

O-045-15

TRADE MARKS ACT 1994

IN THE MATTER OF AN APPLICATION UNDER NO 3014664
IN THE NAME OF CRISPIN JAMES WRIGLEY

AND

OPPOSITION THERETO UNDER NO 401269
BY WM WRIGLEY JR COMPANY

Background

1. Application No 3014664 has a filing date of 20 July 2013, stands in the name of Crispin James Wrigley (“the applicant”) and seeks registration of the trade mark **wrigleys drinks company** for the following goods:

Class 32:

Guarana drinks; Energy drinks; Isotonic drinks; Soft drinks; Non-alcoholic fruit drinks; Sports drinks; Carbonated non-alcoholic drinks; Concentrates for use in the preparation of soft drinks; De-alcoholized drinks; Energy drinks [not for medical purposes]; Jelly drinks; Aloe vera drinks, non-alcoholic.

2. The application was published in the *Trade Marks Journal* 2013/034 on 23 August 2013, following which notice of opposition was filed by Wm Wrigley Jr. Company (“the opponent”). The opposition was founded on the following grounds:

- Under section 5(2)(a) of the Trade Marks Act 1994 (“the Act”) based on two earlier trade marks;
- Under section 5(2)(b) of the Act based on ten earlier trade marks;
- Under section 5(3) of the Act based on ten earlier trade marks;
- Under section 5(4)(a) of the Act based on two earlier rights;
- Under section 3(6) of the Act.

3. The applicant filed a counterstatement in which, essentially, he denied the claims made. As this contains the only statement filed by the applicant, I record it here in full:

“With regard to the objection raised in opposition to our Trademark application.

We note that the primary objection is to the use of the word “Wrigley’s”. Our family name is Wrigley and this is a family business venture with a number of family members involved all with the Wrigley family name leading to the use of the name in plural.

Our legal advice to date is that a family name cannot be trademarked and we assert our right to trade in our own name.

We do fully understand that the logo or depiction of the name and colour scheme may be trademarked. To that end we have gone to lengths to ensure that our logo and the depiction of our family name bears no resemblance to any existing offerings. Having undertaken this research process we believe there are no valid grounds for objection on the basis of similar mark.

Further objection has been raised on the grounds of potential customer confusion.

We would like to note that we have established a drinks business, and we assert that we are the only “Wrigley’s” with a presence in the drinks market. The objector does not produce nor have had any drinks products in their range and do not market any drinks in the UK or Europe in their own or any related name. Our pre searches have revealed no other Wrigley’s with any

interest in the drinks market or any application for trademark protection in relation to the drinks market under Sect.32.

Our business is built on the goodwill and familiarity associated with our family name across a large target market.

As Family we are well known personalities in the realms of extreme sports, we have existing business interests in a wide range of activities including Skateboarding, Scootering, BMX Racing & Freestyle, Kart Racing and Circuit based Motorsports. It is a natural extension of our business interests to have a place in the drinks & sports drinks market.

The linking of our own family name to our business venture is our fundamental right, we believe that any opposition to our application is groundless. No confusion can exist as we are the only Wrigley's in the drinks market."

On his own admission, the applicant's knowledge of trade mark legislation is limited. I note that the applicant refers to "our logo and the depiction of our family name". I do not know to which "logo" and "depiction" he refers and cannot make any comment on whether it would be appropriate to continue that use or not. If he considers it appropriate, he would be well advised to seek professional legal advice in relation to the adoption and use of trade marks in relation to his ongoing drinks business. I emphasise that in this decision, the only mark I am considering, is the word-only mark applied for and shown in paragraph 1 above.

4. Only the opponent filed evidence. It consists of a witness statement by Pamela Bower-Nye who is Marketing Director UK & ROI of The Wrigley Company Limited which is a subsidiary of the opponent, companies which, in April 2008 were acquired by Mars, Inc. I shall refer to this evidence as appropriate within this decision.

5. The matter came before me for a hearing on 21 January 2015 when the applicant attended in person and represented himself. The opponent was represented by Mr James Setchell of Field Fisher Waterhouse LLP.

6. In its skeleton argument filed in advance of the hearing, the opponent sought to make a number of changes to its opposition. First, it withdrew its objection founded on section 5(2)(a) of the Act. That is noted. Secondly, it sought to introduce a ground of opposition based on an argument that it has a family of marks, however, no such claim was made in its notice of opposition nor was it sought at any time during the course of proceedings and I refused to allow such an argument to be introduced at such a late stage. Lastly, in respect of its claims under sections 5(2) and (3) of the Act, it indicated that it now relied primarily on just two earlier trade marks. I proceed on that basis.

7. The two earlier trade marks relied on are a UK registration and a Community Trade Mark ("CTM") as follows:

Mark	Dates	Specification relied upon
2433912 WRIGLEY	Filing date: 28 September 2006 Date of entry in register: 2 March 2007	Class 30 Confectionery; confectionery, namely chewing gum, bubble, candy and mints
CTM 218305 WRIGLEY'S	Filing date: 1 April 1996 Date of entry in register: 16 October 1998	Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, coffee substitutes, flour and preparations made from cereals, bread, biscuits, cakes, pastry and confectionery, caramels, ices; honey; treacle, yeast, baking powder, salt, mustard; pepper, vinegar, sauces (condiments), spices; ice; confectionery and chewing gum without medicinal additives, confectionery including chewing gum; sugar-coated chewing gum, chewing gum plain, non-medicated confectionery, chocolate, sugars, candy

8. An “earlier trade mark” is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

9. The opponent relies under this ground on the two marks as set out above. As can be seen from the filing dates shown, they are earlier marks within the meaning of section 6(1) of the Act. Both earlier marks had been registered for more than five years at the date the application was published and so would be subject to the proof of use provisions set out in section 6A of the Act. In his counterstatement, the applicant indicated that he sought to put the opponent to proof of use of its marks, however, he indicated that he put it to proof of use in relation to “Drinks under Section 32”. At the hearing, the applicant confirmed that he intended this to mean that he wanted the opponent to show what use of its marks the opponent had made in respect of drinks as are classified in class 32 i.e. the same goods for which his application seeks registration, however, as I pointed out to him, none of the marks relied on by the opponent are registered for any goods in class 32. The applicant did not seek to put the opponent to proof of use of its marks in relation to any other

goods and accepted that the opponent is entitled to rely on its earlier rights in respect of all the goods for which they are registered whether it has used those marks on those goods or not.

The objection under section 5(2)(b) of the Act

10. Section 5(2)(b) of the Act states:

“5(2) A trade mark shall not be registered if because-

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

11. The opponent claims that there is a likelihood of confusion between the mark applied for and its earlier marks. In determining whether there is a likelihood of confusion, I take into account the guidance provided by the findings made in earlier proceedings determined by various EU courts. The following principles, which are well established, are gleaned from their decisions in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

12. In essence, the test under section 5(2)(b) is whether there are similarities in both parties' marks and goods which, when taking into account all the surrounding circumstances, would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address factors such as the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed.

13. In its skeleton arguments, the opponent referred me to a recent decision of the Office for Harmonization in the Internal Market ("OHIM") involving the same parties and where the opponent relied on the same CTM to oppose registration by the applicant of the mark Wrigley's Drinks Company. The CTM application included the same goods as involved in this decision. Whilst the OHIM decision may have persuasive effect, I have to consider the matters before me afresh and taking into account the average consumer in the UK. This I now do.

Comparison of the respective marks

14. Whilst the opponent now relies on two earlier marks, I intend to carry out the comparison under section 5(2)(b) on the grounds of CTM 218305 only as the two earlier marks differ only in respect of the addition of the apostrophe and letter 's' in the CTM and the CTM includes all the goods for which 2433912 is registered. For ease of reference, the marks to be compared are:

Earlier mark	Application
WRIGLEY'S	wrigleys drinks company

15. Each of the respective marks is a word mark. Whilst the earlier mark is presented in plain block capitals and the application is presented in lower case letters, nothing rests on this. The earlier mark is a single word whilst the application is made up of three words. The whole of the earlier mark is the first word of the application, the only difference between them being the additional apostrophe appearing in the earlier mark which is likely to go unnoticed by the average consumer.

16. The marks are visually similar to the extent that the only or first word is the same in each case. The marks are visually different in that the words “drinks company” only appears in the applicant’s mark. The same is true from the aural comparison. They are visually and aurally similar to a reasonably high degree.

17. The word Wrigley is a surname and will be seen as such by the average consumer in the UK. The addition of the apostrophe and letter ‘s’ in the earlier mark will be seen as the possessive form of the name. Although the apostrophe does not appear in the applicant’s mark, I consider the word wrigleys will still be seen as the possessive form of the name, even though this is grammatically incorrect, as it will be taken to refer to a drinks company owned or run by a person or family named Wrigley. I consider there is reasonable degree of conceptual similarity between the respective marks.

18. As a single word, none of which is highlighted in any way, the earlier mark has no dominant elements and its distinctiveness rests in its whole. The application consists of three words and breaks down into two elements: the word ‘wrigleys’ and the words ‘drinks company’. Given that the goods for which registration is sought are drinks, the element ‘drinks company’ does no more than describe the source of those goods and is non-distinctive. The dominant and distinctive element of the application is the surname Wrigley, whether in its possessive or pluralised form, which is all but identical to the earlier mark, the absence of an apostrophe in the application, as indicated above, likely to go unnoticed by the average consumer.

The comparison of the respective goods

19. The factors to be taken into account when comparing goods have been identified in earlier judgments from the courts. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

20. The relevant factors for assessing similarity identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

21. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

22. For ease of reference the goods to be compared are:

Opponent’s specification	Applicant’s specification
Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, coffee substitutes, flour and preparations made from cereals, bread, biscuits, cakes, pastry and confectionery, caramels, ices; honey; treacle, yeast, baking powder, salt, mustard; pepper, vinegar, sauces (condiments), spices; ice; confectionery and chewing gum without medicinal additives, confectionery including chewing gum; sugar-coated chewing gum, chewing gum plain, non-medicated confectionery, chocolate, sugars, candy	Class 32: Guarana drinks; Energy drinks; Isotonic drinks; Soft drinks; Non-alcoholic fruit drinks; Sports drinks; Carbonated non-alcoholic drinks; Concentrates for use in the preparation of soft drinks; De-alcoholized drinks; Energy drinks [not for medical purposes]; Jelly drinks; Aloe vera drinks, non-alcoholic.

23. The applicant has not commented on the similarity or otherwise of the respective goods but, at the hearing, made submissions to the effect that the opponent does not market the same drinks he does. As I explained, the comparison I have to make is between the goods as registered by the opponent in its earlier mark and the goods applied for by the applicant. That comparison is on a notional basis.

24. In its notice of opposition, the opponent submitted that all of the respective goods are identical or similar. In its skeleton argument, it submitted that they are similar as the respective users are the same, they share the same nature, ingredients and trade channels and are in competition or are complementary products. At the hearing, Mr Setchell finally gave some focus to these submissions and stated that the high point of the comparison is in respect of coffee and tea. He submitted that the natures of the respective goods are highly similar and that as each of them is a drink, their purpose is the same and they will have the same users, be sold in the same outlets and through the same trade channels. He also sought to rely on the earlier mark insofar as it is registered for confectionery. He submitted that these are also similar goods to those for which the applicant seeks registration. He did so, on the basis that they are each consumed by the same users as snacks or refreshments, are sold in the same outlets and through the same trade channels and are complementary. In support of this he referred me to Ms Bower-Nye's evidence. At PBN19, page 248, is exhibited an article dated 17 February 2012 which advertises the introduction into the market of a milkshake under the mark Starburst and which is said "to mimic the flavour of the popular Starburst chew". At PBN20, pages 260-262, is exhibited advertising taken from YouTube(GB) and published on 18 May 2013. It shows a "Skittles Fruit Flavoured Milk" drink which is said to be "flavoured with the popular sweet/candy Skittles".

25. The applicant's specification covers a wide range of drinks. The opponent's coffee and tea are also drinks. From my own experience, I am aware that coffee and tea can come in many flavours e.g. caramel or mint-flavoured coffee or fruit-flavoured or herbal tea, can be served hot or cold (iced) or have other supplementary ingredients such as added vitamins or caffeine. The natures of the respective goods are the same in that they are a liquid intended to be consumed, they will have the same users and will be sold through the same channels including e.g. newsagents, takeaways, stores and restaurants with one being a substitute for the other. I consider the respective goods to be similar to a reasonable degree.

26. The applicant's specification also includes concentrates for use in the preparation of soft drinks. Whilst the nature of these goods may differ from prepared drinks as are included within the opponent's specification, they target the same end users and will be sold through the same trade channels and I consider them to be similar to a moderate degree to the opponent's coffee and tea where these are prepared drinks but similar to a reasonable degree when compared to the opponent's coffee and tea when sold as a product to be made into a drink.

27. Given my findings, I do not intend to go on to consider the similarity of the applicant's goods with confectionery.

The average consumer and the nature of the purchasing process

28. I have to take into account the average consumer for the respective goods. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to

vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

29. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

30. Each of the respective goods is a drink or a preparation for making a drink. Some of them are specified as being energy or sports drinks, however, all of them are goods which are used by the general public. They are goods which are widely available in e.g. newsagents, grocery stores, cafes or other take away establishments as well as in bars and restaurants. In stores, the goods are normally displayed on shelves and are obtained by self selection whereas in cafes and restaurants they may be displayed on shelves behind the counter or bar and may appear on menus. Even if ordered orally, there is nothing to suggest that the goods are sold in such a manner as to preclude a visual inspection. In *Simonds Farsons Cisk plc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-3/04, the Court of First Instance (now the General Court) said:

“In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant’s goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

31. Consequently, while the goods may be ordered orally in e.g. cafes and restaurants, it is likely to be in the context of a visual inspection of e.g. the bottles containing the goods prior to the order being placed. Considered overall, the selection process is likely to be predominantly a visual one, although I accept that aural considerations will also play their part. As to the level of attention the average consumer will display when selecting the goods, given that, for the most part, the cost of the goods is likely to be relatively low but bearing in mind that the average consumer will wish to ensure they are selecting the correct type, flavour, strength etc. of beverage, a reasonable but not the highest degree of attention is likely to be paid to the selection of the goods at issue.

The distinctiveness of the earlier mark

32. In *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

33. The applicant does not dispute that the opponent’s mark has a reputation, however, he takes issue with the extent of that reputation, submitting that it relates only to chewing gum and similar products and not to drinks.

34. In her evidence, Ms Bower-Nye states that products under the earlier mark were first sold in the UK in 1911. Its first factory opened in London in 1927 but it is now located in Plymouth, it has its headquarters in Reading and currently (the witness statement is dated 13 June 2014) it employs some 500 people in its UK operations. Its products are said to make it a “leading provider of confectionery products in the UK” with a turnover in the UK for the year ending 28 December 2013 in excess of £210 million. At PBN3 she exhibits copies of pages downloaded from the company’s UK website showing the trade marks WRIGLEY and WRIGLEY’S in use including on packaging, the history of those products and the company’s activities in the UK. The text on these pages refers exclusively to chewing gum and mouth fresheners. The opponent’s overall advertising and marketing expenditure under its WRIGLEY and WRIGLEY’S branded products during the period 2008 to 2014 is said to be in excess of £85 million and is said to have taken place through press and television advertising, billboards, social media, in-store promotion trade shows and movie placements. The opponent is a member of various UK trade organisations including the Food and Drink Federation and the Chewing Gum Action Group, has been involved in various community projects throughout the UK as shown at exhibit PBN9 and has sponsored various sporting and entertainment events as shown at PNB15,16,17 and 18. All refer to the opponent’s chewing gum and mouth freshener brands.

35. Exhibit PBN9 includes extracts downloaded from a number of sources. At page 53, is an article dated 7 February 2002 published in MarketingWeek which indicates that the opponent had a 50% share of the global and almost 100% of the UK gum markets. At page 67, an extract from the Western Morning News dated 20 October 2011 refers to it having a 90% share of UK gum sales and at page 104, an extract from companiesandmarkets.com dated 20 February 2013 shows it to have an 84% of the UK gum market. Whilst those figures appear to show a declining share of the UK gum market, its share of the market has been consistently high and justifies its claim to be the market leader. Whilst a number of subsidiary trade marks are shown to have been used, e.g. Juicy Fruit, Extra, they are shown to have been used with the WRIGLEY'S mark.

36. Ms Bower-Nye states that the opponent "has been actively involved in developing, manufacturing, promoting and selling a range of beverages based on its popular confectionery products". She goes on to state:

"In particular, STARBURST branded drinks are inspired by Wrigley's STARBURST branded confectionery. These drinks are dairy based and have been available for purchase periodically from various UK retail outlets since 2006..."

And that:

"[it] has also developed a SKITTLES branded dairy drink which was inspired by Wrigley's SKITTLES branded confectionery. The SKITTLES branded drink was launched in 2013 in grocery retailers throughout the UK and the availability has recently been extended to other retail outlets such as supermarkets."

37. At PNB19 (page 248) is an article taken from drinksbrands.com dated 17 February 2012. It is headed "Mars Brings Back Starburst Milkshakes", shows a bottle of Starburst strawberry milkshake and begins: "After almost three years since Mars decided to stop producing Starburst milkshake, the popular drink is scheduled to hit our shelves once again early this year". It is not clear from this when and for how long the product may have been on sale. No mention is made of the opponent or its WRIGLEY/WRIGLEY'S marks.

38. At PNB20 (page 251) is exhibited a page downloaded from the mcdonalds.co.uk website on 15 May 2014 (after the relevant date which is 20 July 2013). It shows a cup of "Starburst Mixed Berry Flavour Milkshake" and acknowledges that "Starburst® and all affiliated designs are trademarks of The Wrigley Company Limited or its affiliates and are used with its permission". At pages 252 to 259 are pages downloaded from the morrisons.com website also on 15 May 2014. It gives details of a "buy 2 for £2" offer for Skittles Fruit Flavoured Milk which it states is manufactured by Mars Ireland.

39. Ms Bower-Nye goes on to say that with the opponent's permission "Mars Drinks sells STARBURST and SKITTLES branded drinks in the UK" and that "consumers associate these drink products with" the opponent.

40. The overwhelming majority of the evidence filed by the opponent relates to chewing gum or mouth fresheners. Whilst there is some evidence of activity within the drinks market, none of it establishes the timing or level of sales of such goods or their market share and I agree with the applicant that the evidence does not support any claim that the opponent had a reputation in its earlier marks at the relevant date in respect of any goods other than chewing gum and mouth fresheners.

41. As I indicated earlier in this decision, WRIGLEY'S is the possessive form of the surname WRIGLEY. The applicant submits in his counterstatement that "a family name cannot be trademarked" but this is not the case and the earlier mark is registered and considered to be a valid mark. The earlier mark has an average degree of inherent distinctive character which has been enhanced to a very high degree in relation to its use in respect of chewing gum and mouth fresheners only.

Likelihood of confusion

42. In determining whether there is a likelihood of confusion, a number of factors have to be borne in mind. The first is the interdependency principle whereby a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. I also have to factor in the distinctive character of the earlier mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely on the imperfect picture of them he or she has retained in mind.

43. At the hearing, the applicant submitted that he had carried out a search of the trade marks register and identified 87 marks which include the word Wrigley, noting that all of them are owned by the opponent. He also submitted that he had carried out a search of the trade marks register for the more common surname Smith and found 856 registrations including that name which are owned by 450 entities. As Mr Setchell submitted, nothing relating to any searches the applicant may have carried out has been provided in evidence and so I cannot take it into account. Even if it had been, however, it would not have assisted the applicant. I have to consider the position relating only to the mark as applied for and those relied on by the opponent and, as indicated above, I must do so on a notional basis.

44. Earlier in this decision, I found:

- The respective marks are have a reasonably high degree of visual and aural similarity and a reasonable degree of conceptually similar;
- The dominant and distinctive element of the mark applied for is all but identical to the earlier mark;
- Whilst I found concentrates for use in the preparation of soft drinks to be similar to a moderate degree with some of the opponent's goods, I have found all of the applicant's goods are reasonably similar to goods within the opponent's specification;

- The average consumer is a member of the general public who will pay a reasonable, but not the highest, degree of attention to his purchase;
- The earlier mark has an average degree of inherent distinctive character which, in relation to goods other than chewing gum and mouth fresheners, has not been enhanced through its use.

45. At this point, I also refer to other submissions made by the applicant at the hearing. He submitted that as his family name was Wrigley, a point not in dispute and, amongst other business interests, he made drinks, he wanted to use the mark which he had applied to register. He stated that he understood the opponent's objection to "anyone else using the mark so that they can have a complete monopoly" and that the opposition was launched immediately following the publication of his application "based on its policy to maintain that monopoly". He then went on to state that if his mark as applied for were to be used, then "customer confusion is unavoidable to some extent" but that given "they have a monopoly in the use of the name with their 87 registrations, every other person's use would cause some sort of confusion until the customer gets used to it". That is an admission against interest, however, even had he not said it, taking all matters into account and as set out above, I find that there is a likelihood of confusion between the mark for which registration is applied and the opponent's CTM 218305. That being the case, the opposition against the application based on section 5(2)(b) of the Act succeeds in full.

46. At the hearing, Mr Setchell confirmed the submissions made in his skeleton argument that the remaining grounds were relied upon in the alternative should the opponent not succeed on the basis of its claim under section 5(2)(b) of the Act. As I have found it has succeeded in full, I do not go on to consider the other objections.

Costs

47. As the opponent has succeeded, it is entitled to an award of costs in its favour. I take note that the opponent withdrew one of its grounds of opposition only in its skeleton argument though this late withdrawal is unlikely to have caused the applicant any additional costs. I also note that the only evidence in these proceedings was that filed by the opponent. That said, earlier in these proceedings, the applicant sought to file evidence. The admission of that evidence was refused by me at a case management conference ("CMC") which took place on 4 November 2014. The applicant did not attend the CMC nor did anyone appear on his behalf. Following the CMC, I wrote to the parties in the following terms:

"Mr Wrigley had been allowed a period, expiring on 13 August 2014, to file evidence. No evidence was received within the period allowed. By way of a letter dated 19 September 2014, the parties were advised that in the absence of filing of evidence on behalf of the applicant, the evidence rounds were deemed concluded and the proceedings were ready for determination. They were asked to indicate whether they wished to be heard or were content to have a decision from the papers on file. On 1 October 2014, Mr Wrigley filed a letter accompanied by a witness statement and exhibits and asked that it be accepted, indicating:

“I am aware of the fact that the evidence time has closed but due to administrative error I got the dates wrong.”

The witness statement is dated 3 September 2014. There has been no explanation of the nature of the administrative error that caused Mr Wrigley to fail to file evidence within the period allowed. Neither is there any explanation of why it took from 3 September, when he signed the witness statement, until 1 October, when it was received, for him to file that material. In the absence of any explanation, I refused to admit it. In doing so, I took note that part of it seeks to establish his “identity and family name”, a point that is not in dispute. The remainder appears to be submission and of a nature which is not appropriate to be filed as ‘evidence’.”

48. Taking all matters into account, I make the award on the following basis:

Preparing a statement and considering the other side’s statement:	£200
Fee:	£200
Preparation of evidence:	£500
Preparation for and attendance at the CMC:	£200
Preparation for and attendance at the substantive hearing:	£500
Total:	£1600

49. I order Crispin James Wrigley to pay Wm Wrigley Jr Company the sum of £1600. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 30th day of January 2015

**Ann Corbett
For the Registrar
The Comptroller-General**