

**CONSIDERATION OF COMPULSORY LICENCE APPLICATION
BY SACKER POTATOES LIMITED TO THE CONTROLLER OF
PLANT VARIETY RIGHTS ABOUT THE POTATO VARIETY
LADY ROSETTA**

Introduction

1. A compulsory licence application was submitted by Sacker Potatoes Ltd (the applicant) on 7 December 2000 pursuant to section 17 of the Plant Varieties Act 1997 (the Act) in respect of the potato variety Lady Rosetta. This application was subsequently joined with a Section 25(3) application to make written representations by Higgins Agriculture Ltd. The grounds submitted by the applicant are summarised by the applicant at Annex A. A summary of the response provided by the holder of rights in Lady Rosetta and their UK agents (Meijer/MBM) is at Annex B.

The relevant legislation

2. The following summarises those sections of the Plant Varieties Act which are most relevant to the circumstances of the present application.

3. **Section 6(1)** of the Act confers extensive rights over a protected variety. It provides that the holder of rights can prevent anyone doing any of the following acts as respects the propagating material of the protected variety without his authority, namely -

- (a) W production or reproduction (multiplication),
- (b) W conditioning for the purpose of propagation,
- (c) W offering for sale,
- (d) W selling or other marketing,
- (e) W exporting,
- (f) W importing,
- (g) W stocking for any of the purposes mentioned in paragraphs (a) - (f) above, and
- (h) W any other act prescribed for the purposes of this provision.

(2) W The holder of plant breeders' rights may give authority for the purposes of subsection (1) above with or without conditions or limitations.

Section 8

4. The exceptions to the rights provided for in section 6 of the Act are set out at section 8 of the Act. They are that plant breeders' rights shall not extend to any act done:

- (a) for private and non-commercial purposes,
- (b) for experimental purposes, or
- (c) for the purpose of breeding another variety.

Section 17

5. Section 17 of the Plant Varieties Act 1997 specifies the statutory conditions to be satisfied in any consideration by the Controller of Plant Variety Rights of a compulsory licence application. The relevant parts of Section 17 are set out below:

17. - (1) Subject to subsections (2) and (3) below, if the Controller is satisfied on application that the holder of any plant breeders' rights-

- (a) has unreasonably refused to grant a licence to the applicant, or
- (b) has imposed or put forward unreasonable terms in granting, or offering to grant, a licence to the applicant,

he may grant to the applicant in the form of a licence under this section any such rights as might have been granted by the holder.

(2) The Controller shall not grant an application for a licence under this section unless he is satisfied-

- (a) that it is necessary to do so for the purpose of securing that the variety to which the application relates-
 - (i) is available to the public at reasonable prices,
 - (ii) is widely distributed, or
 - (iii) is maintained in quality,
- (b) that the applicant is financially and otherwise in a position to exploit in a competent and businesslike manner the rights to be conferred on him, and
- (c) that the applicant intends so to exploit those rights.

Interpretation of the legislation

6. The Guide to the Plant Varieties Act 1997 explains the scope of plant breeders' rights in protected varieties. The general position provided for by section 6 of the Act is that the holder of a plant breeders' right is entitled to prevent anyone else doing certain things with propagating material of the variety without his authority. Authority may be given on whatever terms or conditions the holder of rights wishes to impose, subject to the safeguard of compulsory licensing set out in section 17. There is nothing in the Act that requires the holder of rights to issue licences to all who apply.

7. These plant breeders' rights do not extend, however, to the activities exempted by virtue of section 8 of the Act. The most relevant of these for the purposes of this application is the exception relating to experimental purposes at section subsection 8(b).

8. Section 17 of the Act enables applicants to apply to the Controller for a compulsory licence. This Section requires the Controller to over-ride the authority of the holder of rights and to license others on the Controller's own terms if the holder of rights has unreasonably refused to grant a licence or has offered or imposed unreasonable terms. The Controller has noted that the compulsory licence provisions in the 1997 Act have to be consistent with article 17 of the 1991 UPOV Convention which specifies that contracting parties (ie signatory States to the Convention) may not restrict the free exercise of the breeder's right for reasons other than of public interest.

9. In reaching a decision pursuant to Section 17(1)(a) of the 1997 Act on whether the compulsory licence application has been unreasonably refused, the Controller should have regard not only to the conduct of the holder of rights and the applicant but also to the public interest criteria at Section 17(2)(a) of the Act. At least one of these criteria must be satisfied before a compulsory licence may be granted. The Controller also notes with reference to Section 17(2)(b) and (c) that a compulsory licence may not be granted unless she is satisfied in addition that the applicant is financially and otherwise in a position to exploit the licence in a competent and businesslike manner and so intends to exploit those rights.

10. There is no dispute for the purposes of this application that the burden of proof rests on the applicant to satisfy the Controller that the relevant conditions for the grant of a licence are met.

UNREASONABLE REFUSAL (Section 17(1)(a) of the PVA 1997)

Exchanges between the main parties

11. The first documented request by the applicant for a licence was set out in its letter to C Meijer B.V. dated 16 October 2000. That letter followed one dated 13 October 2000 from [REDACTED] acting on behalf of MBM Norfolk (MBM), a trading division of MBM Produce Ltd. This stated that MBM administers the rights in Lady Rosetta in the United Kingdom and Eire. It went on to say that that C Meijer B.V. (Meijer) were the holder of rights in Lady Rosetta and noted that the applicant may have imported, conditioned for the purpose of propagation or offered for sale propagating material of the variety in 1998 and/or 1999, in contravention of the breeders right.

12. By that same letter, the applicant was served an Information Notice under Section 14 of the Act requiring them to provide certain information about the Lady Rosetta propagating material used by them and setting out the remedy [REDACTED] would seek on behalf of its client should infringement be established by a court.

13. It is relevant in that context to note that on 23 July 1999, the British Society of Plant Breeders (BSPB) wrongly advised the applicant in writing that because Lady Rosetta had been on the Common Catalogue for longer than 4 years seed could be imported and exported between Member State without the prior authority of the holder of rights. That advice was corrected in writing by BSPB in two letters to the applicant dated 6 October 2000 and 13 October 2000, drawing specific attention to the fact that the permission of the holder of rights or their agents would be required to import Lady Rosetta into the UK where it is protected by a grant of plant breeders rights.

14. The letter of 16 October from the applicant requesting a licence from Meijer post-dated the two letters from BSPB and the Section 14 Information Notice served by [REDACTED] on behalf of Meijer. The letter referred to an unfulfilled UK market for Lady Rosetta which the applicant proposed to source from a Member State where Lady Rosetta was not subject to plant breeders' rights. It further requested a licence to import seed potatoes in November 2000 for harvest in early 2001 subject to paying Meijer a "reasonable royalty, taking into account that you yourself have not had to make any investment in connection with the development and production of these particular seed potatoes which has been undertaken independently by a third party in another Member State". The letter suggested a "running royalty proportionate to the quantities actually sold in the United Kingdom" and that "we would not expect the quantities to be limited in any way in the light of the fact that consumers have in the past had difficulties in purchasing sufficient quantities of this variety". The letter also noted that breeders' rights should be exercised in accordance with the Act and articles 81 and 82 of the Treaty. The letter concluded by requiring authorisation for importation and planting of Lady Rosetta seed potatoes within 15 days, failing which the applicant would assume a Section 17 (of the Plant Varieties Act 1997) licence had been refused on an 'expedited basis'.

15. A letter from [REDACTED] dated 27 October informed the applicant that [REDACTED] was now instructed to act for Meijer as well as MBM in relation to the application made in the letter of 16 October. [REDACTED] informed the applicant that, if its client was not in a position to respond within the notional 15 day deadline, this did not indicate that Meijer had elected to grant or refuse an application under Section 17 of the Act. The letter referred again to the Information Notice enclosed with [REDACTED] letter of 13 October, to which the applicant had still not responded.

16. DLA, acting for the applicant, wrote to [REDACTED] on 3 November providing the information required under the Section 14 notice but submitting that Section 14 did not apply to that Lady Rosetta material. The information provided by the applicant indicated that they had imported 24,440 kg of Lady Rosetta seed from [REDACTED] in Germany on 22/11/99 and 75,560 kg of seed from Agricrop in Eire on 3 /3/00 (around 100 tonnes in total sourced from countries in which it has been confirmed in subsequent correspondence between the parties that Lady Rosetta is not protected by plant breeders' rights).

17. DLA submitted that the importation of this material was for experimental purposes under Section 8(b) of the Act and thus fell outwith the scope of the breeders right. DLA furthermore reserved their clients position that the breeders right may already have been exhausted (albeit with reference to the provisions of the EEC Treaty rather than the relevant provision of the Plant Varieties Act 1997).

18. The same letter of 3 November also noted that on 30 October, representatives of Meijer, the applicant and [REDACTED] had met in the Netherlands to discuss the applicant's request for a licence and that the applicant had been advised that a licence would not be granted under any circumstances. The letter from DLA noted that the applicant has made no proposals, reasonable or otherwise for the grant of a licence.

19. [REDACTED] responded to that letter on 14 November, dealing with the DLA letter of 3 November and the applicant's letter of 16 October. [REDACTED] commented on the meeting that took place on the evening of 30 October, stating that it had been arranged at the applicant's request and, so far as Meijer was concerned, its purpose was not to formally consider licensing the applicant. [REDACTED] stated in this letter that Meijer had since considered whether to license the applicant but had decided not to do so at this time.

20. The letter cited 5 reasons:

1. Meijer B.V. already had a UK agent (MBM) which distributes to the whole UK market and that a second agent would impose an undue burden and cost in administering its business;
2. their client's belief that the applicant represents a poor credit risk citing the results of a Dunn & Bradstreet search;
3. the applicant is a small company lacking in the opinion of their client the resources and reputation to develop such a variety with the large food companies in the required competent and business like manner;
4. Meijer's concern that the applicant had imported 100 tonnes of Lady Rosetta without seeking a licence which had only been sought following service of the Section 14 notice, and their belief that such

importation did not fall within the section 8(b) (experimental purposes provisions) of the Act;

5. the applicant had no involvement in the introduction of Lady Rosetta into the UK, nor in the time, effort and expense of making the variety a success.

21. It was also stated that Lady Rosetta was one of the lowest-priced protected potato varieties used by the crisping industry and that, with regard to the third reason cited in the letter, Meijer was involved in a careful program to ensure the continued high quality of the protected variety.

22. DLA responded to this letter on 17 November, noting that the applicant had been refused a licence on the above grounds (although none of these had been mentioned at the meeting on 30 October) and responding that:

1. the applicant did not wish to become a second agent, only to be granted a licence to import, stock, sell and market propagating or harvested material of Lady Rosetta;
2. the applicant has a good relationship with its bank and excellent credit facilities;
3. though small, the applicant had the technical competence and confidence of major companies in the food produce and processing industries;
4. the imports of Lady Rosetta were for experimental purposes in small scale field trials comparing yield and disease resistance of Meijer and third party produced material of Lady Rosetta;
5. the applicant could not have been involved in the introduction of Lady Rosetta in the UK because Meijer are the holder of rights.

23. The letter went on to assert that Meijer, acting through its agent MBM, had consistently restricted supplies of Lady Rosetta to customers in the UK and that it had engaged in certain practices seeking to create or strengthen a dominant position in the market for Lady Rosetta. DLA stated that its client had evidence for these assertions. It was concluded that its client had little choice but to apply for a compulsory licence application.

24. On 1 December 2000, DLA wrote to [REDACTED] enclosing a copy of its client's compulsory licence application, which had yet to be lodged with the Controller. They went on to say that unless they received reasonable written proposals on behalf of Meijer and/or MBM for the immediate grant of a voluntary licence in favour of their client before the close of business on 6 December 2000, they had instructions to file this compulsory licence application on behalf of their client. Having received no substantive response, DLA subsequently submitted a compulsory licence application on behalf of the applicant on 7 December 2000.

25. On 8th March 2001, having already seen the applicant's first round of written representations in the context of this application, [REDACTED] wrote to DLA asking them to provide confirmation on two points:

- (a) documentary evidence of their client's position that any seed was produced by or with the consent of their client, C Meijer B.V. in the Netherlands; and
- (b) confirmation of what was done with the harvest of ware potatoes produced from planting the 100 tonnes of Lady Rosetta during 1999 and early 2000.

26. The applicant responded to this letter by confirming that clarification would be provided in the further submission to the Controller. Subsequently, in its further written representations, the applicant stated that the Dutch Lady Rosetta seed potatoes used in the trials had been imported from Agricorp in Eire; and that the issue of disposal or destruction of harvested trial material "was of no particular relevance to the status of the trials themselves" and "there are circumstances in which it may be acceptable from a regulatory viewpoint for the harvested crop of such trials to be disposed of for consumption" or " (for example where susceptibility to disease is detected) where it may be necessary for the crop to be destroyed".

Controller's observations

27. For the purpose of this application, the relevant ground for the grant of a compulsory licence is section 17(1)(a) of the Act: that is, an unreasonable refusal by the holder of plant breeders' rights to grant a licence. The terms of the correspondence between the parties is such that it is clear that section 17(1)(b) of the Act does not apply because the holder of rights has refused outright to grant a licence.

28. By way of general observation on the tenor of the correspondence between the parties, the Controller notes that the applicant's approach to the holder of rights did little to facilitate an atmosphere of reasonable negotiation; one illustration of this is the applicant's immediate imposition of a deadline for the grant of a licence, coupled with an immediate reference to the prospect of a compulsory licence application, in the opening correspondence with the holder of rights. The Controller notes that the applicant cited the need to import the protected variety the following month as the reason for imposing this deadline, but the urgency on the side of the applicant arose because the applicant had initially misunderstood the operation of the Act. This was not the fault of the holder of rights.

29. The Controller also notes that the reasons offered by the holder of rights for the refusal to grant a licence in the letter of 14 November were, on the face of it, reasonable criteria by which to judge whether or not it was appropriate to grant a licence to the applicant. The guide to the 1997 Act makes it clear that a plant breeder may think it more advantageous to limit the licences granted to one or more selected growers or merchants. The Act permits the Controller to intervene in that position only insofar as permitted by Section 17 of the Act.

30. The Controller wishes to comment in particular on the concerns raised by Meijer about the import of 100 tonnes of Lady Rosetta and the applicant's subsequent response to those concerns during the course of this compulsory licence application. The applicant's stated view is that the disposal or destruction of the trial material "is of no particular relevance to the status of the trials themselves" and "that there are circumstances in which it may be acceptable from a regulatory viewpoint for the harvested crop of such trials to be disposed of for consumption ..".

31. The Controller disagrees. The scale of the experimental trial conducted by the applicant under Section 8 of the Act is surprising. The holder of rights was entitled to query the fate of the harvested material from such a large trial and, in the absence of a clear response, to conclude that the applicant could have potentially disposed of that material in breach of the holders plant breeders' rights. Whilst these events occurred after the initial refusal to provide the applicant with a licence, they presumably reinforced one of the reasons for its refusal to grant a licence as cited by the holder of rights in their letter of 14 November 2000.

Submissions of the parties

32. In addition to examining the conduct of the holder of rights in relation to the request for the grant of a licence, the Controller must also have regard to the 'public interest' criteria at Section 17(2)(a)(i), (ii) and (iii) of the Act in deciding whether the holder of rights has unreasonably refused to grant a licence to the applicant. Submissions have been received from all the parties to this application on the points arising from these criteria.

33. The applicant contends, in relation to the first criterion that the variety should be available to the public at reasonable prices, that "the public" comprises growers, potato merchants and crisp manufacturers and that the market demand for Lady Rosetta is not being met in full. The experience of Higgins Agriculture Ltd is cited to demonstrate that the holder of rights and their agents in the UK (MBM) have a policy of restricting supplies in the UK. It is also submitted that a seed producer in Europe (Strahmann) has been asked to source Lady Rosetta seed because it is not available in sufficient quantity in the UK. James Ruane Ltd, Kolak and

Snack House are also cited as examples of companies that cannot access sufficient supplies in the UK.

34. The applicant also submits that the variety is not widely distributed in that Meijer/MBM have sought to restrict multiplication of Lady Rosetta in the UK (having refused to license multiplication in Scotland) and have said they wish to concentrate multiplication in the Netherlands.

35. In relation to the final criterion that the variety must be maintained in quality, the applicant asserts with reference to Meijer's wish to concentrate multiplication of Lady Rosetta in the Netherlands that this may have far-reaching effects on the quality of the variety in the event of a localised outbreak of any of the numerous diseases to which potatoes are susceptible.

36. Higgins Agriculture Ltd, a Section 25(3) party to the compulsory licence application, has supported the points submitted by the applicant and has confirmed that the points made in relation to Higgins Agriculture Ltd are accurate.

37. Meijer/MBM reject the submission by the applicant that Lady Rosetta is not available in sufficient quantities to meet market demand and also refer in this connection to the availability of other varieties of potatoes which may be used as substitutes for Lady Rosetta. They allege that crisp manufacturers do not insist on that variety in particular. They also submit that the public comprises the UK crisp manufacturers and not growers, ware producers or ware traders. In this context, leading UK crisp manufacturers/ware suppliers are cited as examples in their representations that Lady Rosetta is available in sufficient quantities to satisfy their UK demand. It is stated that Higgins Agriculture Ltd is also supplied with sufficient seed to satisfy its contract with KP.

38. Meijer/MBM reject the evidence from James Ruane, Snack House and Kolak submitted by the applicant and have, during the course of this compulsory licence application, offered the last two companies all of the Lady Rosetta seed they require - despite them having an exclusive contractual arrangement with Higgins Agriculture Ltd to source their material.

39. It is submitted that as a Dutch company Meijer is entitled to arrange the multiplication of their variety where they please and that they have sound technical reasons for deciding their current policy of multiplication in various parts of the EU.

40. With regard to the criterion that the variety must be maintained in quality, it is submitted that Meijer/MBM have been responsible for building up and ensuring the continuing stock of high quality seed of Lady Rosetta.

The applicant's submission that its policy of concentrating seed multiplication in the Netherlands carries risk for the long term health and quality of the seed is rejected.

EVIDENCE

41. The applicant provided a letter from [REDACTED] dated 2/2/01 which states [REDACTED] was asked by other UK customers if [REDACTED] could serve them directly with seed. [REDACTED] commented in the letter that "English merchants cannot get the amount of Lady Rosetta seed, which they need to serve their customers". The letter also states that [REDACTED] gave the applicant "exclusivity for selling my seed in the UK".

42. A letter from James Ruane Ltd dated 9/2/01 states that Lady Rosetta seed "has only been available ... (1) Direct from factories on strict allocation on them receiving the ware back (2) Direct from Beesons - this source has never been prepared/able to supply me" and " (3) From Beeson's agents - they have only sold it on guaranteed buy back of the ware crop".

43. Also provided are identically worded letters from Snack House (22/01/01) and Kolak (12/2/01) stating they have "been disadvantaged over a number of years by not being able to access the variety Lady Rosetta for crisp production, other than from one supplier who is the agent for the variety in the UK" and "We now have a sole supply agreement with Higgins Agriculture Ltd and they cover our requirement with other varieties. However, we would strongly support the advertised compulsory licence application to provide us with the choice of variety supplies and suppliers".

44. The applicant also seeks to show that the Higgins Agriculture Ltd were unable to secure an additional 2000 and 3000 tonnes of Lady Rosetta in 2000 and 2001 respectively and that this demonstrates an unfulfilled market demand. The negotiations which took place between Higgins and Beesons (the latter merged with MBM last year and is to be treated as the same person for the purposes of this application) are described in detail and evidence is provided of the conditions which Beesons sought to impose for the supply of Lady Rosetta. These included precluding the supply of Lady Rosetta to existing customers of MBM/Beesons and an undertaking not to promote seed production in countries that do not have plant breeders' rights in Lady Rosetta.

45. With regard to the requirement that the variety be widely distributed, the applicant submits evidence that a request for a licence to plant seed in Scotland was refused and that Meijer/MBM wish to concentrate seed multiplication in the Netherlands. The applicant asserts that a policy of multiplying Lady Rosetta in the Netherlands is not without its problems and that they may have far reaching effects on its availability in the UK.

46. On the criterion of maintaining the variety in quality, a European Commission report of July 2000 on an audit of plant health in the Dutch potato sector is cited which noted non-compliance with plant protection precautions against *S. Endobiticum*, *Globodera* spp. and Beet necrotic yellow vein virus. Problems relating to a number of positive samples for brown rot were also noted as well as problems with ring rot and with monitoring for potato cyst nematode. The applicant asserts that the policy of Meijer to concentrate seed multiplication in the Netherlands carries with it an inherent risk for the long term health and quality of the variety which will be particularly exposed to pests and diseases which are endemic to certain geographical areas.

47. Meijer/MBM reject the allegations on the availability and distribution of Lady Rosetta. They supply four letters written during the course of this application by Frito-Lay (for Walkers crisps), [REDACTED] and the Snack Factory respectively, all of which state that there is no cause for complaint with regard to the supply of the variety. They also provide evidence on each of the companies cited by the applicant as examples of problems with the supply of Lady Rosetta.

48. On [REDACTED] Meijer/MBM have provided a Dun & Bradstreet report which they allege suggests that [REDACTED] may be in some financial difficulties. They also provide evidence of [REDACTED] offer to supply Meijer with Lady Rosetta at a dump price in support of their view that [REDACTED] may not operate a quality seed production operation.

49. Meijer/MBM submit that they had good, justifiable grounds for any refusal to supply Ruane with seed of Lady Rosetta. They cite in support of this documentary evidence relating to a MAFF investigation of Ruane's compliance with plant health legislation and go on to say that Ruane is currently being supplied with Lady Rosetta from another source.

50. They submit that Snack House had a 3 year exclusive contract with MBM to supply them with Lady Rosetta but that at the end of that period Snack House declined to maintain the exclusivity of the arrangement. Snack House are now supplied under an exclusive contract by Higgins Agriculture Ltd, and it is submitted that is why they cannot source Lady Rosetta seed from MBM. Evidence is supplied that, since this start of the current proceedings, MBM have offered to supply Lady Rosetta seed to Snack House by letter dated 23/4/01.

51. MBM also state that they have introduced KOLAK to Lady Rosetta though in 13 years of dealing with them KOLAK never indicated a preference for Lady Rosetta. Past contracts indicate that KOLAK required a choice of varieties eg Saturna, Record, Lady Rosetta, Erntestolz and Bintje.

They too have, by letter of 23/4/01, been offered Lady Rosetta seed from MBM. However, they also have a sole supply agreement with Higgins Agriculture Ltd which would prevent them sourcing Lady Rosetta seed from elsewhere.

52. With regard to the attempt by Higgins Agriculture Ltd to obtain further supplies of Lady Rosetta seed in 2000 and 2001, Meijer/MBM state that such a large request for seed could only have been met by re-allocating supplies earmarked for existing loyal customers. They state that the applicants claim that it was attempting to impose customer allocations and a division of the market is misleading and that they assemble marketing plans 4 to 5 years ahead of supply in order to meet likely customer demand. Meijer submits that Higgins estimate of its demand for increased quantities was unrealistic and that it seemed calculated simply to disrupt supplies to the usual users of Lady Rosetta.

53. It is also stated that Higgins request for seed was speculative and that, if Higgins Agriculture Ltd had not taken up this large allocation, Meijer/MBM would have been left with a large quantity of seed which could not be disposed of in the ware market for technical/quality reasons. MBM confirms that it offered Higgins Agriculture Ltd 400 tonnes of Lady Rosetta in the UK and 300 tonnes of French seed with the expectation that it could supply 1700 tonnes of UK seed and 300 tonnes of French seed by 2002. In the event Meijer/MBM and Higgins Agriculture Ltd did not reach agreement on a contract but MBM nonetheless offered 400 tonnes of Lady Rosetta, only 30 tonnes of which was purchased and only 22 tonnes uplifted and paid for.

54. Meijer/MBM reject the allegation that Lady Rosetta is not widely distributed because of their policy of concentrating multiplication in the Netherlands. They are a Dutch company and state that the Netherlands is the largest EU and world exporter of seed potatoes with a reputation for high quality. They comment on the Commission report referred to by the applicant by citing the statement in the same report that Holland has a very resourceful plant protection service that has proven its efficiency. They state that the Commission report does not suggest any need to move to a system of dispersed seed production and point out that, in any event, 60% of UK destined seed is already produced in the UK with 40% coming from the Netherlands. In 2001, Meijer/MBM have diversified seed production into France but provide evidence dating back to the note of a meeting held between Meijer and MBM on 17 November 1997 that they have avoided using Scotland because of their concerns about Lady Rosetta's susceptibility to blackleg.

Plant Health and British Potato Council figures on Lady Rosetta

55. The Controller has sought to obtain objective, independent information of the amount of Lady Rosetta grown in the UK as seed and ware crops. The seed crop data is based on information supplied by DEFRA's Plant Health Division, and the ware crop data was obtained from the British Potato Council. The figures have been provided to the parties and are at Annex C.

CONTROLLERS CONSIDERATION of SECTIONS 17(2)(a)(i) and (ii) and (iii)

56. The Controller has already commented on the conduct of the parties to this application in relation to the question whether there has been an unreasonable refusal on the part of Meijer/MBM to grant a licence to the applicant. The public interest criteria set out in section 17(2)(a) of the Act must also be taken into account by the Controller so far as this question is concerned.

57. The Controller rejects the submission of the holder of rights on the meaning of 'the public' in Section 17(2)(a)(i) of the Plant Varieties Act. The Controller's view is that 'the public' is not intended in this context to be limited to crisp manufacturers alone. The fundamental assumption underlying the plant breeders rights regime is that protected varieties should be widely available to those who grow or use them. On this basis, the experience of all of the companies referred to by the applicant is relevant to the question whether Lady Rosetta is available to the public and widely distributed.

58. The Controller notes the arguments of Meijer/MBM that other varieties may be substituted for Lady Rosetta but considers that, although this may be true, it is not relevant for the purposes of this application.

59. The applicant has sought to show that Lady Rosetta is not available to the public (S17(2)(a)(i)) or widely distributed (S17(2)(a)(ii)) in sufficient quantity by providing evidence from Georg Strahmann, James Ruane, Kolak, Snack House, and Higgins Agriculture Limited. (In relation to the additional requirement in section 17(2)(a) that the variety must be available at reasonable prices, neither the applicant or Higgins Agriculture have challenged the submission of the holder of rights that Lady Rosetta is one of the lowest priced of comparable varieties of potatoes protected by plant breeders rights.)

60. So far as [REDACTED] is concerned, the Controller notes that this is a German-based company and that its comments on the availability of Lady Rosetta in England are based on other companies in England with which it has had dealings. Other than a reference to its relationship with the applicant, none of these companies are named, however, and [REDACTED] simply states that "I have the feeling that English customers cannot get the amount of Lady Rosetta seed they need". Given the vague and anecdotal nature of this evidence, the Controller notes it but attaches very limited weight to it.

61. The Controller accepts, on the basis of the evidence submitted by Meijer/MBM, that it was not unreasonable of the holder of rights to refuse to license or supply Lady Rosetta to James Ruane if it so wished and that James Ruane is in any event supplied from elsewhere. The Controller notes that comments are made by James Ruane on the terms on which Lady Rosetta is supplied to the company. None of these have any direct relevance to the public interest criteria in section 17(2)(a) of the Act, however.

62. It also appears that Kolak and Snack House previously sourced Lady Rosetta from Meijer/MBM but have now entered into exclusive supply arrangements with Higgins Agriculture Ltd. Their letters - which are substantively identical - do not state they have been unable to obtain Lady Rosetta in sufficient quantities but state that "they have been unable to access the variety for crisp production, *other than from one supplier who are the agents for the variety in the UK*" (emphasis added). Again, that is a different issue to availability or wide distribution.

63. The Controller notes that evidence has been submitted by potato merchants and manufacturers (referred to at paragraph 47) that they have no difficulty in obtaining sufficient supplies of Lady Rosetta.

64. From the figures at Annex C, the Controller has noted a steady increase in the acreage of ware crops grown of Lady Rosetta during the period 1996-2000, and an overall increase in UK seed production over the same period. The figures largely correlate with those cited by [REDACTED]. However, the Controller recognises that these data exclude imported material and therefore provides only a partial picture.

65. In addition to the applicant's wish to import Lady Rosetta, the other example cited in the evidence presented in the course of this application relates to an alleged failure of Meijer/MBM to supply the quantity of Lady Rosetta requested by Higgins Agriculture Limited. This is relevant to both to whether Lady Rosetta is available to the public and whether Lady Rosetta is widely distributed.

66. The Controller accepts the submission of the holder of rights that Higgins request for an additional quantity of seed appears to have been speculative in the first instance. This is supported by the note of the meeting held on 28 September 1999 to discuss this request for additional seed, which records that Higgins believed that they had a potential to use up to 5000 tonnes of Lady Rosetta seed annually and that Higgins could be interested in up to 2000 tonnes Lady Rosetta seed for year 2000 and 3000 tonnes in year 2001.

67. The Controller considers that the reasons cited by Meijer/MBM for not meeting these additional, substantial requests for seed in the 2000/2001 seasons amounting to 5000 tonnes, were sufficient in the circumstances and notes that an offer was made to meet the demand in part in any event. So far as this is concerned, the Controller also notes the representations which have been made on the conditions which Meijer/MBM sought to attach to the contract with Higgins Agriculture Limited and those issues are considered separately below.

69. With regard to the submission by the applicant that Meijer/MBM have refused to licence multiplication in Scotland, this is also relevant to the question whether Lady Rosetta is available to the public and is widely distributed, since it is alleged that larger quantities of Lady Rosetta could be produced were multiplication permitted in Scotland. Meijer/MBM have stated that 60% of the UK requirement for Lady Rosetta seed is produced in the UK, with 40% coming from the Netherlands. Of the UK production, only 10% takes place in Scotland and evidence is provided as to why Meijer/MBM are reluctant to license further seed production in Scotland because of concerns about the susceptibility of Lady Rosetta to blackleg. The Controller cannot comment on whether these concerns are justified, but accepts that the evidence provided by Meijer in the form of the note of the meeting held in 1997 indicates that the concern is genuinely held and that it is legitimate.

69. So far as the question whether the variety is maintained in quality is concerned, the focus of the applicant appears to be on possible long term risks of concentrating multiplication of Lady Rosetta in the Netherlands. However, the applicant has presented no substantive evidence of current problems with maintaining the variety in quality. The phytosanitary controls imposed by the Plant Health Directive apply equally to all Member States and it would not be appropriate for the Controller to comment further on the adequacy of these controls in any individual member State.

Unreasonableness test in Section 17(1) in the light of Section 17(2)(a)

70. On the basis of the evidence submitted, the Controller considers that the applicant has failed to discharge the burden of proof which lies on it to

demonstrate that the holder of rights has unreasonably refused to grant a licence. In reaching this decision, the Controller has had regard to the general conduct of the parties and has commented in particular on the circumstances surrounding the applicant's import of Lady Rosetta into the UK against the background of Meijer's consideration of the applicant's request for a licence. The Controller has also had regard to the public interest criteria set out in Section 17(2)(a)(i) and (ii) and (iii) of the Act and is not satisfied that any of these are met as a prerequisite for the grant of a licence.

Applicant's submission on competition law

71. This application is being considered by the Controller with reference to section 17(1)(a) of the Act and the question whether the holder of rights has unreasonably refused to grant a licence to the applicant. The applicant has, however, sought to show that Meijer/MBM sought to impose unreasonable and restrictive conditions on Higgins Agriculture Ltd during the relevant negotiations between those parties and that by illustration, those same conditions might have been applied to the applicant. This line of argument would fall to be considered under section 17(1)(b) of the Act were Higgins Agriculture the applicant in this case. However, it is not; and the Controller can only take into account the experience of Higgins Agriculture in its dealings with the holder of rights insofar as it is relevant to this application.

72. The applicant also contends that the conditions which the applicant sought to impose on Higgins Agriculture represented an abuse of a dominant position contrary to Section 18 of the Competition Act 1998 and/or Articles 81 and 82 of the EC Treaty. However, the Controller has no jurisdiction to arbitrate on whether there has been an abuse of the Competition Act 1998. Nor has the applicant drawn to the attention of the Controller any relevant decision by the Director General of Fair Trading under that Act.

73. The Controller notes that Higgins Agriculture Ltd has been afforded the opportunity of making representations and/or of being heard as a consequence of their Section 25(3) application (ie as having a substantial interest in the application). However, whilst noting these arguments made in relation to Higgins so far as the public interest criteria at section 17(2)(a) of the Act are concerned, it is clear that Meijer/MBM have not sought to impose these same restrictions on the applicant.

CONTROLLER'S DECISION

74. For the detailed reasons given above, the Controller is not satisfied that the applicant has provided sufficient evidence to demonstrate that the holder of rights has unreasonably refused to grant a licence to the applicant.

In reaching this view, the Controller has had regard to the criteria in Section 17(2)(a)(i) (ii) and (iii) of the Act, at least one of which must be met to justify the grant of a compulsory licence to Sacker Potatoes Limited. The Controller therefore rejects this application for the grant of a compulsory licence.

75. Because the Controller does not intend to grant a compulsory licence for the reasons set out above, the requirements of Section 17(2)(b) and (c) have not been addressed.

76. The Controller notes that it would have been necessary to consider these conditions (relating to the applicants financial status and competence and its intention to exploit any rights conferred) had she been minded to grant a licence under section 17. However, because she does not consider the necessary public interest criteria to have been met for the grant of a licence, there is no reason to examine the evidence which has been presented by the parties relating to these matters.

77. This decision shall take effect from 1 December 2001. In accordance with Section 26(1)(c) of the Plant Varieties Act 1997, an appeal against this decision shall lie to the Plant Varieties & Seeds Tribunal as set out in Regulation 9 of the Plant Breeders Rights Regulations 1998.

78. As required by Regulation 8(13) of the Plant Breeders Rights Regulations 1998, the Controller shall publish in the Plant Varieties & Seeds Gazette, details of the decision and of the time within which and the manner in which an appeal may be brought.

Plant Variety Rights Office
31 October 2001

ANNEX A

COMPULSORY LICENCE APPLICATION FINAL REPRESENTATIONS ON BEHALF OF SACKER POTATOES LIMITED Contents

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Annexes

The Annex has been numbered by reference to the paragraph in which it appears.

Annex 15.1 Statement from [REDACTED] of Agricrop describing the process of production of Lady Rosetta variety seed potatoes by use of photo-autotrophic technology

1. Introduction

These final representations, which are submitted on behalf of Sacker Potatoes Limited. 2 Hardwick Farm Cottages, Great Casterton, Stamford, Lincolnshire PE& 4AQ ("Sacker"), are intended to summarise the principal points of the submission which have been made on behalf of Sacker in:

- (1) the Application lodged on 7 December 2000;
- (2) the Applicant's First Representations submitted on 12 February 2001; and
- (3) the Applicant's Further Representations submitted on 27 April 2001.

2. Unreasonable refusal to license

Sacker's application for the grant of a compulsory licence for the protected, variety "Lady Rosetta" ("LR") is based upon the refusal by the Rightholder and its exclusive licence MBM/Beesons (the "Agent") to grant a licence to the Applicant in circumstances which, in the Applicant's submission, are unreasonable.

3. The Rightholder and its Agent limited the quantities of UR. variety seed potatoes that they were prepared to make available ill the UK. They also sought to make the supply of LR variety subject to a number of restrictive and unreasonable conditions notably:

- (1) resale restrictions-not to resell seed;
- (2) restrictions as to the customers to whom the seed or the ware crop could be sold,
- (3) use restrictions requiring the ware crop to be sold back to the Agent;
- (4) territorial restrictions on where the seed could be multiplied

They also sought to restrict the promotion of LR variety in certain other EU Member States, notably Germany, where plant breeders' rights exist but where the LR variety is not a protected variety (please see Paragraphs 10 to 16 of the Applicant's First Representations. The combination of the limitation of quantities and the imposition of restrictive and unreasonable conditions by the Rightholder and its Agent means that there is an unfulfilled demand for LR variety seed potatoes in the UK, which the Applicant wishes to satisfy. It is

submitted that the outright refusal to grant the Applicant a licence is, in these circumstances unreasonable.

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4. **Restriction of supplies**

There has been a clear and consistent policy by -the Rightholder and its Agent to restrict supplies of *LR* seed potato to customers in the UK. We have adduced evidence of the difficulties of obtaining supplies experienced by Higgins, Snack House (Bensons), Kolak and James Ruane Limited ("James Ruane"), who together represent at least some 45% of the UK market for crisping potatoes. In connection with James Ruane, the Rightholder and its Agent have admitted refusing to supply James Ruane (please see Paragraph 11 of the Rightholder's Further Representations) but justified any such refusal on the basis that James Ruane had been "caught importing" LR seed potatoes into the UK in irregular circumstances in 1999. We do not wish to enter into a polemic over this particular situation, but simply to comment that it was obviously not easy to obtain supplies of LR seed potatoes from the Agent in the UK in the period immediately before this situation arose in 1999. Otherwise James Ruane would not have gone to the trouble and expense of importing LR seeds from elsewhere.

5. In connection with Snack House (Bensons) and Kolak; the letters written by the Agent to each of them on 23 April 2001 are entirely self-serving and give no clear undertaking of any kind by the Agent. Interestingly, these letters make no mention of the kind of onerous conditions which MBM/Beesons has sought to impose in the past. These letters have clearly been written by the Agent specifically for the purposes of these proceedings and to be read by the Controller of Plant Variety Rights.

6. Although these letters appear to demonstrate a change of attitude on the part of the Rightholder and its Agent, the offers to supply Snack House and Kolak are stated by the Rightholder and its Agent to be limited to "the Lady Rosetta seed which they [Snack House and Kolak] sensibly may require and which reasonably may be allocated from current seed production (or factored into longer term production forecasts)" - (Paragraphs 12 and 13 of the Rightholder's Further Representations). This statement must be read in the light of the experience of Higgins which had requested 2,000 tonnes for the year 2000 and was offered 400 tonnes by the Agent and what has been said by the Rightholder and its Agent in Paragraph 2S of the Rightholder's Further Representations:

"Meijer/MBM would not have been able to supply these quantities of seed]...[2,000 tonnes]... at such short notice, as it takes 4 to 5 years to plan and produce additional

quantity commercial grades of seed from mini-tubers (as already set out in Paragraph 83 and 84 of the Representations)."

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There can, thus, be no assurance that the unfulfilled demand for LR seed potatoes in the UK can, in fact, be met by the Rightholder and its Agent. Furthermore, unless the Controller grants a compulsory licence pursuant to this application, there can be no assurance that the Rightholder and its Agent will not later revert to their previous restrictive business practices.

7. It is not surprising that the Agent's own customers have been satisfied; they have received preferential treatment and apparently obtained all the LR

variety seed or ware potatoes that they have required which has given them an advantage over some of their less fortunate competitors who have been unable to obtain supplies and thus been placed at a competitive disadvantage.

8. In the Applicant's submissions, the grant of a compulsory licence is absolutely necessary to ensure that LR variety is
- (1) "available to the public...", or
 - (2) "widely distributed".

9. Substitutive varieties

There has been a great deal of debate over whether there are substitutes for LR variety in the UK. The Rightholder has submitted evidence on varieties grown outside the UK, which is not relevant to this application and information on varieties which are not commercially viable or widely distributed in the UK. In the Applicant's submission, there are currently only two commercially viable substitute varieties in the UK: "Hermes" and "Saturna"; and these varieties are not available in the crucial mid-summer period (except for old potatoes supplied out of storage which are inherently less satisfactory for quality reasons). Accordingly, the Applicant submits that the LR variety gives the Rightholder and its Agent a dominant position in the UK crisping market

10. Availability of "Lady Rosetta" variety

However, the Controller does not have to decide the issues of whether there are any suitable substitutive varieties for LR variety in the UK or whether the Rightholder and its Agent to reason of the plant breeders' rights over LR variety seed potatoes have a dominant position in the downstream markets, namely the markets for LR ware crop potatoes or for crisping potatoes. The Controller only has to decide whether LR seed potatoes themselves have been:

- (1) "made available to the public..."; or
- (2) "widely distributed",

in the UK. In the Applicant's submission, there is ample evidence that the Rightholder and its Agent have sought to restrict supplies of LR seed potatoes or made such supply subject to unreasonable conditions i.e. the imposition of restrictions which have nothing to do with the proper exploitation of plant breeders' rights and which are intended to restrict competition in downstream markets contrary to Section 18 of the Competition Act 1998.

11. The "public"/the "relevant market"

In the Applicant's submission, it is clear that when the Controller considers availability to the "public", the "public" should encompass not only crisp manufacturers but also potato growers and potato merchants. Indeed among the Agent's "satisfied customers" in the UK is William Murphy (Potatoes) Ltd which describes itself on its letterhead as "Authorised Potato Merchants" and in Paragraph 43 of the Rightholder's Further Representations Meijer and MBM refer to the need to maintain their ability to market their varieties "to reputable growers". It is evident that potato growers as well as potato merchants and crisp manufacturers must also be included in a proper definition of the "public" in this context.

12. Applicant's financial standing

The Rightholder and its Agent have attempted to disparage the Applicant's business because

it is relatively small and recently created. In the Applicant's submission, its business is in good financial standing and has good relations with its trading partners. It has submitted evidence to this effect. The Rightholder and its Agent have even gone so far as to say:

"Neither Meyer nor MBM had heard of or dealt with the Applicant previously." (Rightholder's Further Representations, Paragraph 17).

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As the Applicant is a limited company incorporated in 1997, this statement may technically be correct but it is totally misleading, the Applicant's Managing Director, [REDACTED] has been working in the potato industry since 1990 and while he was a potato stores manager for McCain Foods (GB) Limited between 1990 and 1992, he became acquainted with Rob Geers, Director of C. Meijer B.V., the Rightholder, and had regular contacts with him over this period. In fact, it was [REDACTED] previous personal acquaintance with [REDACTED] that enabled him to arrange the meeting with the representatives of the Rightholder on 30 October 2000, which is referred to in the Application (Paragraph I of the Grounds) without difficulty and quite soon after sending a letter requesting a licence. In addition, [REDACTED] has been personally acquainted for many years with [REDACTED] one of the co-founders of MBM/Beesons ("MBM" originally Standing for "Morton, Beeson, Manchett"). While [REDACTED] was employed by McCain Foods, [REDACTED] invited him several times to MBM/Beeson's annual dinners. When [REDACTED] left McCain Foods in 1997, over a business lunch together, [REDACTED] gave [REDACTED] some friendly advice on [REDACTED] future professional career in the potato industry. [REDACTED] occasionally sees [REDACTED] at industry fairs and exhibitions. So although the applicant company may not have been previously known to the Rightholder or its Agent, the Applicant's Managing Director, [REDACTED] is well-known to both and has been for many years.

13. Applicant's professional competence

The Applicant's professional competence is demonstrated by the fact that it enjoys the confidence of Frito-Lay (Pepsico), McCain Foods as well as Higgins, one of the leading potato merchants in the UK. It is submitted that the Applicant's approach to the introduction of German-grown LR seed

into the UK has always been a cautious and entirely responsible one. He verified his position with the British Society of Plant Breeders Limited and had the results of his experimental field trials tested by MAFF's Plant Health and Seed Inspectorate before seeking a licence.

14. Applicant's supply chain

The Applicant has put in place a production chain of the highest quality with mini-tubers being produced in Ireland under the supervision of the Irish Department of Agriculture and Food and with certified seed being produced in Germany under the supervision of the German regulatory authorities.

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15. Lead times

The Rightholder and its Agent state that for them "it takes 4 to 5 years to plan and produce additional quality commercial grades of seed from mini-tubers" (see Paragraph 28 of the Rightholder's Further Representations). With the use of the photo-autotrophic (PAT®) technology described in the Applicant's First Representations (Paragraph 37) the Applicant would be able to respond to increases in demand for LR variety seed much more quickly. In Annex 15,1 [REDACTED] of Agricrop explains how large quantities of commercial grade seeds could be produced from mini-plants within a period of 2½ years. This technique provides the possibility of producing an almost infinite quantity of high grade seed within this time period. The details of this technique have already been explained in Annex 37.1 of the Applicant's First Representations. The avowed ability of the Rightholder and its Agent to meet increased demands for LR variety in the UK in a period of less than 4 to 5 years is a further reason why it is "necessary" for the Controller to grant a compulsory licence pursuant to this application to ensure that the LR variety is "widely distributed" in the UK.

16. Intention to exploit the rights

In fact, the Applicant has developed a detailed business plan to enable it to supply the forecasted demand for LR variety seed in the UK which is not being currently met by the Rightholder and its Agent.

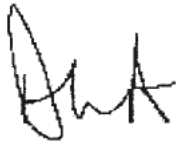
17. Remuneration

Remuneration is not in issue. The Applicant has never contested the Rightholder's entitlement to fair and reasonable remuneration for its plant breeders' rights.

18. Expedition

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The Applicant made his original request to the Rightholder for a licence on 16 October 2000. The Rightholder's refusal to grant a licence has already kept the Applicant out of the market for a complete season. We therefore request that this application be considered as a matter of urgency.

A handwritten signature in black ink, appearing to be 'DLA', is written over the word 'urgency' in the text above.

DLA

8 June 2001

COMPULSORY LICENCE APPLICATION

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POTATO VARIETY: "LADY ROSETTA"

Reference No; PVA 1340

Final Representations

On behalf of Sacker Potatoes United

ANNEX 15.1