

O-316-09

**TRADE MARKS ACT 1994**

**TRADE MARK APPLICATION No. 2482096**

**BY AXLE ASSOCIATES LTD**

**TO REGISTER 'BRAMLEY OLD SPOT PORK' IN CLASS 31**

**AND**

**OPPOSITION No. 97766**

**BY GLOUCESTERSHIRE OLD SPOTS PIG BREEDERS' CLUB**

**UNDER SECTIONS 3(3)(B) & 5(4) OF THE ACT**

## **BACKGROUND**

1. On 10 March 2008, Axle Associates ('Axle') applied to register BRAMLEY OLD SPOT PORK as a trade mark for 'live animals (pigs)' in Class 31.

2. The application was accepted and published for opposition purposes. On 15 August 2008, Gloucester Old Spots Pig Breeders Club ('Club') filed opposition to the registration of the trade mark. In summary, the grounds of opposition are that:

- i) The mark is of such a nature as to deceive the public because the words 'Old Spot' appearing in the mark are liable to deceive the public into believing that pigs sold under the mark are pure breed Gloucestershire Old Spots, whereas this is not reflected in the specification for which the mark is to be registered, or Axle's intended use. Consequently, registration would be contrary to s.3(3)(b) of the Trade Marks Act 1994 ('the Act').
- ii) On 13<sup>th</sup> February 2004, Club applied under Council Regulation 509/06 to register the words TRADITIONALLY FARMED GLOUCESTERSHIRE OLD SPOTS PORK as a Traditional Speciality Guaranteed in respect of pork products derived from pedigree Gloucestershire Old Spots pigs. The use of the trade mark will infringe the rights to be granted under that Regulation. The above name therefore constitutes an earlier right by virtue of s.5(4)(a) or s.5(4)(b) of the Act, and registration of the trade mark would be contrary to these provisions.

3. Axle filed a counterstatement in which it denies the grounds for objection and states that:

- i) The mark will be used in relation to cross breed pigs which have been sired by Gloucester Old Spots pigs.
- ii) This is analogous to the production of cattle used to provide Aberdeen Angus beef, which have long been produced in this way.
- iii) The pigs sold under the mark will be offered to a selected group of breeders and not sold to the general public.
- iv) There is no intention to deceive the public.

## **THE EVIDENCE**

### **Club's Evidence**

4. The opponent's evidence takes the form of two witness statements by Richard Lutwyche, who is the Secretary of Club. Mr Lutwyche states that Club was formed in 1990 to promote the Gloucestershire Old Spots ("GOS") pig breed and to help dealers. Most of its members are involved in breeding and marketing the GOS breed

and products derived from such pigs. According to Mr Lutwyche, the GOS is the oldest spotted pedigree pig breed in the world and:

“..consumers encountering the name Gloucester Old Spots in connection with pigs expect the pork to be derived from such meat to be of particularly high standard and to be especially tasty and succulent and are willing to pay an (sic) correspondingly high price.”

5. Mr Lutwyche says that an important aspect of the GOS breed is that such pigs should be registered with the British Pig Association which requires that, unless both parents are of the GOS breed, the offspring cannot be called GOS. Mr Lutwyche exhibits to his witness statement (as RL2) some undated pages from Club’s web site and information leaflets, which as one would expect provide a history of the GOS breed and its commercial potential. One of the web pages notes that the GOS breed is sometimes known as ‘Gloster Spot’ or just ‘Old Spot’.

6. Mr Lutwyche gives evidence that on 13 February 2004 Club applied to DEFRA to register the name ‘Traditionally farmed Gloucestershire Old Spots Pork’ under Council Regulation EEC 2082/92 as a Traditional Speciality Guaranteed. Two copies of the application are in evidence (exhibit RL3 to Mr Lutwyche’s first statement and exhibit RL8 to his second statement). It is clear from these that the form of the application has evolved along the way. It is not clear whether either of the applications in evidence reflect the exact terms of the original application in 2004. What is clear is that the application seeks to reserve the above name for use in relation to meat products derived from pigs for which the appropriate classification appears to be “Fresh Meat”. At least by 2008, the proposed specification included a requirement that the meat must come from registered pedigree GOS pigs. It appears that the application has been approved by DEFRA and the European Commission and has just been, or shortly will be, published so that other Member states, third countries, or interested parties based outside the UK are able to object to the proposed registration in accordance with the procedure adopted in Council Regulation EEC 509/06. According to that procedure (which is set out in RL4) interested parties in the UK should have been given the opportunity to object to the application before it was forwarded to the Commission. It is not clear whether Axle had an opportunity to lodge such an objection.

7. Club is regarded as an ‘interested party’ by the Local Authorities Coordinators of Regulatory Services (“LACORS”), which provides guidelines to Trading Standards Officers in the field of food labelling. Mr Lutwyche says that Club was consulted by LACORS and he provides (as exhibit RL5) a copy of a letter from LACORS dated 28 May 2008. The letter is addressed to “Interested Parties” and thanks those parties for contributing views and technical information relating to “Labelling of Gloucester (sic) Old Spot (sic) Pork Products”. It goes on to record that the issue was considered at a meeting of the LACORS Food Labelling Focus Group on 22 May 2008. It continues that:

“The Focus Group agreed that the original LACORS advice on rare breeds referred almost entirely to Aberdeen Angus and Hereford cattle and should be viewed as stand alone advice dealing solely with cattle breeds. All references to other species should be removed and separate LACORS advice should be

developed to cover Gloucestershire Old Spot (sic) GOS pork products specifically. It was further agreed that this advice should be developed in consultation with all interested parties”.

8. The letter continues that this advice will cover how consumers can be informed as to the difference between products from a GOS sire/GOS dam and those from a GOS sire/hybrid dam.

9. This activity at the beginning of 2008 may have been connected with another matter mentioned in Mr Lutwyche’s first statement, which is dated 21 January 2009. He says that around a year earlier “Waitrose launched a bacon pack majoring on ‘Gloucestershire Old Spot’ even though it was produce of cross-bred stock”. Club opposed this use (it is not clear how) and Waitrose subsequently changed its labelling so as to make it clear that the bacon in question was “produced from pigs sired by registered Gloucestershire Old Spot boars”.

10. LACORS subsequently issued guidance on the matter under the title ‘LACORS guidance on the Labelling of meat and meat products for all species other than beef sold by breed’. The guidance states that:

- Consumers require sufficient information about product labelling by breed so as to avoid being misled.
- There is a need for labelling of meat to distinguish between products derived from the mating of pedigree GOS pigs and those derived from the mating of a pedigree GOC sire with a hybrid sow.
- Any reference to a specific breed should refer to an animal registered by an officially recognised registration authority, such as the British Pig Association.
- Any trade mark applied to the products should not be similar to the name of the breed in question.

11. Rather oddly, despite the generality of the advice suggested by the title, the guidelines make no mention of any animal breed other than GOS. It is not clear when these guidelines came into effect. Mr Lutwyche’s first statement on 21 January 2009 gives the impression that the LACORS guidelines had already been issued, but his second statement dated 31 July 2009 states that the wording of the guidelines had “now” been finalised, and he attaches a copy of them dated 31 January 2009 (as RL 9).

### **Axle’s Evidence**

12. Axle’s evidence takes the form of a witness statement dated 16 March 2009 by James Ironside, who is a Director and shareholder of Axle (the other Director is Mr Ironside’s wife). Mr Ironside has long experience in the food industry having previously been closely involved in the development and operation of a large co-operative producing Aberdeen Angus cattle for the supply of beef. His evidence is that he decided to develop a high quality pork brand, to emulate the success of beef

sold under the certified Aberdeen Angus Beef and Authentic Aberdeen Angus Beef schemes, which operate under certification and collective trade marks, respectively. A number of native pig breeds were considered for the project, but it was decided to select GOS. The pork was to be derived from pigs cross bred between a GOS boar and a dam from another breed.

13. Axle has registered the mark applied for in classes 29 and 30 as a certification trade mark covering pork products from pigs sired by a GOS boar, and meat products containing pork and apple. This application to register the certification mark was filed on 30 April 2008, i.e. after this application. Mr Ironside says that he thought it reasonable to give the breeding livestock the same name. He points out that the livestock will not be offered to consumers. Rather the mark will be applied to:

“...livestock bred for a specific project by a ring fenced nominated group of pig farmers. Whilst in theory, Bramley Old Spot Pork “livestock” may be transferred between members of the nominated group, such transfer is highly unlikely since the pigs will be bred for slaughter/food consumption rather than onward breeding purposes”.

14. Mr Ironside further states that “Axle is fully aware of what constitutes a breed in that both parents ought to show the traits and characteristics of the named breed”. However, he points out that “most” (he does not name them) Livestock Breed Societies permit the introduction of a second breed, although he accepts that the second breed may have to breed for four or five generations before the progeny of such breeding is accepted as being representative of the original breed.

## **THE HEARING**

15. Having reviewed the papers, I invited the parties to attend a hearing on 17 August 2009. Club was represented at that hearing by Mr Mark Armitage of Withers and Rogers LLP. Axle was represented by Mr James Ironside.

## **THE EARLIER RIGHT**

16. I find it convenient to consider first Club’s claim that it is the proprietor of an earlier right and therefore entitled to oppose the registration of Axle’s trade mark under s.5(4)(a) or (b) of the Act. Section 5(4) is as follows:

“(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”.

17. This part of the national law is based on article 4(4)(b) of Directive 2008/95/EC (originally 89/104/EEC) and the national law must therefore be applied, so far as possible, in accordance with the underlying Directive. Article 4(4)(b) is as follows:

“Any Member State may...provide that a trade mark shall not be registered or, if registered, shall be liable to be declared invalid where, and to the extent that:

(a) -

(b) rights to a non-registered trade mark or to another sign used in the course of trade were acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed for the application for registration of the subsequent trade mark, and that nonregistered, trade mark or other sign confers on its proprietor the right to prohibit the use of a subsequent trade mark.”

18. Although Club is professionally represented in these proceedings, it has not presented any specific argument to show that the protection, if and when granted, will a) prohibit the use of the mark applied for, and b) have been acquired prior to the date of the trade mark. I have not even been provided with a copy of the relevant Regulations. A party wishing to advance a legal case based on a non-intellectual property right should expect to have to provide an appropriate analysis showing the hearing officer the legal basis for the result it seeks. Parties who neglect to do this should not be surprised if their case is given short shrift.

19. On this occasion I have taken it upon myself to inspect the relevant Regulations. Regulation 509/2006 protects registered Traditional Speciality Guaranteed. It replaces Regulation 2082/92, which previously served that purpose. I note that Article 5 of Regulation 509/2006 states that:

**“Restrictions on the use of names**

1. This Regulation shall apply without prejudice to Community rules or those of the Member States governing intellectual property and in particular those concerning geographical indications and trademarks. “

20. This may be contrasted with Article 14 of Regulation 510/2006 covering protected geographical indications, which provides for the invalidation of trade marks where they conflict with geographical indications. In the light of Article 5 of Regulation 509/2006 it is possible that, unlike the position with protected geographical indications, a name protected as a Traditional Speciality Guaranteed (“TSG”) is not capable on that account alone of prohibiting the registration of a trade mark. However, as I have not heard argument on that point, I shall assume for present purposes (without deciding it) that a registered TSG is, in principle, capable of constituting an earlier right.

21. It is clear from the evidence that the TSG applied for by Club in 2004 had not been granted at the date of the opposed trade mark application. In fact, the name is still not protected. According to Article 13 of Regulation 509/2006, if and when protection is granted, the name TRADITIONALLY FARMED GLOUCESTERSHIRE OLD SPOTS PORK will be protected against misuse on products covered by the

registered specification and “similar agricultural products or foodstuffs not satisfying the registered specification”. I note that Article 9 of the Regulation requires the Commission to publish the protected name after it has been registered. Article 13 appears to grant protection only from the date of such publication. This is consistent with the possibility that the terms and scope of application might be amended during the course of the examination process. On that view of the matter, Club had not acquired a legal right to prohibit Axle from using the mark applied for “prior to the date of the [trade mark] application for registration”. In short, even if a protected TSG is capable of constituting an earlier right, the TSG in question is not an **earlier** right. Furthermore, I doubt that live pigs are, in any event, a similar agricultural product to pork products such as to fall within the scope of protection of the proposed TSG.

22. At the hearing, Mr Armitage sought to develop another line of attack under s.5(4)(a) arguing that Club has a passing off right in the name Gloucestershire Old Spots. In doing so he sought to rely on what is sometimes described as the extended form of the law of passing off. In this connection, he drew my attention to the well known Elderflower Champagne case, *Taittinger SA and Others v Allbev Ltd and Another* [1993] FSR 641. The difficulty with this submission is that Club’s earlier right was not pleaded on this basis. The pleaded earlier right relies only on the registration of Gloucestershire Old Spots as a Traditional Speciality Guaranteed. It is not therefore open to Club to rely on a passing off right as the basis of its claim to have an earlier right.

23. For the reasons given above, I reject the pleaded s.5(4) ground based upon the application to register TRADITIONALLY FARMED GLOUCESTERSHIRE OLD SPOTS PORK as a Traditional Speciality Guaranteed.

## **THE DECEPTION GROUND**

24. Section 3(3)(b) of the Act is as follows:

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

(a) –

(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).”

25. This part of the national law is based on article 3(1)(g) of Directive 2008/95/EC (originally 89/104/EEC) and the national law must therefore be applied, so far as possible, in accordance with the underlying Directive. According to paragraphs 46-50 of the judgment of the European Court of Justice (“ECJ”) in Case C-259/04, *Elizabeth Florence Emanuel v Continental Shelf 128 Ltd*, two conditions must be satisfied before this ground for refusal can apply. Firstly, there must be actual deceit or a sufficiently serious risk that the relevant consumer will be deceived. Secondly, the deception must be attributable to the nature of the mark itself (as opposed to the way in which it is used). By parity of reasoning, a serious risk of deception that is attributable to the nature of the mark itself will provide a ground for refusal even where the applicant has plans to mitigate that risk by making appropriate statements in its promotional material, or elsewhere. The reason for this is that a trade mark can be licensed and assigned, and the current intentions of the applicant cannot

therefore be relied upon to counter deception liable to arise from the very nature of the mark itself. This was also the position under the previous law of trade marks: see *China-Therm* [1980] FSR 21. I have no doubt that the current law should be applied in the same way. Indeed this seems wholly consistent with the ruling of the of the ECJ in *O2 Holdings Ltd v Hutchison 3G Ltd* Case, C-533/06, (at paragraph 66) that when applying another ‘absolute’ ground for refusal it is necessary to consider all the circumstances in which the mark might be used if it were to be registered.

26. It seems to me to follow from the scheme of the Act and the Directive that whether the ground of exclusion set out in s.3(3)(b) applies must be assessed as at the date of the trade mark application. I note that Mr David Kitchen QC (as he then was) appears to have accepted as much in his judgment as Appointed Person in the *Elizabeth Emanuel* case cited above. Mr Kitchen’s decision is reported at [2004] RPC 15. I will proceed on this basis that this is the correct approach in law.

27. I turn now to the facts. This is a convenient point to record that Mr Ironside confirmed at the hearing that, if it assisted, Axle would restrict the list of goods in the application so as to make it express that the pigs covered by the application are sired by GOS pigs (allowing for the dam to be another type of pig). This represents no material concession on Axle’s part because, as is clear from the evidence, this is precisely the sort of cross breed pig that Axle intends to market under the mark. I will therefore consider the s.3(3)(b) objection on the basis that such a restriction would be entered before the trade mark is registered. Mr Armitage made it clear that such a restriction would not overcome Club’s objections to registration.

28. Club relies on the 2004 application to register ‘Traditionally farmed Gloucestershire Old Spots Pork’ as a TSG and the 2009 LACORS meat labelling guidelines described in paragraphs 6 and 10 above, respectively, as evidence that use of the mark in respect of pork meat products produced from cross bred pigs presents a serious risk of deception of the public. However, in my view, this evidence is in some respects unsafe and/or of marginal or no relevance to this opposition. I accept that the very existence of the 2004 application is an indication that Club (and subsequently DEFRA) perceived a need to protect the name ‘Traditionally farmed Gloucestershire Old Spots Pork’ going forward. However, other than that the GOS is a very old breed of pig originating in Gloucestershire and that there are public houses and a beer named after it, this evidence tells me little about the expectations of the general public in March 2008 with regard to the use of the name Gloucestershire Old Spots in respect of pork products produced from cross bred pigs sired by GOS boars.

29. The revised LACORS guidance appears to have been developed after the date of this application, and may have been developed at the instigation of Club as an “interested party” following events at the beginning of 2008, including the filing of Axle’s applications to register this trade mark and a related certification mark. The new guidance appears to have been developed to correct a perceived defect in the meat labelling guidance in force at the date of this application, which appears to have focussed on the labelling of meat produced from various well known cattle breeds, such as Aberdeen Angus, where cross breeding seems to be accepted for the production of animals for slaughter. The revised LACORS guidelines cast meat derived from the famous cattle breeds as exceptions to the normal meat labelling



requirements with regard to the use of breed names. However, although apparently of general application, the revised meat labelling guidelines mention only one breed of one animal: the GOS pig. In these circumstances, I would need a much better understanding of the series of events leading up to the issuing of the revised LACORS guidelines than can be gleaned from Club's evidence before I would be prepared to view the revised LACORS guidelines as a reliable indicator of whether the use of the GOS name on meat produced from crossbred pigs carried a serious risk of deception of the public in March 2008.

30. This brings me to the issue of the relevance of the above evidence, or rather the lack of it. The opposed trade mark application does not cover meat products but live animals. I was told that in order to limit its costs, Club decided to oppose this trade mark application, but not Axle's other application to register the same mark as a certification mark for pork products in Class 29 and 30. If this opposition is successful, Club may make a further application to invalidate the certification mark. I am very doubtful of the wisdom of this approach because:

- i) The heart of Club's case (and its evidence) goes to the use of the mark in relation to pork products, the trade in live animals being merely ancillary to such use.
- ii) Mr Armitage accepted that the evidence filed to support this opposition would be largely the same as would have been filed in order to support an opposition or application to invalidate Axle's certification trade mark.
- iii) Mr Armitage had to accept that the typical customer for pork products is likely to be very different to the typical customer for live pigs, which means that their respective knowledge of, and the weight they attach to, names of pig breeds is likely to be quite different – as therefore might be the risk of any material deception.

31. In my view, if Club intended to oppose Axle's registration of the trade mark for pigs and pork products it would have been better if all its actions against Axle's marks had been brought at the same time. The cases could then have been consolidated, one set of evidence filed, and one decision issued covering all the issues between the parties. The decision to deal with matters sequentially seems bound to increase Club's costs, to say nothing about the apparent complete disregard for Axle's potentially wasted costs in setting up a certification trade mark scheme. The immediate result is that I find the evidence about the TSG application and the revised LACORS guidance, which cover measures intended to assist consumers of pork products, to be of very limited relevance (in the case of the TSG application) or no relevance (in the case of the LACORS guidelines), to a trade mark application directed at the far more specialised market for live pigs.

32. Mr Ironside sought to persuade me that the (only) group of consumers that mattered for the purposes of assessing the risk of deception in relation to the use of the mark for live pigs were those pig traders covered by the certification scheme. I do not agree. As indicated above, the law requires that objections to the registration of a trade mark are assessed in all the circumstances in which it might be used. Even taking into account the restriction offered at the hearing, there would be nothing to

prevent the mark being used in respect of live pigs sired by a GOS and offered for sale for purposes unconnected with the certification mark scheme. Consequently, I will test the objection against whether the trade mark is of such a nature as to create a serious risk of deception as to the quality or other characteristics of live pigs (sired by a GOS pig) from the viewpoint of all potential purchasers of the animals, which includes farmers, dealers and slaughterhouses (“the relevant consumer group”).

33. The part of Mr Ironside’s statement recorded in paragraph 14 above is not entirely clear, but in response to a question I put to him at the hearing, Mr Ironside accepted that, just like when buying a dog by reference to its breed, traders in live pigs would expect a pig offered for sale under the name GOS to be a pure bred GOS pig rather than a cross bred pig. It is quite clear on the evidence that a GOS pig has particular characteristics that would not be present (or present to the same degree) in a cross bred pig. Indeed the reason that Axle wants to produce meat from cross bred pigs is in order to tone down some of the characteristics of the breed when it is turned into meat, which some consumers might find off putting, e.g. it produces meat with a high fat content. Others, of course, might value taste and succulence above other considerations. The differing characteristics of the meat produced from pure GOS and cross bred pigs is therefore a characteristic that is liable to move those in the relevant consumer group to purchase one kind of pig or the other. These uncontested factual points effectively reduce the issue that I have to decide to whether the trade mark BRAMLEY OLD SPOT PORK is sufficiently different to the breed name GOS so as to avoid raising the same expectations amongst the relevant consumer group with regard to the breed of pig.

34. In this connection, Club relies upon the evidence from its own website (see paragraph 5 above) that the GOS is sometimes known as just ‘Old Spot’. However, the web page in question is not dated, and I notice that the claim does not appear in Club’s (also undated) paper promotional leaflets, which form part of the same exhibit (RL2). Mr Lutwyche’s statement is silent on the date that the web page was created. Placing a claim on one’s own web site obviously does not make it true. I am concerned by the possibility that the page was posted after this application was filed and the trade mark BRAMLEY OLD SPOT PORK became an issue between the parties. In these circumstances I feel unable to attach any weight to this particular piece of evidence.

35. Having said that, the potential for Gloucestershire Old Spots to be shortened to ‘Old Spots’ is, I think, self evident. Further, it would not be at all surprising if ‘Old Spots’ was more than occasionally miswritten as ‘Old Spot’. Indeed, there are examples of this in the evidence. The high point of Axle’s case is therefore that the inclusion of the word ‘Bramley’ in the trade mark might be sufficient to put those familiar with the name of the breed (as the relevant consumer group will be) on warning that a pig offered for sale under the mark BRAMLEY OLD SPOT PORK is not a GOS pure breed pig.

36. Mr Axle pointed out that some of the products covered by the certification trade mark are pork products containing apple, for which Bramley is descriptive. That may be so, but it cannot be relevant when the mark is considered in respect of live pigs. There is no challenge to Club’s claim that ‘Old Spots’ is a unique and distinctive as (part of) a name for a breed of pig. I regard that as a relevant factor. I also regard it

as relevant that 'Bramley' does not appear to be a name, or part of a name, for any other breed of pig. Consequently, the substitution of the word 'Bramley' for 'Gloucestershire' is not an obvious signal that the pig is a cross breed. Further, the context of the proposed use of BRAMLEY OLD SPOT PORK is as a trade mark for pigs. It is not unusual for trade marks to consist of a mixture of distinctive (from a trade mark perspective) and descriptive material. Consequently, BRAMLEY is liable to appear as the part of the mark which distinguishes the pig according to a trade source, and OLD SPOT PORK is liable to be regarded as a reference to the GOS breed. Taking all these points together, I have come to the conclusion that the mark is of such a nature as to present a serious risk of deception amongst the relevant consumer group.

37. The s.3(3)(b) objection therefore succeeds and the application is refused.

### **COSTS**

38. The opposition having succeeded, Club is entitled to a contribution towards its costs. As I have already made clear, I am not impressed with Club's decision to use this opposition as a sort of proxy (or dry run?) for further proceedings directed at Axle's certification mark. However, the proper place to consider the reasonableness of that approach will be in the context of any further proceedings.

39. The introduction of material, such as the TSG application and the LACORS guidelines, which were of little or no relevance to this opposition, has complicated these proceedings much more than was necessary. I will reflect this in the costs awarded.

40. I would have assessed the costs due to Club as £2000 made up of:

i)	Filing opposition fee, including official fee ---	£400
ii)	Considering counterstatement---	£150
iii)	Filing Evidence ---	£500
iv)	Considering Axle 's evidence	£250
v)	Attending hearing & skeleton --	£700

41. For the reasons given above, I reduce this to £1200. This sum to be paid within 7 days of the end of the period allowed for appeal.

**Dated this 13<sup>th</sup> Day of October 2009**

**Allan James  
For the Registrar**