

## **TRADE MARKS ACT 1994**

**IN THE MATTER OF Application Nos**

**2105514 & 2168957 by Dr Ala Towfiq Sharif**

**for the registration of two trade marks in Classes**

**3 & 5**

**AND IN THE MATTER OF Oppositions thereto**

**under Nos 46788 & 49659 by American Home Products**

**Corporation**

### **Background and Pleadings**

1. On 20 July 1996 Dr Ala Towfiq Sharif applied for the registration of the trade mark shown below in Class 5 in respect of “Pharmaceuticals; vitamin supplements, multi-vitamins, cod liver oil, vitamin E, evening primrose oil; skin creams; all the aforesaid goods being for human use.”



**ADVANCED HEALTH PRODUCTS**

2. On the 10 June 1998 Dr Sharif made a further application to register the trade mark shown below.



**DERMAKIND**

3. The second application is made in respect of goods within classes 3 and 5. The list of goods in Class 3 is:

“Soaps, perfumery, essential oils, cosmetics, hair lotions, dentifrices.”

4. The list of goods in Class 5 is:

“Pharmaceutical preparations; dietetic substances adapted for medical use.”

5. The applications were subsequently published for opposition purposes. Both applications are opposed by American Home Products Corporation of the USA. The grounds of opposition have been amended during the course of the proceedings. They are now as follows.

6. With regard to application No. 2105514:

- 1) The opponent is a manufacturer and merchant of pharmaceutical preparations and healthcare products and has a world-wide reputation for these products;
- 2) The opponent’s corporate title, American Home Products, is abbreviated in use to the letters “AHP” and references thereto are common in the opponent’s own literature, independent trade literature and amongst pharmaceutical industry media, as well as in National newspapers and magazines;
- 3) As a consequence of the above, the mark “AHP” was, at the filing date of the application No. 2105514, entitled to protection under the Paris Convention as a well-known trade mark;
- 4) Registration of the applicant’s mark would be contrary to Section 5(2) of the Trade Marks Act 1994 because it is identical or similar to the opponent’s earlier trade mark “AHP”, has been applied for in relation to goods identical

with or similar to those which the opponent's mark is protected, and there exists a likelihood of confusion on the part of the public (including the likelihood of association);

- 5) The opponent conducts his business through, inter alia, a network of subsidiaries around the world, including John Wyeth and Brother Limited in England, AHP Pharma SA/NV in Belgium and AHP Pharma BV in the Netherlands (so named since 1995);
- 6) All the pharmaceutical and healthcare products manufactured by or for AHP Pharma SA/NV and AHP Pharma BV have, since the adoption of their corporate names, borne the name AHP Pharma SA/NV or BV, as appropriate, on their packaging and/or accompanying literature;
- 7) Such products have been available for purchase by UK residents who visit Belgium and/or Netherlands and a range of pharmaceutical and healthcare products bearing the name AHP Pharma SA/NV has been imported into the UK, made available for sale and sold to the public in the UK;
- 8) By virtue of the above the opponent would be entitled to prevent the use of the applicant's trade mark by virtue of the law of passing off and registration of application No. 2105514 would accordingly be contrary to the provisions of Section 5(4)(a) of the Trade Marks Act 1994.

7. The same grounds of opposition apply to application No. 2168957. Additionally, insofar as the later application covers goods which may be regarded as dissimilar to those for which the earlier trade mark is protected, the opponent says that use of the applicant's mark in relation to such goods would take unfair advantage or be detrimental to the distinctive character or repute of the opponent's earlier trade mark. Registration would therefore be contrary to Section 5(3) of the Trade Marks Act 1994.

8. The proceedings commenced on the 1 May 1997 when the notice of opposition to application No. 2105514 was filed. The opposition to application No. 2168957 was filed later on 16 April 1999. The applicant filed counterstatements denying the grounds of opposition. The proceedings were subsequently consolidated and the matter came to be heard on 24 January 2000, when the applicant was represented by Ms F Clark of Counsel instructed by A T Maguire & Co, and the opponent was represented by Ms A Carboni of Linklaters.

### **The Opponent's Evidence-in-Chief**

9. The parties (particularly the opponent) has filed a substantial body of evidence. I have considered all the evidence that has been filed and admitted into the proceedings. The following summary is sufficient to set out the principal facts upon which the parties rely.

10. The opponent's evidence includes a number of statutory declarations by Liam F McEvoy. Mr McEvoy is the Assistant Company Secretary of John Wyeth and Brother Limited, an English subsidiary of American Home Products Corporation. Mr McEvoy states that American Home Products Corporation is one of the largest pharmaceutical and healthcare businesses in the world. The Corporation was founded in 1926 and expanded steadily so that by 1995 it was listed as the seventh largest pharmaceutical company in the world. Exhibit LFM1 consists of pages from the opponent's website. Exhibit LFM2 to Mr McEvoy's declaration consists of copies of the Annual Reports for the years 1993, 1994, 1995 and 1996. Mr McEvoy says these reports circulated to all stockholders in American Home Products Corporation, to industry analysts world-wide and to other interested parties. The reports indicate that American Home Products Corporation is a large corporation with world-wide sales. Sales for the year 1995 are said to amount to over 13 billion dollars. The reports indicate that around two thirds of the group's sales are in the field of pharmaceutical or healthcare products. The majority of the sales take place in the USA but around a quarter are reported to take place in Europe and Africa (there is no more specific information). The Annual Reports primarily identify the opponent by its corporate name, "American Home Products Corporation". However, the letters AHP also appear. The letters appear in a stylised form within a circle as a logo on the cover of the reports and also in block capitals.

The latter use is plainly as an abbreviation for the words “American Home Products”.

11. Mr McEvoy states that American Home Products Corporation is referred to as “AHP” in printed media such as “SCRIP” Magazine (which is said to be available to UK and overseas subscribers) and also by a Reuters’ TEXTLINE, which is an information source available via computer databases to world-wide subscribers. Exhibit LN3 to Mr McEvoy’s declaration consists of the results of a database search carried out by his company’s library service on 27 March 1997 which extracted selected entries from “SCRIP”, Reuters’ TEXTLINE, the Chemical Business news base, Chemical Industry notes, the Financial Industry Reports and IAC Magazine database, which are all said to feature references to “AHP” in relation to news items concerning the opponent’s business activities.

12. Mr McEvoy filed a second statutory declaration dated 5 February 1998. In his second declaration he provides details of further UK Press references to American Home Products Corporation as “AHP” reporting the merger discussions in January 1998 involving the opponent and another company called SmithKline Beecham. Copies of the press reports in question are attached to Mr McEvoy’s declaration as LM4.

### **The Applicants’ Evidence-in-Chief**

13. The applicants’ evidence includes a statutory declaration dated 4 September 1998 by Dr Ala Towfiq Sharif. Dr Sharif says that he has been practising general medicine in the United Kingdom for the past 20 years, specialising in dermatology. He says that he is registered with the General Medical Council of the United Kingdom. He further states that:

“I initially marketed products by mail-order, though advertisements in the relevant consumer press. The success of my products was such that I felt it necessary to develop a means of distinguishing my products in the market place and I developed the “AHP” logo, the subject of the current proceedings (hereinafter “my trade mark”). The letters “AHP” were selected by me as a result of my adoption of the trading name “Advanced Health Products” and as I had never encountered pharmaceutical products, using “AHP” in a trade mark context, in my 20 years of experience of dealing, handling

and describing pharmaceutical and healthcare products from all major manufacturers. In addition, I made enquiries at the UK Trade Marks Registry and confirmed that there were no conflicting marks registered in the classes relevant to my products.

I commenced use of my trade mark in 1994. It has been used on a variety of cosmetics, vitamins, supplements, appetite suppressants and skin creams. Sales have totalled around £135,000, representing some 45,000 units of products at wholesale prices.”

14. Dr Sharif provides a breakdown of his sales for the years 1994 through to May 1998. He continues:

“Since first use of my trade mark, I advertised products marketed thereunder in a number of healthcare and associated magazines including top circulation titles such as “Good Health”, “Slimmer Magazine” and “Top Sante”.”

15. Dr Sharif provides annual figures for advertising expenditure for the years 1994 through to May 1998. Exhibit ATS.03 to his declaration is a copy of an advertisement for his weight control products as it is said to appear in the magazine “Top Sante”. The exhibit in question contains the “AHP” logo contained within the applications for registration.

16. Referring to Mr McEvoy’s first declaration, Dr Sharif refers to the pages from the Internet website of the opponent contained in exhibit LFM1 to Mr McEvoy’s declaration . Dr Sharif states that it is clear from this information that the opponent is the parent company of a “family” of companies. He concludes that the parent company appears to be predominantly interested in the acquisition of smaller companies and forging alliances with other independent entities within the same field. Dr Sharif notes that the Internet website is not used for the marketing of pharmaceuticals or healthcare products in the UK or elsewhere. He further notes that the Annual Reports contained within exhibit LFM2 to Mr McEvoy’s declaration are predominantly relevant to those interested in corporate development and investment. He says that “wherever individual products are described, they are associated with particular members

of the American Home Products Group, none of which incorporate the letters “AHP” in the name, trading style, or trade marks.”

17. With regard to exhibits LFM3 and LFM4 to Mr McEvoy's first two declarations, Dr Sharif notes that the use of the letters “AHP” in relation to the opponent as set out in the various extracts from news reports is “no more than a journalistic device in order to save copy”. Exhibit ATS.05 to Dr Sharif's declaration consists of a copy of a search report of the UK Trade Marks Register and the database of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) for trade marks in the name of the opponent. Dr Sharif notes that the opponent has some 399 trade marks registered, pending or recently lapsed in the United Kingdom jurisdiction. However, none of these consist of or include the letters “AHP”. Exhibits ATS.08 and ATS.09 to Dr Sharif's declaration consist of pages from the “Compendium of Patient Information Leaflets” 1998/99 Edition, and “Compendium of Data Sheets and Summaries of Product Characteristics”, both published by the “Association of the British Pharmaceutical Industry” and covering the entry for Wyeth Laboratories. Dr Sharif points out that neither the United Kingdom holding company, “American Home Products (UK) PLC” nor the letters “AHP” appear within these pages.

18. Exhibit ATS.10 to Dr Sharif's declaration consists of examples of the packaging from 2 famous and popular products of Whitehall Laboratories Limited, another subsidiary of the opponent. Dr Sharif notes that neither the packaging, nor the leaflet associated with the products, make any mention of the opponent, its United Kingdom Holding Company, or the letters “AHP”.

19. Dr Sharif further states that:

“I undertook a survey of a number of wholesalers with whom I deal to ascertain whether or not they had experienced any confusion, in the market place, between goods supplied by me under my Trade Mark and those of any of the constituent parties of the opponent.”

20. Exhibit ATS.11 consists of two letters from Kamal Kotecha and John Sutton who both support the applicant's position. The absence of any further indication as to how this "survey" was conducted added to its self evidently inadequate sample, suggest that this evidence should be given no weight. I mention it merely to provide the context within which Mr Sutton's first statutory declaration (which I will come to next) was filed.

21. Exhibit ATS.12 to Dr Sharifs' declaration consists of a copy of the report of a search of the United States Federal Trademarks Register. This revealed that the opponent has one registration of the letters "AHP" in a logo form in the United States. However, this mark is not registered in a relation to pharmaceutical or healthcare products but in relation to "periodically issued reports of corporate activity."

22. Dr Sharif concludes that his own application was filed in good faith, having regard to the state of the United Kingdom's Trade Marks Register and his own knowledge of existing trade marks used in the United Kingdom. He states that in the 4 years since the commencement of use of his own mark (in 1994) he has experienced no incidences of confusion in the market place between his own goods and those of the opponent of any of its subsidiary companies.

23. The opponent filed a statutory declaration by John Sutton dated 4 September 1998. Mr Sutton was one of the two respondents to the applicant's confusion "survey." He says that:

"During my career in the wholesale of pharmaceutical products, I have had regular dealings with Whitehall Laboratories Limited, Wyeth Laboratories Limited and Advanced Health Products and have dealt in products of all three companies."

24. Mr Sutton goes on to say that he was not previously aware that Whitehall Laboratories and Wyeth Laboratories were subsidiaries of American Home Products and that he never experienced any incidence of confusion between the products of the first two of those companies and those of the Advanced Health Products.

The applicant's submitted a statutory declaration by Anthony Thomas Maguire dated 22

October 1999. Mr Maguire is the applicant's Trade Mark Attorney. His declaration introduces a further statutory declaration made by him of the same date. Mr Maguire's declaration reports the outcome of an Internet search which reveals that there are a number of organisations in the United States of America with the initials AHP. A number of these are in the healthcare business and have web-sites which can be accessed by searching on the letters AHP.

### **Opponent's Evidence in Reply and Further Evidence Under Rule 13(8)**

25. The opponent's evidence in reply consists of a third statutory declaration by Mr McEvoy dated 9 August 1999. Exhibit LFM7 to Mr McEvoy's declaration consists of further external publicity material in which the letters "AHP" are used as an acronym for American Home Products Corporation. Exhibit LFM8 to Mr McEvoy's declaration consists of a list of subscribers to the SCRIP publication. The list indicates that the United Kingdom has 2,178 subscribers. The list is not dated.

26. Mr McEvoy also says that his company refers to American Home Products Corporation by reference to the "AHP" acronym in its promotional literature. Exhibit LFM9 to Mr McEvoy's declaration consists of a copy of the company's promotional booklet which he says is made available to perspective employees and other persons contacting its English subsidiary Wyeth's publicity department. The letters "AHP" are used on a number of occasions within this document as an acronym for American Home Products Corporation. The document is said to be distributed to an average of 500 enquirers per annum. There is no indication of when this document was first distributed within the United Kingdom.

27. Mr McEvoy further states that his company produces a document entitled "Company Profile", a copy of which he attaches as exhibit LFM10. There are one or two references in this 23 page document to American Home Products Corporation as being the holding company of Wyeth. The letters "AHP" are used (within brackets) after the name American Home Products. It is not clear when this document was first issued within the United Kingdom. Mr McEvoy states that 8000 copies were distributed as an insert to a "recent" issue

of Pharmaceutical Marketing. However this would have been in 1999 well after the date of the applications under opposition.

28. Mr McEvoy further states that the letters “AHP” are used as part of the corporate title for other operating subsidiaries within the American Home Products Corporation group of worldwide companies, in particular AHP Pharma SA/NV, its Belgian subsidiary company. Mr McEvoy says that certain products manufactured and sold by AHP Pharma SA/NV bear the letters AHP, either on the packaging or the accompanying product information leaflets. He says that one of these products is the EFEXOR anti-depressant which is widely available to patients in the United Kingdom. Mr McEvoy states that in many cases, this pharmaceutical is parallel imported into the UK from Belgium. Exhibit LFM12 to Mr McEvoy's declaration consists of what he describes as parallel imported EFEXOR tablets, which he says have been over stucked with the name of the UK based parallel importer, but which still feature the corporate name AHP Pharma on the packaging thereof.

29. The exhibit in question consists of photocopies of samples. The pharmaceutical product packaging in question prominently bears the trade mark EFEXOR 75. The name “Wyeth” also appears, although somewhat less prominently. The name AHP Pharma SA/NV also appears at one point (in still smaller print) on the product packaging. Contrary to Mr McEvoy's declaration there is no sign of any name being over stucked. The packaging in question bears no date, other than an expiry date of June 2000. It is not therefore possible to place this example within the relevant timescale.

30. Finally, Mr McEvoy states that there are a number of Belgian nationals resident within the United Kingdom and he speculates that these individuals may have purchased, or been dispensed, pharmaceutical products emanating from AHP Pharma SA/NV during their time in Belgium and thus be aware of the “AHP” acronym as a consequence.

31. The opponent also submitted a declaration by K J Duijn, who was employed by AHP Pharma BV of the Netherlands. Mr Duijn states that AHP Pharma BV has been known by this title since 1995 and that the corporate title is featured on all pharmaceutical products

distributed by his company. Exhibit KD1 to Mr Duijns' declaration is a sample of the packaging of his company's products featuring the corporate title as indicated. The sample in question prominently features the trade mark LEDERTREXATE. A further trade mark LEDERLE appears somewhat less prominently, and also (less prominently again) the corporate name AHP Pharma BV.

32. Mr Duijns states that AHP Pharma BV is mentioned in the Martindale Directory (in English) which he says circulates in the Netherlands and throughout the rest of Europe and is generally employed by pharmacists, physicians and hospitals as a reference work used to cross-index products. Exhibit KD3 to Mr Duijns declaration consists of pages from the Marindale Directory of Manufacturers listing his company's contact details. The exhibit confirms what Mr Duijn says, but is not dated.

33. The opponent also filed a declaration by Christian Huyghe M.D, who was employed by AHP Pharma SA/NV. Mr Huyghe states that AHP Pharma SA/NV has been known by this title since 1995 and that the corporate title is featured on all pharmaceutical products distributed by his company. He provides examples which are similar to those provided by Mr Duijn and described earlier. Mr Huyge also says that:

“I am aware that a percentage of our products, initially distributed and sold by my company in Belgium, are diverted to the United Kingdom by way of parallel imports; in particular, the PREMARIN brand of estrogen replacement therapy and ISOTEN brand of anti-hypertensive oral dosage forms are widely re-exported from Belgium and sold in the United Kingdom. I would estimate that the percentage of such sales amounts to 5% of the total manufacturing output. Although the parallel imported products are often over-stickered by the company which brings them in to the United Kingdom, they are obliged legally to ensure the name of the product licence holder (AHP Pharma SA/NV) remains visible. We believe that most, if not all our products are subject to parallel importation to the UK; however, the greatest diversion occurs in respect of the above mention ISOTEN and PREMARIN brands.

In 1998 we believe that, of several hundreds of thousands of units (i.e. packages) of our products which were diverted to the UK, approximately 150,000 units of the aforesaid products were diverted to the UK. These numbers are based on internal calculations and sales figures.”

34. The opponent’s evidence in reply also includes an affidavit dated 30 June 1999 by Ted M Kushner who is a paralegal in the Law Department of American Home Products Corporation of the USA. He says that since September 1997 the opponent has maintained a website with the Internet address of “WWW.AHP.COM”. Mr Kushner provides details of the number of “hits” (that is the number of times a user of the Internet has accessed the opponent’s website) between September 1997 and June 1999. Only the period up to June 1998 (the later of the two application dates) is potentially relevant. During this period the figures provided by Mr Kushner indicate that the number of “hits” from users of the Internet with a top level domain name of “.UK” was around 14,000.

35. The opponent’s evidence also includes a statutory declaration dated 29 November 1999 by Phillipa Mary Watson Montgomerie, who is a Solicitor employed by Linklaters. She refers to evidence given by Dr Sharif, the applicant, to the effect that he had advertised his products under the marks applied for in the magazines “Good Health”, “Slimmer Magazine” and “Top Santé”. Ms Montgomery then describes various enquiries that she undertook to establish the applicant’s promotion of the marks applied for. She describes a telephone conversation with an unnamed person at “Good Health Magazine” on 12 October 1999. Ms Montgomery says that the person who answered the telephone told her that no one at “Good Health Magazine” had heard of Albany Slimming Clinics, Albany Medical Services or Advanced Health Products until recently, not had they carried any advertising for any of these entities.

36. Ms Montgomery also described various telephone conversations that took place with members of staff of “Slimmer Magazine”. These enquiries were inconclusive.

37. Ms Montgomery describes how she telephoned the advertising department of “Top Santé Magazine” on 12 October 1999 and spoke to a woman called Francesca. Francesca is

reported as having said that Albany Slimming Clinics (a business conducted by Dr Sharif) first placed an advertisement in the March 1995 issue of “Top Santé”. Ms Montgomerie then describes how she came to order 25 back copies of “Top Santé Magazine” from between March 1995 and December 1997. She points out that, although all but two copies of the publication included advertisements placed by the applicant, none of the advertisements included either of the trade marks applied for. She concludes that no advertisements were placed in the “Top Santé Magazine” by the applicant before January 1998, which included the “AHP” logo of the applicant.

38. The opponent submitted a further statutory declaration dated 8 December 1999 by Liam McEvoy. Mr McEvoy refers to John Wyeth and Brother Limited’s promotional booklets and company profile as previously exhibited to his earlier statutory declarations. He says that he has since discovered that these documents were available and used by his company’s sales force from March 1996. He attaches, as Exhibit LFM16, another promotional booklet for Wyeth which indicates that Wyeth is part of the American Home Products Corporation. As with the previous booklets the letters “AHP” appear in brackets after the name American Home Products Corporation. Mr McEvoy also attaches, as Exhibit LFM14, the full text of articles and extracts previously filed as Exhibit LFM7 to his earlier declaration.

39. Mr McEvoy filed a fifth statutory declaration dated 13 January 2000. In his final declaration Mr McEvoy refers to various appetite suppressant products marketed by Dr Sharif under the names “Slim Ease” and “Caffy-Slim”. He says that he has obtained samples of these products and notes that the packaging contains various mis-spellings which, in his opinion, create something of an amateurish and unprofessional impression. He says that it would be extremely detrimental to the well regarded and professional reputation of his company if these products were confused as emanating from American Home Products Corporation.

40. Exhibit LFM3 to Mr McEvoy’s declaration consists of the full texts of news items of news items from 1994 to 1996, which he says are examples of the extensive use of the AHP acronym as a reference to American Home Products Corporation well before the date of the applications in suit. He says these articles do not relate only to corporate activity. By way of

example he cites several articles written in October and November 1995 concerning the possible dangers of the contraceptive pill, including his company's Minulet pill. Mr McEvoy refers in particular to seven articles contained within Exhibit LFM3. I have examined these pages but find that only one of them (page 39 of Exhibit LFM3) actually contains any reference to an organisation under the name AHP. The one article that does include these letters includes them as an acronym for the name American Home Products. The letters appear within brackets. Mr McEvoy says that even in relation to those articles which are about the opponent's corporate activity, rather than its products, they will have reached an audience well beyond that of stockbrokers, bankers and the like. In this connection Mr McEvoy refers to an entry in the Financial Times in late 1995. He says he is informed by the research department of the Financial Times that its circulation figures in the UK for 1995 were 335,892. (I assume this means per issue).

41. In response to Dr Sharif's assertion that he was unaware of the connection between Wyeth and the opponent, Mr McEvoy notes that several of the articles in Exhibit LFM3 to his declaration highlight the association between his company and the opponent. He refers to nine pages within Exhibit LFM3 containing articles in which he believes the association is made clear. I have examined these articles. Only two of them include the letters AHP as a reference to American Home Products. One is an article by Reuters News Services dated October 1995. The second article appeared in the financial section of "The Independent" around the same time. It mentions the drug Temazepam, that is produced by American Home Products Corporation and manufactured in the UK by AHP's Wyeth pharmaceutical division.

#### **Applicant's Evidence under Rule 13(8)**

42. The applicant submitted a statutory declaration dated 18 January 2000 by John Sutton, who describes himself as having been "associated with the applicant herein for some years". Mr Sutton says that he was instrumental in compiling the material contained in Dr Sharif's declaration concerning, inter alia, advertising. Mr Sutton says he has spoken to Francesca of Top Sante who informed him that contrary to the declaration of Phillipa Montgomerie, she was given to understand that Ms Montgomerie was authorised by the applicant to seek the

information, which, otherwise, would be regarded as confidential. Mr Sutton continues:

“Unfortunately, it is the case that copies of relevant advertisements were not kept and thus could not be exhibited at the applicant’s declaration. Moreover, there may have been some confusion as to that which was meant by the “mark” as “Advanced Health Products” has always been regarded as being as important as the “AHP” logo.

I affirm that the figures supplied in the applicant’s declaration were offered in good faith and that, despite the statement of Ms Montgomerie, advertisements had been placed, including the “AHP” logo, prior to the date of application.”

43. The opponent submitted a further statutory declaration by Phillipa Montgomerie dated 21 January 2000 in which she denies Mr Sutton’s statement that she misrepresented herself when conducting her enquiries with Francesca of Top Sante.

#### **Opponent’s request to admit further evidence**

44. The opponent sought to file a further statutory declaration by Christian Huyghe dated 14 January 2000. The evidence was filed in relation to opposition to application No. 2168957 (the period for filing such reply evidence ended on 17 January 2000) and was said to be in reply to the evidence filed in that opposition by Dr Sharif. In particular his statement that at the time he adopted his “AHP” logo, he has never encountered pharmaceutical products using “AHP” in a trade mark context. Mr Huyghe declaration was said to provide further evidence of parallel imports into the United Kingdom, in the years 1996 through to 1998, of products bearing the name AHP Pharma SA/NV on the packaging.

45. After hearing submissions from Ms Clark and Ms Carboni, I decided that this evidence should not be admitted into the proceedings. I gave the reasons for my decision at the hearing. They are as follows:

- 1) I did not consider the evidence to be truly “in reply” to the applicant’s evidence.

Even if the information that Mr Huyghe provides is accurate, it is not such as to suggest that Dr Sharif could not claim never to have encountered the sign “AHP” in a trade mark context when he adopted his mark. The figures provided for parallel imports by Mr Huyghe are relatively small, and even if the name AHP Pharma SA/NV appeared on the packing in the manner suggested, it is unlikely to have made a major impact on the UK market.

2) It is clear from paragraph 5 of Mr Huyghe’s declaration that the figures provided are no more than an educated guess as to the extent of parallel imports into the UK during the years 1996 to 1998. Mr Huyghe himself describes the figures as “fairly rough estimates”.

3) Mr Huyghe says that he bases his estimate on a comparisons between his company’s sales to wholesalers and independent market research data. However, he has not disclosed the specific data he relies upon.

4) It appeared to me that Mr Huyghe’s evidence was really belated evidence-in-chief and not evidence-in-reply as it purported to be. Further, in view of 2 and 3 above, I took the view that the evidence in question should not be admitted in exercise of the Registrar’s discretion under Rule 13(8).

46. That concludes my review of the evidence. I now turn to the decision.

## **Decision**

47. I will first consider the grounds of opposition under Section 5(2) and 5(3) of the Act which are as follows:

**5.-(1)** A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

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

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

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

(3) A trade mark which-

- (a) is identical with or similar to an earlier trade mark, and
- (b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

48. Both provisions depend upon the existence of a relevant “earlier trade mark”. That term is defined in Section 6(1) of the Act as including:

- (c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention as a well known trade mark.

49. The opponent claims that the sign “AHP” was entitled to protection under the Paris Convention as a well known trade mark at the dates of the applications. The requirements for protection are set out in Section 56(1) of the Act, as follows:

**56.-**(1) References in this Act to a trade mark which is entitled to protection under the Paris Convention as a well known trade mark are to a mark which is well-known in the United Kingdom as being the mark of a person who-

(a) is a national of a Convention country, or

(b) is domiciled in, or has a real and effective industrial or commercial establishment in, a Convention country,

whether or not that person carries on business, or has any goodwill, in the United Kingdom.

References to the proprietor of such a mark shall be construed accordingly.

50. A “Convention country” is defined in Section 55(1) of the Act as “a country, other than the United Kingdom, which is a party to the Convention.”

51. The USA is a party to the Paris Convention. The opponent says that it thus falls within the formal requirements for protection set out in Section 56(1). The applicant does not dispute that the opponent is a national of, or has a place of business in, a Convention country, but points out that the mark “AHP” is not registered in the USA for pharmaceutical and healthcare products. It is only registered there for publications about corporate activity. The first question that arises is whether the opponent can claim to be the proprietor of a mark which is well known in the UK for pharmaceutical products, when it is not the registered proprietor of such a mark in the USA or, as far as I am aware, anywhere else.

52. In most circumstances a mark that is well known in the UK, but unregistered here, will be registered elsewhere. One would have thought that it would be exceedingly rare for a truly well known trade mark to be unregistered in any Convention country. However, I see nothing in the Act that requires the proprietor of the well known mark to have *registered* the mark in a Convention country. Consequently, if he can demonstrate his proprietorship in some other way he is not debarred from protection merely because of the absence of registration.

53. Ms Clark submitted that, on a proper reading of the evidence, the opponent has not itself engaged in the trade in pharmaceutical products either in the USA or the UK. Rather the opponent is a holding company which owns shares in numerous subsidiaries, some of which trade in pharmaceuticals. In her submission there was no evidence that the opponent owned a goodwill as a trader in pharmaceutical products.

54. Ms Carboni took me through those aspects of the opponent's evidence which she submitted showed that the opponent's AHP mark was well known in the UK at the relevant dates. The main evidence the opponent relies upon is the coverage the opponent received in English language publications circulating within the UK prior to the relevant dates. According to the "summary of news stories by date" handed to me at the hearing, the opponent's evidence includes copies or extracts from 53 articles which refer to the opponent by the letters "AHP" before the date of the first application, and in a further 17 before the date of the second application. Many of these articles appear in specialist trade publications such as "SCRIP", "Biotechnology Business News", "Chemical Week" and "Pharmaceutical Business News", the UK circulation of which (at the relevant dates) is not clear. They all appear to be business publications directed at those with a commercial interest in the pharmaceutical and/or chemical industries.

55. A number of the articles appear in Reuters News Reports, which no doubt duplicate many of the articles which appear in UK newspapers around the same time. There is evidence of articles appearing in well known newspapers, such as the "Guardian", the "Daily Telegraph", "Financial Times", the "Times", "Daily Mail" and the "Independent". These articles seem to have almost invariably appeared in the financial sections of these papers.

56. The article that appeared in the Daily Mail on 30 June 1995 is fairly typical (except that it is shorter than most). The heading is "Medeva to buy AHP Drugs for pounds 5.8m". The "article" is a single sentence "Drugs group Medeva is paying pounds 5.8m cash for tetanus and diphtheria vaccines made by American Home Products", thus making it clear that "AHP" is used in the title as an acronym for "American Home Products." More typically the letters "AHP" are used after the first use of the name "American Home Products", sometimes in

brackets immediately following the name. In my view, there is some force in the applicant's argument that the letters "AHP" are merely being used as a journalistic device to save copy. The opponent argues that, even if this is so, over time such use can result in the letters coming to denote its organisation. This may be so but there is little evidence that this has happened. The only use of the letters "AHP" without the name "American Home Products" that Ms Carboni could point to was in an index that appeared in several editions of the "Financial Times". The index is entitled "Companies in this Issue". The letters "AHP" do appear alone in this list but, as Ms Clark pointed out, viewing the index in isolation from the rest of the document (which has not been filed) may well create a false impression.

57. If Ms Carboni was correct in saying that the repeated use of "AHP" in news articles had resulted in the letters alone coming to denote the opponent to some section of the public in the UK, one would expect to see an increasing trend of the letters appearing without the full corporate name. In fact the evidence shows no such tendency. There is no evidence of journalists using the letters alone to identify the opponent up to 1998, or at all.

58. The opponent relies upon other evidence to show that the letters "AHP" had become well known in the UK by the relevant date. This consists in the main of evidence of the activities of its Belgian and Dutch subsidiaries, which have been known since 1995 as "AHP Pharma SA/NV" and "AHP Pharma BV", respectively. These companies are said to have sizeable businesses in Belgium and Holland and it is suggested that UK nationals would have come across the companies names (which appear in smallish print on the packaging of their products) primarily through:

- 1) UK visitors to Holland and Belgium;
- 2) Belgian and Dutch consumers resident in the UK;
- 3) Parallel imports of Belgian pharmaceutical products under various trade marks;
- 4) An (undated) entry for the Dutch company in Martindale's Directory, which is

said to be used by healthcare professionals in the UK.

59. There are undoubtedly a significant number of visitors to the UK from Belgium and Holland. However, I note that:

- 1) The Belgian and Dutch subsidiaries only adopted the titles “AHP Pharma SA/NV” and “BV” in 1995", one year (or less) before the date of the first application;
- 2) The pharmaceuticals marketed by these companies all bear prominent trade marks with the company name appearing in relatively small print;
- 3) It does not therefore follow that even those visitors to or from Belgium or Holland who have had cause to use the products of the Belgian and Dutch subsidiaries would be familiar with the company name;
- 4) The same applies to parallel imports, assuming for the moment that the evidence supports the existence of significant parallel imports bearing the subsidiaries titles;
- 5) There is nothing to prove that even those persons within the UK who might have come across the goods of the Belgian or Dutch subsidiaries and noticed their names on the product, would have had reason to believe that the letters “AHP” appearing within these names was the mark of the American opponent.

60. The opponent also seeks to rely on visits by UK physicians and healthcare professionals to AHP Pharma BV in Belgium or Medical Symposia and meetings in Europe sponsored or “attended” by AHP Pharma BV. However, there is no evidence of any such activity before the material dates in these proceedings.

61. There is also some evidence that the opponent’s UK subsidiary, “John Wyeth & Brother”

handed out promotional material in the UK which include mention of its holding company “American Home Products”. The letters AHP are sometimes used as an acronym for the full name. The distribution of this material appears to be limited and it is not clear whether any of it was issued prior to the date of the first application. It is also very doubtful whether this use would have had the effect of educating the recipients to the perception that the letters “AHP” is a “mark” of American Home Products Corporation.

62. I have not overlooked the opponent’s other evidence, such as the existence of its website but I do not believe that it adds materially to the opponent’s case. For a start the site was not established until September 1997, well after the date of the first application. The number of “hits” recorded from UK “top level” domains is not necessarily representative of the number of different UK viewers who accessed the site before the date of the second application. The number involved (14K in nine months) is relatively small (by comparison The Patent Office’s Website is accessed 350k times per week). It is not clear how many of the recorded accesses would have been accidental. And of those that accessed the site and took the trouble to see what it contained they would have seen the name “American Home Products” not just the letters AHP (assuming the name or the letters appear on the “links” to the website which I note where also included in the count).

63. It is convenient at this point to weigh this evidence against that which is required to demonstrate that a mark is “well known” for the purposes of the Paris Convention. In *General Motors Corporation v Yplon SA* (1999 ETMR page 122), Advocate General Jacobs considered what is necessary to show a “reputation” for the purposes of Article 5(2) of EC Directive 104/89 (Section 5(3) of the 1994 Act). In so doing he also considered the difference between marks with a “reputation” and marks which are “well known”. The relevant part of his opinion is reproduced below.

“Marks with a reputation and well-known marks

30. Both in the proceedings before the Court, and in general debate on the issue, attention has focussed on the relationship between “marks with a reputation” in Article

4(4)(a) and Article 5(2) of the Directive and well-known marks in the sense used in Article 6 *bis* of the Paris Convention for the Protection of Industrial Property. Well-known marks in that sense are referred to in Article 4(2)(d) of the Directive.

31. General Motors, the Belgian and Netherlands Governments and the Commission submit that the condition in the Directive that a mark should have a “reputation” is a less stringent requirement than the requirement of being well known. That also appears to be the view taken in the 1995 WIPO Memorandum on well-known marks.

32. In order to understand the relationship between the two terms, it is useful to consider the terms and purpose of the protection afforded to well-known marks under the Paris Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Article 6 *bis* of the Paris Convention provides that well-known marks are to be protected against the registration or use of a “reproduction, an imitation, or a translation, liable to create confusion” in respect of identical or similar goods. That protection is extended by Article 16(3) of TRIPs to goods or services which are not similar to those in respect of which the mark is registered, provided that use of the mark would “indicate a connection between those goods or services and the owner of the registered trade mark and provided that the interests of the owner of the registered trade mark are likely to be damaged by such use”. The purpose of the protection afforded to well-known marks under those provisions appears to have been to provide special protection for well-known marks against exploitation in countries where they are not yet registered.

33. The protection of well-known marks under the Paris Convention and TRIPs is accordingly an exceptional type of protection afforded even to unregistered marks. It would not be surprising therefore if the requirement of being well-known imposed a relatively high standard for a mark to benefit from such exceptional protection. There is no such consideration in the case of marks with a reputation. Indeed as I shall suggest later, there is no need to impose such a high standard to satisfy the requirement of marks with a reputation in Article 5(2) of the Directive.”

64. The Advocate General concluded that a mark had a relevant “reputation” when it is known to a significant proportion of the relevant public. That view was subsequently confirmed by the Court of Justice (1999 ETMR 950).

65. I do not believe that this case requires me to take a view on how far a “well known” mark sits above that of a mark that merely has a “reputation”. For even if I adopt the lower threshold the opponent has not crossed it. The most that can be said of the opponent’s evidence is that there would have been some members of the UK public with an interest in corporate dealing who would have been aware at the relevant dates, that AHP was sometimes used as an acronym for an American company called “American Home Products Corporation”.

66. The “relevant public” includes those with an interest in pharmaceutical and health care businesses, but the most relevant section of the public are customers such as doctors, pharmacists and ordinary members of the public. There is no persuasive evidence that the mark “AHP” was known to “significant proportion” of the latter category at the relevant dates. And there is no *independent* evidence that the letters “AHP” were known as the “mark” of a pharmaceutical manufacturer or trader to a significant proportion of those within the first category. That conclusion is certainly not self evident from the evidence. The onus of establishing that the mark is “well known” and entitled to the “exceptional protection” described by Advocate General Jacobs, rests on the opponent. The burden has not been discharged with the result that the oppositions under Sections 5(2) and 5(3) must fail.

67. I next turn to consider the ground of opposition under Section 5(4)(a) of the Act, which is as follows:

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

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

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

68. In order to establish a passing off right the opponent must be able to establish a local goodwill in a business, misrepresentation by the applicant and the likelihood of significant damage to the goodwill. (*Erven Warnink BV and Another v J Townend & Sons (Hull) Ltd* 1980 RPC 31, per Lord Fraser).

69. In order to satisfy the requirement for a local goodwill the opponent relies in part upon the business conducted in the UK by its UK subsidiary John Wyeth & Brother. However, that business is conducted under the name “Wyeth”. There is no evidence that Wyeth uses the initials “AHP” in relation to any of the products it markets within the UK. All the opponent can point to is a few references in its corporate material to being owned by American Home Products, which is sometimes referred to by the acronym AHP. But it is not clear how much of this material was distributed before the dates of the applications, or to whom. This is thin to the point of vanishing as evidence of the existence of a local goodwill under the sign “AHP”.

70. The opponent relies rather more heavily on the evidence of Mr Huyghe and Mr Duijn, of parallel imports and exposure of UK nationals abroad to the names “AHP Pharma BV” and “AHP Pharma SA/NV”. I indicated earlier that I refused to admit a second declaration from Mr Huyghe because I did not consider it to be what it purported to be (evidence-in-reply) and I considered the evidence about parallel imports to be little more than guesswork. The same criticism can be made of Mr Huyghe’s first declaration of 6 September 1999. He estimates that 150,000 units of drugs trade marked ISOTEN and PREMARIN were parallel imported into the UK in 1998. He says that it is a legal requirement for the name of the product licensee (AHP Pharma SA/NV) to be left on the packaging. He says his figures are based upon “internal calculations and sales figures”. He cannot say who imported the goods, at which dates, or where they were sent in the UK or that the legal requirement he mentions was complied with. He cannot definitely say that any parallel imports occurred because he does not claim any first hand involvement. Consequently, he cannot say that such imports occurred before the date of the first application in July 1996.

71. The existence of a local goodwill based upon parallel imports therefore falls at the first hurdle. But even if I am wrong and there were parallel imports in the manner suggested, it does not follow that this is sufficient to establish a local goodwill or that the letters AHP had become factually distinctive.

72. Ms Clark pointed out that the opponent was unlikely to own the goodwill in the businesses conducted by its subsidiaries. That may be right but it would not be sufficient, by itself to defeat the opposition because Section 5(4) does not presently require an opponent to be the proprietor of the earlier trade mark or right (Section 8(1)) provides power for the Secretary of State to introduce such a requirement).

73. As I noted earlier, the goods claimed to have been parallel imported were packaged under prominent trade marks such as ISOTEN. The number of products claimed to be imported is relatively small compared to the size of the market. Would a significant number of persons have even noticed the product licence holder's name? Even if they did, why should they suppose that the applicant's marks, which 1) do not include the word and style "Pharma NV/SA", 2) place the letters "AHP" within a quite stylised logo, and 3) contain other words, such as "Advanced Health Products" and "Dermakind", are marks of the same or a related undertaking? Why should they? It is not as though the letters AHP have an inherently strong distinctive character.

74. In this connection I reject Ms Carboni's submission that it is enough if people are "caused to wonder" whether or not the applicant's goods come from the opponent. That was sufficient under Section 11 of the 1938 Act but it has long been recognised that the test for confusion under Section 11 of the old law was lower than that required for passing off. See Lord Upjohn's speech in BALI 1969 RPC 496 at line 42. Passing off depends upon there being a misrepresentation resulting in damage to goodwill, or at least the likelihood thereof.

75. Ms Carboni pointed out that "Advanced Health Products" is descriptive, which, of course, it is. But if the opponent's primary submission is right - that the public in the UK know that "AHP" equals "American Home Products", the presence of these words is potentially relevant

because they are likely to send the alternative message that in the applicant's mark, the letters stand for "Advanced Health Products". I was told that the applicant has previously applied to register the mark "Dermakind" and faced an objection from the Examiner that it is descriptive for skin care products. The application was not pursued to a final decision. In my view the word is more allusive than descriptive. It may assist in avoiding confusion but probably would not be enough if I was persuaded that "AHP" was distinctive of American Home Products in the UK at the relevant dates.

76. That brings me to the significance of those UK nationals abroad who may have come across goods of the opponent's subsidiaries marked with names including the letters "AHP". In this connection Ms Carboni relied upon the decision of the Vice-Chancellor in *Pete Waterman Ltd and Others v CBS United Kingdom Ltd* (1993 EMLR 27). After an extensive review of the authorities, Sir Nicholas Browne-Wilkinson reached the following conclusions on the law:

**A.** As a matter of principle, the existence of a severable English goodwill attached to a place of business in this country is not the basis of a right to complain of passing off in this country. What is necessary is for the plaintiffs to show they have a trade connection here which will normally consist of customers forming part of their goodwill, wherever that goodwill is situate, which goodwill is being invaded by the acts of the defendant in this country;

**B.** The approach which I have set out at A above is not open to me as there is binding authority to the effect that the basis of plaintiffs' claim must be a goodwill locally situate in England; but

**C.** The presence of customers in this country is sufficient to constitute the carrying on of business here whether or not there is otherwise a place of business here and whether or not the services are provided here. Once it is found that there are customers, it is open to find that there is a business here to which the local goodwill is attached;

77. The opponent (or its subsidiaries) does not need to have a place of business here under the name AHP to establish a local goodwill. The presence of customers in the UK opens the door to a finding that there is a business here (under the name “AHP”) to which a goodwill is attached.

78. Can the presence of “UK” customers who purchased pharmaceuticals bearing the letters “AMP” whilst in Belgium or Holland be sufficient, by itself, to establish the existence of a business in the UK to which a local goodwill is attached? In my view it is not. In the Pete Waterman case the services at issue were record recording studios. There was evidence that producers and recording artists from this country used a New York based recording studio for many years. The judge noted that the pop music business was international in its nature. It is easy to understand how, in these circumstances, UK artists and producers could be regarded as customers of a business physically located in New York but which extended to the UK. By contrast the trade in pharmaceuticals (from the perspective of the customer) is national or even more local. It is difficult to see how purchases of pharmaceutical products made by UK nationals whilst in Belgium and Holland can be said to amount to carrying on a business in the UK to which a local goodwill could attach.

79. In any event, the opponent’s evidence does not establish that there are any UK nationals who are customers of its Belgian or Dutch subsidiaries and who regard the letters AHP as a sign which distinguishes either. The opponent’s evidence of “UK customers” is pure guesswork based upon the number of UK visitors to these countries. There is no firm evidence of any sales to UK nationals. And even if there were it would not follow that any goodwill would subsist under the sign “AHP Pharma SA/NV” (or BV) when the products in question all carry far more prominent badges of origin, such as ISOTEN.

80. Ms Carboni asked me to take into account evidence from which she submitted a proper inference could be drawn that the applicant intended to deceive the public when he adopted the “AHP” marks. Although an intention to deceive is not a necessary requirement to succeed in a passing off action, it has long been held that a court (or tribunal) should be slow to find that a “dishonest defendant had been unsuccessful in his fraudulent design”. (Ash (Claudins) &

Sons v Invicta Manufacturing (1912) 29 RPC 465 at 475).

81. The matters upon which Ms Carboni rests her charge of an intention to deceive are as follows:

1. The applicant has offered no satisfactory explanation for his adoption of the “AHP” logo within his marks;
2. The applicant has misrepresented the position as to his advertising the mark so as to represent that he has a “concurrent” goodwill in the “AHP” logo;
3. The applicant’s reliance on the evidence of a business colleague (Mr Sutton) to demonstrate that confusion is not likely - without disclosing the business relationship between them.

82. Dr Sharif has given evidence that he adopted the “AHP” as a consequence of choosing the business name “Advanced Healthcare Products”. That appears a perfectly plausible explanation and I accept it. Ms Carboni suggested that the explanation begged the question of why the name was chosen. She suggested that it might have been because the name conveniently has the initials “AHP”. However, there is no evidence before me from which I could conclude that Dr Sharif could have been expected to be aware of the opponent’s “AHP” mark when he adopted his own AHP logo mark. The opponent’s suggestion seems fanciful in the circumstances.

83. The opponent’s evidence casts serious doubt on whether the advertising claimed by Dr Sharif going back to 1994 included the marks applied for or the “AHP” logo component which is at the centre of the dispute. I believe that there is also some force in the criticism that the applicant should have disclosed the business relationship between Dr Sharif and Mr Sutton at the time the latter’s first Statutory Declaration was filed. However, in my judgement, neither of these matters show that the applicant adopted his mark with the intention to deceive. The applicant’s prosecution of his application is open to criticism but that does not establish an

intention to deceive. I will return to this when I come to the question of costs.

84. It will be apparent from the above that I am not persuaded that the opponent has made out its case under Section 5(4)(a). The burden is on the opponent to show the use the applicant's marks would have been unlawful at the relevant dates. The opponent has not discharged that burden with the result that the opposition under Section 5(4)(a) also fails.

### **Costs**

85. The opposition having failed the applicant would normally be entitled to a contribution towards his costs. In this case I would expect that contribution to be in the order of £1700. Further, taking account of the two interlocutory hearings that were necessary on the earlier filed opposition (before consolidation of the proceedings) I believe that the applicant would be entitled to a further contribution of £400 towards his costs. However, there are two matters of concern to me which I believe should be taken into account in determining the issue of costs.

86. Dr Sharif gives evidence that, "since first use of my trade mark" (in 1994) he has "advertised products marketed thereunder in a number of healthcare and associated magazines including top circulation titles such as "Good Health", "Slimmer Magazine" and "Top Santé". He provides a sample advertisement from "Top Santé" which features the "AHP" logo. On a fair reading of this evidence, I believe that Dr Sharif is claiming that the "AHP" logo has been promoted in magazines, including "Top Santé", since 1994, or at least for a substantial proportion of the period between first use and the date of the declaration in September 1998. In fact it appears from Ms Montgomerie's evidence that no advertisements featuring the "AHP" logo appeared in "Top Santé" before January 1998 at the earliest. She also says that no-one at "Good Health" magazine had heard of the applicant until shortly before her enquiry in October 1999.

87. I admitted Ms Montgomerie's evidence at an interlocutory hearing held on 17 December 1999. I allowed the applicant a month to respond. Mr Sutton's second declaration was filed as a result. Mr Sutton says that he was instrumental in preparing the material contained in Dr

Sharif's evidence. He affirms that the figures previously provided were correct and that advertisements including the applicant's "AHP" logo were placed before the date of the application. As Dr Sharif's evidence was first filed in response to the opposition to his first application, I take this to mean that advertisements were placed before July 1996. Mr Sutton further states that "there may have been some confusion as to that which was meant by the "mark" as "Advanced Health Products" has always been regarded as being equally important as the "AHP" logo.

88. In fact, Dr Sharif's declaration is quite specific on this point. It defines "the trade mark" as "the "AHP" logo, the subject of the current proceedings". I am left with the impression that the part of Dr Sharif's evidence which describes his promotion of his "AHP" logo is both generally unreliable and misleading because it fails to distinguish adequately between the applicant's promotion of the name "Advanced Health Products" and the marks applied for, particularly the "AHP" logo. I am also concerned that the close business relationship between Mr Sutton and the applicant was not revealed in either Dr Sharif's evidence or Mr Sutton's first declaration, which was supposedly filed following a confusion "survey" conducted by the Dr Sharif.

89. In the event, Dr Sharif's evidence of the use of his own marks has had no bearing on the outcome of my decision, which is based upon the opponent's failure to make good its claims that its mark is well known in the UK and/or that it enjoys a relevant local goodwill under the sign "AHP". I do not believe that the unsatisfactory nature of this part of the applicant's evidence is a sufficient reason to conclude that the applicant adopted his mark in bad faith or that his applications were originally made in bad faith (I rejected a request to add this as a ground of opposition at the interlocutory hearing on 17 December).

90. Nevertheless, a party which seeks to prosecute its application in an unsatisfactory manner can expect to see that reflected in the costs awarded at the end of the proceedings. In the circumstances I have decided to forego the usual award of costs to the applicant.

**Dated this 23 day of March 2000**

**Allan James**

**For the Registrar**

**The Comptroller General**