

O-146-09

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO 1470618  
IN THE NAME OF THE SILVER SPRING MINERAL WATER CO LTD  
IN RESPECT OF THE FOLLOWING MARK:**

**SPRING-ORA**

**IN CLASS 32**

**AND**

**AN APPLICATION FOR REVOCATION ON THE GROUNDS OF NON-USE  
UNDER NO 83131  
BY THE COCA-COLA COMPANY**

## TRADE MARKS ACT 1994

**In the matter of registration no. 1470618  
in the name of The Silver Spring Mineral Water Co Ltd**

and

**An application for revocation (no.83131) on the grounds of non-use  
by The Coca-Cola Company**

### **Background**

1. Registration 1470618 is for the trade mark SPRING-ORA. It completed its registration procedure on 15 April 1994 and is registered for:

Orange-flavoured non-alcoholic beverages; preparations for making such beverages; all included in Class 32.

2. On 24 January 2008 The Coca-Cola Company ("*Coca*") applied for revocation under sections 46(1)(a) & (b) of the Trade Marks Act 1994 ("the Act"). It says that as a result of investigations, it has reason to believe that the proprietor has never used the mark in relation to the goods for which it is registered. The mark's proprietor, The Silver Spring Mineral Water Co Ltd ("*Silver*"), deny the allegation of non-use.

3. Both sides filed evidence<sup>1</sup>. Rather than summarise the evidence here, I will refer to it, to the extent that it is relevant to the issues before me, when dealing with the substance of the case. The matter came to be heard on 30 April 2009. At the hearing, *Coca* were represented by Mr David Stone of Simmonds & Simmonds. *Silver* were represented by Mr Ross Manaton of Bromhead Johnson.

### **The law**

4. The relevant parts of section 46 of the Act read:

"46.-(1) The registration of a trade mark may be revoked on any of the following grounds –

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) .....

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<sup>1</sup> *Coca's* evidence come from Mr Kieran Heneghan (a trade mark attorney of Simmonds and Simmonds), *Silver's* evidence come from Mr James Ludlow (a director of *Silver*).

(d) .....

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

5. Section 100 of the Act is also relevant, this reads:

“**100.** If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

6. At the hearing Mr Stone also referred to other legal texts that set out the underlying rationale for revocation e.g., in the recitals of the Directive<sup>2</sup> where it is stated:

“9) In order to reduce the total number of trade marks registered and protected in the Community and, consequently, the number of conflicts which arise between them, it is essential to require that registered trade marks must actually be used or, if not used, be subject to revocation. It is necessary to provide that a trade mark cannot be invalidated on the basis of the existence of a non-used earlier trade mark, while the Member States should remain free to apply the same principle in respect of the registration of a trade mark or to provide that a trade mark may not be successfully invoked in infringement proceedings if it is established as a result of a plea that the trade mark could be revoked. In all these cases it is up to the Member States to establish the applicable rules of procedure.”

### **The leading authorities**

7. The leading authorities on the principles to be applied in determining whether there has been genuine use of a mark are the judgments of the European Court of Justice (“ECJ”) in *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 (“*Ansul*”) and *Laboratoire de la Mer Trade Marks* [2006] F.S.R. 5 (“*La Mer*”). From these judgments, the following points are of particular importance:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be ‘on the market’ and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);
- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);
- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);

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<sup>2</sup> Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks which, itself, codifies (due to amendment) Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks.

- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*La Mer*, paragraphs 32 and 48);
- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*La Mer*, paragraph 34);
- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*La Mer*, paragraph 44).

### **The relevant five year periods**

8. The application for revocation is based on sections 46(1)(a) & 46(1)(b) of the Act. Coca seeks revocation with effect from either 17 April 1999 (section 46(1)(a)) or from 24 January 2008 (section 46(1)(b)). The relevant periods are:

**Section 46(1)(a)** – The registration procedure for *Silver's* mark was completed on 15 April 1994. Therefore, the five year period begins on 16 April 1994 and ends on 15 April 1999. Revocation could potentially be granted (if the application succeeds) with effect from 16 April 1999, but it is only sought from 17 April 1999.

**Section 46(1)(b)** – Revocation is sought with effect from 24 January 2008. Therefore, the five year period begins on 24 January 2003 and ends on 23 January 2008.

### **The mark used and the nature of its use**

9. Despite Mr Heneghan's evidence (for *Coca*) that a search of *Silver's* web-site for the terms SPRING-ORA and SPRING ORA revealed no results, Mr Ludlow (for *Silver*) gives evidence of the actual use that has been made of the mark. He states that use has been made continuously since 1955, he also provides a label that was used in the 1950s, 1960s & 1970s (Exhibit JL1) and a label that was used in the 1980s (Exhibit JL2). However, as these labels were used in periods prior to the relevant periods here, they are of no real assistance other than to set out the historical context of use. The labels in JL1 & JL2 prominently feature the words SPRING-ORA (JL1) and SPRING ORA (JL2).

10. In relation to the relevant periods, Mr Ludlow provides a label in JL3 that he states was used from before the beginning of the first relevant period until towards the end of 2007. The JL3 label was then replaced by a label shown in JL4. This means that the JL3 label was used throughout the first period and for the vast majority (all but a few months) of the second. The JL3 label is, therefore, the most crucial piece of evidence showing use of the mark. The label in JL3 is depicted below:



11. In relation to sales, Mr Ludlow provides UK sales information with reference to litres sold (the goods were either one or two litre bottles) and also turnover. The sales were to retail customers (I take this to mean sales to retailers). The figures are:

Period	UK sales (Litres)	UK turnover (£)
2003	856,272	133,031
2004	610,416	96,469
2005	814,236	118,762
2006	1,090,908	166,686
2007	601,824	98,781
<b>Total</b>	<b>3,973,656 litres</b>	<b>£613,779</b>

12. Mr Heneghan’s evidence highlights that there are no supporting invoices, advertising or promotional materials or other independent evidence. That is quite correct. Nevertheless, Mr Ludlow has given factual evidence relating to sales, their quantum and the labels used on the goods sold. This evidence has not been challenged in the sense described by Mr Richard Arnold QC (sitting as the Appointed Person) in the *Extreme* case (BL O/161/07) nor has Mr Ludlow been called for cross-examination on his factual evidence. In the circumstances, I am prepared to accept that the evidence for what it is, namely, that sales to the extent set out took place under the respective labels (predominantly the JL3 label).

13. In terms of the use of the mark on the JL3 label, I note that the hyphen (as it appears in the mark as registered - SPRING-ORA) is missing from this form of use (SPRING ORA). However, *Silver* claim in its evidence that this form of use can support the mark as registered. I also note from Mr Stone’s skeleton argument that he says<sup>3</sup> “This is not a case about a hyphen”. I agree that this is not a case about a hyphen. Section 46(2) provides that use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the

<sup>3</sup> Paragraph 3 of the skeleton argument

form in which it was registered. The use as presented certainly falls within this category.

### **Token use**

14. *Coca* regard any use that has been made as being merely token use. In his skeleton argument Mr Stone argues that *Silver* have:

“...attempted to preserve the rights conferred by the registration of the Mark by cynically including SPRING-ORA or SPRING ORA on the label of its orangeade product.”

15. Token use cannot constitute genuine use. In *Ansul*, the ECJ stated:

“Genuine use” must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark.”

16. It is clear from the evidence that the degree of prominence given to SPRING-ORA or SPRING ORA has reduced over time. In JL1 & 2 it was the primary sign used on the label whereas in JL3 & JL4 it has a reduced significance. It is also against this background that *Coca* relies, namely that whilst the trade mark was previously used as a distinguishing sign, it no longer does so, but it still used it on the label in order to preserve its rights. *Coca* also note that the trade mark, in view of Mr Heneghen’s search referred to in his evidence, does not appear to be used on *Silver*’s web-site. It should be noted that Mr Stone’s skeleton argument contained further “evidence” of *Silver*’s own web-site, but I decline to consider this because it was not filed in evidence.

17. Does all this mean that the use is token? An allegation of tokenism or sham use is a serious matter. Mr Stone referred to the “cynical” inclusion of the trade mark on the JL3 & JL4 labels. The allegation, therefore, goes as much to motive and intent as it does to the impact of the used trade mark in the course of trade. The only evidence relied upon is the reduced significance of SPRING-ORA on the labels together with the fact that Mr Heneghan found no results for SRPING-ORA on *Silver*’s web-site. None of this supports the allegation. It is just as plausible, if not more plausible, that *Silver* has simply adopted a different marketing strategy but is still applying its SPRING-ORA trade marks to the goods as a distinguishing sign. There is certainly nothing in the evidence to persuade me that the use has made merely to preserve the rights in the trade mark registration, *Coca*’s claim is nothing more than speculation.

### **Essential function of a trade mark**

18. *Coca*’s argument on this is put in two ways. Firstly, that the use of the trade mark on the label is so small that it will not perform the essential distinguishing function of a trade mark; the position is worsened, according to *Coca*, because the goods in question are often offered for sale in a refrigerated state (behind glass) and they could also be covered in droplets of water. Secondly, even if the use is noticed, it will be regarded as indicating the spring (the Ora spring) from which the water used

in the goods has been sourced rather than distinguishing the goods of one trader from those of others

19. The second argument is, in my view, fanciful. I am not aware (nor informed through evidence) of any spring that is called Ora. Whilst the consumer could, arguably, regard it as a hypothetical spring (or a spring that they do not know) and, therefore, will only take the message I am asked to believe, the presentation SPRING ORA ORANGEADE does not lend itself to this conclusion. The frieze-like presentation, in which the words encircle the top of the label in JL3, do not alter this view. If the words are noticed, they will be regarded as a distinguishing sign of trade origin.

20. In relation to the first argument, I accept that if a mark is used in such a minor way so that it would never be noticed, such use should not be regarded as genuine because it would not be performing the essential function of a trade mark (see *Ansul* paragraph 36); to find otherwise would fail to reflect commercial reality and how consumers encounter marks in the marketplace<sup>4</sup>. However, the words SPRING ORA are clearly present on the label in JL3. They are not hidden nor are they *de minimus*. Looking at the label as whole, the most dominant feature is the word ORANGE, however, given this word's descriptive qualities this would not be seen as a distinguishing sign. We are then left (other than basic descriptive indications) with the words SILVER SPRING (and device) and the words SPRING ORA ORANGEADE repeated around the top of the label. I have no doubt that the SILVER SPRING sign will clearly be noticed and probably as the primary sign of origin. Whilst the SPRING ORA element is presented in text a little smaller than SILVER SPRING, it is not significantly smaller and is also presented in a reasonably close proximity to it. All of this leads me to conclude that a reasonably observant consumer (the average consumer is considered to be this<sup>5</sup>) will notice the SPRING ORA trade mark and will regard it as a sign performing the essential distinguishing function of a trade mark. I have considered the behind glass argument, but this does not alter my view given that this does not strike me as the most typical way of selling the goods nor is there any evidence to show that this is how *Silver* predominantly sell its goods.

21. In coming to the above view I have taken care not to substitute my own detailed analysis of the label for the impact that it will have on a consumer in the course of trade. I appreciate that I am required to look and examine the label for use of a particular trade mark whereas the consumer of the goods will have no such requirement. As expressed above, my view is that the trade mark will be noticed by the consumer even though it is not the dominant element on the label.

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<sup>4</sup> By way of analogy, the role of the consumer in determining the elements that make up the distinctive character of a mark was explained by the Court of Appeal in *Bud and Budweiser Budbräu Trade Marks* [2003] R.P.C. 25

<sup>5</sup> See *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77

## Use warranted in the economic sector concerned

22. In *Le Mer*, the ECJ stated:

“When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial use of the mark is real in the course of trade, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark. When it serves a real commercial purpose, in the circumstances cited above, even minimal use of the mark or use by only a single importer in the Member State concerned can be sufficient to establish genuine use within the meaning of the Directive.”

23. There is also a two-pronged attack from *Coca* here. It says that the use is not warranted in the economic sector to create or maintain a share in the relevant market due to both low volume of sales and also due to the nature of the use made.

24. In relation to sales, Mr Stone referred in his skeleton argument to the CFI's<sup>6</sup> judgment in *Hipovit*<sup>7</sup> case where it was held that OHIM had not erred when it found low turnover and sales, in absolute terms, of a medium or low-priced product supported the conclusion that use of the trade mark in question was not genuine. However, I must of course have full regard to the judgments of the ECJ in *Ansul* and *La Mer* that sales need not be quantitatively significant (*Ansul* paragraph 39) and that reference to the maintenance or creation of a share in the market does not mean a significant market share (*La Mer* paragraph 44). There is also interdependence between the various factors (*Ansul* paragraph 38); further, each case must, of course, be determined on its own facts.

25. The sales figures provided cover only the second period of alleged non-use. However, this is not fatal because if genuine is proven in the second period then the first period is not relevant given the provisions (relating to post-period commencement or resumption) in section 46(3) of the Act. The sales (in the second period) are very consistent. There are no significant peaks or troughs and the use has been continuous. Mr Stone made reference to *Silver's* operating capacity and that production of goods sold under the mark was a very small part of this capacity. This information is not only inadmissible (it was not filed in evidence) but it is also irrelevant. The fact that an undertaking may have the capacity to produce more goods under the mark does not equate to what was produced being not warranted in the economic sector. Reference was also made at the hearing to the total value of the UK non-alcoholic beverages market. Whilst there is no evidence that sets this into context, it is safe to assume that the market is a large one. However, even in its worst performing year (2007) for litre sales almost 602,000 litres of the goods were sold. The evidence shows that sales are made in either 1 litre or 2 litre bottles, even if they were all 2 litre bottles this still equates to some 300,000 bottles being sold. Whilst this may not be to the standards of the leading market players, I have a great

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<sup>6</sup> Court of First Instance of the European Communities

<sup>7</sup> Case T-334/01

deal of difficulty in saying that sales on this level were not warranted in the economic sector and they would certainly, in my view, be sufficient to have created or maintained a share in the market.

26. The other line of argument relates to the nature of use. Although a similar line of argument to that discussed in paragraph 20 above, the argument here is slightly different, namely that a trader in the highly competitive and developed market for the goods in question would need to use a mark much more prominently than *Silver* has done if it wanted to create or maintain a market share. Some “evidence” of other trader’s marks was filed in Mr Stone’s skeleton argument, this will be ignored as, again, it should have been filed in evidence. The argument, in any event, is not persuasive. Having found already that the mark will not go unnoticed, it is difficult to see how *Coca* can succeed. Whilst I agree that a primary and dominant trade mark will be the most memorable or striking part of a label, this does not equate to marks having less significance from also creating a share in the relevant market with reference to that sign. Mr Manaton argued that whilst the manner of use in JL3 may represent a different marketing strategy (giving more focus to the nature of the goods in order to draw consumers in) to the leading players in the market, this did not mean that the use was not warranted in the economic sector. I agree, in my view, and returning again to the JL3 label, both the SILVER SPRING mark and the SPRING ORA trade mark will be seen as distinguishing signs and will create or maintain a market share with reference to those signs.

27. Even applying an interdependency analysis, i.e. the low (in *Coca*’s view) turnover figures coupled with the less dominant nature of use equating to use that is not warranted in the economic sector to create or maintain a share in the market, my view is that *Coca*’s argument fails. In my view, and for a combination of the reasons already given, the use is sufficient and is warranted in the economic sector concerned.

### **Summary of findings on genuine use**

28. I have found that the use set out in JL3 represents genuine use in the second period of alleged non-use. Whilst I may not be able to say the same in relation to the first period (because of lack of turnover details etc) this is not an issue given the provisions of section 46(3).

### **A fair specification**

29. This is not, however, the end of it because I am left to consider what would be a fair specification to reflect the use that has been made. In determining this, I take into account the helpful guidance provided in a number of cases. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 Aldous LJ stated at paragraph 31:

“Pumfrey J. in *Decon* suggested that the court’s task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view the task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use.”

30. In *Reckitt Benckiser (España), SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-126/03 the CFI stated:

“42 The Court observes that the purpose of the requirement that the earlier mark must have been put to genuine use is to limit the likelihood of conflict between two marks by protecting only trade marks which have actually been used, in so far as there is no sound economic reason for them not having been used. That interpretation is borne out by the ninth recital in the preamble to Regulation No 40/94, which expressly refers to that objective (see, to that effect, *Silk Cocoon*, cited at paragraph 27 above, paragraph 38). However, the purpose of Article 43(2) and (3) of Regulation No 40/94 is not to assess commercial success or to review the economic strategy of an undertaking, nor is it to restrict trade-mark protection to the case where large-scale commercial use has been made of the marks (Case T-334/01 *MFE Mariefelde v OHIM – Vétoquinol (HIPOVITON)* [2004] ECR II-0000, paragraph 32, and Case T-203/02 *Sunrider v OHIM – Espadafor Caba (VITAFRUIT)* [2004] ECR II-0000, paragraph 38).

43 Therefore, the objective pursued by the requirement is not so much to determine precisely the extent of the protection afforded to the earlier trade mark by reference to the actual goods or services using the mark at a given time as to ensure more generally that the earlier mark was actually used for the goods or services in respect of which it was registered.

44 With that in mind, it is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established.

45 It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories relating to which the goods or services for which the trade mark has actually been used actually belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

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53 First, although the last sentence of Article 43(2) of Regulation No 40/94 is indeed intended to prevent artificial conflicts between an earlier trade mark and a mark for which registration is sought, it must also be observed that the pursuit of that legitimate objective must not result in an unjustified limitation on the scope of the protection conferred by the earlier trade mark where the goods or services to which the registration relates represent, as in this instance, a sufficiently restricted category."

31. In *Animal Trade Mark* [2004] FSR 19 Jacob J held:

"20 The reason for bringing the public perception in this way is because it is the public which uses and relies upon trade marks. I do not think there is anything technical about this: the consumer is not expected to think in a pernicky way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. Thus, for instance, if there has only been use for threeholed razor blades imported from Venezuela (Mr T.A. Blanco White's brilliant and memorable example of a narrow specification) "three-holed razor blades imported from Venezuela" is an accurate description of the goods. But it is not one which an average consumer would pick for trade mark purposes. He would surely say "razor blades" or just "razors". Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods--are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made."

32. The evidence shows that only one product has been sold, namely, "sparkling orangeade". The specification as registered covers both orange flavoured non-

alcoholic beverages and preparations for making such beverages. *Coca* argue that the former term should be restricted and the latter removed.

33. In relation to “orange flavoured non-alcoholic beverages”, this strikes me as an already quite limited specification within which the used goods fall. Indeed, the term strikes me as a quite normal way of describing the goods. Whilst the term may also include non-sparkling products such as orange flavoured waters, I consider it too pernickety to require that the term be qualified as such.

34. In relation to preparations for making beverages, *Silver’s* argument that its product may be mixed to form other beverages is, in my view, missing the point. The goods are not sold as a preparation for making non-alcoholic beverages, it is sold as a ready-made beverage. Preparations for making beverage would more naturally be powders or syrups that are mixed with water to form a beverage; this is not the case with the goods here. Taking all this into account, I consider that a fair description of the goods, that is neither pernickety nor overly broad, would be:

“Orange-flavoured non-alcoholic beverages; all included in Class 32.”

### **Conclusion**

35. The application for revocation is partially successful. *Silver’s* registration is hereby revoked under the provisions of section 46(6)(b) of the Act with effect from 17 April 1999 other than for:

“Orange-flavoured non-alcoholic beverages; all included in Class 32.”

### **Costs**

36. *Silver* made a request for costs on an indemnity basis. I refused this request at the hearing because even without making a decision on the substance of the case, I could see nothing exceptional or abusive (even if the details of the *Spring’s* use made was made known to *Coca* before it made its application) in the making of the application. Costs will, therefore, be awarded from the Registrar’s published scale.

37. Although *Coca* was partially successful (in relation to preparations for making beverages) its success is in relation to what seems to me to be a side issue. *Silver* has, therefore, been most successful and is entitled to a contribution towards its costs (I have, however, reduced the costs by a small amount given the partial revocation). I hereby order The Coca-Cola Company to pay The Silver Spring Mineral Water Co Ltd the sum of £1375. This sum is calculated as follows:

Considering application for revocation	£175
Filing counterstatement	£250
Considering <i>Coca’s</i> evidence	£200
Filing evidence	£400
Preparation for, and attendance at, the hearing	£350
Total	£1375

38. The above sum should 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 26<sup>th</sup> day of May 2009**

**Oliver Morris  
For the Registrar  
The Comptroller-General**