

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

**IN THE MATTER OF APPLICATION FOR REGISTRATION
NO. 1484700 BY CASTELL BLANCH SA
AND OPPOSITION NO. 38565
BY CHAMPAGNE LOUIS ROEDERER**

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BACKGROUND

Castell Blanch SA applied on 5 December 1991 to register the trade mark shown below:

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This was accepted for a specification of goods which reads:-
"Sparkling wines; all included in Class 33."

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The application is proceeding under the procedures of Section 12(2) by reason of 'honest concurrent use' with registration number 1368211. (The opponents registration - see below). On 21 February 1994, Champagne Louis Roederer filed Notice of Opposition. The grounds of opposition are in summary:-

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(i) Under Section 11 by reason of the use by the opponents of their CRISTAL trade mark any use by the applicants of their trade mark would be likely to deceive or cause confusion

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(ii) Under Section 12(1) because the applicants' trade mark is confusingly similar to the opponents prior registrations and that the use by the applicants of their trade mark does not fall within the "honest concurrent user" provisions of Section 12(2) of the Act.

The prior registrations on which the opponents seek to rely are as follows:-

	<u>Number</u>	<u>Trade mark</u>	<u>Specification</u>
5	1368211	CRISTAL	Champagne wines included in Class 33
	1169486	CRISTAL CHAMPAGNE (LABEL)	Champagne wines

10 The opponents also ask the Registrar to exercise her discretion in their favour (under the provisions of Section 17) and seek their costs. The applicants deny all of the grounds of opposition. They too asked the Registrar to exercise discretion in their favour and seek their costs.

15 Evidence was filed by both parties and the matter came to be heard on 5 July 1999 when the applicants were represented by Mr Christopher Morcom of Queens Counsel, instructed by their trade mark agents, Haseltine Lake Trademarks. The opponents were represented by Ms Denise McFarland of Counsel, instructed by Forrester Ketley & Co.

20 By the time this matter came to be heard, the Trade Marks Act 1938 had been repealed in accordance with Section 106(2) and Schedule 5 of the Trade Marks Act 1994. In accordance with the transitional provisions set out in Schedule 3 to that Act however, I must continue to apply the relevant provisions of the old law to these proceedings. Accordingly, all references in the later parts of this decision are references to the provisions of the old law.

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Opponent's Evidence

30 This consists primarily of a Statutory Declaration by Jean-Claude Rouzaud, Director General of Champagne Louis Roederer, the opponents, dated 20 March 1995. He states that he has been connected with the opponents in an executive capacity since October 1979 and the information contained within the Declaration is either from his own knowledge or derived from the records or files of his Company to which he has full access. He is also fully conversant with the English language.

35 He states that the opponents are the proprietor of the two registered trade marks set out earlier in this decision. No. 1368211 was obtained on the basis of evidence of use and he provides as Exhibits copies of the Declaration Exhibit filed in support of that application. He confirms the facts and matter set out in that Declaration, which provide some background to the opponents (one of the famous champagne houses of France), together with information on sales, customers and advertising in the United Kingdom. In the current Declaration, he
40 supplements the information provided in that earlier Declaration in relation to the number of bottles of champagne sold by the opponents in the years 1989 - 1993 (in 1993 the number of bottle sold in the United Kingdom was 21,726). The value of sales in those years was approximately £1,000,000 each year and advertising and promotion continued at a steady rate.

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Mr Rouzaud states that the opponents promote champagne under their trade marks by referring to the word CRISTAL. In addition, he states that the product is referred to by the

press as CRISTAL alone (various press cuttings in support of this are exhibited) as well as being promoted and referred to under the terms LOUIS ROEDERER CRISTAL and/or ROEDERER CRISTAL. As a result, the recognition of CRISTAL as a trade mark belonging to the opponents is very important. Mr Rouzaud goes on to say that it is his understanding that in the United Kingdom the trade normally orders products sold under the opponents' trade mark by referring to CRISTAL alone, whereas members of the public would be more likely to ask for "CRISTAL champagne." It is his view, therefore, that people who purchase sparkling wine under the trade mark of the applicants are likely to refer to it using the trade mark CRISTAL alone and not "CRISTAL CASTELL BLANCH".

Mr Rouzaud goes on to state that his company exercises strict quality controls in the production of the champagne sold under their trade marks. These controls, he says, go far beyond the extremely strict laws and regulations that apply in France to the production of champagne wines. The champagne sold and promoted under the CRISTAL trade mark comes from the best vineyards, the wines are kept in cellars for a minimum of 5 years (the legal minimum is 18 months) and the champagne is produced only during years which are worthy of producing a vintage champagne - the poor quality of the harvest did not allow for production in 1991 or 1992. By contrast, the products manufactured and sold by the applicants are of an inferior quality. And because CRISTAL has been used by the opponents since 1949 any use of the same trade mark by the applicants, in combination with their trade mark or house mark CASTELL BLANCH, would result in association of the word CRISTAL with the declarant's company.

Mr Rouzaud notes that the application in suit is associated with four other registrations standing in the name of the applicants but all of these contain the words BRUT ZERO or CASTELL BLANCH but none contain the word CRISTAL or CRYSTAL. He also notes that the application proceeded to advertisement on the basis of "honest concurrent use" from 1977 (since the opponents' registration no. 1368211 for the trade mark CRISTAL was raised as an earlier conflicting trade mark). Mr Rouzaud expresses surprise that there was a claim to such use from 1977. He acknowledged that there was minor use by the applicants of this trade mark between 1979 and 1990. But as the applicants knew that the opponents objected to the use by them of the CRISTAL trade mark, because of contacts between them, the use could not be honest.

In addition to this Statutory Declaration there are eight Statutory Declarations from people in the trade covering their responses to an enquiry by Forrester Ketley & Co, the opponents' trade mark attorneys, asking for comments and views from the individuals in relation to the CRISTAL trade mark. In each case the declarant provides a copy of their response to this enquiry and in each case the declarant is aware of the CRISTAL trade mark of the opponents and states that customers would be confused if any other company used that trade mark in the same area of business.

Applicant's evidence

This consists of a Statutory Declaration dated 6 June 1996 by Felix Benito, the Managing Director of C & D Wines Limited, a position he has held since the company was formed in 1985. He states that he first worked in the United Kingdom as an internal auditor for the

Spanish company Rumasa in 1979. This involved auditing the books of Augustus Barnett & Son Limited, a multiple off-licence chain of some 300 branches throughout the country and owned by Rumasa. As part of his work as an internal auditor Mr Benito reviewed items that were stocked by August Barnett and became aware of the CRISTAL CASTELL BLANCH product in either 1979 or 1980. He subsequently left Rumasa and became Managing Director of Garvey (London) Limited who imported and distributed wines as the exclusive United Kingdom agent of Castell Blanch SA, these include the CRISTAL CASTELL BLANCH cavas. Garvey (London) Limited was run down voluntarily and Mr Benito became Managing Director of C & D Wines Limited which took over, exclusively, the importation and distribution within the United Kingdom of the Castell Blanch range of cavas including the CRISTAL CASTELL BLANCH cava.

Mr Benito goes on to say that in the years since his company took over this exclusive contract it has spent between five and fifty thousand pounds annually promoting the range, although in 1991 the figure was £100,000. Most of the promotion took place in the trade press and exhibits are produced showing the CASTELL BLANCH range of cavas, including the CRISTAL CASTELL BLANCH cava. The goods sold under the trade mark in suit have been sold widely throughout the United Kingdom in off-licences, wholesalers, cash and carries, restaurants and retailers generally. A list of outlets from which the CASTELL BLANCH range of cavas including CRISTAL CASTELL BLANCH has been sold is exhibited.

The number of bottles of CRISTAL CASTELL BLANCH cava sold in the United Kingdom since 1985 are as follows:

25	1986	173,000
	1987	262,000
	1988	176,000
	1989	214,000
	1990	131,000
30	1991	114,000

Mr Benito further states that he is not aware of any case of confusion between the applicants and the opponents trade marks nor was he aware of any objection by the opponents to the sale of the applicants' products prior to this opposition. He comments that he would have expected to have been made aware of any objection by the opponents whilst he was an Internal Auditor for Rumasa or whilst he was Managing Director of Garvey (London) Limited. He goes on to state that in his view confusion between goods of the applicant and the opponent is unlikely because

- i. the retail price of the applicants' goods is approximately £6 per bottle whilst the opponents' premium champagne sells at many times that price.
- ii. the applicants trade mark clearly states that the product is a cava whilst the opponents labels clearly states that the product is champagne. Thus, there is a significant difference between the products themselves.

- iii. the predominant word in the applicant's label is CASTELL BLANCH whilst CRISTAL appears above that word, it is both small and in finer type thus the product is likely to be seen by purchasers and potential purchasers as a CASTELL BLANCH product. In support of this contention he exhibits a copy of "Off Licence News" dated May 13 1991 in which both the applicants and the opponents products are advertised and promoted.

Also filed is a Statutory Declaration dated 5 July 1996 by Mr Jose Ferrer Sala, the President of Castellblanch SA a position which he has held since 1984. He confirms that he has a working knowledge of the English language.

Mr Sala states that the applicants were acquired by Freixinet SA in 1983 and that he was the Chairman of Freixinet at that time. At the date of acquisition the applicants had been selling sparkling wine under the trade mark in suit for some years, he is therefore unable to provide any information on why or how the trade mark was adopted. However, the trade mark was being used in many countries outside Spain at that time, including the United Kingdom, and international sales of cavas bearing that trade mark have continued. In support of the claim to use of the trade mark in the United Kingdom there is exhibited copies of invoices and their associated bills of lading in relation to the export of goods from Spain to the United Kingdom for years 1988 onwards.

Opponents evidence in reply

This consists of a Statutory Declaration by Jean-Claude Rouzaud dated 26 August 1997. He states that he has read the applicant's evidence. First of all he notes that Mr Felix Benito's knowledge of CASTELL BLANCH wines in 1979 and 1980 arises as a result of his position as an Auditor; he must also have been aware of the opponents' champagnes which were available through Augustus Barnett at that time.

He goes on to say that Mr Benito seems to suggest that the CASTELL BLANCH name is associated solely with cava, but he notes that the application is not so limited to this particular method of manufacture of a sparkling wine. He also notes that the advertising and promotional spend is related to the range of products sold under the CASTELL BLANCH name and not limited to CRISTAL CASTELL BLANCH and in relation to the number of bottles sold over the period prior to the date of application, it means that 137 retailers each sold just over 100 cases per annum of the CASTELL BLANCH Cava which in his view represents only minimal sales, (keeping evidence of confusion to a minimum).

Mr Rouzaud also exhibits correspondence between the applicants and the opponents from 1979 which, he says, makes it plain that whilst his company would not cease trading in Spain they would not object to CASTELL BLANCH selling in their home market of Spain (until Spain entered the EEC) but would object to their marketing activities outside Spain if they used the CRISTAL trade mark. Finally, Mr Rouzaud states that the get up of the applicants' products which includes the classic champagne bottle, together with the words "methode champenoise" (which he states is likely to be interpreted by consumers in the UK as meaning "manufactured by the champagne method"), despite the fact that it is disclaimed, further reinforces the likelihood that the applicants' product would be confused with that of the

opponents. He also states that it is now no longer legally possible because of an EU regulation to use the term ‘methode champenoise.’

Applicants Additional Evidence

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This consists of a Statutory Declaration dated 17 March 1998 by Martin Hermann Krause, a Trade Mark Attorney and partner of Haseltine Lake Trademarks. He states that he sought to ascertain whether any businesses would stock both the CRISTAL champagne of Champagne Louis Roederer and the CRISTAL CASTELL BLANCH cava of the applicants. He used the exhibit attached to the Statutory Declaration of Felix Benito as the source for contacting those listed who were said to be wholesalers or off licences. Of those listed only one, Wine Barrels Limited, said that they stocked the opponents’ products as well as the applicants. In response to Mr Krause’s question, Mr Troisi of Wine Barrels Limited said that it was highly unlikely that the public would confuse the two products given the expense of the CRISTAL champagne and fact that people buying that particular product would be likely to know precisely what they wanted and they would not, therefore, mistakenly buy a cava in its place. A more general enquiry by means of telephone calls and letters were conducted subsequently with the aid of trainee trade mark agents with the result that a further individual, a Mrs Hind of the Old Windsor Stores, responded stating that she was aware that her premises stocked both products but she was unaware of any confusion arising because of the similarity of names. Both Mrs Hind and Mr Troisi have submitted their own Statutory Declarations in confirmation of their statements.

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Mr Felix Benito also submitted a Statutory Declaration dated 17 March 1998. He makes a number of comments on those made by Mr Rouzaud in relation to the sales of the applicants goods and in addition states that as an auditor in a senior position within his then company, it is his belief that he would have been told of, or found out about, instances of confusion as between CRISTAL champagne and CRISTAL CASTELL BLANCH cava.

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Opponent’s addition evidence

This consists of a Statutory Declaration dated 16 June 1998 by Mr Jean-Claude Rouzaud. He comments on the contacts made by Mr Krause and their results but comments that the applicant’s specification is not limited to sparkling wines of a cheap variety. The two specifications of goods are therefore clearly in conflict.

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That concludes my review of the evidence insofar as I consider it relevant.

DECISION

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The first two grounds of opposition are based upon Sections 11 and 12(1) of the Act which state:

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11. It shall not be lawful to register as a trade mark or part of a trade mark any matter the use of which would, by reason of its being likely to deceive or cause confusion or otherwise, be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

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

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

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(2) In case of honest concurrent use, or of other special circumstances which in the opinion of the Court or the Registrar make it proper so to do, the court or the Registrar may permit the registration by more than one proprietor in respect of:-

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- a. the same goods
- b. the same description of goods or
- c. goods and services or descriptions of goods and services which are associated with each other,

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of marks that are identical or nearly resemble each other, subject to such conditions and limitations, if any, as the Court or Registrar, as the case may be, may think it right to impose.

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For the purposes of this decision I consider the opponents' registration for the word CRISTAL solus. They would be in no better position in respect of their label registration. The established tests for the Section 11 and 12 objections raised in this case are set down in Smith Hayden & Co Ltd's application (Vol 1946) 63 RPC 101 as adapted by Lord Upjohn in the Bali trade mark case 1969 RPC 496. In relation to the present case the tests may be expressed as follows:-

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(a) under Section 11). Having regard to the user of the mark CRISTAL is the tribunal satisfied that the mark applied for, CRISTAL CASTELLBLANCH (Label), if used in a normal and fair manner in connection with any goods covered by the registration proposed will not be reasonably likely to cause deception and confusion amongst a substantial number of persons?

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(b) under Section 12) Assuming user by the opponents of their mark CRISTAL in a normal and fair manner for any of the goods covered by the registrations of that mark, is the tribunal satisfied that there will be no reasonable likelihood of deception among a number of persons if the applicants use their mark the CRISTAL CASTELLBLANCH (Label), normally and fairly in respect of any goods covered by their proposed registration?

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Dealing with Section 12(1) first, I only need to determine whether the respective trade marks are confusingly similar because there was no dispute at the Hearing that the respective specifications cover the same goods or goods of the same description. In doing so I employ the test propounded by Parker J in the Pianotist case (1906) 23 RPC at page 777, line 26 et seq;

“You must take two words. You must judge of them both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of these trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion - that is to say - not necessarily that one will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public, which will lead to confusion in the goods - then you may refuse the registration, or rather you must refuse the registration in that case.”

In this case the applicants’ trade mark contains the whole of the opponents’ trade mark registered under number 1368211. Although it was put to me that in the applicants trade mark the word CRISTAL was the less dominant element, CASTELLBLANCH predominating, I do not consider the former word de minimis. Nor can I ignore the fact that normal and fair use of the trade mark as a whole means that the respective elements could be increased or decreased in size or could be represented in different colours such that the word CRISTAL became a more, or the most, prominent element in the trade mark. I also bear in mind that the goods are sparkling wines and champagne respectively where it would not be unusual for a customer to ask for a product by name in the following terms “ie a bottle of CRISTAL wine” (or CRISTAL champagne). In these circumstances I have no doubt that the two trade marks are likely to be confused one with the other sufficient to give rise to the likelihood of deception amongst a number of persons.

Turning to the ground of opposition based upon Section 11, my finding is no different from that under Section 12. The opponents have used their trade marks on a high quality champagne which sells at a premium price. The applicants on the other hand have sold a cheaper sparkling wine (a cava) which sells for a relatively small sum. However, as was pointed out at the Hearing as well as in the evidence, the applicants specification could include the goods of the opponent (champagne being a sparkling wine) and therefore, normal and fair usage of the trade mark could be on the same goods as those provided by the opponent under their CRISTAL trade mark. Though a minor point the presence of the term ‘method champenoise’ on the applicants label might also serve to increase slightly the possibility of confusion.

Whilst I do not give a significant amount of weight to the surveys or enquiries the results of which the parties have sought to pray in aid of their cases, it seems to me that the opponents have significant use of their CRISTAL trade mark on champagne and a very high reputation. This reinforces, in my view, the possibility that the public may confuse, or associate the applicants’ trade mark with that of the opponents - perhaps thinking that the opponents are

selling a cheaper version of their product under the CRISTAL CASTELLBLANCH trade mark. In the circumstances I consider that it is reasonably likely that deception and confusion may be caused among a substantial number of persons.

5 The opponents, for the reasons given above, are therefore successful in their grounds of the opposition based upon Sections 11 and 12(1). That, however, is not the end of the matter because the application was accepted by the Trade Marks Registry and is proceeding under the provisions of Section 12(2) of the Act (the provisions of which are set out above).

10 I do not think it is disputed that Section 12(2) can be considered in this case and that in appropriate cases Section 12(2) can be utilised to overcome a finding as to possible confusion under Section 11 of the Act. This point was in fact confirmed by Mr Justice Falconer in the CHELSEA MAN case 1989 RPC 111 at page 121 line 41 where he said:

15 “In the Spillers’ case Danckwerts J after considering the decisions of the House of Lords in Case, Ratcliffe & Gretton Ltd -v- Nicholson & Son Ltd (1932) 49 RPC 85 and in Alex Pirie & Sons’ Applications (1933) 50 RPC 147, stated, at page 337, line 15 of the report:

20 “It seems to me that the construction put by the House of Lords in the cases to which I have referred” - and In interpolate, those were the Bass, Ratcliffe -v- Nicholson and Pirie cases - “on sections 11, 19 and 21 of the 1905 Act must also apply to sections 11 and 12 of the 1938 Act, and lead to the conclusion
25 that cases where the Court or Registrar thinks fit to exercise the discretion conferred by section 12(2) do not fall within the general prohibition contained in section 11. This being so, it would appear logical in cases which come within section 12(1) to consider first whether the case is one in which the discretion conferred by section 12(2) should be exercised so as to allow
30 registration of the mark, and if the answer is in the affirmative, it cannot be necessary to consider section 11 separately, because if there are reasons other than resemblance to an existing mark which cause the proposed mark to be disentitled to the protection of the court, such reasons must surely affect the exercise of the discretion conferred by section 12(2). It is not possible, as it seems to me, to apply the provisions of the Act as though they were in separate
35 compartments.”

and again at page 122 line:

40 In Berlei -v- Bali case, Megarry J had to consider whether section 12(2) could override a section 11 objection. After setting out section 12(2) he stated (at page 476):

45 “I think it is plain that this subsection” - that is section 12(2) - “provides a discretionary path to registration notwithstanding section 12(1) and also notwithstanding section 11. Section 12(1) make this explicit in its opening words”, and he reads section 12(1). “In the case of section 11, there is no such explicit provision enabling section 12(2) to override the section. Section 11 provides”, and he reads that. Going on at line 14, he says, “Nevertheless, when

one considers the origin of these sections, coupled with the fact that the Act of 1938 is a consolidation Act, I think that section 11 must be subject to section 12(2). In the Trade Marks Act, 1905, section 11 provided the origin of the present section 11, section 19 the origin of the present section 12(2). In Bass, Ratcliff & Gretton -v- Nicholson & Son Limited (1931) 49 RPC 88, the House of Lords held that the then section 11 was subject to the then section 19, the clear intention of section 19 being that, despite section 11, there was power to register in a case excepted by section 19. Section 19 excepted from its prohibition two cases, namely where there was an order of the court, and where the trade mark was in use before 13 August 1875. The Bass case fell under the latter head; but if that head not only escaped the specific prohibition of section 19 but also operated to override the general prohibition of section 11, so also, I think, must the former head. Correspondingly, under the Act 1938, as section 12(2) plainly escapes the specific prohibition of section 11. That plainly appears to have been the view of Danckwerts J in relation to the Act of 1938 (see Spillers Limited's Application (1952) 69 RPC 327 at 337), and accordingly, despite the verbal contrast in the consolidation Act between section 11 and section 12(1), I do not think that this has changed the law. The specific case envisaged by section 12(2) accordingly permits registration, despite the general prohibition of section 11".

Having established my view as to the applicability of Section 12(2) the main matters for consideration under that Section were laid down by Lord Tomlin in Pirie's Trade Mark (1933) 50 RPC 147 at 159. They are:-

- i. The extent of use in time and quantity and the area of trade.
- ii. The degree of confusion likely to ensue from the resemblance of the marks, which is, to a large extent, indicative of the measure of public inconvenience.
- iii. The honesty of the concurrent use.
- iv. Whether any instances of confusion have been proved.
- v. The relative inconvenience which would be caused if the mark in suit was registered, subject if necessary to any conditions and limitations.

I go on to consider the application against these matters.

At the date of application the opponents argue that the amount of use by the applicants is de minimis and that the goods on which the CRISTAL CASTELLBLANCH trade mark was used was confined to cava, a particular type of Spanish sparkling wine. I am not persuaded however that the use was de minimis. Not least because I am not given any evidence on what might be considered the normal or average number of bottles of this type of wine sold in the United Kingdom and how the applicants' sales compare nor am I given any independent evidence on the point. In any event I have examples of the applicants' advertising which show that the trade, at least, may have knowledge of the trade mark and therefore of the use by the

applicant of the word CRISTAL CASTELLBLANCH on cava. In the circumstances, I am prepared to accept that the use by the applicant was more than de minimis. But I agree with the opponents that the use has only been on cava wines.

5 At the relevant date there is no evidence of actual confusion and I do not consider that the information supplied as part of the survey and enquiries is sufficiently robust to enable me to infer from it that confusion between the respective trade marks is or is not likely. That being so, I form my own view and conclude that the absence of confusion may be indicative that the products, champagne and cava (together with the price difference), are discernable by the public purchasing such goods and thus are not likely to be confused. Provided the applicants confine themselves to their current range of products this situation is unlikely to change.

15 The honesty of the applicants' was questioned by the opponents. However, there is nothing that I can see in the evidence that supports this. The fact that the applicants have sought to register this trade mark in the light of known objections by the opponents does not amount to dishonesty.

20 As far the relative inconvenience which would be caused by the registration of the trade marks, I can see little that would be caused to the opponents if the applicants present trade under their trade mark continues. By that I mean that if the registration was confined to the goods, cava, on which the applicants trade mark has been used so far then it seems to me that neither party will be burdened in marketing or selling their respective products.

25 In all of the circumstances it seems to me that the applicants' and the opponents' trade marks have been used alongside each other in the marketplace without damage to the opponents. Thus I believe it justified to allow registration of the trade mark in suit but only for the goods on which it has been used. I am therefore prepared, under the provisions of Section 12(2), to exercise the Registrars' discretion in the applicants favour and allow the trade mark to proceed to registration for a specification which reads:

30 Spanish sparkling wines, all being cava; all included in Class 33.

35 The applicants will have one month from the end of the appeal period in respect of this decision to file a form TM21 so limiting the specification. In the event that they do not do so the application will be refused in its entirety.

40 As the opposition has been unsuccessful I order the opponents to pay to the applicants the sum of £550. If the application is subsequently refused as a result of refusal by the applicant to so limit the specification as set out above the applicants must pay to the opponent the sum of £750.

Dated this 14 day of October 1999

45 **M KNIGHT**
For the Registrar
the Comptroller General