

**TRADE MARKS ACT 1938 (AS AMENDED)
AND TRADE MARKS ACT 1994**

**IN THE MATTER OF Application No 1549573
by Loblaw Companies Limited for the registration
of a trade mark in Class 30**

**AND IN THE MATTER OF Opposition thereto
under No 45841 by Besnier S.A.**

Background and Pleadings

1. On 1 October 1993, Loblaw Companies Ltd applied for the registration of the trade mark PRESIDENT'S CHOICE in Class 30.

2. The application was subsequently advertised for opposition purposes in respect of the following specification of goods:

"Salad dressings; frozen fruit pies; preparation of macaroni and cheese; sauces; dried and fresh pasta; breakfast cereals; coffee; tea; crackers; cookies; flour and preparations made from cereals; popcorn and popped popcorn; spaghetti sauce; salsa; condiments; salt and spices; syrup; prepared meals and snack meals; all included in Class 30."

The applicant entered a disclaimer of any exclusive right to the use of the word 'Choice'.

3. On 7 November 1996, Besnier S.A. filed notice of opposition. The opponent contends that:-

i) it is the proprietor of the trade mark PRESIDENT which is registered in the UK

under No 1059644B in Class 29 in respect of "edible lard; cheese and dairy products for food";

ii) the applicant's mark nearly resembles its registered trade mark and is proposed to be registered in respect of the same goods or goods of the same description and registration would therefore be contrary to Section 12(1) of the Trade Marks Act 1938 (as amended);

iii) it has used its trade mark in the United Kingdom for many years in respect of the goods for which it is registered; use of the applicant's mark would therefore be liable to cause confusion or deception with the result that registration would be contrary to Section 11 of the Trade Marks Act 1938;

iv) the application should be refused in the exercise of the Registrar's discretion under Section 17(2) of the Trade Marks Act 1938.

There was originally a further ground of opposition under Section 17(1) of the Act, but this was not pursued before me.

4. The applicant filed a counterstatement denying the grounds of opposition. Further, the applicant says that, by virtue of a Settlement Agreement dated 5 February 1993 between Besnier SA and Loblaw Companies Ltd, Besnier SA are estopped from filing opposition because the specification of goods of the application conforms with the terms of paragraphs 2(a) and 2(b) of the aforesaid Settlement Agreement. The action undertaken by Besnier SA is therefore said to be a direct breach of paragraph 2(c) of the aforesaid agreement by which Besnier S.A. undertakes not to oppose use or registration by Loblaw's of the words 'President's Choice' anywhere in the world. In the alternative, the opponent contends that the opponent has acquiesced to the use of the mark 'President's Choice' in relation to the goods for which registration is sought.

5. Both sides ask for an award of costs.

6. The matter came to be heard on 11 April 2000 when the applicant was represented by Ms F Clark of Counsel instructed by Maguire Boss & Co, and the opponent was represented by Mr Mitcheson of Counsel instructed by Frank B Dehn. By the time the matter came to be heard the Trade Marks Act 1938 had been repealed. However, in accordance with the transitional provisions set out in the Trade Marks Act 1994, the provisions of the old law continue to apply to these proceedings. Accordingly, all further references to provisions of the Act are, unless otherwise stated, references to the Trade Marks Act 1938.

7. The opponent's evidence consists of two Statutory Declarations by Michel Besnier, who is the President of Besnier S.A. The key points that emerge from Monsieur Besnier's first declaration of 2 September 1997 are as follows:

i) Besnier has used the mark 'President' in the United Kingdom continuously since 1980.

ii) It is claimed that the use of the mark has been in relation to a full range of dairy products including butter, cheeses and dairy spreads. However, from the copies of invoices and written articles about the opponent's products which appear in the exhibits to Monsieur Besnier's declaration, it appears that the opponent's trade in the UK prior to the material date of 1 October 1993 is primarily in relation to French cheeses such as Brie and Camembert. There may also have been some use in relation to butter.

iii) Turnover figures for sales of Besnier's products under the 'President' mark, in the United Kingdom, from 1987 to 1993 show that turnover in 1987 was just over £500,000 rising to over £1.5 Million by 1990 and subsequently falling back to about £1,250,000 in 1993.

iv) The opponent has provided copies of a number of unsolicited articles from publications such as 'The Grocer' which include articles featuring 'President' products.

v) On the basis of the opponent's reputation, Monsieur Besnier claims that the use by the applicant of the mark 'PRESIDENT'S CHOICE' in relation to products containing cheese is likely to lead the public to believe that such products are associated with the opponent. Monsieur Besnier makes particular mention of the inclusion in the applicant's specification of 'preparations of macaroni and cheese'.

vi) The Settlement Agreement dated 5 February 1993 between Besnier and the applicant prohibits the applicant from filing an application to register any trade mark including the term 'President' in countries where Besnier already owned rights in their mark 'President' prior to the date of the agreement, in respect of any food with the exception of non-dairy products. The application was therefore filed in breach of the agreement and the application to register the mark is, therefore, made in bad faith.

8. The applicant's evidence takes the form of a declaration by Marion M Burrows, who is the Assistant Secretary of Loblaw Companies Ltd. The key points that emerge from Ms Burrows declaration are as follows:

i) Loblaw and its associated companies is the largest retail supermarket chain in Canada.

ii) The 'President's Choice' brand was first used in Canada in 1983. By May 1988 the opponent was selling over 2,300 different types of products under the 'President's Choice' brand.

iii) Loblaw exports products under the 'President's Choice' brand to other countries including, but not limited to, Hong Kong, Bermuda, United States, Israel and South America.

iv) The opponent's products, in particular President Camembert and Brie are sold alongside the applicant's 'President's Choice' products in the opponent's retail stores in Canada. Ms Burrows says she is not aware of any instances of confusion.

Ms Burrows accepts that the application includes 'preparation of macaroni and cheese' but says that this must be understood to be a prepared dinner. She exhibits at MB7 the packaging of a deluxe white cheddar macaroni and cheese dinner sold under the 'President's Choice' trade mark. She disputes that this falls within the terms of the Settlement Agreement.

v) The specification of the application does not include dairy products in accordance with the terms of the Settlement Agreement. Therefore, she says that, if there is any breach, it is the opponent who is in breach of the Settlement Agreement by filing the opposition.

9. The opponent filed evidence in reply. This takes the form of a further Statutory Declaration by Michel Besnier dated 10 November 1998. The main points which emerge from Monsieur Besnier's second declaration are as follows:

i) The evidence of co-existence in the Canadian market is not evidence that there is no likelihood of confusion between the respective marks in the UK.

ii) The opponent's mark has been widely advertised in the UK. Figures for advertising expenditure are exhibited to Monsieur Besnier's second declaration. The figures provided are in French francs. The same figure of one million French francs is provided for each of the years 1990 through to 1993.

iii) The applicant's "deluxe white cheddar macaroni and cheese dinner" (as shown in Exhibit MB7 to Ms Burrows declaration) contains cheese as a main ingredient. Use and registration of the mark 'President's Choice' in relation to products containing cheese would be in breach of the Settlement Agreement.

iv) In the alternative, use of the mark 'President's Choice' in relation to all of the products covered by the trade mark application should be considered aside from any agreement between the parties, particularly since the agreement is in dispute.

Decision

10. At the outset of the hearing, Mr Mitcheson clarified the specific goods within the applicant's specification to which the opponent objects. These are:

'Preparations of macaroni and cheese; sauces; spaghetti sauces and prepared meals.'

11. The opponent contends that these are 'dairy products' and that the use of the mark applied for would be contrary to the Settlement Agreement referred to in the evidence. The opponent relies upon paragraph 4 of the Settlement Agreement, which is as follows:

"With the exception of non-dairy products (e.g "President" Champagne used by BRIGHTS, a Canadian winery company), LOBLAWS acknowledges the validity of BESNIER's exclusive rights to any trademark and/or product name (including the goodwill symbolized thereby) including the word "president" anywhere in the world and any trademark and/or product name for the word "president" alone; and LOBLAWS undertakes not to challenge or otherwise interfere with (or allow any licensee or other entity under its control to challenge or otherwise interfere with) such exclusive rights nor BESNIER's use of such trademarks and/or product names, nor to use and/or permit any licensee or other entity under its control to use any such marks or product names, or any similar thereto in association with any such products, including without limiting the generality of the foregoing and subject to the other terms and conditions of this agreement, any food and/or dairy products."

12. As the clause states, this is subject to the other terms of the Agreement. The applicant relies upon paragraphs 1 and 2 of the Agreement, which (insofar as is relevant) are reproduced below:

"WHEREAS, the parties believe that their use of their respective marks for the respective goods in accordance with the terms of this Agreement will not result in a likelihood of confusion as to source, origin or sponsorship of the goods and services of

the respective parties;"

"1. For the purposes of this Agreement, and except as otherwise expressly provided herein: "dairy products" shall mean all products referred to as "dairy products" under attachment 1 to (and made a part of) this Agreement, and "president" or "PRESIDENT" shall mean the word "president" (including the possessive form thereof) and its translations and/or transliterations into any and all languages."

"2.(a) LOBLAWS undertakes to file such documents as may be necessary to cancel or withdraw all pending applications for registration of, to voluntarily cancel all registrations for and to refrain from filing for registration of, and/or from using, save as otherwise provided herein, anywhere in the world, any trade mark and/or product name including the word "president" in association with dairy products, where such pending applications are solely for dairy products."

"2.(c) Further, LOBLAWS will not oppose use or registration by BESNIER of the word "president" anywhere in the world, provided such word is not used or applied to be registered in combination with the word "choice."

BESNIER will not oppose use or registration by LOBLAWS of the words "President's Choice" anywhere in the world, provided such words are used or applied to be registered in combination only and not each word singly, for any products other than dairy products."

13. Attachment 1 to the Agreement is as follows:

"(A) All the following generally contain 50% or more milk products and are in any event deemed to be "dairy products" for the purposes of this Agreement.

1. Plain milk in liquid, powder or concentrated form without additives.
2. Butter.

3. Cheese.
4. Yogurt.
5. Cream.

(B) If any of the following products contain 85% or more milk products, they are deemed to be "dairy products" for the purposes of this Agreement.

1. Liquid milk with additives and flavourings.
2. Refrigerated or frozen milk-based desserts.
3. Milk-based sauces and bakery items.
4. Frozen entrees containing milk products.
5. Shelf-stable desserts in cans, glass or aseptic packaging.

None of the following products shall be deemed to be "dairy products" for the purposes of this Agreement.

1. Ice Cream, Ice Milk and Sherbets.
2. Dry powdered milk modifiers/additives.
3. Margarines with or without milk products."

14. Ms Clark indicated that the applicant was prepared to limit the specification of goods so that the items in dispute were all qualified by "containing less than 85% milk products". With this addition, she submitted that her clients were within the terms of the Settlement Agreement because none of the disputed goods fell within the term "dairy products" as defined in the Agreement.

15. Mr Mitcheson drew my attention to paragraph 5 of the Agreement, which contains the following clause:

"Except for the provisions of article 6 of this Agreement, LOBLAWS undertakes not to register or use on any dairy product ("dairy products" here being used as defined in

article 1 hereof and also including those items included in its usual, unrestricted sense), anywhere in the world, any trade mark and/or product name including the word "president".

16. Article 6 relates to the position in North America and is therefore not relevant. In Mr Mitcheson's submission, the disputed goods were all "dairy products" within the usual unrestricted sense of these words, and use of the mark 'President's Choice' on these goods would therefore be contrary to article 5 of the Agreement.

17. The terms of the Agreement appear to conflict with one another. Clause 2 appears to envisage Loblaw being free to apply for registration of PRESIDENT'S CHOICE other than in respect of dairy products in the restricted sense set out in the attachment to the Agreement. Clause 5 appears to restrict Loblaw's right to apply for registration further. It appears to prohibit Loblaw from applying for registration of any mark including the word 'PRESIDENT' in respect of any dairy products.

18. Neither counsel was able to shed much light on this apparent contradiction between clauses 2 and 5. Mr Mitcheson suggested that clause 2 only applied to applications and registrations which existed at the time of the Agreement in North America. But in fact the clause expressly deals with future filings "anywhere in the world". In the event I do not believe it matters, for the purposes of these proceedings, whether I consider the applicant to be bound by the restricted meaning of "dairy products" or by the usual meaning. For even if I take the usual meaning of the words, with the restriction accepted by the applicant at the hearing, the goods which are the subject of the dispute cannot be regarded as "dairy products".

19. In interpreting specifications of goods, descriptions should be given the meaning they would be accorded in the relevant trade. See the remarks of Jacob J. in the *TREAT case, 1996 RPC 281 at page 289, lines 6-11*. "Preparations of macaroni and cheese" is a pasta product flavoured with cheese. It is in Class 30 because it is a pasta product. This is confirmed by the applicant's specification which limits the goods to those placed in Class 30 by the Registrar. 'Dairy products' fall in Class 29. I doubt whether 'sauces' or 'spaghetti sauces' would naturally

be described as 'dairy products'. Rather these are goods that, in the case of (say) a cheese or butter sauce, are properly classified as a cooking sauce derived from dairy products. In any event, I would expect the restriction the applicant has accepted to exclude sauces made principally from butter or cheese. 'Prepared meals' fall into two classes. Those based on meat, fish, game or dairy products fall into Class 29. They are not covered by the applicant's specification. The 'prepared meals' in Class 30 are those based upon cereal products, bread and pastry. There is nothing within this term, and which is also in Class 30, which could be regarded as a dairy product.

20. Consequently, I do not consider that the application has been filed contrary to the terms of the Settlement Agreement between the parties. This leads me to the question of whether the opponent is, as the applicant contends, estopped from filing this opposition by the terms of the Settlement Agreement. The Agreement records the parties belief that "use of their respective marks for the respective goods in accordance with the terms of this Agreement will not result in a likelihood of confusion as to source, origin or sponsorship of the goods and services of the respective parties". Paragraph 17 of the Agreement provides:

"In the event that either LOBLAWS or BESNIER alleges a breach of this Agreement by either party, this Agreement shall be governed and construed in accordance with the laws of the country where the alleged breach occurred, regardless of what the law of conflicts may otherwise provide, and all parties consent to the jurisdiction of the Court of the State of New York or any United States Federal Court."

21. Paragraph 2(c) of the Agreement (which is re-produced above) states that Besnier will not oppose Loblaw's registration of the words "President's Choice" for any products, other than dairy products, anywhere in the world. I have already found that the applicant's revised specification does not include 'dairy products' (whether used in the restricted sense or otherwise). There is no suggestion that the Agreement was varied or terminated prior to the relevant date (or subsequently).

22. Mr Mitcheson submitted that his client was entitled to succeed in the opposition even if it

was found to be acting contrary to the terms of its Agreement with the applicant. If that was the case the applicant's proper course was to sue for breach of contract. To justify this position, Mr Mitcheson relied upon passages from *Dunn v Eno s1890 7 RPC 311* to the effect that registration ought not to be allowed where it would amount to a fraud upon the public.

23. Ms Clark reminded me that the Agreement between the parties recorded their belief that use in accordance with the Agreement would not result in confusion. In her submission, there was now an estoppel which prevented the opponent from filing an opposition contrary to the terms of the Agreement.

24. I am not persuaded by Mr Mitcheson's argument that, despite the fact that the opponent at one stage asserted that the application should be refused because of an alleged breach of the Agreement by the applicant, the terms of the Agreement should not bind the opponent in these proceedings. Neither Counsel were able to assist me with any authority on the application of estoppel in similar circumstances. I note that in *Wantoch and Wray's Patent 1968 RPC 394*, Mr Justice Lloyd-Jacob found that an applicant for revocation of a patent, who had previously conveyed by deed the full benefit of any letters patent to be granted on certain patent applications, could not subsequently prosecute an application for partial revocation of the patent. I acknowledge that the facts in the case before me are significantly different, but I nevertheless believe that this case shows that a person seeking to attack or oppose the granting of an intellectual property right can be estopped from asserting facts contrary to the terms of a deed between the parties concerned. Whether the use of two trade marks on certain goods will cause confusion appears to me to be a question of fact. I believe that there is an estoppel by agreement which prevents the opponent from asserting that there is a likelihood of confusion in circumstances where there is a legal agreement between the parties that sets out the terms upon which the parties agree that their respective uses will not give rise to confusion, and where the application conforms with the terms of the Agreement. The opponent's alleged acquiescence is really the same point. I don't think it takes the applicant's case any further. However, despite what I have said, I do not consider that I have heard full argument on these matters and, in case I am wrong in finding that the opponent is estopped from opposing this application beyond the terms of the Agreement, I will go on and consider the grounds of opposition under Sections 11

and 12 of the Act without regard to the terms of the Agreement between the parties.

25. I will first consider the Ground of Opposition under Section 12(1) of the Act. This provides:

12.-(1) Subject to the provisions of subsection (2) of this section, no trade mark shall be registered in respect of any goods or description of goods that is identical with a trade mark belonging to a different proprietor and already in the register in respect of the same goods or description of goods, or that so nearly resembles such a trade mark as to be likely to deceive or cause confusion, or nearly resembles a mark belonging to a different proprietor and already on the register in respect of -

- (a) the same goods,
- (b) the same description of goods, or
- (c) services or a description of services which are associated with those goods or goods of that description.

26. I have already found that the goods within the disputed goods within the applicant's specification are not 'dairy products'. At the hearing, Mr Mitcheson submitted that the term that appears in the specification of the opponent's registered mark "dairy products for food" (my emphasis) has a wider meaning covering foodstuffs containing dairy products. In his view, this term encompassed the disputed goods in the application and even extended to goods where the dairy product content was very low, even "cheese and onion crisps". There may have been an element of overstatement in that submission to illustrate his point. I would prefer to think so.

27. Ms Clark contended that the words "for food" were present simply to indicate the purpose of the 'dairy products'. She observed that dairy products can be used for other purposes. I believe that Ms Clark is plainly right. Prior to the practice of adding "all included in Class X" at the end of specifications, it was the Registrar's practice to edit every item in a specification so that it could only fall in one class. This may be the origin of the words "for food" in the opponent's registration for "dairy products". In any event it would be a fantastic result if the

addition of these words were to extend the meaning of the resulting term to cover every foodstuff containing dairy products. Adding a purpose to a description of goods normally narrows the scope of protection rather than extending it. In my view "Dairy products for food" means "Dairy products for use as a foodstuff". The disputed goods in the application do not fall within this description. Nor do they fall within the descriptions "edible lard" or "cheese".

28. The next question is whether the respective goods are "of the same description". Mr Justice Jacob set out the criteria to be considered in the well known *TREAT case*, 1996 RPC page 281, at 296. He said that the following should be taken into account:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

29. Strictly speaking, these factors were put forward as a means of addressing similarity of goods under the 1994 Act but as Jacob J. noted, they are really no more than an update of the old judicial test for 'goods of the same description' as set out by Romer J. in *Jellinek's Application* (1946) 63 RPC 59.

30. The disputed goods within the application are 'prepared meals', 'preparations of macaroni and cheese', 'sauces' and 'spaghetti sauces'. These descriptions are subject to the qualifications 'all included within Class 30' and 'being less than 85% milk products'. For the reasons I have

already explained, there is some overlap between these qualifications. The opponent's goods are 'cheese', 'edible lard' and 'dairy products for food'.

31. The respective users of these goods (like most foodstuffs) could be the same. The uses of 'macaroni and cheese preparations' and 'prepared meals' are generally different to the opponent's goods. 'Cheese' may be used as a snack food and 'dairy products' may be used as a dessert, but neither would usually serve as (or as a substitute for) a main meal in the way a prepared meal or 'preparation of macaroni and cheese' would.

32. 'Sauces' and 'spaghetti sauces' will be used either as cooking sauces or as condiments. The former use is closer to 'dairy products', which may also be used as ingredients in cooking. However, the specific purposes would usually be different. 'Sauces' are usually used to flavour a meal whereas 'dairy products' are generally used as a more basic ingredient.

33. The physical nature of the goods would be different even though some of the applicant's goods could contain dairy products. Even though 'macaroni and cheese' includes cheese, it is principally a pasta product.

34. There is no evidence to suggest that producers of dairy products generally trade in any of the goods for which the applicant seeks registration. It seems highly unlikely that prepared meals or macaroni and cheese preparations would appear on the same shelves or cabinets as dairy products. The same applies to spaghetti sauces. It is possible that chilled cooking sauces could appear on shelves within roughly the same area of a store as dairy products but they would probably not be adjacent to each other or in the same cabinet. The applicant's exclusion of sauces made from 85% or more milk products makes it even less likely that the applicant's sauces will appear on shelves close to the opponent's goods.

35. I doubt very much whether the trade would regard the respective goods as competitive. In my view, there is less similarity between the respective goods in this case than there was between the respective goods in the *TREAT* case (dessert sauces and syrups v spreadable sweet toppings), which Jacob J. decided were not similar for the purposes of Section 5(2) of the new

law. It is clear from his remarks that he would not have found them to be 'goods of the same description' under the old law.

36. I conclude that the respective goods are not of the same description. The opposition under Section 12(1) is therefore bound to fail.

37. This brings me to the Ground of Opposition under Section 11 of the Act. It is common ground that the appropriate test is that set out in *Smith Hayden's Application (1946) 63 RPC 97* as amended by Lord Upjohn in *Bali 1969 RPC 472*. Adapted to the matter at hand the test is:

"Having regard to the user of the name 'President', is the tribunal satisfied that the mark applied for, 'President's Choice', if used in a normal and fair manner in connection with any of the goods covered by the proposed registration, will not be reasonably likely to cause deception and confusion amongst a substantial number of persons?"

38. The evidence indicates that the opponent has sold French cheeses, particularly Brie and Camembert, in the UK since 1980. Monsieur Besnier claims to have sold other dairy products but there is little evidence to support this assertion. All the invoices contained in Exhibit II to Monsieur Besnier's declaration relate to sales of Brie or Camembert under the mark. The press cuttings in Exhibit III also relate primarily to the opponent's trade in French cheeses. There are copies of articles relating to the sale of President butter, but these are all after the relevant date. The opponent's use of the mark prior to the relevant date was on a substantial but not exceptional scale.

39. Mr Mitcheson relied upon *Hack's Application (1941) 58 RPC 91* as support for the proposition that the opposition under Section 11 should succeed if people's minds are placed in a state of doubt or uncertainty as to whether macaroni and cheese, sauces and prepared meals promoted under the mark PRESIDENT'S CHOICE are connected in trade with PRESIDENT dairy products. For her part, Ms Clark relied upon Romer J.'s remarks in *Jellinek's Application* to the effect that, although it is sufficient "if the ordinary person entertains a reasonable doubt" (as to a trade connection between the goods), "the court (or tribunal) must be satisfied not

merely that there is a possibility of confusion; it must be satisfied that there is a real tangible danger of confusion". In Ms Clark's submission there is no such danger on the facts of this case.

40. In my judgment, Ms Clark is right. Although the opponent has established earlier user of its mark in relation to cheese, the evidence does not support a claim that it enjoyed an exceptional reputation amongst the public in the UK by the material date. Further the opponent's reputation and user appears to be based upon its trade in French cheeses. Although the applicant's specification includes 'preparations of macaroni and cheese' there is no special connection between macaroni (or any of the applicant's other goods) and cheeses such as Brie and Camembert. As I have already noted, prepared meals based primarily on a dairy product (such as a cheese salad) would not fall within the applicant's specification in Class 30. Further, although the respective marks are clearly similar, they are not the same mark (as was the case in Hack's Application), and this must further reduce the likelihood of the ordinary person supposing a trade connection between the respective goods.

41. I have therefore come to the conclusion that the applicant has satisfied the onus which is upon it to establish that there was no real danger of confusion at the material date. I record here that, in reaching this view, I have placed no reliance on the fact that the respective marks have been used side by side for many years in North America without apparent confusion. As Mr Mitcheson submitted, conditions in different markets can vary and it is not safe to infer that concurrent use in one market without confusion necessarily means that there will be no confusion in the event of concurrent use in another market. However, for the reasons I have given, the opposition under Section 11 also fails.

42. The applicant should file a Form 21 within one month of the date of this decision, formally restricting its specification by excluding 'goods containing 85% or more milk products'. If they fail to do so the application will be refused in the exercise of the Registrar's discretion.

Costs

43. Mr Mitcheson submitted that the applicant's concession at the hearing about the specification of goods should be taken into account in assessing any order for costs. Ms Clark pointed out that, prior to the hearing, the opponent had failed to identify any specific goods, other than 'preparations of macaroni and cheese' to which its objections applied. Further, she submitted that the opponent's decision to proceed with the opposition, even to the extent that it was in breach of its Agreement with the applicant was a matter which justified a more generous contribution towards the applicant's costs than usual.

44. I have carefully considered these points and, whilst I do not believe that they entirely balance each other out, I have decided that they do not justify a departure from the usual scale of costs. I therefore order the opponent to pay the applicant the sum of £1,200. This sum to be paid within 7 days of the expiry of the period allowed for appeal or within 7 days of the final determination of this case in the event of an unsuccessful appeal.

Dated this 18 day of May 2000

Allan James
for the Registrar
the Comptroller-General