

O-164-07

DECISION OF THE TRADE MARKS REGISTRY

TRADE MARKS ACT 1994

OPPOSITION N^o. 94002
APPLICANT: ROSS HEAVEN
AND
OPPONENT: SIMON BUXTON T/A THE SACRED TRUST
APPLICATION N^o. 2395188
CLASS 41

DARKNESS VISIBLE

TRADE MARKS ACT 1994

BACKGROUND

1. The application listed on the first page of this decision was filed on 25th June 2005 for the following services:

Class 41: *Arranging and conducting workshops;*

Class 45: *Spiritual and lifestyle counselling.*

The applicant is Mr. Ross Heaven of 25 South Road, Newhaven, East Sussex BN9 9QL.

2. The opponent is Simon Buxton t/as The Sacred Trust, PO Box 7777, Wimbourne Dorset BH21 9JT. Mr. Buxton argues that use of the mark at the filing date of the application was liable to be prevented in the UK by virtue of an action in passing-off within the meaning of s. 5(4)(a) of the Trade Marks Act. In particular, Mr. Buxton states that he, trading as the Sacred Trust, traded in services under the mark in suit before the application date.
3. Mr. Heaven denies this, stating that he is the holder of the unregistered right in the name DARKNESS VISIBLE.

HEARING

4. The parties were at liberty to request an oral hearing of their case, but did not do so. This decision is determined from the evidence submitted in the documents presented to the Office.

EVIDENCE

5. The structure of the evidence is as follows:

Opponents evidence in chief

Witness Statement by: Simon Buxton (Exhibits 1-4)

Witness Statement by: Professor Harrop

Witness Statement by: Kenneth Smith

Witness Statement by: Philip Johnson (Exhibits: TC1 –TC11)

Witness Statement by: Lisa Tolland

Applicants evidence in support

Witness Statement by: Donna Maree Waugh

Witness Statement by: Ross Haven (Exhibits: 1-20)

Witness Statement by: Leticia Parmer

Witness Statement by: Tania Ahsan

Opponents evidence in reply

Witness Statement by: Simon Buxton (Exhibits:1B-18B)

Witness Statement by: Naomi Lewis

Witness Statement by: Avalon Lau

Witness Statement by: Saffron McCaughna

Witness Statement by: Susan Stoffart

Witness Statement by: Marius Hansson

Witness Statement by: Dr Patricia Coates

Witness Statement by: Lisa Tolland

Witness Statement by: Christina Mahler

Witness Statement by: Allison Brown

There are other evidence rounds that I consider below, but are not set out here. And there is a further, more serious issue to consider here also.

Mr Buxton submitted to the Registry, together with a letter dated 1st May 2007 (well after the closure of the evidence rounds), a statement by Ms. Leticia Parmer (one of Mr. Heaven's witnesses) which states:

'I am Patricia Peters of 40 Kirdford Road, Arundel, W.Sussex, BN18 9EE. I am a workshop facilitator and author, working under the professional name Leticia Parmer.

This is my first statement in this regard. Any statement earlier than 27th April 2007 is not valid and was not written by me. I first made contact by email with Mr. Heaven in February 2003. I first met him on March 1st 2003 and first worked with him on his workshop on 15/16th March 2003 (not 2002). I assisted (co-facilitated with) him on a series of workshops entitled Beautiful Mutants. This series ran from March 2003 to September 2003. On the first workshop in March students were taken on a walk of attention which involved walking outdoors wearing blindfolds for a short period of time – maximum half an hour. There was no longterm blindfolded experience until the August workshop of that year, when students were kept blindfolded (some using Mindfolds) for 2 nights. Subsequent to this blindfolds were ritually removed. I did not at the time understand this to be called Darkness Visible, and only remember it being referred to as "being kept in darkness in the Djevo" as a vision quest. It had been explained to me at the time by Mr. Heaven that this was a ritual he had learned during his studies of Voodoo Shamanism in Africa.

The only recent contact I have had with Mr. Heaven was when he asked for my support in a custody case over his son (March 20th 2006). For this purpose I provided him with a signed statement, the first lines of which were identical to the forged statement about the Darkness Visible dated June 1, 2006. That was not my statement and I had no knowledge of it until yesterday when Mr. Buxton informed me it had been submitted in an application by Mr. Heaven for a trademark. Mr. Heaven at no time asked for a statement from me in this regard, nor received one'.

6. The earlier putative statement by Ms. Parmer (dated 01/06/2006) asserts that she has worked with Mr. Heaven since 2002 as an assistant on his workshops. 'During this work ...' ritual induction into darkness was conducted involving 'mindfolds' (that is, blindfold masks) including the undertaking of various exercises etc. The work was called DARKNESS VISIBLE. Obviously this is in complete contradiction with the later statement.
7. The forgery of a witness statement is, of course, a serious matter (and a criminal offence), and Mr. Heaven quickly responded, in a letter to the Registry dated 3rd May 2007. This contained a further statement from one of his two remaining witnesses (Ms. Donna Maree Waugh) in which she avers that she witnessed the signing of the earlier statement by Ms. Parmer.
8. In summarising the evidence in this case, as set out in paragraph 5 above, I have tried to keep in mind the one ground pleaded in this case is that of the law of passing off under s. 5(4)(a). This is a matter of evidence and fact. There is comment from both sides in this case that relates directly (or by inference) to the veracity of the statements each makes, and those of their supporting witnesses. Clearly the circumstances surrounding that of the putative statements by Ms. Parmer's is an extreme example of this. The broad approach of this decision is to place much greater weight on those statements of the witnesses in this case where they are supported by corroborating material. I return to this point below (see paragraph 40ff), but point out here that the content of the witness statements, in the context of this, has had little affect on my findings overall. It follows from this that the putative first 'Parmer' witness statement has little significance in this case on way or another.
9. Further, the level of honesty displayed by the applicant in this matter is not a determining factor in relation to the earlier right claimed. It is to be noted that the opponent did not plead bad faith as such (a ground of opposition under s. 3(6) of the TMA) where the integrity of the applicant in applying for the mark is 'under the microscope'; as a consequence, the probity of the latter is not really the main issue in this case. It follows that any determination as to the circumstances in which Mr. Heaven 'came by' the evidence he has submitted has, again, little affect on the findings herein.

The Opponent's evidence

10. The opponent is Mr. Simon Buxton who describes himself as 'the sole proprietor of The Sacred Trust, an organisation that organises, promotes and administers, designs and teaches seminars on alternative healing methods and shamanism' (his statement dated 16th May 2006).
11. Mr. Buxton states that the Trust has been trading since 1995. He adds that in 1986 he was inducted into a small, private shamanic group of 'bee-keepers' known as 'The Path of Pollen'. The full detail of this is set out in the book *The Shamanic Way of the Bee* (see Exhibit 1), Mr. Buxton being the putative author. He explains that induction into this group involved spending a number of days in darkness and this 'was introduced to' him as having the name DARKNESS VISIBLE, the latter being inspired by *Milton's Paradise Lost*, and the line: 'No light, but rather darkness visible'. Further reference to this experience appears in the book by Ross Heaven and Simon Buxton of the same name (Exhibit 1), in the second authors' preface (page xixff).

12. Mr. Buxton states that he has spent many years reflecting on how the ‘application of physical darkness’ could be used for healing and therapy outside the ‘Path of Pollen’ and discussed this with a number of individuals. He mentions specifically, Professor Stuart Harrop and Kenneth Smith. Professor Harrop states in a witness statement dated 15th May 2006 that he is an academic working at The University of Kent’s Anthropology Department and that he has known Mr. Buxton since 1996. He adds that Mr. Buxton informed him in 2001 that he intended to begin shamanic workshops under the name DARKNESS VISIBLE. He adds that he has received literature referring to the same originating from The Sacred Trust and associates the mark with that organisation.
13. Mr. Kenneth Smith, of Richmond, Virginia, USA, describes himself in his Statement dated 05/05/2006 as Communications Director for Institute for Therapeutic Discovery, and a teacher of ‘alternative modalities’ and writer under the *nom de plum*, or professional name, ‘Ken Eagle Feather’. He has known Mr. Buxton since 1995 and since that time has heard him speak of a body of work known as DARKNESS VISIBLE: ‘I understood that the distinguishing feature of this work involved taking people into a darkened room or blindfolding them’. There was mention of teaching a course on the same in the year 2001.
14. Mr. Buxton states that Mr. Heaven was third choice as co-teacher after Professor Harrop and Mr. Smith (neither of whom were able to commit) to teaching the course DARKNESS VISIBLE, which was ‘... to be organised, promoted and administered by The Sacred Trust’.
15. In this regard, Mr. Buxton refers to promotion of the course in appropriate magazines, on The Sacred Trust’s website and to those individuals on the Trust’s 8000 strong mailing list and 2000 email addresses. Though he does not mention a date for this promotion, enclosed in evidence are two archive bi-annual programmes produced by the Trust dated 2003 and 2004; advertisements for the training appear on pages 1 and 4 respectively. The course ‘Enlightenment through Ceremonial Darkness’ is offered, before the relevant date, ‘with Simon Buxton and Ross Heaven’, but through the auspices of The Sacred Trust (see Exhibits 2 and 3). It is clear from the application forms for the course – see page 20 of Exhibit 2 and page 16 of Exhibit 3 – that all monies accruing are to be paid to The Sacred Trust.
16. Mr. Buxton states that he is aware of no advertising on behalf of Mr. Heaven in relation to training courses, except that which appeared on his own (that is Mr. Heaven’s) website. Exhibit 4 is an alleged download from this site, but is undated and not in the usual format associated with the same. Mr. Heaven doubts the reliability of this document, but its content is, to some extent, verified by Ms. Ahsan in her witness statement dated 10th June 2006 (paragraph 5).
17. Mr. Buxton states that he and Mr. Heaven co-taught three DARKNESS VISIBLE seminars on 6th to 10th April 2003, 10th April 2004 and 26th to 30th May 2005. The first two accord with the dates in Exhibits 2 and 3. He adds that no other courses were offered or run before these by Mr. Heaven. He states that Mr. Heaven was not asked to teach a fourth course and his application for the mark was made, without informing him, shortly after this.
18. Finally, he states that there is no mention of the mark in suit in any of Mr. Heaven’s earlier books, such as, *The Journey to You* or *Spirit in the City* (copies of the latter are enclosed in the evidence from Mr. Heaven). The only mention of the mark by name appears in a later work *Vodou Shaman*, pages 83 to 87) which also mentions Mr. Buxton.

19. Other evidence in chief consists of a Witness Statement by a Ms. Lisa Tolland of Port Talbot, South Wales, who is a service practitioner, currently working for Barnardos children's charity. Ms. Tolland states that her first knowledge of 'darkness therapy' was via Mr. Heaven, at a seminar he conducted on 'cross cultural soul retrieval', where the basic principal behind it was described; however, Ms. Tolland adds that her first acquaintance with the name DARKNESS VISIBLE came later, after she had contacted Simon Buxton and the Sacred Trust and was sent a copy of the 2003 programme (Exhibit 2 to Mr. Buxton's statement dated 16th May 2006). She eventually attended the seminar conducted by Messrs. Buxton and Heaven on 6th to 10th April 2003.
20. Finally, there is a letter from the graphic design company engaged by The Sacred Trust to design the artwork for advertisements for DARKNESS VISIBLE seminars from 2003 to 2006.

The applicant's evidence

21. This resides in a statement by Mr. Ross Heaven dated June 15th 2006. Mr. Heaven states that he studies at University College Northampton for a combined degree in psychology, comparative religion/anthropology, sociology and philosophy. He learned of shamanism and practices of initiation and 'the positive effects of darkness and isolation on the human mind'. Mr. Heaven is thus claiming the he had some acquaintance with 'darkness' as therapy in the earlier 1980s.
22. He further claims that he has used 'darkness and silence, closed eye techniques, blindfolds and time spent in a darkened space' in workshops conducted by him from 1994, which were further developed such that, by 1995 through to 2001, the techniques involved longer periods of darkness. Later he states that he used the name DARKNESS VISIBLE as an appellation for these workshops and seminars, the mark being known to his students via the latter, 'mail shots' and e-mailings to approximately 4000 names.
23. There is no material supporting the latter assertions, though enclosed with Mr. Heaven's witness statement are statements from three of his students. These are by Ms. Tania Ahsan, one time editor of a magazine (July 2002 to 2006) called *Prediction* which is concerned with 'all aspects of spiritually' and by Donna Maree Waugh. (The disputed statement by Ms. Parmer is discussed above).
24. Ms. Ahsan states that the month she become editor of *Prediction*, she attended a workshop with Mr. Heaven in Brighton, which took place in a darkened room, in which all the exercises were conducted with eyes closed or blindfolded and involved '... practices which I understood to be called Darkness Visible'. Mr. Buxton was not involved. Ms. Ahsan adds that 'around this time' Mr. Heaven began writing articles for *Prediction* at her request and he subsequently wrote one 'about Darkness Visible'. No copy of this article is enclosed in evidence and no date for its publication is provided.
25. In his statement dated 16th October 2006 Mr. Buxton claims that the article referred to by Ms. Ahsan was actually printed in April 2003 called 'Are you afraid of the dark' and was penned by both himself and Mr. Heaven (see Exhibit 9B). He also states that he can find nothing on the premier Internet Archive site (<http://www.archive.org/>) which refers to DARKNESS VISIBLE workshops being offered in 2002. In terms of the latter assertion, I have no information on the extent to which this site is exhaustive and it is thus difficult to place much reliance on this finding.

26. In paragraph 5 of her statement, Ms. Ashan states that she has ‘acted as Mr. Heaven’s website designer since 2002 until the present’ and made changes to reflect the fact that Mr. Buxton and The Sacred Trust were included, and then were not, on that website in relation to the DARKNESS VISIBLE courses. However, no specific dates are provided as to when these changes took place or, indeed, are there examples of their content.
27. Ms. Ahsan confirms Mr. Heaven’s assertion that he showed her chapters of a book he was ghost writing for Mr. Buxton that later appeared in the *The Shamanic Way of the Bee*. She is convinced that Mr. Heaven is the author and that the book is fictional, the latter belief being based on her knowledge and experience – as a professional journalist and editor – in ‘spiritual’ subjects.
28. This assertion of Ms. Ahsan’s (Mr. Buxton refers to this in his statement dated 16th October 2006 at paragraph 11) does not sit well with the review of *Prediction Magazine* when the book was published. In the unnumbered opening pages of *The Shamanic Way of the Bee* it is praised as ‘Simon Buxton’s much awaited debut ...’. Ms. Ahsan was the editor of this magazine at the time and, apparently, the book was also elected *Prediction* ‘Book of the Month’.
29. Ms. Ahsan states that she attended a workshop in 2002 run by Mr. Heaven where the DARKNESS VISIBLE initiation was mentioned by other students as one they had attended. Ms. Ahsan goes on to state that she has attended other such courses herself conducted by Mr. Heaven, where Mr. Buxton was not present, one of these being filmed for television. These events are undated.
30. Ms. Ahsan points out the similarity of various passages that refer to enlightenment via darkness therapy in Mr. Heaven’s books published well in advance of the later book he co-authored with Mr. Buxton (which is called *Darkness Visible*, in evidence as Exhibit 1 to Mr. Buxton’s first statement) that also appear in the latter. She later states that she associates the name in suit with Mr. Heaven ‘for all the time I have known him’.
31. Ms. Waugh’s statement refers to her experiences of a seminar in August 2001 in which the mark was mentioned and also her attendance at a weekend undertaken in darkness and was called DARKNESS VISIBLE. Again, the ‘mindfolds’ and activities therewith are described; 15 other students were said to be present.
32. Mr. Heaven states that his book *The Journey to You*, first published in 2001, mentions such techniques. There is a fairly detailed description of this on pages 364 to 365. There are also references to the same in his book *Spirit in the City*, published in 2002 and in *Vodou Shaman*, published in 2003. His initiation into the Haitian Vodou tradition required a week spent in complete darkness, blindfolded. These themes are extended and evolved in the book *Darkness Visible*. Mr. Heaven also points out that his earlier work contains material relating to Shamanic techniques that take place in darkness that appears in the later co-authored work.
33. His recollection of events in relation to the circumstances of the use of the name in suit in conjunction with Mr. Buxton differs markedly from the latter’s depiction thereof. In particular, it is Mr. Buxton who approaches Mr. Heaven as a consequence of the formers familiarity with the work of the latter, suggesting that the Sacred Trust promote his darkness workshops. At this time, Mr. Buxton had no name for the latter and was informed by Mr. Heaven of the name that he had been using: DARKNESS VISIBLE.

34. Their professional relationship developed: they co-wrote the book *Darkness Visible* and conducted workshops under the same name in 2004 to 2005. Mr. Heaven also claims that he ghost wrote the book *The Shamanic Way of the Bee* for Mr. Buxton. Certainly he is not credited with authorship – though he claims that he expected this following the publication of *Darkness Visible* in joint names and states that the Acknowledgement on page ix of the *The Shamanic Way of the Bee*, where he is thanked ‘for his golden heart and poet’s quill’ is a reference to his authorship. Of the book *Darkness Visible* Mr. Heaven also states that he penned the vast majority of this composition, Mr. Buxton contributing fewer than 15 pages (see paragraph 20 of Mr. Heaven’s statement), his name only appearing ‘as a courtesy’. In support of this Mr. Heaven refers to a download from Amazon, the on-line bookshop, which refers to Mr. Buxton as ‘contributor’ not as a co-author (Exhibit 6). In a later statement, Mr. Buxton argues that this reference was made by an unknown unauthorised third party (see Mr. Buxton’s statement dated 16th October 1994 and Exhibit 17B).
35. Returning to the *The Shamanic Way of the Bee*, Mr. Heaven also states that this was written as a work of fiction, a fantasy, and places in evidence various pieces of material to bolster this contention (Exhibits 2 and 3: Exchanges on Internet Forum that refers to ‘The Path of Pollen’ as depicted in the book as a fraud; Exhibit 4: a download form the on-line encyclopaedia, Wikipedia, which labels the book as an Example of ‘Plastic Shamanism’, that is, of individuals who pass themselves off as spiritual leaders, but are ultimately motivated by personal gain; and Exhibit 5: various comments on the book by way of reviews on Amazon).
36. Mr. Heaven states in paragraph 19 of his statement that his relationship deteriorated after the publication of *The Shamanic Way of the Bee*; in particular: it was published as a work of non-fiction, his involvement in it was not mentioned and he never received any payment for the work (as promised). He adds ‘I had questions about Mr. Buxton’s integrity and was concerned for my reputation’.
37. Mr. Heaven further describes how their relationship broke down completely at the final course they ran together in 2005, claiming that Mr. Buxton lost control during conduct of the seminar and he reminded him that DARKNESS VISIBLE was his work and said that he was uncertain, in view of this behaviour, whether he wanted him to assist in the future. Mr. Heaven further asserted his rights when an article by a journalist working for the Observer newspaper, who had attended this final course, marginalised his contribution (Exhibit 12). The paper later published the following correction:
- ‘In the article below we said that the Darkness Visible course is run by the Sacred Trust. It is, in fact, the project of Simon Buxton and Ross Heaven ... and while Simon Buxton runs the Sacred Trust, Darkness Visible is a quite separate initiative’.
38. Mr. Heaven further states his concerns about the subsequent conduct of these courses by Mr. Buxton on safety grounds and adds that he informed the latter to desist from using the mark in an email sent after their final workshop together; he says: ‘I made clear that Darkness Visible was a name widely associated with me and requested that he stop using it’.
39. Mr. Heaven refers to the wide association of the name with himself in various articles in magazines and newspapers. These are included in evidence (Exhibits 13 to 20), and some have already been cited above. I have examined these as follows:

- Exhibit 13: This appears to be from Mr. Heaven's website, and is copyrighted 2006;
- Exhibit 14: An extract from a magazine called 'Tree of Life' which is dated 'Winter 2006' contains part of an article based in an interview with Mr. Heaven. There is mention of 'darkness therapy', but no mention of the mark in suit in relation to the latter; this appears to be a promotion of the book under the same name that Mr. Heaven co-authored with Mr. Buxton and, indeed, it is mentioned at the end of the article;
- Exhibit 15: An article that appeared in *Prediction* magazine in March 2006. It mentions retreats conducted under the mark and also the book of the same name;
- Exhibit 16: Another article; it mentions therapy sessions conducted under the name, but is undated and it is not clear where and when it appeared;
- Exhibit 17: Another download from the website 'AlternativeApproaches.com'. This is clearly a much earlier document (copyrighted 2002), but it does not mention darkness therapy in the developed sense it has been set out above and appears to be more about use of imagination as information, accessed by closing ones eyes. 'Darkness' is mentioned, but not in the form the parties have previously discussed – as a therapeutic tool – but only as one image amongst others that may communicate some form of truth. The mark DARKNESS VISIBLE is not mentioned at all.
- Exhibit 18: This appears to be another extract from Mr. Heaven's website, downloaded in 2006; it mentions DARKNESS VISIBLE course to be conducted in Canada in 2006;
- Exhibit 19: What appears to be an older article called 'Shamanic Healing Through Soul Retrieval'. Darkness therapy is not mentioned and neither is the mark in suit, except at the end of the article (which is about 'Shamanic Healing Through Soul Retrieval') where the book *Darkness Visible* is cited as to be published in 2005, and refers to Mr. Heaven's 'unique workshops in ceremonial darkness'. The date of this article is rather a puzzle. It is posited as copyrighted in 2002, but also refers to Mr. Heaven as having acted as consultant to feature films 'such as 2004's London Voodoo';
- Exhibit 20: A 'goggle' search conducted in 2006 on the word 'Shaman', which refers to DARKNESS VISIBLE retreats and to Mr. Heaven's website. This is dated well after the relevant date.

In my view, this evidence contributes little to any association the relevant public might make between Mr. Heaven before the date of the application in suit. Where the name is mentioned, the document concerned is dated well after that date; where there is a possible exception to this (Exhibit 19), the name is associated with book *Darkness Visible*.

The Parties Further Evidence

40. Leaving aside the issues surrounding the 'Parmer' witness statements made above, I feel it unnecessary to summarise all the evidence in the other remaining documents submitted in this case. In my view there is little that is useful in this material, that I have not already mentioned, which assist me in coming to a view on the one ground pleaded.

41. In particular, there is significant effort on behalf of Mr. Heaven to attribute ulterior motives to those who made witness statements on Mr. Buxton's behalf, relating to their personal or business circumstances that, he contends, limits the reliability of their evidence. In response to Mr. Heaven's assertions – which I will not go into – Mr. Buxton's witnesses seek, quite understandably, to establish their *bona fides* and the remaining exchanges consist of statement and counterstatement the detail of which do not impact one way or another on whether 'passing off' has occurred or not.
42. For his part, Mr. Buxton contends that the statements of Ms. Ahsan and Ms. Waugh were, in general, mistaken as to fact. In particular, he points out that all three of these former students and associates of Mr. Heaven's were 'in error' in asserting that they attended a DARKNESS VISIBLE workshop in 2002; the date is contradicted by three of Mr. Buxton's witnesses, who say they attended the same course and it was in 2003. It is to be noted that Mr. Buxton's witnesses outnumber those of Mr. Heaven.
43. In the case BRUTT HELICAL/Brutt Helical (BL O/372/06), acting as the Appointed Person, Richard Arnold QC referred to the well-known passage in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57 where Robert Goff LJ (as he then was) said:

'Speaking from own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the independent facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth'.

Mr. Arnold went on to state:

'Thus before addressing the conflicts of evidence the fact-finding tribunal should first consider what is common ground, what is asserted by one party and not contested by the other and *vice versa* and what is shown by the documentary evidence. Once these matters have been ascertained and put into chronological order, it is frequently much easier to resolve the remaining conflicts. In resolving such conflicts it is of assistance to consider which version of events is the more likely'.

44. Though it is not an unusual experience in dealing with evidence that emanates personal experience to find examples of inconsistency and contradiction, the extent that this occurs between the witnesses in this case is rather more stark than is usual. I do not consider that I have to base my findings on any particular statement or group of statements. In particular, without cross-examination of these witnesses it is difficult – and dangerous – to come to any considered conclusions that might lead to some sort of 'league table' as representative of their relative reliability. As a consequence, it seems to me that it is entirely sensible to rely on that within the various witness statements that are substantiated in some manner by supporting material evidence.

45. This must govern my approach to the claims of both Mr. Buxton and Mr. Heaven. Before their relationship broke down, these two gentlemen were effusive of the talents and integrity of each –

Mr. Buxton of Mr. Heaven in ‘Acknowledgements’ in *The Shamanic Way of the Bee*: ‘I wish to thank ... Ross Heaven for his golden heart and poet’s quill’;

Mr Heaven to Mr. Buxton, in the quoted reviews of the *The Shamanic Way of the Bee*: ‘Simon Buxton is a man with genuine miracles to impart’

It is clear that this case challenges the views they once held of each others’ probity and integrity. It certainly appears that each have made assertions that do not sit well with certain other parts of the evidence they have submitted.

46. For example, Mr. Heaven refers to the fictional nature of the *The Shamanic Way of the Bee*, but he writes in the Forward of that book: ‘As fantastic as it all sounds, I will vouch for every word of it. I have known Simon Buxton for many years and have had the pleasure and privilege of teaching with him on occasion. I have also been his student and know him as a fine teacher, an intelligent and ethical man, and a person of complete integrity’. Mr. Buxton also points out that Mr. Heaven was active in defending the veracity of his claims in relation to the truth of the events in *The Shamanic Way of the Bee*, writing a ‘robust defence’ as a response, on his behalf, to a highly critical editorial in an American magazine called *Shaman’s Drum* (see his statement dated 16th October 2006, paragraph 1 and Exhibit 3B). Many of the comments in this email – dated 29th November 2004 – do not sit well with Mr. Heaven’s later claim that he ghost wrote the book as a work of fantasy. For example,

I also wrote the foreword to Simon,s book, which I could do with full trust in Simon,s integrity. He also shared large sections of his book with me during its writing and supplied a great deal of background evidence which he has not covered in the book itself because of the private nature of his tradition. I have absolutely no doubts about the veracity of everything he has written in his book.

47. Mr. Heaven states that he sent this letter out of loyalty to Mr. Buxton and later regretted it, sending a retraction. A copy of the latter is not enclosed in evidence and I am thus unsighted as to its date and contents.
48. Whatever Mr. Heaven may contend now, there is a profound and direct contradiction between his stance as indicated in Exhibit 3B and that as set out in his statements in this matter. In terms of defending his honesty Mr. Heaven is caught between ‘a rock and a hard place’: either he spoke the truth when he supported the events as set out in *The Shamanic Way of the Bee*, and thus his statements in this case are a misrepresentation of the truth, or he has ‘come clean’ now, for whatever reason, but was not doing so when the book was published.
49. More generally, it is notable that Mr. Heaven places in evidence little secondary material that supports his assertions of fact. For instance, the draft of the work that (in his contention) resulted in the *The Shamanic Way of the Bee* as it developed and progressed would have been useful evidence of his authorship of this book. And there is no material – such as examples of advertising or ‘flyers’ – in relation to the seminars he stated as being organised by him alone under the name in suit or, indeed, any statement as to the number of these events, their location and their participants – that would support his contentions. In paragraphs 29ff of his statement

dated 15th June 2006 Mr. Heaven contrasts his evidence of ownership of the mark with that of Mr. Buxton's, stating that the latter's evidence does not include any reference to a wider audience in the form of articles, presentations, interviews and so on. This may be the case, but neither does Mr. Heaven's evidence before the relevant date – I have examined the material he has provided in this regard in detail above.

50. As for Mr. Buxton, the evidence submitted by Mr. Heaven may be taken to suggest that doubt exists in the 'spiritual' community as to the veracity of the events described in the *Shamanic Way of the Bee*. The extent of this is hard to gauge as the material included in evidence is not always clearly autonomous, but there does seem to be some clearly independent comment to that effect mentioned in evidence (in particular, the article in *Shaman's Drum*, though not, itself, submitted in this case). In Mr. Buxton's defence, he has not resiled from his initial view of the events described in the *Shamanic Way of the Bee* and, indeed, they are now advertised as part of his teachings and training. Students of his claim to follow the 'Path of Pollen'.
51. Nevertheless, Mr. Buxton's account of events is not always internally consistent with the evidence. For example, he attributes the techniques marketed under the name DARKNESS VISIBLE to the 'Path of Pollen' which are, to some extent, set out in the *The Shamanic Way of the Bee*. This does not sit well with the content of that book. There is no mention of the use of 'darkness' as a means to spiritual enlightenment in this volume: the only application of the word is that of its more customary guise as a negative reference, for example, to ignorance (e.g. 'Perhaps they can save another child, lost in alone in a world of darkness', page 9). And the experience he describes in the book relating to the 'oversized, six-sided dog basket' (page 62ff) appears not to have taken place in darkness at all:
 - Page 64: 'In the *half-light* I would discover a jug of cool water ... A pattern of behaviour began to emerge of rising in *half-light* ... And then one evening – was it *dusk or dawn* ...';
 - Page 66: 'At the time of my next meal, I carefully inspected the small grains that *seemed to shine* with every hue of the colour spectrum'; and
 - Page 67: 'The ever-present *twilight* of my enclosed monastic life within the hermits cell continued'.(From *The Shamanic Way of the Bee*, emphasis added)
52. Further, though Mr. Buxton claims to have used and developed the use of darkness as a tool over some years, the application of the same appears to be more evolved in Mr. Heaven's earlier work than in Mr. Buxton's. There are well developed references to 'darkness therapy' in both *The Journey to You* and *Spirit in the City*, books penned by Mr. Heaven, which can be unfavourably compared to its perfunctory mention in *The Shamanic Way of the Bee*.
53. Nevertheless, as to the use of darkness as a means to spiritual enlightenment, it is clear that neither party claims to have invented this. They both would rather assert that they are 'tapping into' what are said to be very ancient practices. And who did what first in this sense – including whoever initially proposed the name DARKNESS VISIBLE – is irrelevant to the legal basis of the case. The latter turns on a finding as to the ownership of any goodwill under the name as of the date of the application. And it is to this issue I now wish to turn.

DECISION

54. The following section of the Act apply:

‘5.(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

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

(b) ... ,

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

Goodwill and the law

55. The common law right of passing off is clearly set out by Geoffrey Hobbs QC, acting as the Appointed Person, in *Wild Child* [1998] 14 RPC, 455:

‘A helpful summary of the element of an action for passing off can be found in *Halsbury’s Laws of England* 4th Edition Vol 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in *Reckitt & Colman Products Ltd v Borden Inc* [1990] RPC 341 and *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] ACT 731 is (with footnotes omitted) as follows:

“(a) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(b) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and

(c) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.”

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

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

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

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

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

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

56. The first matter that I have to decide is the material date. It is well established that the material date for passing-off is the date of the behaviour complained of (see *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* [1981] RPC 429 and *Inter Lotto (UK) Ltd v Camelot Group PLC* [2004] RPC 8 and 9). S. 5(4)(a) is derived from article 4(4)(b) of First Council Directive 89/104 of December 21, 1998 which states:

‘... rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark’.

Consequently, the material date cannot be after the date of application; in this case it is the date of application: 25th June 2005.

57. Having established this I wish to say one or two words about the law of passing off. It is to be noted that this rule of law does not protect trade marks *per se*. In *Burberrys v J. C. Cording & Co. Ltd* (1909) 26 RPC 693, for example, at 701: it is stated ‘..apart from the law of trade marks [i.e. that which protects register trade names], no one can claim monopoly rights in the use of a word or name’. Rather, passing off protects the goodwill in a business, for which a mark of trade is a token, or cipher or, as an American case puts it, goodwill is ‘.. a property right, for the protection of which a trademark is an instrumentality’ (*Prestonettes Inc. v Coty*, 264 US 359 at 368 (1924)). Goodwill is *labelled* by the mark, the mark is not the goodwill.

58. The latter has been variously defined. Most famously in Lord Macnaghten's '...the attractive force which brings in custom' (*IRC v Muller & Co's Margarine Ltd.* [1901] AC 217 at 223) but also as 'Nothing more than the probability, that the old customers will resort to the old place' (as per Lord Eldon in *Cruttwell v Lye*, (1810) 17 Ves 335 at 346).
59. This sets out the nature of goodwill. The opponent must first show that, on the balance of probabilities, there existed a protectable goodwill under the name DARKNESS VISIBLE at the date of the application and that this goodwill was not the possession of the applicant. Having done so, the opponent must also demonstrate use of the name by the applicant will result in a 'misrepresentation'. For example, if the applicant used the name as a trade name in association with the services for which he has applied (class 41: *Arranging and conducting workshops*; and Class 45: *Spiritual and lifestyle counselling*) there would be confusion as to the originator of the services amongst the relevant public. Once this is established, it follows that there would be damage to his goodwill as a consequence. An example of the latter would be diversion of trade: that is, customers would be lost: they would attend Mr. Heaven's seminars as opposed to Mr. Buxton's.
60. This, I hope, explains to the parties the fundamental nature of what is required to be proved in this case, as set out in the case law cited in *Wild Child* cited above. It is obvious from the latter and in my added explanation, but worth emphasising nonetheless, that goodwill is the consequence of a business activity, that is, of trade in the marketplace.

Findings of Fact

61. After this exposition of the nature of the law, it is worth saying something about how it is proved. In this regard, the statement of Lord Oliver in *Reckitt & Colman* is pertinent: 'it has been observed more than once' in relation to the law of passing off '... that the questions which arise are, in general, questions of fact'. And it is perhaps useful to set out an inventory of corroborated fact in this matter, as gleaned from the evidence of the parties, that are directly relevant to the issue of passing off:
 - Simon Buxton is the sole proprietor of The Sacred Trust (See Exhibit 3; page 1; where he is described as 'Founder/Director');
 - The book *Darkness Visible*, published in the same year of the application, is in the name of both parties to this dispute. Within the book, both also share, equally, involvement in darkness therapy;
 - The course 'Enlightenment through Ceremonial Darkness' is offered, before the relevant date, 'with Simon Buxton and Ross Heaven'. It is promoted in very close association with both parties, whose names significantly figure in all advertising associated with the course including CVs and prominent photographs;
 - Before the relevant date, there is no material evidence that either Mr. Buxton or Mr. Heaven used the name DARKNESS VISIBLE in relation to the retreats without mention of the other;

- None of Mr. Buxton’s witnesses state that darkness therapy courses were promoted and conducted by Mr. Buxton alone under the name in suit before the relevant date;
- Before the relevant date the retreats were promoted through the auspices of The Sacred Trust (see Exhibits 2 and 3 to Mr. Buxton’s first statement); it is clear from the application form for the course – see page 20 of Exhibit 2 and page 16 of Exhibit 3 – that all monies accruing are to be paid to this organisation;
- Though ‘The Trust’ is clearly the originator of a range of ‘spiritual’ workshops and retreats, it also promotes and facilitates courses on behalf of others; for instance on page 6 of Exhibit 3 the course taught by a ‘Sandra Ingerman’ called MEDICINE FOR THE EARTH. It is clear that this course has an existence outside that of The Sacred Trust: the accompanying text states: ‘... this five day training ... will combine two of the key MEDICINE FOR THE EARTH trainings taught in the United States’. The monies for this course are also collected by the Trust but – one might reasonably infer – on behalf of Ms. Ingerman;
- Mr. Buxton and The Sacred Trust, before the relevant date, taught darkness therapy without reference to the mark in suit (see the inside cover page of Exhibit 2 to his declaration dated 16th May 2003). The course SHAMANIC HEALING WITH THE SACRED TRUST is offered, an element of which is:

● **Shamanic Darkness Therapy** Darkness therapy is a potent shamanic-based tool for deepening ones connection with life & spirit and seeking clarity on life issues in the form of a vision quest to the core of the self. The therapy consist of a pre-determined number of days and nights spent in total darkness, with daily guidance from Simon Buxton. See www.sacredtrust.org for an article on shamanic darkness work.

It is quite clear that ‘darkness work’ has an existence of its own outside that of the name DARKNESS VISIBLE;

- There is no evidence from the parties as to the turnover under the name, or even as to the numbers of individuals who attended the training.

62. In relation to this last point, it is to be noted that the law of passing-off does not protect a trivial goodwill (*Hart v Relentless Records Ltd* [2003] FSR 36). Nevertheless, it does protect a limited goodwill (see for instance *Stannard v Reay* [1967] FSR 140, *Teleworks v Telework Group* [2002] RPC 27 *Stacey v 2020 Communications* [1991] FSR 49) and this is normally established by evidence of trade under the sign. Though not exclusively: Professor Annand, sitting as the Appointed Person, in *Loaded* BL O/191/02, accepted that proof of goodwill could be accomplished by other means and in the judgment in *Phones4U Ltd v Phone4u.co.uk Ltd* [2007] RPC 5 Jacob LJ warns against applying a formulaic approach. This was commented upon by Richard Arnold QC, sitting as the Appointed Person, in *Aggregate Industries UK Limited v Cooper Clark Group Limited* BL O/178/06:

‘15 As to point (ii), counsel for the applicant accepted that *REEF* does not establish that a claim for passing off will fail in the absence of trade evidence to support it. As Jacob LJ has recently explained in *Phones4U Ltd v Phone4u.co.uk Ltd* [2006] EWCA Civ 244 at [5], what a passing off claimant needs to do is to establish that he has built up a goodwill which

the defendant is invading by a misrepresentation and accordingly what matters is what the claimant did to create a goodwill. Jacob LJ returned to this point at [33], saying that showing what had actually been done to publicise the name or badge relied upon was the key evidence and that in the case in question expert evidence was not required to infer from the proved use that the name must have been known to a substantial section of the public. As Jacob LJ explained, the test for establishing goodwill for the purposes of passing off is not the same as the test for establishing that a descriptive mark has acquired a distinctive character for the purposes of registration.’

63. I have set out certain of the facts in relation to this above and the list is not long, but this is not unusual in cases before the Office. Pumfrey J in *South Cone Inc v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 stated:

‘27 There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a *prima facie* case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods.

Limited trade can give rise to a protectable goodwill and I am prepared to make a finding that, though the evidence of use is not profound, there is enough to show that there existed a goodwill in the name DARKNESS VISIBLE as of the relevant date. My reasons for this are as follows:

- the significant number of witnesses on both sides that attest to their attendance these courses (on this point, at least, they agree);
- the promotional material as set out above;
- the published book *Darkness Visible*; and
- the nature of the relevant public.

64. In relation to the last point I also note the comment of Ms. Ahsan in the copy of her letter dated 11th November 2006 (Exhibit 4 to Mr. Heaven's submissions received by the Office on 5th December 2006): ‘As you know the mind, body and spirit community is very incestuous and everybody knows everybody else.’ Though Ms. Ahsan was referring, in context, to ‘malicious gossip’ it is clear that little trade would be sufficient, amongst such a community, to establish a reputation and goodwill under a mark.
65. A finding of the existence of goodwill is only part of the issue. The key question in this case is to whom did the goodwill belong when the application was made to register the mark DARKNESS VISIBLE? In my view, it seems to me that it must have been associated with both Mr. Buxton and Mr. Heaven and, possibly, with the Sacred Trust also. There are several reasons for this finding.
66. First, in the period running up to the application date, in association with the mark, the names of both parties appear together when they appear at all, in conjunction with that of The Sacred Trust. Mr. Heaven states of Mr. Buxton that he does not ‘... offer evidence for use or promotion of the name Darkness Visible prior to his assistance on my workshops’, and apart from the witness statements, this is so. But the comment also equally applies to Mr. Heaven. It is perhaps worth

stating that it is irrelevant who first thought of the name or who first discussed it, and the body of work it labels, with friends and colleagues (see the witness statement of Professor Stuart Harrop dated 15th May 2006); what is important is the exposure of the name to customers. As Laddie J stated in: *Associated Newspapers Ltd v. Express Newspapers* [2003] F.S.R. 51 ‘The law of passing off is concerned with what happens in the market place’.

67. Next, there is evidence that lends support to the view that both Mr. Buxton and Mr. Heaven, despite their assertions now, saw the project as something they provided together to their customers. For example, in the book *Darkness Visible* both seem to share ‘ownership’ of the courses:

‘For a number of years, *we* have run Darkness Visible retreats ...’ page 23;
‘In *our* Darkness Visible retreats ...’ pages 30, 39 and 106; and
‘One of *our* retreat participants ...’ page 61.

The correction to the article published in the Observer newspaper on 12th June 2005 by the journalist Ms. Weitz (see Exhibit 15B) also underlines the apparent perception of the parties, at the time, as to the collaborative nature of the undertaking:

‘In the Article below we said that the Darkness Visible course is run by the Sacred Trust. It is, in fact, the project of Simon Buxton and Ross Heaven ... while Simon Buxton runs the Sacred Trust, Darkness Visible is a quite separate initiative’.

This was posited very close to the application date and came from Mr. Heaven. One may assume that it was representative of his understanding when he did so. In commenting on the correction Mr. Buxton, even at a late date (his statement is dated 16th October 2006 – see paragraph 12), appears to agree with the sentiment that Darkness Visible was a joint venture.

68. Third, the names of Mr. Buxton and Mr. Heaven figure prominently in all the literature associated with the promotion of the courses. It is hardly surprising, given the emphasis that this field of work places on individual teachers and spiritual leaders (‘Shaman’), that the names of those individuals would be promoted – and become associated – with certain teachings and, indeed the names that brand them.
69. In my view, the facts as set out above, also tend to support a finding that goodwill was shared between the parties. It is also possible that The Sacred Trust had some share in this as well, as an organiser of the course. This is certainly the first impression gained by Ms. Weitz (see Exhibit 15B) who, as a professional journalist, unconnected with either of the parties, stated that ‘The Darkness Visible course is run by The Sacred Trust Shamanic group’. Nevertheless, she also saw the project as a combined project: ‘Simon Buxton and Ross Heaven [sic] ... run the course together ...’. Goodwill, in general, is associated with the provider of the services in question – and in this case, the providers of the services are Mr. Buxton, Mr. Heaven and, possibly, The Sacred Trust.

70. Such a finding seems to me an inevitable consequence of an analysis of the facts as set out above, together with an answer to the question ‘Of whom is the mark distinctive?’ As a matter of fact, as of the relevant date, the mark was distinctive of the combined efforts of both Mr. Buxton’s and Mr. Heaven’s: each has developed – and therefore possessed – a goodwill in the name for the conduct of workshops and in spiritual and lifestyle counselling, under the indicium DARKNESS VISIBLE.
71. It is to be noted that ‘... there is no requirement in the law of passing off that the claimant's reputation has to be exclusive. There have been a number of cases where a claimant has succeeded even though he was not the only trader with a reputation in the mark’ (*Associated Newspapers Ltd v. Express Newspapers* [2003] F.S.R. 51). Such cases have in the past been exemplified in the so called ‘drinks cases’ where all those entitled to use, for instance, the name *Champagne* (see *Bollinger v. Costa Brava* [1969] R.P.C. 16) may take action against any trespass of their collective goodwill in the name. It is to be noted that these groups refer to ‘a definite and ascertainable class’ that may not be economically connected (e.g. all champagne producers). Clearly, such a class would have great difficulty in acting against each other: though each would be able to demonstrate that they have a goodwill in the name in suit, they will struggle to show that the another member of the class, by using the sign, was misrepresenting themselves to the relevant public (see *The Law of Passing Off* by Christopher Wadlow, paragraph 2.82). This is illustrated in the case *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5, where Jacob LJ referred to the old case of *Dent v Turpin* (1861) 2 J&H 139:

‘Father Dent had two clock shops, one in the City, the other in the West End. He bequeathed one to each son – which resulted in two clock businesses each called Dent. Neither could stop the other; each could stop a third party (a villain rather appropriately named Turpin) from using “Dent” for such a business. A member of the public who only knew of one of the two businesses would assume that the other was part of it – he would be deceived. Yet passing off would not lie for one son against the other because of the positive right of the other business. However it would lie against the third party usurper’.

(Though deception has occurred, there is no misrepresentation as both have a stake in the ‘positive right’ – the goodwill – and neither could be the purveyor of the deception).

72. Nevertheless, it is possible for one in the definite and ascertainable class to trespass on the goodwill of another or other within the class – as each class member has a goodwill of its own, partially attributable to the reputation under the name itself and partly to its own efforts – but the circumstances of this would be very much dependant on the individual facts. For example, in *Sir Robert McAlpine Ltd v Alfred McAlpine Plc* [2004] R.P.C. 36 Robert McAlpine (RM) and Alfred McAlpine (AM) ran construction companies under these names respectively. Following a rebranding exercise, AM altered its name simply to ‘McAlpine’. The court found, *inter alia*, that the shared rights to goodwill could be damaged by a co-owner arrogating to himself the use of the name in circumstances where that amounted to a misrepresentation. In this case, the use of the name ‘McAlpine’ alone was capable of being a reference to RM, and AM was not entitled to represent itself as if it were the only company known by that name.

73. I have given some thought as to whether the parties were in a 'partnership' and have decided that this was not the case. The latter is defined as a 'contract between two or more persons who agree to pool talent and/or money and share profits or losses'. As the conditions of a partnership are governed by contract they do not need to be recorded in a written document, but may be defined verbally (*parol*) and/or *implied* by the intentions of the parties.
74. Though 'partnerships by parol' are not uncommon (see *Lindley & Banks on Partnership* eighteenth edition, paragraph 7-23), there is nothing here to suggest that the parties considered this to be the case. In particular, there is a complete absence of the usual supporting evidence associated with the same, such as joint bank accounts and the like (see *Lindley & Banks on Partnership*, paragraph 7.20 *et. seq.*). In my view it seems to me that the relationship between them is much closer to that represented by the situation in *Dent* as set out above. Both Mr. Buxton and Mr. Heaven shared the goodwill under the name as a consequence of working together under the name DARKNESS VISIBLE. This may, in part, explain the contradictory witness evidence as to which of these two gentlemen were associated with the latter.
75. It is clear that both of them considered that name referred to a particular body of work that they shared together, for a period of time, but it is also clear that it is not uncommon for teachers in this field to collaborate on certain undertakings whilst continuing their own projects at the same time: Mr. Buxton and Mr. Heaven certainly did so.
76. It seems to me, therefore, that the DARKNESS VISIBLE teachings were of a cooperative nature and the goodwill shared between the parties to this case is severable and separate. It follows from *Dent*, to paraphrase the conclusion of the judge in that case that passing off would not lie for one against the other because of the positive right of the other in the name. As a consequence, Mr. Heaven, as of the application date of 25th June 2005 would not have fallen foul of the law of passing off as he shared in the goodwill the parties had generated under the name up to that date. The opposition fails.

COSTS

77. I see no reason to make a costs award in excess of the usual scale, that is, £1000. This sum is to be paid to Mr. Heaven 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 Day of 11th June 2007.

**Dr W J Trott
Principal Hearing Officer
For the Registrar**