) **The evidence of the advertising and brand experts**

142. A number of experts from the fields of advertising and branding have given evidence on branding issues and have gone on to express a view on issues that are ultimately for me to determine namely the likelihood of confusion for Section 5(2) purposes or unfair advantage/detriment in the context of Section 5(3). In particular there is the evidence of Messrs Cunningham and Knowland for PCI and Messrs Coleman and Fisk on behalf of TCCC.

143. Whilst they are undoubtedly competent in their professional capacities to talk about the effects and likely impact of branding it is less clear that they are in a position to address the precise impact of individual marks on consumers in terms of likelihood of confusion etc. More importantly, whilst they answer the other side's experts, they do not appear to have seen the totality of the evidence, including particularly the survey material which forms a key part of this case. They had, as Mr Hobbs put it, blinded themselves to relevant evidence (my attention was drawn in this respect to observations of Mr Justice Lightman in *Alan Kenneth McKenzie Clark v Associated Newspapers Ltd*, [1998] R.P.C. 261). In these circumstances I find the survey evidence to be of more direct assistance than that of the expert witnesses when it comes to assessing the impact of the IPSEI mark on consumers and in particular the nature, strength and effect of the association between the competing marks that comes out of the survey evidence.

144. In conclusion, the individual and collective force of these 'other issues' has not in the event played a material part in my decision. They are certainly not make or break points.

Conclusions on likelihood of confusion

145. It is well established that the likelihood of confusion must be appreciated globally taking account of all relevant factors (*Sabel v Puma*, paragraph 22). I approach the matter against the background of my findings in relation to the survey evidence, similarity of marks and goods and the very substantial reputation that exists in the earlier trade mark PEPSI. That reputation is based on a trade in carbonated colas but, the guidance from the ECJ is that marks with a highly distinctive character enjoy a broader protection. In my view PEPSI must be held to benefit from that broader protection certainly in relation to a range of non-alcoholic beverages.

146. I also bear in mind that the goods in issue are relatively low price items. A potential customer wishing to quench his thirst is unlikely to spend a great deal of time deliberating over his choice of product or exercise the degree of thought and discrimination on branding issues that might be the case with higher value items.

147. Nevertheless it remains to be considered whether the evidence from the Taylor Wessing B and D surveys is likely to be reflective of consumers' reactions in an actual retail environment. The mere fact that consumers are not required to express thoughts about a product's origin during the course of the purchasing process does not mean that they do not sub-consciously have those thoughts and make their choices accordingly.

148. As I have already said the key question in the surveys did not invite thoughts about brand origin or third party marks. The fact that such a large proportion of the survey population were moved (unprompted) to refer to PEPSI seems to me to be a powerful indicator as to how consumers would respond in a retail environment albeit that they would not articulate their thoughts. Mr Hobbs put the matter at its plainest by noting that registration of the mark in issue would allow an IPSEI cola to be sold next to a PEPSI cola. When the matter is put in those terms, the reason for the opponent's concern becomes plain.

149. However, the applicant's speculation is a broad one covering a wide range of goods in Class 32. As I understand it the applicant is of the view that it is entitled to a registration in respect of 'flavoured waters' and 'fruit drinks' reflecting the product of particular interest (depending on how one describes it) even if I am against it in terms of the generality of the specification. Mr Thorley drew support for this from passages in Mr Haskins' (paragraphs 11 to 14) and Professor Barwise's evidence (paragraph 17). He submitted that there would be no confusion resulting from a spill over of reputation in relation to these more narrowly defined sub-sets of goods.

150. I accept that Article 13 of First Council Directive 89/104 has the effect that refusal of registration is only to take effect in relation to those goods where grounds of objection have been made out – see also *Sensornet Trade Mark*, O/136/06 and *Citybond Trade Mark*, O/197/06. However, without needing to determine precisely how the IPSEI product is best described, the survey answers point to the strong capacity of IPSEI to generate association with PEPSI in relation to soft drinks at large and not just colas. In my view that association points to more than simply an inconsequential bringing to mind and is indicative of a likelihood of confusion at the point of sale. That is not to say that one mark would be taken for the other. Rather it suggests that consumers will be led to think that this is a development in trade or the PEPSI brand being adapted for use with a non cola soft drink. On that basis, the opposition succeeds under Section 5(2)(b).

151. In case I am wrong in relation to the finding of confusion or the extent to which I have so found, and as I received full submissions on Section 5(3), I go on to consider that ground.

Section 5(3)

152. As a result of regulation 7 of The Trade Marks (Proof of Use etc) Regulation 2004 Section 5(3) now reads:

“5.-(3) A trade mark which—

(a) is identical with or similar to an earlier trade mark,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark,

in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

General principles and authorities

153. Both sides have referred to *Mango Sport System S.R.L. Socio Unico Mangone Antonio Vincenzo v Diknah S.L.* [2005] E.T.M.R. 5 as providing a useful summary of the factors to be considered in relation to Section 5(3). The following is, for convenience, taken from the headnote to the case:

- “1. When a sign is used for identical or similar goods or services, it must enjoy at least as extensive protection as where the sign is used for non-similar goods or services.
2. The scheme and purpose of Article 8 dictates that the relevant date at which reputation must exist is the date of application for registration of the Community trade mark.
3. The infringements referred to in Article 8(5) are a consequence of a certain degree of similarity between the mark and the sign which causes consumers to establish a link between them, even in the absence of confusion.
4. A knowledge threshold is implied by the requirement of a reputation for the earlier mark under Article 8(5), both in terms of the public concerned and the territory concerned.
5. Once the earlier mark’s reputation is established, it must be determined whether the later mark takes unfair advantage of or is detrimental to the distinctive character or repute of the earlier mark. These requirements are in the alternative and are not cumulative.
6. Unfair advantage occurs when another undertaking exploits the distinctive character or repute of the earlier mark to benefit its own marketing efforts, using the renowned mark as a vehicle for generating consumer interest in its products. This allows the undertaking to make a substantial saving on investment in promotion and publicity of its own goods since it is able to free-ride on that undertaken by the earlier reputed mark. Such a result is unfair because the reward for the costs of promoting, maintaining and enhancing a particular trade mark should belong to the owner of the earlier trade mark in question.
7. The stronger the earlier mark’s distinctive character and reputation, the easier it will be to accept that unfair advantage has been taken or detriment has been caused.
8. The closer the similarity between the marks, the greater the risk that unfair advantage will be taken. Identity or a very high degree of similarity between the marks is a factor of particular importance in establishing whether an unfair advantage will be taken.

9. The greater the proximity between the parties' goods and the circumstances in which they are marketed, the greater the risk that the public in question will make a link between the mark and the sign in question and the greater the risk there is that unfair advantage will be taken."

154. I have also been referred to *Adidas-Salomon AG v Fitnessworld Trading Limited*, Case C-408/01, in relation to the concept of association.

The standard of the test

155. Where the parties differ in terms of the applicable legal principles is on the question of the standard of the test to be applied in determining whether unfair advantage or detriment has been established. The weight of authorities up until now has broadly favoured a high threshold test that requires actual unfair advantage or detriment to be shown or that these adverse consequences are a reasonably foreseeable consequence. The issue has not yet surfaced for judgment in the European Court but as long ago as 1998 the Advocate General in *General Motors Corporation v Yplon SA (Chevy)*, [1999] ETMR 122 said in relation to the Directive provisions:

"43. It is to be noted in particular that Article 5(2), in contrast to Article 5(1)(b), does not refer to a mere risk or likelihood of its conditions being fulfilled. The wording is more positive: "takes unfair advantage of, or is detrimental to" (emphasis added). Moreover, the taking of unfair advantage or the suffering of detriment must be properly substantiated, that is to say, properly established to the satisfaction of the national court: the national court must be satisfied by evidence of actual detriment, or of unfair advantage."

156. The English Courts have generally adopted a similar line and taken the view that the Act and the Directive are concerned with actual effects and not risks or likelihoods. Thus, Mr Justice Pumfrey in *Daimler Chrysler AG v Javid Alavi*, [2001] ETMR 98 picked up and followed the Advocate-General's views in *Chevy* – see paragraph 88 of the judgment. One of the most recent expressions of this approach can be found in *Intel Corporation Inc and CPM United Kingdom Limited* [2006] EWHC 1878 (Ch) where Mr Justice Patten considered a number of cases including *Creditmaster Trade Mark* [2004] EWHC 1623 (a case to similar effect) and the approach adopted in *Elleni Holding BV v Sigla SA*, [2005] E.T.M.R. 7 by one of the OHIM Boards of Appeal. He concluded that:

"In cases of opposition where the mark is unused, there can never be evidence of the actual consequences of use and the enquiry is necessarily prospective. The question in such cases is whether the prohibitive consequences will or are likely to occur not simply where there is a risk of them occurring."

157. Thus, there is a clear line of authority that points away from the test being one of mere risk assessment.

158. Against that background Mr Hobbs noted that the recent UK judgments do not appear to have taken account of the CFI's judgment in *Spa Monopole, compagnie*

fermière de Spa SA/NV v OHIM, Case T-67/04 dated 25 May 2005 (as regards the applicability of CFI decisions generally he relied on paragraphs 62-64 of *O2 Holdings Ltd, O2 (UK) Ltd and Hutchinson 3G Ltd*). In *Spa Monopole* the CFI said:

“40. The Court notes, as a preliminary point, that the purpose of Article 8(5) of Regulation No 40/94 is not to prevent registration of any mark which is identical with a mark with a reputation or similar to it. The objective of that provision is, notably, to enable the proprietor of an earlier national mark with a reputation to oppose the registration of marks which are likely either to be detrimental to the repute or the distinctive character of the earlier mark, or to take unfair advantage of that repute or distinctive character. In that connection, it should be made clear that the proprietor of the earlier mark is not required to demonstrate actual and present harm to his mark. He must however adduce prima facie evidence of a future risk, which is not hypothetical, of unfair advantage or detriment.”

159. The Court repeated the use of the word ‘risk’ in applying the above test (see paragraphs 52 and 53 of the judgment). Does this introduce a lower threshold test than has hitherto been accepted in this country?

160. The wording of the Act, which mirrors the Directive in this respect, uses the words “.... would take unfair advantage of, or be detrimental to,”. That may be contrasted with the wording of Section 5(2) of the Act (and again the same Directive wording) which speaks of a “likelihood of confusion” as noted by the Advocate-General in *Chevy*. As a matter of statutory construction and plain language it seems to me that one should be cautious about inferring the presence of words such as ‘likelihood’ or ‘risk’ where they form no part of the wording of the Act or the Directive on which it is based.

161. The CFI has not explained its choice of words or suggested that particular significance should be attached to the use of the word ‘risk’ in *Spa Monopole*. That might seem somewhat surprising if it was indeed intending *Spa Monopole* to be a departure from the conventional thinking at that point in time. Nor, so far as I am aware, has the issue arisen since with *Spa Monopole* being followed and accepted as representing a fully considered and concluded view on the approach to be adopted in interpreting the Directive provision and its equivalents in the Community Trade Mark Regulation and the UK statute. There are other indications in *Spa Monopole* which suggest that too much reliance should not be placed on the use of the word ‘risk’ – see, for instance, the discounting of mere hypothetical dangers (paragraph 40) and the need for evidence to support the claim that unfair advantage or detriment will occur (paragraph 47). More importantly, the context in which the word is used in paragraph 40 quoted above suggests that the Court was merely saying that allowance needs to be made for prospective harm in addition to actual and present harm rather than offering a reasoned view on the standard of the test. In short I hesitate to draw as much from the choice of words used by the CFI as Mr Hobbs invites me to.

Association

162. It is accepted by the applicant that the opponent enjoys a reputation in this country under the mark PEPSI for a cola drink but not in relation to any others drinks or products. I have already indicated that I regard the PEPSI mark as having a high distinctive character such that it is entitled to command wide protection within the non-alcoholic beverages sector. That must be the starting point for consideration of the position under Section 5(3).

163. In *Adidas-Salomon* the European Court dealt with the concept of association between the earlier trade mark and the later mark proposed for registration:

“29. The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECT I-5421, paragraph 23).”

164. If I am wrong in relation to my finding of a likelihood of confusion for Section 5(2) purposes, the opponent is not thereby debarred from pursuing its Section 5(3) ground. As Mr Hobbs noted in his skeleton argument, Section 5(3) establishes a form of protection which does not require either the existence or the absence of a likelihood of confusion. It is, however, dependent on an association being made. I believe that, on the basis of my appraisal of the marks and the relevant survey evidence, the requisite association has been shown to exist.

165. There was, nevertheless, some debate before me as to the degree of association that needs to be shown. Various words have been used in this respect such as link, connection and association. They are apt to embrace a range of possible interpretations from confusing association at one end of the scale to a mere fleeting reminder at the other end. I do not think it is useful to try and define the level of association that is necessary. It may vary according to the relative proximity or distance between the marks and the goods or services. Association is probably best seen in terms of consequences. If unfair advantage or detriment is shown to exist then the association must have been sufficiently strong to produce that outcome. A mere ‘calling to mind’ type of association is unlikely to produce that result. In this particular case I regard the association to be a strong one having regard to the responses to the Taylor Wessing B and D surveys.

Interdependency

166. I have already commented on the marks in dealing with Section 5(2). I do not need to repeat those findings here but I do need to deal with a submission in Mr Thorley’s skeleton argument that a very high degree of similarity between the two marks is needed for unfair advantage to be shown. The point is taken from paragraph 27 of *Ferrero SpA v Kindercare Learning Centers Inc.*, [2005] E.T.M.R. 6. However, in that case the OHIM First Board of Appeal was dealing with a situation where there was some distance between the goods and services that were the subject of the action under Article 8(5) of the Community Trade Mark Regulation. It is in each case

necessary to perform a global assessment based on the particular circumstances of the case which, here, includes identical and/or closely similar goods.

Unfair advantage

167. The question is, therefore, whether PCI has made out one or more of the heads of damage provided for in Section 5(3). For the reasons already given I am unable to give weight to the expert evidence to the extent that the individuals comment on unfair advantage or detriment. They have not had the benefit of seeing the totality of the evidence and are simply not in a position in my view to comment on issues of association and the consequences thereof. In reaching my own view of the matter I base myself on the mark in the form applied for and not just the form of mark used to date (which includes particular features of presentation and packaging). I must also consider the totality of the applicant's specification and not just the particular product that has been marketed to date.

168. Unfair advantage occurs when another undertaking exploits the distinctive character or repute of the earlier trade mark to benefit its own marketing effort (per *Mango Sport*). This is the slipstreaming effect referred to in Mr Hobbs' skeleton argument. The added commercial impetus gained for the later mark must be to a material degree. In *C A Sheimer (M Sdn) Bhd's Trade Mark Application* [2000] RPC 484 it was held:

“I think it is clear that Sheimer would gain attention for its products by feeding on the fame of the earlier trade mark. Whether it would gain anything more by way of a marketing advantage than that is a matter for conjecture on the basis of the evidence before me. Since I regard it as quite likely that the distinctive character or reputation of Visa International's earlier trade mark would need to increase the marketability of Sheimer's products more substantially than that in order to provide Sheimer with an unfair advantage of the kind contemplated by Section 5(3) I am not prepared to say that requirement (iv) is satisfied.”

169. In that case the VISA financial services mark was pitted against the same mark for condoms. There have been few cases to date where parties have been successful under the unfair advantage head. *Pfizer Ltd and Pfizer Incorporated v Eurofood Link (United Kingdom) Ltd*, [2000] ETMR 896 is an example of an action that did succeed. The competing marks were the well known mark VIAGRA and the mark VIAGRENE that was proposed to be used for an aphrodisiac drink. The primary finding in that case was under Section 10(2) but it was also held that the claimant would have succeeded under Section 10(3)

170. Even if it is putting the matter too high to say that the interviewee reactions would translate to a likelihood of confusion in an actual retail environment, the surveys are nevertheless a powerful indication of the capacity of IPSEI to provoke association with PEPSI in the context of a trade in soft drinks.

171. It is said on TCCC's behalf that PEPSI's reputation though huge is exclusively linked to a cola beverage. It is, as Mr Thorley put it, strength in depth rather than breadth. Furthermore, although there have been variant forms of the mark they have

all incorporated the element PEPSI along with other (often descriptive) matter such as DIET, MAX, COLA etc. The evidence is that, generally speaking, where TCCC or PCI have extended their activities beyond the core cola market they have done so under other names – Tropicana, Mountain Dew etc. Whether consumers would be aware of or have thoughts about such trading practices is not clear. In any case the fact that a mark is very well known for a particular product does not mean that the protection to be accorded it must be so limited.

172. Taking the overall results of the relevant surveys and having considered the individual answers I take the view that the strength of the association made with PEPSI suggests that a soft drink marketed under the brand IPSEI would benefit to a sufficiently material extent that the Section 5(3) unfair advantage claim has been made out.

Detriment

173. In *Adidas-Salomon*, the Advocate General considered the concept of detriment to the distinctive character of a trade mark in the sense that is usually referred to as dilution. He suggested that “The essence of dilution in this classic sense is that the blurring of the distinctiveness of the mark means that it is no longer capable of arousing immediate association with the goods for which it is registered and used”. This sort of detriment – whether one calls it dilution, blurring or some other near synonym – most commonly arises where a mark is adopted in a field of trade outside that of the mark with a reputation. To take the words from the Advocate General’s Opinion in *Adidas Salomon* “...if you allow Rolls Royce restaurants and Rolls Royce cafeterias, and Rolls Royce pants, and Rolls Royce candy, in 10 years you will not have the Rolls Royce mark any more”.

174. The position here is different in that the fields of trade are the same or overlapping but the marks are only similar and not identical. However, the effect in terms of detriment to distinctive character are in my view the same. The uniqueness of PEPSI in the marketplace will be diluted by the presence of a similar mark that is shown to have a considerable capacity to spontaneously generate consumer expectation of a link with the well known brand. Accordingly, the opponent also succeeds on this aspect of its case under Section 5(3).

Other issues under Section 5(3)

175. In the circumstances I do not propose to deal with further matters raised by the opponent in relation to Section 5(3). For the record there is a tarnishment argument which is said to arise if the applicant sold goods of lesser quality under the mark IPSEI. Unlike most successful tarnishment cases to date, therefore, the point does not arise from the intrinsic nature of the goods themselves and would give rise to the question as to whether it is appropriate to make assumptions about, and allowance for, the possibility that goods of inferior quality might be offered under the applied for mark. It may be thought that such an argument might result in Section 5(3) being extended into precisely the sort of hypothetical areas that the UK and European Courts have hitherto discountenanced.

176. There is also a suggestion of fettering of the opponent's future freedom to develop new products to expand its flagship brand (paragraph 11 of Mr Cunningham's second witness statement). That is an issue that was dealt with in *Loaded Trade Mark*, O/455/00 but has not to the best of my knowledge been fully explored since. I have not heard full argument on this point.

COSTS

177. The opponent has been successful and is entitled to a contribution towards its costs. Mr Thorley made two submissions on the issue of costs and invited me to consider an award outside the standard scale (or a reduction of the award against his client).

178. The first matter relates to the bad faith ground which was maintained throughout the evidence rounds and only abandoned at a late stage shortly before the hearing. If I understand him correctly the complaint is that such an objection amounts to an allegation of fraud and should not have been raised in the first place. Moreover, it should have been dropped once Mr Petrov and Ms MacNamara had entered their evidence explaining the process by which the name was chosen.

179. Beyond that, Mr Thorley had drafted his skeleton arguments dealing with the Section 3(6) ground prior to the opponent notifying the fact that the objection was not being pursued.

180. On the question of the propriety of raising the objection in the first place Mr Hobbs submitted that the authorities to date indicate that whilst a bad faith claim can clearly include dishonest conduct it can also extend to allegations of misconduct falling short of outright dishonesty. I accept that that is the position and that it was not improper in all the circumstances to raise the claim.

181. I do, however, have some sympathy with the applicant's view that a bad faith claim is a serious matter and in this case should have been withdrawn immediately if the opponent accepted the applicant's explanation of the process by which the mark was adopted. The late notification of the opponent's decision to withdraw the ground was unacceptable and has involved some wasted effort which I propose to reflect in a reduced cost award.

182. The second point I am asked to consider is the extensive use of expert evidence, in relation to the surveys and from the academics and the advertising and branding experts. In particular was the assistance provided by this material of assistance to the tribunal and was it proportionate in the circumstances of the case?

183. These are adversarial proceedings. The parties choose the ground on which they wish to fight. Both sides here are large companies. The opponent, not knowing in advance how I would approach matters, was entitled to take a view on what evidence was needed to support its case. There might, of course, come a point where the sheer volume of evidence becomes oppressive and calculated to overwhelm the other side. However, the parties here are evenly matched and I am not prepared to say that the expert evidence has been wholly disproportionate to the issues that needed to be addressed. As will be apparent from my decision I have found the opponent's survey

evidence to be of persuasive value. The remaining pieces of expert evidence have played some part but not in the event a defining role in helping me to reach a decision. Taking the matter in the round, I do not think it was inappropriate or excessive for the opponent to have entered the evidence it did. Nor, of course, was it necessary for the applicant to answer in kind if it saw no value in the evidence taking the course it did. I do not intend to further reduce the cost award in this respect.

184. In the ordinary course of events, I would have ordered the applicant to pay the opponent the sum of **£4,450**, reflecting the evidence filed and the fact that senior Counsel was engaged for the hearing. I will reduce that to **£4,000** to reflect the late notification of the intention not to pursue the Section 3(6) ground.

185. 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 17th day of November 2006

M REYNOLDS
For the Registrar
the Comptroller-General

OPPONENT'S EVIDENCE**Rule 13C(1) evidence**

5 Witness Statement by **Jason William David Rawkins** with exhibits JWDR1 -

Witness Statement by **Lorna-May Caddy** with exhibits LMC1 -4

Witness Statement by **Adela Maria Solomon** with exhibits AMS1 - 4

Witness Statement by **Camilla Claire Smith** with exhibits CCS1 - 5

Witness Statement by **Lucy Rebecca Beard** with exhibits LRB1 - 5

Witness Statement by **Nada Masoud Jarnaz** with exhibits NMJ1 - 4

Statement by **John Bergman** with exhibit JB1

Statement by **Tony Kyte** with exhibit TK1

Statement by **Raymond Jonker** with exhibit RJ1

Statement by **Gary Stuart Attewell** with exhibit GSA1

Statement by **Kerry Michelle Long** with exhibit KML1

Statement by **Sally Boston** with exhibit SB1

Statement by **Yvleen Walrond** with exhibit YW1

Statement by **Michael Stemp** exhibit MS1

Statement by **Naoise Glover** with exhibit NG1

Statement by **Steve Gard** with exhibit SG1

Witness Statement by **Jeremy Bankes Pennant** with exhibit JBP1

Witness Statement by **Gemma Hennessey** with exhibits GAH1 – 3

Witness Statement by **Helen Jane Cawley** with exhibits HJC1 - 11

Witness Statement by **Peter Knowland**

Witness Statement by **Nicole Kennedy** with exhibit NK1

Witness Statement by **Alistair Cunningham**

Witness Statement by **John Bourke**

Witness Statement by **Jane Raymond** with exhibits JR1 – 2

Second Witness Statement by **Jeremy Bankes Pennant** with exhibit JBP2

Witness Statement by **Elizabeth N Biolos** with exhibits ENB1 – 19

Rule 13C(5) evidence

Second Witness Statement by **Jane Raymond** with exhibits JR4 - 5

Witness Statement by **Thomas Patrick Barwise** with exhibits TPB1 – 2

Witness Statement by **Peter Knowland** with exhibit PK1

Second Witness Statement by **Alistair Cunningham**

Witness Statement by **Graham Michael Robinson** with exhibits GR1 – 2

Witness Statement by **Christopher Graeme Haskins** with exhibit CGH1

Second [Third] Witness Statement by **Jeremy Bankes Pennant** with exhibits JBP2 – 12

Second Witness Statement by **Jason William David Rawkins** with exhibits JWDR6

Witness Statement by **Holly Linnell Havers** with exhibits HLH 1- 3

Witness Statement by **Carlos Ricardo** with exhibits CR1 – 2

Witness Statement by **Melanie Hardman** with exhibits MH1 - 6

APPLICANT'S EVIDENCE

Rule 13C(4) evidence

- Witness Statement by **Zena Bagshaw** with exhibit ZB-1
Witness Statement by **David Angus Stone** with exhibits DAS1
– 16
Witness Statement by **Zoe Bent** with exhibits ZLB1 - 8
Witness Statement by **Matthew Caton** with exhibits MRC-1 – 4
Witness Statement by **Shirley Black**
Witness Statement by **Kristien Carbonez** with exhibits KC1 - 5
Witness Statement by **Andrew Munro** with exhibits AM-1 - 2
Witness Statement by **Michael Chambers** with exhibits MC-1 - 2
Witness Statement by **Calum Smyth** with exhibits JWDR1 - 5
Witness Statement by **Bruce Coughlin**
Witness Statement by **Christine Hale**
Witness Statement by **Nuala Shortt**
Witness Statement by **Linda Maynard**
Witness Statement by **Christopher Nanton** with exhibit CN-1
Witness Statement by **Stephen Jeffrey Lupker PH.D** with exhibit SJL1
Statement by **David Rundle** with exhibit DR -1
Statement by **Peter Jackson** with exhibit PJ-1
Statement by **John Ireland** with exhibit JI - 1
Statement by **Karen Hudson** with exhibit KH-1
Statement by **Sarah Chopping** with exhibit SC-1
Witness Statement by **Adele Carson** with exhibit AC-1
Statement by **Oliver Ashford** with exhibit OA-1
Witness Statement by **Adrian Michael Coleman**
Witness Statement by **Philip Ian Malivoire** with exhibit PIM- 1
Witness Statement by **Peter Rober Fisk**
Second Witness Statement by **Zoe Bent** with exhibit ZLB - 9
Witness Statement by **Patricia Anne MacNamara** with exhibits PAM1 - 3
Witness Statement by **Andrey Alexeyevich Petrov** with exhibits AAP1 - 13

Rule 13C(6) further evidence

- Second Witness Statement by **David Angus Stone** with exhibits DAS-17 - 22
Second Witness Statement by **Patricia Ann MacNamara** with exhibit PAM-4

Pilot Survey – Questionnaires B

Key:

✓ - indicates Pepsi mentioned in response to question 1.

Q = questionnaire number allocated by interviewer.

London

Q1

1. “Looks like Pepsi”; ✓
2A “It almost spells like Pepsi...I don’t know.”

Q2

1. “I don’t know ...looks a bit like Pepsi”; ✓
2A. “They’ve got the same letters. No other reason”.

Q3

Interview not completed.

Q4

1. “How do you pronounce it? It looks a lot like Pepsi and Japanese – eg”; ✓
2A. “Because all the letters are mixed around”.

Q5

1. “Pepsi” – looks like Pepsi, so it’s a good idea”; ✓
2A. First impression. If you are a bit dyslexic or you see it on a bus going by, it looks like Pepsi”.

Q6

1. “Is it like something like Pepsi. If you wouldn’t have said soft drink, I wouldn’t have thought of Pepsi”. ✓
2A. “Because of the letters”.

Q7

1. “I think I know IPSEI”;
2B. “Is it a cold/ice tea?”

Q8

1. "Is it a new name? I'd think of Pepsi"; ✓
- 2A. "Because of the letters".

Q9

1. "Not convincing enough".
- 2B. "Cola".
- 2C. "It reminds me of Pepsi".

Q10.

1. "It doesn't hit you in the face".
- 2B. "A cold fizzy drink".
- 2C. "It looks like Pepsi because of the P".

Q11 (to replace Q3)

1. "It reminds me of Pepsi". ✓
- 2A. "Because of the EI at the end and you've got the SE".

Southampton

Q1:

1. "Probably a rip off of Pepsi; come up with something individual; buy it by accident in blue can". ✓

Q2:

1. "Not a very good name; Foreign name".
- 2A/B. "Pepsi. See letters looks like Pepsi, look closely its not".

Q3:

1. "Doesn't think much of it cos not easily run off the tongue; not remerable; looks like PEPSI." ✓
- 2B. "Coca-Cola – fizzy drink".

Q4

1. "Don't know – kids hard to pronounce";
- 2B. "Coca-cola";
- 2C. "IPSEI"

Q5

1. "Hard to pronounce – not catch on".
- 2B: "Fruit drinks – vitamin".

Q6

1. "Unusual".
- 2B. "Pepsi".

Q7

1. "It looks like Pepsi in a jumbled up letter thing". ✓

Q8

1. "Random and different; can't say it".
- 2B. "Coke looks like Pepsi".

Q9

1. "Immediately think Pepsi". ✓

Q10.

1. "Not much".
- 2B. "Pepsi".

Of the 20 people interviewed 17 mentioned Pepsi. Of those 17, 11 mentioned Pepsi in response to question 1 and 9 specifically said it looks like Pepsi.

Main Survey –Questionnaire D

London (50 questionnaires)

Q41 (American)

1. “It’s like..it’s almost looks like Pepsi. Sort of...I’m not sure – IPSEE?” ✓
3. “ A cola – a dark cola”.

Q42

1. “Soft drink IPSEE ...a new name ..aah I don’t know. Not a good name”.

[No mention of Pepsi]

Q43

1. “Yes it reminds me of Pepsi because it has the same letters I suppose.” ✓
3. “ Like a cola”
4. Because it reminds me of Pepsi. Because the letters are joined”.

Q44 (French living in England)

1. “OK....no.....doesn’t mean anything. It seems very difficult to pronounce and it doesn’t ...mean anything. I’m sorry”
10. When told about the purpose of the survey the interviewee said: “I don’t think it does look like Pepsi”.

Q45

1. “Stupid”.

[No mention of Pepsi]

Q46

1. “ I don’t know. What could it be about. Maybe because I don’t live in London”.

[No mention of Pepsi]

Q47

1. “Pepsi without the other P”.✓
2. “Because it’s like Pepsi without the P. Its confusing.”
7. “Diet IPSEE.....aah Pepsi I mean.”

10. When told about the purpose of the survey the interviewee said “Really....its similar”.

Q48.

1. “It looks too much like Pepsi to me”. ✓
2. “It’s got everything in it that Pepsi is made of.”
10. “As soon as I saw that I thought, well that’s Pepsi...”

Q49

1. “Ipssee.....No...”
3. “Fizzy.”
4. “Because most of them are it looks like Pepsi, that’s why”
10. When told about the purpose of the survey the interviewee said” “It does definitely”.

Q50

1. “Pepsi” ✓
2. “Because the letters are all mixed up you see”.
3. “ I don’t know. I’d just say Pepsi. Pepsi is a fizzy drink with no ...in it. It should be like Pepsi, fizzy.”

Q51

- 1.”Soft drink? not much really”.

[No mention of Pepsi]

Q52.

1. “Ipsayee – I wouldn’t prefer that as a name for a soft drink”.

[No mention of Pepsi by interviewee]

Q53

1. “I don’t know what it means. Not very good”.
3. “That’s Pepsi. Just seems its like Coke”.
10. “It would be confusing, yeah”.

Q54

1. “Its Pepsi-ish; I don’t know” ✓
2. “Because it has the same letters”.
3. “Tropical or fizzy.”

Q55

1. "Don't think its very good. It could be pronounced in a....different way IPSAYEE, IPSEE. It's Pepsi, really...isn't it". ✓
2. "It's the same letters all jumbled up".
3. "I think Cola because of the association".
10. "That's pretty interesting. I have to say, when I read it I read Pepsi first thing".

Q56

1. "I suppose that could work."
2. "I don't know. It looks like Pepsi to me with the letters rearranged and one missing. Its quite weird to me to be honest".
3. "Some kind of pop...."

Q57

- 1."My initial reaction is that it looks like Pepsi. You are looking for an anagram of Pepsi. It is not quite Pepsi but almost. It is about association with Pepsi." ✓
3. "Coke".
4. "Because of the association with Pepsi. It looks like an anagram of Pepsi".

Q58

- 1."IPSEE - Pepsi mixed up". ✓
2. "Because it is like Pepsi but is missing the letter P".
3. "Pepsi – it looks like Pepsi, so it would be like Pepsi".
10. "I don't think Pepsi would be too happy with that".

Q59

1. "I think it has too many connotations to Pepsi, I think". ✓
2. "Because it has almost the same letters".
3. " I think it could be a herbal drink".

Q60

1. "That looks like Pepsi, but not quite. It might work". ✓
2. "It is the short word". It looks a bit like Pepsi, well similar it might work".
3. "Fizzy".
4. "Because its that kind of thing, like Pepsi, yeah.."
10. "It looks like an anagram of Pepsi doesn't it" They could probably think of something more original."

Q61

1. "It looks like Pepsi doesn't it?" ✓
2. "Because it has the P and S".
3. "Maybe a blue one...something fizzy. "SEI" sounds like the "sea".

Q62

1. "Not a good name it doesn't mean anything to me".

[No mention of Pepsi]

Q63

1. "Not a good name".
2. "No child would remember it, would it be something like Pepsi?"
10. "I would have thought of Pepsi just because it has the same letters".

Q64 (a German)

1. "No, I wouldn't like it".

[No mention of Pepsi]

Q65

1. "Something like Pepsi, isn't it? Sounds like a software type of thing." ✓
3. "Like Coke....cola...yeah".

Q66

1. "Very similar to Pepsi". ✓
2. "It remind me of Pepsi".
3. "Foreign".

Q67

1. "I don't have a view either way".

[No mention of Pepsi]

Q68

1. "It kind of looks like Pepsi without one of the P. There is an I as well but Pepsi is what it made me think of." ✓
2. "I have no idea. It basically reminds me of Pepsi I think".
3. "Fizzy because it reminds me of Pepsi".

Q69

1. "It sounds a bit like Pepsi. It sounds like something with chemicals". ✓

2. "First reaction".

Q70

1. "You're going to ask me whether its got Pepsi in it. It reminds me of Pepsi. I am completely indifferent to it." ✓

Q71

1. "Its alright. It looks a bit like Pepsi, doesn't it? Its got the same letters in it and ...the same shape of letters." ✓

Q72

1. "It's Pepsi ain't it? ✓
2. "Its obvious isn't it.....".
3. "Something that's got gas in it. Gassy drinks are not soft drinks really".

Q73

1. "Its Pepsi spelt weird". ✓
2. "Because it is".
3. "Foreign".

Q74

1. "Its not very catchy. Its just like Pepsi, just rearranged. It doesn't look very good not catchy enough". ✓
3. "Maybe a cola".

Q75

1. "I don't know. I suppose its like Pepsi with the letters rearranged." ✓
2. "Its not easy to remember. Maybe because of the EI at then end. Its not very memorable."
3. "Something fruity."

Q76

1. "Don't know. It doesn't strike me as a name for a soft drink".

[No mention of Pepsi by the interviewee]

Q77

1. "Pepsi, isn't it? Isn't it? Oh no its not...there's a P missing isn't it? ✓
3. "Too close to Pepsi, so you'd think it tastes like Pepsi wouldn't you?"

Q78

1. "How do you pronounce it? I know what you are getting at, it looks too much like Pepsi." ✓
3. "I would say a coke".
4. "Because of Pepsi".

Q79

1. "Its not easy to spell."
3. "Pepsi".
4. "It's the same letters just they're mixed up."

Q80

1. "Well its hard to pronounce. Presumably someone thought of PEPSI and jumbled the letters around". ✓
3. "Something fizzy, especially when you see its Pepsi with the letters jumbled".

Q81

1. "No".

[No mention of Pepsi].

Q82

1. "IPSEE - I can see what it is, but no."
2. "Well I see Pepsi but without the P".
3. "Cola".
4. "Again because of Pepsi".

Q83

1. "Looks like Pepsi without the P". ✓

Q84

1. "What is that: I don't drink soft drinks anyway".
3. "Pepsi or something".
4. "Well, EPSEE, IPSEE".

Q85

1. "I've never seen this name. I'm not sure. Not really a good name."

4. "At first glance, it makes me think of Pepsi"

Q86

1. "It doesn't look like a name for a soft drink to be honest".
3. "I thought it was a mix of PEPSI but its not, it only has one P in it".

Q87

1. "What kind of soft drink? It sounds like a children's one. It doesn't sound very appealing, It doesn't say anything. It sounds like UPSEE something went wrong"

[No mention of Pepsi]

Q88

1. "Are you joking. How do you pronounce it? That's weird..."

[No mention of Pepsi by the interviewee].

Q89

1. "Yeah...it's an attractive name."
3. "Similar to Coca-Cola".

[No mention of Pepsi]

Q90

1. "I don't know what is that? I like Pepsi". ✓
3. " I don't know....I think something like Pepsi"
4. "Because of the letters"

Of the 50 people interviewed, 36 mentioned Pepsi, 27 mentioned Pepsi in response to question 1, 12 specifically said it looks like Pepsi and 2 specifically mentioned anagrams.

Southampton (40 questionnaires)

Q1.

1. "What I think it could be? Rubbish".
3. "Coke".
4. "Because it looks like Pepsi doesn't it."

Q2.

1. "Yeah not very good".

[No mention of Pepsi]

Q3

1. "IPSEI its not bad. I think its better with a T at the front".

[No mention of Pepsi].

Q4

1. "Not very nice, IPSEI no".

[No mention of Pepsi]

Q5

1. "Its Pepsi, its an anagram of Pepsi". ✓
2. "Because its got the same words as Pepsi".
3. "The same sort or very similar to Pepsi if not the same."
4. "Same letters but giving it another name. Selling the same drink."

Q6

1. "Its alright I suppose as long as its heard."

[No mention of Pepsi]

Q7

1. "Oh what's this Pepsi?". ✓
2. "Because its similar to Pepsi because of the letters PSI".
3. "Sweet".
4. "Just from the concept of the word".

Q8

1. "Close to Pepsi not particularly brilliant." ✓
2. " Looks like an anagram of Pepsi; probably has nothing to do with it".
3. "It could be anything".
4. "...Pepsi because it looks like it. Totally different."

Q9

1. "Its not a rip off of Pepsi then?" ✓
2. " Fair enough suppose it's a bit peculiar."
3. "Probably a coke because of the letters and spelling".
4. "Because of the wording its a bit like Pepsi".

Q10.

1. "Its very similar to Pepsi." ✓
2. "Cos the letter are similar."
3. "Probably a cola".
4. "Because it is similar to Pepsi."

Q11

1. "Looks like a bit of a rip off of Pepsi." ✓
2. "Because it looks like Pepsi".
3. "Some sort of coke".
4. "Because it looks like Pepsi."

Q12

1. "It's a bit like Pepsi". ✓
2. "Because some of the letters are the same."
3. "Probably one of those lucozade, isotonic things".
4. "I don't really know. Maybe logically some remote association with the name of the brand."

Q13.

1. "I think it looks like a zoao word".

[No mention of Pepsi]

Q14

1. "IPSEI kind of sounds like TIPSEI".

[No mention of Pepsi]

Q15

1. "IPSEI its very similar to an existing one."
2. "Its an anagram of Pepsi".
3. "I would say it would be carbonated fruit drink or something."

Q16

1. "I think its....".

[No mention of Pepsi]

Q17

1. "Yeah be OK".

[No mention of Pepsi]

Q18

1. "Latin".
3. "Pepsi; its an anagram of Pepsi."
4. " Because it is with one letter missing"

Q19

1. "Its horrible it really is horrible. It doesn't convey anything about soft drinks."

[No mention of Pepsi]

Q20

1. "Nothing springs to mind".
3. "Probably a cola or something".
4. "Its an anagram of Pepsi"

Q21

1. "Not a lot".

[No mention of Pepsi]

Q22

1. "Well its Pepsi, sort of". ✓
3. "Well cola".
4. Because its Pepsi.

Q23

1. "It doesn't make any sense."
2. "Because it looks a bit like Pepsi".
3. "Some sort of cola".
4. "Because of the Pepsi."
10. "You see Pepsi straight away".

Q24

1. "Its probably something quick that you sip."

[No mention of Pepsi]

Q25

1. "Pepsi". ✓
2. "Because of the letters".
3. "I can't really tell."

Q26

1. "I think it would make quite a good name."

[No mention of Pepsi]

Q27

1. "Well its very similar to Pepsi" ✓
2. "Because they have the same letters"
3. " A coke, some sort of cola"
4. "Same sort of letters as Pepsi."

Q28

1. "I think it's a bit different, I don't know how to pronounce it."
3. " I don't know; it confusing looks like Pepsi but the other way round. It looks like a spring...fizzy."

Q29

1. "Rubbish".
2. "Its an anagram of Pepsi without the P and the extra I"
3. "Coke".
4. "Just the Pepsi thing; sorry its the first thing to pop in my head".

Q30

1. "It's a bit strange wouldn't know how to pronounce it".
2. "Because it is not a traditional English word. It looks like Pepsi, it is Pepsi".
3. "Some kind of tropical drink".

Q31

1. "I don't really know it wouldn't stand out".

[No mention of Pepsi]

Q32

1. "It sounds like Pepsi messed up." ✓
2. "Just reminds me of Pepsi".
3. "Something fizzy"
4. "Because it reminds me of Pepsi".

Q33.

1. "Well I think its not a good name copying Pepsi; upside down difficult for kids to pronounce not catchy" ✓
2. "Lots of soft drinks, it has to be captivating; not a good name".
3. "...a cola..."
4. "Because it sounds like Pepsi".

Q34

1. "Is it a kind of....Pepsi thing?" ✓
2. "Well its almost English and almost the same letters; rings a bell with Pepsi".
3. "Fizzy drink".
4. "Because it sounds like Pepsi".

Q35

1. "Too much like Pepsi". ✓
2. "Similar letters".
3. "Depends what the can was like."

Q36

1. "Its Pepsi reversed." ✓
2. "Because that's what it is; it looks like it".
3. "Coca-cola equivalent".

Q37

1. "Pepsi. Its not bad its alright." ✓
2. "Its just another brand like Pepsi".
3. "Not really too sure to be honest; maybe a fruity kind".
4. "Don't know, it just sounds a bit like it."

Q38

1. "Not very good".
2. "Because its Pepsi mixed around".
3. "I don't know something fizzy."
4. "Only because of Pepsi; it reminds me of fizzy drinks".

Q39

1. "IPSEI alright; IPSEI its not too bad".

2. "Trying to figure out what kind of drink it is".
3. "I don't know probably Pepsi or Coke.
4. "It looks like Pepsi".

Q40

1. "Its not v good".
4. "It kinda looks like Pepsi with all the words mixed around".

Of the 40 people interviewed, 27 mentioned Pepsi, 16 mentioned Pepsi in response to question 1, 8 specifically said it looks like Pepsi and 6 specifically mentioned anagrams.

Croydon (30 questionnaires)

Q91

1. "It's a bit hard to say. Looksas a word."
3. "Something fruity maybe".
4. "Because it would be something not around...something different rather than a standard Pepsi or Coke."

Q92

1. "Pepsi" ✓
2. "Only thing I can think of IPSEI or something."
3. "...a fizzy drink".
4. "That's what I associate Pepsi with."

Q93

1. "Too similar to Pepsi". ✓
2. "Because it's the same apart from one letter."
3. "Fizzy coke style."
4. "Just because of the connotations of the name, the letters."

Q94

1. "Looks like IPSI, a bit like Pepsi." ✓
2. "I don't know apart from another P it looks like Pepsi jumbled up."
3. "Mixed fruits, I don't know why, its just a weird word".

Q95

1. "What's it mean? IPSI. What's it mean IPSI? Pepsi?" ✓
2. "Well Pepsi – why are they calling it IPSI?"
3. "What do you mean? What Pepsi it's a fizzy drink isn't it? Are you saying I prefer Pepsi?"

4. "Do I prefer Pepsi or Coke; when I was 17 I'd drink Coke, now I prefer Pepsi Max."

Q96

1. "I don't know, yeah I suppose to kids."
3. "Well you're looking at Pepsi...?"
4. "Because its all the letters practically".

Q97

1. "Daft. It sounds like a printer. Sounds like a Hewlett Packard NPS2 or something.

[No mention of Pepsi]

Q98

1. "No wouldn't impress me."

[No mention of Pepsi]

Q99

1. "Not really no. Pepsi innit." ✓
2. "I can only think of Pepsi that all. With the letters it makes you think Pepsi."
3. "I don't know, something in the coke, Coca-Cola region."
4. "The recognition of letters makes you think of Pepsi."

Q100

1. "IPSI? It's a lot like Pepsi isn't it". ✓
2. "The first thing that comes to mind is Pepsi. That's the first thing I see, Pepsi, P, S, I."
3. "Drink like a cola".
4. "Because of the Pepsi association".

Q101

1. "It just looks like Pepsi with the letters moved around." ✓
2. "It looks kinda similar".
3. "Sparkling; maybe sporty, something like that."

Q102

1. "New soft drink. It looks like, I would think of Pepsi, if I saw that because of all the P's. ✓
2. "Just because of the P's it looks like an anagram".

3. "Cola."
4. "As Pepsi is a coke. Pepsi is the drink I've heard of."

Q103

1. "Well its very similar to Pepsi, but its eye catching, yes. ✓"
2. "When you showed it to me I thought you were going to say what does this mean. When you said soft drink, Pepsi came to mind."

Q104

1. "EPSI? Like a.....".
2. "Because you have Pepsi. It just looks an imitation of another drink."

Q105

1. "IPSEY? A name for a ...OK...no I can't think of anything."
3. "Because there's a few words related to Pepsi, so I would say related to Pepsi."
4. "The words ...like PES, nothing else I can think of."

Q106

1. "IPSI? Not a lot."
2. "I don't know it just doesn't sound like anything; its nearly Pepsi isn't it but not quite."

Q107

1. "IPEEZEE? Must admit its eye catching; it depend on what it is."

[No mention of Pepsi]

Q108

1. "IPSEE. Its catchy."

[No mention of Pepsi]

Q109

1. "It looks like pies but then again that's because I'm a pie lunatic – how do you think I got like this. It looks like Pepsi without a P as well." ✓
2. "Because I'm dyslexic, no I'm joking."
3. "Fizzy, full of sugar, sort of thing you wouldn't give a kid."

Q110

1. "No its Pepsi. No" ✓
2. "Well like thatits an arrangement of Pepsi isn't it?"
3. " A cola."
4. "Because it looks so much like Pepsi even though its not."

Q111

1. "Of a soft drink? I don't know, it looks like Pepsi." ✓
2. "Don't know because of the P and the S I think. People would have trouble pronouncing it."
3. " I don't know. I'd say a hot drink."

Q112

1. "No, it doesn't make sense."
2. "It doesn't look English, it looks like its Pepsi isn't it, an anagram of Pepsi."
3. "Fruit, something with fruit in it."

Q113

1. "I actually look at this as being Pepsi, don't ask me why?" ✓
2. "I don't know it just reminds me of Pepsi. As a new drink."
3. "...something like Pepsi".
4. " I don't know it just looks to me like Pepsi."

Q114

1. "Its all right, its not bad."

[No mention of Pepsi]

Q115

1. "Too complicated."

[No mention of Pepsi]

Q116

1. "Not much, I don't think it is very good".

[No mention of Pepsi]

Q117

1. "Its like Pepsi kinda spelt the wrong way." ✓
2. "You just kinda look at it and its like yeah."
3. "Some sort of like mineral spring water thing with flavour".

Q118

1. "Probably not very good".
3. "A cola".
4. "Because its Pepsi".

Q119

1. " IPSEE, it sounds quirky."

[No mention of Pepsi].

Q120

1. "It reminds me of Pepsi I suppose." ✓
2. "Because of the P-E-S-I".
3. "Really fizzy".
4. "Again because of Pepsi".

Of the 30 people interviewed, 22 mentioned Pepsi, 15 mentioned Pepsi in response to question 1, 8 specifically said it looks like Pepsi and 2 specifically mentioned anagrams.

Summary

Of the 140 people interviewed, 102 (72.9%) mentioned Pepsi; 69 (49.2%) mentioned Pepsi in response to question 1; 37 (26.4%) specifically said it looks like Pepsi and 10 (7.1%) specifically mentioned anagrams. In addition, 31 (22.1%) commented that this was "because of the letters" or similar (together, on occasions, with words such as "mixed around", "jumbled up", "rearranged" and "moved around" i.e. suggestive of anagrams) as the basis for saying Pepsi

September 2006

PRIVILEGED QUESTIONNAIRE B

- ONLY ASK THE QUESTIONS WRITTEN DOWN
- RECORD ALL THE ANSWERS VERBATIM

QUESTIONNAIRE NO:
 INTERVIEWER:
 LOCATION:
 DATE:

<p>1. Please could I ask you what you think of this as a new name for a soft drink?</p> <p>[Show interviewee the IPSEI card and allow him/her to look at it for as long as he/she may wish]</p>	<p>Record comments:</p>
<p>2A. [If interviewee says "Cola" or similar, or "Pepsi", then ask]</p> <p>Why do you say that?</p>	<p>Record comments:</p>
<p>2B. [If interviewee has not said "Cola" or similar, or "Pepsi", then ask]</p> <p>What kind of soft drink would you expect it to be?</p>	<p>Record comments:</p>

<p>[If interviewee says "Cola" or similar, or "Pepsi" then ask:]</p> <p>2C. Why do you say that?</p>	<p>Record comments:</p>
<p>3.(a) Finally, please could you speak the word on the card for me</p> <p>[Record on dictation machine]</p> <p>(b) Please could you repeat what you said</p> <p>[Record]</p> <p>(c) And please could you speak your name for me</p> <p>[Record]</p>	<p>Record comment if any:</p>
<p>4. Would you mind if I made a note of your occupation and age band?</p> <p>Occupation:</p> <p>Age band: Under 18, 18-25, 26-35, 36-45, 46-55, 56-65, over 65</p> <p>Record sex: M / F</p>	

<p>5. Thank you for your help. Would you mind being contacted again for further information about the answers you have given?</p> <p>If no objection</p> <p>Name:</p> <p>Address:</p> <p>Telephone number:</p>	
<p>6. Finally, would you have a look through the answers I have written down and sign below if you agree that they accurately record what you said.</p>	

Signed

PRIVILEGED QUESTIONNAIRE D

- ONLY ASK THE QUESTIONS WRITTEN DOWN
- RECORD ALL THE ANSWERS VERBATIM

QUESTIONNAIRE NO:
INTERVIEWER:
LOCATION:
DATE:

1. Please could I ask you what you think of this as a new name for a soft drink? <small>(Show interviewee the IPSEI card and allow him/her to look at it for as long as he/she may wish)</small>	Record comments:
2. Why do you say that?	Record comments:
3. What kind of soft drink would you expect it to be?	Record comments:

<p>4. Why do you say that?</p>	<p>Record comments:</p>
<p>5. Please could you speak the word on the card for me</p> <p>[Record on dictation machine]</p>	<p>Record comment if any:</p>
<p>6. Do you drink or buy soft drinks?</p>	<p>Record answer:</p>

<p>7. Which do you drink or buy most frequently?</p>	<p>Record comments:</p>
<p>8. How often do you drink or buy soft drinks?</p>	<p>Record answer:</p>
<p>9. Would you mind if I made a note of your occupation and age band?</p> <p>Occupation:</p> <p>Age band: Under 18, 18-25, 26-35, 36-45, 46-55, 56-65, over 65</p> <p>Record sex: M / F</p>	

<p>10. Thank you for your help. Would you mind being contacted again for further information about the answers you have given?</p> <p>If no objection</p> <p>Name:</p> <p>Address:</p> <p>Telephone number:</p> <p>Mobile number (if not already given):</p>	
<p>11. Finally, would you have a look through the answers I have written down and sign below if you agree that they accurately record what you said.</p>	

Signed