

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 2188911  
BY BABCO INTERNATIONAL LIMITED**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 49926  
BY AGATHA CHRISTIE LIMITED**

# TRADE MARKS ACT 1994

**IN THE MATTER OF Application No. 2188911  
by Babco International Limited**

**and**

**IN THE MATTER OF Opposition thereto under No. 49926  
by Agatha Christie Limited**

## **Background**

1. On 6 February 1999, Babco International Limited applied to register the trade mark POIROT in Class 33 in respect of:

Alcoholic beverages (except beers)

2. On 29 June 1999, Agatha Christie Limited filed notice of opposition to this application in which they say that they are the proprietors of many registrations of the mark POIROT throughout the world, citing three that are registered in the United Kingdom:

<b>Number</b>	<b>Mark</b>	<b>Class</b>	<b>Specification</b>
1535215	POIROT	9	Recording discs; sound recordings, whether or not coupled with a visual image, records, compact discs, cassettes, video tapes, pre-recorded tapes; sound and visual recording, amplifying, reproducing and transmitting apparatus; sound recording materials; video recording cassettes; digital audio tapes; compact discs, phonograph records, sound reproducing apparatus; sunglasses and glass cases; cords, chains and ribbons all for use with sunglasses; all included in Class 9.
1535216	POIROT	41	Entertainment information; rental of cine-films; discotheque services; organisation of exhibitions; presentation of live performances; orchestra services; production of radio and television programmes and of shows; radio and television entertainment; audio and video recording studio services; rental of stage and show scenery, radio and television sets, sound recordings and of stadium facilities; video tape film production; all included in Class 41.
2033418	POIROT	16	Printed matter, newspapers and periodicals, books; bookmarks; book-binding material; photographs; stationery; adhesive materials; artists' materials; paint brushes; office requisites; instructional and teaching materials; playing cards; plastic materials for packaging not included in other classes.

3. They claim that by virtue of the use the opponents (and their predecessors in title) have made of the mark, that at the date of application it enjoyed a valuable goodwill and reputation within the United Kingdom. The grounds on which the opposition is based are as follows:

- 1. Under Section 3(6)** because the application was made in bad faith.
- 2. Under Section 5(3)** because the mark applied for is identical to the opponents' earlier trade mark and is sought to be registered for goods which are not similar to the goods/services for which the opponents' mark is protected and has a reputation, and its use would, without due cause, take unfair advantage or be detrimental to the distinctive character or repute of the opponents' mark.
- 3. Under Section 5(4)(a)** by virtue of the law of passing off.

4. The applicants filed a counterstatement in which they deny the grounds on which the opposition is based.

5. Both sides ask that an award of costs be made in their favour.

6. Both sides filed evidence in these proceedings. The matter came to be heard on 16 April 2002 when the applicants were represented by Mr James St Ville of Counsel instructed by William A Shepherd & Son, their trade marks attorneys, the opponents by Mr Michael Edenborough of Counsel, instructed by Berwin Leighton Paisner, their trade mark attorneys.

### **Opponents' evidence**

7. This consists of two Affidavits from Mathew Caradoc Thomas Pritchard, the grandson of the author Agatha Christie, and for the last 25 years, the Chairman of the Board of Directors of the opponents. Mr Pritchard says that the opponents own all of the copyright and trade marks that relate to the literary works of Agatha Christie. He confirms that the fact and matters deposed to are within his own knowledge, information and belief, save where otherwise stated.

8. The first Affidavit is dated 13 January 2000. Mr Pritchard refers to exhibit MP1, much of which consists of instances of the use of POIROT as a reference to a character in books written by Agatha Christie, and later in a television series (also released on video tape), feature films, talking books (audio cassettes). The exhibit includes a review from the New York Times from August 1975 that refers to Hercule Poirot as being a real life Belgian detective and the basis for the POIROT novels. The exhibit also shows use on jigsaw puzzles, an "after-dinner mint" murder mystery game, and gives details a Belgian, chocolate, cognac and cream liqueur (produced by the opponents) but none of this can be dated.

9. Mr Pritchard goes on to refer to the applicants' intentions to use the mark as the brand for a chocolate based liqueur, details of which are shown in exhibit MP1, noting similarities in their use and the character Hercule Poirot, namely, both have the name POIROT, are characters invented by women, are Belgian, the connection with gourmet food, chocolate and "after-dinner". He goes on to detail the success of the POIROT books written by his grandmother, the first in the 1920's, saying that POIROT has been used as a means of identifying the novels and short stories, and in connection with film and television adaptations of the books.

10. Mr Pritchard states that video and audio tapes of a London Weekend Television series of POIROT have been sold in the United States, but does not say that this is the case for the United Kingdom. He says that so as not to dilute the mark the opponents have refused most requests for licences, but have granted two in respect of a jigsaw and a murder mystery game that uses after-dinner chocolate mints.

11. Mr Pritchard goes on to refer to parts of exhibit MP1 that refer or relate to the real-life Hercule Poirot, to the results of an on-line search for the name, and to a motion picture produced in 1976 that was a parody of the Agatha Christie's POIROT character. He again refers to and cites instances to illustrate the connection between Hercule POIROT and Belgium, gourmet food, chocolate and after-dinner drinks, all of which are encompassed by the applicants' use in connection with a Belgian chocolate liqueur beverage. He comments on the applicants promotional materials, namely, "artwork rendered in an art-deco style and with the name POIROT in a large stylised typeface, evocative of 1920s and 1930s" and the use of two "flapper" era women. Mr Pritchard asserts that this mimics the era used in the Agatha Christie novels which are set in the 1920's and 1930's when art deco was popular, and that they are doing so to market the product to the same consumers that appreciate Agatha Christie novels. Mr Pritchard says that the applicants take this further by creating a marketing story.

12. Mr Pritchard doubts that the applicants' choice of Yvette Poirot was mere coincidence, alleging that the applicants had located a reference to Poirot's younger sister, Yvonne in the biography "The life and times of Hercule Poirot", the same character appearing in the Hercule Poirot novel "The Chocolate Box", a copy of the reference being shown in the exhibit.

13. Mr Pritchard goes on to say why he believes consumers will be confused by the applicants' mark, namely that the opponents' mark is strong conceptually, has for over 75 years been the name of a famous fictional Belgian detective, and has been shown to have widespread recognition and strength in the marketplace. He says that as a consequence consumers will make an immediate association between the applicants' liqueur and Hercule Poirot and conclude that the opponents are the source of the product. He reiterates the connection of Hercule Poirot's epicurean lifestyle, the art deco period and the look and feel of the typeface used by the applicants.

14. He further states that the opponents will be damaged by the restriction of their marketing and licensing strategy for the brand, saying that although this has not extended to liqueurs, this could not be ruled out. He claims the applicant is attempting to appropriate and potentially divert the opponents' goodwill in the trade mark.

15. The second Affidavit is dated 21 March 2000. Mr Pritchard states that Hercule Poirot is a household name and one of the most popular characters in detective fiction, and has been the subject of two books entitled “The life and times of Hercule Poirot” written by Ann Hart, and “Agatha Christie’s Poirot - A celebration of the great detective” by Peter Haining. Copies of these books are shown in exhibit MP1.

### **Applicants’ evidence**

16. This consists of an Affidavit dated 14 February 2001 from Julie Hodge, a Director of Windsor Services Inc, sole corporate Director of Babco International Limited. Ms Hodge confirms that the fact and matters deposed to are within her own knowledge or have been obtained from the files and records of the company.

17. Ms Hodge accepts Hercule and Yvette Poirot to be the names of fictional characters, that Hercule Poirot had distinct and often eccentric characteristics and had been made famous through the novels of Agatha Christie who owned the copyright. She disputes that this means that the name has become the trade mark of Agatha Christie beyond certain goods such as recordings, publications and services related to entertainment found in classes 9, 16 and 41. She notes Mr Pritchard’s reference to Agatha Christie’s and the opponents’ use of their mark as an essential way of identifying the novels and short stories of Agatha Christie. She refers to exhibit JH1 saying that this contains details of the opponents’ actions to register the name of another character, Miss Marple. The exhibit in fact consists of extracts from various publications debating whether the work of another author had been the inspiration for Agatha Christie’s POIROT character.

18. Ms Hodge refers to the Declaration by Mr Pritchard, noting the instances of use of the name POIROT in exhibit MP1 and stating that the opponents have adopted the image of David Suchet to promote the stage, film television and video productions of the POIROT books, and as such are completely distinct from the applicants’ packaging.

19. Ms Hodge accepts that the opponents have the right to oppose the exploitation of the name POIROT in relation to board games, chess sets, CD ROMS and Internet based games because these may be associated with the goods and services provided by the opponents, but do not have rights in relation to a field separate from the literary world. She asserts that the fact that the reason why POIROT is not used in the titles of books by Agatha Christie is because the name is not used as a trade mark to identify her novels. She reiterates that Hercule Poirot is the name of a fictional character, not a trade mark, and will be recognised as such.

20. Ms Hodge says that the opponent’s are attempting to assume intellectual property rights in respect of goods associated with a particular character. She accepts that the applicants’ promotional materials depict “flappers” and the art deco period but challenges the assertion that the LWT television series are evocative of the art deco style saying that POIROT as represented by David Suchet is dressed merely as a gentleman.

21. Ms Hodge says that the name Yvette Poirot and the image of “flappers” was chosen to appeal to and attract female consumers, noting that the name Yvonne was mentioned only once in the original version of “The Chocolate Box” and was omitted in later versions. She comments on the claim that there is a likelihood of confusion and damage to the opponents, and notes that the publications “The life and times of Hercule Poirot” and “A celebration of a great detective” make mention of certain characteristics of Hercule Poirot but other than a penchant for good food and drink, no association with an alcoholic beverage or liqueur.

That concludes my review of the evidence insofar as it is relevant to these proceedings.

### **Decision**

22. Turning first to the ground under Section 5(4)(a). That section reads as follows:

“**5(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) ....”

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.”

23. Mr Geoffrey Hobbs QC sitting as the Appointed Person in the *Wild Child* (1998 RPC 455) set out a summary of the elements of an action for passing off. The necessary elements are said to be as follows:

- (a) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
- (b) 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
- (c) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

24. To the above I add the comments of Pumfrey J in the *South Cone Incorporated v Jack Bessant, Dominic Greensmith, and others*) (the *Reef* case) in which he said:

*“There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the Registrar is entitled to be presented with evidence which at least raises a*

*prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirement of the objection itself are considerably more stringent than the enquiry under Section 11 of the 1938 Act (See Smith Hayden (OVAX) (1946) 63 RPC 97 as qualified by BALI [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on*

*Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed at the relevant date. Once raised the applicant must rebut the prima facie case. Obviously he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of possibilities that passing off will occur."*

25. The opponents claim a connection with the rights in POIROT dating from 1955, but the applicants highlight that the evidence shows that it wasn't until much later that the opponents acquired the rights in POIROT, so if anything, the evidence shows a connection between POIROT and a succession of organisations, but not the opponents. Mr Edenborough, referring to the *Wild Child trade mark case* submitted that whether or not the opponents have the benefit of goodwill in POIROT, if it subsists, even in the ownership of a third party, then the opponents can still rely on that goodwill in bringing the opposition. That indeed is the view expressed by Mr Hobbs in that case, but should, however be taken in the context of the words of Walker J in *United Biscuits (U.K.) Ltd v Asda Stores Ltd* [1997] RPC 513 in which he said:

*"There is authority that a customer need not know or care about the name of the manufacturer who owns the goodwill, provided that the customer knows that there is such a person and cares that goods which he buys are made by that person."*

26. There is no dispute that Hercule Poirot is the name of fictional Belgian detective created by Agatha Christie, and that through the books, motion pictures and television programmes in which he has featured the character and name have become extremely well known. However, the applicants contend that this is the extent of the opponents' use of POIROT; as the name of the character and the contents of the goods and not as a trade mark sense, and consequently, there can be no reputation.

27. Mr Edenborough submitted that such an argument misses the point of character merchandising. Whilst accepting that a fictional character could never be the genesis of any trading activity per se, Mr Edenborough went on to say that it is clear that any product that features POIROT as the central character rather than being about him, such as a biography, would emanate from a trade source that controls the rights, and thus, use of POIROT in relation to books, pre-recorded videos and films is use in the course of trade. That may be the case, but it pre-supposes that there has been use in connection with such goods.

28. Whilst I am prepared to accept that there has been such use in the United Kingdom in respect of books, the evidence does not establish this to be the case in respect of video cassettes. With regard to films, be they serialised or feature, shown on television or at a

cinema, it is not uncommon for successful books to be transferred to the screen, and whilst the viewing public may well be aware of the author of the book, it seems more likely to me that they would associate what they are seeing with the production, distribution or broadcasting company than with the author. There have been instances where fictional characters have become the subject of merchandising (see *Mirage Studios v Counter Feat* [1991] FSR 145). Such activities, and I would say not surprisingly, involve use in relation to goods or services that have some connection with the character or some aspect of the character which no doubt accounts for the type of goods said to have been licenced by the opponents; they are all forms of mystery puzzles.

29. In *Lynstad v Annabast Products Limited* [1975] FSR 488 Oliver J considered the question of character merchandising involving the pop group ABBA, saying:

*“There is no business of the plaintiffs here with which in my judgement the defendant’s goods could possibly be confused. To suggest that there is some proprietary right in the plaintiff’s name which entitled them to sue simply for its use is contrary to all English authorities, see for instance the recent case of Tavener Rutledge Ltd v Trexapalm Ltd (supra), where Walton J stressed the necessity for demonstrating that the circumstances give rise to at least an inference in the public mind that the plaintiffs exercise some sort of quality control over the defendants’ products. The evidence here does not suggest that. So far as it goes it suggests no more than that some people might think that the plaintiffs might have granted a licence for the use of the name..”.*

30. The evidence contains examples of POIROT being used in respect of an audio tape recording of the book “Murder on the Orient Express” and under licence for book/jigsaw puzzle and a murder mystery game that uses after-dinner chocolate mints. All refer to Agatha Christie and the character POIROT, but in each case the item is sold under the trade mark of the manufacturer. There is nothing that establishes where, when or to what extent any sales may have been effected; the audio tape bears a label “promotional copy - not for resale”. Consequently, it is not possible to determine with any degree of certainty whether this would have established any goodwill or reputation. Nor is it possible to say that at the relevant date that this, or indeed any other use had established the concept of the name POIROT being used for merchandising.

31. It seems self-evident to me that there is no commonality between the goods for which the opponents claim use (books, tapes, films, puzzles and games) and the Belgian chocolate liqueur (or alcoholic beverages at large) for which the opponents intend to use the mark, but this is not, in itself, fatal to the opponent’s case, it being well established that the opponents need be trading in the same goods. The opponents address this by referring to the fact that POIROT is a Belgian with a penchant for food and drink. There is no evidence that the public would associate the POIROT character with food or drink and mere references to an appreciation of gastronomic delights by the character, no matter how well known, cannot be taken to have established such a link in the minds of the public.



32. The opponents also refer to the fact that the applicants market their beverage by reference to the “flapper” era of the 1920's in which the POIROT stories are said to be set, and a character called Yvette POIROT that they say is a deliberate ploy to confuse the public with Yvonne, Hercule POIROT’S sister. Again there is no evidence that the public would be aware of either, let alone associate them with the character.

33. There can be no dispute that the mark applied for is identical to the surname of the well known Agatha Christie character and by which it is most commonly referred to. The applicants are silent on how they came to use the name in connection with their goods. As far as I am aware the surname POIROT is not a common one in the United Kingdom, nor is it a common or garden word or a word with some passing relevance for the goods. This, and the fact that the beverage contains Belgian chocolate and is marketed by reference to a period in time that is supposedly associated with the character could be taken as a reasonable inference that the applicants have latched on the name to gain the benefit of the opponents’ use. But even if I were to accept that the opponents have goodwill/reputation in the name POIROT and that the public would associate the characteristics referred to above with that name, would the applicants’ use amount to a misrepresentation, and if so, would this be likely to cause damage?

34. It is in this consideration that the lack of a common field of activity and the absence of an established character merchandising activity will have an influence. It may well be that a public well aware of the Belgian detective Hercule POIROT, on seeing the name POIROT used on a liqueur beverage containing Belgian chocolate, will note the parallels and wonder whether there is some connection. In the *Stringfellow v McCain Foods (G.B.) Limited case* [1984] RPC 501 at page 545, the owner of a well known and prestigious night club STRINGFELLOWS, took objection to the use of the name STRINGFELLOWS by McCain for a brand of french fry. In his decision Slade LJ took the following view:

*“Mr Sher submitted that the court should not be astute to relieve McCain from legal responsibility in this action, bearing in mind that they knew of the existence of the club when they selected the name for their new product, , and further did nothing to steer away from the disco image in their advertisement which, in conjunction with the name “Stringfellows”, as I have concluded, gave rise to such confusion as did occur. If, however, one has regard to the broader aspects of this claim, there is another side of the coin. The plaintiffs, as a matter of law, can claim no monopoly in the use of the unregistered word “Stringfellows”. The law does not encourage any such monopoly. McCain or any other person (albeit with full knowledge of the plaintiffs’ prior use) are perfectly free to use that same word in marketing or advertising their goods, provided only that they are not thereby in breach of contract or guilty of passing off, within the principles laid down by the Advocaat case, or some other tort. Any such use may well lead some uninformed, perhaps unreflective, members of the public to the mistaken belief that there is some connection between the goods in question and the Club, however far apart from that of a high-class nightclub and the nature of the goods may be. Experience in the present case has shown that much. Nevertheless, even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs, as against an innocent defendant in a completely different*

*line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than a minimal loss is in my opinion a heavy one. I have said nothing about the position which might have arisen in this case if there had been any reason to question the reputability of McCain or their new product, since these have never been in doubt. As things are, the onus has not in my opinion been discharged.”*

35. In the same case at page 546/7, Stephenson LJ commented on the loss of a possible field for merchandising of the mark concerned was a permissible head of damage in passing off, saying:

*“Here the respondents seek to supplement what Slade LJ. has aptly called the “tenuous overlap” between their fields of activity and the appellants’ by contemplating the prospect of damage to the respondents in the field of future franchising or merchandising.*

*I have some doubts whether such damage is recoverable in a passing off action, but I have no doubts that it is not recoverable by the respondents on the facts set out by Slade LJ. I agree with him that in a case such as the present the burden of satisfying Lord Diplocks’s requirements in the Advocaat case, in particular the fourth and fifth requirements, is a heavy burden; how heavy I am not sure the judge fully appreciated. If he had, he might not have granted the respondents relief. When the alleged “passer-off” seeks and gets no benefit from using another trader’s name and trades in a field far removed from competing with him, there must, in my judgement, be clear and cogent proof of actual or possible confusion or connection, and of actual damage or the real likelihood of damage to the respondents’ property in their goodwill, which must, as Lord Fraser of Tullybelton said in the Advocaat case, be substantial. In this case there was no such proof.”*

36. Section 5(4)(a) of the Act offers protection to the goodwill and reputation built up by a trader through the use of a sign. In this case the nature and extent of the opponents’ goodwill/reputation is far from clear, and even though there appears to have been some merchandising, it is uncertain as to whether, at the relevant date, this will have impacted on the consumer. The applicants may well be using the same name but are doing so in an area distinct from that in which the opponents claim goodwill/reputation and is not necessarily a misrepresentation. As Slade LJ. said:

*“even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs, as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than a minimal loss is in my opinion a heavy one.”*

37. I come to the view that this is the position in this case. In my view the opponents have failed to discharge the onus placed upon them to show that even if there were to be some

confusion that this would be such that it would result in any let alone minimal damage to their goodwill/reputation. I therefore find that the ground under Section 5(4)(a) fails.

38. Turning next to the grounds under Section 5(3) of the Act. That section reads as follows:

“**5(3)** A trade mark which -

- (a) is identical with or similar to an earlier trade mark, and
- (b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

39. An 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,”

40. In *Daimler Chrysler AG v Alavi* (2001) All ER (D) 189, Pumfrey J considered the approach to considering an objection under Section 5(3) to be as follow:

*“The enquiry is as follows:*

3. *Does the proprietor’s mark have a reputation? If so,*
4. *Is the defendant’s sign sufficiently similar to it that the public are deceived into the belief that the goods are associated with the proprietor so that use of the sign takes unfair advantage of the mark, or alternatively cause detriment in their minds to either:*
  - (1) *the repute*
  - (2) *the distinctive character of the mark, or*
3. *Even if they are not confused, does the sign nonetheless have this effect and*
4. *Is the use complained of nonetheless without due cause?*

*Detriment can take the form of either making the mark less attractive (tarnishing...) or less distinctive (blurring...).*”

41. The opponents rely on three trade marks, all for the word mark POIROT and registered in classes 9, 16 and 41. The application is for the word POIROT and is sought to be registered in class 33. The fact that the marks are identical and that the respective goods and services are dissimilar is, I believe, self-evident. The first question, therefore, is if, and to what extent the opponents have a reputation.

42. In *General Motors Corporation v Yplon SA* (2000) RPC 572 (the Chevvy case), the ECJ made the following statement in relation to Article 5(2) of the Directive (Section 5(3) of the Act):

*“In order to enjoy protection extending to non-similar products or services, a registered trademark must be known by a significant part of the public concerned by the products or services which it covers.”*

43. There is no dispute that Hercule Poirot the name of fictional Belgian detective created by Agatha Christie and that the character has become extremely well known through the books, motion pictures and television programmes in which he has featured. It is however clear from the “Chevvy” case that for there to be a protectable reputation the trade mark must have been used in connection with goods or services.

44. I have already mentioned the absence of detail by which to assess the opponents’ claim to a reputation within the United Kingdom. Even if I started on the premise that the licences granted in respect of the puzzles and game had actually resulted in a trade, the evidence, such as it is, does not establish that this had taken place prior to the relevant date. Nor is it possible to say that through the use of POIROT on goods other than written or recorded media has established the concept of the name being any more than that of a fictional character. This being the case I do not see how I can find there to be anything to take advantage of, or that could be adversely affected by the applicants using the mark applied for in respect of the goods for which registration is sought. The ground under Section 5(3) fails accordingly.

45. This leaves the ground under Section 3(6). That section reads as follows:

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

46. The statement of ground contains no more than a bald statement that the application was made in bad faith. From the submissions it would seem that the opponents’ objection has two strands, the first relating to the breadth of the specification for which registration is sought, the second to the choice of POIROT.

47. Turning first to the specification. The opponents have seen from the applicants’ evidence that they intend to use POIROT in relation to a chocolate-based liqueur drink, whereas they are seeking registration in respect of a much wider range of goods. On the question of the applicants not having used or having no bona fide intention to use the mark. Section 32(3) of

the Act sets out, as a basic requirement of making an application, that an applicant confirm in a statement that the trade mark is being used, either by the applicant or with his consent, in relation to the goods or services for which they seek registration of their mark, or that they have a bona fide intention that it shall be so used. The section does not require that an applicant be using the trade mark in relation to all, or indeed any of the goods or services for which they seek registration at the time of application for registration, only that where the mark is not in use that there is a bona fide intention that it will be so used. Whilst Section 32(3) clearly allows for some futurity in putting the trade mark into use, if through evidence it can be established that an application covers goods/services that the applicants know that the trade mark cannot or will never be used in connection with there is every likelihood that they would be found to have acted in bad faith in making the application. There is no such evidence in this case.

48. The second part of the opponents' objection revolves around the premise that POIROT is not a word that is likely to be happened upon by chance, that the applicants must have been aware that the name was that of a famous character in the books written by the well known author Agatha Christie, and that the applicants deliberately adopted the name and a particular style of use that reflects the traits and other circumstances for which the character has become known. *In Gromax Plasticulture v Don & Low Nonwovens Ltd* [1999] RPC 367 Lindsay J considered bad faith in the following terms:

*“I shall not attempt to define bad faith in this context. Plainly it includes dishonesty and, as I would hold, includes also some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined. Parliament has wisely not attempted to explain in detail what is or is not bad faith in this context; how far a dealing must so fall-short in order to amount to bad faith is a matter best left to be adjudged not by some paraphrase by the courts (which leads to the danger of the courts then construing not the Act but the paraphrase) but by reference to the words of the Act and upon a regard to all material surrounding circumstances.”*

49. There seems to be no obvious reason as to how the applicants came to select the name POIROT, the only previous use that I am aware of being the name of the Agatha Christie character. In the Abba case cited above, it was said *“To suggest that there is some proprietary right in the plaintiff's name which entitled them to sue simply for its use is contrary to all English authorities..”* It would therefore seem to me that adopting the name for use in an area removed from that for which it has become known, cannot in itself be grounds for a finding of bad faith. Provided that they did not fall foul of some prohibition the applicants were quite at liberty to do what they did. As for adopting a style of promotion that mirrors those for which the character is said to be known, I do not consider that the opponents have not got anywhere near to establishing their case. An allegation of bad faith is a serious one, all too frequently used in a last-gasp attempt to thwart an application where all other allegations have failed. The onus rests firmly with the opponents and in this case I find that they have not discharged that onus. The ground under Section 3(6) fails accordingly.

50. The opposition having failed on all grounds, the applicants are entitled to an award of costs. I order the opponents to pay the applicants the sum of £685 as a contribution towards their costs. This sum 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 5<sup>th</sup> day of September 2002**

**Mike Foley  
for the Registrar**