

TRADE MARKS ACT 1994

**IN THE MATTER OF Opposition Nos. 45711
and 45600 in the name of
Fruit of the Loom Inc.
to Application Nos. 2063511 and 2063539
to register trade marks in Class 25
in the name of Fruitcake Ltd**

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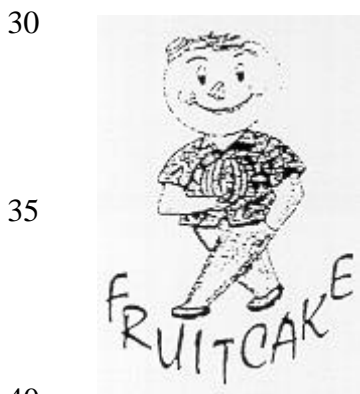
15 **BACKGROUND**

Fruitcake Ltd of Wembley, Middlesex applied on 22 March 1996, to register two trade marks in respect of the following specification of goods:

20 Articles of outer clothing, headgear; articles of sportswear and leisurewear all included in Class 25.

The respective trade marks are:

25 <u>No.</u>	<u>No.</u>
2063511	2063539



FRUITCAKE

40 The applications were accepted by the Trade Marks Registry and published. Notice of opposition to the registration of these trade marks was subsequently entered by Fruit of the Loom Inc, of Kentucky, United States of America. The grounds of opposition are:

- 45
1. The application offends against the provisions of Section 5(2)(b) because the opponents have earlier trade marks which are registered for the same or similar goods as those covered by the application limitations;.
 2. The opponents have earlier rights which would prevent registration of the
- 50 applicants trade marks, under the provisions of Section 5(4)(a).

5 Details of the opponents earlier trade marks are as follows:

<u>No.</u>	<u>Trade Mark</u>	<u>Class</u>	<u>Specification</u>
10	790245 FRUIT BRAND	25	All goods included in Class 25.
15	790246 FRUIT OF THE LOOM	25	All goods included in Class 25 being woven or warp knitted.
20	1102521 FRUIT OF THE LOOM	25	Articles of underclothing; pullovers, cardigans, sweaters, jackets, jeans (being articles of clothing), shirts, shorts, stockings, tights, panty hose, hats, caps, aprons, and socks, all for wear, tracksuits being articles of sports clothing.
25	1469566 FRUIT OF THE LOOM (THE ORIGINAL SINCE 1851)	25	Articles of underclothing; pullovers, cardigans, sweaters, jackets, jeans, shirts, shorts, stockings, tights, panty hose, hats, caps, aprons, socks and tracksuits; all included in Class 25.
30	2010168 FRUIT	25	Articles of clothing for men, women and children; underwear, lingerie, shirts, tee shirts, sport and knit shirts, sweatshirts, pants, sweatpants, jackets, socks, hosiery, leotard tights, shorts, thermal knit underwear, brassieres, panties, slips, camisoles and petti culottes.

50 The last, No. 2010168, was an earlier application at the time the opposition was filed but it was subsequently accepted, published and registered on 3 September 1997.

5 The applicants deny these grounds of opposition.

Both sides seek an award of costs.

10 Only the opponents filed evidence in these proceedings. The applicants' agents informed the Trade Marks Registry that the applicants were in bankruptcy (and withdrew as the applicants agents). However, the Trade Marks Registry sought to contact them in order to ensure that they were aware of the proceedings and that a hearing was to be held. There was no response.

15 In the event the Hearing, sought by the opponent, was held on 20 March 1998 where Mr John Hornby and Mr Gary Mills of Clifford Chance represented the opponents. The applicants were neither present or represented.

DECISION

20 The evidence filed by the opponents consists of Statutory Declarations from Mr Leonard Marbury, Mr Stuart Ogg, Mr Stephen Briggs, Mr Mirpuri, Mr R Bindra and Mr P Tesseract.

Mr Leonard Rutherford Marbury's Statutory Declaration is dated 15 September 1997. He is a Director of Fruit of the Loom UK Limited, a position held since 1989. His Company is a subsidiary Company of Union Underwear Company, Inc. Of Bowling Green, Kentucky, United States of America which is the parent Company of Fruit of the Loom, Inc.

30 Mr Marbury states that mens clothing has been extensively sold under the FRUIT OF THE LOOM trade mark in the United States of America for many years, and has, for a number of years, been the brand leader in the mens underwear market in that country. In 1975, a sole distributor was appointed in the United Kingdom for the distribution and sale of FRUIT OF THE LOOM garments. Initially, these items consisted of briefs, vests, T-shirts and boxer shorts. However, the range of clothing items has since been extended to include jeans, fleecewear, jogging pants, running shorts, baseball shirts, polo shirts, rugby shirts, golf shirts, 35 football jerseys and tank tops as well as children's wear, including shirts, fleecewear and jogging pants.

40 Mr Marbury explains that amongst other things all of these goods carry a label bearing the words FRUIT OF THE LOOM. Some of the T-shirts, sweatshirts and other garments also carry the FRUIT OF THE LOOM logo screen-printed or embroidered on the front of the garment. Since 1987, the approximate wholesale value of sales of the garments under the FRUIT OF THE LOOM trade marks in the United Kingdom has been as follows:

	£
45	
	1987 526,038
	1988 560,998
	1989 360,518
	1990 2,622,565
50	1991 5,989,000
	1992 9,202,000

5	1993	12,213,000
	1994	14,798,000
	1995	24,149,000
	1996	24,559,000

10 Advertising expenditure in the United Kingdom during the period 1988 to 1996 has been in excess of £4.2m. This advertising has taken the form of broadcasts on local radio stations, posters on London Underground stations, national bus side advertisements, point of sale material, and advertisements and press releases in consumer media such as magazines. Examples of some of these advertisements are exhibited at "LRM-1".

15 Mr Marbury goes on to state that the FRUIT OF THE LOOM brand has acquired a tremendous popularity in Continental Europe as well as in the United Kingdom and is well-known as indicating, both to the trade and the public, clothing items originating from his Company. He is aware from his own knowledge as well as from the Company's records that
20 there have been a number of occasions in recent years when action has been taken, both in the United Kingdom and elsewhere, to prevent or stop the use of trade marks consisting of or containing the word and/or devices of FRUIT, use of which was clearly intended to benefit unfairly from the goodwill and reputation of the "FRUIT OF THE LOOM" brand. He exhibits
25 at "LRM-2" a copy of a warning notice to any would-be unauthorised users of the FRUIT OF THE LOOM trade mark which was published in a trade publication by the Rochester T-Shirt Company which, between 1975 and 1980, was the sole distributor of goods under the FRUIT OF THE LOOM trade marks in the United Kingdom, mentioned earlier.

30 Mr Marbury further states that he is aware that his Company has taken steps to challenge the registration of trade marks by third parties including the word FRUIT or similar words. For example, he is aware that the applications to register FRUTZ (No. 1381061), FRUIT CAKE (No. 1480653), FRUIT DE LA MER (No. 1541586), FRUITS DE LA MER and device (No. 1579444) and FRUIT PHOOL (No. 1533005) were withdrawn following objections from his Company. The marks TUTTI FRUTTI and FRUIT JUICE were also objected to and these
35 matters were settled by the assignment of the trade marks to his Company (and by their subsequent cancellation). He believes that this demonstrates the constant endeavours of the opponents to prevent third parties adopting the mark FRUIT for clothing.

40 Mr Marbury goes on to state that many members of the clothing trade refer to the FRUIT OF THE LOOM brand as "FRUIT". At LRM-3 he exhibits a selection of articles which have appeared in various trade publications which indicate that the FRUIT OF THE LOOM trade marks are known generally as 'FRUIT' marks. Also exhibited at "LRM-4" is a Fruit of the Loom promotional flyer which is currently being distributed to retailers in the United Kingdom, this carries the slogan "Fruit is goods for you". This demonstrates, says Mr
45 Marbury, how his Company and its products are referred to as "FRUIT" and that, in the context of the retail clothing trade, members of the trade and public would understand "FRUIT" to be a reference to his Company and its products.

50 Mr Stuart Ogg's Statutory Declaration is dated 15 September 1997. He is employed by Fruit of the Loom UK Limited having worked in the retail clothing industry for around 6 years and for the Company for about 4 years. Initially, he was employed as a Regional Sales Manager

5 and 2 years ago, he was appointed as the Company's National Account Manager. In this capacity, he is responsible for sales under the FRUIT OF THE LOOM trade mark to some of his Company's largest accounts, which represent an annual turnover of approximately £9m.

10 Mr Ogg states that in his experience, the Company's name, FRUIT OF THE LOOM, is often abbreviated by Company personnel, members of the trade and the public to FRUIT. He says that he often refers to the Company and its products as FRUIT, both within the Company and also when dealing with people outside the Company. For example, when he telephones customers or contacts he introduces himself as calling from FRUIT and then refer to FRUIT products. By way of a further example, he also asks which FRUIT clothes they wish to
15 purchase. He asks similar questions when he visits customers. Mr Ogg states that he knows that other sales representatives of the Company do likewise and that customers too refer to the Company and its products as FRUIT.

20 In Mr Ogg's view, if the applicants used the trade mark FRUITCAKE or incorporating the word FRUITCAKE, this could be very misleading because, he believes, there is a danger that members of the trade and the public will associate the word FRUITCAKE with his Company's use of the word FRUIT and might therefore think that any products sold under the trade mark FRUITCAKE were made by or were in some way connected with his Company.

25 Mr Stephen Briggs in his Statutory Declaration dated 15 September 1997 declares that he is employed by Fruit of the Loom UK Limited as Commercial Director and is authorised by the Company (which, in this Declaration, means the whole of the Fruit of the Loom group) to make this Declaration.

30 He has been employed by the Company for about 7 years, first as National Account Manager for around 4 years before becoming Marketing Manager for Northern Europe and now Commercial Director. He states that it is extremely common for, people within his Company to refer to FRUIT OF THE LOOM as FRUIT; many of the Company's employees, including
35 other sales representatives, refer to the Company and its products as FRUIT. When dealing with customers, for example, they will often introduce themselves as working for FRUIT and ask whether the customer they are calling wishes to purchase any FRUIT clothes. Customers also call the Company, and refer to its products, as FRUIT.

40 Mr Briggs, who has seen Mr Ogg's Declaration, agrees with Mr Ogg that the Company is so well known among people in the clothing trade as FRUIT that when the Company's employees refer to FRUIT they know that they are referring to FRUIT OF THE LOOM and its clothes as opposed to any other Company or any other Company's products.

45 Finally, Mr Briggs states that he has never before come across Fruitcake Limited or its products. However, in view of his Company's reputation in the trade mark FRUIT in relation to clothing he too believes there is a significant risk that any use by Fruitcake Limited of the mark FRUITCAKE in relation to clothing may lead members of the trade and public to believe that the goods are somehow connected with his Company.

50 Michael Mirpuri's Statutory Declaration is dated 18 September 1997. He is a Director of

5 Europa Hall Fashions Limited (“Europa”) and has worked in the retail clothing industry for
around 25 years. Europa is involved in the export clothing business but also owns a retail
outlet in Chapel Street Market, Islington, London called “Young Folk”, in which is sold
FRUIT OF THE LOOM garments as well as other well-known brands. Mr Mirpuri considers
that he has a good knowledge of the retail clothing industry in the United Kingdom and goes
10 on to state that he has been familiar with the FRUIT OF THE LOOM brand for around 10
years and cannot recall ever having come across another manufacturer of clothing which uses
the word FRUIT, or a design of fruit, as its trade mark or logo. Also, he says, FRUIT OF
THE LOOM is well-known as FRUIT and he has often heard people in the trade, and also
customers, refer to FRUIT OF THE LOOM garments as FRUIT garments. For this reason, if
15 another clothing Company used FRUIT as part of its name, this could be very misleading for
customers.

Mr Mirpuri states that he has never before come across FRUITCAKE garments. However,
because FRUIT OF THE LOOM garments are so well-known as FRUIT he thinks it is likely
20 that some people will think that any products under the FRUITCAKE trade mark are made by
or connected with Fruit of the Loom Inc.

Mr Ranjeev Bindra’s Statutory Declaration is dated 18 September 1997. He is a Director of
Rinkys, a retailer of mens, womens and childrens clothing. He founded the Company five
25 years ago and has worked in the clothing business for twelve years. Mr Bindra has stocked
FRUIT OF THE LOOM products for a number of years and sells a wide range of their
garments. He is very familiar with the FRUIT OF THE LOOM brand and the FRUIT logo
and believes that the word FRUIT used in connection with clothing is synonymous with
FRUIT OF THE LOOM.

30 Mr Ranjeev Bindra refers to FRUIT OF THE LOOM products by their full name but also
uses FRUIT as a shorthand and might, for example, ask one of his assistants “how’s FRUIT
doing?” by which he would be referring to FRUIT OF THE LOOM products. In his
experience, many people in the trade, and customers alike, refer to the brand as FRUIT. He
35 knows that Fruit of the Loom Inc use the name FRUIT and the idea of fruit in their marketing.
He also believes that Fruit Of The Loom Inc are the only manufacturers of clothing to use a
Fruit design on clothing. In Mr Ranjeev Bindra’s view if the FRUIT name was used by a
different Company as the name for clothing, he would definitely associate the products with
those of Fruit of the Loom Inc. For example, if he was offered clothing with the FRUIT
40 name on it or with FRUIT as part of the name, he would think it was from Fruit of the Loom
Inc. He thinks that FRUITCAKE clothing could cause problems. If people in the trade or
customers see FRUITCAKE t-shirts, they are likely to think they are made by or are
connected with FRUIT OF THE LOOM.

45 Mr Peter Tesserars’s Statutory Declaration is dated 19 September 1997. He is a Director of
Cromwell’s Madhouse PLC (“Cromwell’s”), which was founded over 25 years ago, and own
a chain of 57 retail clothing outlets throughout the United Kingdom. These stock most of the
major brands of clothing; he has been involved in the industry for over 20 years.

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5 Mr Tesserar states that Cromwell’s have stocked FRUIT OF THE LOOM clothing for a
number of years and, in retail terms, last year sold over £1 million in value of FRUIT OF THE
LOOM clothing which he says is a very well known brand. Like the other trade declarants,
Mr Tesserar is not aware of any other clothing manufacturer, other than FRUIT OF THE
LOOM, which uses either the word FRUIT or a fruit design on clothing products and that
10 when he hears the word FRUIT used in connection with clothing, he associates this with
FRUIT OF THE LOOM and no-one else. If other clothing companies were to use the FRUIT
name on clothing such as t-shirts and sweatshirts, or as part of such a name, he would think
that a substantial number of people in the trade and customers might think that those products
were made by FRUIT OF THE LOOM or somehow connected with them.

15 That completes my review of the evidence filed by the opponents and I therefore I go on to
consider the first the ground grounds of opposition based upon Section 5(2)(b) of the Act,
which states:

- 20 (2) A trade mark shall not be registered if because -
- (a)
 - (b) it is similar to an earlier trade mark and is to be registered for goods or
25 services identical with or similar to those for which the earlier trade
mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the
likelihood of association with the earlier trade mark.

30 An earlier trade mark is defined in Section 6 which as far as is relevant states:-

6.-(1) In this Act an “earlier trade mark” means-

- 35 (a) a registered trade mark, international trade mark (UK) or Community trade
mark which has a date of application for registration earlier than that of the
trade mark in question, taking account (where appropriate) of the priorities
claimed in respect of the trade marks,
- 40 (2) References in this Act to an earlier trade mark include a trade mark in respect of
which an application for registration has been made and which, if registered, would be
an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so
registered.

45 The first matter I consider is whether the specifications of goods of the applications are the
same or similar to the goods of the opponents’ registrations. Inasmuch as both the opponents’
and the applicants’ specifications include articles of outer clothing; articles of sportswear and
leisurewear all included in Class 25, I hold that the respective trade marks are used, or are
proposed to be used, on the same goods. I go on therefore to consider the matter of the
50 similarity or otherwise of the respective trade marks which, for convenience, I set out again
below:

5 Applicant's trade marks

Opponent's trade marks

2063511



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790245

FRUIT BRAND

790246

FRUIT OF THE LOOM

1102521

FRUIT OF THE LOOM

1469566

FRUIT OF THE LOOM
(THE ORIGINAL SINCE
1851)

2010168

FRUIT

2063539

FRUITCAKE

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The established test for the comparison of trade marks is that set out by Parker J. In *Pianotist Co's Application* (1906) 23 RPC 774 at line 26 et seq:

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You must take the 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 those 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 man 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.

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Also, I have regard to *Sabel BV v Puma AG* (1998) RPC at page 224, in relation to Article 4(1)(b) of the First Council Directive of 21 December 1988, which corresponds directly with Section 5(2)(b), in which the European Court of Justice in dealing with the issue of comparison of marks said:

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That global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The wording of Article 4(1)(b) of the Directive - "... there exists a likelihood of confusion on the part of the public..." - shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global appreciation

5 of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.

In this case the opponent has earlier registered trade marks which consist of the word FRUIT solus and with other elements. One of the applicants' trade marks consist of the word FRUIT
10 co-joined with the word CAKE and the other consists of the same word together with the device of a figure carrying a what looks like a piece of fruit.

There is evidence from the opponent's employees that all the trade marks of the opponents are known as FRUIT marks. There is evidence too that the trade press considers that the word
15 FRUIT is synonymous with the opponents. In addition there is evidence from clothing retailers that they would consider that goods sold under the applicants trade marks come from the same trade source as goods sold under the opponents' trade marks and that therefore confusion would occur if the applicants' trade marks were registered.

20 Laddie J stated in WAGAMAMA LTD v CITY CENTRE RESTRAINTS PLC FSR 1995 page 732:

“A judge brings to the assessment of marks his own, perhaps idiosyncratic, pronunciation and view or understanding of them. Although the issue of infringement
25 is one eventually for the judge alone, in assessing the marks he must bear in mind the impact the marks make or are likely to make on the minds of those persons who are likely to be customers for goods or services under the marks. Not all customers are the same. It is therefore sometimes of assistance for the court to hear evidence from witnesses who will help him to assess the variety of ways in which members of the
30 target market will pronounce the marks and what, to them, will be the visual or phonetic impact of the marks. When considering infringement it is also necessary to bear in mind the possible impact of imperfect recollection on the part of members of the target market”.

35
Though this was an infringement case I infer from Laddie J's comments that though the final decision as to the similarity of the trade marks was with the Tribunal, evidence from consumers or the relevant trade can be of assistance. Therefore taking account of the tests laid down, the guidance provided by the earlier decided cases and the evidence before me I
40 find that the applicants' trade marks are similar to those of the opponents. Each contains as a predominant element the word FRUIT, though the degree of similarity regresses as more elements are added into the opponents trade marks. The opponents' FRUIT and FRUIT BRAND trade marks are in my view very similar to the applicants' FRUITCAKE trade mark and similar to the applicants' word and device trade mark. The opponents' FRUIT OF THE
45 LOOM trade mark is, however, only similar to the applicants' trade marks. But in each case there is, in my view, a risk of confusion amongst the public and the trade if registration of the applicants' trade marks were to proceed in the face of the opponents earlier trade marks.

In reaching this view I note that the goods themselves are not necessarily ones which will be
50 the subject of great deliberation by purchasers and therefore could be subject of impulse buys. Thus the possibility of imperfect recollection is also a significant factor.

5 The sum of all of these considerations is that I find that the opposition based upon Section 5(2)(b) and based upon the opponents earlier registrations is successful.

I go on to consider the ground of opposition based upon Section 5(4)(a) which states:

- 10 (4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is likely 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

15

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.

20 This provision requires the opponents to demonstrate that they have a right which can be asserted against the applicants in accordance with the law of passing off. In that connection Halsbury’s Laws of England 4th Edition Vol. 48 (1995 re-issue) at paragraph 165, refers to the speeches in House of Lords in Reckitt & Colman Products Ltd -v- Borden Inc [1990] RPC 341 and Erven Warmink BV -v- J Towned & Sons (Hull) Ltd [1979] AC 731 and gives the following guidance:-

25

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

- 30 (1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the defendant are goods or services of the plaintiff; and
- 35 (3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

40 The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of ‘passing off’, and in particular should not be used to

45 exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.”

Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted that:

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“To establish a likelihood of deception or confusion in an action for passing off where

5 there has been no direct misrepresentation generally requires the presence of two factual elements:

- 10
- (1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and
 - (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

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

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

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

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

45 Clearly, these are onerous requirements which are unlikely to be satisfied by mere use by one person of a trade mark prior to any use of the same or similar trade mark by another. They are likely to be met only when it can be established that the trade mark or trade marks in respect of which a claim to an earlier right is made has established good will and/or reputation such that no one else should be allowed to use the same or similar trade mark on the same or similar goods or services.

50 In this case I am satisfied that the opponents' use of their trade marks has enabled them to establish significant goodwill and reputation in the trade marks set out earlier in this decision, in the clothing trade. This is evidenced by the amount of sales of goods under the trade marks, the advertising that has been undertaken to bring the trade marks to the attention of the

5 trade and the public and by the recognition of the opponents' trade marks, as a result, by clothing retailers.

10 I have already held that the respective goods are the same and that applicants' trade marks, which as far as I am aware were not in use at the time the applications were made, are similar to the opponents' trade marks such that confusion is likely to occur. This view is reinforced by the evidence filed by the opponent from clothing retailers who state that they would be confused as to the origin of any goods put onto the market under the FRUITCAKE trade marks in view of the reputation of the opponents FRUIT marks.

15 In the result I believe that the opponents are likely to suffer damage as a result of any use by the applicants of their trade marks on any of the goods covered by the specifications of goods. I consider therefore that the opponents' claim to earlier rights under the provisions of Section 5(4)(a) is established and therefore the opposition based upon those grounds is successful.

20 Both oppositions having been successful, on both grounds, I order the applicants to pay to the opponents the sum of £500.

Dated this 31st day of March 1998

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**M KNIGHT
for the Registrar
The Comptroller General**