

Logos & No-Gos

Spring 2002

Marketing Law Newsletter

Welcome to Logos & No-Gos

Macfarlanes would like to introduce Issue 1 of Logos & No-Gos, our new marketing law quarterly newsletter. Brand protection has now become a fundamental concern and represents a significant proportion of the marketing (and, if things go wrong, legal) budget for all businesses. It is therefore important for anybody active in this area to keep track of all significant legal developments concerning how best to promote, protect and enforce brand rights.

Intellectual property and marketing law is a continuously developing area. The Trade Marks Act has only been in force for the relatively short period of seven years. As such, significant decisions on trade mark law are being given by the English courts and the European Court of Justice on an almost monthly basis.

A steady flow of new intellectual property rights are emerging from Europe. In 1998 a new database right was introduced and a very important decision from the European Court of Justice on the scope of this new right is awaited. With effect from March 2002, we now have registered and unregistered Community Designs to complement the existing Community Trade Marks. There are also plans for the introduction of a "droit de suite", or a resale right for artists.

The introduction of the Human Rights Act 1998 has also had an important effect on intellectual property rights. Lawyers are still grappling with the scope of its significance but one obvious area of intellectual property that has already been the subject of debate and court battles is the right to privacy and its conflict with the right to freedom of speech.

We act for a large number of brand owning, marketing and advertising clients and as such advise on all aspects of intellectual property law on a regular basis. We will be producing this newsletter in response to our clients' desire to be kept up-to-date with all significant legal developments. We hope that you will find it useful and we would welcome any feedback from you.

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Changes to Trade Mark Classifications

The Nice Classification, the international classification of goods and services for trade marks, has changed with effect from 1 January 2002 (through The Trade Marks (Amendment) Rules 2001). This was because Class 42 had become a "catch-all" category which included the provision of services of everything from food and drink and temporary accommodation to medical, legal and even funeral services.

Class 42 has now been reclassified only to include scientific and technological services, design and development of computer hardware and software and legal services. Three new Classes have been introduced which cover the following:

- Class 43 - services for providing food and drink; temporary accommodation;
- Class 44 - medical and veterinary services; hygienic and beauty care; agriculture and related services;
- Class 45 - personal, social and security services.

All applications filed from 1 January 2002 must be filed in accordance with the new Classes. Existing trade marks in Class 42 do not have to be reclassified. However, the Trade Marks Registry is encouraging proprietors to reclassify and they can do so free of charge.

Team News

In each issue, we will be featuring a profile of a member of Macfarlanes' Marketing Law Group, starting with Geoff Steward.

Profile



Geoff Steward became a Partner on 1 May 2002.

Together with Iain Mackie, Geoff is responsible for the contentious side of the intellectual property and marketing law practice. Geoff joined Macfarlanes as a trainee in 1993 and qualified into the litigation department in 1995, specialising in intellectual property. Geoff is currently acting on a number of high profile and reported cases including the Budweiser case referred to in this issue which is now going to the Court of Appeal, and the most significant parallel importing decision in recent years, Davidoff -v- A&G Imports Limited, upon which judgment was received from the European Court of Justice at the end of last year.

Following the birth of his two daughters, Geoff occupies his spare time writing children's fiction and is a published author.

What elements constitute the distinctive character of a trade mark?

Section 46(1) Trade Marks Act 1994 ("TMA") provides that the registration of a trade mark may be revoked where use of the trade mark has been suspended for an uninterrupted period of five years and there are no proper reasons for non-use.

Section 46(2) provides as follows:

"For the purposes 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..."

In the latest hearing in the long running "Budweiser" dispute between the American company Anheuser-Busch Inc ("AB"), and the unpronounceable Czech company Budejovický Budvar Narodní Podnik (which we had better call "BB"), the High Court had to consider two important questions in relation to Section 46(2) TMA 1994. First, what is meant by "the distinctive character of a trade mark"; and second, what alterations to the elements of the mark will be of sufficient immateriality as not to alter that overall distinctive character?

BB had obtained a trade mark registration for the stylised words "Budweiser Budbrau" (see Figure 1). AB claimed that the trade mark should be revoked pursuant to Section 46 TMA on grounds of non-use. BB relied upon two different types of alleged use. The first was BB's use of the words "Budweiser Budbrau" on the seal device shown on the neck of bottles of BB's beer (see Figure 2). The second use relied upon by BB was its use of the non-stylised words "Budweiser Budbrau" as part of a frieze surrounding the invoices for its beer.

AB's revocation action failed before the Trade Marks Registry but was appealed to the High Court. The Judge regarded how properly to interpret Section 46(2) as a point of general legal importance. In particular, the appeal raised two important questions:

- How is the court to set about the task of assessing what is the distinctive character of the mark?
- What is the correct approach to take in assessing whether or not use of a mark different from the registered mark is use "in a form differing in elements which do not alter the distinctive character of the mark in the form which it was registered"?



Figure 1

The Judge held that in seeking to apply Section 46(2), a Tribunal must determine:

- What is the distinctive character of the mark and which are the elements that, in combination, contribute to that distinctive character?
- Thereafter it must enquire whether any alteration to any of those elements is of sufficient immateriality as not to alter that overall distinctive character.

In the case of a word mark in a stylised form, the meaning and impact of the word are unlikely to be the only elements of the distinctive character (albeit that they may well be one of the most important elements). The stylisation itself must have a purpose and is therefore likely to enhance the distinctiveness of the mark. It was held that it was not possible to state in general terms what it is that gives any particular mark its distinctive character. The elements of each mark must be assessed separately.

The High Court held that the Trade Marks Registry had erred in holding that Section 46(2) required a question to be asked as to what is the average consumer's reaction to the trade mark. Instead, the section requires the

determination of the elements that make up the distinctive character of the mark, which is a question to be viewed through the eyes of the Registrar in assessing whether or not the mark shall be registered.



Figure 2

On the facts of the case, it was concluded that there were four elements that contributed to the overall distinctiveness of the trade mark in issue:

- The word Budweiser.
- The word Budbrau.
- The specific fonts used for the two words and the contrast in fonts.
- The inter-relationship of the two words, one being above the other and following behind the enlarged B of Budbrau.

All of these elements, in combination, contributed to the overall distinctive character of the mark.

In the case of the first use relied upon by BB (Figure 2), it did not embody the final two elements and was a use in a form differing in elements which did alter the distinctive character of the mark. In relation to the second use on the frieze, it was held that again this use was in a form which did alter the distinctive character of the mark. The "Budweiser Budbrau" trade mark was therefore revoked for non-use.

This decision is important because it is the first time that the High Court has provided clear guidance on the meaning of Section 46(2) TMA. It sends an important message to trade mark owners to ensure that wherever possible they use their trade marks in the form for which the registration has been obtained, otherwise the mark may be susceptible to revocation. This is particularly so in the context of stylised word marks. Trade mark owners should not assume that the words themselves are the only distinctive elements of the mark: if this is the case, then they should obtain registrations for the words alone. In the case of stylised word marks, the elements of stylisation will ordinarily constitute a distinctive element and if the mark is only used with a different stylisation it will always be open to the risk of being revoked.

Macfarlanes acted for Anheuser-Busch on this case

False Endorsements

Can famous personalities prevent false endorsements which use their name or image without authorisation?

The first decision in this area since 1947 was given by the High Court in March. The only previous authority concerned a radio star, "Uncle Mac", who unsuccessfully sued a cereal company for using references to him in advertising without his permission. The latest case concerned a passing off claim brought by the Formula 1 racing driver, Eddie Irvine, against the radio station, Talksport. In 1999, Talksport obtained the rights to cover the F1 Grand Prix World Championship. It sent boxed packs of promotional materials to approximately 1,000 people who were responsible for the placement of radio advertisements. The boxed packs included a brochure showing a manipulated picture of Eddie Irvine. Talksport had purchased the right to use the photograph from a sporting photograph agency but whilst the original photograph showed Eddie Irvine holding a mobile telephone, Talksport had manipulated the photograph so that he was shown to be holding a portable radio to which the words "Talksport" had been added.

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Eddie Irvine had a number of different endorsement deals for sunglasses, mens toiletries, fashion clothing, footwear and car racing helmets. However he did not have an endorsement deal with Talksport and had not authorised the use of his image.

Although in recent years there have been a number of passing off cases concerning unauthorised merchandising, notably involving The Spice Girls and Elvis Presley, rather surprisingly there have been no cases for over 50 years concerning false endorsement.

In the Eddie Irvine case, Mr Justice Laddie was careful to distinguish between "merchandising", which concerns spin-off products and the exploitation of images, themes or articles which have become famous; and "endorsement", which involves a famous personality telling the relevant public that he approves of the product or service and is happy to be associated with it. Merchandised products do not necessarily involve an element of endorsement.

Laddie J considered the critical question of whether or not the law of passing off covers false endorsement. He concluded that it does. It is for the owner of goodwill to maintain, raise or lower the quality of his reputation or to decide who, if anyone, can use it alongside him. The ability to do that will be compromised if a third party can use the reputation or goodwill without his permission. Accordingly, Laddie J concluded that the law of passing off should apply to false endorsement cases and Eddie Irvine succeeded in his damages claim against Talksport. The court concluded that a significant proportion of those to whom the Talksport brochure was sent would be confused into thinking that Eddie Irvine had endorsed or recommended Talksport.

The distinction between unauthorised merchandising and false endorsement is a fine one to draw. However, in a false endorsement case, if a famous personality can satisfy the court that he has a significant reputation or goodwill; and that the actions of the defendant give rise to a false message which would be understood by a "not insignificant section of the defendant's market" to mean that the goods have been endorsed, recommended or approved by the celebrity, then he will be able to prevent it. This decision is to be welcomed by rights owners and provides clarification of an area of the law that was long overdue.

It's my personality and I'll cry if I want to

Following the implementation of the Human Rights Act in October 2000, personality rights have never been more topical. Last year, Michael Douglas and Catherine Zeta Jones went a considerable way, in their Court of Appeal case against Hello! magazine, towards finally establishing a concept in English law of a right to privacy. This year, there have already been three high profile cases considering the scope of any right to privacy and the role of the law of confidence in protecting famous personalities.

The first case involved the much publicised (amongst the tabloids anyway) anonymous Premiership footballer

(subsequently confirmed to be Garry Flitcroft) who was initially successful in restraining a newspaper from publishing a story detailing his extra-marital affairs with two women.

The case turned upon the law of confidence and consideration of the conflict between Article 10 of the European Convention on Human Rights (the right to freedom of expression) and Article 8 (the right to respect for private and family life). The Judge of first instance, Jack J, had to consider how to balance, at an interlocutory stage, these competing rights and what the likely outcome of such a balancing exercise would be at

trial. He also had to consider the extent to which the information was in the public domain and whether it would be in the public interest to publish it.

It is established law that there are three requirements which must be met in order to make out a breach of confidence claim:

- the information must be of a confidential nature
- it must have been imparted in circumstances imposing an obligation of confidence
- it must have been used without authorisation.

To the surprise of many commentators, the Judge held that the protection of confidentiality which already applied to sexual relations within marriage should, in the context of modern sexual relations, also be applied outside marriage. It therefore did amount to a breach of confidence for the two women to provide information to a newspaper or to anyone else with a view to its publication in the media. In Jack J's view, there was no public interest in the publication of the article. As the details of the sexual relationships were unknown to anyone other than the participants, the information was also not in the public domain. It was held that the footballer's right to privacy should prevail over the newspaper's right to freedom of expression and the injunction restraining publication of the article was initially granted.

This decision was the subject of much criticism as it extended the scope of the law of confidence way beyond its existing boundaries. However, in March the Court of Appeal saw sense, reversed the decision and overturned the injunction. The Court of Appeal disagreed with Jack J on three counts. First, the same degree of confidentiality should not apply to sexual relations within and outside marriage. There was a significant difference between the confidentiality attaching to a permanent relationship and a casual non-committed relationship. Second, any interference with the press had to be justified, even if there is no identifiable special interest in an article being published. Third, there was a public interest in such stories about footballers who are perceived as role models. As a result of the more sensible Court of Appeal decision, the Blackburn Rovers' footballer's anonymity could no longer be protected.

The second case involved the now infamous incident when Jamie Theakston visited a Mayfair brothel and had

sex with at least one prostitute in the "dungeon". The fact that we all know about it means that his interim injunction application was ultimately unsuccessful, but only in part. Whilst he failed in preventing The Sunday People from publishing an article reporting the fact that he had visited a brothel and the details of his sexual activity there, Mr Theakston did succeed in preventing the publication of photographs of him taken inside the brothel.

The Judge first considered Mr Theakston's argument that the prostitutes had acted in breach of confidence. The case was heard after Jack J's first instance decision but before the Court of Appeal decision and so Ouseley J felt obliged to follow Jack J and hold that the law of confidence could protect sexual relations outside marriage. However, he did not accept that the full range of all sexual relations in any relationship should be protected by confidentiality. Whether a duty of confidence exists should, he decided, depend upon the nature of the relationship, the nature of the activity and all the other circumstances in which that activity takes place. On the facts of the case, Mr Theakston had gone to what was obviously a brothel. Passers-by could have seen him coming in and going out; other customers, prostitutes and members of staff could have seen him inside. It was held that to allow protection of the fact of Mr Theakston's visit would unduly extend the law of confidence. The relationship between a prostitute in a brothel and the customer is not confidential in nature, although it could become confidential if the customer stipulated and the prostitute accepted an obligation of confidence.

In considering the human rights angle, the court held that in respect of both the fact and detail of Mr Theakston's brothel visit, the freedom of expression of both The Sunday People and the prostitute seeking to sell her story outweighed the intrusion into Mr Theakston's privacy. The fact that Mr Theakston had permitted previous press coverage about his sex life, and that his role model status meant that such an article was in the public interest, counted against him.

However, the Judge did restrain the publication of the photographs on the basis that Mr Theakston had not consented to them, their publication was not in the public interest and they constituted an undue degree of intrusion into his private life.



© Credit: Fred Duval/FAMOUS

The final case concerned Naomi Campbell's claim against MGN Limited, publishers of *The Mirror*. In February 2001, *The Mirror* reported that the supermodel was attending Narcotics Anonymous meetings. The newspaper published details about the regularity of her attendance at the counselling sessions and photographs of her outside the building where the meetings had taken place. Naomi Campbell sued MGN Limited for the publication of alleged confidential information, for infringement of her right to privacy and for publishing sensitive personal data contrary to the Data Protection Act 1998. *The Mirror* denied all of the claims and asserted that the publication was of legitimate public interest. Mr Justice Morland found in favour of Naomi Campbell.

Whilst *The Mirror* was entitled to publish the fact that she was a drug addict and was having therapy, the fact that the therapy was being obtained through Narcotics Anonymous and the details of her attendance at those meetings was information that had the necessary quality of confidence. This confidential information, from an undisclosed source, must have been imparted in circumstances importing an obligation of confidence and upon receipt *The Mirror* was subject to a duty of confidentiality. The publication of information about her attendance at the meetings clearly caused her damage and distress.

As in the Garry Flitcroft case, the Court also considered the conflict between the right to respect for private and family life and the right to freedom of expression. Ms Campbell had previously lied in the press about her drug addiction and *The Mirror* was therefore entitled to put the record straight and publish the fact that her denials

were misleading. However *The Mirror* should not have published specific details about her therapy in circumstances where it knew that the information was confidential. Furthermore, and the most significant aspect of the judgment, it does not follow that all details of the private life of celebrities are in the public interest. Even self-publicists are entitled to privacy in respect of details of their lives which they legitimately choose to keep private.

Finally, in relation to the novel data protection claim, it was held that information as to the nature of and details of her therapy from Narcotics Anonymous, including the photographs, was information as to Ms Campbell's physical or mental health or condition and therefore "sensitive personal data". *The Mirror* had no exemption from liability under Section 32 of the Data Protection Act. Furthermore *The Mirror* had breached the first data protection principle because details of Ms Campbell's therapy were not in the substantial public interest.

Ms Campbell was entitled to damages for breach of confidentiality and for breach of the Data Protection Act, including aggravated damages, totalling £3,500.

It is difficult to draw any firm conclusions from the three cases, which all turned upon their own facts. The courts appear to be basing their decisions upon the nature of the information published. Salacious information such as Garry Flitcroft's affairs and Jamie Theakston's visits to a brothel will receive less sympathy from the courts than information relating to laudable attempts to overcome addiction. The moral for the famous is to ensure, when conducting sordid activities, that the other participant enters into a binding confidentiality agreement.

Focus

In each issue we will be considering some of the more esoteric and obscure aspects of intellectual property and marketing law which may have escaped your attention but which could directly impact upon you. We will look at a range of subjects including: the risks of making threats of infringement; the formalities of correctly transferring rights; and the criminal provisions which can result in infringers actually going to prison. In this issue we will be considering the possibility of directors being personally liable for their company infringing intellectual property rights.

Personal Liability for Infringement of Intellectual Property Rights

Two recent cases have highlighted the risks of individuals who are directors and/or controlling shareholders of a company being found to be personally liable for intellectual property infringement.

Directors and shareholders can usually take advantage of

what is known as the "corporate veil". Company law principles, dating back to the *Salomon* case in 1897, state that a company is a separate and distinct legal entity and, in relation to its activities, it is the company which will be liable and not its shareholders or directors.

However, there are circumstances when the Courts will look behind this veil and find individual shareholders or directors

liable for intellectual property infringement under the "joint tortfeasor" principle. The test as set out by Lord Templeman in *CBS Songs Limited -v- Amstrad Consumer Electronics plc* is whether the individual "intends and procures and shares a common design that the infringement takes place".

The Court of Appeal has recently clarified the circumstances in which a court should find an individual to be personally liable for copyright infringement as a "joint tortfeasor" with the company. In *MCA Records Inc -v- Charley Records Limited*, Mr Young, the second defendant, had founded a business which was involved in reproducing a set of recordings known as the "Chess recordings". The business had been sold to Charley Holdings Inc ("Holdings"), a Panamanian company whose ownership was unclear. The first defendant, Charley Records Limited was Holdings' wholly owned UK subsidiary. Mr Young was a director and later an employee of the first defendant and was found to be jointly liable with it for the infringement of MCA's copyright in the "Chess recordings".

The Court of Appeal found that in practice Mr Young "enjoyed the ultimate control of the first defendant and was regarded

as its ultimate boss". It held that he had procured and induced the first defendant to commit the infringing acts.

In a December 2001 High Court decision, Mr Justice Pumfrey held that a former director of Indirect Lighting Limited was liable as a joint tortfeasor for trade mark infringement. He had formed the infringing company and the Judge rejected his defence that he had resigned as a director and appointed his son in his place.

Personal liability is something which should always be considered when bringing infringement proceedings against a small company which has one or two directors or major shareholders. As it has to be shown that the individual(s) procured and induced the company to commit the acts, a diversity of shareholding will obviously mean that personal liability is harder to establish, but it is something which has to be considered on the facts of each individual case. If a claim can justifiably be brought against a major shareholder or director, it can put greater pressure on that individual to ensure that the company ceases carrying on the infringing acts in a way that an action against the company may not.

Protection of Designs

Protection of designs has long been the poor relation of the IP world, with those rights which were available being underused. However, European legislation is now significantly expanding the scope of rights in designs, and many companies which have not concentrated on the area before could benefit. The new rights should be considered when developing any new products where protection may be desirable.

The UK has two systems available for designs. The first is known as 'design right' and is similar to copyright. It provides automatic protection (i.e. no need for registration) for original designs which were not commonplace when created. This "unregistered" right applies to the design of articles and grants up to fifteen years protection against copying of the design. The second is the recently amended registered designs regime which grants up to twenty five years of "ownership" of the design. Unlike design right, a claimant who claims that its registered design has been infringed need not show that the defendant has copied its design. Registered designs are monopoly rights: even independently created designs may still infringe.

The registered system was altered at the end of last year to comply with a European Directive intended to harmonise national laws in this area. The new law protects the "designs" of "products" which are new and have individual character. The new definitions mean that many more items will be able to take advantage of registered protection:

- A "design" is the appearance of the whole or part of a "product". It includes features of shape, colour, texture, materials or ornamentation.
- "Products" include one-off "handicraft" items as well as those which are mass produced.
- In addition, packaging, get-up, graphic symbols (such as logos), and typefaces can be separately protected.

Hot on the heels of this harmonising Directive, a new European Regulation has created two entirely new Europe-wide rights to protect both registered and unregistered designs. These rights came into force on 6 March 2002 and are in addition to the existing UK systems.

Both rights use the same wording and definitions that now apply to UK registered designs (so that any design which could be registered will automatically be protected as an unregistered design). This will have important advantages. Once the administrative system is in place, one registration will allow a company to protect its design across the EU for up to twenty five years. At the same time, the UK's concept of unregistered protection has been expanded across the EU so that products will automatically be protected against copying for up to three years.

So in summary, we now have the existing UK unregistered design right, together with the amended UK registered design right and the new EU registered and unregistered rights. Such a varied menu should surely provide something for everyone.

The Marketing Law Top Ten

Are you aware of the main legal developments of recent months?

- 1 Zino Davidoff SA -v- A&G Imports/Tesco -v- Levi: European Court of Justice clamps down on parallel importing from outside Europe.
- 2 British Horse Racing Board -v- William Hill: the Court of Appeal refers questions concerning the scope of the new database right to the European Court of Justice.
- 3 Registered Designs Regulations 2001: with effect from 9 December 2001, the scope of designs capable of registration has increased. Registered designs have also been topical with the decision that computer icons are registerable as designs (Apple Computers Inc -v- Designs Registry).
- 4 BABY DRY: the European Court of Justice holds that because of the unusual juxtaposition of the two words "BABY DRY", the trade mark did not allude to the function of the goods (nappies) and was registrable.
- 5 Anheuser-Busch Inc -v- Budejovicky Budvar Narodni Podnik: the High Court considers what elements constitute the distinctive character of a trade mark.
- 6 Asprey -v- Garrard Limited: the Court of Appeal considers the 'own name defence' to trade mark infringement.
- 7 Ralf Sieckmann -v- Deutsches Patent-und Markenamt: the European Court of Justice considers whether a smell can be registered as a trade mark.
- 8 The Copyright and Related Rights Directive: a European Directive to be implemented into UK law later this year seeks to harmonise copyright law and strike an appropriate balance between rights holders and users in the internet environment.
- 9 The Trade Marks (Amendment) Rules 2001: the old class 42 has been split into three new classes of services from 1 January 2002.
- 10 Draft Competition Act 1998 Guidelines: the Director General explains how he expects the Competition Act to operate in relation to agreements and conduct concerning intellectual property rights.

Pop Idle

With the recent success of Simon Cowell's "Pop Idol" and the Brit Awards, you may be forgiven for thinking that the British music industry can do no wrong. Unfortunately this is not the case. Two decisions this year, one for copyright infringement and one for passing off, have gone against the pop idols.

The first concerns Robbie Williams. Ludlow Music Inc. successfully sued Robbie Williams for copyright infringement in respect of a song on his "I've Been Expecting You" album entitled "Jesus in a Camper Van". The claimant successfully claimed that its copyright in the lyrics of the Woody Guthrie song "I am the Way" had been infringed by Robbie Williams. Robbie Williams was ordered to pay damages equating to 25% of the royalties that he made on "Jesus in a



© Credit: Casper/FAMOUS

Camper Van". An injunction was also ordered against him whereby the song is not permitted to be included on future pressings of the album. So if you have a copy of "I've Been Expecting You" containing the infringing song, hang on to it - it could become a collectors' item!

The second case concerns the band formed following their near success (but ultimate failure) on the television programme "Popstars". The band of wannabes named their group "Liberty". Unfortunately for them, there had been another band called "Liberty" which achieved modest commercial success but critical acclaim in the mid-1990s. The original Liberty sued for passing off, claiming that it still had sufficient goodwill in the name "Liberty". Rather surprisingly, given that so few people had heard of the original "Liberty" band, the passing off claim succeeded. Having failed in the television programme, the band also failed in the High Court and had to choose another name. They are now known as Liberty X.

The firm is not authorised under the Financial Services and Markets Act 2000, but we are able in certain circumstances to offer a limited range of investment services to clients because we are members of the Law Society. We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Logos and No-Gos is intended to provide general information about developments which may be of interest. It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained. If you would like further information or specific advice on any of the above, please do not hesitate to contact your usual Macfarlanes' contact or Geoff Steward (telephone: 020 7831 9222/ fax: 020 7831 9607/ e-mail: geoffrey.steward@macfarlanes.com).