

BL O/0461/26

TRADE MARKS ACT 1994

IN THE MATTER OF UK Designation of International Registration No. 1605912 and UK Trade Mark Registrations Nos. 917962980 and 3341823, all in the name of Ripple Foods, PBC

AND IN THE MATTER OF UK Trade Mark Registrations Nos. 1029283, 900001644, 912348934 and 1336468, all in the name of Mars Wrigley Confectionery UK Limited

AND IN THE MATTER OF Consolidated Oppositions and Cancellations Nos. OP436081, CA505180, CA505181, CA505183, CA505576, CA505571 and CA505572

DECISION

1. This is an appeal by Ripple Foods, PBC (“RFP”) against aspects of the decision of Hearing Officer Ms. Leisa Davies (“the Hearing Officer”) dated 8 January 2026 in respect of seven consolidated actions. The actions were;
 - (a) Four applications for revocation based on non-use brought by RFP in respect of UK trade mark registrations owned by Mars Wrigley Confectionery UK Limited (“Wrigley”) for the mark RIPPLE in plain and stylised form;
 - (b) The opposition by Wrigley to RFP’s application for designation in the UK of RFP’s International Registration no. WO1605912 (“912”) for the mark RIPPLE (“the Opposition”); and
 - (c) Two applications by Wrigley for declarations of invalidity in respect of UK trade mark registrations owned by RFP in respect of a stylised form of the mark “RIPPLE Dairy-Free As It Should Be”.

2. Wrigley’s Opposition and applications for declarations of invalidity depended on the UK trade mark registrations sought to be revoked for non-use, in respect of which PFB had also put Wrigley to proof of use for the purposes of s. 6A of the Trade Marks Act 1994 (“the Act”). though the relevant periods for the purposes of revocation and proof of use were different. Insofar as relevant to this appeal, the five year period for the purposes of non-use ran from 22 July 2017 to 21 July 2022 (with revocation

sought as of 22 July 2022) and the period for proof of use in the Opposition ran from 4 January 2017 to 3 January 2022 (the relevant date for assessment of the Opposition).

3. PFB's applications for revocation were partially successful but failed in respect of a number of goods, such that Wrigley retained registrations (and had proved use for the purpose of s. 6A) in respect of the following marks and goods which therefore remained relevant earlier rights relied on by Wrigley as against PFB's marks and registrations:

- (a) UKTM no. 1029283, "RIPPLE" (the '283 Mark).

Class 30: Non-medicated confectionery but not including ice cream, frozen confections containing cream, water ices, ice cream confections or water ice confections and not including preparations for making or coating any of these excluded goods.

- (b) UKTM no. 900001644, "RIPPLE" (the '644 Mark)

Class 29: Dairy products.

Class 30: drinking chocolate; chocolate based drinks; non-medicated confectionery; cakes; chocolates, chocolate; all included in Class 30.

- (c) UKTM no. 912348934, "RIPPLE" device (the '934 Mark)

Class 29: milk and milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods.

Class 30: confectionery; drinking chocolate; cakes; chocolate; products prepared for consumption and consisting primarily of the aforesaid goods.

- (d) UKTM no. 1336468, "RIPPLE" (the '468 Mark)

Class 30: cakes; non-medicated chocolate confectionery, none being frozen; all included in Class 30.

4. The Opposition was successful in respect of the following goods under s. 5(2) of the Act:

Class 29: milk, yogurt and protein-based beverages used as a milk and yogurt substitute, namely, non-alcoholic plant-based beverages in the nature of milk composed primarily of plant proteins, fats and carbohydrates; plant-based non-dairy cheese substitutes.

Class 30: Frozen non-dairy desserts.

Class 32: Protein-based beverages, other than milk-substitutes, namely, non-alcoholic plant-based beverages in the nature of vegetable, legume, seed plant-based beverages not being milk substitutes; beverages and aromatized beverages based on protein and other fluid nutrients, namely, protein drinks for use as food fillers and not for use as meal fillers; protein-based beverages, other than milk-substitutes, namely, non-alcoholic plant-based beverages in the nature of grain.

5. The Opposition under s. 5(3) of the Act succeeded in part. The Hearing Officer held that Wrigley had established of a strong reputation for its marks as registered for chocolate, confectionary and cakes. In light of that reputation the Hearing Officer allowed the Opposition under 5(3) in respect of goods in classes 29 and 30 for which she had found similarity to chocolate and confectionary (namely goods other than “plant-based non-dairy cheese substitutes”). The Opposition under s. 5(3) failed in respect of “plant-based non-dairy cheese substitutes” in class 29, notwithstanding its success under s. 5(2) in respect of such goods. The Hearing Officer further held that the class 32 goods in issue were not similar to cake, chocolates or confectionary, but in light of her decision in favour of Wrigley under s. 5(2) in respect of class 32, she did not need to further consider the opposition under s. 5(3) and declined to do so.
6. The Hearing Officer dismissed Wrigley’s applications for declarations of invalidity and there is no appeal by Wrigley against that decision.

SUMMARY OF THE APPEAL

7. The appeal concerns the outcome of RFP’s non-use revocations and of the Opposition in respect of goods in class 29 and 32. No appeal is brought in respect of the success of the Opposition in respect of goods in class 30 (frozen non-dairy based desserts).

8. RFP contends that the Hearing Officer erred in finding that Wrigley had put the ‘644 and ‘934 Marks to genuine use in respect of the following goods, in each case insofar as they appear in the specifications for those registrations (as set out under paragraph 3 b) and c) above):
 - (a) milk and milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods in class 29; and
 - (b) drinking chocolate and chocolate based drinks in class 30.

In consequence, RFP contends that ‘644 Mark and ‘934 Mark should each be revoked insofar as registered for those goods. The appeal in respect of the goods in class 29 turns on an issue of the appropriate fair specification rather than any dispute as to the particular use proved, though RFP also contends the Hearing Officer was wrong to take judicial notice of the composition of milk chocolate. The appeal in respect of the goods in class 30 principally concerns the Hearing Officer’s findings of use, but an issue also arises as to whether use in relation to drinking chocolate is sufficient to support a registration for chocolate based drinks.

9. RFP also contends that the Hearing Officer erred in finding that Wrigley had established proof of use of ‘644 and ‘934 Marks for the purposes of s. 6A of the Act. This adds nothing to the appeal in respect of the class 29 specification but may make a difference in respect of the class 30 goods in light of the nature of the evidence of use and whether it can be said to support a finding of use on or after 4 January 2017 even if genuine use was not shown on or after 22 July 2017.
10. RFP contends that the Opposition should have been dismissed in respect of class 29 and 32 in their entirety, primarily (but not exclusively) in consequence of such revocation / failure to prove use.
11. Wrigley defends the Hearing Officer’s findings in respect of revocation for non-use, proof of use and the Opposition, and further contends (by respondent’s notice) that the Opposition should be maintained on the following additional grounds to those found by the Hearing Officer:
 - (a) In respect of RFP’s registration for plant based non-dairy cheese substitutes in class 29 and the entirety of class 32, under s. 5(3) of the Act in reliance on

Wrigley's mark as reputed for chocolate, cakes and confectionary based on (it contends) the existence of a link and consequent unfair advantage; and

- (b) In respect of RFP's registration for goods in class 32 based on a likelihood of confusion with Wrigley's mark as registered for the (unchallenged on appeal) registrations for "chocolate" and "chocolate products".

- 12. Before me (as before the Hearing Officer) RFP was represented by Mr Sam Carter instructed by Abion UK Ltd and Wrigley by Julius Stobbs of Stobbs IP.

STANDARD OF APPEAL

- 13. Although the parties set out a range of different authorities in which the correct approach on appeal was discussed in the context of trade mark registry appeals and otherwise, there was in the end no dispute on this issue. Wrigley relied in particular on the summary in *Lidl Great Britain Ltd. v Tesco Stores Ltd* [2024] EWCA Civ 2 at [110]. RFP placed particular weight on REEF [2003] RPC 5 at [20] in support of the contention that where a party alleges that the tribunal at first instance was "clearly wrong", the appellate court should show a reluctance, but not the highest degree of reluctance, to intervene.
- 14. The correct approach was summarised by the Supreme Court in *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. I have sought to apply those principles. Absent an error of law, it is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was plainly wrong in the conclusion she reached, in the sense of being outside of the bounds within which reasonable disagreement is possible. In the case of a multifactorial assessment (such as the assessment of use, of similarity between marks or goods and services, and the consequences of any such similarity) then in the absence of a distinct and material error in the approach of the Hearing Officer, the appellate tribunal should (as RFP contended and Wrigley did not dispute) show real reluctance, though not the very highest degree of reluctance, to interfere.
- 15. In respect of RFP's contention that the Hearing Officer was wrong to take judicial notice of the average consumer's awareness of the composition of chocolate, the parties were in agreement that the test to be applied was whether no reasonable hearing officer could have formed the view in issue, rather than any issue as to the personal knowledge of the Hearing Officer in this case. Mr Carter fairly referred me

to paragraph 16 of the decision of Professor Phillip Johnson as the Appointed Person in *LIVING DREAMS* O66919, which provides:

“In cases where a Hearing Officer has made a finding of fact based on her own experience (in the absence of any evidence) the first of these limbs [*that there was no evidence before them to support a finding*] cannot apply otherwise every single finding using judicial notice would be appealable). Such a finding can be overturned only where no reasonable Hearing Officer could have reached the decision. Where the trade mark relates to ordinary consumer goods, whether high or low value, this is an incredibly difficult standard to meet.”.

I agree with this characterisation and have borne it in mind when considering the appeal concerning the fair specification in class 29.

THE HEARING OFFICER’S DECISION

16. I set out particular findings of the Hearing Officer where relevant below, but it is important when considering the present appeal to bear in mind the large number of overlapping issues that were before the Hearing Officer and the very significant quantity of evidence that she had to consider in reaching her findings. The decision is lengthy but is in general very clearly expressed and carefully reasoned. There is no suggestion by either party that the Hearing Officer misdirected herself as to the law or that she disregarded any relevant evidence. Although Mr Carter suggested in his skeleton that the Hearing Officer was “in essence bending over backwards” to make the findings which he challenged on appeal, he made clear in oral submissions that he was not making any allegation of bias, but rather suggesting that the Hearing Officer’s findings were outside of the bounds within which reasonable disagreement is possible. He was right to clarify his case. There is in my view no basis for any criticism of the fairness of the Hearing Officer’s approach to the task before her.
17. Mr Stobbs submitted that I should view any criticism that only limited reasons were given in respect of aspects of the Hearing Officer’s decision in the context of a lengthy and complex judgment where the importance of an issue that may become central on appeal (such as the scope of particular evidence of use) may not have been apparent in the broader debate at the hearing before her. I agree and have treated any criticism based on the form as opposed to the content of the decision with care. However, I have also borne in mind that although the complexity of the issues before the Hearing Officer might provide an explanation for how an error came to be made

in such an otherwise well reasoned and expressed decision, if such an error exists and is material, it is not to be ignored despite that explanation.

GROUND OF APPEAL / RESPONDENT'S NOTICE

18. As a matter of logic, the starting point on RFP's appeal is the challenge to the revocation and proof of use decisions in respect of the '644 and '934 Marks. The success, or degree of success, of those aspects of RFP's appeal has a direct effect on RFP's challenge to the Opposition, although RFP maintains certain aspects of that appeal irrespective of the outcome of the revocation/proof of use appeals. In consequence, and entirely properly, the Grounds of Appeal are lengthy and somewhat interwoven. Similarly, Wrigley's response to the appeal and its respondent's notice are relatively complicated. I am satisfied that all of the arguments pursued by the parties in their skeletons and oral submissions were fairly open to them on the appeal (Mr Carter's skeleton was very helpful in providing a route map allowing me to assure myself in this regard) and in consequence there is no need for the purposes of this judgment to parse out which ground of the appeal or the respondent's notice relates to which issue. I will therefore address the matters raised before me by reference to the issues in dispute rather than the appeal ground(s) to which they relate.

PROOF OF USE / FAIR SPECIFICATION

19. The Hearing Officer's assessment of the evidence as to the use to which Wrigley had put the marks in issue is at [29] to [37] of her decision. She carefully considered the evidence of use for particular goods at [29] to [30], held that the mark has been used in text and figurative form for all goods for which use had been shown and then at [32] to [37] she made findings as to whether the use in evidence was sufficient to allow her to conclude that the use was "genuine" so as to defeat the revocation applications and to satisfy s. 6A of the 1994 Act, the latter issue being addressed separately under [57] to [60].
20. In light of concessions made by RFP and of her assessment of the evidence, the Hearing Officer held at [33] that genuine use had been shown in respect of "cake/s, cupcakes, chocolate, single or multi pack chocolate bars, Easter eggs, selection boxes and advent calendars". At [35] she held that Wrigley had proved genuine use in respect of drinking chocolate from 2014 until an unspecified point in 2017 "so as to satisfy the fourth genuine use period" (namely from 22 July 2017 to 21 July 2022)

for drinking chocolate. At [59] she went on to hold that such use “just falls on the right side of the relevant period to count” (namely after 4 January 2017).

Class 29

21. RFP contends that the Hearing Officer erred in holding that the ‘644 Mark had been put to genuine use in respect of “dairy products” and the ‘934 Mark in relation to “milk and milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods”, all in class 29. The issue in respect of each turns not on the Hearing Officer’s assessment of the evidence of use but on her conclusion that evidence of use in relation to chocolate goods (which is not challenged on appeal) was sufficient to support the disputed specifications.
22. The relevant paragraph the decision is [45], which provides:

“Further, I note that Wrigley has the terms “dairy products; milk and milk products; products prepared for consumption and consisting primarily of the aforesaid goods” which consumers in my view would understand to include such items as milk, yogurt, butter, cream and cheese and products made of these ingredients. Given that chocolate goods contain dairy ingredients (amongst other ingredients) and are predominantly made of cream and/or milk, Wrigley may also retain dairy products; milk and milk products; products prepared for consumption and consisting primarily of the aforesaid goods.”
23. There was no dispute between the parties as to the approach to be followed when considering partial revocation of a trade mark. Each relied on the principles summarised by Kitchin LJ (as he then was) in *Merck KGaA v Merck Sharpe & Dohme Corp & Ors.* [2017] EWCA Civ 1834 at [244] to [248], which were plainly in the Hearing Officer’s mind as she set them out under [39] of the decision under appeal.
24. The Hearing Officer’s conclusion on the appropriate specification under class 29 was based on two factors, each of which was challenged by RFP. The first is that the Hearing Officer took judicial notice of the fact that chocolate goods contain dairy ingredients (amongst others) and are predominantly made of cream and/or milk. The second is that in consequence a fair specification in respect of such use would extend to “milk and milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods”.

25. Mr Carter made four submissions on these issues, which I address in the order set out in his skeleton.
26. First, he contended that the Hearing Officer's finding in [45] of her decision that consumers would understand "dairy products" to include such items as milk, yogurt, butter, cream and cheese and products made of these ingredients was inconsistent with her finding that chocolate was a dairy product because she did not state in the first sentence of [45] that the consumers would understand dairy products to cover chocolate. I do not consider this to be a fair reading of the Hearing Officer's finding. She held that dairy products would be understood to include products made of milk and cream (as well as other dairy ingredients such as yoghurt, butter and cheese). She then held (as a matter of judicial notice) that some chocolate contains dairy ingredients such as cream or milk, and that in consequence Wrigley could retain the specification for dairy products and others. The fact that she did not spell out the obvious intermediate finding that chocolate was a dairy product because it can be made of cream or milk does not mean her reasoning was internally inconsistent. The first submission fails.
27. Second, Mr Carter challenged the Hearing Officer's finding that milk and cream are known to be ingredients of chocolate, and in consequence that chocolate (or at least milk chocolate, for which Wrigley had shown use of the marks in issue) was a dairy product. This finding was made by the Hearing Officer based on her own knowledge and experience of consumer goods, and in consequence it is only open to challenge on the basis that no reasonable hearing officer could have reached that decision. Mr Carter's principal point was that the finding was incorrect as a matter of fact, because there are forms of chocolate that do not contain dairy (high cocoa solid dark chocolate for example) and that in consequence the finding that chocolate was a dairy product was unsupportable. However, he did not contend that other forms of chocolate (including as it turns out, the chocolate in respect of Wrigley used the mark) did not amount to dairy products. In consequence it was open to the Hearing Officer to make the finding that she did, and it cannot be said that no reasonable hearing officer in her place could have reached the same conclusion.
28. Third, it was alleged that the Hearing Officer erred because she held the same use supported the registration for chocolate in class 30 and the goods in class 29. However, as Mr Stobbs rightly pointed out (with examples from previous IPO

decisions, though none were necessary in that the principle was conceded by Mr Carter at the hearing) there is no legal principle that use for one class of goods cannot be relied upon to sustain terms different terms with a specification or indeed within different classes.

29. At the oral hearing Mr Carter deployed a modified form of this submission, which was that if (contrary to his primary case) chocolate was a “dairy product”, the fair specification in class 29 was not the broad term “dairy products” but rather “chocolate”, which would be viewed by consumers as a suitable sub-category within the broader specification.
30. Mr Carter relied in particular on the principle under [246] of *Merck* that if a mark is registered for a category of goods sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, the use in relation to one or more of the sub-categories will not constitute use of the mark in relation to all of the other categories. There is force in Mr Carter’s submission, but on balance, I am not persuaded that the Hearing Officer fell into error for two reasons.
 - (a) First, it is important to note that the Hearing Officer’s finding that “chocolate” as sold by Wrigley under the mark was a dairy product does not equate to a finding that chocolate would be viewed by the average consumer as a distinct sub-category of dairy products. As Mr Carter pointed out, and was not disputed, not all forms of chocolate are dairy products. Thus “chocolate” is not an appropriate sub-category of “dairy products”. I consider that a limitation of “dairy products” to a sub-category such as “chocolate that contained dairy products” would amount to an arbitrary distinction.
 - (b) Second, I do not accept that the Hearing Officer allowed a too broad specification for “dairy products” where (on her findings) chocolate could be made of both cream and milk, which are two different dairy ingredients.

For these reasons I consider the Hearing Officer’s decision is open to her, in particular under the approach set out under [247] of *Merck* that care must be taken to ensure that the exercise “does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way”.

31. Mr Carter's final point concerned the fact that the EUIPO similarity tool did not identify chocolate and milk products/dairy products as similar. The EUIPO similarity tool is not binding on me or the Hearing Officer. It is perfectly possible that the particular issue that gave rise the Hearing Officer's finding (the fact that some chocolate is a dairy product) had not been raised in argument in the decisions considered in the operation of the EUIPO similarity tool. I did not find the absence of a decision addressing the issue persuasive in support of RFP's case, and certainly not to a degree that warranted casting doubt on the decision of the Hearing Officer.
32. Despite Mr Carter's persuasive submissions, I hold that RFP's appeal against the non-use revocation and in respect of proof of use under s. 6A fails for the class 29 specification of the '644 Mark, namely "dairy products". Similarly, the equivalent appeal in relation to the '934 Mark fails, save in one respect. The Hearing Officer held that there had been genuine use for "milk and milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods" (emphasis added). There was no evidence before her of use in relation to milk and use for chocolate cannot reasonably be said to amount to use for milk as such, as opposed to use for a milk product. In consequence she should not have allowed the mark to remain registered in respect of that term or held that use had been proved in respect of "milk" under s. 6A of the Act.
33. In consequence the correct specification for the '934 mark should be "milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods". Mr Carter did not contend that this further limitation or the equivalent change to the Hearing Officer's decision under s. 6A has any impact on the Hearing Officer's subsequent findings and I consider that they are not material to any other issue on the appeal.

Class 30

34. Three issues arise in respect of the Hearing Officer's findings of use in respect of goods in class 30.
 - (a) The first concerns whether the Hearing Officer was correct to hold that the limited evidence of use by Wrigley of the marks in relation to drinking chocolate amounts to genuine use on or after 4 January 2017 (the relevant period for use under s. 6A of the Act).

- (b) The second, closely related, issue is whether the Hearing Officer was correct to hold that Wrigley had shown genuine use one or after 22 July 2017 (the relevant period for revocation for non use).
- (c) The third is whether, even if the Hearing Officer was correct to hold there was genuine use in a relevant period for “drinking chocolate”, she was correct to hold that such use was sufficient amount to use in respect of “chocolate based drinks”.
35. The evidence of use in relation to drinking chocolate was scant, amounting to a statement in evidence from a Mr Cavanaugh that RIPPLE hot chocolate powder had been sold “between 2014 and 2017” with a peak sales value of £500,000 (from the context, *per annum*) as a standalone product but that it was also sold in combination with other products and some images of relating to launch of the product in 2014. However, in the context of the general evidence of use there was ample material on which the Hearing Officer could find that the use shown had been genuine. The issue was the period over which the use had been shown to take place.
36. The point underpinning RFP’s first two points on their appeal was whether the Hearing Officer was “plainly wrong” (there was no error of law identified) to hold on the evidence before her that use in relation to drinking chocolate extended to the end of 2017, or at least beyond 22 July 2017. The Hearing Officer’s findings on this issue are at [34] of her decision. She noted that the evidence was of use “between 2014 and 2017”, observed that it was “unclear when during 2017 the use extends to. The documentary evidence to support such a statement does not assist, as there is no indication as to when the use continued until or when it ceased.” I did not understand Mr Carter to criticise those findings.
37. The key (and disputed) portion of the Hearing Officer’s reasoning is found in the final sentence of the relevant paragraph which states;
- “Mr Cavanaugh’s evidence was, however, unchallenged during the evidence rounds and therefore I am prepared to accept on the balance of probabilities, that at least a proportion of that use would have extended into 2017 to satisfy use in the fourth relevant period for drinking chocolate where appropriate, but I cannot be certain that the use extended beyond 2017.”

38. In my view the Hearing Officer was entitled to hold in the evidence before her that use in relation drinking chocolate extended into 2017. The failure by RFP to challenge Mr Cavanaugh's evidence combined with the fact that Mr Cavanaugh had used the formulation "between year x and year y" to refer to sales taking place within each of the boundary years provide ample support such a finding. Of more difficulty is the question of whether the Hearing Officer was entitled to find that it continued until 22 June 2017 (the fourth period of use) or, as is perhaps implicit from the phrase "I cannot be certain that the use extended beyond 2017", that sales continued throughout 2017.
39. In my opinion the evidence does not come close to establishing that use extended throughout 2017 and insofar as the Hearing Officer made such a finding, it would be a clear error which entitles me to consider the position afresh. In my view the use must be taken to have come to an end at some point within 2017. With that in mind, I consider that the finding that use extended to some point in 2017 is sufficient to establish use at least up to 4 January 2017, being only the second working day of 2017.
40. However, I do not consider that there was sufficient material before the Hearing Officer to establish use up to or beyond 22 July in that year, a point more than half way though the year. In my view such a finding falls foul of the prohibition on use being demonstrated by "*probabilities or suppositions*" referred to by the General Court in the assimilated law decision of *El Corté Ingles* [2013] ETMR 3, and I hold that Wrigley has not established genuine use of the marks on or after 22 July 2017.
41. In consequence the appeal in respect of the Hearing Officer's finding on proof of use under s. 6A of the act fails, but that in respect of her finding that use extended into the fourth non-use period succeeds.
42. The remaining issue on RFP's appeal in respect of the class 30 goods in issue is whether use in relation to drinking chocolate is sufficient to support the registration of the '644 Mark for "chocolate based drinks". RFP did not dispute that drinking chocolate is a chocolate based drink. However, Mr Carter's argument was that because drinking chocolate was in powdered form, and chocolate based drinks encompassed both powdered and ready made drinks, the use proved should be limited to a sub-category of chocolate based drinks, presumably "non-ready made chocolate based drinks". The cumbersome nature of this phrase may reveal the fact that I had a

certain amount of difficulty in formulating the sub-category of “chocolate based drinks” contended for by RFP. In my view any such sub division of chocolate based drinks would be arbitrary and as such not appropriate in light of the guidance given in Merck. The Hersing Officer was correct to hold that use in respect of drinking chocolate supported the inclusion of chocolate based drinks in the specification.

43. In consequence of my decisions set out above, the appeal in respect of the partial revocation of the ‘934 and ‘644 Marks in respect of “drinking chocolate” and “chocolate based drinks” in class 30 succeeds, but the finding that Wrigley had satisfied the proof of use requirements under s. 6A of the Act in respect of the said marks remains.

THE OPPOSITION

s. 5(2) of the Act

Class 29

44. In light of the dismissal of the appeal in respect of the Hearing Officer’s findings on proof of use under s. 6A of the Act, RFP’s challenges to the outcome of the Opposition in respect of class 29 either fail because they were dependent on success on proof of use or fall away because they cannot change the outcome of the Opposition in light of such failure. The challenge to the Hearing Officer’s finding under s. 5(2) of the Act as a result of similarity between the class 29 goods for the ‘934 and ‘644 Marks and the class 29 specification of RFP’s application fails, and in consequence RFP’s other challenges in respect of class 29 fall away.

Class 32

45. The goods in issue in in respect of RFP’s application in class 32 are as follows:

Protein-based beverages, other than milk-substitutes, namely, non-alcoholic plant-based beverages in the nature of vegetable, legume, seed plant-based beverages not being milk substitutes; beverages and aromatized beverages based on protein and other fluid nutrients, namely, protein drinks for use as food fillers and not for use as meal fillers; protein-based beverages, other than milk-substitutes, namely, non-alcoholic plant-based beverages in the nature of grain

46. The class 32 goods are all plant and protein based non-alcoholic beverages. The Hearing Officer held at [72] that Wrigley's goods in class 30, namely drinking chocolate and chocolate based drinks, were similar to a low degree with such goods. RFP's primary challenge to the Hearing Officer's finding was based on its appeals in respect of proof of use and in consequence fails with those appeals. However, Mr Carter did challenge the finding of similarity on the basis that the *Canon/Treat* factors suggesting similarity were only at a high level of generality. No error in her approach was identified by RFP and the finding was plainly open to her on the materials before her. In consequence, I reject that challenge.
47. Turning to similarity, the Hearing Officer compared the marks in issue carefully and concluded that they were either identical or shared a high degree of similarity. At [92] she considered likelihood of confusion and held that in light of the identity/high similarity between the marks in issue there was a likelihood of confusion, even where there was only a low level of similarity between the goods in issue. That conclusion was again plainly open to her, and (although it is not the test on appeal) in my view she was plainly correct.

Conclusion

48. RFP's appeal under s. 5(2) of the Act fails in respect of both class 29 and class 32.

s. 5(3) of the Act

49. The Hearing Officer explained at [94] of the decision that in light of the success of the s. 5(2) Opposition, the s. 5(3) attack did not improve Wrigley's position. She was correct, and the same applies in respect of the PFB's appeal. In light of my decision on the appeal under s. 5(2), the outcome of PFB's appeal under s. 5(3) cannot assist it and I decline to address it further.

Respondent's Notice.

50. The dismissal of PFB's appeal in respect of the Opposition means that Wrigley's respondent's notice points do not require determination. I will therefore not address them, save to say that I did not find them convincing and if PFB had succeeded on its appeal I consider it unlikely that they would have assisted Wrigley to any material degree.

Disposition and costs.

51. PFB's appeal in respect of the Opposition is dismissed.
52. PFB's appeal in respect of the revocation of the '934 and '644 Marks:
 - (a) Is refused in respect of class 29, save that the words "milk and" should be deleted from the specification of the '934 mark, leaving the following:

"milk products; dairy products; products prepared for consumption and consisting primarily of the aforesaid goods".
 - (b) Is allowed in respect of class 30 insofar as the Marks are registered for "drinking chocolate" and "chocolate based drinks", and those marks should be revoked as of 22 July 2017 for those goods in class 30. This leaves the following specification for the said marks in Class 30

The '644 Mark: non-medicated confectionery; cakes; chocolates, chocolate; all included in Class 30.

The '934 Mark: confectionery; cakes; chocolate; products prepared for consumption and consisting primarily of the aforesaid goods.
53. As the appeal has been partially successful but Wrigley remains the successful party overall and on the appeal:
 - (a) I will reduce the award of costs made in favour of Wrigley by the Hearing Officer by £500, to £3,200.
 - (b) In respect of the appeal costs, by analogy with the scale costs under TPN 1/2023, I award Wrigley £500 in respect of the preparing for and attending the Appeal (to reflect the relative success of the parties on the Appeal and setting off a notional award in RFP's favour in respect of the revocation appeal against the costs otherwise to be awarded to Wrigley on the appeal).
54. I therefore direct that the RFP shall pay to Wrigley the sum of £3,700 within 21 days of the date of this decision.

Tom Moody-Stuart KC

The Appointed Person

29th May 2026