

O-367-13

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2588566

BY

**ADAMS FOOD INGREDIENTS LIMITED
TO REGISTER THE TRADE MARK**

LEAN WHEY

IN CLASSES 05, 29, 30 and 32

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO 103041

BY

GLAXO GROUP LIMITED

BACKGROUND

1) On 20 July 2011 Adams Food Ingredients Limited ('Adams') filed an application to register the trade mark 'LEAN WHEY' in respect of the following specification of goods:

Class 5: Analgesic preparations in the form of health supplements; anti-oxidant food supplements; chemical preparations for pharmaceutical purposes; collagen based medicated supplements for food; dietary and nutritional supplements, preparations and substances; drinks predominantly of vitamins or minerals; drugs; elixirs [pharmaceutical preparations]; esters for pharmaceutical purposes; fibre supplements [non-nutritive]; food and dietary supplements for sports and performance enhancement; food substitutes (for nutritional use); food supplements for dietetic use; food supplements, consisting of vitamins, amino acids, minerals and trace elements; food supplements made principally of vitamins or minerals; healthcare products for persons with special dietary requirements; meal replacement and dietary supplement drink mixes; medicated food supplements; medicated isotonic drinks; milk minerals; mineral food supplements; mineral nutritional supplements; mineral salts for baths; mineral salts for medical use; nutritional drink mix for use as a meal replacement; pharmaceutical preparations containing amino acids; pharmaceutical preparations containing enzymes; pharmaceutical tonic preparations with a coffee and tea base; powdered dietary food concentrates for use in a weight reduction programme for medical purposes; preparations consisting of minerals; preparations of vitamins; slimming aids for medical use; stimulants made of minerals; stimulants made of vitamins; vitamins and vitamin preparations; vitamin and mineral supplements.

Class 29: Dried whey products; dairy products for foods; food protein for human consumption; food preparations having a base of milk; food substitutes (for nutritional use); foodstuffs in the form of snack foods; grapeseed oil; milk powder for nutritional purposes; milk protein; non-alcoholic milk shakes [milk predominating] containing vegetable extracts; protein based, nutrient-dense snack bars; protein preparations for food; protein foods for dietetic purposes [other than adapted for medical purposes]; vegetable extracts for food; whey; whey protein.

Class 30: Amylaceous products for food; beverages made from tea, coffee, cocoa, drinking chocolate, and substitutes there for; carbohydrate-based nutritional drink mix for use as a meal replacement; carbohydrate based preparations for foods; dietary supplements principally of royal jelly [other than for medical use]; drinks made from tea, coffee or cocoa; farinaceous products for food for human consumption; foodstuffs in the form of snack foods; glucose for food; malt products for food; maltodextrins for nutritional use [other than medical]; non-medicated tea products; non-medicated confectionery for use as part of a calorie controlled diet; polymers of glucose for dietetic use [other than by persons with a dietary disorder]; pregelatinized

starches for food [other than specially made for persons with dietary disorders]; powdered sugar for preparing isotonic beverages; slimming products [food], other than for medical use; tea extracts; wheat germ [other than a dietary supplement

Class 32: *Beverages containing added minerals; beverages enriched with added vitamins; beverages for use as aids to slimming; isotonic beverages; non-alcoholic beverages with tea flavour; non-medicated mineral drinks; whey beverages; vegetable extracts [beverages].*

2) The application was published in the Trade Marks Journal on 25 November 2011 and notice of opposition was subsequently filed by Glaxo Group Limited ('Glaxo') on 21 February 2012. The opposition is based upon Sections 3(1)(a), (b), (c) and (d) of the Trade Marks Act 1994 ('the Act') and is directed against all of the goods listed in Adams' specification.

3) Glaxo frames its objections in the following terms:

3(1)(a)

The sign is incapable of distinguishing goods containing fat reduced whey of the Applicant from those of other undertakings.

3(1)(b)

The sign consists of the descriptive words 'lean whey'. These terms are wholly descriptive of a whey-based good which has a reduced fat content which aids in slimming and weight-loss.

3(1)(c)

The sign consists of the ordinary dictionary words 'lean' and 'whey'. The term 'lean' is defined in the Oxford Online Dictionary as an adjective meaning "(of a person or animal), thin, especially healthily so; having no superfluous fat".

The term whey is defined in the Oxford Online Dictionary as "the watery part of milk that remains after the formation of curds".

Therefore the sign has a purely descriptive meaning which is commonly used to describe the kind of whey goods, i.e. whey that is lean, having little or no fat content.

3(1)(d)

The sign is used by the Applicant and other undertakings to describe whey and whey protein goods which contain little or no fat.

4) On 12 March 2012, Adams filed a counterstatement in which it denies all of the grounds raised by Glaxo. It claims that the opposition is 'frivolous and vexatious' and further states, inter alia:

All of the arguments put forward by the opponent were considered during examination of the application and dismissed. If the allegations are not made out in evidence the Applicant will seek and order for punitive costs.

...

The fact that the words "LEAN" and "WHEY" taken as separate elements have a specific meaning in the English Language is irrelevant; when used in combination they are entirely fanciful.

...

Combining the word "LEAN" with the word "WHEY" is syntactically unusual and is not one that has become customary in the current language or in the bona fide and established practice of the relevant trade. The term LEAN WHEY is not a recognised phrase in any dictionary.

...

The Applicant will submit evidence to show use of the trade mark LEAN WHEY in the United Kingdom and demonstrate that the mark has, in the relevant market, become synonymous with them in relation to the specified goods and therefore has the power to distinguish their goods from those of other traders.

5) In the event, only Glaxo filed evidence in the proceedings. Adams did however file short submissions. Neither party requested to be heard; only Glaxo filed submissions in lieu of a hearing. I make this decision after conducting a thorough review of the papers and giving full consideration to all submissions.

Opponent's evidence

6) The opponent's evidence consists of a witness statement dated 15 May 2012 in the name of Emma Sophia Stopford, Vice President and Trade Mark Counsel of GlaxoSmithKline Services Unlimited.

7) At paragraph 3, Ms Stopford provides an extract from www.dictionary.com showing various dictionary definitions of the words 'lean' and 'whey' and example sentences showing use of 'lean'. The word 'lean' is defined, inter alia, as:

lean

adjective

- 1) (of persons or animals) without much flesh or fat; not plump or fat; thin: *lean cattle.*
- 2) (of edible meat) containing little or no fat.
- 3) lacking in richness, fullness, quantity, etc; poor: *a lean diet; lean years.*

.....

noun

9) the part of flesh that consist of muscle rather than fat.

8) One of the example sentences states *'It cooks quickly and is a lean source of protein'*.

9) The word 'whey' is defined as:

Whey

noun- a milk serum, separating as liquid from the curd after coagulation, as in cheese making.

10) Exhibit ESS1 is a print out from www.visualthesaurus.com showing various meanings of the word 'lean', including as an adjective, to mean *'thin' (lacking excess flesh)* and *'skimpy' (containing little excess)*.

11) At paragraph 6 of her witness statement, Ms Stopford refers to Exhibit ESS2 which she states shows articles printed from the Internet showing use of the word 'lean' in common parlance in the UK as an adjective in relation to products which contain reduced, little or no fat, or as an aid in achieving or maintaining a lean body. Exhibit ESS2 shows:

- An article from www.dailymail.co.uk dated 24 July 2010 entitled **'The great 'lean' mince swindle: There's LESS fat in standard meat, says study'**. The article highlights that certain mince sold in supermarkets which is labelled as 'lean' or 'extra lean' may actually contain more fat than standard mince.
- An extract from www.Minimins.com showing a forum discussion. A question posted by a consumer on 25 June 2012 (after the filing date of the contested application) asks other users to explain what is meant by the term 'Lean Meat'. One response states 'Lean meat is meat without any fat or skin'.
- An extract from www.uk-muscle.co.uk showing a forum discussion about 'Lean Beef Mince' in response to a question posted on 27 May 2009.
- An article from www.eblex.org.uk entitled **""No evidence"" that eating lean red meat in moderation has negative health effects'**. The article goes on to discuss the health benefits or otherwise of lean red meat. The date of the article is unclear. The page was printed on 11 May 2012.
- An extract from uk.answers.yahoo.com (UK & Ireland) showing a forum discussion about 'good lean protein foods for vegetarians'. One user states 'Egg whites and whey protein are great if you're not strictly vegan'. Another user states 'Whey protein powders, nuts and organic peanut butter are all great sources'. The discussion appears to date from May 2011.

- An article from www.PropaneFitness.com dated 5 January 2011 entitled '**Why you should cook your own meals**'. A paragraph headed 'Begin with a lean protein source' states 'start with a good, lean protein source and base the meal around it'. It goes on to refer to chicken and turkey and then states 'This doesn't mean you can't use other protein sources like eggs, less lean meats, fish and dairy....'. It appears to be a UK site since it shows prices in pounds sterling.
- An article from www.menshealth.com A date of 08 May 2012 is visible on the article however Ms Stopford states that it dates from 27 May 2009. It is entitled '**THE 3 RULES OF LEAN EATING – The simplest diet ever for getting a healthy, lean body**'. The article states 'Follow these guidelines and you'll quickly find that when it comes to eating for a healthy, lean body, everything else is just details'.
- An article from uk.reuters.com. The article refers to lean beef helping to achieve lowered cholesterol in a similar manner to fruits and vegetables. It is dated 2 January 2012.
- An article from www.subityourarticle.com dated 12 April 2011 which is entitled '**Understand A Lean Body Diet-And Don't Waste Time**'. It states, inter alia, 'A lean body diet is essential for gaining and maintaining lean muscle mass' and 'The best protein is that which is low in fat and this is obtained in lean protein foods'. It goes on to list good sources of protein such as seafood, white meat, dairy products and beans.
- Print outs from www.bizrate.co.uk showing various nutritional supplements for sale such as 'Kinetica Lean Gain', 'Kinetica Whey Protein' and 'Detour Lean Muscle Bars- Product details: High quality whey'. There are also links present to other UK websites such as www.puritans.co.uk entitled 'Whey Protein Online- Buy 1 Get 1 Free On All Products'. The pages were printed on 26 April 2012.

12) At paragraph 9 of her witness statement, Ms Stopford refers to Exhibit ESS3 which she states shows examples of a selection of whey products printed from the Internet and an extract from a website entitled "What is Whey?" Exhibit ESS3 shows:

- An extract from www.whatiswhey.com printed on 11 May 2012. It states, inter alia, the following:

"Whey comes as a by-product of making cheese. When cream is processed while making cheese, it separates out into two parts-the curd portion is used further in making the cheese, while the leftovers are called whey. This whey leftover can be used in a number of ways, including making other kinds of cheese, but what you are most likely interested in is the previously mentioned whey protein.

The whey happens to be very high in protein. When exercising, and especially during weight training, an important part of fuelling and rebuilding muscle is to be sure you can consume plenty of protein.

Since it is not always easy to find healthy forms of protein-eating a steak after a workout is probably not the best plan-whey is a very popular source for relatively healthy protein.

...

Protein shakes are one of the easiest methods of consuming whey protein.”

- Extracts from www.maximuscle.com and www.thehealthbay.com showing a variety of products for sale containing whey protein such as ‘Promax’- ‘Britains best selling protein whey powder’, ‘Promax Drink’ and ‘Promax Breakfast Oats’. The ‘Promax’ shake is claimed to be ‘**The UK’s No.1 whey protein shake to support lean muscle growth, strength and recovery**’. These were printed on 11 May 2012. Prices of goods are shown in pounds sterling.
- A print out showing results of a search conducted on www.google.co.uk for the words *lean whey protein powder* on 11 May 2012. The results show, inter alia, the following:

lean whey protein powder

Search About 6,040 results (0.21 seconds)

Your location: London - Change Sort b

Everything **Myprotein® Whey Protein | myprotein.com**
www.myprotein.com/Whey-Protein 11,871 seller reviews
The UK's Lowest Prices Guaranteed. **Whey Protein** To Meet Your Goals.

Images Our Best Selling Protein Shakes - Best Selling Impact Whey £12.99 - Our Ultimate True Whey Protein £30.99

Maps

Videos **5lb Whey Protein £23.99 - Save 32% Plus Free Shaker**
www.discount-supplements.co.uk/Whey - 2,201 seller reviews
Buy your Favorites Now.

News

Shopping Quality Whey Protein From £19.99 - Optimum Health Ultimate Whey £24.99 - 5kg Nutrisport 90+ Prote Xtra Whey - £34.99

More **Whey Protein Supplements | naturesbest.co.uk**
www.naturesbest.co.uk/Whey-Protein
naturesbest.co.uk is rated 630 reviews
Easy to digest, excellent mix of amino acids - £16.95 / 908g UK-Made

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Checkout
Free shipping
New Items



BSN Lean Dessert Banana Cream Meal Replacement Whey Protein Powder ...
 BSN Lean Dessert Banana Cream Pud 1.39lb
 Add to Shopping List



BSN Lean Dessert Chocolate Coconut Candy Meal Replacement Whey ...
 BSN Lean Dessert Choc Coconut 1.39lb
 Add to Shopping List



BSB Lean Dessert Banana Nut Bread Meal Replacement Whey Protein ...
 BSN Lean Dessert Banana Nut Bread 1.39lb
 Add to Shopping List



Hench Nutrition Pro Active Whey Protein Powder 5lb / 2.25kg (Toffee)
 Hench Pro Active **Whey Protein** has been designed with one thing in mind; to build **lean**, hard muscle that will transform your body. Its carefully ...
 Add to Shopping List



2 X Maximuscle Promax Strawberry Whey Protein Powder 908
 Maximuscle Promax Strawberry **Whey Protein Powder** 908 g UK's No.1 **whey protein** shake to support **lean** muscle growth, strength and recovery.
 Promax ...
 Add to Shopping List



Dymatize Elite Whey Protein Isolate 2.2kg - Chocolate
 Dymatize Elite **Whey Protein Isolate** is a high quality **Protein Powder**, Bodybuilding and Sports Nutrition Supplement. With each and every serving ...

13) At paragraph 10 of her witness statement, Ms Stopford refers to Exhibit ESS4 which she states shows articles from the Internet showing use, as a customary term, of the words 'lean whey' in common parlance as an adjective and noun to designate whey and whey protein products having a reduced fat content. Exhibit ESS4 shows:

- An extract from www.getsupplements.co.uk showing a page 'as it appeared on 21 April 2012' with the heading '**Lean Whey Protein Supplements**' below which is a paragraph stating, inter alia, the following:

"Lean whey protein is an essential supplement used to grow lean muscle mass. Whether you workout on a recreational basis, lean whey protein can help with muscle building, recovery and repair....Lean whey protein shakes also have less calories than mass protein drinks so are a perfect supplement for people looking at weight management or dropping a few body fat percentages..."

- An extract from www.proteinforwomen.co.uk, printed on 26 April 2012, advertising the product 'CEL Supplements Lab Series Lean Whey with Promotone'. Below the advertisement, the page states, inter alia, the following:

"Working alongside a calorie controlled diet Lean Whey is ideal for the calorie conscious athlete...Lean Whey has no added sugars, dextrose or maltodextrin."

- An extract from www.celsupplements.com , printed on 26 April 2012, advertising the product 'Lean Whey Protein With Promo-Tone IKG'. The 'Product Description' states, inter alia, the following:

“CEL Lean Whey Protein Working and alongside a calorie controlled diet is ideal for the athlete seeking to build and sculpt Lean Muscle via the delivery of CEL Supplements Promo-Tone....Lean Whey has no added sugars, dextrose.....”


14) At paragraph 10 of her witness statement, Ms Stopford states that it is her belief that the two products referred to above which are advertised on www.proteinforwomen.co.uk and www.celsupplements.com are manufactured by the applicant in these proceedings (or an entity related to the applicant) since the latter website states, in its terms and conditions, that CEL and the CEL logo mark are registered trade marks of Adams Food Ingredients Ltd. A print out of the relevant page of terms and conditions is present at Exhibit ESS5.

15) The remainder of Exhibit ESS4 shows:

- An extract from www.therightwhey.co.uk , printed on 26 April 2012, advertising a product which is not clearly visible on the print out but is referred to as 'Lean Whey- A new great tasting low calorie high quality whey protein shake.....It mixes easily, tastes great and can be used in conjunction with a balanced diet to maintain a lean healthy body.'
- An extract from www.uk-muscle.co.uk showing a forum question posted by a user on 12 July 2011 under the heading 'usn ultra lean whey' which states, inter alia, the following:

“...just wondering anyone used usn ultra lean whey? If yes would you say its better than their normal whey regarding lean gains/fat loss?...”

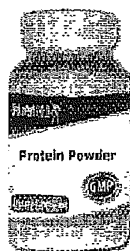
- An advertisement on www.nutriaid.co.uk , printed on 26 April 2012,

showing a 'Protein Powder' for sale. The mark  is present at the top of the webpage. The advert, is shown below:

lean whey protein powder

[You are at Home](#)

[Shop for lean whey protein powder](#)




lean whey protein powder

lean whey protein powder – Great OFFERS on Best High Quality tasty Protein Powder manufactured in UK at a GMP certified facility using only premium quality ingredients. This proven product is manufactured in the UK at GMP certified facility using only premium quality ingredients.

Price: £14.99 [More Information »](#)

[Review this product](#)

Merchant	Logo	Product Name	Price	Shop Now
NutriAid UK		lean whey protein powder	£14.99	SHOP NOW

- An extract from www.maximuscle.com showing user comments posted on 5 January 2011 about a product named 'Promax Extreme' which states inter alia, the following:

"...it provides lean whey protein with almost zero amounts of carbohydrates and fats..."

- Print outs showing results of a search conducted on www.google.co.uk for the words "lean whey" on 26 April 2012. The search results shows, inter alia, the following:

CEL Supplements Lean-Whey 1.1kg with PromoTone - Physique

www.physique-iq.com/?option...1...

CEL Supplements Lab Series **Lean Whey** 1.1 kg with Promotone - At last a g well designed **lean whey** product with additional slimming support.

Lean Protein | Lean Muscle | Lean Whey Protein | Protein Shak

www.getsupplements.co.uk/browse-type/lean-protein

Lean whey protein is an essential supplement used to grow lean muscle ma Whether you workout on a recreational or professional basis, **lean whey** prot

CEL Supplements Lab Series Lean Whey with Promotone 1.1kg

www.proteinforwomen.co.uk/index.php?page...

CEL Supplements Lab Series **Lean Whey** 1.1kg with Promotone. A complete meal alternative for slimming and dieters, fortified with fibre, green tea ...

lean whey | A2 Pump (ArgiLean) | Alcalean, 500mg | Amphetamine

www.powerbody.co.uk/search/lean-whey

A2 Pump Product Details:100% Arginine Ethyl Ester Hydrochloridel- Increase Pumps- Increase Vascularity- Increase Muscle HardnessA2-PUMP is an ...

- A further search result entitled 'Sports Nutrition Europe Anabolic Dessert Whey Protein' from sportsnutritioneurope.co.uk states 'When you're in need of a lean whey protein supplementation, SNE's Anabolic Dessert is the ultimate source of long-lasting, low calorie satisfaction...'

16) That concludes my summary of the evidence insofar as I consider it necessary.

DECISION

The law

Section 3 of the Act provides:

3. - (1) *The following shall not be registered -*
 - (a) *signs which do not satisfy the requirements of section 1(1),*
 - (b) *trade marks which are devoid of any distinctive character,*
 - (c) *trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose,*

value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

17) For its part, Section 1(1) provides:

1. - (1) In this Act a “trade mark” means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

The average consumer

18) The applicant's specification covers a broad range of food and drink, nutritional supplements and pharmaceutical preparations. I would expect the average consumer of these goods to be the general public and, where the goods have specific nutritional benefits, those members of the general public who are particularly health conscious. The goods are likely to vary in price. On the whole, the general public will pay a reasonable degree of attention to the purchase of the goods. However, where the goods are purchased for a specific dietary requirement, or for medicinal purposes, the level of attention may be somewhat higher whereas in relation to goods that may be a quick impulse purchase such as 'foodstuffs in the form of snackfoods', the level of attention is likely to be lower. Further, in relation to certain of the goods in class 05 such as 'drugs' and 'chemical preparations for pharmaceutical purposes' I would expect the average consumer to also consist of health professionals such as pharmacists. A reasonably high degree of attention is likely to be paid to the purchase of such goods to ensure they are fit for purpose.

Section 3(1)(a)

19) Section 3(1)(a) of the Act, by virtue of Section 1(1), requires a two leg test. The first leg of that test requires that the trade mark must be capable of being represented graphically; the second leg requires that it must be capable of distinguishing the goods of the applicant from those of other undertakings.

20) Glaxo's objections are only directed towards the second leg of the test. It states that 'the sign is incapable of distinguishing goods containing fat-reduced whey of the Applicant from those of other undertakings'. In this regard, I note the comments of the Court of Justice of the European Union ('CJEU') in *Koninklijke Philips Electronics NV v Remington Consumer Products Ltd*, Case C-299/99, where it stated:

36. *It is true that Article 3(1)(a) of the Directive provides that signs which cannot constitute a trade mark are to be refused registration or if registered are liable to be declared invalid.*

37. *However, it is clear from the wording of Article 3(1)(a) and the structure of the Directive that that provision is intended essentially to exclude from registration signs which are not generally capable of being a trade mark and thus cannot be represented graphically and/or are not capable of distinguishing the goods or services of one undertaking from those of other undertakings.*

38. *Accordingly, Article 3(1)(a) of the Directive, like the rule laid down by Article 3(1)(b), (c) and (d), precludes the registration of signs or indications which do not meet one of the two conditions imposed by Article 2 of the Directive, that is to say, the condition requiring such signs to be capable of distinguishing the goods or services of one undertaking from those of other undertakings.*

39. *It follows that there is no class of marks having a distinctive character by their nature or by the use made of them which is not capable of distinguishing goods or services within the meaning of Article 2 of the Directive.*

40. *In the light of those considerations, the answer to the first question must be that there is no category of marks which is not excluded from registration by Article 3(1)(b), (c) and (d) and Article 3(3) of the Directive which is none the less excluded from registration by Article 3(1)(a) thereof on the ground that such marks are incapable of distinguishing the goods of the proprietor of the mark from those of other undertakings.*

21) It is clear that, in order to fall foul of Section 3(1)(a) of the Act, Adams' mark must be completely incapable of distinguishing its goods from those of other traders no matter what use has been made of it. To my mind, this is a high threshold. There is nothing in the trade mark LEAN WHEY which makes it so incapable. The objection under Section 3(1)(a) is not well founded and is dismissed.

Section 3(1)(c)

22) I now consider it appropriate to turn to the objection raised under Section 3(1)(c) of the Act.

23) The proviso to Section 3(1) of the Act provides that, if a trader can demonstrate that, through the use made of its mark, it has become sufficiently distinctive so that it serves as an indication of origin in the minds of the relevant public or a significant proportion thereof (see *Windsurfing Chiemsee*, Case C-108/97), registration may be granted. However, as Adams has not filed any evidence in these proceedings, I have only the prima facie case to consider.

24) In *Agencja Wydawnicza Technopol sp. Z o. O. V OHIM* [2011] ETMR 34, the CJEU stated:

36. In examining that argument, due account must be taken of the objective pursued by art. 7(1)(c) of Regulation 40/94. Each of the grounds for refusal

listed in art.7(1) must be interpreted in the light of the general interest underlying it (see, inter alia, Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-456/01 P & C-457/01 P) [2004] E.C.R. I-5089; [2004] E.T.M.R. 87 at [45], and Lego Juris A/S v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-48/09 P) [2010] E.T.M.R. 63 at [43]).

37 The general interest underlying art.7(1)(c) of Regulation 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, Wrigley [2004] E.T.M.R. 9 at [31] and the case law cited).

38 With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of art.7(1)(c) of Regulation 40/94, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (Wrigley [2004] E.T.M.R. 9 at [32]; Campina Melkunie [2004] E.T.M.R. 58 at [38]; and the order of February 5, 2010 in Mergel v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) (C-80/09 P), not yet reported, para.37).

39 By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber (C-108/97 & C-109/97) [1999] E.C.R. I-2779; [1999] E.T.M.R. 585 at [35], and Koninklijke KPN Nederland NV v Benelux-Merkenbureau (C-363/99) [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [58]). It is, furthermore, irrelevant whether there are other, more usual, signs than *693 that at issue for designating the same characteristics of the goods or services referred to in the application for registration (Koninklijke KPN Nederland [2004] E.T.M.R. 57 at [57]).

40 It follows from the foregoing that the application of art.7(1)(c) of Regulation 40/94 does not require the sign at issue to be the usual means of designation. Paragraph 37 of Procter & Gamble [2002] E.T.M.R. 3, which is relied upon by Technopol and which uses the terms “no different from the usual way of designating the relevant goods or services or their characteristics”, cannot therefore be understood as defining a condition for refusing to register a sign as a Community trade mark.

25) In Campina Melkunie BV and Benelux-Merkenbureau, Case C-265/00, it further stated:

39. *As a general rule, the mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics within the meaning of Article 3(1)(c) of the Directive even if the combination creates a neologism. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.*

26) In *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04, it stated:

24. *In fact, to assess whether a national trade mark is devoid of distinctive character or is descriptive of the goods or services in respect of which its registration is sought, it is necessary to take into account the perception of the relevant parties, that is to say in trade and or amongst average consumers of the said goods or services, reasonably well-informed and reasonably observant and circumspect, in the territory in respect of which registration is applied for (see Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 29; Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 77; and Case C-218/01 *Henkel* [2004] ECR I-1725, paragraph 50).*

27) In *Ford Motor Co v OHIM*, Case T- 67/07, it stated:

there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics

28) There are two strands to Glaxo's objection under Section 3(1)(c). The first is that the individual words 'LEAN' and 'WHEY' have specific meanings (as identified the evidence summary above) which, when combined together in the manner in the opposed mark, serve to act as 'a purely descriptive meaning which is commonly used to describe the kind of whey goods i.e. whey that is lean, having little or no fat content'. The second strand, which was not made clear in the notice of opposition but which emerges in Glaxo's evidence and submissions, is that the mark describes the intended purpose of 'goods [which] support or aid the consumer in achieving or maintaining a lean body'.

29) I do not agree with the second strand of the opponent's argument. Whilst I note that the evidence indicates that goods containing whey may be used 'For lean muscle growth', I must assess the mark which is before me. The mark is 'LEAN WHEY'. 'LEAN' is acting as a qualifier to the term 'WHEY'. It is not referring to the body nor do I consider that it would be perceived as such. I therefore see no basis for concluding that the mark 'LEAN WHEY' would send a descriptive message of the intended purpose of the goods to the effect that they would aid the consumer in achieving a lean body. This line of argument is dismissed.

30) I now turn to the first strand of Glaxo's objection. In doing so, I will first consider the separate meaning of the words 'LEAN' and 'WHEY', as evidenced by the dictionary definitions provided by Glaxo, before considering the message which the mark, as a whole, is likely to portray to the average consumer of the goods at issue.

31) 'LEAN' (an adjective) is used to describe animals, persons or edible meat without much flesh or fat. The evidence clearly illustrates use in the latter sense from a number of UK websites which refer, for example, to 'lean red meat', 'the great lean mince swindle'.

32) 'WHEY' (a noun) denotes the liquid which separates from milk during the process of cheese making (to leave the curds).

33) It is clear that the word 'LEAN' is (and was at the relevant date) commonly used to describe meat which is low in fat and the average consumer would be aware of such use, with the result that they would view it as merely descriptive if used on, or in relation to, meat or goods containing meat. However, 'WHEY' is not meat; it is a substance which is derived from milk. Accordingly, the crux of the issue of whether the application falls foul of Section 3(1)(c) lies in whether the word 'LEAN' may be used in a wider context beyond meat goods, such that it may also be used in trade, and perceived by the average consumer, as a means of describing whey (or goods containing whey) which is (are) low in fat.

34) The opponent's evidence does contain examples indicating that the term 'lean' may be used in a wider context than meat. For example, the extract from www.PropaneFitness.com refers to a 'lean protein source' and the extract from www.dictionary.com provides an example of how the term 'lean' may be used: 'It cooks quickly and is a lean source of protein'. It therefore appears that 'lean' may be used to describe low-fat protein foods in general, not just meat. I further note that the evidence indicates that whey is high in protein. There are numerous hits referring not just to 'whey' but to 'whey protein' and, more crucially, 'lean whey protein'. For example, the Google search result from sportsnutritioneurope.co.uk states 'when you're in need of a lean whey protein supplementation...' The extract from www.getsupplements.co.uk states 'Whether you work out on a recreational basis, lean whey protein can help with muscle building...' The extract from www.nutriaid.co.uk shows a protein powder for sale; the logo is given as Nutriaid (and device) the product name is given as 'lean whey protein powder'- this appears to be descriptive of the kind of product. It therefore appears that use of the term 'lean' may extend beyond just meat. The evidence illustrates that 'lean' may be used descriptively in relation to protein sources in general, including sources of whey protein.

35) I am aware that certain of the exhibits I have referred to in the preceding paragraph are either not dated (aside from the date they were printed) or are dated after the relevant date in these proceedings. However, it is permissible to take them into account if they enable the drawing of conclusions as to the position as it was on the relevant date. This is in accordance with the guidance of the CJEU in *L & D SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case C-488/06 P, where it stated:

71 In fact, as the Court of First Instance correctly recalled in paragraph 81 of the judgment under appeal, the case-law of the Court of Justice shows that account may be taken of evidence which, although subsequent to the date of filing the application, enables the drawing of conclusions on the situation as it was on that date (see order in Case C-192/03 P Alcon v OHIM [2004] ECR I-8993, paragraph 41).

36) With the above comments in mind, I note that the exhibits which are dated after the relevant date do not indicate that the products they refer to are new to market; they are also dated less than one year after the relevant date. I think it fair to assume that they are a reflection of the position as it was at the relevant date.

37) In light of the above, I am of the view that the mark did not satisfy the requirements of Section 3 (1)(c) at the relevant date, on the basis that it may have served in trade to designate low-fat whey goods.

38) Even if I am found to be wrong in any of the above conclusions, it is my view that the mark would still have fallen foul of Section 3(1)(c) for goods containing whey, as of the relevant date, for the reasons given below.

39) The applicant submits that the mark is 'syntactically unusual'. I do not agree. The mark consists of an adjective followed by a noun; such a construction of words is commonplace in the English language. Accordingly, in that respect, the mark is neither grammatically or syntactically unusual. Moreover, 'whey', like 'meat', is a foodstuff. To my mind, as the average consumer would already have been accustomed to the use of 'lean' in relation to one foodstuff (meat) which is low in fat, at the relevant date, it appears to me that upon encountering the word 'lean' in the context of another foodstuff, albeit of a different sort, they still would have perceived it as merely indicating that the food in question was also low in fat. It follows that, when faced with the mark 'LEAN WHEY' on foodstuffs containing whey at the relevant date, the consumer is likely to have perceived it as a description indicating that the goods contained whey with little or no fat. That is to say that it would have 'enable[d] the public concerned immediately to perceive, without further thought, a description of the goods in question or one of their characteristics'. To my mind, a foodstuff is anything consumable which has nutritional value and therefore includes food, drinks, supplements and certain pharmaceuticals.

40) For all the reasons given above, there is 'a sufficiently direct and specific relationship' between the mark 'LEAN WHEY' and those of the applicant's goods which clearly consist of, or may contain, whey. The objection under Section 3(1)(c) is therefore successful in relation to a number of the applicant's goods, as follows:

Class 5: Anti-oxidant food supplements; collagen based medicated supplements for food; dietary and nutritional supplements, preparations and substances; drinks predominantly of vitamins or minerals; food and dietary supplements for sports and performance enhancement; food substitutes (for nutritional use); food supplements for dietetic use; food supplements, consisting of vitamins, amino acids, minerals and trace elements; food supplements made principally of vitamins or minerals; healthcare products for

persons with special dietary requirements; meal replacement and dietary supplement drink mixes; medicated food supplements; medicated isotonic drinks; milk minerals; nutritional drink mix for use as a meal replacement; pharmaceutical preparations containing amino acids; pharmaceutical preparations containing enzymes; pharmaceutical tonic preparations with a coffee and tea base; powdered dietary food concentrates for use in a weight reduction programme for medical purposes; slimming aids for medical use.

41) All of the above food supplements in class 05 may contain whey. As regards the goods described as 'pharmaceutical', these all appear to be of a nature intended to provide dietary supplementation (as they contain amino acids, enzymes, coffee and tea) and, as such, I see no reason why they may not also contain whey. Further, those goods which state they have a 'collagen base' or which consist 'predominantly of vitamins and minerals' or 'contain amino acids' does not mean those goods would consist solely of those substances and therefore they may also contain whey.

Class 29: *Dried whey products; dairy products for foods; food protein for human consumption; food preparations having a base of milk; food substitutes (for nutritional use); foodstuffs in the form of snack foods; milk powder for nutritional purposes; milk protein; non-alcoholic milk shakes [milk predominating] containing vegetable extracts; protein based, nutrient-dense snack bars; protein preparations for food; protein foods for dietetic purposes [other than adapted for medical purposes]; whey; whey protein.*

42) All of the above goods in class 29 are those which either clearly contain whey, or may contain whey.

Class 30: *Amylaceous products for food; beverages made from tea, coffee, cocoa, drinking chocolate, and substitutes there for; carbohydrate-based nutritional drink mix for use as a meal replacement; carbohydrate based preparations for foods; dietary supplements principally of royal jelly [other than for medical use]; drinks made from tea, coffee or cocoa; farinaceous products for food for human consumption; foodstuffs in the form of snack foods; malt products for food; non-medicated tea products; non-medicated confectionery for use as part of a calorie controlled diet; slimming products [food], other than for medical use.*

Class 32: *Beverages containing added minerals; beverages enriched with added vitamins; beverages for use as aids to slimming; isotonic beverages; non-alcoholic beverages with tea flavour; non-medicated mineral drinks; whey beverages*

43) In my view, whilst whey may not be the principal ingredient of certain of the above goods in classes 30 and 32, they may still contain a certain amount of whey. For example, 'malt products for food' is not the same as 'malt' itself. The former, whilst consisting mainly of malt, may also contain other ingredients (including whey).

44) I now turn to the goods which I consider do not fall foul of Section 3(1)(c). Such goods would clearly include 'grapeseed oil', 'vegetable extracts for food' and 'tea extracts' which would not contain whey. Further, goods such as 'Preparations of

vitamins' are those which, in my view, are likely to consist solely of vitamins and unlikely to contain whey. I have also nothing before me to indicate that, in addition to use in foodstuffs and nutritional supplements, whey may also be used in 'analgesic preparations...', 'drugs' and 'elixirs'. The objection under Section 3(1)(c) fails in relation to the following goods:

Class 5: *Analgesic preparations in the form of health supplements; chemical preparations for pharmaceutical purposes; drugs; elixirs [pharmaceutical preparations]; esters for pharmaceutical purposes; fibre supplements [non-nutritive]; mineral food supplements; mineral nutritional supplements; mineral salts for baths; mineral salts for medical use; preparations consisting of minerals; preparations of vitamins; stimulants made of minerals; stimulants made of vitamins; vitamins and vitamin preparations; vitamin and mineral supplements.*

Class 29: *Grapeseed oil; vegetable extracts for food.*

Class 30: *Glucose for food; maltodextrins for nutritional use [other than medical]; polymers of glucose for dietetic use [other than by persons with a dietary disorder]; pregelatinized starches for food [other than specially made for persons with dietary disorders]; powdered sugar for preparing isotonic beverages; tea extracts; wheat germ [other than a dietary supplement].*

Class 32: *Vegetable extracts [beverages].*

Section 3(1)(b)

45) In *Koninklijke KPN Nederland NV v Benelux Merkenbureau*, Case C-363/99, the CJEU stated:

86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive."

62. Article 3(1)(b) of the Directive is the equivalent of section 3(1)(b) of the Act.

46) It is clear that, where I have found the mark to be contrary to Section 3(1)(c), it follows that the mark must also be contrary to Section 3(1)(b). In light of this, I will only consider the objection under Section 3(1)(b) separately in relation to those goods which were found to be unobjectionable under Section 3(1)(c). That is, in relation to those goods listed at paragraph 44.

47) In *Combi Steam Trade Mark* (BL O/363/09) the Appointed Person commented on Section 3(1)(b) of the Act in the following terms:

7. It has been said that lack of distinctive character is the essence of any objection under section 3(1)(b), (c) or (d) of the Act and that, despite its

position in the list, section 3(1)(b) performs “a residual or sweeping-up function”, backing up the other two provisions, which contain specific and characteristic examples of types of marks that lack distinctive character: *Procter & Gamble Ltd’s Trade Mark Application* [1999] RPC 673 (CA) per Robert Walker LJ at 679. If a trade mark is entirely descriptive of characteristics of goods or services (and thereby prohibited from registration under section 3(1)(c)), it will also be devoid of any distinctive character under section 3(1)(b): *Case C-363/99 Koninklijke KPN Nederland BV v Benelux-Merkenbureau (POSTKANTOOR)* [2004] ETMR 57 (ECJ) at [86]. However, the converse is not true: a mark which is not descriptive may nevertheless be devoid of distinctive character for other reasons (*ibid.*).

8. When a trade marks examiner assesses the distinctiveness of a trade mark within the meaning of section 3(1)(b), s/he must do so firstly by reference to the goods or services listed in the specification, and secondly by reference to the perception of the mark in relation to such goods or services by the relevant public, which consists of average consumers of the goods or services in question, who are deemed to be reasonably well informed, observant and circumspect: *Joined Cases C-53/01 to C- 55/01 Linde AG, Winward Industries Inc and Radio Uhren AG* [2003] ETMR 78 at [41].

9. It is not necessary to show that a mark has a particular level of creativity or originality in order to establish distinctive character: *Case C-329/02P SAT.1 Satelliten Fernsehen GmbH v OHIM* [2005] ETMR 20 (ECJ) at [41]. While the Court of First Instance (“CFI”) has repeatedly referred to “a minimum degree of distinctive character” as being sufficient to avoid article 7(1)(b) of the CTMR/article 3(1)(b) of the Directive (for example, *Case T-34/00 Eurocool Logistik GmbH & Co. KG v OHIM (“EUROCOOL”)* [2003] ETMR 4 at [39]; *Case T-128/01 Daimler Chrysler Corp v OHIM* [2003] ETMR 87 at [33]; *Case T-320/03 Citicorp v OHIM (“LIVE RICHLIY”)* at [68]), the ECJ has not adopted this wording and has deemed it unnecessary to give any more precise definition to the possible dividing line between lack of distinctiveness and the minimum distinctiveness to which the CFI refers: *Deutsche Krankenversicherung AG v OHIM (“COMPANYLINE”)* [2002] ECR I-7561 at [20].

10. The ECJ approaches the issue of distinctiveness by reference to the underlying purpose of article 3(1)(b) of the Directive/7(1)(b) CTMR, which in the Court’s view is to preclude registration of trade marks that are incapable of performing the essential function of guaranteeing the identity of the origin of the marked product to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or service from others which have another origin: *SAT.1 v OHIM* at [23]; *Case C-37/03 P BioID AG v OHIM* [2005] ECR I-7975 (ECJ) at [27].

48) At paragraph 79 of *Koninklijke KPN Nederland NV v Benelux Merkenbureau*, the CJEU stated:

79 The answer to the sixth question must therefore be that Art.3(1) of the Directive must be interpreted as meaning that a mark which is descriptive of

the characteristics of certain goods or services but not of those of other goods or services for the purposes of Art.3(1)(c) of the Directive cannot be regarded as necessarily having distinctive character in relation to those other goods or services for the purposes of subparagraph (b) of the provision. It is of no relevance that a mark is descriptive of the characteristics of certain goods or services under Art.3(1)(c) of the Directive when it comes to assessing whether the same mark has distinctive character in relation to other goods or services for the purposes of Art.3(1)(b) of the Directive.

49) It is clear that where a mark is deemed to be non-descriptive of certain goods under Section 3(1)(c), it does not necessarily follow that the mark will be distinctive in relation to those goods under Section 3(1)(b).

50) In its notice of opposition Glaxo states the following in relation to this ground:

The sign consists of the descriptive words 'lean whey'. These terms are wholly descriptive of a whey-based good which has a reduced fat content which aids in slimming and weight-loss.

51) The difficulty in the case before me is that Glaxo's objection under Section 3(1)(b) is made *solely* on the basis that the mark is descriptive of a characteristic or intended purpose of goods which are whey-based. However, I have already found that the mark is not descriptive for the goods listed above as none of those goods would contain whey. Glaxo has not advanced any alternative line of argument as to why the mark would nonetheless be non-distinctive under Section 3(1)(b) and moreover, has not advanced any argument as to why the mark would send a non-distinctive message in relation to those goods in the specification which do not contain whey.

52) It is not clear to me that the mark would send a non-distinctive message in relation to the remaining goods. To my mind, the message the words 'LEAN WHEY' would send to the average consumer on such goods is somewhat opaque. In my view, the mark has, at least, the minimum level of distinctiveness required to satisfy the requirements of Section 3(1)(b) in relation to the relevant goods and, in the absence of any alternative line of argument from the opponent as to why I should find to the contrary, the objection under Section 3(1)(b) fails in relation to them.

Section 3(1)(d)

53) In *Telefon & Buch Verlagsgesellschaft mbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-322/03, the General Court stated:

49 Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 Mertz & Krell [2001] ECR I-6959, paragraph 31, and Case T-237/01 Alcon v OHIM –Dr. Robert Winzer Pharma

(BSS) [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public's perception of the mark (BSS, paragraph 37).

50 With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (BSS, paragraph 38).

51 Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, Merz & Krell, paragraph 35, and BSS, paragraph 39).

54) The basis of Glaxo's objection under Section 3(1)(d) is that:

The sign is used by the Applicant and other undertakings to describe whey and whey protein goods which contain little or no fat.

55) It is clear from the case law that, in order to fall foul of Section 3(1)(d) there must be evidence to show that the mark had become customary in the relevant trade at the relevant date. The opponent has submitted no evidence which shows use of the mark 'lean whey' in relation to the remaining goods. The ground of opposition under Section 3(1)(d) is dismissed.

SUMMARY

56) **The opposition is successful in relation to the following goods:**

Class 5: *Anti-oxidant food supplements; collagen based medicated supplements for food; dietary and nutritional supplements, preparations and substances; drinks predominantly of vitamins or minerals; food and dietary supplements for sports and performance enhancement; food substitutes (for nutritional use); food supplements for dietetic use; food supplements, consisting of vitamins, amino acids, minerals and trace elements; food supplements made principally of vitamins or minerals; healthcare products for persons with special dietary requirements; meal replacement and dietary supplement drink mixes; medicated food supplements; medicated isotonic drinks; milk minerals; nutritional drink mix for use as a meal replacement; pharmaceutical preparations containing amino acids; pharmaceutical preparations containing enzymes; pharmaceutical tonic preparations with a coffee and tea base; powdered dietary food concentrates for use in a weight reduction programme for medical purposes; slimming aids for medical use.*

Class 29: *Dried whey products; dairy products for foods; food protein for human consumption; food preparations having a base of milk; food substitutes*

(for nutritional use); foodstuffs in the form of snack foods; milk powder for nutritional purposes; milk protein; non-alcoholic milk shakes [milk predominating] containing vegetable extracts; protein based, nutrient-dense snack bars; protein preparations for food; protein foods for dietetic purposes [other than adapted for medical purposes]; whey; whey protein.

Class 30: *Amylaceous products for food; beverages made from tea, coffee, cocoa, drinking chocolate, and substitutes there for; carbohydrate-based nutritional drink mix for use as a meal replacement; carbohydrate based preparations for foods; dietary supplements principally of royal jelly [other than for medical use]; drinks made from tea, coffee or cocoa; farinaceous products for food for human consumption; foodstuffs in the form of snack foods; malt products for food; non-medicated tea products; non-medicated confectionery for use as part of a calorie controlled diet; slimming products [food], other than for medical use.*

Class 32: *Beverages containing added minerals; beverages enriched with added vitamins; beverages for use as aids to slimming; isotonic beverages; non-alcoholic beverages with tea flavour; non-medicated mineral drinks; whey beverages.*

57) The opposition fails in relation to the following goods:

Class 5: *Analgesic preparations in the form of health supplements; chemical preparations for pharmaceutical purposes; drugs; elixirs [pharmaceutical preparations]; esters for pharmaceutical purposes; fibre supplements [non-nutritive]; mineral food supplements; mineral nutritional supplements; mineral salts for baths; mineral salts for medical use; preparations consisting of minerals; preparations of vitamins; stimulants made of minerals; stimulants made of vitamins; vitamins and vitamin preparations; vitamin and mineral supplements.*

Class 29: *grapeseed oil; vegetable extracts for food.*

Class 30: *glucose for food; maltodextrins for nutritional use [other than medical]; polymers of glucose for dietetic use [other than by persons with a dietary disorder]; pregelatinized starches for food [other than specially made for persons with dietary disorders]; powdered sugar for preparing isotonic beverages; tea extracts; wheat germ [other than a dietary supplement].*

Class 32: *vegetable extracts [beverages].*

COSTS

58) In light of each party having achieved a reasonable measure of success, I consider that both parties should bear their own costs and I therefore decline to make an order.

Dated this 11th day of September 2013

**Beverley Hedley
For the Registrar,
the Comptroller-General**