

Bach/Healing Herbs Legal Case
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Judgement of the High Court of England, Chancery Division - Patents Court
BETWEEN: HEALING HERBS LIMITED, Applicant -and-
BACH FLOWER REMEDIES LIMITED, Respondent

Mr Geoffrey Hobbs QC and Mr James Marshall (instructed by Messrs. Taylor Joynson Garrett, London EC4) appeared on behalf of the Applicant.

Mr Michael Bloch and Mr Henry Whittle (instructed by Messrs. Cameron McKenna, London EC1) appeared on behalf of the Respondent.

This is an official judgment of the court and I direct that no further note or transcript be made.

The Hon Mr Justice Neuberger

Dated: 22nd May 1998

MR JUSTICE NEUBERGER:

1. INTRODUCTORY

2. This is an application brought by Healing Herbs Limited ("the applicant") for declarations that certain trademarks registered in the name of Bach Flower Remedies Limited ("the respondent") are invalid. The marks at issue are "BACH FLOWER REMEDIES", "BACH", "BACH" in a distinctive script, and a roundel device including "BACH FLOWER REMEDIES" with a depiction of a flower. All four marks were registered by the respondent or its predecessors in title between 1979 and 1991 in respect of products and publications in Classes 5 and 16. There are thus eight registrations in all, and they are as follows:

3. Registered No. 1,110,133

4. Registered No. 1,213,807

5. Registered No. 1,377,082

6. Registered No. 1,377,083

7. Registered No. 1,377,084

8. Registered No. 1,377,085

9. Registered No. 1,461,972

10. Registered No. 1,461,973

11. The applicant objects to the validity of each of these marks on each of the four grounds specified in Section 3(1) of the Trade Marks Act 1994 ("the Act").

12. THE UNCONTROVERSIAL FACTS

13. Dr Edward Bach

14. Edward Bach (apparently pronounced "Batch") was born in 1886 near Birmingham. He trained as a doctor at University College Hospital, London, and subsequently in Cambridge. After research into immunology, he developed an interest in homeopathy, and joined the laboratories of the Royal London Homoeopathic Hospital in 1919. In 1928 he began work on his own remedies made from plants. In 1930 he left London in order to concentrate on finding a new system of healing involving plant remedies.

15. Between 1928 and 1935, Dr Bach devised 38 new remedies, almost all of which were made from flowers, and he also proposed a combination of some of these remedies which he called the "Rescue Remedy". He propounded these remedies (which I shall call "the Remedies") as a means of counteracting various negative states of mind.

16. Dr Bach published his work, principally in public lectures and in magazine articles. In particular, he wrote articles and gave lectures between 1933 and 1936 in relation to the Remedies. In these works, Dr Bach made public three aspects of the Remedies. The first was the prescriptive aspect, that is which Remedy was appropriate for which state of mind. Thus, rock rose was appropriate for terror, and scleranthus for indecision. The second aspect he revealed was the method of manufacture. In this connection, there are essentially two methods, which were given the names "the sun method" and "the boiling method". Each involves placing the flowers in water; in the former method, the water is then left in the sunshine for a period, whereas in the latter method the water is boiled. The subsequent liquor (or "tincture") is then mixed with brandy or alcohol. (In this connection, there was a dispute between the parties as to whether Dr Bach's recipes required brandy, as the applicant says, or alcohol, as the respondent contends: that is not now an issue before me, as both parties are agreed, at least for the purpose of these proceedings, that either will do). The third aspect about which Dr Bach informed the

public in his lectures and writings was the manner of treatment, namely the method, quantum, and frequency of administration of the Remedy.

17. At the end of one of his articles ("The Twelve Healers & Four Helpers" - published in 1933) Dr Bach wrote this:

18. "For those unable to prepare their own stocks, the chemists mentioned below have very kindly undertaken the distribution of these Remedies at a most modest price."

19. He then identified two retail chemist shops in the W1 postal district of London, operated by Keene & Ashwell Limited ("Keenes") and Nelson & Co. Limited ("Nelsons"). Keenes ceased business in about the late 1960's. Nelsons is now a substantial company which is, and has for a long time been, involved in the alternative medicines business.

20. In his various lectures and articles, Dr Bach referred to his medicines as "healing herbs" and "Remedies", although he also referred to them as "Healers" and he does not seem to have used the expression "Flower Remedies" or "Bach Flower Remedies".

21. Dr Bach died in 1936; he spent the last few years of his life in a cottage called Mount Vernon in the village of Sotwell in Oxfordshire. During most of that period, and up to the time of his death, he was helped in his work by various people, most notably Nora Weeks (the sole beneficiary under Dr Bach's will) and Victor Bullen.

22. The Bach Centre

23. Until their respective deaths, Miss Weeks and Mr Bullen were the individuals primarily responsible for carrying on the work of Dr Bach from Mount Vernon which they in due course called "The Bach Centre". They made, marketed, and sold the Remedies.

24. These activities were carried on from Mount Vernon from April 1950 to March 1955, by Miss Weeks trading as "Dr Edward Bach's team". From April 1955, she continued doing so, in partnership with Mr Bullen. In 1958 they (and a Ms Thomas) formed the Dr Edward Bach Healing Trust ("the Trust") which acquired the freehold of Mount Vernon the same year. In 1974, Miss Weeks and Mr Bullen started trading as "Dr Edward Bach's Centre". Mr John Ramsell and his sister, Mrs Nickie Murray, joined the Bach Centre in 1971 and became trustees of the Trust in 1973.

25. Mr Bullen died in 1975 leaving his estate to Miss Weeks and, with effect from 1st April 1976, she traded as "Dr Edward Bach's Centre" together with Mr Ramsell and Mrs Murray on the basis of a formal partnership agreement, whereunder the assets of "The Dr Edward Bach Centre" belonged to the three of them in equal shares. Following the death of Miss Weeks in January 1978, Mr Ramsell and Mrs Murray carried on the business as surviving partners under the name of "The Dr Edward Bach Centre".

26. Since the early 1950's, the Bach Centre has published a quarterly newsletter ("the Newsletter"). Until about 1985, the Newsletter was called "The Bach Remedy Newsletter - Flower Healing", and it always contained the heading: "The simple and natural method of healings through the personality by means of wild flowers discovered by Edward Bach...". From the inception of the Newsletter until her death, Miss Weeks was responsible for its publication. After about 1985, the style of the Newsletter was modernised, so that its title was shortened to "The Bach Remedy Newsletter" and the heading I have quoted was replaced by the roundel device.

27. In 1983, the business and assets of "The Dr Edward Bach Centre" were transferred by Mr Ramsell and Mrs Murray to a company, then known as Bach Flower Remedies Limited (not the respondent), which they owned in equal shares. In February 1989 a company called BFR (Mount Vernon) Ltd (also owned by Mr Ramsell and Miss Murray) was formed: it acquired all the shares in, and then all the assets and liabilities of, Bach Flower Remedies Ltd which thereafter ceased trading in April 1989.

28. In 1987, Mrs Murray departed from the Bach Centre to live in Crete, leaving Mr Ramsell and his daughter Judy Howard, effectively in charge of the Bach Centre. Sometime thereafter, Mrs Murray sold her shares in BFR (Mount Vernon) Limited to Mr Ramsell. At the present time, as Mr Ramsell has retired, Mrs Howard has control of the day to day activities of the Bach Centre at Mount Vernon.

29. From the 1930's, Nelsons and Keenes were supplied, initially by Dr Bach and later by his successors at Mount Vernon, with the tinctures, from which Nelsons and Keenes then made up and bottled the Remedies, which they sold from their own pharmacies. In the case of Nelsons, this arrangement appears to have continued until the mid-1970's, after which Nelsons continued as a contract manufacturer for the purpose of making the rescue Remedy in the form of a cream. In the case of Keenes the arrangement apparently ended when it ceased trading in the late 1960's. Accordingly, from 1940 (and earlier), the Remedies were made up (from tinctures prepared at Mount Vernon) and sold by those at Mount Vernon, by Nelsons (until 1975 or so) and by Keenes (until 1967).

30. In January 1991, BFR (Mount Vernon) Ltd entered into an exclusive arrangement with Nelsons, whereby Nelsons were to manufacture, package, market and distribute world-wide the Remedies prepared from tinctures made at Mount Vernon; under the names "Bach" and "Bach Flower Remedies". This was apparently because the demand for the Remedies had become so great that the Bach Centre decided that it could not cope.

31. In 1993, Nelsons bought the business carried on at the Bach Centre for "4.3m; that business is now owned by a wholly owned subsidiary of Nelsons, Bach Centre Mount Vernon Limited, which is licensed to use the trade marks the subject of the instant applications. A new company, the respondent, was formed and its shares were sold by the Ramsell family to Nelson's: it is the current registered proprietor of the subject marks. The Bach Centre's principal present activities are making the tinctures for the Remedies, selling the Remedies in or from Mount Vernon, writing and distributing written and cassette material about the Remedies, organising and running educational programmes, providing free public advice and information on the Remedies, and maintaining Mount Vernon including artefacts which belonged to Dr Bach and historical records.

32. The increasingly commercial approach of those in Mount Vernon from 1979 onwards is perhaps mirrored by the dates on which the applications for the registered trade marks the subject of these proceedings were made. The first application was made on 24th February 1979 by Mr Ramsell trading as "Dr Edward Bach Healing Centre" (and the benefit of it was subsequently assigned to Bach Flower Remedies Limited on 1st November 1984). The second application was made by Bach Flower Remedies Limited on 28th February 1984. The next four applications were made on 14th March 1989 by BFR (Mount Vernon) Limited, who also made the two most recent applications on 22nd April 1991.

33. Julian Barnard

34. Mr Barnard was originally an architect. In 1975 he read a copy of Dr Bach's book "The Twelve Healers and Other Remedies" which had been published in 1936. Thereafter, he made contact with Mrs Murray at the Bach Centre, and visited her about twenty times between 1975 and 1979. After studying herbalism in Australia, he taught classes on Dr Bach and the Remedies.

35. Between 1985 and 1987, it appears that there was a continuing disagreement between Mrs Murray and Mr Ramsell as to whether or not Mr Barnard should be brought in to the Bach Centre with a view to taking it over when Mrs Murray and Mr Ramsell retired. The issue was ultimately resolved against Mr Barnard when Mrs Murray retired from Mount Vernon in 1987. However, Mr Barnard carried on working in connection with the Remedies. In 1986 he had set up the "Bach Educational Programme", in which Mrs Murray was initially his partner. Mr Ramsell took the view that Mrs Murray had given Mr Barnard quite a lot of information about Bach Centre clients she ought not to have given him. Just before Mrs Murray emigrated in July 1987 she purported to appoint Mr Barnard as her successor, but nobody has suggested that that was effective.

36. After the Bach Educational Programme was set up in 1986, Mr Barnard continued his lectures, but under that name. He also sold tapes about Dr Bach and the Remedies which were recorded by Mrs Murray. So long as Mrs Murray was involved with the Bach Centre, she refused to co-operate with Mr Ramsell in allowing Bach Flower Remedies Ltd to take action against Mr Barnard.

37. By 1988, Mr Barnard and his wife were making all thirty-eight Remedies

according to the recipes of Dr Bach and they started marketing them. For this purpose, they formed a company, the applicant.

38. The attitude of the Bach Centre to competition

39. In 1970 it would appear that there was hardly any significant commercial trade in preparations made from flowers for medicinal purposes other than that of the Bach Centre (and Nelsons). It also appears clear that the Bach Centre was the only generally known supplier of Remedies marked with the name BACH. It seems that the direct trading use of the expression BACH FLOWER REMEDIES by the Bach Centre began in about 1976, and the phrase was fairly widely in use by mid-1979. Other flower remedies (most of them called "flower essences" of one type or another) started to appear in this country (some from abroad, others indigenous) in and after the mid to late 1970's.

40. With the growth of interest, in this country and abroad, in flower remedies or essences generally, knowledge of and interest in the Remedies increased. There had been (since 1938 or earlier) individuals who made and/or prescribed the Remedies to their own circle of friends and patients. They were frequently, indeed normally, referred to as "Bach Practitioners". During the 1980's and 1990's, both in the United Kingdom and abroad, more people became interested in teaching about the Remedies or prescribing them, some on a rather larger scale than before.

41. It is clear that Dr Bach and, after him, Nora Weeks and those at the Bach Centre positively encouraged others to make and prescribe the Remedies, clearly referring to such Remedies generically as "Bach Flower Remedies" on occasion. Indeed, there is nothing to suggest that this attitude changed on the death of Miss Weeks. In this connection, it is interesting to note what is said in an "announcement" in the Newsletter of April 1981:

42. "Please beware of any "Bach Remedy" that does not bear our name and address on the label - try to get to know our official labels so that you will not be in doubt. A medicine or dosage bottle is a preparation we normally give to patients as a specific treatment... . Some people are preparing these diluted preparations and selling them as Stock Bach Remedies - this is wrong and misleading."

43. As I read this announcement, it is not challenging the rights of third parties to call their product "Bach Remedy", provided it is an accurate description in the generic sense. Furthermore, far from directing attention to the description "Bach Remedy" on the bottles from the Bach Centre as a badge of origin, it is The Bach Centre and the address ("Mount Vernon, Sotwell...") of the respondent which is being put forward as the distinguishing feature. This view is reinforced by "an important development" referred to in the same Newsletter:

44. "The following announcement was included in the December issue of the American Homeopathic Journal:

45. "Whereas: the pharmacopoeia convention recognises the valuable contribution to therapeutics by Dr Bach and the endorsement of his methodology by practising physicians internationally as well as in

England!

46. This means that the Bach Remedies will be officially registered in the forthcoming ... edition ... of the Homeopathic Pharmacopoeia of the USA thus bringing the Remedies under the protection of an accepted registered body. We will now revert back to our original title of "Bach Flower Remedies" rather than the recently introduced "Bach Flower Essences".

47. While it might be said that the reversion to the "Bach Flower Remedies" name indicated at the end of that passage is ambiguous if read on its own, it seems to me that, when read together with the quotation from the Journal, the more natural inference is that it is being put forward as a generic expression, especially in light of the way "Bach Flower Remedies" had been used in the Newsletter from 1976 or 1977.

48. Indeed, until the end of 1985 there is no suggestion of the Centre objecting to the use by others of the word BACH in connection with the Remedies, or in connection with teaching the methods and discoveries of Dr Bach. However, in the December 1985 issue of the Newsletter sent out by the Bach Centre, there is the following statement:

49. "We have decided in the near future to introduce part of Dr Bach's

actual signature as a significant projection of his name in the title "Bach Flower Remedies". ...This will help to identify much more clearly the "original product" against the many facsimiles that are beginning to emerge in different parts of the world based on Dr Bach's work and the use of his name for credibility."

50. This actual signature is "BACH" as shown in the two marks in the distinctive script.

51. In 1988, the Bach Centre issued leaflets warning the public to "beware of dilutions, facsimiles and replicas that purport to be "equal to" or "the same as" or "with any claim of association to Dr Bach's discoveries and methods of preparation... Such products are not Bach Flower Remedies". Also in 1988, Mr Ramsell sent out a circular on behalf of the Bach Centre warning shops that they would not be supplied with the respondent's Remedies if they sold Mr Barnard's "particular offerings of any description" and indicating a similar attitude would be taken with regard to "foreign flower essences".

52. As a result of this, Mr Barnard began proceedings which were settled in 1989 on terms which included Mr Barnard agreeing that he would no longer trade under the name of "The Bach Educational Programme" and that he would not make statements calculated to lead to the conclusion that he, rather than the Bach Centre, was the repository of the teachings of Dr Bach. In his affidavit in those proceedings, Mr Barnard stated that "BACH FLOWER REMEDIES" was a trade name of the Bach Centre in 1988.

53. In 1988, Mr Barnard also applied to the Trade Marks Registry to remove the second trade mark. He failed before the Registrar on the ground that he was not a "person aggrieved" under the then trade marks legislation and also on the merits of his case: see the decision in Bach Flower Remedies Trade Mark [1992] RPC 439. In his decision, the Registrar said that there was "little doubt that the marks BACH and marks incorporating BACH indicate goods from the Bach Centre" and that "the evidence found in these proceedings confirms that the mark BACH FLOWER REMEDIES indicates a connection with goods from the Bach Centre" (see at 450 lines 35 and 36 and at 453 lines 24 and 25). Mr Barnard, who conducted that application in person, did not appeal. It appears that during the argument, Mr Barnard said that he was not challenging registration under Class 5, but only under Class 16.

54. Further, from about 1989, the respondent's trade mark agents threatened proceedings for infringement of registered trade mark against a number of people seeking to prevent them selling products using the name "Bach", in relation to Remedies prepared in accordance with the recipes of Dr Bach, or stocking the same. They also issued warnings stating that genuine Bach Flower Remedies "originate with the Dr Edward Bach Centre" and that "The Bach Centre alone are the true successors of the Doctor's work and sole producers of the genuine Bach Flower Remedies". Further, they objected to alternative medicine organisations using the words "Bach" or "Bach Flowers" in connection with their literature advertising their courses.

55. This attitude can be contrasted with the position 20 years ago. Thus in December 1977, Mrs Weeks wrote in the Newsletter that she and the Bach Centre "would suggest that patients needing the perfect Bach Remedies should contact a practitioner who has made or obtained the Remedies prepared in the simple natural way as Dr Bach laid down".

56. To complete the picture on this aspect it is right to mention that, in the earlier proceedings, Mr Ramsell said:

57. "I and the Bach Centre cannot and do not seek to prevent others applying the teaching of Dr Bach commercially" (at [1992] RPC 439 at 448 lines 49-50).

58. To the same effect, in the instant proceedings, Mr Wilson a director of Nelsons said in his evidence that the respondent recognised:

59. "that it is legitimate for others to make reference to Dr Bach and his discoveries, in particular where products are made according to Dr Bach's methods. [The respondent has] no wish to prevent use of descriptive phrases such as "prepared in accordance with Dr Bach's directions" as long as the manner of such use does not give rise to a likelihood of buyers confusing that product with Bach Flower Remedies [by which he means the

respondent's goods] for example by an undue emphasis of the word "Bach". For example, Nelson's has no objection to the label currently used by [the applicant] which states "a flower essence prepared according to the original directions of Dr Edward Bach".

60. The retail market for the Remedies: the respondent, Nelson's and the applicant

61. During the mid-1960's, the Bach Centre started appointing retailers to distribute the Remedies made by it. At the time of the hearing before the Registrar in 1991, the respondent had "some 900 outlets in the UK". The annual turnover of the Bach Centre had grown from about "74,000 in 1978/79 to some "1.7m in 1988/89.

62. Since that time, the market in the Remedies manufactured by the respondent has increased substantially. The annual turnover of the Bach Centre for the year 1996/97 was about "3.75m (almost all of which was attributable to the Remedies or the tinctures). The Remedies made by the Bach Centre are available at Boots, Lloyds, Holland & Barratt, Selfridges, Harrods and around 5,000 independent pharmacies and health food shops. The Remedies made by the Bach Centre and Nelsons are currently marketed in distinctive 10ml brown glass cylindrical bottles with an octagonal black plastic screw top, which contains a glass pipette which protrudes downwards into the Remedy; protruding upwards out of the lid, there is a round topped, hollow orange rubber cylinder; if this rubber is squeezed and released before the lid is removed, the Remedy will be sucked up into the pipette, and will consequently be ready for dispensing when the lid is removed together with the pipette and rubber. Most of the brown bottle is covered by light yellow sticky paper which contains both "BACH" in dark green in the script, and, in lighter green, the roundel device with the flower and "BACH FLOWER REMEDIES". The label also contains the name of the particular Remedy. The lid is surrounded by an adhesive plastic wrapper with several markings "BACH" in green in the script.

63. Boxes containing a number of bottles of different Remedies produced by the Bach Centre or by Nelsons have been available for about fifteen years. These boxes are marked with the "BACH" in the distinctive script, and also with the roundel device. More recently, the Bach Centre or Nelsons have devised a simple wooden shelving display system, with forty compartments for the thirty-eight Remedies and the Rescue Remedy. The system, which is devised to be put on the wall of retail outlets, contains the words "BACH FLOWER REMEDIES" prominently at the top.

64. Nelsons have produced a leaflet about the Remedies, which is, as I understand it, available at most of the retail outlets who supply the Remedies made by Nelsons. The leaflet contains photographs of the 38 Remedies in the current bottles used by Nelsons. The leaflet also contains the "BACH" script mark and the roundel device in two prominent places (as well as the signature mark being clearly visible on the photographs of the bottles). The leaflet states that:

65. "The Bach Flower Remedies... are the original flower remedies made according to the exact traditions of Dr Edward Bach... [and that they] were created by a Harley Street Doctor, Edward Bach, in the 1930's."

66. It then goes on to explain briefly the purpose of the Remedies, and mentions the Bach Centre "where Dr Bach lived and worked and discovered his healing flowers". The leaflet goes on:

67. "These same flower locations are still used in the preparation of the Bach Flower Remedies by the present custodians."

68. The leaflet also sets out a number of books and cassettes which provide "further information on Bach Flower Remedies", and they include many of the books to which I refer below.

69. Between about 1950 and about 1975, products from the Bach Centre were sold in clear glass bottles with round black plastic screw lids, whose labels were headed "The Bach Remedies" identified the Remedy, and, at the bottom, referred to "The Dr Bach Centre" giving its address. Between about 1975 and 1985, the labels were substantially the same, but the glass of the bottles was changed to its current brown, and the lid was like the current lid (i.e. octagonal rather than round and containing the pipette system). During the second half of the 1980's, the label was changed so that it was headed "Bach Flower Remedies" and, at the bottom it also had

"BACH FLOWER REMEDIES", with the signature device. From the early 1990's, the label was revised to its current simpler form, and, for the first time, the plastic was stuck over the lid.

70. From about 1950 to the mid-1970's, Nelsons marketed the Remedies, as manufactured at the Bach Centre, also in small bottles but under their own labels. The only reference to the source or nature of the remedy, other than the identification of the relevant flower, was "(Bach)" after the name of the flower.

71. The applicant started marketing its Remedies in 1988/89. Its products are sold in bottles which, while slightly longer and thinner than those of the applicant, also hold 10ml in volume. The lid system is substantially the same. The labels are different, being white and containing most prominently the name of the relevant flower, a drawing of a flower (the same on each bottle). The applicant's trade name "HEALING HERBS" appears on the label. In smaller and less distinctive writing, the applicant's bottles contain the words "A flower essence prepared according to the original directions of Dr Edward Bach". Consistently with the evidence of Mr Ramsell in the earlier proceedings, and with the evidence of Mr Wilson, the respondent does not object to this form of words being included in the applicant's current labelling. The turnover of the applicant is such that the vast majority of sales of the Remedies in this country, even today, is that of the respondent.

72. The sales of both the respondent and the applicant are derived partly through retail shops supplied by the respondent or applicant and partly by way of direct mail order from the respondent or applicant

73. Publications by the Bach Centre and others on the Remedies

74. In 1940, Nora Weeks published a book called "The Medical Discoveries of Edward Bach, Physician: What Flowers Do for the Human Body". In 1964, together with Victor Bullen, she published another book, "The Bach Flower Remedies: Illustrations and Preparations". The latter book has been republished, most recently in a new edition in 1990, when a number of changes were made both in the text and in the illustrations: in relation to the latter, drawings of the relevant plants were replaced by photographs. The introduction to the 1964 edition of the book begins with the sentence:

75. "The purpose of this book is to give in detail the two methods of preparing the Bach Remedies for those who wish to do so."

76. In the introduction to the 1990 edition, this sentence now reads:

77. "The purpose of this book is to describe the two methods used in the preparation of the Bach Remedies."

78. The preface to the 1990 edition contains an excerpt from a letter from Miss Weeks to the publisher in June 1977 in which she said that the decision had been made not to send any more books to America "for many people are preparing them from the wrong flowers and preparing them in the wrong way, and selling them as Bach Remedies... and this we cannot have".

79. In the introduction to each edition, the reader is referred to "The Twelve Healers and Other Remedies" by Dr Bach for a fuller description of the manner of manufacture, although it seems to me that there is little more in that book than there is in the 1964 or 1990 publications.

80. There is an informal index at the back of the 1964 edition of the book, and the index is divided into two parts. The first is headed "The Bach Flower Remedies", and has, albeit not in alphabetical order, entries identifying items such as the biography of Dr Bach, the boiling method, the sun method, the type of bottles to use, the dosage to apply etc.; the second part of the index relates to the individual Remedies that is, the particular flowers.

81. Miss Weeks also wrote articles in natural health magazines in the 1950's and 1960's about "The Bach Remedies".

82. I have mentioned the quarterly newsletters published from the Bach Centre. These Newsletters contained a mixture of reports (sometimes from abroad) of cases of successful administration of the Remedies, a list of the Remedies which it was appropriate to prepare at the relevant time of year and articles mainly aimed at the uninitiated. The preparations made in accordance with the discoveries of Dr Bach were referred to in the Newsletter as "Remedies", "Flower Remedies" or "Bach Remedies", and, from

the mid 1970's, "Bach Flower Remedies". During that period, reference was sometimes made (often prominently) in the Newsletter with approval to books published by third parties with the name "Bach Flower Remedies" in their titles. From time to time, a Newsletter carried a report from third parties, sometimes living in the United Kingdom and sometimes not, referring to their having prepared their own Remedies. Furthermore, the Newsletter often contained detailed instructions as to how to make the Remedies.

83. The June 1952 edition of the Newsletter included this:

84. "Some people are still inclined to think that only the Tinctures prepared by Dr Bach himself are effective, and that he imparted some of his own magnetism or healing power to them. This is not so, and to prove this, he left the preparation of some of the Tinctures to his helpers and they were used by them with the same good results. The curative power of each Remedy is unaffected by the one who prepares the Tincture or who prescribes and makes up the medicine."

85. The June 1960 edition of the Newsletter contained the following passage:

86. "Dr Bach believed that all knowledge which would benefit humanity must be given freely, so he published every detail of his findings the name and descriptions of the flowers used, the method of preparation and how to prescribe the Remedy, so that everyone would find and prepare and use them safely. He wrote simply and in few words giving the bare facts."

87. In the June 1966 edition of the Newsletter, Miss Weeks wrote:

88. "We do, of course, send the Remedies from here to every country, but we feel it would be good to know that they could be prepared by Bach practitioners themselves in their own lands".

89. To much the same effect, in the September 1967 edition, Miss Weeks wrote on behalf of the Bach Centre:

90. "More and more people are making their own Remedy Essences. We are so pleased about this. Here are answers to two questions in connection with the preparing of the Essences."

91. In the December 1977 edition, Miss Weeks wrote, under the subtitle, it should be noted; "The Preparation of Bach Flower Remedies":

92. "It has come to our notice that some people are preparing the Bach Remedies by radionic and magno-geometric methods... but these Remedies must not be called "Bach Remedies", but Flower Remedies."

93. Because he found the language used by Dr Bach slightly peculiar, Mr Barnard wrote in February 1979 a book entitled "A Guide to the Bach Flower Remedies": this has been in print ever since. He also wrote "Patterns of Life Force: A view of the life and work of Dr Edward Bach and the Discovery of the Flower Remedies" published in 1987 (reprinted in 1989). He has also written together with his wife, Martine Barnard, "The Healing Herbs of Edward Bach: An Illustrated Guide to the Flower Remedies" in 1988 (re-printed in 1995).

94. In 1990, Mrs Howard wrote a book called "The Bach Flower Remedies: Step by Step: A Complete Guide to Prescribing". This book refers to Dr Bach's "eventual discovery of the healing property of plants that had become so well-known throughout the world - the Bach Flower Remedies", and also refers to "the Bach Remedy literature". The book deals with prescribing for oneself, for others, for children, and for animals. It also has a section headed "How the Remedies are made" and points out that "the Bach Remedies are harmless and so one cannot overdose". It also sets out a number of earlier publications on the Remedies.

95. One or two other books have been put out by the Bach Centre since the mid-1980's. Thus, "Questions & Answers Clarifying the Basic Principles and Standards of the Bach Flower Remedies" was published in 1986 by the Bach Centre. It was written by Mr Ramsell and Mrs Murray. The front page contains the roundel device, the signature "BACH", and there is also "after "The Bach Flower Remedies" in the title. It sets out a number of questions relating to the Remedies together with fairly full answers.

96. Although most of the publications devoted to publicising the Remedies discovered by Dr Bach were written (until his death in 1936) by Dr Bach or (after his death) under the auspices of the Bach Centre or (since 1979) by Mr Barnard, there have been some publications which appear to have nothing

to do with either Dr Bach or the Bach Centre or Mr Barnard. Thus, in 1952, "The Bach Remedies Repertory" written by one F J Wheeler was published, the "Illustrated Handbook of The Bach Flower Remedies" by one Philip Chancellor was published in 1971, in 1974 "Introduction to the benefits of The Bach Flower Remedies" by one Jane Evans was published, and in 1976 "Dictionary of The Bach Flower Remedies" by T W Hyne Jones was published. In 1986 "An Astrological Study of the Bach Flower Remedies" was published. 97. Although these books were not published by the Bach Centre, it appears that they were all (with the exception of the last, I think) available from the Bach Centre, as was Mr Barnard's 1979 book.

98. By 1980, the information sheet supplied by the Bach Centre to retailers or prospective retailers of the Remedies, and also sent out with mail order products was headed "BACH FLOWER REMEDIES" and carried the roundel. The roundel was also contained on the Newsletter from April 1983; indeed, the writing paper used by the Bach Centre had the roundel from at least February 1983. The roundel was also used as a house mark on at least some of the books produced by the Bach Centre.

99. Other published material

100. While it would appear that Dr Bach may well have been the first person this century to publicise a specific set of remedies made from flowers, it is clear (as I have mentioned) that there are now many other flower remedies. A division of Harper Collins Publishers has produced a large book called "The Encyclopaedia of Flower Remedies" which includes among the products from Britain "Bach Flower Remedies", Bailey Essences and Herbal Remedies, and, from other countries, Living Essences of Australia, Californian Flower Essences and Canadian Flower and Gem Remedies.

101. I have also been referred to a number of more general encyclopaedias and dictionaries. Thus, the Hamlyn Encyclopaedia of Complementary Health (published in 1996) has a six page entry for "Bach Flower Remedies", summarising the nature of the Remedies, their manufacture, their purpose, and what the individual remedies are intended to treat. In the directory at the back of the encyclopaedia, reference is made to the Bach Centre, on the basis that it is a source of Bach Flower Remedies.

102. "The Alternative Dictionary of Symptoms and Cures" published in 1986 in this country, has a two page entry for "Bach Flower Remedies", which states, among other things, that "you can either make the remedies yourself or obtain them from the Dr Edward Bach Centre"; a summary of how to manufacture the Remedies is included in the book. There is a three page entry on "Dr Bach's Flower Remedies" in "Natural Remedies for Common Ailments" published in 1973 (and re-published in 1975) in this country. This book gives no guidance as to how to make the Remedies, but states that they can be obtained from the Bach Healing Centre. It makes reference to six publications, including two by Dr Bach, and the works to which I have referred by Nora Weeks and Victor Bullen. It also refers to the Newsletter.

103. I have seen a number of other such publications, but I do not propose to deal with them specifically, because they represent more of the same.

104. In 1990, the Journal of Alternative and Complementary Medicine reported on the dispute between the Bach Centre and Mr Barnard as a row between "the leading supplier of the Bach Flower remedies and other suppliers". The Journal said that the Bach Centre claimed to be "the only company producing the genuine Bach remedies".

105. I have also seen copies of the magazine "Here's Health" which ran a "Natural Products Awards" scheme, whereby readers were invited to vote for various categories of brands or ranges, one of which was "Best Brand/Range of over-the-counter Homeopathic Remedies". For 1996, there were five candidates listed, namely Bach Flower Remedies, Boots, Nelsons, New Era and Weleda, and, in the December 1996 of "Here's Health" the winner was "Bach Flower Remedies". The entry recording the winner had a photograph of four of the bottles in which the respondent markets its remedies on which the script "BACH" was clearly visible and the roundel device was rather less visible.

106. The 1993 edition of the British Homoeopathic Pharmacopoeia includes in the "List of Manufacturing Methods":

107. "Method BR9 preparation of a Bach mother tincture by the sun method.

108. Method BR10 preparation of a Bach mother tincture by the boiling method."

109. If one then turns to the relevant two entries, the two methods of manufacture are set out with some particularity.

110. I have also been provided with the monthly price list of "Chemists & Druggists" which records the monthly trade and retail prices of all sorts of different medicines (traditional as well as homeopathic) under their brand names. The products of the respondent are listed under "Bach Flower Remedies".

111. Bach Practitioners

112. Following the publication by Dr Bach of the manufacture and use of the Remedies, a number of people held themselves out as competent in making and/or prescribing the Remedies. Thus, as long ago as 1938, a lady called Olive Wilson, living in Hampstead, appears to have been offering her services as a practitioner in the administration of "Dr Bach's Healing Herbs"; she does not appear to have had any connection with the Bach Centre.

113. With the passage of time since 1940, the number of people operating as Bach Practitioners (by which, as I have mentioned, is people who prescribe the Remedies, often for a modest fee, to others, and who sometimes make their own Remedies according to Dr Bach's recipes) increased. Some of these practitioners were connected with the Bach Centre; others were not.

114. The proprietor of Gould's Pharmacy, a retail chemist shop in the NW1 postal district of London, made up his own Remedies (according to Dr Bach's recipes) for sale to the public from some time in the early 1960's until about 1985. The name Bach was used in connection with these Remedies, but it was probably not on the bottle. Further, a Dr Arthur Bailey, when treating patients in West Yorkshire made up the Remedies from the recipes in Miss Weeks's book from about 1966. He described the Remedies as "Bach Remedies" to his patients and colleagues. He also used that expression on labels on bottles of the Remedies which he made and sold to fellow practitioners between about 1978 and 1982. Later, he developed his own "Bailey Essences".

115. The Bach Remedy Newsletters contained frequent reference to Bach Practitioners, at home and abroad. It is clear, for instance, from what was said in the September 1960 issue of the Newsletter, that many of the Bach Practitioners referred to were not personally known to, or even in any way connected with, the Bach Centre. Information about the Remedies was said to "spread from one to another like the whispering of the wind". In the December 1964 issue reference is made to one Jane Evans, who is said to have "published four articles about the Bach Remedies" and is described as "one of the increasing number of Bach Practitioners who prepare their own Essences from the living flowers". Furthermore, it is inherent in the fact that the Newsletter frequently contained detailed information as to how to manufacture the Remedies that one of its major functions was positively to encourage independent, but properly informed, Bach Practitioners.

116. In the September 1975 and September 1977 editions of the Newsletter, names and addresses of certain Bach Practitioners in England were given. Furthermore, in the December 1977 edition, immediately after the passage emphasising that "Bach Remedies" could only be properly so called if they were prepared strictly in accordance with the recipes of Dr Bach, Miss Weeks wrote the following:

117. "[W]e would suggest that patients needing the perfect Bach Remedies should contact a practitioner who has made or obtained the Remedies prepared in the simple natural way as Dr Bach laid down."

118. Accordingly, up to the date of Miss Weeks's death, it is clear from the Newsletter that even the Bach Centre was content to use the expression "Bach Practitioner" to refer to anyone who manufactured or prescribed the Remedies, provided that they were made strictly in accordance with the recipes of Dr Bach. There was no question of the Centre requiring or suggesting that any one who called himself or herself a Bach practitioner would have to receive any training from the Bach Centre or would have to

obtain any Remedies from the Bach Centre, or even would have to be limited in his or her work to prescribing the Remedies, and no other remedies.

119. Neither the oral evidence I have heard nor the documents I have seen suggest that anything changed so far as the Bach Centre's attitude to Bach Practitioners was concerned for at least 10 years after the death of Miss Weeks, in 1978.

120. However, it would appear that, from about 1991, the Bach Centre objected to people calling themselves Bach practitioners, unless they had been trained at the Bach Centre. It also objected to other organisations running courses for Bach Practitioners or using the expression "Bach Flowers" in their literature. In 1991 the Bach Centre started a practitioner course, which is still running. People who successfully complete the course can thereafter become licensed Bach Practitioners (the licence being issued by the Bach Centre) but they have to renew that licence annually. Such a licence will only be granted to people who are prepared to agree that they will only prescribe the Remedies, and no other flower remedies, and that the Remedies which they prescribe can only be those produced by, or at least with the approval of, the Bach Centre. It would appear that there are currently about 400 such licensed Bach Practitioners.

121. THE ORAL EVIDENCE

122. The Survey

123. The respondent commissioned a survey of the public by the well known market research company NOP Research Group Limited ("NOP"). Over a period of five weeks during the late summer of 1997, NOP questioned a total of 9,596 people who were asked, in the first week whether they bought or used flower essences, and, if so, which one or ones. In the second week they were asked whether they were familiar with flower essences, and, if so, which ones. In the third, fourth and fifth weeks, they were asked whether they were familiar with "flower remedies" and, if so, "which brands of flower remedies are you aware of?". A total of 1,533 people who responded to the questions indicated that they were acquainted with "flower essences" (in the first two weeks or "flower remedies" in the last three weeks). Of these, a total of 215 (of whom 196 were in the last three weeks) gave answers indicative of Bach Flower Remedies in answer to the second question.

124. Particularly in relation to the interviewees who answered in the affirmative to the second question in the third, fourth and fifth weeks, it might be said that this survey provides some support for the respondent's contention that "Bach Flower Remedies" or some other expression involving the word "Bach" in relation to flower remedies or flower essences is understood by a significant proportion of the public to be a "brand name" and hence appropriate for a trade mark.

125. I am not persuaded by this argument. I should refer to the evidence of Mr John Barter, an economist and chartered accountant, who was Managing Director of National Opinion Polls Limited (an associated company or predecessor of NOP) from 1972 until 1991, was a part time non-executive director and consultant to NOP until 1997, and is still a consultant to NOP, albeit "in a minor capacity". It is plain from this summary and from his other experience that he is very knowledgeable about surveys of this sort. He said:

126. "There are strong indications despite the use of the word "brand" in [certain questions] of the Survey that many [interviewees] have had a type of product rather than a "brand" in mind when they answered with the word "Bach"."

127. I accept that evidence. Quite apart from his experience, Mr Barter struck me as a convincing witness. Further, this evidence accords with my overall assessment of the view of a number of the members of the public called to give evidence in this case on behalf of the respondent (who were in fact identified from the survey) following their cross-examination. Indeed, the evidence receives some support from examination of the answers given by interviewees to NOP. Quite apart from this, no expert evidence contradicting that of Mr Barter was called on behalf of the respondent.

128. More specifically, I was also impressed by Mr Barter's evidence as to the general unreliability of surveys of the sort conducted in the present

case. They are known as "omnibus surveys" as the interviewees are asked a wide variety of different questions based on NOP's clients's requirements. Mr Barter said: "While omnibus surveys are suitable for commercial purposes they are generally considered to be inappropriate for the purposes of legal proceedings." It is difficult to weigh the value of an answer recorded by an interviewer in circumstances such as these. One cannot assess the context, either in the physical sense or in the sense of knowing precisely what was said before the interview started or precisely what was said by the interviewee (and, possibly, the interviewer) before the crucial question is asked. Nor does one know whether the interviewee asked for clarification of the vital questions and, indeed, whether the interviewer recorded verbatim the answers given. It is by no means impossible, for instance, that some of the relevant interviewees during the last three weeks expressed some doubt about, or asked for clarification of, the precise meaning of the word "brand". Any such doubts are reinforced by the answers given in cross-examination by some of these interviewees, as discussed below.

129. Of the 215 interviewees to whom I have referred as mentioning Bach Flower Remedies (or something akin thereto) to NOP, 94 said that they were willing to be contacted by the respondent's solicitors; it appears that contact was made with 50 of them. Those 50 interviewees were screened, with a view to finding which of them were helpful to the respondent's case, and I was told by Mr Whybrow of the respondent's solicitors, that 8 refused to discuss matters, 9 appeared not to know what they meant when they used the words "Bach", and 3 were unhelpful to the respondent. The remaining 30 interviewees, were thought to be helpful to the respondent's case, and, of those, 18 were selected to give evidence for the respondent. Thus, as Mr Whybrow accepted in cross-examination, this was a "witness-gathering exercise" to find members of the public who would support the respondent's case in these proceedings.

130. The witnesses: Introductory

131. As is very common in this sort of case, the applicant and the respondent each called a large number of witnesses who were cross-examined. The witnesses may be divided into five categories. First, there were interested parties, such as Mr Barnard on behalf of the applicant, and Mr Wilson (of Nelsons) and Mrs Howard on behalf of the respondent. Secondly, there were Bach Practitioners. Thirdly, there were retailers from chemists and health food shops which (apart from department stores) are the types of retail outlets from which the Remedies are sold. Fourthly, there were members of the public. Finally, there were some witnesses who were experienced in the alternative health field.

132. Although I heard evidence from a large number of witnesses called by each side, there were also a substantial number of witness statements from individuals who were not called. I take their evidence into account, but, having read it, and having heard the cross-examination of a large number of witnesses, I do not consider that the overall picture given by the witnesses who were called and cross-examined is significantly altered as a result of reading these additional witness statements, and I have no reason to think that the overall picture would have been altered if the individuals who made them had been called.

133. The evidence of the people in the first category was of assistance in so far as it provided general information and background. However, the evidence of Mr Barnard and Mrs Howard (respectively of the applicant and the respondent) was not particularly helpful so far as the understanding of the expression "Bach Flower Remedies" or "Bach" were concerned. They were *partis pris*, and gave me the impression of being so for doctrinal, as much as for financial, reasons. Mr Barnard's evidence, in so far as it was to the effect that "Bach Flower Remedies" should not be a trade mark because it did not suggest a connection with the Bach Centre, was a little difficult to reconcile with his evidence in the earlier court proceedings before the Registrar. I did not think that Mrs Howard was reliable at least on one matter: she said that, towards the end of her life, Nora Weeks expressed the desire that the expression "Bach Flower Remedies" be in some way limited to a product from Mount Vernon. This evidence struck me as made up on the spur of the moment, and it is inconsistent with Miss

Week's clear philosophy as manifested in her writings.

134. The witnesses: Bach Practitioners

135. I turn to the Bach Practitioners called on behalf of each party. It seemed to me that the evidence of many of them as to their understanding of the expression "Bach Flower Remedies" must be treated with caution. Some of those called by the respondent had been trained at the Bach Centre since 1991, or had had fairly recent contact with the Bach Centre; they had therefore been trained by reference to, or had been influenced by, the Bach Centre's more recent line, to the effect that "Bach Flower Remedies" were to be seen exclusively as a product of the Bach Centre. Many of the Bach Practitioners called on behalf of the applicant, on the other hand, clearly felt equally strongly that the Bach Centre's attempt to monopolise the name of Dr Bach in connection with the Remedies was repugnant to his whole philosophy, and I believe that this coloured their evidence.

136. A significant majority of the Bach Practitioners who were called supported the case of the applicant in their evidence in chief, but this has to be seen in the context of the applicant having called many more Bach Practitioners than the respondent.

137. However, in the course of fairly brief cross-examination, a number of the five or six Bach Practitioners called on behalf of the respondent appeared to change their minds, and to accept that the expression "Bach Flower Remedies" was, in their view, apt to describe a remedy made in accordance with the recipes of Dr Bach. Indeed, at least one of them said that, if she saw "Bach Flower Remedy" on a bottle, she would look for the logo, namely what might be called the signature mark, and the address of the Bach Centre in order to discover the origin of the Remedy. Even the evidence of some of those who adhered to their views expressed in chief can be called into question to the extent that they were under a misapprehension as to the source of the flowers required by Dr Bach in his recipes: two of the practitioners called on behalf of the respondent appeared to believe that, in order to comply with the discoveries of Dr Bach, remedies would have to be made from flowers gathered in fields near Sotwell and identified by Dr Bach (apparently, as they thought, as extended from time to time by his successors at The Bach Centre). Further, at least some of these witnesses had not come across any source of the Remedies other than the respondent (either directly or through Nelsons).

138. It is obviously difficult to draw any sort of clear conclusion as to the views among Bach Practitioners as a whole from this evidence, particularly bearing in mind that the applicant chose to call more than the respondent, and because the respondent has been conducting a campaign over the past twelve years, and more intensively (through the courses it runs) over the past six years, to promulgate its line, which would have been particularly directed towards practitioners, as opposed to any other group of people. Bearing in mind that the only substantial commercial source of the Remedies over the past twenty years has been the respondent (or Nelsons), I was struck as to how many practitioners were currently of the view that the expression "Bach Flower Remedies" is generic in its meaning rather than operating as a badge of origin.

139. However, it would be wrong to make too much of this. First, as I have mentioned, the applicant decided to call more practitioners than the respondent, and, while this may be because there are more practitioners who support the applicant's case, I suspect (but cannot be sure) that it was because the applicant thought that the views of practitioners were more important than did the respondent. Secondly, as I have also mentioned, there is an element, possibly a strong element, of dogma in the minds of a substantial proportion of the practitioners. Indeed, there were fairly close connections between many of the practitioners called by the applicant. Thirdly, as Mr Bloch submitted on behalf of the respondent that the views of practitioners are not of central relevance to the issue before me. However, one should not make too much of that point, not merely because practitioners obviously have contact with members of the public, but because that section of the public which resorts to Bach Practitioners represents a potentially important constituent of the overall public, when considering how the word "Bach" in the context of the Remedies and how the expression "Bach Flower Remedies", are understood: they are a significant

segment of the public who know about the Remedies by a generic or trade name.

140. The witnesses: Retailers

141. As to the evidence of the retailers, some of them also appeared to be influenced by what they thought should be the right result in the present case either because they did not think it was commercially fair that someone (such as the applicant) should be able to use the same name for its products as the respondent uses and has used, or because, like some of the Bach Practitioners called by the applicant, they were influenced by what they saw as Dr Bach's philosophy. There is a further reason to doubt the evidence of some of the retail witnesses called on behalf of the applicant: while they said in their witness statements that they would understand the expression "Bach Flower Remedies" in the generic sense, and would therefore think it equally appropriate to describe the products of the applicant or of the respondent (both of which they stocked), it appears that when an employee of the respondent's solicitors went into the relevant shops and asked for a Bach Flower Remedy, the relevant witness (or an assistant in the shop) reacted as if reference was being made to the respondent's products only.

142. The effect of the evidence in chief of the retail witnesses as a totality was that, at least during the past few years, the majority of such retailers (who represented chemists shops and health food shops, which are the types of retail outlets from which the Remedies are sold) would, at any rate as a matter of first impression, understand the expression "Bach Flower Remedies" to refer to the respondent's products, rather than to the Remedies generically. This conclusion may well be attributable to the fact that the respondent called rather more retail witnesses than did the applicant. As in the case of the practitioners, it must to some extent be an open question as to whether this balance is representative or comes about as a matter of choice. I am prepared to assume that it is representative, particularly as I have real doubts about the value of the evidence of some of the applicant's witnesses in light of what happened when their shops were actually visited.

143. Cross-examination of the thirteen retail witnesses called by the respondent resulted in a significant change to my overall impression as to the understanding of the words "Bach" and "Bach Flower Remedies" in the retail trade. First, it appears pretty clear that the majority of the respondent's retail witnesses did not know about any source of the Remedies other than the respondent/Nelsons: in other words, their evidence was given in the context of believing, in effect, that there was only one commercial source for the product. It would appear that even those who knew that there might or could be another source, had never stocked any Remedies other than those produced by the Bach Centre (either directly or through Nelsons who, it will be remembered, have manufactured the Remedies from tinctures made at the Bach Centre).

144. In cross-examination, the views of such witnesses were tested mostly rather shortly, with a few questions, such as asking them what they would call the results of their own manufacture of the Remedies strictly in accordance with the recipes of Dr Bach, or (more commonly) what they would call a product made from a source other than, and unconnected with, the respondent, but strictly in accordance with the recipes of Dr Bach. Most of the respondent's retail witnesses to whom those questions were put, accepted that the proper name for such a product at least could be, and, normally, would be, "Bach Flower Remedies". Most of the respondent's retail witnesses who were asked whether they regarded the expression "Bach Flower Remedies" as "synonymous" with Remedies made in accordance with the recipes of Dr Bach, said they did. Others of such retail witnesses agreed in cross-examination that "Bach Flower Remedies" on a bottle told one what was in the bottle.

145. If one is to judge the matter by reference to the retail witnesses who gave evidence in this case, I consider that the picture after all the evidence was given is rather different from that which it was after reading the witness statements. Some of the applicant's witnesses were to a significant extent discredited by the visits to their shops to which I have already referred. However, it seems to me that by far the majority of

the respondent's were either "turned" (in the sense that they accepted that, on thinking about it a little, "Bach Flower Remedies" was really a generic expression rather than a brand name) or at least were "neutralised" (in the sense that they were unclear about the expression "Bach Flower Remedies"). It should be added that some of the respondent's retail witnesses, although perhaps a little shaken by cross-examination, did stick to their views as expressed in their witness statements. However, I do not think that that comment applies to more than three of the thirteen or so retail witnesses called by the respondent. At least one of those could be said to have been on something of a moral crusade, in that he clearly thought that the applicant would be acting immorally, in commercial terms, if it could use the expression "Bach Flower Remedies", but that does not entirely devalue his evidence: it could be said to be a manifestation of the strength of his view that "Bach" is a badge of origin. It is also right to say that a number of the retailers referred to the packaging and to the signature mark as indicating a badge of origin.

146. The questions put in cross-examination to these various retail witnesses was subjected to fairly close analysis by Mr Bloch and Mr Whittle, on behalf of the respondent, in their closing submissions. It is fair to say that their analysis does provide some ground for reconsidering the effect of the cross-examination of those witnesses. Thus, many of the respondent's retail witnesses answered affirmatively to two sequential questions which were put substantially in the following terms.

147. Is it your understanding that they are called Bach Flower Remedies because they are made in accordance with his teachings and instructions?

148. And is it right, therefore, that when you see the words "Bach Flower Remedies" used in relation to a flower remedy, if you do see it, you would expect them to be made in accordance with his teachings?"

149. Affirmative answers to those questions are heavily relied on by the applicant. However, Mr Bloch argued such positive answers take matters little further in relation to the point at issue: the fact that a witness believes that a sign indicates one thing (e.g. the nature of the product) does not mean that it does not also indicate another (such as a badge of origin). So, too, a positive answer to the question:

150. "Is it your understanding that the word "Bach" in relation to a flower remedy indicates that they are flower remedies made in accordance with his teaching and instructions?"

151. is said not to take matters much further in the absence of the word "only" in the question.

152. On the other hand, while one can argue about whether the word "synonymous" is fully understood by a witness, a positive answer to the following question, as was given in the case of some witnesses, appears to me of more undoubted significance:

153. "Would you agree with me that according to your understanding of it, the word "Bach" is synonymous with following the teaching of his methods and recipes".

154. Furthermore, given that it is said on behalf of the applicant that the name of a product is the antithesis of a trade mark, one can see why the applicant relies on the many positive answers given by witnesses to the first three types of questions I have quoted.

155. In summary in relation to the evidence of the retailers called to give evidence before me, the position would appear to be as follows. In the retail pharmacist and health food business, a substantial proportion of individual shop operators would assume that a reference to "Bach Flower Remedies" was a reference to the respondent's products rather than a generic term, at least if they did not stop to think about it. That is explicable, at least in part, because (save to a small extent in the past seven or eight years) the only supplier of Remedies to retailers has been the respondent or Nelsons. On only slightly more careful consideration, the majority of such retailers think that "Bach Flower Remedies" is not so much a badge of origin as a generic term. This would seem to be in part attributable to the fact that the expression is, as Mr Bloch and Mr Whittle themselves put it in their skeleton argument "an apt collocation of words by which to refer to flower remedies made in accordance with the teachings of Dr Edward Bach". I suspect that this also serves to explain

in part why there is a substantial minority of retailers who would, even as a matter of first impression, see the expression as having a generic meaning.

156. The witnesses: members of the public

157. The majority of members of the public who were called to give evidence in this case were called by the respondent. As I have mentioned, the members of the public called by the respondent were found pursuant to a "witness-gathering exercise" following the Survey. Many of the members of the public who gave evidence purchased the Remedies made by the respondent (or more accurately, by Nelsons) from shops, but some did not. The members of the public called by the respondent all suggested in their evidence in chief, in their witness statements, that they understood the expression "Bach Flower Remedies" or "Bach" to describe products from a particular source, which in some cases they identified as the respondent, and many of them indicated that they associated the word "Bach" with that source. However, quite apart from any other points arising as a result of cross-examination, it is clear that virtually all these witnesses knew only one source for the Remedies, namely the respondent/Nelsons.

158. One or two members of the public who gave evidence on behalf of the respondent, and who appeared to support the respondent's case were under a serious misapprehension as to the undisputed facts relating to the Remedies or thought the applicant was acting immorally in seeking to use the name "Bach" for its products. Thus some witnesses believed that, in order to be a Bach Flower Remedy, the flowers must actually be harvested and taken from particular locations identified by Dr Bach or that no one could use Dr Bach's methods except the Bach Centre.

159. Furthermore, cross-examination (normally pretty short) of the other members of the public called by the respondent, appeared to cause many, indeed most, of these members of the public to reconsider their position and to accept that the expression "Bach Flower Remedies" was apt to describe remedies made in accordance with the discoveries and recipes of Dr Bach, and that, if they wished to know the source of the Remedies which they had purchased, or wished to purchase, they would look at the name and address of the supplier on the bottle label. As one might expect, the majority of the witnesses could not describe in any detail the packaging used by Nelsons, but they did refer to it as being recognisable. This is not surprising: the bottle used by the respondent (or, more accurately, Nelsons) is pretty distinctive, in terms of its shape, size, colour, wrapping and rubber extension. Some of the witnesses specifically recalled the roundel device or the signature device.

160. My assessment of the effect of the cross-examination of the members of the public called to give evidence by the respondent, and indeed the arguments relating to the cross-examination (including the respondent's analysis of the questions and answers) are very similar to those in relation to the retail witnesses called by the respondent. However, in addition to the points I have discussed in relation to the retailers, it is right to add that it seemed to me that, in the case of the members of the public called on behalf of the respondent, cross-examination established that, as Mr Barter suggested, many witnesses had in mind a type of product rather than a brand when they used the expression "brand".

161. The Witnesses: Experts

162. Four experts were called on behalf of the respondent, but on analysis it seems to me that their evidence was of more assistance to the applicant. Mr Hanssen, a consultant to the health industry and President of the Health Food Manufacturers Association, said in cross-examination not merely that he thought that "Bach Flower Remedies" signified "things made according to Dr Edward Bach's recipes" but also agreed that if anyone made up "exact remedies according to the teachings of Edward Bach" then they would be "Bach Flower Remedies" according to his view. Similarly, Ms Miller, a health food journalist, agreed that she would recognise the Bach Centre's packaging, and if she saw in a shop something calling itself "Bach Flower Remedies", she would look to see who the manufacturer was. Ms Viner, Director of the Health Food Manufacturers Association and on the Board of the British Association of Homeopathic Manufacturers, accepted

that anything made in accordance with the recipe laid down by the Pharmacopoeia could properly be called it a Bach Flower Remedy. The evidence of a general practitioner, Dr Ratsey was rather confused in the end, but, as I understood him, he also accepted that a remedy made in accordance with Dr Bach's recipe would be a Bach Flower Remedy.

163. DISCUSSION

164. Introductory

165. As I have mentioned, the applicant relies on each paragraph of Section 3(1) of the Act, which provides:

166. "(1) The following shall not be registered -

167. signs which do not satisfy the requirements of Section 1(1),

168. trademarks which are devoid of any distinctive character,

169. trademarks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the town of production of goods or rendering of services, or other characteristics of goods or services,

170. trademarks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

171. Provided that, a trademark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.

172. ..."

173. Section 1(1) of the Act is in these terms:

174. "In this Act a "trademark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings.

175. A trademark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging."

176. Section 11(2) of the Act states:

177. "(1) A registered trade mark is not infringed by-

178. the use by a person of his own name or address,

179. the use of indications concerning the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services, or

180. the use of the trade mark where it is necessary to indicate the intended purpose of a product or service (in particular, as accessories or spare parts),

181. provided the use is in accordance with honest practices in industrial or commercial matters."

182. I should also refer to Section 47(1) of the Act which provides :

183. "(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

184. Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered."

185. The following questions have to be considered:

186. whether the trade mark was properly registerable as at the date of registration without reliance on any distinctive character which it may have acquired as a result of the use which had been made of it;

187. whether it was properly registerable on the basis of any distinctive character which it had acquired as a result of the use which had been made of it; and

188. whether it has acquired a distinctive character as a result of the use which has been made of it to date.

189. In the case of each mark, the applicant will fail if the answer to any of those three questions is in the affirmative.

190. I shall first deal with a couple of extraneous points and then I

shall turn to the arguments on the mark "Bach Flower Remedies" in relation to the Remedies (i.e. Registered Trade Mark 1,110,133, "the First Mark"). I shall then deal with the other Marks.

191. Extraneous Points

192. The applicant initially also relied on Section 3(6) of the Act, which prohibits registration of a mark "if or to the extent that the application is made in bad faith". This difficult provision (as to which see the observations of Robert Walker J in *Road Tech Computer Systems Limited -v- Unison Software (UK) Limited* [1996] FSR 805 at 816 to 818) was referred to on the basis that all the marks in question were registered with a view to suppressing legitimate use by others of the words "BACH" and "BACH FLOWER REMEDIES" in relation to flower remedies. This was said to be inconsistent with the teachings of Dr Bach, as continued after his death by his successors at Mount Vernon. It was also said to be contrary to the aims and objectives of the Trust, which, it will be recalled, was formed in 1958. The applicant contended that this argument was reinforced by the reluctance of the respondent to agree even to the signature mark and the roundel mark being subject to a disclaimer in relation to the word "Bach".

193. While I see the force of, and indeed to a substantial extent agree with, the argument that the attitude of those at the Bach Centre, who put themselves forward as the successors to Dr Bach, is pretty different from that of Dr Bach and his immediate successors, I do not see the applications to register, or the attempts to maintain the registration of, the instant marks can be said to be in bad faith. As to the terms of the Trust, they do not seem to me to take matters any further. In my judgment, the point was rightly abandoned by the applicant.

194. Equally, I consider that the respondent was right to abandon a point which it had initially taken, namely that, because the applicant was a company substantially owned and controlled by Mr Barnard, the decision of the Registrar in 1992 dismissing his application effectively operated to dispose of the applicant's case in relation to some or all of the marks before me. Mr Barnard and the applicant are different people, and, given that the Registrar concluded that Mr Barnard had no *locus standi*, it seems to me that the respondent would have faced great difficulty in pursuing any such argument.

195. I was invited at the outset by both parties to read the Registrar's decision, which, as mentioned above, is reported at [1992] RPC 439. It provided a useful source of information before the case was opened. However, neither party has relied in any significant way upon the evidence before the Registrar or upon his decision, and that seems to me to be correct. I have to decide the present case on the evidence and arguments which have been put before me.

196. The First Mark:

197. The applicant contended that "Bach Flower Remedies" is a generic term, meaning "flower remedies prepared in accordance with the teachings of Dr Bach", and as such remedies that can be prepared by anybody, they cannot, in principle, constitute a badge of origin, that is an expression indicating a particular source of the remedies.

198. In this connection, Mr Hobbs QC summarised the applicant's case in three propositions, which were:

199. The name of a product is the very antithesis of a trademark. It tells you what the product is.

200. So long as a name retains the capacity to function as the name of a product, it is ineligible for registration as a trademark.

201. The question with which the court is confronted in the present case, and which should be answered in the affirmative on the applicant's contention, is whether the word BACH retains the capacity to function as the name of a product. If it does, then, on the basis of his first two propositions, Mr Hobbs contends that the applications must succeed.

202. On the other hand, the respondent contended that (before and since 1979) the expression "Bach Flower Remedies" indicated to the public remedies which come from a particular source. In this connection, Mr Bloch submitted, and I readily accept, that the fact that many of the witnesses who, at any rate in chief, appeared to support the respondent's case were unable to state the name or identity of the source does not harm the

respondent's case. The respondent also contended that the applicant puts its case too high in the three propositions advanced by Mr Hobbs, at least in relation to the words "Bach Flower Remedies".

203. Mr Bloch and Mr Whittle gathered together a list of twenty "famous registered trade marks" which were said to demonstrate that there are marks which are commonly used by the general public in a generic sense as well as in a trade mark sense. It is quite instructive for the purposes of this case to list the marks in question. They are: Blu Tac, Coke, Durex, Filofax, Formica, Gore-Tex, Hoover, Jacuzzi, Jeep, Kleenex, Lycra, Portakabin, Portaloo, Rubik's Cube, Sellotape, Teflon, Tetra Pak, Valium, Ventolin, Xerox.

204. Save, perhaps, for two exceptions, it appears to me that none of these marks identify the precise nature or function of the articles in respect of which the marks are registered. The "Blu" merely tells one the colour of Blu Tac; the "Fil" in Filofax may show that some sort of file is involved; the "Cube" tells one that Rubik's Cube is indeed a cube but no more; the "Kleen" in Kleenex only indicates some sort of cleaning; the "Tape" in Sellotape informs one that some sort of tape is involved but that is all; and the "Pak" at least indicates that some sort of packaging is involved in Tetra Pak, and I suppose the "Tetra" would inform classically educated people that the number four was in some way involved. However, none of these marks can be said to be precisely descriptive. Probably the most descriptive are "Portakabin" and "Portaloo" which do suggest something portable, and a cabin and a lavatory respectively.

205. None of these marks can be said to be as descriptive or informative as "Bach Flower Remedies". So far as the words "Flower Remedies" are concerned, there is no problem. Indeed, no specific right is claimed in respect of them by the respondent (as is clear from the qualifications to the relevant instant registrations). They are purely descriptive and precise in that they describe a cure (often, it would seem, a holistic cure) made from flowers. It appears to me that the expression "Flower Remedies" is a generic term which has a specific meaning and in this connection it is, for instance plainly distinguishable from an expression such as "Farm Fluids" as discussed in the recent decision of Mr Michael Hart QC in *Antec International Ltd -v- South Western Chicks (Warren) Ltd* (the Times: 8th April 1998). As the judge said in that case (at page 6 of the transcript) the expression "Farm Fluids" is distinguishable from expressions such as "office cleaning" or "oven chips" which "describe... with some precision in ordinary words the goods or service in question". So too do "flower remedies".

206. The more difficult question, of course, is whether the addition of the word "Bach" renders, on the facts of this case, the expression "Bach Flower Remedies" a trade mark. There is no doubt that the evidence provides support for the applicant's basic proposition that "Bach Flower Remedies" is and has been used to mean, and understood to mean, flower remedies prepared in accordance with the recipes of Dr Bach. However, it is also clear that there is evidence to support the respondent's contention that the expression is both used to mean, and understood to mean, flower remedies from a particular source, namely the Bach Centre. Given that "Bach" is what is sometimes called a "fancy name" and that the evidence of some members of the public, practitioners and shopkeepers, and some of the printed material show that "Bach Flower Remedies" does operate, and did operate in 1979, as a badge of origin, there is no doubt that the respondent has made out a real case for maintaining the first mark.

207. Nonetheless, and not without hesitation, I have reached the conclusion that, on the evidence as a whole, the applicant succeeds on the first mark. While I am persuaded by Mr Bloch that the three propositions propounded by Mr Hobbs are perhaps somewhat too rigid, it does seem to me that they have considerable force, and at least provide useful general guidance. In that connection I derive assistance from certain passages in well-known judgments.

208. In *The Shredded Wheat Co. Ltd -v- Kellogg Co. of Great Britain Ltd* (1940) 57 RPC 137, Viscount Maugham said at 147 that:

209. "[I]t may be useful to cite the statement by Mr Justice Parker in *In*

re Gramophone Company's Application [1910] 2 Ch. 423 at page 437 since he was a master in this branch of law: "For the purpose of putting a mark on the register, distinctiveness is the all-important point, and in my opinion, if a word which has once been the name of the article ought ever to be registered as a trade mark for that article, it can only be when the word has lost, or practically lost, its original meaning. As long as the word can appropriately be used in a description of the articles or class of articles in respect of which a trade mark is proposed to be registered, so long, in my opinion, ought the registration of that word for those articles or that class of article to be refused."

210. More recently, in Philips Electronics NV -v- Remington Consumer Products (unreported), 22nd December 1997, Jacob J said this at 20-21:

211. "[Counsel] also asked me to reconsider what I said in British Sugar [1996] RPC 281:

212. "A manufacturer may coin a new word for a new product and be able to show massive use by him and him alone of that word for the product. Nonetheless the word is apt to be the name of the product and not a trade mark. Examples from old well-known cases of this sort of thing abound. The Shredded Wheat saga is a good example: [in] the Canadian case.... (1938) 55 RPC 125... Lord Russell said at 145: "A word or words to be really distinctive of a person's goods must generally speaking be incapable of application to the goods of anyone else." It is precisely because a common laudatory word is naturally capable of application to the goods of any trader that one must be careful before concluding that merely its use however substantial has displaced its common meaning and has come to denote the mark of a particular trader.

213. "[Counsel] in particular challenged the word "displace". He said it was enough that the words had come to denote the goods of a particular trader. I think this is fallacious: unless the word, when used for the goods concerned, has in practice displaced its ordinary meaning, it will not properly denote the trader's goods and none other."

214. Jacob J then referred to the facts of that case and continued at 21:

215. "Here the sign of a three headed shaver denotes such a shaver. To some if no word trade mark is used, it also suggests manufacture by Philips. However, that is because no one hitherto had made such shavers - a matter hardly to the point. As Hoffmann J said in Unilever (Stripped Toothpaste No. 2) Trademarks [1987] RPC at 19:

216. "There is in my view a similar obstacle in the path of a trader who has enjoyed a de facto monopoly of a product with a relatively simple feature chosen not as a badge of origin but on the ground that it was likely to appeal to the public. The fact that members of the public now associate that feature with its product tells one nothing about what they would think if a product with a similar feature came upon the market."

217. I conclude that the sign of a three headed shaver is incapable of distinguishing the goods of Philips from those of others and that it is devoid of distinctive character." (page 20 line 26 to page 21 line 28).

218. Mr Bloch, said that Unilever and Philips (like Interlego AG's Applications [1998] RPC 69) involved attempts to register a feature of the product as a trade mark with a view to preventing the product being manufactured by anyone else. I accept that there is that important distinction between those cases and the present case, and that it is inherently more objectionable (but not impossible) for a physical feature, as opposed to a verbal name, of an article to be registered as a trade mark for the reasons discussed in those three cases. However, it does not seem to me to follow that the reasoning in those cases simply falls to be ignored in a case such as this, merely because those cases were concerned with a physical attribute of a product.

219. Indeed, in light of the reliance by Mr Bloch on the evidence (especially in chief) of many of the respondent's witnesses, it is helpful to cite another passage from Unilever relating to names rather than physical attributes. Hoffmann J said this at 19 lines 30 to 44:

220. "There are many cases which speak of the extreme difficulty which faces a trader who produces a new article to which he attaches a descriptive name in proving that the name has acquired a secondary meaning denoting an article made by him. As Lord Davey said in Cellular Clothing

Company Ltd -v- Maxton & Murray [1899] AC 326 at 344:

221. "... the evidence of persons who come forward and say that the name in question suggests to their minds and is associated by them with the plaintiff's goods alone is of a very slender character, for the simple reason that the plaintiff was the only maker of the goods during the time that his monopoly lasted, and therefore there was nothing to compare with it..."

222. There is in my view a similar obstacle in the path of a trader who has enjoyed a de facto monopoly of a product with a relatively simple feature chosen not as a badge of origin but on the ground that it was likely to appeal to the public. The fact that members of the public now associate that feature with his product tells one nothing about what they would think if a product with a similar feature came upon the market."

223. In *British Sugar* itself, the mark in question was "Treat" and was therefore different from "Bach" in two significant respects. First, it was an ordinary, indeed (as Jacob J said) laudatory, English word, and was not (and did not involve) a proper name. Secondly, it was what is known as a "limping" mark: it was only used in conjunction with "Robertson", whereas "Bach Flower Remedies" are used without any other marks or names.

Nonetheless, the reasoning of Jacob J cannot simply be cast on one side because of these distinctions.

224. I revert to the facts in the present case.

225. One starts with the fact that Dr Bach clearly and expressly set about publicising not merely his discovery of the existence, of the Remedies, but all aspects of what a less altruistically minded person would regard as the concomitant trade secrets, namely prescription, manufacture and application. He made it clear that he intended to "give" the Remedies to the world, and, while also calling them "healers", he did describe them as "remedies".

226. After the death of Dr Bach in 1936, and until her death in 1978, Nora Weeks (together with Victor Bullen for most of that time) promulgated very much the same message from the Bach Centre but for a longer period, to a wider audience and in more frequent publications. As I have mentioned, in the Newsletter which she started publishing quarterly in the early 1950's, Nora Weeks seems to have referred frequently to the Remedies generically as "Bach Remedies": that is apparent not only from the title but also from the fact that readers of the Newsletter were encouraged to make their own Remedies or to obtain Remedies either from the Bach Centre or from reputable practitioners. I accept that some of these practitioners may themselves have acquired their Remedies from the Bach Centre, but I consider that in many cases the practitioners made their own Remedies. It also seems clear that, in 1964 when Miss Weeks and Mr Bullen published "The Bach Flower Remedies: Illustrations and Preparations", the expression "Bach Flower Remedies", both in the title and in the text, was intended to be a generic expression and was not used as any sort of badge of origin. Further, by 1977 at the latest, Nora Weeks was referring to the Remedies generically as "Bach Flower Remedies", as well as "Bach Remedies" in the Newsletter.

227. Indeed, it will be recalled that even in the last, December 1977, edition of the Newsletter before Miss Weeks's death in January 1978, she made it clear that, provided Remedies were "prepared in the simple natural way as Dr Bach laid down" they could, indeed should, be called "Bach Remedies". I do not consider that this view is in any way called into question by what Mrs Weeks wrote in her letter of June 1977: she was merely concerned to ensure that Remedies, which were manufactured or marketed on the basis of an association with Dr Bach, were prepared strictly in accordance with his recipes and not in some other way.

228. Furthermore, there is nothing in the Newsletters I have seen during the years immediately following Miss Weeks's death which showed a marked change. I have quoted from the April 1981 Newsletter which seems to have a couple of relevant passages. While I accept that they could be read in more than one way, it appears to me that they are more consistent with the expression "Bach Remedies" and "Bach Flower Remedies" being a generic term rather than a brand name. Indeed, while it is not a point that should be taken too far, it appears to me that the emphasis in the April 1981

Newsletter to potential purchasers concentrating on the Bach Centre and its address as indicating the source of origin ties in well with the evidence of many members of the public called on behalf of the respondent and cross-examined by Mr Hobbs.

229. So far as other published material is concerned, I consider that the fact that "Bach Flower Remedies" would have been understood in and before 1979 as being a generic description, rather than a badge of origin, is supported both by the specific publications such as those of F J Wheeler, Philip Chancellor, Jane Evans, T W Hyne Jones, and Mr Barnard himself, as well as by the entry on "Dr Bach's Flower Remedies" in the 1973 and 1975 editions of "Natural Remedies for Common Ailments".

230. So far as the published material since 1979 is concerned, it is perhaps rather more equivocal. Initially, the publications from the Bach Centre continued to suggest the expression "Bach Remedies" or "Bach Flower Remedies" connoted a generic product rather than a particular origin for that product, but, as one progresses through the 1980's, the emphasis shifts. Nonetheless, not even the Bach Centre was consistent in its use of the expression, as is perhaps best demonstrated by its re-publication in 1990 of "The Bach Flower Remedies: Illustrations and Preparations" by Miss Weeks and Mr Bullen, and by its publication of Mrs Howard's book in the same year in which "Bach Flower Remedies" appears to be used as a generic term. The evidence from other publications since 1979 also does not point all one way, but it seems to me that it is, once again, more consistent with the applicant's case than that of the respondent. Thus, the guides and encyclopaedias to various systems or medicines relating to complementary health tend to treat the expression "Bach Flower Remedies" as generic, as do the magazines. Against that, the respondent places emphasis on the way in which the respondent's products are listed in "Chemists & Druggists" and on the way in which "Bach Flower Remedies" is treated as the brand name of the respondent in the competition "Here's Health" competition". However, once again it is worth remarking that, although these publications are both sufficiently recent to have been written at a time when the applicant's products were on the market, the respondent and Nelsons enjoyed virtually 95% of the market, and, for what it is worth, the applicant did not use the name "Bach Flower Remedies", or indeed the word "Bach" to promote its products. Furthermore, not only does the Pharmacopoeia (of which two of the five editors are directors of Nelsons) clearly treat the expression "Bach Flower Remedies" as descriptive of the product, but the contents of Nelson's own promotional leaflet seems to use the expression more as a generic term than as a badge of origin.

231. I turn to the oral evidence. The results of the survey did not seem to me to take matters very much further for the reasons already given. I have already discussed the effect of the evidence of the large number of oral witnesses in this case. When considering such evidence, particularly in so far as it is said to assist the respondent's case, I think that it is salutary to bear in mind what Lord Russell said about similar evidence in the Canadian Shredded Wheat case (1938) 55 RPC 125 at 145 lines 25 to 40:

232. "Without analysing it in detail it may be stated that... it falls far short of establishing that in 1928, or indeed at any time, the words "Shredded Wheat" had acquired a secondary meaning which meant that the goods to which they were applied were the manufacture of the plaintiff and of no one else. The questions (couched often in the leading form) and the answers given are full ambiguity. It must be remembered that Shredded Wheat was not only the name given by the inventor to a new product which could be baked into a biscuit, but was also descriptive of the product both as to its composition and its appearance. It must also be remembered that for a lengthy period the plaintiff enjoyed a legal monopoly of making and selling in Canada the product Shredded Wheat baked into biscuits, and that with the negligible exception of some shredded wheat biscuits called Muffets, the plaintiff continued to be the sole maker of the product, baked or otherwise. In these circumstances it would be inevitable that the words "Shredded Wheat"... should become associated in Canada with the goods of the plaintiff, since many members of the public get to know that

the product Shredded Wheat was in fact the plaintiff's product. But this is far from establishing the required meaning of distinctiveness, which must carry with it the feature that the goods distinguished to the goods manufactured by a particular person and by no other.

233. At line 47, he then said that the evidence:

234. "is full of ambiguities. One is left in doubt whether a witness in speaking of Shredded Wheat refers to the baked biscuit or to the material of which it is composed; and the answers of many are inconsistent with witness really believing that the words "Shredded Wheat" necessarily indicates goods manufactured by the plaintiff exclusively and by no one else."

235. He then went on to consider specific witness, and referred at 146 line 10 to the "illuminating contribution" of a retail grocer who said:

236. "That when asked for shredded wheat he supplied the plaintiff's carton "because I have nothing else like it in the store", which can only mean because he had no one else's shredded wheat in stock."

237. In light of those observations, it appears to me that the fact that a substantial number of witnesses in each of the five categories which I have identified considered that "Bach Flower Remedies" was really a description of the product and not a badge of origin of a particular source of the product is of substantial assistance to the applicant. In my judgment, the effect of the oral evidence was that the expression "Bach Flower Remedies" is understood by the majority in each of the main categories represented by the witnesses (i.e. Bach Practitioners, Retailers, members of the public and experts in the alternative health field), to be descriptive of the Remedies generally, rather than of the Remedies as specifically made by Nelsons or the Bach Centre. In so far as there is (as I accept there to be) a significant body of persons in these categories of witness, who believe that the expression is a badge of origin, it appears to me that the weight to be given to that evidence should be discounted to a substantial extent because the only real commercial source of the Remedies up to about 1988/89 has been the respondent, and the applicant's share of the market since that date has been very slight.

238. Mr Bloch is right at least in principle, in my judgment, to warn against making too much of the fact that a member of the public (and even a retailer) can be "educated" as a result of skilful (and, it should be said, entirely honest) cross-examination to accept a proposition which, in the absence of his or her mind being directed along a particular line of thought or argument, would or might not have occurred to him or her. In the end, as Mr Bloch said, one is concerned with commercial reality, which is how individuals perceive the relevant mark in the market place, which may not be the same thing as how a witness may see the mark after a skilled, if short and simple, cross-examination. In this connection, Mr Bloch drew support from observations of Whitford J in *Imperial Group PLC -v- Philip Morris Limited* [1984] RPC 293, a passing off case, where he referred to the oral evidence before him as being:

239. "Flawed by the way and form that the question that was put. It is flawed by the fact that most of the witnesses were being asked to make a guess about something which they might not have bothered to trouble themselves on if the matter had not been put to them in the way in which it was" (310 lines 44 to 47).

240. Furthermore, Mr Bloch was also right to point out the unsatisfactory nature of relying on answers obtained in cross-examination pursuant to leading questions, about which Lord MacNaughten expressed reservations in *Payton & Company Limited -v- Snelling Lampard & Company Limited* (1900) 17 RPC 628 at 635.

241. In the first place, it would be wrong to take into account this criticism without applying it equally to the evidence given in chief. So far as the great majority of the members of the public called on behalf of the respondent are concerned, they were interviewed in the survey, and were then further interviewed in the subsequent screening process by or on behalf of the respondent's solicitors: although I know the questions asked in that process, I do not know all the circumstances of the screening, nor the answers given, or whether anything else was said to the witnesses by

or on behalf of the respondent's solicitors. Equally, once someone was selected as a witness, I do not know what input he or she had into the making of the witness statement which stood as his or her evidence. While I have no doubt whatever as to the bona fides of the respondent's solicitors (particularly having heard Mr Whybrow as a witness) it seems to me that the applicant can fairly say that, whatever criticism could be made of the nature, contents and circumstances of the questions put on its behalf, the court at least knows all those aspects of the applicant's questions, because they have been asked in court. Although the court has some information with regard to the questions and answers put by the respondent in the survey and the questions at screening, it has far less idea of the nature and circumstances of the questions which led up to the witness's proof or to how precisely the proof was compiled.

242. Quite apart from this, although Mr Hobbs asked some of the respondent's witnesses leading questions, most of those who were "turned" or "neutralised" were not, to my mind, asked questions which, either objectively or (judging from the witnesses' reactions) subjectively, took the witness along unexpected avenues of thought or conjecture; many of Mr Hobbs's significant questions were not leading ones. Mr Bloch's warnings are nonetheless by no means devoid of force in relation to this case. However, I consider that viewed overall, the majority of the respondent's witnesses who accepted in cross-examination that "Bach Flower Remedies" was a generic description should not be effectively discounted for the reasons discussed by Whitford J and Lord MacNaughten.

243. There was little independent oral evidence as to the position as at 1979, as opposed to the present day, and I accept Mr Bloch's submission that the absence of evidence should, at any rate of itself, tell against the applicant, bearing in mind that it has waited more than fifteen years before challenging the registration of the first mark: in this context see the observations of Stirling and Cozens-Hardy L.J.J. in re Chesebrough's Trade Mark "Vaseline" [1902] 2 Ch. 1 at 9 and 11 respectively. However, even taking that into account, it appears to me that if the witnesses who actually gave evidence (or similar individuals) had given oral evidence in 1979 rather than 1998, their evidence would have been, if anything, of more assistance to the applicant rather than the respondent. So far as witnesses in the second category, Bach Practitioners, are concerned, it seems to me that, in so far as any of them would have been educated by, or had connection with, the Bach Centre, they would not have been encouraged into thinking that "Bach Flower Remedies" was associated exclusively with the Bach Centre: on the contrary, they would have been more likely to have been induced to think that the expression was a generic one. As to retailers and members of the public, they would, in general, have been less aware of the Remedies, and less likely to have come across the respondent's product, because it was not so widely available. They would not therefore have been so likely to have associated it with a specific source. Furthermore, as at 1979, there was not anyone other than the Bach Centre (and Nelsons) in the general commercial market for the Remedies, whereas at the present day there is another general commercial supplier (sc. the applicant) albeit not one who has a particularly significant share of the commercial market or who uses the expression "Bach Flower Remedies". It also appears to me that, at least since 1990, there has been much less encouragement on Bach Practitioners (and indeed members of the public) to make their own Remedies than there was in 1979, and this again would suggest that the oral evidence would have been of more assistance to the applicant had it been provided in 1979 than in 1998.

244. Mr Bloch pointed out that, in 1979 the expression "Bach Flower Remedies" was far less prevalent than "Bach Remedies" or "Bach Flowers" relative to the present day. As he said, "Bach Flower Remedies" had only been adopted by the Bach Centre as a name for their products recently, and "Bach Flower Remedies" had not been used much, if at all, to describe the Remedies in the Newsletter until 1976 or so. In my judgment, there are three answers to that point. The first is that "Bach Flower Remedies" had been used as a generic term by, and with the express approval of, the Bach Centre in many books which disseminated the information to the relevant trade (i.e. the limited number of retailers who then stocked the Remedies,

Bach Practitioners and the interested public) and were reviewed and publicised in the Newsletter. Secondly, given that the Newsletter described the Remedies generically as "Bach Remedies" or "Bach Flowers" or even "Bach Flower Essences", it is unrealistic to believe that "Bach Flower Remedies" would have been used to mean, let alone understood to mean, anything other than the Remedies generically. Thirdly, that is how the Newsletter and those who wrote it treated the expression, especially in light of its approval of books which so used the expression: indeed, the Newsletter used the expression generically for two or three years before 1979.

245. Another way of arriving at the same conclusion may be as follows. Given that the words "Flower Remedies" must, even on the respondent's case, be the subject of a disclaimer in relation to the Mark "Bach Flower Remedies", it would seem a little odd if the expression "Bach Flower Remedies" could nonetheless remain on the Register in respect of the Remedies unless the word "Bach" can properly be said to be a badge of origin in respect of the Remedies: in my judgment, it would require an exceptionally strong case for a sign consisting purely of words to be registered in respect of products where a disclaimer was required in respect of each of those words in relation to the relevant products. In that connection, it appears to me that the documentary evidence (i.e. the books specifically devoted to the Remedies, other books, in so far as they were published in 1979 and the quarterly Newsletters) really speak with one voice: the name "Bach" in relation to the Remedies was used generically and not as a badge of origin. The fact that the Remedies produced by the Bach Centre were marketed as "Bach Remedies" does not call that view into question, because the term is perfectly apt to describe the product generically, and because the labels contained the name and address of the producer, which could, and indeed, I suspect, did, operate as a badge of origin. Bearing in mind the fact that there were Bach Practitioners who, judging from the documentary evidence as well as from the oral evidence, would have used the word "Bach" in connection with the Remedies generically, and that there was no supplier other than the Bach Centre (either directly or through Nelsons) of Remedies to the retail trade as at 1979, I reach the conclusion, on the evidence, that the word "Bach" as at 1979, in relation to the Remedies, would have been used and understood in a generic sense, rather than to identify specifically the Remedies marketed directly or indirectly from Mount Vernon.

246. Quite apart from this, it is to be noted that, when the first mark was registered on behalf of Mr Ramsell in 1979, it recorded "Use claimed from the year 1933". Thus, although there is a disclaimer in that registration in respect of "Flower Remedies", it does seem as if Mr Ramsell must have put forward the case for registration on the basis that the whole expression "Bach Flower Remedies" had been in currency since 1933. With all the knowledge available to Mr Ramsell in 1979, it is hard to believe that "Bach Flower Remedies" had not been used for at least some substantial number of years before the registration, even if not since 1933. Given the way in which those at Mount Vernon from the evidence appear to have used expressions such as "Bach Remedies" and "Bach Flowers" between 1950 and 1979, I find it hard to believe that they did not use the expression "Bach Flower Remedies" in the same way, viz. generically.

247. Between 1950 and 1979, there were three main sources for the Remedies, namely the Bach Centre, Keenes and Nelsons, and that it was only the products from the Bach Centre which were sold in bottles marked "The Bach Remedies". However, as I have mentioned, the expressions "Bach Flower Remedies" and "Bach Remedies", are as the respondent's counsel accept, quite capable of naturally meaning "Remedies prepared in accordance with the publicised recipes of Dr Bach" (although they could equally well be a badge of origin, at least to those who know nothing about Dr Bach). It is not, therefore, merely a matter of the expression "Bach Flower Remedies" being, as the respondent acknowledges, perfectly apt to describe the Remedies generically. The expressions "Bach Remedies" and "Bach Flowers" undoubtedly used since the early 1950's, and the expression "Bach Flower Remedies" used perhaps more intermittently until the mid-1970's appear to have been employed preponderantly in the generic sense. Indeed, taking

into account all the oral evidence I have heard and all the documentary evidence I have seen, it appears to me that from well before 1979 the expressions "Bach Remedies", "Bach Flowers" and "Bach Flower Remedies", were used to mean, and were understood to mean, the Remedies generically, and not merely the Remedies made or supplied by the Bach Centre, or made up from tinctures supplied by the Bach Centre. Additionally, the evidence seems to me to make it clear that those operating from the Bach Centre represented easily the most important single source for publicising and propagating both the Remedies and the expressions "Bach Remedies" and "Bach Flower Remedies" in the generic sense, from before 1979, at least until the mid or late 1980's.

248. In these circumstances, it seems to me that the applicant's case derives assistance from observations such as those of Lord Davey in Cellular Clothing as cited and discussed by Hoffmann J in Unilever. The applicant's case also gets help from what Warrington LJ said in Williams Ltd's Application (1917) 34 RPC 197 at 204:

249. "The danger of allowing the name given to a new article to be registered as a Trade Mark is that the article may become known and popular under that name, and other persons, though they have a right to make and sell the article, are practically debarred from doing so, because the public would refuse to buy it unless sold under the name by which they know. The owner of a Trade Mark may thus obtain a monopoly in the goods by having the exclusive right to use them."

250. (See also per Lord Selborne LC in Sugar Manufacturing Company -v- Loog (1882) 8 App Cas 15 at 27 to much the same effect).

251. Given the respondent relies upon the use by the Bach Centre of the word "Bach" or the description "The Bach Remedies" on the Remedies it marketed from 1950 until 1979 (and later), it seems to me that those observations are particularly in point, in light of the way in which Dr Bach and (after his death) those at the Bach Centre promulgated "The Bach Remedies" (and similar expressions) to indicate and publicise the generic product rather than a badge of origin.

252. Mr Bloch relied on the decision of Bennett J in Edison Storage Battery Co -v- Britannia Batteries Ltd (1931) 48 RPC 350, in which he rejected an argument that the plaintiff could not succeed in a claim in passing off, which was based on the contention that "Edison Storage Batteries" were distinctive of the plaintiff's goods; indeed, it was the plaintiff's case, apparently accepted by the judge, that "'Edison" in connection with storage batteries is a manufacturer's mark" (see at 364 lines 38 to 39). The judge accepted that "at the commencement of the business relationship... the words "Edison Storage Battery" were used descriptively, descriptively I think of a battery which embodied in it the inventions of Mr Thomas Alva Edison" (at 364 lines 45 to 51). After referring rather more fully than I (through Hoffmann J) have done, to the speech of Lord Davey in Cellular Clothing, and after considering the evidence of two witnesses in considerable detail, Bennett J held in favour of the plaintiff.

253. In my judgment, Edison provides no real assistance to the respondent. First, it is quite clear from the reading of the judgment of that case, that it turned on the special facts of the case, which were very different from those here. Secondly, neither the plaintiff nor its predecessors had at any time been involved in using or propagating the word "Edison" in connection with batteries generally: on the contrary, Bennett J said, the plaintiff had "for years" advertised its accumulators in the trade papers "under advertisements which gave prominence to the word "Edison"" (at 367 lines 44 to 45). Thirdly, as is clear from the passage which immediately follows, the plaintiff in that case was using "Edison" to characterise its batteries at a time when there were other batteries of similar or identical design and manufacture, which were being marketed by the plaintiff's various competitors under various different names (such as "Ionic", "Nife" and "ALKLUM", and "Edison" was not applied to them "in any kind of way" - at 368 line 1). Bennett J then said this:

254. "It was very largely, I think, as a result of the advertisements in that state of facts that words, which I have no doubt were as between the parties originally used descriptively, became in the trade - and that is

what matters: trade between persons wanting to buy and persons wanting to sell - distinctive of the goods which... were manufactured by the plaintiffs."

255. In the present case, the facts are very different: the respondent (together with Nelsons, with whom it has always been closely associated and to whom it has always supplied the Remedies or the tinctures) has been until 1988/89 the only commercial supplier of the Remedies to the retail trade, and, since 1988/89, by far the largest commercial supplier of the Remedies in this country. Fourthly, Edison was not a trade mark dispute, but a case involving passing off.

256. For what it is worth, I accept the submission of Mr Hobbs, on behalf of the applicant, that the attitude of the individuals running the Bach Centre over the past fifteen years or so represents a pretty radical departure from the philosophy of Dr Bach and, indeed, the philosophy embraced by his immediate successors, Nora Weeks and Victor Bullen. It seems to me that their attitude was to make the Remedies available as widely as possible. While I do not think that they would have been attracted to the idea of people "cashing in" on the Remedies, in the sense of making large profits out of manufacturing and selling them, they were certainly not concerned with ensuring that the Bach Centre was seen as the main, let alone the exclusive, source of either the manufacture or the sale of the Remedies, or that it should try and prevent other organisations from using the name "Bach".

257. Further, albeit on a rather different aspect, it does appear to me that what Lord Oliver said in *Reckitt & Colman Products Ltd -v- Borden Inc.* [1990] RPC 341 at 412 is also of some assistance to the applicant. Lord Oliver said this:

258. "The application by a trader to his goods of an accepted trade description or of ordinary English terms may give rise to confusion. It will probably do so where previously another trader was the only person in the market dealing in those goods, for a public which knows only of A will be prone to assume that any similar goods emanate from A. But there can be no cause of action in passing off simply because there will have been no misrepresentation. So application to the Defendant's goods of ordinary English terms such as "Cellular Clothing"... cannot entitle a plaintiff to relief simply because he has used the same or similar terms as descriptive of his own goods and has been the only person previously to employ that description."

259. While this is, of course, a trade mark dispute, and Lord Oliver was concerned with passing off, considerations of free speech as well as legitimate protection of commercial interests, apply in both fields. Further, it is always worth remembering in cases such as this that, even if the proprietor loses his mark, he still retains the protection which the law gives him against competitors who tried to pass off their products as his. If others make the Remedies, they should be entitled, as I see it, to market their products as "Bach Flower Remedies" in the same way as Fry J accepted that anyone who discovered the formula for the product should be entitled to market it as Angostura Bitters in *Sigert -v- Findlater* (1878) 7 Ch. D., 801 at 813. On the other hand, as he also made clear at 811, that would not entitle any such person to package, or otherwise publicise, his product so as to suggest that it was in fact the product of another (sc. the person who first marketed the product).

260. It is also relevant to refer to what by Lord Simmonds said in *Office Cleaning Services Ltd -v- Westminster Window and General Cleaners Ltd* (1946) 623 RPC 39 at 43:

261. "So long as descriptive words are used by two traders as part of their respective trade names, it is possible that some members of the public will be confused whatever the differentiating words may be."

262. After citing those words, Lord Scarman, in *Cadbury-Schweppes Pty Ltd -v- The Pub Squash Co Ltd* [1981] RPC 429 at 490 also cited with approval a further comment on that observation by Stephen J in an Australia case:

263. "The risk of confusion must be accepted, to do otherwise is to give to one who appropriates to himself descriptive words an unfair monopoly in those words and might even deter others from pursuing the occupation which the words describe."

264. Lord Scarman then went on to say:

265. "He is discussing a name; but what he says about a name may with equal force be applied to other descriptive material, if it has given to a product (or business) a distinctive character."

266. Mr Bloch also argued that the cases on which I have relied were no longer good, or at least reliable, authorities, following the passing of the Act which was intended to give effect to the Council Directive of 21st December 1988. While I accept that the Act represents a new regime, I am not persuaded that that submission is correct so far as this case is concerned. First, while one must obviously be careful of construing a new Act (particularly when it is implementing EC legislation or an EC directive) by reference to authorities or a predecessor statute, and it may be said that:

267. "all that old law has been swept away [it] does not follow the sort of concepts and safeguard provided for in the old laws... have no place under the new law. On the contrary one is bound to bump up against the same sort of problems under the new laws under other laws. Some matters are basic to any rational law of trade marks."

268. (Per Jacob J in Philips, transcript, 16 line 25 to 17 line 3). In my judgment, this is such a case.

269. However, I have so far been concentrating on cases (almost all of which were on the previous law), and consideration of Mr Bloch's submission gives a timely reminder that this case has to be decided by reference to the current law and in particular to the applicant's argument that the first mark falls foul of each of the four paragraphs of Section 3(1). I propose first to consider whether the applicant has made out its case, in light of the findings I have made, under Section 3(1)(c) of the Act, which provides, in my judgment, the applicant's strongest ground.

270. "Bach Flower Remedies" in my judgment, "consist[s] exclusively of signs or indications which may serve, in trade, to designate the kind, quality... or other characteristics of goods", both as at 1979 and as at the present time. It seems to me that this follows from the conclusions I have reached as to the effect of the oral and documentary evidence. Mr Bloch argued that some of the oral evidence, and much of the documentary evidence, did not relate to "trade". So far as the oral evidence to which that point is directed, it is the Bach Practitioners. As I have already said, most of them have patients and friends for whom they prescribe the Remedies, and it therefore appears to me that the way such Practitioners use the word "Bach" and "Bach Flower Remedies" is of at least some significance, because their patients and friends are the sort of members of the public who would be potentially particularly interested in the Remedies on the market. So far as the documentary evidence is concerned, the books and Newsletters publicising the Remedies, and to which I have referred, obviously must influence the state of mind of those who read them, which must include many members of the public and retailers who are interested in alternative medicine.

271. So far as Section 3(1)(a) of the Act is concerned, this takes one to Section 1(1), and therefore one has to consider whether the first mark is a "sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings". The question of distinctiveness under the Act is one of fact, as Jacob J explained in British Sugar. In the sense that there are members of the public and retailers, who (even after Mr Hobbs's cross-examination) see the expression "Bach Flower Remedies" and the word "Bach" as badges of origin, it could be said that the expression and word are "capable" of distinguishing the respondent's Remedies from those produced by others. On the other hand, given the way in which the expression "Bach Flower Remedies" and the word "Bach" are and have been used and understood, there must be a powerful argument for saying that, in common with the robust approach of Jacob J in Philips, I should find against the respondent under Section 3(1)(a) as well. In the circumstances of this case, I do not think it is necessary to resolve that conundrum in light of the fact that I have found in favour of the applicant under Section 3(1)(c).

272. So far as Section 3(1)(b) of the Act is concerned, much the same sort

of considerations apply, in light of the evidence of some of the witnesses and the contents of some of the documents in the present case, and also in light of the fact that Jacob J relied on it also in Philips. For the same reasons as in relation to paragraph (a), I do not need to decide the point.

273. For the same reasons, it is unnecessary for me to decide whether the applicant succeeds on Section 3(1)(d) of the Act. However, I will nonetheless express a view on the point. I note that the word "exclusively" in that paragraph governs what the sign or indication consists of, and does not govern the word "customary". Accordingly, I have to ask myself whether the expression "Bach Flower Remedies" had in 1979, and has today, "become customary in the current language or in the bona fide and established practices of the trade". The respondent accepts, quite rightly in my judgment, that there is evidence to show that the word "Bach" and the expression "Bach Flower Remedies" were (and indeed are) used by some people to refer to the Remedies, irrespective of whether or not they originate from the Bach Centre. The respondent, however, argues that there is insufficient evidence of such language having been or being "customary in the current language... of the trade". Assuming in the respondent's favour (but without deciding) that the words "in the trade" in Section 3(1)(d) do govern the words "in the current language", I reject the respondent's contention on this point. As at 1979, "the trade" existed on a far lower scale than it does now. If one takes "the trade" in the comparatively wide sense of including the activities of Bach Practitioners (with their patients and friends) as well as the direct market and indirect market (through Nelsons) of the Bach Centre, then it seems to me that, in light of the oral evidence and the publications to which I have referred, it is difficult to reach any conclusion other than that the first mark falls foul of Section 3(1)(d) of the Act. The public would have included friends and patients of Bach Practitioners, and many of the most interested members of the public would have read one or more of the books to which I have referred and/or the Newsletters. So too, I believe, would the retailers who stocked the Remedies. I accept that there were undoubtedly people who could be produced to establish that, at least as far as they were concerned, Section 3(1)(d) did not apply as at 1979, or indeed does not apply as at the present day (and, of course, the respondent called such witnesses, some of whom survived as helpful witnesses for the respondent after cross-examination). However, in the first place, I would rely on the fact which I have already mentioned, namely that "customary" is not governed by the word "exclusively". Secondly, I refer to the judicial comments about the value of such evidence, particularly in the context of the respondent being the only significant source of the product in question, and the fact that the first mark is at the very least as capable of being a generic name as a brand name.

274. In all these circumstances, I consider that the applicant has made out its case in relation to the first mark as at 1979 and as at 1998.

275. The other marks

276. I can dispose of the other "Bach Flower Remedies" mark (Registered Trade Mark 1,213,807) and the two "Bach" marks (Registered Trade Marks 1,377,082 and 1,377,083) shortly. Effectively for the reasons that I have already given, it seems to me that it must follow that these marks should be declared invalid. So far as the first of those marks is concerned it is limited to "Publications related to remedies produced from herbs or from flowers": if the first mark goes in respect of such remedies, I think that this mark should go in respect of publications, especially in light of the publishing history. The "BACH" marks go, effectively for the same reasons as the "Bach Flower Remedies" marks.

277. I turn, then, to the two marks which are "BACH" in the distinctive script (Registered Trade Marks 1,377,084 and 1,377,085). Given my conclusion on the four marks I have been discussing, it is clear that if these marks ("the signature marks") are to survive, it should only be on the basis that there is a disclaimer (pursuant to Section 13 of the Act) in relation to the word "Bach". I have reached the conclusion that, provided the respondent is prepared to agree to such a disclaimer, the

signature marks should be allowed to remain on the register. I have already referred to the fact that some of the witnesses who gave evidence stated that the signature marks, when found on the bottles containing the respondent's Remedies, did operate in their minds as a badge of origin. While it is obviously right to take into account the fact that this evidence suffers from the problems I have discussed, indeed relied on, in relation to the oral evidence generally, it seems to me that there is a great difference between a particular style of writing a word and the word itself, particularly in the context of the word "Bach" on the facts of the present case, and the way in which the relevant evidence was given.

278. In reaching this conclusion, I have been much assisted by consideration of the decision and reasoning of Laddie J in *Elvis Presley Trade Marks* [1997] RPC 543 at 557 to 562. In that case, having decided that "ELVIS" and "ELVIS PRESLEY" should not be on the register in respect of toilet preparations (and other products) in Class 3, he also had to consider whether "ELVIS A PRESLEY" in signature form could nonetheless be allowed to remain on the register. He decided that it could not, but an analysis of his reasoning (which, while it relates to the old law, is to a substantial extent of general application) appears to me to point to the opposite conclusion in the present case. I note that he said that "the court must start from the premise that signatures are prima facie distinctive" (558 lines 30 to 31) although, of course, as he went on to emphasise, that will by no means always be the case.

279. He explained that, in order to be registerable, the signature would still have to be "distinctive" and that such distinctiveness "must be dependant upon the particular graphic style used to write it" (559 lines 5 to 6). It is interesting to note that, even in relation to Elvis Presley's signature, Laddie J was much attracted to the contention that it should be registered, albeit with an appropriate disclaimer with regard to the words (see at 559 lines 50ff). He then went on to consider the reasons which persuaded him not to permit the signature mark to be registered, even with the disclaimer.

280. First, he said at 560 lines 8 to 9 that "on the face of it, the signature does not appear to me to be adapted to distinguish". The signature in that case was, as I understand it, the genuine signature of Mr Presley, and was therefore created as his signature, and not for the purpose of any sort of brand. While it may be that the signature mark was Dr Bach's signature, I strongly suspect that it was not: I strongly suspect that it is at best a stylised and more attractive version of how he signed his surname. Even if it was part of his signature, it does not come across as such, but more as an attractive (and intentionally attractive), if not particularly original or complicated, way of writing "Bach". Apart from anything else, the word "Bach" on its own is inappropriate for Dr Bach's signature (given that he was not a member of the House of Lords). Further, there is evidence of its use for the plain purpose of attracting the public to the product of Nelsons, the respondent for ten or fifteen years.

281. Secondly, as Laddie J pointed out, in the case before him there was no evidence "that any member of the public has learnt to treat [the signature mark] as a mark distinguishing goods as coming from a particular source" (560 lines 19-20). While, as I have said, the evidence on that aspect in the present case was flawed, it would be wrong to say that there was no evidence to such effect in the present case. On the contrary, there was some such evidence.

282. Thirdly, the catalogues used by the unsuccessful respondent before Laddie J in its promotional material, that is the catalogues for its goods, did not actually set out the signature (see at 560 lines 23ff). In the present case, the respondent's publicity material and packaging frequently relies, and has frequently relied, on the signature mark.

283. Fourthly, at 561 lines 20 to 24, Laddie J said this:

284. "I have come to the conclusion that other traders are likely, in the ordinary course of their business and without any improper motive, to desire to use the name "Elvis" or "Elvis Presley" in cursive script which is the same as or nearly resembles the script in the signature mark upon or in connection with their own goods."

285. I reach the opposite conclusion on the facts of the present case. There is nothing to suggest that any other manufacturer or supplier (whether potential or actual) of the Remedies would wish to use the script mark.

286. Lastly, Laddie J relied on the fact that in the case before him the unsuccessful respondent had failed to establish that "there is no reasonable likelihood of deception or confusion among a substantial number of persons" if the mark were registered. It has not been suggested on behalf of the applicant that the respondent in the present case has failed to satisfy that test with regard to the signature mark, and I see no reason for holding otherwise.

287. Mr Hobbs raised what (I hope he will forgive me for saying) appeared to me to be a somewhat arid point, namely whether the signature marks, as registered, extended solely to, or included, the word "Bach". In relation to that point, Mr Hobbs put forward a further argument based on the Trade Marks (Amendments) Rules 1998 (1988 SI No 925) which makes amendments to the Trade Mark Rules 1994. By virtue of Rule 4 of the 1998 Rules, Rule 5(4) of the 1994 Rules now provides:

288. "An application to register a trade mark which is a word shall be treated as an application to register that word in the graphical form shown in the application, unless the applicant includes a statement that the application is for registration of the word without regard to its graphical form."

289. By virtue of Rule 20 of the 1998 Rules, the new Rule 4 only applies to registrations made under 27th April 1998.

290. Clearly, the new Rule 4(5) does not apply to any of the instant trade marks. However, Mr Hobbs, on behalf of the applicant, relied on this new provision of the 1994 Rules as impliedly confirming his argument that any registration pursuant to an application prior to 27th April 1998 should not be taken to have been registered in respect of (or only in respect of) the graphical form shown on the Register in the absence of a statement to that effect under Section 13 of the 1994 Act.

291. As a matter of common sense, anyone seeing the signature mark on the Register would, I believe, consider that the registration was not intended to be so much of the name as of the style. As the detail of the registrations relating to the two signature marks actually refer in terms to the corresponding registration in respect of "Bach", it would be obvious to anyone conscientiously looking at the signature marks on the Register (as they expressly refer to the non-signature marks involving the same word, without any particular style) that the signature marks were intended to relate to the specific style. Given that "Bach" was a registered mark, no question of a disclaimer arose. However, because I have concluded that the "BACH" registrations should go, and that the signature registrations can remain, it is obviously appropriate, indeed necessary, that, if they are to remain, there must be a disclaimer in relation to the word "BACH".

292. I do not consider that this conclusion can be affected by consideration of the 1998 Rules. Unless there is something to support the proposition in the statute itself, I am very dubious as to whether it is appropriate to construe a statute by reference to the provisions of a statutory instrument made under it, even where it is clear the statutory instrument was being drafted at the same time as the statute. In the present case, it is obvious that consideration of the 1998 Rules must have post-dated the passing of the Act. Quite apart from this, I think that Mr Bloch and Mr Whittle are right in contending that Rule 4 of the 1994 Rules (both in its own and new form) is administrative and not substantive.

293. Finally, I turn to the two roundel marks (Registered Trade Marks 1,461,972 and 1,461,973). Mr Hobbs pointed out on behalf of the applicant that if there is no right to the exclusive use of the words "Bach Flower Remedies" (which follows from the conclusion I have reached) and no right to the flower device (which is clear from the terms of the registrations themselves) then one is simply left with the three perimeter circles, which are scarcely distinctive. He therefore contended that the roundel marks fall foul of Section 3(1)(b) of the Act. He referred to the OHIM Guidelines which suggest that there should be no registration in respect

of:

294. "Simple designs such as circles or squares [are]... devoid of distinctive character."

295. However, the paragraph goes on as follows:

296. "Where a trade mark consists of a combination of several elements which on their own would be devoid of distinctive character, the trade mark taken as a whole may have distinctive character."

297. It is true that there is nothing particularly remarkable about the roundel device taken as a whole, and that there is nothing remarkable left at all, if both the flower and the whole expression "Bach Flower Remedies" are excluded from protection. However, the roundel device is and has been used as a badge of origin for some time by the respondent; further, it has been recognised by a number of witnesses as a badge of origin. Additionally, like the signature mark, it struck me as capable of being a badge of origin. Accordingly, in my judgment, taken as a whole, the roundel device (subject to extending the disclaimer to the word "Bach") may remain on the register.

299. CONCLUSION

300. Accordingly, I conclude that:

301. both the "Bach Flower Remedies" trade marks should be removed from the register;

302. both the "BACH" registered trade marks should be removed from the register;

303. both the "BACH" trade marks in signature form can remain on the register but only provided the respondent is prepared to agree a disclaimer in relation to the word "Bach" itself;

304. both the roundel device trade marks may remain on the register, provided that the respondent agrees to the disclaimers extending to the word "Bach" as well as to the words "Flower Remedies".

305. Finally, I should not like to part with this case without thanking all four advocates for the helpful and attractive way in which this (at any rate to me), difficult case was presented.

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