

TRADE MARKS ACT 1994

**IN THE MATTER OF INTERNATIONAL REGISTRATION No 690125
AND THE REQUEST BY SITECO BELEUCHTUNGSTECHNIK GMBH
TO PROTECT A TRADE MARK IN CLASS 11**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER No 70220 BY WHITECROFT LIGHTING LIMITED**

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Background

1) On 27 February 1998 SITECO Beleuchtungstechnik GmbH of Traunreut, Germany, on the basis of a registration held in Germany, requested protection in the United Kingdom of the trade mark **comfit**. The registration was published with the following specification:

lighting apparatus, particularly lamps fixed to a machine, articulated lamps, built-in ceiling lights and parts thereof

An international priority date of 22 October 1997 was claimed based on the German registration.

2) The United Kingdom Trade Marks Registry considered that the request satisfied the requirements for protection in accordance with article 3 of the Trade Marks (International Registration) Order 1996 and particulars of the international registration were published in accordance with article 10.

3) On 23 December 1999 Whitecroft Lighting (Holdings) Limited of Wilmslow, Cheshire, filed a notice of opposition to granting protection within the United Kingdom to the international registration. During the proceedings Whitecroft Lighting Limited of Ashton under Lyne, Lancashire, became the opponents.

4) The opponent stated that he is the registered proprietor of United Kingdom registration no 976438 of the trade mark **COMFORT** which is registered in respect of: *electric light fittings, and parts thereof included in class 11*.

5) The opponent claimed that his earlier registration and the application in suit are similar and encompass identical or similar goods; consequently registration of the application in suit would be contrary to section 5(2)(b) of the Act. The opponent also stated that his earlier registration has a significant reputation and goodwill in the United Kingdom. Consequent upon this he claimed that registration of the application in suit is liable to be prevented by the law of passing off and so would be contrary to section 5(4)(a) of the Act.

6) The opponent claimed that the applicant is an associated company of the previous registered proprietor of the earlier registration, from whom the opponent purchased the trade mark. Consequently the opponent claimed that the application was made in bad faith and so was contrary to section 3(6) of the Act.

7) The opponent sought an award of costs.

8) The applicant filed a counterstatement denying the above grounds and seeking an award of costs.

9) Both parties filed evidence. They both agreed that a decision could be made on the basis of the papers filed. Consequently a decision will be taken from a careful study of the papers.

10) Acting on behalf of the Registrar I duly give the following decision.

Opponent's evidence

11) The opponent's evidence consists of three statutory declarations.

12) The first declaration was made by Paul Cassidy, who is the marketing director of the opponent; it is dated 7 August 2000. The declaration includes much that cannot be characterised as evidence of fact but submissions; the issues to which they refer will be dealt with in my decision. He stated that the COMFORT trade mark was acquired by the Whitecroft Group when it purchased the United Kingdom lighting business of Siemens AG in March 1997. He stated that the trade mark had been used on a continuous basis, first of all by the Whitecroft Group and, since January 2000, by the opponent. Mr Cassidy stated that the turnover of COMFORT brand products since the purchase of the Siemens United Kingdom lighting business was as follows:

Year	Turnover/£
1997	297,000
1998	452,000
1998	683,000

The figures are calculated at retail price. The figures refer to 1998 twice. It is likely that the second reference to 1998 was a mistake for 1999.

13) Mr Cassidy stated that orders for their goods will be made by contractors, who have access to their product catalogues, directly to wholesalers, who then will contact the opponent. He stated that frequently contacts will be made by telephone and only the brand name of the product will be referred to. He stated that a product code would not be used to place the order.

14) Mr Cassidy stated that owing to the association with Siemens he considered it highly unlikely that senior personnel within the applicant's organisation were not aware of the fact that the previous parent company had used and registered COMFORT in the United Kingdom. Mr Cassidy spent some time speculating on the knowledge that he considered that Siemens staff would have of the trade mark COMFORT. Mr Cassidy exhibited a copy of a Siemens lighting buyers' guide and extracts from two lighting catalogues which show use of COMFORT. Mr Cassidy claimed that the applicant's prior knowledge of the opponent's COMFORT trade mark meant that the application was made in bad faith.

15) The second declaration was made by Brian James Clayton, who is trade mark agent; it is dated 11 September 2000.

16) The declaration effectively records that the applicant requested a letter of consent from the opponent. The opponent refused the request.

17) The third declaration was made by Paul Barton, who is the managing director of the opponent; it is dated 7 August 2000. Mr Barton refers again to the request by the applicant for a letter of consent. The rest of the declaration cannot be considered to be evidence of fact but rather submissions; the issues to which they refer will be dealt with in my decision.

Applicant's evidence

18) The applicant's evidence consists of a statutory declaration and a German declaration.

19) The statutory declaration was made by Peter Stanway, who is the managing director of Siteco Company UK, which is a wholly owned subsidiary of the applicant; it is dated 7 November 2000. Mr Stanway stated that the opponent started using the trade mark **comfit** on lighting in the United Kingdom in September 1998. He furnished no exhibits demonstrating this use. He stated that the trade mark is used in relation to louver lights which are sold to professionals and not the general public. He stated that he was not aware of any instances of confusion between the goods sold under the respective trade marks. The rest of the declaration cannot be considered to be evidence of fact but rather submissions; the issues to which they refer will be dealt with in my decision.

20) The German declaration was made by Mr Striegel, who is the head of the indoor lighting department of the applicant; it is dated 7 November 2000. Mr Striegel referred to the relationship between the applicant and Siemens. He stated that in the past that there had been a strong relationship between the applicant and Whitecroft Lighting (Holdings) Limited. He stated that the trade mark COMFORT was known to the applicant.

Opponent's evidence in reply

21) The opponent's evidence in reply consists of a further statutory declaration by Paul Cassidy, dated 12 February 2001. Mr Cassidy refers to sales figures again. On this occasion he quotes the same figures but allocates the sales to 1997-98, 1998-1999 and 1999-2000. Mr Cassidy stated that the applicant had never owned the earlier registration; its assignment had taken place before the applicant was incorporated as a company. The rest of the declaration cannot be considered to be evidence of fact but rather submissions; the issues to which they refer will be dealt with in my decision.

Submissions of the applicant

22) The applicant stated that the respective trade marks have no conceptual similarity, the application in suit being an invented word. He stated that visually and orally there is "insufficient similarity". The applicant asserted that the nature of the goods of the application in suit decreased the likelihood of confusion. He also asserted that the earlier registration is not inherently distinctive as it describes a characteristic of the goods.

23) The applicant submitted that the relevant date in relation to the instant proceedings is the international priority date of 22 October 1997, as per section 35 of the Act. He stated that in relation to the section 5(2) and 5(4) objections the reputation and goodwill of the opponent had to be determined as of that date. The applicant stated that there was no evidence that the goodwill in relation to COMFORT had been transferred to the opponent. He stated that there was no evidence of the extent of turnover in relation to the trade mark prior to 1996. The applicant referred to *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 in relation to making an assessment of the distinctive character of a trade mark. The applicant stated that there is no evidence to show that the earlier registration has acquired distinctiveness. He asserted that there is no evidence as to how the opponent used his trade mark prior to the relevant date.

24) In relation to the claim that the goods of the earlier registration are ordered by name the applicant stated that the opponent's brochure, exhibited as PC4, refers to eighteen different products for the COMFORT model of light. He stated that it would, therefore, be surprising if an order was not confirmed by reference to the product code. The applicant stated that detailed reference to the brochure would be needed to specify the particular light fittings required and so there would not be confusion.

25) The applicant stated that despite three years of parallel use in the market place there had been no confusion.

26) The applicant stated that if there was insufficient similarity between the respective trade marks to give rise to a likelihood of confusion under section 5(2) then the grounds of opposition under Section 5(4) must also fail. The applicant also claimed that there is no evidence of substantial goodwill or reputation.

27) The applicant referred to *Gromax Plasticulture Ltd v Don & Low Nonwovens* (1999) RPC 367 at 379 in relation to the issue of bad faith where it was held that bad faith includes dishonesty and some dealings falling short of the standards of acceptable commercial behaviour. The applicant stated that there had been no such dealings. He stated that there was certainly no deliberate intention to register the trade mark **comfit** to take advantage of any goodwill or reputation of the opponent.

Decision

28) The grounds of opposition pursued by the opponent are those under sections 3(6), 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994. The relevant provisions read as follows:

section 3(6):

A trade mark shall not be registered if or to the extent that the application is made in bad faith.

section 5:

(2) A trade mark shall not be registered if because -

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier 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.

(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....

The term 'earlier trade mark' is defined in section 6 of the Act as follows:

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

(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.

Reputation/recognition of earlier trade mark

29) The applicant has referred to the absence of evidence that the goodwill of the earlier proprietor of the opponent's registration was assigned with the registered trade mark.

In Wadlow's "The Law of Passing-Off" (at 2.66) the following is stated:

"An assignment of goodwill does not have to be in writing or any particular form, and need not mention goodwill by name. A transaction intended to assign a business as a whole necessarily passes the goodwill to the assignee. A transaction which purports to deal with specific brands or mark may be interpreted as dealing with the goodwill of the business in which they are used."

The opponent has stated that the Whitecroft Group acquired the UK lighting business of Siemens AG. A statement that has not been challenged. The opponent stated that he acquired the earlier registration following a management buy out. Taking into account the purchase of the business alone, I consider that this would represent an assignment of the goodwill; a view that is reinforced by the assignment of the earlier registration. I consider it reasonable to interpret the assignment of the registered trade mark as dealing with the goodwill of the business. I note that the applicant has not claimed that there was an assignment in gross.

30) The public would not be aware of the technicalities of any assignment; they would not be asking the question as to whether the assignment of the trade mark came with an assignment of

goodwill. Consequently I do not consider that in relation to reputation or recognition, which is an issue of public knowledge or recognition of a trade mark, that the issue of assignment of goodwill has any bearing upon the matters before me. (Although the issue of reputation/recognition could be effected by the context within which the trade mark is used.)

31) The opponent has argued that under section 35 of the Act that the relevant date in relation to the application in suit is the international priority date, 22 October 1997. Section 35 of the Act must be read in association with article 8 of the Trade Marks (International Registration) Order 1996 - however, nothing turns upon this. The relevance of section 35, in the instant case, arises from section 6(1) - see above. To decide what is an earlier trade mark it is necessary to take into account the priority claimed. It is the logical corollary of this that if an application is under opposition the relevant date in dealing with the rights of the opponent is the date accruing from the international priority claim of the application. Consequently I consider that the applicant is correct in his argument that the relevant date for the instant proceedings is 22 October 1997.

32) The applicant has referred to what he considers deficiencies in the evidence of the opponent. There are no turnover figures that can be definitely attributed to a period prior to the relevant date in relation to the instant proceedings. In Mr Cassidy's first declaration he quotes turnover figures for 1997, in his second declaration these become figures for 1997/1998. In neither case is it possible to decide how much if any of the total sum can be ascribed to a period prior to 22 October 1997.

33) I consider that there is a paucity of evidence in relation to showing recognition, reputation or goodwill in the trade mark of the opponent. **Therefore, I find that the opponent has not established that recognition, reputation or goodwill reside in his earlier registration.**

Likelihood of confusion

34) In determining the question under section 5(2)(b), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG* [2000] E.T.M.R. 723. It is clear from these cases that:-

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v. Puma AG* page 224;

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG* page 224; who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* page 84, paragraph 27.

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG* page 224;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG* page 224;

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* page 7, paragraph 17;

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG* page 8, paragraph 24;

(g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG* page 224;

(h) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v. Adidas AG* page 732, paragraph 41;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* page 9 paragraph 29.

Comparison of goods

35) The goods encompassed by the specification of the earlier registration are: *electric lighting fittings, and parts thereof included in Class 11*. The goods encompassed by the specification of the application in suit are: *lighting apparatus, particularly lamps fixed to a machine, articulated lamps, built-in ceiling lights and parts thereof*.

36) In *Canon* the European Court of Justice held, in relation to the assessment of the similarity of goods, that the following factors inter alia should be taken into account: their nature, their end users and their method of use and whether they are in competition with each other or are complementary.

37) *Lighting apparatus* is a general term that encompasses all apparatus that relates to lighting, therefore it needs must encompass *electric light fittings* of the earlier registration. In so far as it does the goods are identical. In relation to the other goods encompassed by the application in suit they are all used in relation to lighting, the end user is the person who wishes to purchase goods to effect a lighting function, they are likely to be found in the same areas of shops or sold by the same specialist retailers. Taking into account the above I consider that the nature, end user and method of use of the respective goods are the same.

38) Consequent upon the above I find that the respective specifications encompass either identical goods or highly similar goods.

Comparison of signs

39) The trade marks to be compared are as follows:

Earlier registration:

COMFORT

Application in suit:

comfit

40) The applicant has argued that **comfit** is an invented word. This is not the case. Comfit is an ordinary English word that describes a type of sweet, sometimes it relates to a sugar coated sweet containing a nut or seed. It is, in my own personal knowledge, a word that is regularly used in relation to licorice comfits. It is possible that certain members of the population will not know the word **comfit**, as the applicant does not appear to. The knowledge or lack of knowledge of the word **comfit** has implications, in terms of phonetic similarity and conceptual similarity. Neither party has dealt with the fact that **comfit** is an ordinary English word. As an ordinary English word I consider that it falls within the purview of judicial knowledge. However, in any assessment of similarity I need to consider those who might not be aware of this word.

41) I consider that COMFORT will normally be pronounced as kumfoot - most English speakers do not roll the letter “r” and the letter “r” in this word becomes lost in the vowel sound. For those who know of the word **comfit** it has two potential pronunciations; in both the final syllable will be pronounced fit as in the word fit. In one pronunciation the first syllable will be pronounced identically to the first syllable of COMFORT. In the other pronunciation the first syllable will be pronounced as com as in common. For those who are not aware of the meaning of the word **comfit** I believe that it is most likely that it will be pronounced in the second form. In one pronunciation the first syllables are identical, in the other the letters c and m are dominant; they are both strong consonants. The vowel sounds in the second form of pronunciation differ but I do not consider there is an acute difference. In the final syllables the difference in pronunciation rests on the vowel sound. I believe that the consonants will engender the same pronunciation. Again I consider that the effect of the consonants is far stronger than that of the vowels; that they dominate their respective syllables. Taking all the above into account I consider that in either potential form of pronunciation of **comfit** that there is a great deal of similarity to the earlier registration. I, therefore, find that the respective trade marks are phonetically similar.

42) If a person is aware of the word **comfit** the trade marks will engender very different conceptual associations. If a person is not aware of the word **comfit**, the earlier registration will be seen as a common English word and the application in suit as an invented word. In either circumstance there is no conceptual similarity. In the first circumstance the meanings will make the respective trade marks clearly conceptually dissimilar .

43) I do not consider that anything turns upon the fact that one trade mark is in upper case and one is in lower case. As the trade marks are both word marks and in ordinary script I consider that the purchaser’s visual perception will be firmly rooted in the letters per se rather than the form of the letters. I also take into account that in normal and fair use that the opponent could use his trade mark in title case, for instance. The respective trade marks commence with the same four letters and end with the same letter. The visual difference arises from the letter(s) after the letter “f”. I

consider that there is a degree of visual similarity between the respective trade marks.

Conclusion

44) Reference has been made to the applicant seeking a letter of consent to the registration of his trade mark from the opponent. It would appear that the request arose out of an ex-parte objection by the Registry. An objection that was later waived. That the applicant requested a letter of consent is not indicative that he considered that there was a likelihood of confusion. He could have considered that it was the most expeditious way of progressing the application. I must consider the instant case on the basis of the evidence and arguments before me. I do not consider what happened at the ex parte stage of the application has any bearing upon the instant proceedings.

45) The applicant has argued that the earlier registration is devoid of distinctive character. The inherent distinctiveness, or otherwise, of an earlier registration has to be taken into account when considering likelihood of confusion. The registration proceeded to advertisement on the basis of being advertised before acceptance. However, that it was considered necessary to prove user of the registration in relation to the 1938 Act, I do not consider relevant. That was very much another time. I think the argument of the applicant in relation to the lack of distinctiveness of the earlier registration is contrived: a light fitting that may be used in making a building a comfortable place to work or live. I certainly cannot see how COMFORT in relation to light fittings could be described as being devoid of distinctive character.

46) I consider, therefore, that the trade mark COMFORT in relation to the relevant goods enjoys a reasonable degree of inherent distinctiveness.

47) As stated above the opponent has not established that his trade mark enjoys recognition or reputation. It, therefore, does not enjoy an enhanced distinctiveness. I consider, therefore, in the consideration of likelihood of confusion that there is a tabula rasa.

48) The opponent has argued that the issue of aural similarity is very important owing to the nature of his trade. He stated that his trade mark is likely to be referred to without reference to a code or reference number in telephone ordering. The applicant argued that the catalogue of the opponent showed various models under the COMFORT range and so the potential purchaser would have to resort to a model number to identify the particular item of interest to him. The argument of the applicant ignores that the specification of the opponent encompasses light fittings at large; it is not restricted to the goods in the catalogue. The specification of the application also encompasses a large spectrum of goods. Consequently oral ordering could encompass a large variety of goods for which a catalogue number would not be necessary. The scenario of the applicant also does not take into account that a purchaser might phone up without a catalogue and simply refer to the COMFORT brand and indicate the particular goods that he required by reference to his requirements.

49) The argument of the applicant also leaves open a question of primary confusion that is only potentially remedied by secondary information - information not intrinsic to the trade mark as registered. So even if I had not reached the conclusion above I would still not be swayed by the

argument of the applicant.

50) In *Lloyd* the European Court of Justice held that:

“It is possible that mere aural similarity between trade marks may create a likelihood of confusion”.

In the instant case identical or highly similar goods are involved - the interdependency principle, therefore, needs to be taken into account. I need to also consider the nature of the purchasing decision; the goods could be purchased as a result of a careful and considered purchasing decision. However, the goods could be of low value and so the decision might not be particularly considered. In relation to aural confusion even the careful and considered purchasing decision would not necessarily militate against confusion. The purchaser and supplier are dependent upon their enunciation and powers of hearing - so, however careful the purchaser, he could fall foul of the frailties of the human senses.

51) I take into account the clear lack of conceptual similarity in relation to the trade marks. However, again in aural use this conceptual dissimilarity could effectively cease to exist.

52) The applicant has argued that he knows of no instances of confusion. All this statement demonstrates is that what it says - he does not know of instances of confusion. The negative proves very little. Especially as I have to take into account potential use across the spectrum of goods encompassed by the respective trade marks.

53) Taking into account all the above factors I find that there is a likelihood of confusion in respect of all the goods encompassed by the specification of the application in suit.

Section 5(4)(a) objection

54) I intend to adopt the guidance given by the Appointed Person, Mr Geoffrey Hobbs QC in the *Wild Child case (1998) 14 RPC 455*. In that decision Mr Hobbs stated that:

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

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

"The necessary elements of the action for passing off have been restated by the House of

Lords as being three in number:

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

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

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

55) The date at which the matter must be judged is not entirely clear from Section 5(4)(a) of the Act. This provision is clearly intended to implement Article 4(4)(b) of Directive 89/104/EEC. It is now well settled that it is appropriate to look to the wording of the Directive in order to settle matters of doubt arising from the wording of equivalent provisions of the Act. It is clear from Article 4(4)(b) that the earlier right had to have been "acquired prior to the date of application for registration of the subsequent trade mark, or the date of the priority claimed". The relevant date is therefore the date of the priority claimed.

56) As stated above the opponent has not demonstrated that at the time of the relevant date he enjoyed a goodwill or reputation in relation to his earlier registration. **This ground of opposition must, therefore be dismissed.**

Bad faith

57) Lindsay J in *Gromax Plasticulture Limited v. Don and Low Nonwovens Ltd* (1999) RPC 167 stated that the words bad faith in the context of the Act encompass:

“dishonesty and, as I would hold, includes some dealings which fall short of the standard of acceptable commercial behaviour observed by reasonable and experienced men in the particular field being examined.”

58) The applicant has stated that if the objection under section 5(2) fails then this ground must fall. I do not see this as a sequitur, and definitely not an automatic one. The issue of bad faith relates to the nature of an action; a very different proposition to likelihood of confusion. If I accepted the argument of the applicant is the sequitur of finding for the opponent under section 5(2)(b) that I must also find for him under section 3(6)? I certainly do not think so.

59) Bad faith is a serious allegation that must be proved (see *LOADED Trade Mark*, SRIS 0/455/00 and *SMILEY DEVICE trade marks*, SRIS 0/313/01). I find it understandable that owing to the previous relationships of parties linked to the current parties that the opponent might feel aggrieved. However, the basis of the opponent's argument, without corroborative evidence, is conjecture and so cannot be accepted (*Jones v Great Western Railway Company* (1930) 144 LT194 at page 202). In the instant case I consider that to discover whether the applicant had acted in bad faith it would have been necessary to test the issue by disclosure and possibly cross

examination. It would be necessary to show how the decision to coin the trade mark **comfit** had been arrived at. The opponent's case is based on supposition, presumption and conjecture.

60) Taking into account the above I dismiss the ground of opposition under section 3(6).

61) Consequent upon my decision in relation to the objection under section 5(2)(b) the international registration is to be refused protection in its entirety in the United Kingdom.

62)The opponent is entitled to a contribution towards his costs and I therefore order the applicant to pay him the sum of £835. 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 05 day of October 2001

**D.W.Landau
For the Registrar**