

TRADE MARKS ACT 1994  
IN THE MATTER OF APPLICATION No 2018515  
BY FINEST BRANDS INTERNATIONAL LIMITED  
TO REGISTER THE SERIES OF TWO TRADE MARKS  
**FBI / Fbi**  
IN CLASS 25

AND IN THE MATTER OF OPPOSITION THERETO  
BY REYNOLDS - HEPBURN LIMITED

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10 **DECISION**

BACKGROUND

15 On 25 April 1995, Finest Brands International Ltd of FBI House, Low Fields Way, Leeds, West Yorkshire LS12 6HQ applied under the Trade Marks Act 1994 for registration of a series of two trade marks **FBI / Fbi** in respect of the following goods in Class 25:

20 “Articles of outerwear; sports clothing; outdoor clothing, gloves and headgear; and articles of footwear.”

On the 15 April 1996 Reynolds - Hepburn Limited filed notice of opposition to the application. The grounds of opposition are in summary:

25 i) that the opponents are the registered proprietors of the trade mark FBI, number 2002230, dated 19 November 1994, for goods in class 28.

30 ii) As the trade mark is incapable of distinguishing the goods of the applicants from those of the opponents, the mark offends against Sections 1(1) and 3(1)(a) of the Trade Mark Act 1994.

iii) The applicants’ mark will deceive the public and so is contrary to Section 3(3) of the Trade Mark Act 1994.

35 iv) At the time of filing the applicants had no bona fide intention of using the mark and so the application offends against Section 3(6) of the Trade Marks Act 1994

40 v) The opponents’ mark is entitled to protection under the Paris Convention as a well-known trade mark. The opponents’ mark therefore constitutes an earlier trade mark and the applicants should be refused under Section 5(1)(b) of the Trade Marks Act 1994

45 vi) The applicants’ mark is identical to the opponents’ registered trade mark and is for similar goods. It therefore contravenes Sections 5(2) and, by virtue of the opponents’ reputation it also offends against Section 5(4) of the Trade Marks Act 1994.

The opponents also requested the Registrar to exercise his discretion in their favour. However,

under the Trade Marks Act 1994 the Registrar does not have a discretion to refuse trade marks as he did under the old law. A mark can only be refused if it is shown to offend against the requirements of the Act and Rules in one or more aspects. The applicants subsequently filed a counterstatement denying all of the grounds of opposition, other than agreeing that the opponents are the registered proprietors of the trade mark as claimed. Both sides ask for an award of costs. Neither party wished to be heard in the matter. My decision will therefore be based on the pleadings and the evidence filed.

#### OPPONENTS' EVIDENCE

This takes the form of six statutory declarations. The first of which is by Mr John McRae, dated 24 January 1997, who is a director of Reynolds-Hepburn the opponents in these proceedings.

Mr McRae states that "since 1994" the opponents have been involved in the manufacture and sale of fishing tackle under the FBI mark, with the company also using the mark on items of promotional clothing "since 1995".

During the period since 1994 the opponents have spent £1million in developing and promoting their range of fishing tackle and clothing under the FBI mark. Their products are sold by 210 retail stockists. Copies of advertisements, company stationery and other promotional material showing use of the mark FBI is provided at exhibit JM1. This material shows use of the mark FBI in relation to an article of fishing apparatus called a Fish Bite Indicator. The only promotional material dated before the material date (25 April 1995) is an advertisement in Coarse Fisherman which is said to have appeared in February 1995. This announces that "the FBI is coming".

Mr McRae claims that as anglers are exposed to all types of weather they need various items of clothing to pursue their sport. Manufacturers of fishing tackle see the provision of such clothing, under the same trade mark as their equipment, as an important part of their business. Examples, comprising manufacturers catalogues and magazine articles, of companies which provide such a range of goods under the same trade mark are provided at exhibit JM2 and JM3.

Also provided, at exhibit JM4, are two catalogues from retailers showing that a number of leading companies in the fishing equipment trade offer both fishing tackle and clothing. One of these retailers also offers their own range and has their trade mark registered for tackle and clothing. A copy of the registration certificate is provided. Further at exhibit JM5 are two examples of companies, Shimano Inc. and Browning SA, who have trade marks registered for goods under class 25 and 28.

Mr McRae claims that anglers would be familiar with his company's mark and assume any clothing bearing the FBI mark came from his company.

It is also claimed that the applicants are not involved in the fishing industry but merely act as retailers and distributors of other manufacturers branded clothing. A report from an investigation company is at exhibit JM6. This report states that the applicants are listed with British Telecom and Leeds Council as FBI and not Finest Brands International Ltd. The investigator spoke to the receptionist at the applicants' premises and was told that the applicants are UK agents and distributors for manufacturers of fishing and golfing equipment, with only riding hats being

manufactured. Although even this activity is subcontracted to a Cardiff-based company with the hats being branded as “Champion”.

5 The investigator then claims to have spoken to the applicant’s sales manager, Ms Sue O’Connor who confirmed that the applicants used the abbreviated name of FBI and were UK agents and distributors for a range of sporting goods including Jack Nicklaus clothing, Aigle waders and boots and Slotline putters.

10 The second statutory declaration is by Mr Harry Peck, dated 18 December 1996, who is the Managing Director of Bennetts of Sheffield Ltd. Bennetts have been continuously marketing and retailing clothing for anglers alongside fishing tackle since 1954, sourcing their stock from a wide variety of suppliers and also selling under their own brand name. Mr Peck states that the provision of clothing with the same brand name as that used on fishing tackle is both expected by customers and an important aspect of his business

15 The brand name under which Bennetts offer their own clothing and fishing tackle ( classes 25 and 28) is a registered trade mark. Mr Peck provides a copy of the trade mark registration certificate at HP1 and copies of pages from the company’s catalogues showing that clothing and fishing tackle bearing the same trade mark have been on sale from at least 1994.

20 Mr Peck states that if a range of angling clothing were brought onto the market bearing the trade mark of a fishing manufacturer known to him he would assume that the clothing came from the same source as the fishing tackle.

25 Finally, there are four statutory declarations from representatives of companies who manufacture fishing tackle and also provide clothing with the same trade mark. These representatives are:

Mr P R Tallents, dated 24 January 1997, the Managing Director of Ryobi Masterline Ltd.

Mr J L Tomsett, dated 19 December 1996, the Managing Director of Shakespeare Company (UK) Ltd.

30 Mr B Olofsson, dated 3 March 1997, Managing Director of Abu AB.

Mr R Dobbelaere, dated 26 March 1997, the General manager Europe of Browning S.A.

35 The length of time that these companies have been engaged in manufacturing fishing tackle varies but the shortest time span is twenty years and the overall average is fifty years. They all state that the provision of clothing carrying the same brand name as the fishing equipment is important to the companies and to the angling clients, and is an increasing important part of their business. They would associate clothing carrying the brand name of a fishing tackle supplier known to them to come from the same source as the fishing equipment.

#### 40 APPLICANTS’ EVIDENCE

This consists of a statutory declaration by Mr Derek Moore, dated 20 October 1997, who is a registered trade mark attorney working for Jensen & Son who represent the applicants, Finest Brands International Ltd. Mr Moore has used his personal knowledge and also the records of  
45 Jensen & Son to compile his statutory declaration.

Mr Moore states that he is aware that the applicants have been “using and planning to use” the

trade mark FBI on clothing since 1991. As the result of Mr Moore's advice that registration of FBI would be difficult (without evidence of extensive use) under the Trade Marks Act of 1938 the applicants considered other names for their range of waterproof clothing and footwear. Jensen & Son carried out a number of trade mark availability searches.

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Mr Moore states that the trade mark FBI is used on the applicants' stationery, advertising material and in correspondence with clients, many of whom supply goods to participants in outdoor sporting activities, particularly golf, fishing and equestrian sports. Exhibit DM1 consists of brochures and blank invoices. The invoices clearly show the use of the mark FBI in a shield device above the full name of the applicants. The brochures are for "AIGLE" boots and show the supplier as "AIGLE - FBI LTD". Another brochure shows examples of goods under the "AIGLE" and "CHAMPION" labels with the FBI and shield device appearing on the back cover along with the full company name and address as the suppliers. The last brochure features the mark FBI prominently on the front cover and within the brochure itself, as the supplier of other branded goods such as "AIGLE" and "CHAMPION" Also included are two advertisements from 1991 angling magazines which also show use of FBI as the supplier of "AIGLE" waders.

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Mr Moore provides at exhibits DM2 and DM3 copies of envelopes sent to the company addressed to FBI Ltd and claims that this shows that the clients, including those who are specialists in outdoor clothing and fishing tackle, associate the mark FBI with the applicants since they do not use the full company name.

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At exhibit DM4 are the responses to a questionnaire sent out by the applicants. The questionnaire asked whether the use of the mark FBI on clothing would indicate a company to them and if so which company. Mr Moore states that he sent 40 questionnaires to "specialist retail suppliers of equestrian goods, outdoor and sporting clothing range of clothing suppliers". Mr Moore claims that of the twelve responses received ten responded that they would associate the mark with Finest Brands International and one associated it with Aigle (only eleven responses were filed as part of the evidence, of which nine associated the mark with Finest Brands International). The connection with Aigle is, Mr Moore explains, understandable as the applicants used to be the UK agent for this French firm. The majority of replies came from equestrian or saddlery companies who could not be expected to be aware of the market for fishing clothing.

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Mr Moore states that after four years use the applicants decided to seek registration on 25 April 1995. The opponents also sought registration in Class 25 on 18 May 1995 and the applicants' mark was cited by the Registry. Mr Moore explains that his clients, the applicants, refused to give the opponents (Reynolds - Hepburn) consent to use the mark as their products would be in conflict.

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Exhibit DM5 shows a flyer for a trade show where the applicants are listed as FBI, and the opponents as Reynolds-Hepburn. Mr Moore states that at the show the opponents' stand contained only one product, a "Fish Bite Indicator (FBI)". Mr Moore saw no other products or promotional material such as brochures or leaflets.

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Mr Moore takes issue with comments made by the investigator's report referred to in the opponents' evidence. Mr Moore states that in addition to distributing goods which have other trade marks they do also distribute goods under their own trade mark. He refers to the

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promotional literature filed as part of his declaration. He also comments that “I would also refute the investigator’s assertion that a subcontractor produces the goods branded “Champion”. Goods bearing that mark are made by Champion Manufacturing Co. Ltd, a substantially wholly owned subsidiary company of the applicants, and are distributed widely throughout the UK and abroad.”

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

## DECISION

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It is accepted that the opponents are the proprietors of a registered trade mark FBI in class 28. However the presence on the register of this mark does not have a bearing on whether the applicants’ mark meets the requirements of Section 1 of the Trade Marks Act 1994 which states:

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

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

Section 3(1)(a) states:

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*“3.- (1) The following shall not be registered -*

*(a) signs which do not satisfy the requirements of section 1(1).*

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Each trade mark must be considered on its own merits for the purposes of determining whether it meets the criteria of Section 1(1). The proviso to Section 1(1) specifically states that a trade mark may consist of letters. The opponents have not shown why these particular letters are incapable of distinguishing. Consequently the opposition under Sections 1(1) and 3(1)(a) fails.

I next consider the ground of opposition under Section 3(3) which is as follows:

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*“3 (3) A trade mark shall not be registered if it is -*

*(a) contrary to public policy or to accepted principles of morality, or*

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*(b) of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or service).”*

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The opponents contend that the applicants’ mark is likely to deceive the public into thinking that the applicants’ goods originate from them. However, I note that Section 3(3)(b) is intended to apply where the deception alleged arises from the nature of the mark itself. This is consistent with the heading of Section 3 of the Act which is entitled “Absolute grounds for refusal” and is to be contrasted with Section 5 of the Act which deals with the “Relative” rights of the applicant and other parties. Consequently, the opponents cannot succeed under this heading based upon their

use of the same mark. As the opponents have shown no other grounds for refusal under Section 3(3) the opposition under this heading fails.

I next consider the ground of opposition under Section 3(6) which is as follows:

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*“3 (6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”*

10 The Act does not indicate what is meant by bad faith; it must therefore be for the Registrar or the Court to decide in a particular case what amounts to ‘bad faith’. However, in the “Notes on the Trade Marks Act 1994” ( a publication which is based on the Notes on Clauses which was prepared for use in Parliament while the Trade Marks Bill was before it) one of the examples where bad faith might be found is as follows:

15 *“Where the applicant was aware that someone else intends to use and/or register the mark, particularly where the applicant has a relationship, for example as employee or agent, with that other person, or where the applicant has copied a mark being used abroad with the intention of pre-empting the proprietor who intends to trade in the United Kingdom”.*

20 In my view the opponents have offered no evidence to support this pleading, therefore I do not consider this ground proven.

Next, I turn to the grounds of opposition under Section 5(1) & (2) which is as follows:

25 *“5.- (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected*

30 *(2) A trade mark shall not be registered if because -*  
*(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 mark is protected,*  
*there exists a likelihood of confusion on the part of the public, which includes the*  
35 *likelihood of association with the earlier trade mark.”*

The opponents have claimed that their mark is entitled to protection under the Paris Convention as a well-known trade mark. Section 55 of the Trade Marks Act 1994 states:

40 *The Paris Convention: supplementary provisions*  
*55.-(1) In this Act-*  
*(a) “the Paris Convention” means the Paris Convention for the Protection of Industrial Property of March 20<sup>th</sup> 1883, as revised or amended from time to time,*  
*and*  
45 *(b) a “Convention country” means a country, other than the United Kingdom, which is a party to that Convention.*

Therefore, only trade marks which are owned by proprietors outside the UK and in a convention country are protected. Thus, even leaving aside the question of reputation, the opponent cannot claim protection under this provision of the Act.

5 It is accepted by both parties that the trade marks are identical. I therefore need to consider whether the goods are identical or similar.

10 Clearly the applicants' goods, "Articles of outerwear; sports clothing; outdoor clothing, gloves and headgear; and articles of footwear in class 25", are not identical to the goods for which the opponents' mark is registered "Sporting articles and apparatus; fishing articles and apparatus; fishing tackle; fish bite indicators; electronic fish bite indicators; all included in class 28".

15 I must therefore consider whether the goods are similar. In this I have regard to the decision by Jacob.J. in the British Sugar plc v James Robertson & Sons [ "TREAT" 1996 RPC 281]. In that case the court stated that:

"The following factors must be relevant in considering whether there is or is not similarity:

- 20 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;
- 25 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 the trade classify goods, for instance whether market research companies, who of course act for industry, put the goods
- 30 or services in the same or different sectors".

In utilising the same test and applying it to this case it is clear that some of the users will be the same and some of the trade channels will be shared. Where they are sold through the same outlets they are likely to be grouped in different parts of the store or catalogue. The uses and the physical nature of the goods are dissimilar, and they could not be said to be competitive. Whilst I acknowledge that in view of the CANON - MGM judgement by the European Court of Justice ( C-39/97) the TREAT case may no longer be wholly relied upon, the ECJ said that the factors identified by the UK government in its submissions (which are the factors listed in TREAT) are still relevant in determining the degree of similarity of the goods for the purposes of applying the composite test set out in paras 23 & 24 of the ECJ's decision in SABEL v PUMA (1998 RPC page 199 )

45 The evidence that the applicants have used the mark from an earlier date than the opponent's registration does not assist their case, in the absence of any challenge to the validity of the opponent's Class 28 registration. Further, the applicants have used FBI with other marks and therefore the absence of evidence of confusion cannot be taken as indicative that confusion would not occur.



There is no evidence that the opponents had a reputation in sporting articles at the material date, 25 April 1995. The opponents have not provided any sales or advertising figures, and the picture that emerges from the exhibits is that the Fish Bite Indicator had not been launched long before April 1995. The evidence from traders who say that they would assume a common origin needs to be considered in this light. All of the traders qualify their statements with the proviso that the earlier mark of the fishing tackle supplier would have to be known to them. At one level this could be regarded as no more than a statement of the obvious, but it probably has more significance than that because the companies who appear to provide angling equipment and specialist clothing under the same mark all appear to be well-established companies with some reputation. In the opponents' evidence were a number of brochures from manufacturers and also general retailers. These were used to support the contention that manufacturers of fishing tackle considered the provision of clothing under the same brand as an important part of their business.

However, it is apparent from these brochures that clothing is something of an adjunct to the business of the large fishing tackle manufacturers concerned (sometimes under a different trade mark to that used on tackle). The brochures from fishing tackle retailers, not surprisingly, demonstrate a larger range of clothing and other non-tackle items for use by anglers etc. There are instances where the clothing is offered for sale under the same mark as the tackle, but the majority of clothing stocked is shown to be from well-known manufacturers of outdoor clothing such as Barbour.

The picture that emerges from this evidence is that, whilst there is a degree of overlap between the trade in fishing tackle and outdoor clothing used by anglers, this appears to be the result of established manufacturers with wide ranges of fishing tackle extending their business into complimentary goods, and large fishing equipment retailers offering a whole array of goods from fishing tackle to tents. I do not think that this evidence establishes that it is standard practice for traders in fishing tackle to offer outdoor clothing under the same trade mark.

I have already found that the applicants' mark did not have a reputation ( even for fish bite indicators) at the relevant date. Nor do I consider the mark at issue to have an exceptional inherently distinctive character. In these circumstances, notwithstanding the identity of the marks, I do not consider that the similarities between the respective goods to be sufficient to have given rise to a likelihood of confusion at 25 April 1995. The opposition under Section 5(1) & (2) fails accordingly.

Finally, I turn to the ground of opposition under Section 5(4) which states:

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

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

*(b) by virtue of an earlier right other than those referred to in subsections (1) to (3) or paragraph (a) above, in particular by virtue of the law of copyright, design right or registered designs.*

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

In deciding whether the mark in question “FBI” offends against this section, I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC, in the WILD CHILD case (1998 14 RPC 455). In that decision Mr Hobbs stated that:

*“The question raised by the Grounds of Opposition is whether normal and fair use of the designation WILD CHILD for the purposes of distinguishing the goods of interest to the Applicant from those of other undertakings (see Section 1(1) of the Act) was liable to be prevented at the date of the application for registration (see Art.4(4)(b) of the Directive and Section 40 of the Act) by enforcement of rights which the opponent could then have asserted against the Applicant in accordance with the law of passing off.*

*A helpful summary of the elements of an action for passing off can be found in Halsbury’s Laws of England 4th Edition Vol. 48 (1995 reissue) at paragraph 165. The guidance given with reference to the speeches in the House of Lords in Reckitt & Colman Products Ltd - v - Borden Inc [1990] RPC 341 and Even Warnik BV - v - J. Townsend & Sons (Hull) Ltd [1979] AC 731 is ( with footnotes omitted) as follows:*

*‘The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:*

*(1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;*

*(2) that there is a misrepresentation by the defendant ( whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and*

*(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.*

*The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of “passing off”, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.’*

*“ Further guidance is given in paragraphs 184 to 188 of the same volume with regard top establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:*

*To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:*

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

With these considerations in mind I turn to assess the evidence filed on the behalf of the parties in the present proceedings as set out earlier in this decision.

The opponents claim to have a reputation in the market such that any angler who saw the FBI mark on clothing would assume that it came from the opponents. However, apart from this assertion there is little evidence of such goodwill and reputation. The opponents state that their products are sold in 210 retail outlets and that more than £one million has been spent since 1994 in developing and promoting the opponents products. There is no evidence of the market share or the annual value of sales of their fishing tackle. Apart from the fish bite indicator no details of the range of fishing tackle offered for sale is given. And the evidence provides but one example of use of the mark FBI on fishing tackle which is before the relevant date.

The independent witnesses all state that "they would associate clothing carrying a brand name of a fishing supplier **known to them** to have come from the same source as the fishing equipment" (my emphasis). These statements do not provide information regarding the standing of the opponents in the industry or the reputation or goodwill that they have in the marketplace. In the absence of proof of goodwill at the relevant date, the question of misrepresentation does not arise.

No evidence has been offered as to what clothing the mark has been applied to, how it has been sold or the volume and worth of these sales. There is therefore a question mark as to whether the opponents are indeed selling clothing. This would seem to be consistent with the opponents' own evidence, Mr McRae states that the mark FBI has been used on "Promotional clothing". In the CORGI case (Declaration of Invalidity No 9236, dated 30 September 1998) The Appointed Person, G Hobbs QC. , stated that:

"I do not regard it as self-evident that the use which has been made of the word CORGI in connection with the promotion and sale of model vehicles would be liable to shape and determine the perceptions of people exposed to the use of the word CORGI as a trade mark for the goods of interest to the Respondent (outer wear, sport and leisure wear)."

I am not persuaded that at the relevant date, 25 April 1995, the opponents had any reputation in goods in class 28 (fishing tackle), nor am I persuaded that they had acquired goodwill under the FBI mark in relation to clothing. This is strengthened by the fact that most of the promotional material provided post dates the relevant date. I am also not convinced that members of the public would have confused the products of the applicants for those of the opponents. The opposition under this section therefore fails.

The opposition having failed the applicants are entitled to a contribution towards their costs. I order the opponents to pay them the sum of £435

Dated this 24 day of March 1999

George W Salthouse  
For the Registrar  
The Comptroller General