

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No 2104632 BY
GRANADA TELEVISION LTD TO REGISTER
THE MARK BETTY'S KITCHEN CORONATION STREET
IN CLASSES 29 & 30**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER
No 46500 BY BETTYS & TAYLORS GROUP LIMITED**

TRADE MARKS ACT 1994

5 **IN THE MATTER OF Application No 2104632**
by Granada Television Ltd to register the
mark Betty's Kitchen Coronation Street
in classes 29 & 30

10 **and**

IN THE MATTER OF Opposition thereto under
No 46500 by Bettys & Taylors Group Limited

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DECISION

On 9 July 1996 Granada Television Ltd applied to register the mark **Betty's Kitchen**
Coronation Street for a specification of goods which reads:

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Class 29:

Products made from meat, fish, poultry and game; fruits and vegetables, all being
preserved, dried or cooked; jellies; eggs and dairy products; preserves; pickles; snack
foods; meals; pies; hot pots

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Class 30:

Preparations made from cereals; biscuits; cakes; pastry; non-medicated confectionery;
honey; treacle; salt; pepper; vinegar; sauces; spices; snack foods; puddings and
desserts; pies; meat pies; hot pots

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The application is numbered 2104632.

On 28 February 1997 Bettys & Taylors Group Limited filed notice of opposition to this
application. The grounds of opposition in summary are:

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(i) under section 5(2) in that the mark applied for is similar to the opponents'
earlier trade marks (see Annex 1 to this decision for details of the earlier
marks) and is to be registered for goods identical with or similar to those goods
or services for which the opponents' earlier trade marks are registered

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(ii) under section 5(3) in that, having regard to the reputation of the opponents'
earlier trade marks, it is said that use of the applicants' mark without due cause
would take unfair advantage of, or be detrimental to the distinctive character or
repute of the earlier trade marks

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(iii) under 5(4)(a) in that use of the mark applied for is liable to be prevented by
virtue of any rule of law protecting an unregistered trade mark or other sign

used in the course of trade

- (iv) under section 3(6) in that the applicants have no bona fide intention to use the mark in the form that it has been applied for and that there is no use or bona fide intention to use the mark in relation to many of the goods listed in the specification

The applicants filed a counterstatement denying the above grounds. Both sides ask for an award of costs in their favour.

Both sides filed evidence and the matter came to be heard on the 24 September 1999 when the opponents were represented by Mr I. Purvis of Counsel instructed by Appleyard Lees, Trade Mark Attorneys. The applicants were represented by Miss D. McFarland of Counsel instructed by McNeight & Lawrence, Trade Mark Attorneys.

Opponents' evidence

The opponents filed a statutory declaration by Jonathan Wild. In addition the opponents filed statutory declarations by Michael David Lowry, James Edward Fry and Dominic Jude Kay concerning the conduct of a survey, together with ten supporting declarations.

Mr Wild says that he is the Managing Director of Bettys & Taylors Group Limited, a position he has held since 1990. Prior to that he had been Deputy Managing Director since 1980. Mr Wild reviews the history of his company and says that the origin of the mark BETTYS with the opponents' business dates back to 1919 when his great uncle Frederick Belmont opened a high-quality bakery and restaurant in Harrogate.

Today, there are restaurants and associated shops run under the BETTYS mark in Harrogate, York, Ilkley and Northallerton. Mr Wild says that in 1962 BETTYS business merged with the Harrogate-based TAYLORS tea and coffee business. At JW1 Mr Wild exhibits various documents outlining the history of the opponents' business.

Mr Wild says that Frederic Belmont was concerned at the outset to run a very high quality establishment, with the mark BETTYS being seen as a badge of high quality. He includes various exhibits in support of his view that the mark BETTYS is well known. In particular, at:

JW2 Mr Wild exhibits various publicity materials from the earlier years together with later publications reproducing earlier material;

JW3 he exhibits a large selection of press cuttings from 1979 to date. Some of these are regional in nature but others are from the national and international press including The Times, the Daily Telegraph, the Daily Mail, the Daily Mirror together with cuttings from various magazines such as Vogue and Home & Gardens;

JW4 he exhibits extracts from a selection of tourism, travel, good food and restaurant guides including references in "Egon Ronay's Food Guide 1994" and "The 1995 Good Weekend Guide";

JW5 he exhibits references to the mark BETTYS in various contexts such as novels, travelogues and cartoons.

5 Mr Wild says that one way in which they promote their products and business name is through an organisation called The Walpole Committee set up by a consortium of British companies to promote British products of companies with a reputation for excellence. He goes on to say that the companies of the consortium all offer prestigious British products under well known brand names. At JW6 he exhibits a brochure with the title “The Walpole Committee” which features the mark BETTYS. At JW7 he exhibits extracts from the Walpole Committee’s web
10 site. Mr Wild says that they would not be admitted to membership of The Walpole Committee, to promote the mark BETTYS and products alongside names such as DAKS, THE SAVOY, BRITISH AIRWAYS, MAPPIN & WEBB and GLENFIDDICH, if BETTYS was not a well known mark denoting high quality British foodstuffs.

15 As further support for his view that the mark BETTYS has been presented widely Mr Wild refers to various awards that the company has won including Investors in People, National Training Awards and Tea Council Awards. At JW7 he also exhibits copies of pages from various world wide web sites referring to the company under the mark BETTYS.

20 Mr Wild then says that the mark BETTYS has been presented very widely by means of both local and national radio and television broadcasts and at JW8 he exhibits a cassette tape reproducing two such radio broadcasts.

Mr Wild says that it is his belief that BETTYS has a reputation throughout the United
25 Kingdom and beyond through tourists visiting their establishments and through their BETTYS by post service. He says that the mark BETTYS is associated with a considerable reputation for providing high quality foodstuffs, whether served in their restaurants, sold in their shops, or sold through BETTYS by post. He says that he is supported in his opinion by the various exhibits referred to above.

30 Mr Wild then says that the core trade mark is BETTYS but that sometimes this is derivatised. Referring to the exhibits, in particular JW3, he notes that sometimes they are called “BETTYS Tea Rooms, or BETTYS Café, or BETTYS Restaurant, or BETTYS of Harrogate, or BETTYS of York, or BETTYS of Northallerton, or BETTYS of Ilkley, or BETTYS Café Tea
35 Rooms and BETTY’S Bar”. He says that they are BETTYS and that is their distinctive trade mark. He concludes that people clearly recognise the BETTYS mark in all of the derivatised forms which they and others sometimes use. In the light of the publicity that they achieve through magazines etc, Mr Wild says that they do not promote the mark very much by way of paid adverts relying instead on their high standards and reputation.

40 Mr Wild says that a fundamental way in which goodwill in the mark BETTYS has been built up over the decades is by virtue of customers visiting their establishments to take meals and/or drinks and to visit their associated shops to purchase their goods. Mr Wild says that their current assessment is that they have approximately 1,600,000 customers each year in their
45 BETTYS establishments. This is split between approximately 1,000,000 customers in their restaurants and 600,000 in their four shops making retail purchases.

Mr Wild says that they are interested to know where their customers come from and based on samples of customers visiting their shops and restaurants, their estimate of the split between local customers (those from the towns and cities themselves where their establishments are based or within one hour's drive), and tourists/visitors is about one-quarter to three-quarters.

5 Mr Wild says that this is an overall figure which varies from season to season and from branch to branch but he points out that their two largest establishments are in York and Harrogate. He says that both have a large number of visitors every year.

10 Mr Wild refers to the applicants' suggestion that the opponents are just "genteel tea shops" and says that although they sometimes describe their establishments as café tea rooms they are in reality restaurants serving a wide range of products. At JW9 he exhibits copies of menus over the years.

15 Mr Wild says that another way in which their goodwill in the mark BETTYS has been built up is through their BETTYS by post business. This was established in 1986 and Mr Wild explains that BETTYS by post is their mail order business by which they market their products throughout the United Kingdom and overseas. At JW10 he exhibits mail order catalogues including the 1997 and Christmas 1997 catalogues together with extracts from earlier catalogues, the earliest being the "Easter 1988 Catalogue", and press cuttings about their
20 BETTYS by post service.

In addition to table sales and sales through the BETTYS by post service Mr Wild says that they also sell substantial quantities of goods in over-the-counter sales at their four BETTYS establishments. He says that these include, or have included, breads, filled sandwiches, mini
25 pizzas, savoury pastry products, cakes and biscuits. At JW11 he exhibits photographs which he says show their bakery sales counter on a typical day in October 1997 and at JW12 he exhibits two photographs that he believes were taken at least 15 years ago. JW12 shows a stand which appears to display various savoury products with the words "A mouth watering array of savouries and pastries from BETTYS". Mr Wild says that deliveries to these
30 establishments from their own bakery are made by their five delivery vans which are painted with the BETTYS mark. Mr Wild then goes on to say that an additional form of business for them under the mark BETTYS has been in providing food goods for their customers to serve at parties. At JW13 he exhibits a photocopy of a leaflet with the title "Party Pieces from BETTYS". Mr Wild says that this leaflet dates from about 1985 and that at present they are
35 not promoting this line but may do so later.

Mr Wild then explains that since the merger in 1962 of BETTYS and TAYLORS they have expanded the TAYLORS business through national supermarket chains. Whilst they have expanded the BETTYS business through BETTYS by post, he says that they have chosen not
40 to take the supermarket route to expand the BETTYS business because they do not wish to adopt mass production techniques. He says that it remains their imperative that all products sold under the BETTYS mark should be of high quality. However, he says that owing to their reputation under the BETTYS mark and their links established with the multiple retailers through their TAYLORS business it would be a relatively straightforward step to go down the
45 mass marketing route for their BETTYS business. He says that whilst it is not what they have chosen to do up to the present time it remains in their thinking as an option.

Mr Wild then provides various sales figures for the period 1987 to 1996. Mr Wild states that the figures are broken down into BETTYS catering which relate to table sales of their products, BETTYS retail which relate to over-the-counter sales and BETTYS by post. The figures are:

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Year to October	BETTYS CATERING £'000	BETTYS RETAIL £'000	BETTYS BY POST £'000	BETTYS TOTAL £'000
1987	2,300	1,575	88	3,963
1988	2,842	1,731	109	4,742
1989	3,401	2,049	144	5,594
1990	3,734	1,891	105	5,970
1991	3,790	1,987	150	5,927
1992	3,920	2,172	141	6,233
1993	4,133	2,360	146	6,619
1994	4,238	2,470	171	6,879
1995	4,158	2,549	187	6,894
1996	4,370	2,702	205	7,277
1997	4,513	2,720	260	7,493

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TOTAL	43,379,000	24,466,000	1,706,000	67,351,000
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Mr Wild then lists various ways in which he says that they present the mark BETTYS or its derivative marks such as BETTYS Café Tea Rooms. In relation to table services he says that the mark is prominently presented as the name of the establishment and on bills and menus, reference is made to exhibit JW9, which comprises a range of menus from over the years. In relation to retail sales at the establishments Mr Wild says that the mark is presented as the name of the establishment and on packaging for the products. At JW14 he exhibits a label, paper bag and cake box all showing the mark BETTYS. Referring again to exhibits JW10 and JW14 Mr Wild says that in relation to BETTYS by post the mark is displayed on the catalogues and on packaging applied to the goods.

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Mr Wild then says that over the years they have sought to ensure that the mark BETTYS is secure. He refers to a number of United Kingdom registrations of the mark BETTYS including stylised and derivatised versions. At JW15 he sets out their registrations (see Annex 1).

Mr Wild refers to the applications filed by the applicants containing the word BETTY'S and at JW16 he includes papers relating to this application and an earlier application to which the

examiner had objected. Mr Wild compares his companies registered trade marks and goods with those of the application in suit. Mr Wild says that there is considerable overlap between the goods covered by their BETTYS registrations and those of the application in suit, and that other goods are similar.

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Before making a comparison of the marks Mr Wild outlines his experience in marketing in the area of food and drink. Mr Wild says that applying his experience it was his immediate view that there would be association of the mark BETTY'S KITCHEN CORONATION STREET, in which BETTY'S is the first word and a very significant part of the mark, with their mark BETTYS, in the minds of customers, and there would be a likelihood of confusion. In relation to the programme Coronation Street Mr Wild then says:

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“I was aware that Coronation Street is a well known television programme. I was also aware of the extensive practice of dual branding of products, including food and drink products. It was my immediate view on learning of the mark BETTY'S KITCHEN CORONATION STREET that some customers would see it and assume a link with ourselves and the makers of the Coronation Street television programme. However, whilst I was confident of my view I had my trade mark Attorneys Appleyard Lees prepare a list of dual branded food and drink products on sale in their local Sainsbury, Tesco, Asda and Iceland supermarkets, so that I could test my view against such products currently in the shops. That list is exhibited as Exhibited JW17 hereto.

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This list confirmed my view that purchasers of foodstuffs are by now very well accustomed to seeing the trade marks of two (or more) different trade mark owners on products. In very many cases one of the trade marks corresponds to the name of a celebrity, or of a film or television programme. There are all sorts of different contexts in which this happens. Sometimes it is transitory - examples may be the many products currently bearing the trade marks the SPICE GIRLS or DISNEY/HERCULES, alongside the manufacturer's trade marks. Such examples are normally merely promotional and customers do not think that the Spice Girls or the Disney Corporation have done much more than lend their name, to help sell the products. In other cases the names of longer running film or television characters or programmes may be used on products as trade marks, for example THOMAS THE TANK ENGINE AND FRIENDS or MR. MEN, alongside one of the manufacturers' trade marks. Such examples tend to be less transitory.”

Later he continues.

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“In other cases it may be that one company known for its restaurants “lends its name” to a product by, apparently, providing a recipe, or endorsing the product - for example TESCO TGI FRIDAY frozen deserts, or YOUNG'S haddock steaks with “batter approved by HARRY RAMSDEN'S” ”.

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In reviewing the products/marks set out in Exhibit JW17 he says that it is his view, based on his marketing expertise, that customers will assume in each case that two (or more) proprietors of trade mark rights, registered or unregistered, have been involved - and that customers would be correct to make such assumptions.

Therefore, Mr Wild says that customers will consider that they are involved in some way or other in the food product called BETTY'S KITCHEN CORONATION STREET. He says that they may for example think that they manufacture a product sold under the mark BETTY'S KITCHEN CORONATION STREET, or that they have provided the recipe, or that
5 they have endorsed the product, or that they have set up an arrangement whereby products are manufactured for them.

Mr Wild says that he understands that there is a character called Betty Williams in Coronation Street and that it has been suggested that customers will associate the mark with this character.
10 Mr Wild says that even if some Coronation Street viewers do so, some may still think that the opponents are involved in some way and there are many people who do not watch the programme and are not likely to make the association with the character. Mr Wild then says that despite his view that people would associate and/or confuse the marks BETTYS and BETTY'S KITCHEN CORONATION STREET he instructed a firm of solicitors Addleshaw
15 Booth & Co to carry out research. Mr Wild says that he has read drafts of the resulting declarations and believes that these support his views set out above.

Mr Wild says that he is concerned that registration of the mark BETTY'S KITCHEN CORONATION STREET would seriously dilute their rights and cause confusion with their
20 existing customers. Mr Wild says that they have over many decades built up an extensive good will in the mark BETTYS. Although they are based in Yorkshire Mr Wild says that this has not stopped them gaining a reputation nationally and internationally. As stated previously, he says that their distinctive identifier is BETTYS and they consider it their right to adopt different trade marks which ally their "identifier" with other available terms.

25 Mr Wild says that his company keeps an eye on the activities of other companies in relation to trade marks. He says that last year his company purchased two registrations relating to confectionery. He also says that since 1979 they came to an agreement with a company called General Mills, Inc., who have an interest in the mark BETTY CROCKER which is often used
30 in conjunction with a spoon device.

Mr Wild says that he is aware of the products being sold, under the licence of the applicants, relevant to this opposition, and which has led him to the view that the mark BETTY'S
35 KITCHEN CORONATION STREET is not being used and that there is no proper business intention to use it. At JW19 he exhibits four packages of products sold by Holland's Pies. On the top, side and back of each packet is a riband which contains the word HOLLAND'S followed by the words BETTY'S KITCHEN. At the bottom of the front of the packet is the name of the television programme CORONATION STREET written out as a street sign. Mr Wild says that he does not see any use of the mark BETTY'S KITCHEN CORONATION
40 STREET, as applied for, on any of these packages. He then says that he has also seen a reference to an advert which uses only the term BETTY'S KITCHEN and at JW19 he exhibits a reproduction of the advert. At JW20 he exhibits a description of a video of a television commercial together with a still photograph from that commercial and at JW21 he exhibits a video tape recording of the commercial. Mr Wild says that he does not believe that these
45 materials show any use of the mark BETTY'S KITCHEN CORONATION STREET. Referring back to exhibit JW19 Mr Wild refers to an article in The Grocer, where the trade press had picked up on the BETTY'S KITCHEN part of the mark.

Mr Wild concludes by saying:

5 “In all these circumstances I cannot see how the applicant can be regarded as using the mark BETTY’S KITCHEN CORONATION STREET or having a proper intention to use it.

10 In summary, based on our trade mark registrations comprising BETTYS as the distinctive element, on our reputation in the mark BETTYS for foodstuffs, and on the research carried out as to dual branding and confusion in practice, I believe that the mark BETTY’S KITCHEN CORONATION STREET is likely to cause significant and damaging confusion and/or association with our marks, and accordingly should be refused. Furthermore it should be refused on the basis of lack of use or of intention to use it.”

15 The statutory declarations of Michael David Lowry, James Edward Fry and Dominic Jude Kay concern the conduct of three surveys. The first two surveys are outlined in the statutory declarations of Mr Lowry and Mr Fry. Mr Fry and Mr Lowry say that they are assistant solicitors in the intellectual property department of the Leeds office of Addleshaw Booth & Co the solicitors to Bettys & Taylor Group Limited. They state that the surveys were conducted
20 on the streets of Leeds City Centre on the morning of 17 November 1997. Participants were asked what their reaction would be if they heard someone was selling meat pies under the name “Betty’s Kitchen Coronation Street” (a variant form of the question also invited respondents to say who they thought might be behind it).

25 Mr Dominic Jude Kay says that he is an assistant solicitor in the Commercial Litigation Department of the Leeds office of Addleshaw Booth & Co the solicitors to Bettys & Taylor Group Limited. Mr Kay says that he was asked to conduct a survey in the Leeds office to assess the reaction of staff to products sold under the name “Bettys Kitchen Coronation Street”.

30 Mr Kay refers to nine statutory declarations sworn by various staff within Addleshaw Booth. A further statutory declaration by David Christopher Buncall is also submitted this is similar in content to those referred to by Mr Kay (Mr Buncall was approached by Mr Kempner, a partner in Addleshaw Booth).

35 To the extent that it is necessary I will deal with issues raised by the evidence relating to the surveys in the body of the decision.

Applicants’ Evidence

40 The applicants’ evidence consists of a statutory declaration by Gail Ann Rook. Ms Rook says that she has been the Company Secretary of Granada Television Limited, the applicants, since 1 October 1996 and that she has been Deputy Controller of Legal Services of Granada Media Group Limited which is the direct holding company of Granada since 1 January 1997. Ms
45 Rook says that she makes the declaration from facts and matters within her knowledge which she knows to be true and accurate or alternatively based on information given to her.

Ms Rook says that she does not respond to each and every paragraph and exhibit of Mr Wild's statutory declaration in detail and that this should not be taken as an acceptance of the accuracy and/or relevance of any of his evidence. Ms Rook then says that where she does specifically admit any part of his evidence she will endeavour to make that plain.

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Ms Rook says that the first substantive paragraphs of Mr Wild's declaration and exhibit JW1 contain historical information which is not reflective of the present situation. Ms Rook notes that whilst the opponents claim that their business is run under the BETTYS mark her enquiries show that the opponents' premises are listed, for at least telephone directory purposes, by reference to the names Bettys Café/Tea Room, Betty's Café and not 'Bettys'.

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Ms Rook then says:

"I do not deny that the name 'Bettys' is used in a distinctive manner as evidence by exhibit JW2 referred to in paragraph 5 of Mr Wild's declaration. Indeed the exhibit clearly shows that 'Bettys' is almost always used in a distinctive manner and/or in conjunction with other words. Further, all the materials exhibited identify Bettys geographically and in the main relate to confectionery, teas and cakes (which may be served at their café or restaurant premises as part of their restaurant services)".

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Ms Rook says that the opponents' evidence seems to support the evidence adduced on the applicants earlier application that the opponent is a well-known Harrogate tea room with business interests that extend to other tea rooms in Yorkshire and the supply of hamper food, teas, coffees and fancy foodstuffs via mail order. Ms Rook says that there is a significant geographical limitation to any reputation that they enjoy and that in her view there is no realistic overlap between their goods/or services and those of interest to the applicant. Ms Rook refers to the numerous extracts from JW3 and says that many of the descriptions provided by third parties are valuable observations as to the limits of the opponents' activities under or by reference to the name 'Bettys'. Ms Rook says that the various descriptions given by these third parties tends to suggest no likelihood of confusion between the applicants' mark and products and those of the opponent.

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Ms Rook says:

"However, I should record that we do not challenge the view that the mark BETTYS (in the distinctive typeface and script form used by the Opponent) is well-known in the specific geographical locations where their cafeterias/teas-rooms operate and in relation to foodstuffs offered by those cafeterias/tea-rooms. However, we dispute that there is any reputation and goodwill;

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(a) generally in the forename Betty simplicitor;

(b) in respect of foodstuffs other than its own specific bakery products as may be sold by the opponent at its cafeterias/tea-rooms or to a very limited range of epicurean standard products that may be sold to a small number of selective customers through a 'by post' service and presumably mainly to people who have been customers of the shop"

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Ms Rook then makes various other comments regarding the evidence in the statutory declaration of Mr Wild. In particular, Ms Rook comments that paragraph 7 through to 9 of Mr Wild's declaration and exhibits JW4 - JW6 show the limited territory in which the opponents' business exists and that exhibits are limited to descriptions of the facilities and products and services available in the cafeteria/tea rooms and bakery products offered at those premises. Ms Rook says that the opponents are regarded as a comparatively expensive restaurant offering coffee and cake.

10 Concerning exhibit JW7 Ms Rook says that these emphasise throughout that the luxury products and services provided by the companies mentioned in the exhibit are only affordable by more affluent members of society. Ms Rook says that the opponents' products and services are wholly distinguishable from those of the BETTY'S KITCHEN CORONATION STREET range which she says on pricing factors and channels of availability alone, is designed to be
15 accessible and affordable to all.

Ms Rook refers to the web-sites cited by Mr Wild and says that the value of these as a corollary to any reputation must be directly dependant on how many times they are accessed. Ms Rook notes that Mr Wild provided no evidence to indicate the amount of access of the web
20 sites in question. Referring to the radio and television broadcasts mentioned in Mr Wild's declaration, Ms Rook says that they are commentaries on the cafeteria/tea room facilities in Yorkshire and the services offered at those premises. Ms Rook then says:

25 "As mentioned above, I do not deny the localised notoriety of the Opponent's cafeterias/tea rooms, however, that is a far cry from establishing a reputation in products sold outside of Yorkshire, throughout the United Kingdom, and independently of those cafeterias/tea rooms. I also suggest that the fame and notoriety appear to be limited to "teas" in the main".

30 Ms Rook says that she has examined closely the exhibits cited in paragraphs 12,13, and 14 of Mr Wild's declaration and says that the articles again concentrate on the subject of tea and coffee. Ms Rook says that in her submission the opponents have not produced evidence to suggest any actual conflict with Granada's mark as presently used nor any likelihood of conflict with the products the subject of Granada's trade mark application for the mark BETTY'S
35 KITCHEN CORONATION STREET. Concerning BETTYS by post, she says that a postal ordering service is a very limited narrow incursion into retail marketing and that in this case it is only for a rare selection of high priced arguably expensive products which are sold to the discerning few. Ms Rooks says that the applicants' licensed products are sold by major supermarkets throughout the country and she therefore contends that given the limited
40 geographical area in which the opponents operate and the restricted form of distribution, there can be no possibility of confusion. Ms Rooks says that the evidence serves to confirm the wholly distinguishable nature of the opponents' business, services and products.

Ms Rook says that in response to paragraph 16 of Mr Wild's declaration she would suggest
45 that to the extent that the opponents' mark BETTYS is used simplicitor it is used in a distinctive script style. Ms Rook also says that the evidence of the titles subsequently used in that paragraph such as 'Bettys Tea Rooms' suggests a need to limit or better identify the

opponent by reference to geographical location or alternatively their cafeteria/tea rooms. Ms Rooks says that she does not accept that the derivative 'Bettys by post' is a name which is in every day use but is purely incidental to the main business of the opponent.

5 Ms Rook notes the emphasis that Mr Wild placed on the standard of quality and reputation, however, she suggests that Mr Wild is dealing with a totally different type of customer or consumer from those who purchase the applicants' goods of interest under the name BETTY'S KITCHEN CORONATION STREET with its clear connotations and connections with the television programme.

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Ms Rook also notes the extensive details given of the apparent number of visitors to the shops and restaurants but says that no details are provided of the goods actually sold and/or their packaging or get-up, which she says would suggest that the goodwill and reputation of Bettys is founded in and with respect to the services of the shops and restaurants themselves and not any products sold. Ms Rook says that although Mr Wild may seek to allay or refute suggestions that the opponent simply sells tea and coffee and tea shop confectionery at their premises, she says that the evidence does indeed show that these are the opponents' products. Ms Rook refers to the menus provided at exhibit JW9 and notes that they are a list of the food products available at the opponents cafeteria/tea room premises and provided as part of their restaurant services. Ms Rook says that these food products provided in connection with that restaurant service cannot in any way be considered trade mark use.

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Ms Rook notes that orders for the "Bettys by post" service have to be forwarded to the address of the opponents in Harrogate. This she says highlights the "geographical singularity" of the reputation of the opponent for their 'by post' products. Ms Rook then notes that other than ordering by post, the opponents's goods are only available through their four Yorkshire premises. Referring to exhibit JW11 and JW12 Ms Rook notes that none of the products in the photographs are available in the 'by post' catalogue which she says offers tea, coffee and a range of specialist food products.

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Regarding the 'Party Pieces from Bettys' line of products Ms Rook notes that they have not been offered since around 1995 and that the products described in the accompanying exhibit are not by their nature goods of interest to Granada or its licensees. Ms Rook suggests that the service, when offered, must have been provided, in almost all cases, within a limited geographical radius of the opponents' premises in Yorkshire. Ms Rook says that the delivery vans used by the opponents also operate in a limited geographical area and in relation to the 'by post' service notes that Mr Wild does not particularise what products or quantities may be supplied to customers who have subscribed to that service.

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Ms Rook says that the applicants' licensed goods are currently sold in major supermarkets such as Iceland, Kwiksave, Asda, Tesco and Safeway. Ms Rook notes that Mr Wild confirms that the opponents have chosen not to take the supermarket route and she says this highlights the different type of outlet that the opponents and Granada utilise for their respective goods. Ms Rook then says that this again makes it clear that any likelihood of confusion, which she disputes there will be in any event, will be even further diminished.

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Referring to the turnover figures provided in the body of Mr Wild's declaration, Ms Rook says

that Bettys Catering and Bettys Retail which she says form the vast majority of the turnover are available only at the four locations. With regard to the 'Bettys Catering' figures Ms Rook says that she suspects that the vast majority if not all of this is evidential of the restaurant services provided rather than the goods sold under the name BETTY. Referring to the 'Betty Retail' figures, Ms Rook says that there is no breakdown as to what product is sold under or by reference to Bettys alone and she says that in relation to these figures and those for 'Bettys by post' she suspects that a large proportion, if not the majority of goods sold, comprises coffees and teas which do not bear the BETTYS mark.

10 Commenting on paragraph 26 of Mr Wild's declaration, Ms Rook refers back to the comments that she made concerning the use of various derivatives of the BETTYS mark as suggesting a need to limit or better identify the opponents. Ms Rook says that Mr Wild's comments concerning use of the opponents mark in relation to table sales go only to prove use of the mark in connection with restaurant services. Ms Rook says that they do not show actual products sold under the mark and are misleading in this context. Ms Rook goes on to say that the paper bag and box at exhibit JW14 are only available from the opponents four premises located in Yorkshire.

Ms Rook then says:

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"I do not challenge Mr Wild's comments in paragraph 27 that the mark BETTYS has a stylised version and that the different stylised versions are a specialised use of the mark. That Mr Wild admits that the different stylised versions "*reflect the ways in which we have chosen to present the mark BETTYS over years*" suggests quite clearly that the mark is and has been mainly used at the appropriate time only in the then 'current' style and I suggest that what Mr Wild is referring to in paragraph 26 sub paragraph (a) as "*many different ways*" is no more than a reference to the historical variations use in the past. This is demonstrable however of the fact that the opponent chooses to use as far as possible representations of its mark BETTYS in a distinctive stylised form."

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Ms Rook refers to Mr Wild's comments concerning the applicants' original BETTY'S KITCHEN application number 2029276. Ms Rook then refers to her declaration sworn on 12 January 1998 filed in opposition proceedings number 46942 and in particular paragraph 11 of that declaration. At GAR-1 she attached a copy of that declaration as an exhibit. At paragraph 11 of the declaration of 12 January 1998 Ms Rook outlines the fact that Granada sought consent from Bettys & Taylor Group to registration and use of the original application but that this was refused and that after some correspondence Granada chose to, and did then withdraw application number 2029276.

40 Ms Rook explains that Granada then filed the present application for BETTY'S KITCHEN CORONATION STREET and she refers to the comments made in their agents letter of 14 April 1996 concerning the image and operation of the opponents. Ms Rook says that this is of relevance because in her view it is clear that the opponents aim to and do provide a range of products wholly distinctive from the goods of interest to Granada under the mark BETTY'S KITCHEN CORONATION STREET and cater for customers wholly distinctive from the customers of Granada's licensed products.

45

Commenting on Mr Wild's contention that there is an overlap between his companies' products and those of the applicants, Ms Rook says that whatever overlap Mr Wild seeks to infer, that when dealing with food products there will always be in the mind of one person or another an 'overlap' but that this is distinguished by the respective parties' marks including in this case the
5 goods of Granada and those of the opponents and the differing merchandising between them.

Ms Rook then compares Mr Wild's work in marketing the Yorkshire Tea product with Granada's marketing team who conceived the idea of merchandising a range of good quality, honest and affordable food products under the name BETTYS KITCHEN CORONATION
10 STREET directly from the story line of Coronation Street.

Ms Rook then says:

15 "I am pleased to note that Mr Wild in paragraph 28 sub-paragraph 9(h) acknowledges the intended link with products marked BETTY'S KITCHEN CORONATION STREET and the Coronation Street programme. However, I do not accept that his comments have any relevance and I do not accept that even if separated there could be any suggestion that Betty's Kitchen is otherwise than associated with Coronation
20 Street. The Coronation Street television programme is the most popular television programme in history, having been broadcast for some thirty-seven years and the story line of the preparation of good quality, honest and affordable food by Betty in the kitchen of the Rovers Return for its customers has been followed and used for over twenty-five years and forms a well-known theme in the Coronation Street serial of
25 programmes."

Ms Rook says that Mr Wild does not identify how any confusion would arise and suggests that owing to the difference outlined above in the products and outlets that none would occur. Ms Rook also questions the explanation given by Mr Wild for the purchase of the two
30 BETTYS marks in August 1996. Ms Rook suggests that the purchase of these marks was prompted by this opposition to avoid the need to explain how they could have tolerated the existence of these marks on the market and yet seek to oppose Granada's mark. Ms Rook notes Mr Wild's reference to the BETTYS CROCKER mark and the longstanding agreement for co-existence which she says covers goods of the same description. Ms Rook says that if
35 Betty Crocker and, up to August 1996 the mark BETTY'S which the opponent purchased from Madam Foods Limited, can be distinguished from the opponents' mark BETTYS then so too must BETTY'S KITCHEN CORONATION STREET be distinguishable.

Noting Mr Wild's comment that different forms of marketing avoid any public confusion and diminution of rights Ms Rook says:
40

45 "Given that our products of interest are marketed with at least as many different forms (when comparing the number and types of differences between Betty Crocker goods with those of the opponent's products), Mr Wild must also agree and accept that our forms of marketing must equally reduce if not eradicate the likelihood of confusion, if, which I do not accept, any exists or could be said to exist in the first place."

Ms Rook then refers to correspondence between the applicants and the opponents concerning

the applicants earlier application for BETTY'S KITCHEN number 2029276. Copies of two letters dated 26 April 1996 and 17 June are attached as exhibits GAR-2 and GAR-3. Ms Rook says that in these letters it was suggested that the mark BETTY TURPIN would be acceptable, Mr Wild explaining "*that in relation to survey products, the opponents are the only*
5 *proprietors in class 30 of the mark BETTYS (plural or possessive) in the mark. The other proprietors all have Betty in the singular eg Betty Crocker...*". Ms Rook then says that she considered that it is incorrect for Mr Wild to assert that the opponents' mark covers the possessive use as well as the plural since their registrations and all current use contain no apostrophe before or after the letter 's'. Ms Rook goes on to make the assertion that, given
10 the co-existence of the BETTY CROCKER mark and up to August 1986, BETTYS (owned by Madame Foods Limited) Mr Wild surely accepts that "use of BETTY plus another word or mark or part mark, such as "s" is not an equivalent use of BETTYS"

Ms Rook refutes Mr Wild's contention that the applicant does not use the mark BETTY'S
15 KITCHEN CORONATION STREET as applied for. Ms Rook contends that the front panel of the packaging contained in exhibit JW19 shows use of that mark notwithstanding the marking on the other panels and in any event the opposition lodged by the opponent is in respect of the application of Granada for the whole mark. Ms Rook says that even if the mark was referred to in a shortened form as 'Betty's Kitchen' which she says is not their intention
20 not that or its licensees, she does not consider any confusion would arise.

Ms Rook then comments on the survey evidence submitted by the opponents. I will deal with the applicants' comments to the extent necessary in the body of the decision.

25 Ms Rook concludes by asking that the opposition be dismissed.

Opponents' evidence-in-reply

This consists of a further statutory declaration by Mr Wild. Mr Wild says that it would seem
30 that most of Ms Rook's declaration is not evidence but merely her comment and opinion to which no response is appropriate in his evidence but that this should not be interpreted as an acceptance of any part of Ms Rook's statutory declaration. Mr Wild replies to various sections of Ms Rook's declaration, in particular, concerning:

- 35 • sections 5 & 7, he refers to section 16 of his earlier declaration and at JW-ER1 he attaches further examples showing use of their mark BETTYS as it is used now, both stylised and plain lettering, solus and/or in conjunction with wholly descriptive terms
- 40 • sections 8, 12,14 suggesting that their reputation in the trade mark BETTYS is geographically limited. He refers to exhibits JW3, JW4 and JW10 of his earlier declaration which he says contains dozens of examples or write ups in the national press, guide books and national awards. Mr Wild says that in the light of these materials he does not see how Ms Rook can say that there is a significant geographical limitation to any reputation. At JW-ER2 he exhibits further examples of cuttings from
45 magazines and newspapers published since he made his declaration of 27 November 1997. Mr Wild says that the geographical locations where they choose to base their business do not equate to a geographical limitation in the reputation in their mark

BETTYS.

Mr Wild says that he believes Ms Rook's observation that there is no realistic overlap between their goods and services and Granada's goods of interest to be quite incorrect. Mr Wild says
5 that it is clear from his evidence that the opponents sell a wide variety of foodstuffs and hold relevant prior registrations for a wide range of foodstuffs. He says that the applicants' specifications cover a very wide range of foodstuffs and that perhaps Ms Rook in this respect is referring not to Granada's trade mark specifications but to the goods sold by their licensee.

10 In response to section 17 of Ms Rook's declaration, Mr Wild refers to exhibit JW-ER1 which he says shows many examples of BETTYS used in plain letter form. He does not accept Ms Rook's assertion that BETTYS BY POST is merely incidental to their main business. He says that they regard it as an important way in which customers are aware of their reputation. Mr Wild says that in 1997 BETTYS BY POST sales figures represented over 7500 orders. Mr
15 Wild says that customers of BETTYS BY POST are located overseas and throughout the United Kingdom. He gives a list of locations of recent customers which cover all parts of the United Kingdom.

Mr Wild says that he believes that their customers are not divisible as a class from supermarket
20 customers. Mr Wild also produces a list of products sold in their shops and says that such products are packaged with the BETTYS trade mark either on labels or wrappers examples of which he included in exhibit JW-ER1, or, if sold loose, by using on Bettys paper bags, cake boxes and carrier bags. Mr Wild gives details in the form of tables of figures showing sales of products on the retail and catering side during the period November 1997 - May 1998. I need
25 not set these out in detail. Mr Wild says that from these figures it can be seen that sales of tea and coffee through their BETTYS establishments are much lower than sales of edible foodstuffs and that both savoury and sweet foodstuffs are sold in substantial quantities.

Concerning the opponents decision not to take the supermarket route Mr Wild notes that they
30 are commissioning a new bakery which will give them increased capacity at which stage they may decide to take the supermarket route and capitalize further on the national reputation which he says that they have in the mark BETTYS. Mr Wild says that they regard it as their right to take the supermarket route and/or change the positioning of the BETTYS brand in the marketplace if they so choose.

35 Mr Wild says that he does not accept the distinction Ms Rook seeks to draw between restaurant and retail sales of food and drink. Concerning sales through BETTYS BY POST Mr Wild says that he regards all sales through this channel as being sold with reference to the BETTYS trade mark even if some teas and coffees bear the mark TAYLORS on the packet.

40 Mr Wild goes on to say that the opponents had objected from the outset to the applicants' use of BETTY'S KITCHEN and he refers to a copy of a letter dated 7 November 1996 reserving their rights and confirming that no consent was or had been given. A copy of the letter is attached at exhibit JW-ER4. Concerning the mark BETTY'S purchased by the opponents in
45 1996 Mr Wild says that this mark did not cause the opponents any difficulty or, not being used as far as he is aware, cause any confusion in the marketplace.

With reference to sections 37 & 39 of Ms Rooks' declaration Mr Wild attaches at exhibit JW-ER5 a copy of the Trade Marks Registry's hearing notes of 12 February 1996 concluding that BETTYS and BETTY'S KITCHEN are confusable.

5 Finally, Mr Wild refers to a booklet produced by the applicants' licensee which he says refers, on the relevant pages, only to the "Betty's Kitchen...range" never "Betty's Kitchen Coronation Street....range". Mr Wild concludes:

10 "I believe that the use is of the trade mark BETTY'S KITCHEN and that the applicant and/or its licensee does not use the mark BETTY'S KITCHEN CORONATION STREET nor have they shown any intention to use the latter mark."

That concludes my summary of the evidence.

15 I will deal firstly with the Section 3(6) ground.

Section 3(6) reads:

20 "(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith"

The opponents have launched a twin attack alleging that there is no intention to use the mark in the form applied for and further that there is no intention to use the mark across the full range of goods. In relation to the first of these objections Mr Purvis suggested that the application
25 has been made for tactical reasons following the withdrawal (in the face of Registry objections at the examination stage) of an earlier application for the words BETTY'S KITCHEN (solus). As is acknowledged in the Notes on the Trade Marks Act 1994 (based on the Notes on Clauses prepared for Parliament of the Bill stage) Section 3(6) does not attempt to indicate what is meant by bad faith, thereby leaving it to the Registrar or the Courts to decide on a particular
30 case what amounts to bad faith. In *Growmax Plastics Ltd v Don & Low Nonwovens Ltd*, 1999 RPC 367 at page 379 Lindsay J says: "I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and
35 experienced men in the particular area being examined. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances". Section 32(2)(d) of the Act requires an applicant to include in his
40 application a representation of the trade mark. It is unusual for an opponent to suggest that the applicants do not intend to use their mark in the form applied for but in this case the opponents base their claim on packaging that is being used by the applicants and/or their licensee. The mark has been applied for in upper and lower case lettering as shown above. Normal and fair use of a mark can, of course, include variations in presentation such as different typefaces and
45 use in different colours (where, as here, a particular colour combination is not a feature of the application). However, it seems to me that the general scheme of the Act is that normal and fair use should not be stretched to the point where it would undermine the principle that anyone

inspecting the register should be able to determine the protection sought or obtained (cf the provisions of Section 41(2) regarding marks which can be considered a series; Section 44(2) regarding alterations of registered marks; and Section 46(2) regarding use in differing forms in the context of non-use revocation actions). If an applicant's use or proposed use is not within
5 the normal boundaries of normal and fair use then, having regard also to the surrounding circumstances, he may leave himself open to the charge that the mark proposed for registration has been applied for in bad faith.

The opponents have filed samples (JW19) of the applicants' claimed use of the mark. One of
10 the items of packaging is reproduced at Annex 2 - (the others are simply variations on the theme). Ms Rook, for the applicants says in her declaration "I contend that the front panel of the packaging contained in Exhibit JW19 shows a use of that mark notwithstanding the marking on the other panels..." It can be seen that the main elements appearing on the front face of the packaging are the words HOLLANDS (and device of a chef or butcher), BETTY'S
15 KITCHEN, a representation of the Rovers Return pub (from the television series) and the words CORONATION STREET in block letters on a white background in the form of a street sign. The HOLLANDS and BETTY'S KITCHEN elements appear within a banner device. There is other pictorial or descriptive matter which I need not refer to. Holland's produce the goods (pies and hot pots) under licence from the television company. Whilst the front of the
20 packaging contains the elements BETTY'S KITCHEN and CORONATION STREET they are positioned some way apart and represented in wholly different styles which do nothing to suggest that a single composite mark is intended. The matter must of course be considered from the point of view of the average consumer who would not, I think, pause to analyse packaging or look for intended connections. If anything the presentation of the packaging
25 might suggest to the purchaser that the mark is HOLLAND'S BETTY'S KITCHEN given the unifying presence of the banner device on which these elements appear though even this much is uncertain. In any event I do not accept that customers would be at all likely to regard BETTY'S KITCHEN and CORONATION STREET as elements of a composite mark. It is true that those members of the public who are familiar with Coronation Street and the
30 characters in that programme would probably see the connection but that is not the same as saying that they would see the elements as constituting a single mark. For other members of the public who either do not know the programme or have heard of the programme but do not know the characters in it even this tenuous link would be lost. There are other reasons for finding that the applicants' use is not normal and fair use of the mark applied for. Neither the
35 side panels nor the reverse side of the packaging (see Annex 2) contain any prominent reference to Coronation Street though I see that the footnote on the reverse of the packaging indicates that Coronation Street is a registered trade mark thus emphasising the independent nature of that mark. Furthermore, the Betty's Kitchen commercial (JW20) has a voice over saying "If you are fanatical about food, you will love the new Betty's Kitchen range from
40 Hollands ..." and "Hot pots and pies from Betty's Kitchen ..." none of this suggests that there is any real intention to use the mark in the form applied for.

The applicants were aware of the opponents' registrations from their earlier failed application (No 2029276) for the words BETTY'S KITCHEN. The opponents had also indicated that
45 they were not prepared to give consent to the registration of that mark under Section 5(5) of the Act. Against that background it seems to me that the mark applied for is an attempt by the applicants to put sufficient distance between themselves and the opponents for the purposes of

securing a registration but without that mark being a true reflection of what is conceded to be the intended and actual form of use. Taking all these circumstances into account I have come to the view that the applicants' dealings fall short of "acceptable commercial behaviour" to use Lindsay J's words. I, therefore, find that the opposition succeeds in this respect.

5

The second leg of the Section 3(6) objection is that the applicants have no intention to use their mark across the full range of goods. The applicants counter that the packaging filed in evidence is proof that they are using the mark as is the licensing arrangement that underpins that use. I accept the applicants' contention so far as it goes. Their use has been in relation to a range of pies and hot pots - the sort of goods that are associated with the Rovers Return pub in the storyline of the programme. The specifications in classes 29 and 30 are self evidently much wider than necessary to cover such items. However, it is reasonable to suppose that if the applicants intend to proceed by means of licencing arrangements (as with Holland's) then it will take time to negotiate and put in place such arrangements. Given also that it is entirely permissible to apply on the basis of an intention to use it is not fatal to the applicants' case that they cannot point to actual use on other goods. However, in the face of the opponents' challenge, it would have been a simple matter for the applicants to point to preparations made, discussions with other potential licensees, a programme of product introductions or other indicators of their intentions. By failing to do so they have left themselves open to attack in relation to goods other than the pies and hot pots referred to above (or generalised description of goods embracing such items) and the opposition succeeds to that extent.

My finding under Section 3(6) effectively decides the matter but in case on appeal I am found to be wrong in that respect I go on to consider the remaining grounds. Section 5(2)(b) reads:

25

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

(a)

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(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,

35

There exists a likelihood of confusion on the part of the public, which concludes the likelihood of association with the earlier trade mark".

The correct approach to the interpretation of the expression "a likelihood of confusion on the part of the public" as used in article 4(1)(b) and section 5(2) was considered by the European Court of Justice in Case C-251/95 *Sabel BV v. Puma AG, Rudolf Dassler Sport* [1998] RPC 199. The way in which the presence or absence of a "likelihood of confusion" should be assessed was identified in paragraphs 23 and 24 of the judgment of the court at 223:

"Article 4(1)(b) of the Directive does not apply where there is no likelihood of confusion on the part of the public. In that respect, it is clear from the tenth recital in the preamble to the Directive that the appreciation of the likelihood of confusion depends on numerous elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of

45

the degree of similarity between the trade mark and the sign, and between the goods or services identified'. The likelihood of confusion must therefore be appreciated globally taking into account all factors relevant to the circumstances of the case.

5 That global appreciation of the visual, aural or conceptual similarity of the mark in question must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The wording of Article 4(1)(b) of the Directive - 'there exists likelihood of confusion on the part of the public' - shows that the perception of marks in the mind of the average consumer of the type of
10 goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.

15 In that perspective, the more distinctive the earlier mark the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact that the two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, either *per se* or because of the reputation it enjoys with the public".

20 In terms of the above test the distinctive character of the opponents' earlier trade marks must be taken into account having regard to the inherent characteristics of those marks and the reputation they enjoy with the public. I do not regard the mark BETTYS or its variant forms to have a particularly distinctive character *per se*. In terms of the reputation enjoyed the
25 applicants have tried to characterise the opponents' business as being that of a genteel tea shop. Their criticisms can be broadly summarised as being that the opponents' marks are mainly used in script form (and without an apostrophe); their reputation is geographically restricted; their goods are largely restricted to foodstuffs offered by cafeterias/tea rooms or to use Ms Rook's words 'epicurean standard products'; and that those goods can be distinguished in terms of
30 price, trade channels and customer type from the applicants'.

It is true that the origin of the Bettys & Taylors' business lies in the Yorkshire café/tea rooms and that the four current premises still represent a key part of the business. But it is going too far in my view to say that their reputation is limited in quite this way. There is much in the
35 evidence that points to the outward-looking nature of the business e.g. the membership of the Walpole Committee, the operation of their own web site, the publicity efforts made in both local and national press, radio and television. These are all indicators of a company that has built up a more than purely local reputation and it understates that business to characterise it purely as a local café/tea room.

40 A more concrete manifestation of the scope of the opponents' business is the breakdown given by Mr Wild of sales in the opponents' three main areas of trade - that is to say catering (restaurant services), retail (sales from the shops) and mail order. No doubt the latter developed originally as an adjunct to the other strands of the business but for the last ten years
45 at least it has been a valuable trade in its own right. Ms Wild's reply evidence gives further information on the spread of customers for Bettys by Post both national and international and the range of goods sold. Taking account of the totality of the evidence I am of the view that

the opponents are entitled to say in relation to the Sabel v Puma guidance that the use shown broadly matches the coverage of their registrations and that the distinctiveness of their marks has been enhanced by the reputation they enjoy with the public.

5 In the light of the above I go on to consider the likelihood of confusion if the applicants' mark was to be registered. Much depends on the perception of the applicants' mark by the average consumer. Mr Purvis suggested that what the applicants had done was to 'bolt on' another mark (CORONATION STREET) to their earlier withdrawn mark BETTY'S KITCHEN. He relied on British Sugar Plc v. James Robertson & Sons Ltd, 1996 RPC 281 (the TREAT case)
10 dealing with the provisions of Section 10 which mirror those of Section 5 and in particular on the need to discount added matter or circumstances (the passage concerned is at page 293). The parallel is not an exact one in my view and in any case the general public is unlikely to be aware of the history or derivation of this particular mark.

15 I must have regard to the whole of the mark applied for and assume that it will be used in a normal and fair manner (for present purposes I put to one side my finding under Section 3(6) and the considerations that led me to that decision). The important point it seems to me is how the applicants' mark will represent itself to or be seen by the average customer. For the purposes of what follows I should say that I do not attach any great significance to a number of
20 the points made in the applicants' evidence about the opponents' marks. In particular it is said that in contrast to the applicants' mark the opponents' is largely used in unapostrophised form; that BETTYS has its own distinctive form of presentation; and that it is often used with words such as Café or Tea Room etc. These matters are of marginal relevance - the presence or absence of an apostrophe may not be noticed by customers and will not be apparent in oral use;
25 the opponents utilise a commonly found cursive script form for their mark but the degree of stylisation is unremarkable in itself and the fact that descriptive matter (Café, Tea Rooms etc) is sometimes present does not detract from the key feature of the mark and in fact makes it all the more likely that another descriptive term such as Kitchen will be seen as a further variant form. On the whole however, these are peripheral considerations.

30 In Canon Kabushiki Kaisha v. Metro-Goldwyn Mayer 1999 RPC 117 headnote 4 records relevant guidance on the matter of confusion as being:

35 *"(4) There was a likelihood of confusion within the meaning of Article (4)(b) wherever the public could be mistaken as to the origin of the goods or services in question. Moreover, for the trade mark to fulfil its essential function, it had to offer a guarantee that all the goods or services bearing it originated under the control of a single undertaking which was responsible for their quality. Accordingly, the risk that the public might believe that the goods or services in question came from the same*
40 *undertaking (or for economically-linked undertakings) constituted a likelihood of confusion with the meaning of Article (4)(1)(b)."*

I must accept that in this particular case there may be a variety of responses to the mark. Some members of the public will be familiar with the Coronation Street programme and the
45 characters in it, others like myself will know the programme by name only but not the characters and yet others (a small number probably) may not even have heard of the programme. The first two groups are each likely to be substantial in number. I rather think

that a large proportion of those people who are regular viewers of the programme will not be confused because they would recognise the reference to the character (Betty Williams/Turpin) though there is some suggestion to the contrary in the survey evidence which I will consider later. For those who know the programme name only the intended connection between

5 BETTY'S KITCHEN and CORONATION STREET may be lost. It seems to me that if it can be shown that a sufficient number of people are likely to be confused then it cannot save the applicants that there is another group who, because of their particular knowledge, will not or may not be confused.

10 Although I do not accept Mr Purvis' analysis insofar as it relies on knowing the derivation of the mark (in terms of the earlier application) I agree that the impression created is of distinct elements. BETTY'S KITCHEN comes together because of the use of the possessive form and CORONATION STREET would be familiar to an overwhelmingly large number of people as the name of a popular programme. The totality therefore invites speculation as to the nature of

15 the association, link or meaning of the words that make up the mark.

The opponents have provided at JW17 some seven pages of examples of the co-use of different proprietors' marks on products in the food and drink field and Mr Wild offers a commentary on these findings. The research is broken down into some nine product sectors (frozen goods,

20 bakery, chocolates etc) with a wealth of examples in each category. Examples are YOUNGS and HARRY RAMSDEN'S, TESCO and TGI FRIDAY, ELISABETH THE CHEF and MANCHESTER UNITED, ELIZABETH SHAW and HARVEY'S BRISTOL CREAM reflecting marketing links between the respective trade mark owners. It is possible that some of these associations may be short lived (links to current pop groups for instance) but other are

25 likely to reflect longer term marketing arrangements. The applicants have not sought to challenge this material. It seems to me to be persuasive evidence that the general public has been educated to the possibility of dual branding and that there is a real risk that a significant number of people will believe that the mark applied for is a further example of this established trade practice indicating a connection between BETTYS and the Coronation Street

30 programme.

I might just add that it is also not uncommon for television programmes to be associated with a lead or main advertiser in such a way that the latter becomes in effect sponsor of the programme. Although the opponents have not relied on it there is an example in Exhibit JW21,

35 the video featuring the Betty's Kitchen commercial where the advertisement for the product follows an episode of the Coronation Street programme which, I note, is itself said to be sponsored by Cadburys Time Out. That of course is in addition to the acknowledged licencing link with Hollands. I cannot be certain in these circumstances that Betty's Kitchen will not be seen as a trading link with another manufacturer/supplier. Accordingly, I take the

40 view that there will be a real risk of confusion if the application is allowed to proceed.

In reaching the above view I have not needed to consider the opponents' survey evidence. In fact Mr Purvis indicated at the hearing that he did not rely on it as a survey in any formal sense but asked me to consider it in the same vein as the telephone opinion material that was used in

45 Wagamama Ltd v City Centre Restaurants plc 1995 FSR 713 (the passage referred to is on pages 734 and 735). That seems to me to be rather a narrow and selective approach to what in other respects purported to be a survey, albeit an informal one. Nor has there been the

opportunity for cross examination as there was in the WAGAMAMA case. In any case both Counsel took me through the survey results in some detail. Ms McFarland made a number of telling criticisms of the survey both in terms of methodology and results. Bearing in mind also the criteria in IMPERIAL GROUP v PHILIP MORRIS, 1984 RPC 293, the survey suffers
5 from a number of weaknesses notably - there was some variation in the questions asked; full responses were not always recorded; there was some prompting and possibly encouraging interviewees to speculate; one interviewee was certainly fed a leading question; the survey was geographically limited and the results may have been influenced by relative proximity to the opponents' establishments; interviewees in the solicitors' offices may subconsciously have been
10 influenced by knowledge that the firm acted for Bettys & Taylors. Moreover, whilst surveys rarely escape criticism, there are further potential complications when one bears in mind the potential impact of the dual branding issue which has been raised in this case.

The combined effect of these problems seems to me to cast doubt on whether any weight at all
15 should be given to the results of the survey. The general comments of Mr Lowry and Mr Fry, who conducted the street survey, demonstrate the difficulty of accurately evaluating the results:

20 “A substantial number of people who were prepared to answer my question either indicated that they did not know who would be behind the relevant product or that they thought it would be either the relevant television company or a particular character out of Coronation Street, generally either Betty Turpin, Alec Gilroy or Vera Duckworth.”
(Lowry)

and
25

“A substantial number of people who were prepared to answer my questions either indicated that they did not know who would be behind the relevant product or that they thought it would be either the relevant television company or a particular character out of Coronation Street, generally Betty Turpin.” (Fry)

30 Both interviewers then go on to record responses from individuals who did refer to Bettys/Bettys Café/Bettys of Harrogate. The only supporting declarations are from employees of Addleshaw Booth, the solicitors who conducted the survey. For the reasons given above this material needs to be approached with some caution but the following responses are
35 perhaps indicative of the problem that arises when dual branding may be an issue.

“That Betty's of Harrogate were selling meat pies in Coronation Street” (Mr Buncall)

40 “Either Betty's of Harrogate or a Granada TV franchise” (Mr Hastings)

“Either Betty's of Harrogate or Betty Turpin” (Ms Duncan)

“Either the Bettys Café in York or Granada Studios” (Ms Hayman)

45 In short, whilst there is some support for the opponents' claim in the results of the survey, I do not place any great reliance on it and Ms McFarland was also able to draw some support from the results for her client's point of view.

In the event for the reasons given above I find that the opposition substantially succeeds under Section 5(2)(b). Taking account of the goods and services for which the opponents have registrations and the fact that their reputation is in self contained and ready to eat food items the application would not attract objection for a small number of fringe items such as salt,
5 pepper, vinegar and spices which would be outwith the ambit of similar goods.

Section 5(3) reads

10 “(3) A trade mark -

(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
15 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.”
20

Although there were brief submissions in relation to Section 5(3) at the hearing I think it is fair to say that it is very much subsidiary to the Section 5(2) ground and neither side offered a reasoned view as to what goods should be considered dissimilar. Given my findings in relation to the majority of goods within the applicants’ specification under Section 5(2)(b) and the all encompassing finding under Section 3(6) I do not find it necessary to come to a formal view on
25 Section 5(3).



Mr Purvis also indicated at the hearing that he was not proposing to make separate submissions in relation to Section 5(4)(a). No further particularisation of the objection was offered in the
30 statement of grounds though presumably it would arise in relation to passing off. As I understand it Mr Purvis did not think he would be in a significantly better position under Section 5(4)(a) if he were to be unsuccessful under Section 5(2)(b). That is also my view of the matter. This is a case where the actual use claimed by the opponents is of the marks in the form registered and for goods and services which closely match the specifications of the
35 registrations in Annex 1 to this decision. The Section 5(2)(b) finding, where the opponents have been largely successful, effectively decides the matter. In the circumstances I do not propose to give separate consideration to Section 5(4)(a).

As the opponents have been successful they are entitled to a contribution towards their costs. I
40 order the applicants to pay the opponents the sum of £1,000.

Dated this 14 day of October 1999.

45 **M REYNOLDS**
For the Registrar
The Comptroller General

Registrations in the ownership of the opponents

No.	Mark	Class	Journal	Specification
841842	BETTY'S	05	4424/796	Medicated confectionery.
1473887		29	5988/5254	Jams, marmalades, preserves; pickles, chutneys; all included in Class 29.
				
602881	BETTY'S	30	3174/118	Confectionery.
1032944		30	5092/663	Biscuits (other than biscuits for animals), bread, buns cakes, malt bread, pastries, christmas puddings, bread, rolls and tarts, all being in prepared ready to eat form; chocolate, coffee, mixtures of coffee and chicory, coffee extracts, coffee essences, chicory and chicory mixtures, all for use as substitutes for coffee; chocolates, egg and meat pies for tea.
				

1107990

30 5548/98



Biscuits (other than biscuits for animals), bread, buns, cakes, malt bread, pastries, Christmas puddings bread rolls and tarts, all being in prepared ready-to-eat form; chocolate, coffee, mixtures of coffee and chicory, coffee extracts, coffee essences; chicory and chicory mixtures, all for use as substitutes for coffee; chocolates, egg and meat pies and tea.

1474409

30 5974/3112



Coffee, tea; bread, biscuits, cakes, pastry and confectionery, all sold as prepared, read-to-eat items; ices; all included in Class 30.

2019782

BETTYS

30 6114/

Coffee, tea; bread, biscuits, cakes, pastry and confectionery, all sold as prepared, read-to-eat items; ices.

42 6114/

Restaurant and catering services; all provided in the counties of West Yorkshire, North Yorkshire, Greater Manchester, South Yorkshire, Lancashire,

				Cleveland, Durham and Humberside.
2011278	BETTY'S CAFÉ TEA ROOMS BETTY'S CAFE TEA-ROOMS	42	6133/	Restaurant, café and tea room services; catering services; all included in Class 42.



4 SPICY PORK HOT POTS
BETTY'S KITCHEN



4
SPICY
PORK
HOT POTS



A mix of minced pork with potatoes, peppers and kidney beans in a lightly spiced sauce, topped with light flaky pastry.

Serving Suggestion only - Pot not included

CORONATION ST.

KEEP FROZEN - SEE OVER FOR STORAGE INSTRUCTIONS - FOR BEST BEFORE - SEE SIDE OF PACK



BEST BEFORE END



FRONT FACE AND SIDE PANELS OF PACKAGING



BETTY'S KITCHEN

4 SPICY PORK HOT POTS

BETTY'S KITCHEN

4 SPICY PORK HOT POTS



Hot Pot from the Rover's Return is one of Coronation Street's best loved traditions, and now you can try a selection of recipes from Betty's Kitchen for yourself. With over 140 years of culinary expertise, Lancashire based Holland's have prepared a range of Hot Pots and Beef in Ale Pies with delicious fillings together with light flaky pastry - just what you'd expect from Betty's Kitchen!

Try this Hot Pot with a bed of Basmati and Wild Rice, or on its own as a tasty snack or light meal.

Betty



COOKING INSTRUCTIONS

Since all sizes vary, cooking times will need adjustment to suit your own size. For best results cook from frozen and always cover piping hot.

HEATING IN A CONVENTIONAL OVEN

Place product on a baking tray in the centre of a pre-heated oven at 180° C/350° F/Gas mark 4 for 25 to 30 minutes from frozen or 15 to 20 minutes if totally defrosted.

DO NOT RE-HEAT.

MICROWAVEABLE

Can be microwaved, but microwaving may impact pastry quality. For best results, see below.

STORAGE INSTRUCTIONS

Food Freezer* Until Best Before Date
 "Use By" Date* Until Best Before Date
 Frozen Food 1 Month
 Compostable 1 Week
 Ice-Making Compostable 3 Days
 Refrigerate 24 Hours
 *Must be -18°C or Colder
 DO NOT RE-FREEZE AFTER DEFROSTING

INGREDIENTS

Wheat, Pork, Wheatflour, Potatoes, Onions, Mixed Peppers, Tomato, Hydrogenated Animal & Vegetable Oils & Fats, Kidney Beans, Tomato Puree, Modified Starch, Salt, Sodium Caseinate, Spices, Garlic Powder, Full Fat Soya Flour, Peasap, Beefbone. Minimum 15% meat.

NUTRITION INFORMATION

Typical Values per 100g	
Energy	4326/151 kcal
Protein	7.0g
Carbohydrate	15.8g
Fat	4.6g



Walter Holland and Sons, Buxenden, Accrington, Lancashire BB7 2JX

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BACK OF PACKAGING AND SIDE PANEL