

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No 2146098  
BY MATLEY LIMITED OF LONDON  
TO REGISTER A TRADE MARK IN  
CLASS 3**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
BY GOODNIGHT PRODUCTS LIMITED  
OF TELFORD, SHROPSHIRE  
UNDER No 48791**

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**IN THE MATTER OF Application No 2146098  
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**IN THE MATTER OF Opposition thereto by  
Goodnight Products Limited of Telford,  
Shropshire under No 48791**

### **DECISION**

1. On 22 September 1997 Samir Tleel of California, United States of America applied to register the trade mark GOODNIGHT-STOPSNORE. The application was subsequently assigned to Matley Limited in May 1999.
2. After examination the application for registration, numbered 2146098, was accepted and published for a specification of goods which reads as follows:-

"Essential oils; aromatherapies; aromatherapy preparations; aromatic oils; aromatic substances for personal use; aromatic preparations; none for internal use."

3. On 16 July 1998 Goodnight Products Ltd, of Telford, Shropshire filed a Notice of Opposition against the application for registration. The Grounds of Opposition were extensive but at the hearing were narrowed down to:-

Under Section 3(6) - in that the application was made in bad faith.

4. The opponents filed a counterstatement in which they denied the grounds of opposition.
5. Both sides seek an award of costs in their favour and both filed evidence in these proceedings.
6. The matter came to be heard on 26 January 2001 where the applicants were represented by Mr Roger Lewis, of the applicants, and the opponents by Mr Victor Caddy, of A R Davies & Co, their agents.

### **Opponents' Evidence**

7. This consists of a Statutory Declaration by Mr Andrew Philip Gregory and is dated 12 May 1999.

8. Mr Gregory is the Managing Director of Goodnight Products Limited, a position he has held since February 1997. The company was incorporated primarily for the purposes of importing and selling products that are believed by some to be efficacious in promoting or assisting sleep and that element in the company's name "GOODNIGHT" is meant to reflect this. Only one such product has been sold. This is a specialised mouthwash incorporating essential oils which is purchased from a German company and with which it has an exclusive supply contract for the United Kingdom. The product is supplied in small glass bottles within cardboard packaging, which bears the name "DAHMS ORIGINAL GOODNIGHT". A copy of a carton is exhibited. Mr Gregory points out that the word "GOODNIGHT" is given far more prominence on the packaging than the words "DAHM'S ORIGINAL".

9. The first sales of products under this trade mark were in February 1997 and although sales were quite successful Mr Gregory was aware that an experienced distributor of products in the medical field could probably achieve better results and, therefore, whilst not actively seeking such a party, he was amenable to any opportunities that might arise in order to further promote sales of the products under the trade mark. Several months later at an exhibition in Telford an opportunity did arise in the form of an approach by a Mr Roger Lewis from a company called Marshtech International Limited, (Marshtech) another exhibitor at the exhibition. Mr Gregory was aware that Marshtech sold a product called a "fat magnet" and so it already had an established network of customers and contacts who might very well be interested in purchasing his company's product. Subsequently, it was agreed that Marshtech would take over, on an exclusive basis, distribution of the product. Exhibited is a copy of the distribution agreement between the opponents and Marshtech in respect of the product sold under the trade mark DAHM'S ORIGINAL GOODNIGHT. The nature of the agreement, says Mr Gregory, meant that Marshtech were wholly responsible for the promotion and sales of anti-snoring products under the opponents' trade mark.

10. Mr Gregory goes on to say that in his company's trade mark the words DAHM'S ORIGINAL are of secondary prominence to the word GOODNIGHT. The latter word was, he says, most closely associated with the product both before and after the appointment of Marshtech. He exhibits a letter from Mr Roger Lewis of the distributors dated 5 September 1997, in which there is a reference to the "two ads for GOODNIGHT, one in the Daily Mail and the other in the Mirror" as well as another letter from Mr Roger Lewis to his marketing co-ordinators, J E M Marketing, and dated 24 September 1997, which, again, refers to "GOODNIGHT". Mr Gregory believes that it is common ground between the parties that the element "GOODNIGHT" was by far the stronger in terms of brand image and in getting the message across to customers that use of the product would ensure a good night for both the user and, as a consequence, any sleeping partner.

11. Mr Gregory further states that in connection with the distribution agreement Marshtech subsequently ordered, on 25 September 1997, a quantity of 2,000 bottles described in the purchase order and exhibited as "Goodnight anti-snoring mouthwash" amounting in total to £8940. He was not aware at that time that three days earlier Mr Tleel, a Director of

Marshtech International Limited had applied to register GOODNIGHT-STOPSNORE in his own name for goods which Mr Gregory believes includes mouthwashes specifically formulated to include essential oils and similar ingredients to those used in the product sold under the DAHM'S ORIGINAL GOODNIGHT trade mark.

12. Finally, Mr Gregory states that the order for 2000 bottles of the product was fulfilled and supplied to Marshtech but these were never paid for. He speculates that one reason for this might have been the temporary ruling by the Medicine Control Agency that snoring was a medical problem, but that decision was reversed in early December 1997. And, during and after this period Marshtech continued to sell the product. But as a result of the non-payment the opponents terminated the distribution agreement with Marshtech by letter dated December 1997.

13. Mr Gregory believes that Mr Samir Tleel acted in bad faith in filing trade mark application No 2146098 knowing that, for a period of time at least, the trade mark GOODNIGHT STOPSNORE would be closely associated with the DAHM'S ORIGINAL GOODNIGHT product and therefore the opponents. At no time, says Mr Gregory, did his company ever authorise Marshtech or Samir Tleel (the relationship between the two being established in opposition proceedings between the parties in respect of the opponents' application to register the DAHM'S ORIGINAL GOODNIGHT trade mark) to use the trade mark GOODNIGHT-STOPSNORE. If he had known that (as he puts it) it was their collective intention to associate that trade mark with his company's product, he would have not permitted the distribution agreement.

### **Applicants' Evidence**

14. This consists of a Statutory Declaration by Mr Kamlesh Bharadia, Company Secretary of Matley Limited. He states that Matley Limited of which he is Company Secretary, is a wholly owned subsidiary of Gar Investment Corporation of Tarzana, California, United States of America whose President is Mr Roger Lewis. There are various other companies within the Gar Investment Corporation Group, one being Marshtech International Limited, which is now in receivership. Gar Investment Corporation Group specialises in sourcing, developing, manufacturing and marketing natural remedies for various cosmetic and/or health related problems but its products are not medicines as such.

15. Mr Bharadia states that around 10 July 1997, Mr Andrew Phil Gregory (Managing Director of the opponents) approached Roger Lewis at the latter's office with a view to asking Marshtech to take over the distribution of a product known as DAHM'S ORIGINAL GOODNIGHT. According to Mr Bharadia, Mr Gregory advised Mr Lewis that he had been marketing the DAHM'S ORIGINAL GOODNIGHT product himself through his company Goodnight Products Limited which had been incorporated in 1997. Despite certain representations made by Mr Gregory which proved to be false and misleading, it was agreed that Marshtech would enter into a distributorship agreement with Mr Gregory and that agreement was signed on 28 July 1997 by Mr Jonathan Younger, then the Company Secretary

of Marshtech International Limited. He believes that Mr Gregory sought to procure distribution of the product by Gar Investment Corporation Group because he himself was not experienced in marketing and was having solvency problems.

16. The product the subject of the distribution agreement was says Mr Bharadia supplied in liquid form in small bottles each containing 5mls of concentrated natural essential oils and, pursuant to the agreement, Marshtech placed an initial order for 500 bottles at cost price and then ordered a further 2,000 bottles at an agreed higher price. He says that Marshtech began to market the product and committed significant effort and expense in placing advertisements in various national newspapers (they employed the services of JEM Marketing and the PR agency Buzz). However, it soon became clear that despite assurances from Mr Gregory as to the integrity of advertising the product as a snoring palliative doubts emerged in this area. Eventually, Mr Gregory advised Marshtech that as a result of a decision by the Medicine Control Agency the product could not be advertised. A copy of the communication from Mr Gregory to that effect is exhibited. Accordingly, any publicity initiated after August 1997 was attributable to articles written in magazines and newspapers rather than to the direct efforts of Marshtech.

17. Mr Bharadia states that the distributorship agreement was officially terminated on 15 December 1997 as a result of a letter sent from Mr Gregory to Marshtech International Limited. However, he states that Marshtech would claim that it was invalid ab initio due to the misrepresentations made by Mr Gregory in concluding the distributorship agreement in respect of a product of doubtful integrity and legality. Unsold products were not returned to the opponents because they were held as security in respect of money owed to Marshtech International Limited for the considerable advertising and promotional activities that had been undertaken in good faith.

18. Mr Bharadia goes on to state that enquiries made by Gar Investment Corporation Group found that the same snoring palliative as obtained through the opponents and sourced from Germany could be sourced through a Belgian company at significantly less cost. Marshtech was therefore able to source the product more economically from Belgium and chose to do so selling it under the trade mark GOODNIGHT-STOPSNORE. Sales of the product sourced from Belgium continued until 1 March 1998 at which point Gar Investment Corporation Group produced its own snoring palliative mouthwash, still sold under the trade mark GOODNIGHT-STOPSNORE, and in bottles of similar size and appearance to those used previously. On 19 May 1999 the trade mark application in suit was assigned from Samir Tleel to the current applicants, Matley Limited.

#### **Applicants' evidence in reply**

19. This consists of a further declaration from Mr Andrew Philip Gregory dated 9 August 2000. He comments on Mr Bharadia's declaration, but first of all he accepts that it was not Mr Roger Lewis who approached him at the exhibition in Telford. It was Mr Jonathan Younger, the Company Secretary, at the time, of Marshtech International Limited. Because

he subsequently met Mr Roger Lewis, and it was evident that he was in charge of the running and operating decisions of the company, and indeed all of his subsequent dealings were with Mr Lewis, he overlooked the fact that the initial contact he had with Marshtech had been with Mr Younger.

20. Mr Gregory goes on to deny that any representations he made in the course of the negotiations with Marshtech have proved to be false or misleading. At the time the distribution agreement between Goodnight Products Limited and Marshtech International Limited was negotiated and completed Mr Gregory says he made it clear to both Mr Lewis and Mr Younger that Goodnight Products had received approval from the Medicine Control Agency to sell the product to be sold under the DAHM'S ORIGINAL GOODNIGHT trade mark as a cosmetic. This approval was in writing and it was shown to Marshtech before the agreement was signed and before sales commenced. Indeed, he says, paragraph 5 of the agreement under the heading "Goodnight agrees:" refers to this written approval and to the fact that it was to be shown to Marshtech before they signed the agreement. Goodnight Products Limited had already advertised the product in the Daily Mail and had been given verbal assurance by that newspaper's advertising department (who seek approval from the Medicine Control Agency) that the advertising was acceptable, providing that the ongoing German test on the product were acceptable to the Medicine Control Agency. It subsequently transpired that that agency decided that snoring was a "medical problem" and as such, under European Union Law, any therapeutic substance connected with the word 'snoring' was regarded automatically as a medicine and required a licence. This in turn meant that such a product could not be advertised (according to the code of practice of the Advertising Standards Authority) until a licence from the Authority had been obtained. It was at this stage that Mr Lewis started to complain that Mr Gregory had made misrepresentations to him and sought to use this as a reason for not paying for the goods already supplied.

21. Mr Gregory states that no misrepresentation took place, and that on the contrary, that he was entirely honest and open about the position from the start. In his view, Mr Lewis knew very well it was in anticipation of this type of problem, and with Mr Lewis' agreement, that at paragraph 2 of the distribution agreement, under the heading "Goodnight agrees", the following was provided. "Goodnight has verified, to the best of its ability, but does not warrant that .....". In short that both parties accepted that the situation was evolving and the distribution agreement was drafted and entered into on this basis and with all available knowledge at everyone's disposal. Once the licencing problem with the Medicine Control Agency came to light Mr Gregory (and the opponents) behaved responsibly and immediately brought it to Marshtech's attention. Marshtech were asked to return the stock that they had purchased so that the packaging and inner leaflets could be corrected in compliance with the ruling that the product could be sold only as a cosmetic and that the word 'snoring' had to be removed from all packaging and literature. Marshtech did not return any of the goods. Mr Gregory states that they continued to sell it (without having paid for it), up to the point at which Marshtech went bankrupt. Subsequently, and in order to respond to the ruling by the Medicine Control Agency, Mr Gregory obtained advice from an expert witness (an ear, nose and throat specialist) who made representations to the Agency on behalf of Goodnight

Products as a result of which the position was reviewed and they revised their position such that Goodnight Products - and all other businesses with products in a similar field - were able to sell products with reference to the word 'snoring' in the United Kingdom without a licence.

22. Before the distribution agreement was terminated Mr Gregory says that the opponents obtained information that Marshtech had approached their German supplier. Subsequently, Mr Samir Tleel filed the trade mark application in suit, some time before Mr Gregory became aware of the licencing problem.

23. That concludes the summary of the evidence insofar as I consider it relevant in these proceedings.

## **DECISION**

24. At the start of the Hearing Mr Caddy, for the opponents, sought leave to have admitted into the proceedings additional evidence in the form of a Witness Statement by himself dated 22 January 2001 together with 5 exhibits. He submitted that the information they contained was of a factual nature known to both parties (extracts from the register of companies, correspondence between the parties and documentation filed in related opposition proceedings). Thus, it would not inconvenience or prejudice the applicants if it was admitted but it would assist the Hearing Officer reach a decision.

25. Despite the fact that it had been sent by courier to him, Mr Lewis said that he had not seen the request or the evidence in question (which was also sent, and received by fax and courier to the Trade Marks Registry). In all of the circumstances I did not consider that it would be reasonable to admit this additional evidence. The applicants had not seen it and to do so at the Hearing would, in my view, disadvantage them unless they were to be given an opportunity to respond. This would have meant an adjournment which, in my view, was not in anyone's interest because, having read the evidence, I did not believe that this evidence was likely to be determinative of the case, or even assist in determining whether the objections to registration had merit. Mr Caddy's request was therefore refused.

26. Insofar as the substantive objections taken by the opponents in their statement of grounds those under Sections 3(1)(a), 3(1)(b) and 5(4)(a) were withdrawn by Mr Caddy and I need say no more about them. That leaves only the objection based upon Section 3(6) which states:

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

27. In his skeleton argument, Mr Caddy re-stated the basis of the opponents' objections in the following terms:-

"1. Firstly that the application was made in bad faith because the Applicant has only ever intended to use the mark for one particular product and the specification of goods is wider than is justified by the Applicant's intended use of the mark; and

2. Secondly that the application was made in bad faith because at the time the application was made the Applicant owed a duty to the Opponent and its behaviour in seeking to register the mark in suit fell below acceptable commercial behaviour."

28. Insofar as the first strand is concerned I do not consider that there is much substance to it. Mr Caddy, using MAGIC BALL, trade mark [2000] RPC 439, claimed that the trade mark was a one product trade mark, the applicant having stated in Mr Bahradias' Statutory Declaration that the trade mark was to be used on a gargle/mouthwash purported to be a palliative for snoring. Thus, in Mr Caddy's view, the applicant could have no bona fide intention of using the trade mark on all of the goods covered by the specification. In my view, however, all of the goods covered could be said by some to be capable of being used as snoring palliatives (whether one believes the claims or not). This case is therefore not on all fours with the authority quoted. In that (revocation) case there was evidence that, for technical reasons effecting only a narrow range of the goods covered by the specification, the trade mark had not been used and the Hearing Officer was able to revoke the registration in part as a result. In this case there is no evidence that the goods covered by the specification in question could not be used as snoring palliatives even though, initially, the trade mark is to be applied only to a mouthwash. I turn therefore to the second strand of the Section 3(6) objection.

29. In my view the trade mark the applicants are seeking to register is different from the one the opponents used (and are seeking to register separately). It does not in my view encapsulate the distinctive character of the opponents' trade mark. [Geoffrey Hobbs QC acting as the Appointed Person in BALMORAL [1999] RPC 297. There is, of course, a common element, the word GOODNIGHT. But in relation to the end use of the goods sold under the respective trade marks (snoring palliatives) that word (or term) does not have much, if any, distinctive character. Therefore, in the applicants' case it is the combination of the words GOODNIGHT and STOPSNORE which carry it over the threshold of acceptability, prima facie, as a registrable trade mark, whilst it is the words DAHM'S ORIGINAL which are the really distinctive element in the opponents' trade mark. Thus in a situation such as this where the respective trade marks are different it seems to me that there is no bad faith on the part of an applicant in seeking to register a trade mark which differs significantly from the trade mark of an opponent, even if the goods are the same and there was some business agreement between them covering the use of the opponents' trade mark. Unless of course there was some other factor which came into play. There was no such factor here that I can discern.

30. If it is held that I am wrong in holding the above I go on to consider the substance of the bad faith claim.

31. In his skeleton argument Mr Caddy sets out what he terms are points of 'fact and undisputed statement'. I am content to adopt them. They are:-

"1. The Opponent was incorporated under the name Goodnight Products Limited on 18 February 1997 (Mr Bharadia for the Applicant acknowledges the approximate date in paragraph 4 of his declaration). Andrew Gregory says in paragraph 1 of his first



declaration that the Opponent coined the name to reflect its intended purpose of selling products that might promote or assist sleep and in paragraph 2 he says that its first product was a snoring palliative called DAHM'S ORIGINAL GOODNIGHT in the form of a mouthwash ("the Product") for which it held an exclusive supply contract covering the UK from the manufacturer, a German company called Octogon GmbH. The predominant marking on the product packaging was the element "GOODNIGHT", as is shown from the example of packaging exhibited at APG1.

2. Sometime in July 1997, the Opponent and Marshtech decided to enter into an agreement to market the Product. There is a difference in the evidence as to how this collaboration came about, but it is not important. What is important is that the Opponent had been using the mark in the UK since February 1997 (Mr Bharadia acknowledges this point in paragraph 4 of his declaration), and it has since registered the mark in the UK with the backing of Octogon GmbH, having overcome an opposition from Marshtech.

3. The Opponent and Marshtech signed a distributorship agreement for the product on 28 July 1997. A copy of this agreement is exhibited at APG3. It is clearly headed "Distributorship Agreement" and there is no suggestion of any transfer of trade mark rights.

4. In the distributorship agreement the name of the product is given as DAHM'S ORIGINAL GOODNIGHT, but in informal correspondence between Marshtech and the Opponent, there is evidence that Marshtech referred to the name as GOODNIGHT right from the start, as is illustrated by the fax from Roger Lewis to Andrew Gregory dated 25 July 1999 exhibited at APG2, and thereafter, as is illustrated by the letters from Roger Lewis to Andrew Gregory dated 5 September 1997 and to John Mills of JEM Marketing dated 24 September 1997, both of which are exhibited at APG4.

5. Pursuant to the agreement being signed, Marshtech placed an initial order for 500 bottles of the Product, according to Mr Bharadia (paragraph 6 of his declaration) and then a second order for a further 2000 bottles. A copy of this invoice is exhibited at APG5. It is dated 25 September 1997.

6. The application in suit was filed on 22 September 1997.

7. On 17 November 1997, the Advertising Standards Authority ("ASA") wrote to the Opponent to explain that the Medicines Control Agency ("MCA") had written to them to explain that they considered snoring to be a medical problem and, as such, anti-snoring products required a licence. A copy of the ASA's letter of 17 November 1997 is exhibited at APG2-1. The MCA wrote to the Opponent on 15 December 1997, following an appeal by the Opponent, to explain that it had reversed its decision and no longer considered snoring to be a medical problem.

8. The Opponent (or its solicitors - the point is not clear in the evidence) wrote to Marshtech in December 1997 to formally terminate the Distributorship Agreement.

9. According to Mr Bharadia, Marshtech began to source the product from Belgium in January 1998 and continued to do so until March 1998, when the Gar Investment Corporation Group began to produce its own snoring palliative mouthwash (paragraph 10 of Mr Bharadia's declaration).

10. The application in suit was assigned to the Applicant on 19 May 1999.

32. Mr Caddy submitted that the applicants were well aware of the opponents' interest in the word 'GOODNIGHT' in relation to the product of mutual interest. Also, that the applicants went behind the opponents (and the German manufacturer's) back in seeking to source the product through a Belgian supplier and to register their GOODNIGHT STOPSNORE trade mark before any difficulty or problem arose. Thus the application was in bad faith, reference MOTHER PUCKER'S CITRUS BREW (SRIS 0/216/98), DEMON ALE [2000] RPC 345 and Gromax Plasticulture Ltd v Don & Low Non Wovens Ltd [1999] RPC 367.

33. Mr Lewis, for the applicants, said that the applicants believed that Mr Gregory had misled them over a number of aspects of the trade mark DAHM'S ORIGINAL GOODNIGHT and the product sold under it. This emerged at an earlier stage than the point at which the difficulty with the Medicine Control Agency occurred. Thus, in seeking to register another trade mark and find an alternative source for the product the applicants were simply seeking to protect their interests.

34. In my view, the source of this dispute is the distribution agreement itself, the drafting of which leaves a lot to be desired because it leaves a number of important areas open to doubt. As Mr Caddy put it:

"The first thing I would say is that as far as the distributorship agreement is concerned, there seems to be a difference of reading of the clauses in there. Clause 2 under the "Goodnight Agrees" sections says: "Goodnight has verified, to the best of its ability, but does not warrant that 'The Product' conforms with all the appropriate UK authorities and confirms to the best of its ability 'The Products' natural oil composition is safe and its formula, label, box, instruction leaflet, brochure and advertising has received approvals from all relevant agencies ....."

"Under No 5 of the same section it says: "That 'The Product' has been examined by the United Kingdom MCA (Medicines Control Agency) and written approval for 'The Product' to be sold in the UK as a 'cosmetic' has been received from the MCA and is currently in hand. This MCA written approval will be shown to 'Marsh' in advance of signing this agreement."

"In No 12 of the same section it says: "That to the best of [Goodnight's] knowledge (this is to be clarified) 'The Product' formula has a UK patent and the name 'Dahm's

Original Good Night' is a fully registered UK trade name in the appropriate trade mark category. 'Marsh' should confirm this for their own satisfaction." I do not think that that particular paragraph is deliberately deceptive in any way. I think it is possibly naive, but I do not think it goes more than that, and I think it was on the basis that once we found out that DAHM'S ORIGINAL GOODNIGHT was not a registered UK trade mark that the opponent's application was filed with the approval from the German Manufacturer."

35. Bearing these points in mind, I turn to the authorities upon which Mr Caddy relies and which state as follows:

In *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* Lindsay J said (p379):

"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 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 as 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 regard to all material surrounding circumstances."

In *DEMON ALE*, Mr G Hobbs QC refers to Lindsay J's comments and adds that:

"these observations recognise that the expression 'bad faith' has moral overtones which appear to make it possible for an application for registration to be rendered invalid under Section 3(6) by behaviour which otherwise involves no breach of any duty, obligation, prohibition or requirement that is legally binding upon the applicant".

36. In opposition number 45700 (*MOTHER PUCKER'S CITRUS BREW*), Dr W J Trott, Principal Hearing Officer at the Trade Marks Registry refers to the Notes on the Clauses of the Trade Marks Act 1994 and states that:

"A relationship which has characteristics in common with those of the two examples given ("employee" or "agent") would include a business arrangement governed by a contract of some sort .. and this sort of relationship .. is enough to bring it within the scope of Section 3(6)."

37. For a variety of reasons the applicants became concerned about their position under the distribution agreement once it was established that the trade mark under which the goods the subject of the agreement were to be sold (*DAHM'S ORIGINAL GOODNIGHT*) was not a

registered trade mark as Mr Gregory claimed and when the Medicine Control Agency decided that the goods in question were a medicine and could not be advertised. Had the applicants checked out these matters at the start as envisaged by the distribution agreement and determined whether the trade mark under which the goods were to be sold was registered and that the required permissions were in place then this dispute might not have arisen. But it has and I am prepared to accept that verbal assurances were taken at face value such that when things began to look as though they were going wrong the applicants began to take actions on their own behalf - to protect their investment in the product - to independently source the goods and register a suitable trade mark. Given the different interpretations each side has placed on the distribution agreement these do not seem to me to be actions which fall short of acceptable commercial behaviour of the sort envisaged by Mr Justice Lindsay, Mr Geoffrey Hobbs QC or that breached the relationship or business agreement to which Dr W J Trott referred.

38. There is of course, some ambiguity about when the relationship between the parties began to breakdown (and whether the application in suit preceded or followed). But in my view there is no evidence to establish that the actions by the applicants in this case were pre-emptory rather than reactive. In all of the circumstances therefore, and for the reasons given above, I do not consider the applicants acted in bad faith in making this application. The opposition based upon Section 3(6) is therefore dismissed.

39. The opposition having failed the applicants are entitled to an award of costs. I order the opponents to pay to the applicants the sum of £800 as a contribution towards their costs. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 01day of May 2001**

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