

O-306-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2444239
BY MICHAEL ALAN JONES TO REGISTER A
TRADE MARK IN CLASS 3**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 95964 BY HENRY EDWARD DIXON**

BACKGROUND

1. On 22 January 2007, Michael Alan Jones applied to register the following as a trade mark:



The trade mark was examined, accepted and subsequently published for opposition purposes on 26 October 2007 in Trade Marks Journal No. 6707 for a specification of goods in class 3 which reads:

Cleaning preparations; bathroom cleaning preparations, kitchen cleaning preparations; polishing preparations; scouring preparations; abrasive preparations; soaps; glass cleaning preparations; kitchen and hob degreasers; oven cleaners; stain removers; bleaching preparations; waxes and polishes; shampoos; polishing creams; detergents; fragrances; room fragrances; essential oils for use in odourants; air fresheners; essential oils for use in air fresheners.

2. On 28 January 2008, Keltie (a firm of Patent and Trade Mark attorneys) filed, on behalf of their client Henry Edward Dixon, a notice of opposition. It consisted of grounds based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (as amended) (the Act) directed against all of the goods contained in the application for registration.

3. On 28 May 2008, Mr Jones filed a counterstatement which was subsequently amended by his subsequently appointed professional representatives Mewburn Ellis and which, in essence, consists of a denial of the grounds on which the opposition was based.

4. Ordinarily it is at this point in my decision that I would provide a summary of whatever evidence the parties had chosen to file. However, a review of the official file indicates that this is a somewhat unusual case. Briefly, following the filing of Mr Jones' counterstatement the Trade Marks Registry (TMR) allowed Keltie until 1 October 2008 to file Mr Dixon's evidence in chief. This period was extended and on 2 January 2009 Keltie filed a witness statement of Paul Dixon accompanied by thirteen exhibits; this evidence was accompanied by a request for a further period of two months to complete Mr Dixon's evidence; the time was extended and on 27 February 2009 Keltie filed three witness statements from: Matt Gamble, Richard Eley and Pamela Nolan. At this point the TMR set a period for Mewburn Ellis to file Mr Jones' evidence which expired on 28 July 2009. I note that in a letter from Mewburn Ellis dated 18 August 2009 in support of a request for additional time to file Mr Jones' evidence they said:

“..but it is the applicant’s current belief that some of the opponent’s evidence has been fabricated. Clearly, if true, this would be a very serious allegation and naturally the applicant wants to make sure that they have the evidence necessary to prove such an allegation before making it. The applicant is taking steps to contact the relevant people, but it is taking time to establish the necessary contact and obtain further evidence...”

5. The period was extended to 28 September 2009. In a letter dated 25 September 2009 (and received by the IPO on 28 September 2009) Mewburn Ellis filed a witness statement from Mr Jones accompanied by seven exhibits. However, in a letter dated 21 September 2009 (copied to Mewburn Ellis) Keltie advised the TMR that it wished to withdraw the grounds based upon sections 5(3) and 5(4)(a) of the Act and to limit the scope of the opposition under section 5(2)(b) of the Act to three of the five trade marks originally pleaded. Keltie further indicated that they wished to withdraw all of the evidence filed by them and to restrict the scope of their written submissions filed on 2 January 2009. In their letter Keltie said:

“The Opponent has amended its grounds of opposition to simplify the proceedings and to avoid unnecessary costs. The case on the basis of the earlier registrations is strong and as such, debate over the evidence filed is not a worthy investment for the opponent. No comment whatsoever is made by the Opponent on the Applicant’s threat to question the legitimacy of the evidence filed...”

6. In their letter of 25 September 2009 Mewburn Ellis said of this development:

“It will be appreciated that our client has been put to considerable time and expense in preparing evidence to address the issues raised in the opponent’s evidence (now withdrawn). We trust that this will be taken into account when the issue of an award of costs is considered.”

7. On 9 November 2009 Mewburn Ellis filed an amended counterstatement. In a letter dated 4 January 2010 Mewburn Ellis said:

“Our client is not minded to incur further expenses in amending their evidence further.”

8. The upshot of these amendments is that Mr Dixon now bases his opposition, still directed against all of the goods contained in the application, solely upon section 5(2)(b) of the Act. Mr Dixon relies on the following trade marks:

Trade Mark	No.	Application Date	Date of completion of registration procedure	Goods
CLEAN GREEN	4987665 Community Trade Mark	9/3/2006	11/4/2007	3 - Cleaning preparations, other than for use in manufacturing processes.

				21 – Articles for cleaning purposes; cloths, scourers, sponges, dusters; steelwool; abrasive and non abrasive pads for cleaning; brushes; disposable impregnated wipes. 37 - Cleaning services.
CLEAN GREEN	2431278	30/8/2006	2/3/2007	44 - Horticulture and forestry services; gardening services; landscape gardening services; information and advisory services relating to the aforesaid.
CLEANGREEN CleanGreen CLEAN GREEN Clean Green CLEAN GREEN	2410906	12/1/2006	2/2/2007	3 - Cleaning preparations, other than for use in manufacturing processes. 37 - Cleaning services.
Series of 5				

9. I note that in his amended counterstatement Mr Jones says inter alia:

“The applicant denies that the application offends against the provisions of Section 5(2)(b). This is particularly so given that the phrase “clean & green” is an extensively used and widespread phrase, applied to almost every activity relating to environmentally friendly products and services; from the goods claimed in [the application] to washing machines, through street cleaning and graffiti removal, to water and energy reduction programmes. Indeed, the “clean and green” (environmental) sector is huge and diverse, and many government bodies, local authorities, businesses and retailers apply the term “clean and green” to their activities.”

And:

“3. The opponent claims that the goods covered by (sic) application are highly similar. The applicant puts the opponent to proof of use of this fact, in particular with regard to the class 37 and class 44 services covered by the opponent’s registered marks.”

10. Only Mr Jones has filed evidence which remains in the proceedings. Neither party asked to be heard; only Keltie filed written submissions (dated 2 January 2009). I will

refer to these written submissions as necessary below. After a careful consideration of all the material before me, I give this decision.

EVIDENCE

Mr Jones' evidence

11. This consists of a witness statement, dated 19 August 2009, from the applicant for registration Michael Alan Jones who states that the information in his statement comes from his personal knowledge. Mr Jones explains that he is the Managing Director of Clean & Green (GB) Limited which was incorporated on 17 January 2006.

12. Mr Jones states that he chose the trade mark applied for because his business lies in the sale of environmentally-friendly products. He explains that he adopted a mark which conveyed this fact and, in his view, the words CLEAN & GREEN had become synonymous with such products. He adds that he combined this descriptive term with a distinctive circular logo, the latter becoming the main focus of his product's branding. At exhibit MJ1 he provides examples of his product packaging from which he says:

“..it will be seen that the circular logo is a dominant feature.”

13. Exhibit MJ1 consists of a large number of pages (none of which I note have been paginated as required by Tribunal Practice Notice (TPN) 5 of 2008). On each page a trade mark substantially similar to that applied for is shown upon, inter alia, the packaging of a wide range of cleaning products, an example of which is shown below:



A selection of these pages taken at random shows use on, inter alia: Beer & Pipe Line Cleaner, Auto Glass Wash Detergent, Washing Up Liquid, Multi Purpose Kitchen Cleaner, Grill & Oven Cleaner, Clear Flow Drain Liquid, Glass & Stainless Steel cleaner/polish, Carpet Shampoo, Laundry Liquid, Liquid Descaler, Floor Gel Liquid, Heavy Duty Degreaser, Hair & Body Wash, Graffiti Paint Remover Liquid, Floor Polish, Air Freshener, Deodouriser etc.

14. Mr Jones then explains the process by which his application came to be accepted by the Trade Marks Registry. Whilst I note Mr Jones' comments regarding the distinctiveness objection raised by the Examiner at the initial examination stage, and how this objection was subsequently overcome at an ex-parte hearing, this is not relevant to these proceedings. My job is to consider the matter afresh on the basis of the pleadings, evidence and written submissions provided.

15. Mr Jones explains that exhibit MJ3 consists of:

“examples of the phrase “CLEAN & GREEN” (and variants thereof) in use in a descriptive manner in the UK.”

16. Once again this exhibit consists of a large number of un-paginated pages. For ease of reference (and in the event that my decision is the subject of appeal) I have paginated the pages myself. The documents are as follows:

Page 1 – consists of an undated photograph of a poster which appeared in the window of Johnson's the Cleaners in which the following text appears: Don't just clean, Clean Green! Refresh your clothes and care for the planet”;

Page 2 – consists of an undated photograph of a local authority refuse lorry on which the following text appears: “Cleaner, greener and safer”;

Page 3 – consists of a page from the Daily Mirror dated 7 July 2009 in relation to “Green Britain Day”;

Page 4 – consists of a page downloaded from the Intellectual Property Office's website on 6 May 2008 which I note bears a Crown Copyright date of 2006. The article is headed: “Clean, green and on the rise – “Clean technology” is an area currently attracting substantial investment, but we are still at an early stage of the IP cycle, says Robert Jackson”;

Page 5 – appears to consist of page 80 taken from MRO Management dated 7 June 2007. Under the general heading “Environmental Issues”, the words “Clean and green” appear in the context of an engine washing system for aircraft developed by KLM Engineering & Maintenance;

Page 6 – consists of a page downloaded from www.britishcouncil.org on 23 June 2008 in which the words “CLEAN AND GREEN” are used in connection with an on-line game designed to encourage children to recycle;

Page 7 – consists of an e-mail dated 18 June 2009 sent to Mr Jones by “Lucie at LateRoom.com” the subject of which is described as “Green deals for Green Week. Rooms from £48”;

Page 8 – consists of the front page of an Executive Summary of The City of Westminster’s “Go Green Annual Report 2007/2008”;

Page 9 – consists of a page downloaded on 5 June 2009 from the website of the University of Reading at www.rdg.ac.uk entitled, inter alia: “Clean & Green summary of facts”. The article explains that as of July 2008 the university was awarded Fairtrade status and details are provided of the energy saving measures the university has achieved;

Page 10 – consists of a page downloaded on 5 June 2009 from www.green-places.co.uk . The article entitled “Clean and green” explains that the Mayor of London, Boris Johnson, encourages all staff of the Greater London Authority to “spend time out of the office helping to “clean and green” London”;

Page 11 – consists of a page downloaded on 5 June 2009 from the website of the Local Government Association at www.lga.gov.uk. The article entitled “Clean and green” is in relation to the United Kingdom facing targets to reduce dependency on non-renewable energy and to increase its use of alternatives;

Page 12 – consists of a page downloaded on 5 June 2009 from Bristol City Council at www.bristol.gov.uk. Under the heading “What is Bristol Clean & Green?” the article explains that it is a people led project aimed at improving, inter alia, the cleanliness of Bristol’s public spaces and to address problems such as fly-tipping and graffiti;

Page 13 – consists of a page downloaded from the website of “London Clean & Green” which is a community based partnership. Under the heading “London Clean & Green 2007”, I note the aims of the partnership are much the same as those mentioned in relation to page 12 above;

Page 14 – consists of a page downloaded on 19 June 2008 from www.guardian.co.uk which under the heading “Asda sets store by a clean, green image”, explains that Asda “pledged to stop sending any waste to landfill sites within four years as part of a plan to achieve a new clean and green image”;

Page 15 – consists of a page downloaded on 6 May 2008 from www.amazon.co.uk in relation to a “Clean Green Dog Loo” which is a disposal unit for dog waste;

Page 16 – consists of a page downloaded on 6 May 2008 from the website of Camden Town Unlimited which under the heading “Clean and Green” says “A cleaner and greener Camden Town will reduce anti-social behaviour and make people want to spend more time in Camden Town”;

Page 17 – consists of a page downloaded on 6 May 2008 from blogs.guardian.co.uk/ethicaliving/ which, under the heading “Clean and green”, explains how swapping a soak in the bath for a shower saves energy and water;

Page 18 – consists of a page downloaded on 6 May 2008 from the website of Basingstoke & Deane Council which contains the heading “Clean and Green - Pest control”;

Page 19 – consists of a page downloaded on 6 May 2008 from the website of the “Advertiser incorporating the Bicester Review”. The page, which is dated 31 March 2008, contains the heading “Clean and Green campaign a success” and refers to an anti litter campaign along the A34;

Page 20 – consists of a page downloaded on 6 May 2008 from the website of the University of Warwick which carries a broadcast date of 29 January 2004. The article entitled “Clean and Green Water” is in relation to a method of treating contaminated water using titanium dioxide;

Page 21 – consists of a page downloaded on 6 May 2008 from AJP Online. The page which is dated 12 November 2007 contains the heading “Clean Green Approach as Aircraft Manufacturer Lands Wheelabrator Machine” explains that a new washing machine from Wheelabrator Group is helping one of the United Kingdom’s leading aircraft manufacturers remove contamination and increase the life of its reusable packaging system;

Page 22 – consists of a page downloaded on 6 May 2008 from the website of “The Clean Green Bag Scheme” in relation to the use of plastic bags in Poole, Dorset;

Page 23 – consists of a page downloaded on 6 May 2008 from www.guilford.gov.uk. The page which is dated 25 September 2007 contains the heading “Clean, green and warm at education centre” is in relation to an environmentally friendly wood fuel heating system;

Page 24 – consists of the title page of a paper by Peter Teo dated 2002 for Lancaster University entitled “Clean and green – that’s the way we like it; a critical study of Singapore’s environmental campaigns”;

Page 25 – consists of the first page of an Annual Report dated 2004/2005 by Ealing Council entitled “CLEAN AND GREEN PANEL”;

Page 26 – consist of a page downloaded on 6 May 2008 from the website of Barnet London Borough Council. Under the heading “Clean, green and safe” the article mentions: “Ensuring Barnet is a clean, green and safe borough is key to improving quality of life” and reports on “Progress in 2006/07” and “Objectives for 2007/8 and beyond”;

Page 27 – this consists of a page downloaded on 6 May 2008 from the website of the Guardian Unlimited. The article dated 15 November 2007 is headed “A clean, green machine?” and refers to “Brazil’s work in the biofuels industry”;

Page 28 – consists of a page downloaded on 6 May 2008 from the website of the East Devon Council. The article, which contains the heading “Safe, Clean and Green Environment”, refers to “in particular how we make sure it is a safe, clean and green part of the world to live in and visit”;

Page 29 – consists of the front page of a booklet entitled “recycle for Wirral important information on your recycling service” and which appears to be dated 29 January 2007. The page contains the following text: “Clean and Green Paper and Packaging Recycling”;

Page 30 – consists of a page downloaded on 6 May 2008 from “Michael Meacher – Labour’s Future” which is described as “A place for members of the Labour Party to discuss the things that really matter”. The article entitled “Clean, green within our means” discusses the pros and cons of nuclear power;

Page 31 – consists of an undated page downloaded from www.amazon.co.uk in relation to a publication entitled: “Green Clean: The Environmentally Sound Guide to Cleaning Your Home”;

Page 32 – consists of a page downloaded on 6 May 2008 from the website of Denbighshire County Council. The page, dated 6 September 2004, is entitled “Clean, green machines” and is in relation to the Council fitting their heavy vehicles with systems to reduce exhaust emissions;

Page 33 – consists of an undated page produced by the Environmental Thematic Group of North Ayrshire’s Community Planning Partnership. The page is entitled: “Making North Ayrshire Clean & Green” and explains that the Group’s responsibility is to “drive forward the clean and green agenda within North Ayrshire”;

Page 34 – consists of an undated page downloaded on 6 May 2008 from the website of Staffordshire Moorlands District Council. Entitled: “Environmental Enforcement: Keeping the District Clean and Green, the article explains what environmental crime is and lists the offences for which enforcement action can be taken;

Page 35 – this consist of a page taken from the Southwark Local Development Framework Annual Report April 2006 – March 2007. The document is entitled: “Clean and Green – Built Environment”;

Page 36 – consists of a page downloaded on 6 May 2008 from the website of Erewash Borough Council. It consists of a press release which appears to be from 2007 entitled: “Keeping it Clean and Green in Erewash” and refers to an agreement between the Council and Virgin Media to ensure that the latter’s street side boxes are graffiti free;

Page 37 – consists of a page downloaded on 6 May 2008 from the website of Suffolk Coastal District Council. The page, dated 19 March 2008, is entitled: “Help keep our

district clean and green” and comments that: “the council now wants help to make the area even cleaner and greener”;

Page 38 - consists of a page downloaded on 6 May 2008 from the website of Green England. The article entitled: “Clean Green and Save Money” explains ways in which conventional cleaning products can be replaced with more environmentally friendly alternatives;

Page 39 - consists of a page downloaded on 6 May 2008 from www.york-england.com. Entitled “Clean Green Energy” the page discusses creating energy from waste or biomass or converting waste into “something valuable”;

Page 40 - consists of a page downloaded on 6 May 2008 from the website of Redcar and Cleveland Borough Council. The article, which was published on 22 October 2004, is entitled: “Log on for Clean and Green updates”, it states: “The Clean and Green Scene will contain useful information and updates on work completed, work being done and schemes for the future”. It comments on, inter alia, “a series of deep cleans” and gum removal;

Page 41 - consists of a page downloaded on 6 May 2008 from the website of Inteletex. The article entitled: “Clean and green” discusses how Honeywell has added to its green credentials with a new branded nylon for contract carpet products;

Page 42 - consists of an incomplete page downloaded on 6 May 2008 from the website of the Nice Car Company. The incomplete page (which bears a copyright date of 2008) is, it appears, entitled; “Clean & Green” and discusses the environmental credentials of electric vehicles;

Page 43 - consists of a page downloaded on 6 May 2008 from the website of North East Derbyshire District Council. The page, dated 31 March 2008, is entitled: “Clean and green Neighbourhoods” and refers to a booklet containing information about, inter alia, recycling and waste minimisation, street cleaning, fly tipping, dog wardens;

Page 44 - consists of a page downloaded on 6 May 2008 from the website of npower. The page which appears to be from 2007 contains an advertisement in which the following text appears: “npower juice Cleaner greener energy at no extra cost to you or the planet”;

Page 45 – consists of a page which appears to refer to Aberdeen City Council and which contains the following text: “CLEAN AND GREEN INITIATIVE – ANNUAL REPORT OF ACTIVITIES FOR 2005/06”;

Page 46 – consists of a page the origin of which is unclear. It bears the heading “Clean, green and liveable” and appears to refer to various targets including “Tackling environmental crime” and “Cleaning up the environment” which were in place in Lewisham up to 2006/07;

Page 47 - consists of a page downloaded on 6 May 2008 from the website of Sheffield Homes which was generated on 26 July 2007 and modified on 30 October 2007. The page is entitled: "Safe, clean and green estates" and explains that "Sheffield Homes is committed to tackling anti-social behaviour, improving the environment and making areas safe, attractive and sustainable". The page also refers to; "That is why we are committed to keeping the city's estates clean and green by removing fly-tips, graffiti, maintaining gardens..";

Page 48 - consists of a page downloaded on 6 May 2008 from the website of Bath & North East Somerset Council. The article, which is dated 22 May 2006, is entitled: "Six ways to make your journeys clean and green" is an attempt to encourage people out of their cars and to chose healthier and greener ways of travelling;

Page 49 - consists of a page downloaded on 6 May 2008 from the website of Muc-Off which, given the strap line "cleaning made easy" appearing on the page, appears to be a company dealing in cleaning products. The page contains the following text: "We all want to stay clean and green, here at Muc-Off we passionately care about the planet and the environment we live in";

Page 50 - consists of a page downloaded on 6 May 2008 from the website of New Scientist. It refers to an article dated 16 August 2003 entitled: "The clean green energy dream" which relates to Europe's energy vision of the future;

Page 51 – consists of a page taken from the website of the London Borough of Richmond Upon Thames. The article, which was updated on 20 November 2007 and which is entitled: "Clean and Green Weeks", explains that "The Council has launched a series of Clean and Green Weeks that are dedicated to blitzing environmental eyesores in each ward";

Page 52 - consists of a page downloaded on 24 July 2009 from the website of John Lewis. The page is entitled; "Clean green baby" and relates to eco-friendly nursery products;

Page 53 – consists of a page dated June 2009 taken from a publication called CHT. The page mentions "Green cleaning solutions at RWM 09" (where RWM is a reference to the recycling & waste management exhibition) which was held at the NEC in Birmingham on 15-17 September 2009;

Page 54 - consists of a page downloaded on 24 July 2009 which appears to be from the website of wholeliving. The page is entitled: "Clean Green: Natural Cleaning Products" and explains ways in which conventional cleaning products can be replaced with more environmentally friendly alternatives;

Page 55 - consists of a page downloaded on 24 July 2009 from www.cleanitsupply.com which is a site based in the United States of America. The site, which sells cleaning and

janitorial supplies, includes the following text: “Green Cleaning Products, Wholesale Green Cleaning Supplies, You have found the right place to shop for all of your favourite **Green Cleaning Products**”;

Page 56 - consists of a page downloaded on 24 July 2009 entitled “Green cleaning products” which directs the user to wowgreen which appears to be a company offering environmentally friendly cleaning products. It is not clear if wowgreen are based in the United Kingdom;

Pages 57/58 - consist of pages downloaded on 24 July 2009 from www.uktv.co.uk. The article entitled: “Green cleaning” explains ways in which conventional cleaning products can be replaced with more environmentally friendly alternatives;

Page 59 - consists of a page downloaded on 24 July 2009 from the website of the CleaningExpert which appears to be a site based in the United Kingdom. The page is entitled “Green Cleaning Products” and once again explains ways in which conventional cleaning products can be replaced with more environmentally friendly alternatives;

Page 60 - consists of a page downloaded on 24 July 2009 from www.eHOW.com. Once again under the heading “How to Clean Green” the page explains ways in which conventional cleaning products/methods can be replaced with more environmentally friendly alternatives;

Pages 61/62 - consist of pages downloaded on 26 July 2009 from the website of ICIS which appears to be a site based in the United States of America. The pages are dated 19 June 2008 and contain, inter alia, the following text: “Cleaning products are getting greener, Greening and cleaning, Eco-friendliness has become a fundamental consideration throughout the cleaning products value chain. And companies must take account of it...”

Page 63 - consists of a page downloaded on 26 July 2009 from www.pressandjournal.co.uk in relation to an article published on 5 July 2008 entitled: “Give your home a green clean”. The article explores the dangers associated with conventional cleaning products;

Page 64 - consists of a page downloaded on 24 July 2009 from the website of Efficient Energy Saving. Entitled “Green Cleaning” the article explains that: “Green Cleaning is all about cleaning your home with natural products and not using harmful chemicals”;

Page 65 - consists of a page downloaded on 24 July 2009 from an unidentified website. The page is entitled “Green Cleaning Products”. The page provides information on what to consider when selecting “Green Cleaning Products”;

Page 66 - consists of a page downloaded on 24 July 2009 from www.cleaning-green.co.uk which refers to a cleaning service doing business under the name Cleaning Green which describes itself as providing “Eco friendly cleaning”;

Page 67 - consists of a page downloaded on 24 July 2009 from the website of www.tesco.com. The page, which contains the words "Greenerliving", makes references to a range of eco-friendly cleaning and household items;

Page 68 - consists of a page downloaded on 24 July 2009 from www.greenconsumerguide.com. The page contains two articles both dated 28 February 2009 and entitled "Green Spring Clean" and "Cleaning Industry getting greener?" and which discuss how to reduce the environmental impact of cleaning in one's home and how the cleaning industry is becoming more environmentally friendly respectively;

Page 69 - consists of a copy of pages 61/62;

Page 70 - consists of a page downloaded on 24 July 2009 from the website of Wandsworth Council which, in relation to a range of "shopping pledges", contains the following text: "Use green cleaning products";

Page 71 - consists of a page downloaded on 24 July 2009 from the website of the Mail Online. The article, which was last updated on 24 January 2009, is entitled: "Green scene: The non-pollution cleaning solution" discusses the use of non-conventional cleaning methods;

Page 72 - consists of a page downloaded on 24 July 2009 from what appears to be the website of the Daily Telegraph. The article, which was published on 6 October 2008, is entitled: "The green washing liquid that gets whites clean" explains that Procter & Gamble is launching a version of its Ariel product it claims can clean clothes at temperatures as low as 59°F.

17. As the remainder of Mr Jones' statement refers to the evidence filed by Mr Dixon (evidence which has now been withdrawn), it is not necessary for me to summarise it here. That said, I will, as Mewburn Ellis request, keep it in mind when considering the issue of costs.

18. That concludes my summary of the evidence filed to the extent that I consider it necessary.

DECISION

19. The only ground of opposition which remains is under section 5(2)(b) of the Act. This section reads as follows:

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

(a)....

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

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

20. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

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

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

21. In these proceedings Mr Dixon is relying on the registered trade marks shown in paragraph 8 above, which have application dates prior to that of Mr Jones’ application for registration; as such, they qualify as earlier trade marks under the above provisions. The application for registration was published for opposition purposes on 26 October 2007 and Mr Dixon’s earlier trade marks were registered in February, March and April 2007. Consequently, Mr Dixon’s earlier trade marks are not subject to The Trade Marks (Proof of Use, etc) Regulations 2004.

Section 5(2)(b) – case law

22. In reaching a decision I must take into account the guidance provided by the European Court of Justice (ECJ) in a number of judgments germane to this issue. The principal cases are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05),

It is clear from all these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all the relevant factors: *Sabel BV v. Puma AG*, paragraph 22;

- (b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and circumspect and observant – but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;
- (e) when considering composite marks, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element; *Shaker di L. Laudato & Co. Sas* (C-334/05), paragraph 42;
- (f) an element of a mark may play an independent distinctive role within it without necessarily constituting the dominant element; *Medion AG V Thomson multimedia Sales Germany & Austria GmbH*, paragraph 30;
- (g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;
- (i) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;
- (j) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v. Adidas AG + Adidas Benelux BV*, paragraph 41;
- (k) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

The average consumer and the nature of the purchasing decision

23. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In his written submissions Mr Dixon says:

“The relevant consumer for such goods and services as those provided by the two parties are general consumers of household cleaning products and domestic cleaning services as well as contract cleaning companies. Such consumers are unlikely to pay a high level of attention to the goods they are purchasing. Such goods are inexpensive and replaceable.”

24. I agree with Mr Dixon that the goods and services at issue in these proceedings will be purchased by both the general public and those in business; they then are the average consumer for such goods and services.

25. In my own experience (speaking as a member of the public rather than a business user), the selection of the goods at issue is most likely to consist of a visual act made on the basis of self selection in a retail outlet such as a supermarket. However, the evidence suggests that many of the goods may also be purchased by a member of the public from a catalogue or on-line. While the manner in which the goods will be selected by a business user is likely, in my view, to be much the same, the retail setting is more likely to be a trade supplier such as a wholesaler and the catalogues and websites are more likely to be those directed at the trade. While the goods will, I think, be selected primarily by visual inspection, I do not rule out the possibility that both the general public and those in business may also order the goods by telephone; visual and/or aural considerations are therefore likely to play a part in the selection process.

26. As to the manner in which the goods are selected, I note that Mr Dixon thinks that given their potential cost and nature, the average consumer is unlikely to pay a high level of attention to their selection. Insofar as some of the goods concerned this may well be true. For example, neither a member of the general public or a business user, are, I think, likely to spend a great deal of time and effort selecting, for example, a single cleaning cloth or scouring pad.

27. However, as the evidence shows, the average consumer is likely to be increasingly familiar with the adverse environmental and physical effects of some conventional cleaning preparations. Consequently, some members of the general public may wish to select cleaning preparations for their home which are either environmentally friendly or which minimise environmental damage; while the goods may be both inexpensive and selected on a fairly regular basis, this may increase the level of attention some members of the general public pay when selecting the goods. That said, when considered as a whole, the general public are, I accept, likely to pay only a low level of attention to the selection of the goods at issue.

28. The evidence provided suggests that those in business (either buying cleaning preparations for use in their own organisations, or those buying cleaning preparations for use in the provision of a cleaning service) are likely to be acutely aware of the environmental issues at play and the general public's and other businesses' concerns in this regard. This combined with the fact that the goods may be bought in bulk, is likely, in my view, to result in a business user paying a fairly high level of attention to the selection of the majority of the goods at issue despite what is likely to be their relatively low individual unit cost.

29. Insofar as the services are concerned (and once again speaking as a member of the public), their selection is once again likely to consist of a visual act having inspected, for example, publications such as Yellow Pages® or having conducted a search on-line. Equally, it may be on the basis of oral recommendations from colleagues, friends or family. I think that similar considerations are also likely to apply to business users i.e. that visual and aural considerations will both play a part in the selection process. That said, I think that the nature of the sources business users may consult, and the origin of the recommendations they may receive, are far more likely to be business related than the rather more general sources available to the public.

30. Insofar as the nature of the purchasing decision is concerned, the amount of money a member of the public is likely to spend on, for example, routine home cleaning, gardening etc is likely to vary; regardless, the sums involved are (for the most part) not likely to be substantial (although large or unusual jobs will be more expensive. Insofar as business users are concerned (and of course depending on the size and nature of the business), it is far more likely that much more significant sums will be in play.

31. Regardless, it appears to me that whether the average consumer is a business user selecting, for example, a company to clean a large office block, or a member of the public selecting a company to clean their home, both are, in my view, likely to pay a reasonably high degree of attention to their selection. I say this, because both sets of consumers (whether selecting a service provider on a one-off or long term basis), will need to satisfy themselves that the provider concerned is in a position to satisfy their particular requirements, in an appropriate timescale and at an appropriate cost; other factors such as trusting others to work in one's home or work place and insurance for those individuals will also need to be borne in mind.

Comparison of goods and services

32. For the sake of convenience the goods to be compared are as follows:

Mr Dixon's goods and services	Mr Jones' goods
3 - Cleaning preparations, other than for use in manufacturing processes.	Cleaning preparations; bathroom cleaning preparations, kitchen cleaning preparations; polishing preparations; scouring preparations; abrasive preparations; soaps; glass cleaning
21 – Articles for cleaning purposes; cloths, scourers, sponges, dusters; steelwool;	

<p>abrasive and non abrasive pads for cleaning; brushes; disposable impregnated wipes.</p> <p>37 - Cleaning services.</p> <p>44 - Horticulture and forestry services; gardening services; landscape gardening services; information and advisory services relating to the aforesaid</p>	<p>preparations; kitchen and hob degreasers; oven cleaners; stain removers; bleaching preparations; waxes and polishes; shampoos; polishing creams; detergents; fragrances; room fragrances; essential oils for use in odourants; air fresheners; essential oils for use in air fresheners.</p> <p>(Goods highlighted are explained below)</p>
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33. In his written submissions Mr Dixon says:

“Those that are highlighted in the Applicant’s goods above are identical to the goods contained within the earlier registrations of the Opponent in Class 3. The broad term “cleaning preparations” encompasses them all. Furthermore however, they are similar to the cleaning articles in Class 21 (abrasive preparations and abrasive pads for cleaning).”

34. As all of the highlighted goods are contained within the term “cleaning preparations” appearing in Mr Dixon’s registrations, the respective goods are therefore identical. This leaves:

Fragrances; room fragrances; essential oils for use in odourants; air fresheners; essential oils for use in air fresheners.

35. Of these goods Mr Dixon says:

“The remaining goods within the application are similar to cleaning preparations. They share the same trade channels (e.g. hardware stores, the household aisle of supermarkets, cleaning suppliers), the same uses, i.e. to make an environment clean, pleasant and therefore odour free, and the same users. It is contract or domestic cleaners as well as homeowners and tenants that use cleaning preparations and room fragrance.”

36. The leading authorities on how to determine similarity between goods and services are considered to be *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117 and *British Sugar Plc v James Robertson & Sons Ltd (Treat)* [1996] R.P.C. 281. In the first of these cases the ECJ accepted that all relevant factors should be taken into account including the nature of the goods/services, their intended purpose, their method of use and whether they are in competition with each other or are complementary. The criteria identified in the *Treat* case were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

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

37. Insofar as complementary goods and services are concerned, I will keep in mind the comments of the Court of First Instance (now the General Court) in Case T-420/03 – *El Corte Inglés v OHIM- Abril Sanchez and Ricote Sauger* (Boomerang TV). The court said at paragraph 96:

“96.....Goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T14 169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, and judgment of 15 March 2006 in Case T-31/04 *Eurodrive Services and Distribution v OHIM – Gomez Frias* (euroMASTER), not published in the ECR, paragraph, paragraph 35.”

38. I should perhaps start by saying that if Mr Dixon is unable to persuade me that the goods in paragraph 34 are similar to his cleaning preparations in class 3, he is, in my view, in no better position in relation to his other goods and services in classes 21, 37 and 44.

39. While I agree with Mr Dixon that the goods in paragraph 34 will have the same users as his cleaning preparations, that is, in my view, far too general a conclusion to have any real significance. I do however accept that the respective goods may share similar methods of use, for example, they may both be deployed using an aerosol and that both sets of goods are likely to be found in the same general area of a supermarket (even if they are not to be found on the same shelf). However, while I am aware that cleaning preparations are often promoted on the basis that a side effect of their use will be to improve the smell of a room, this is not their primary purpose and it cannot, I think, be realistically argued that the average consumer would buy a cleaning preparation instead of a room freshener i.e. the goods are not in competition with one another. Similarly, while the respective goods may be used as part of a general suite of cleaning and deodorising products, the goods in paragraph 34 cannot, given the comments in *El*

Corte Inglés, be considered “indispensable or important for the use of the other.” So, while the method of use and users of the goods may be the same, the intended purpose is clearly different; in addition, the goods are neither competitive with nor complementary to one another. In short, the degree of similarity between the goods in paragraph 34 and Mr Dixon’s cleaning preparations is, in my view, low.


Comparison of trade marks

40. Of his earlier trade marks Mr Dixon says:

“All are registered for the mark CLEAN GREEN or a variant thereof. All are word marks and all were registered without the need for filing evidence of acquired distinctiveness. Accordingly, the trade mark registrations are afforded the full protection of the 1994 Trade Marks Act or the Regulation on the Community Trade Marks, as applicable.”

41. As Mr Dixon points out, all of his trade marks consist of the words CLEAN GREEN in one form or another. However, as United Kingdom trade mark No. 2410906 is registered in respect of, inter alia, “cleaning preparations, other than for use in manufacturing processes” and as this trade mark consists of the combination CLEAN GREEN presented in a range of different formats, it is this trade mark which, in my view, provides Mr Dixon with the best prospect of success. If his opposition fails insofar as this registration is concerned, it will also fail in relation to his other earlier rights.

42. With that in mind the trade marks to be compared are as follows:

Mr Dixon’s trade marks	Mr Jones’ trade mark
<p>CLEANGREEN CleanGreen CLEAN GREEN Clean Green CLEAN GREEN (Series of 5)</p>	

43. It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as a whole and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity I must

identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must, as the case law dictates, then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

44. In his written submissions (albeit in relation to aural and visual similarity) Mr Dixon says:

“The word “and” does not stand out in the sound of the mark, it merely disappears between the two more dominant words.”

“The most distinctive elements of the mark visually are the two common words CLEAN and GREEN.”

“The font of the words “Clean & Green”... is inconsequential.”

“Accordingly, a plain and featureless ampersand cannot be sufficient to distinguish between these two marks.”

“The device forms only a minor part of the mark; it is presented after the words, almost an afterthought. It comprises merely a green circle with smaller green ellipses within it. It is not in itself highly distinctive and it is certainly not a dominant element of the mark.”

45. As I mentioned above, Mr Dixon’s trade marks all consist of the words CLEAN GREEN presented in different formats. Neither element can, in my view, be said to be truly dominant; the distinctive character of each trade mark resides in its totality.

46. Turning to Mr Jones’ trade mark this also consists of the words Clean/Green separated by an ampersand and accompanied by a device. Despite Mr Dixon’s assertions to the contrary, there is no evidence that the device present in Mr Jones’ trade mark is anything other than highly distinctive. That said, I do agree with Mr Dixon that the relatively common place font in which the words are presented and the presence of the ampersand are neither distinctive nor dominant elements of Mr Jones’ trade mark. While the device appearing in Mr Jones’ trade mark is a distinctive element, it is not, given its size and positioning at the end of the trade mark, a dominant element. Rather, it is the words and symbol Clean&Green which are, in my view, the dominant elements of Mr Jones’ trade mark. In his written submissions Mr Dixon says that these words are “the most distinctive elements” whereas in his counterstatement Mr Jones says that these elements are descriptive; this brings me to the evidence filed by Mr Jones in this regard.

47. Although a good deal of Mr Jones’ evidence is after the material date in these proceedings, it cannot, in my view, be seriously argued that at the material date

(January 2007) the average consumer would not have been aware that the words “Clean”/“Green” were in widespread use in relation to a range of environmentally friendly goods, services and initiatives. Equally it appears that “Clean Green”, “Clean & Green” and “Clean and Green” are also commonly used. However, even if I assume that Mr Jones is correct and the “Clean&Green” element of his trade mark is descriptive (or perhaps non-distinctive), this does not mean that I can simply ignore this element when making an overall assessment of his trade mark’s distinctive and dominant components. I note that in his witness statement Mr Jones says, by reference to an ex-parte hearing held during the ex-officio stage of the proceedings:

“I understand that [the Hearing Officer] found the combination of the descriptive words “CLEAN & GREEN” and my circular logo to be distinctive....I understand that the rights in my trade mark will lie in the combination of the descriptive words “CLEAN & GREEN” and the distinctive circular logo and not in the words “CLEAN & GREEN” alone.”

48. I agree with Mr Jones that the distinctive character of his trade mark lies in the combination of the various elements. This of course means that the word element Clean&Green (which are unarguably a dominant element within his trade mark) must also be taken into account when I assess the competing trade marks from the visual, aural and conceptual perspectives.

Visual/Aural similarity

49. The words “CleanGreen” and “Clean Green” (appearing in versions two and four) of Mr Dixon’s trade marks are also to be found in Mr Jones’ trade mark (albeit in a slightly different font and separated by an ampersand); in Mr Jones’ trade mark the words are accompanied by a device. When considered from the visual perspective, its size and positioning means that the device in Mr Jones’ trade mark plays a subordinate role to the words. When considered from an aural perspective it is, given its imprecise nature, highly unlikely that the average consumer will try and verbalise the device present in Mr Jones’ trade mark. The net effect is that, in my view, the competing trade marks are visually and aurally highly similar.

Conceptual similarity

50. Given the abstract nature of the device element appearing in Mr Jones’ trade mark it is unlikely, in my view, to trigger any conceptual image in the average consumer’s mind. However, as the presence of the words “Clean Green” and “Clean&Green” in the competing trade marks are, I think, likely to evoke similar (environmentally friendly) images in the mind of the average consumer, when considered overall the competing trade marks are, in my view, conceptually similar to a high degree.

Distinctive character of Mr Dixon's CLEAN GREEN trade marks

51. As the case law dictates, I must also assess the distinctive character of Mr Dixon's trade marks. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which it has been registered and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

52. At paragraph 40 above I reproduced Mr Dixon's views on how I should approach his trade marks. Insofar as the United Kingdom registrations are concerned, this is, I think, intended to be a reference to Section 72 of the Act which I note reads as follows:

“In all legal proceedings relating to a registered trade mark (including proceedings for rectification of the register) the registration of a person as proprietor of a trade mark shall be prima facie evidence of the validity of the original registration and of any subsequent assignment or other transmission of it.”

53. As I mentioned above the words Clean/Green and the combinations “Clean Green”, “Clean & Green” and “Clean and Green” are likely to be taken by the average consumer as references to environmentally friendly goods, services and initiatives. However, as Mr Dixon points out his trade marks are all registered and all benefit from the presumption of validity provided by the Act. Taking all of these factors into account, it appears to me whatever inherent distinctive character Mr Dixon's trade marks possess must, at best, be considered to be at a relatively low level.

Likelihood of confusion

54. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of Mr Dixon's trade marks, as the more distinctive these trade marks are the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

55. In his written submissions Mr Dixon says of the likelihood of confusion:

“Furthermore, it is not in the nature of consumers to dissect trade marks and to consider small differences between them in detail. Rather consumers take a broad brush approach and are influenced in the main by the dominant and distinctive components of a mark.

When considering imperfect recollection together with the low level of attention of consumers, and the high similarity between the marks and the goods and services, a likelihood of confusion is unavoidable. Consumers would be entirely incapable of distinguishing between the mark in suit and those of the Opponent. At best, an economic link would be assumed, a licensing agreement for example. At worst, consumers may mistakenly purchase the goods of the Applicant instead of those of the Opponent.”

56. Insofar as the distinctiveness of the Clean & Green element is concerned, I note the following comments of the ECJ in *L’Oréal SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-235/05 P*:

“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.”

57. I have concluded that while some of Mr Jones’ goods are identical to those contained in Mr Dixon’s registrations others are similar to only a low degree. In addition, while I have concluded that the dominant element of Mr Jones’ trade mark is visually, aurally and conceptually highly similar to Mr Dixon’s trade marks, I must also keep in mind the limited distinctive character Mr Dixon’s trade marks possess and balance this factor with the comments of the ECJ in the case mentioned in paragraph 56 above. Having done so, and having applied the interdependency principle (where a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa), I have come to the conclusion that notwithstanding the limited distinctive character present in Mr Dixon’s trade marks, where identical goods are concerned the average consumer is (as Mr Dixon argues) likely to simply mistake Mr Jones’ trade mark for the trade marks of Mr

Dixon. Insofar as those goods which share only a low level of similarity are concerned, the degree of similarity in the goods is, given the proximity in the respective trade marks, sufficient, in my view, for the average consumer to assume that (at the very least) those goods come from a source economically linked to Mr Dixon.

58. Mr Dixon's opposition succeeds in its entirety and Mr Jones' application will be refused.

Costs

59. As Mr Dixon has been successful he is entitled to a contribution towards his costs. However, in paragraph 6 above I noted that Mewburn Ellis had referred me to the costs Mr Jones had incurred in considering and answering the now withdrawn grounds and evidence and asked me to take this into account when making an award.

60. As I explained earlier in this decision, Mr Dixon originally based his opposition upon sections 5(2)(b), 5(3) and 5(4)(a) of the Act. In support of these grounds he filed the witness statement of Paul Dixon (accompanied by thirteen exhibits) together with three further witness statements. Mr Jones was allowed until 28 July 2009 to respond to this evidence, a period which was subsequently extended to 28 September. On 28 September 2009 Mr Jones filed his evidence (the witness statement for which I note was signed on 19 August 2009). However, in a letter dated 21 September 2009 (copied to Mewburn Ellis), Keltie advised the TMR that Mr Dixon was abandoning the grounds based on sections 5(3) and 5(4)(a) of the Act, limiting the opposition based upon 5(2)(b) of the Act to three (of the five) earlier rights, and withdrawing all of Mr Dixon's evidence. The timing of these changes would have given Mr Jones no opportunity to revise his approach to the evidence originally filed by Mr Dixon. In effect, it rendered his response to this evidence (which I note accounts for a good deal of his witness statement and four of his seven exhibits) pointless. In those circumstances, Mr Jones is, in my view, entitled to a contribution towards the unnecessary costs he incurred.

61. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide, and considering the opposition as one based solely upon section 5(2)(b) of the Act with no evidence filed by Mr Dixon, I would have awarded costs to Mr Dixon on the following basis:

Preparing a statement and considering the other side's statement:	£200
Official fee:	£200
Written submissions:	£300
Total:	£700

62. However, given the circumstances I have described in paragraph 60, I intend to reduce this amount by £500 to reflect a contribution to the unnecessary time and effort spent by Mr Jones considering and filing evidence in response to the grounds and evidence which were subsequently withdrawn.

63. Consequently, I order Michael Alan Jones to pay to Henry Edward Dixon the sum of **£200**. 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 31 day of August 2010

C J BOWEN
For the Registrar
The Comptroller-General