

O-176-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2459101
BY FRASER & NEAVE LTD TO REGISTER, AS A SERIES OF TWO, THE
TRADE MARK**



SEASONS
SEASONS

IN CLASS 32

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 97046
BY SAMWORTH BROTHERS LTD t/a GINSTERS**

TRADE MARKS ACT 1994

IN THE MATTER OF Application No. 2459101

By Fraser & Neave to register, as a series of two, the trade mark



SEASONS



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IN THE MATTER OF Opposition thereto under No. 97046

by Samworth Brothers Ltd t/a Ginsters

BACKGROUND

1. On 20th June 2007, Fraser & Neave (hereafter “Fraser”) of # 21-00 Alexandra Point, 438 Alexandra Road, 119958 Singapore applied to register the following mark as a series of two:



SEASONS



SEASONS

in Class 32 for the following goods and services:

Class 32

Mineral and aerated waters and other non-alcoholic drinks; soya bean beverages being non-alcoholic beverages; fruit juices and fruit drinks; fruit concentrates for use in preparation of carbonated and

non-carbonated drinks; syrups and other preparations for making beverages.

2. The application was published on 8th February 2008 and on 7th May 2008 Samworth Brothers t/a Ginsters (hereafter “Samworth”) of Chetwode House, Leicester Road, Melton Mowbray, Leicestershire, LE13 1GA lodged an opposition against all goods.
3. Samworth based its opposition on section 5(2)(b) of The Trade Marks Act 1994 (hereafter the “Act”), citing their earlier UK mark 2451725, the details of which are as follows:

Mark	Filing and registration dates	Goods relied upon in the opposition
SEASONS	4 th April 2007 and 29 th February 2008	Class 32 Mineral and aerated waters and non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

4. Samworth say both marks comprise the identical (as well as distinctive and dominant) element, ‘SEASONS’, with the only difference between the marks being minor stylisation. The respective goods are either identical or similar. Applying a global assessment, there would a likelihood of confusion.
5. Fraser filed a counterstatement denying the ground of the opposition.
6. Both sides filed evidence in the form of witness statements which, insofar as they relate to matters of fact, I shall summarise them below and both filed submissions. Neither party requested a hearing but both request costs. The matter thus falls to be decided on the basis of the papers on file.

Opponent’s evidence in chief

7. This comprises a witness statement dated 14th October 2009 by Fiona McBride, a partner in Withers & Rogers LLP, the firm of attorneys acting for Samworth. She says that Samworth has been trading since 1995, as shown in an extract from Companies House database as Exhibit FM1. It has sold a range of food products under the trading name ‘Ginsters’. Exhibit FM2 is a selection of extracts from their website,

www.ginsters.com. Thereafter, Ms McBride makes a number of submissions in connection with the nature of the respective goods covered by both marks. In particular, she says that a 'soya bean beverage' would be considered to be similar to a 'non-alcoholic drink' on the basis of a definition of 'soya bean beverage' taken from the well known user-generated encyclopedia, WIKIPEDIA. She also says that a 'syrup' would be considered similar to a 'fruit concentrate', based on a definition of the word 'syrup' taken from the Concise Oxford Dictionary (10th Edition). I will return in due course to the question of definition.

Applicant's evidence in chief

8. This comprises a witness statement dated 16th December 2009 by Gemma Williams, an Associate with D Young & Co, the firm of attorneys acting for Fraser. Firstly, she notes that the evidence of Ms McBride is irrelevant insofar as it relates to Samworth's trading activity, although she also notes that she has found no evidence of Samworth trading in beverages or of use of their mark, SEASONS. The remainder of her evidence is commentary or critique upon Ms McBride's evidence rather than evidence of fact. Several matters are however worth recording. She attacks WIKIPEDIA as a reliable evidence source. She says that 'syrups' and 'concentrates' are not similar. Based on a definition in The Cambridge Advanced Learners Online Dictionary at Exhibit GMW1, which says that a concentrate is a "liquid from which water is removed", this cannot be similar to a "syrup used to preserve fruit". Furthermore, at Exhibit GMW2, she provides a copy of an OHIM Decision in opposition B1167626 which, she says, is authority for 'syrup' in Class 32 being a foodstuff, and therefore a 'solid product' which cannot be consumed in the same way as a 'beverage'. She says that syrups are not consumed as beverages and, in respect of other factors used to determine 'similarity', they are also not similar.

Opponent's evidence in reply

9. Again, this takes the form of submission by Ms McBride rather than factual evidence. The one submission, or point of clarification, worth recording is that the relevance of the OHIM decision is denied on the basis that the opponent is not saying that 'syrups and other preparations for making beverages' in class 32 are similar to 'beverages', rather, that they are similar to 'fruit concentrates for use in the preparation of carbonated and non-carbonated drinks' and identical to 'syrups and other preparations for making beverages'.

DECISION

10. The opposition is founded solely upon Section 5(2) (b) of the Act. This reads:

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

(a).....

(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,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

11. 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), 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,

12. With a filing date of 4th April 2007 and a registration date of 29th February 2008, it is clear that under Section 6(1) of the Act, Samworth’s mark is an earlier trade mark. Further, as it completed its registration procedure less than five years before the publication of the contested mark (8th February 2008), it is not subject to the proof of use requirement set out in section 6A of the Act.

13. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (“ECJ”) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P* (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does

not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(I) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

Comparison of goods

14. In assessing the similarity of services, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23 of the 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 end users and their method of use and whether they are in competition with each other or are complementary.’

15. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.
16. It is important to recognise that even though the evidence on similarity is sparse and largely based upon assertion, I nevertheless have the statements of case and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the Appointed Person said in *Raleigh International trade mark* [2001] R.P.C. 11 at paragraph 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items, evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.
17. I should also mention a further important case in terms of the application of legal principles, and that is the European Court of First Instance (“CFI”) (now referred to as the General Court) in *Gérard Meric v Office for*

Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (“Meric”) Case T-133/05, where, at para 29, it is stated:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

18. The relevant goods to be compared are as below:

Samworth’s goods	Fraser’s goods
<p>Class 32</p> <p>Mineral and aerated waters and non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.</p>	<p>Class 32</p> <p>Mineral and aerated waters and other non-alcoholic drinks; soya bean beverages being non-alcoholic beverages; fruit juices and fruit drinks; fruit concentrates for use in preparation of carbonated and non-carbonated drinks; syrups and other preparations for making beverages.</p>

19. It is self-evident that ‘Mineral and aerated waters and other non-alcoholic drinks’ in Fraser’s specification are identical to ‘Mineral and aerated waters and other non-alcoholic drinks’ in Samworth’s specification. ‘Soya bean beverages being non-alcoholic beverages’ in Fraser’s specification are also, applying the Meric case, identical to ‘Mineral and aerated waters and other non-alcoholic drinks’ in Samworth’s specification. This is due to the fact that a ‘soya bean beverage being non-alcoholic’ would be included within the more general category covered by Samworth’s ‘non-alcoholic drinks’. Fraser’s ‘fruit juices and fruit drinks’ are identical to Samworth’s ‘fruit drinks and fruit juices’. The words ‘juice’ and ‘drink’ are, in effect, interchangeable in this context. Fraser’s ‘syrups and other preparations for making beverages’ are identical to Samworth’s ‘syrups and other preparations for making beverages’. This leaves the question

whether Fraser’s ‘fruit concentrates for use in preparation of carbonated and non-carbonated drinks’ are identical or similar to ‘syrups and other preparations for making beverages’.

20. The definition of ‘syrup’ put in evidence by Ms McBride is, “*a thick sweet liquid made by dissolving sugar in boiling water, used for preserving fruit*” and “*a thick sweet liquidused as a drink*”. From this, Ms McBride says that ‘syrups’ would be considered similar to ‘fruit concentrates’ on the basis that both would be used as ‘bases’ for making beverages. I do not believe the above definitions help Ms McBride in this claim as, in neither case do they describe a syrup as a ‘base’ for making beverages. Nevertheless, it is plain from a reading of Fraser’s specification that the ‘fruit concentrate’ is intended not to be drunk as a drink itself but to be used in the ‘preparation of carbonated and non-carbonated drinks’. Thus, it will be an ingredient supplied to a manufacturer or producer to be used in the overall process leading to the end, drink, product. As such, it will come within Samworth’s general term, ‘syrups and *other preparations* for making beverages’. Applying, once again, the Meric case, Fraser’s ‘fruit concentrates for use in preparation of carbonated and non-carbonated drinks’, are therefore identical to Samworth’s ‘syrups and other preparations for making beverages’.

21. In summary I conclude that all Fraser’s goods in Class 32 are identical to Samworth’s in the same Class.

Comparison of marks

22. The respective marks to be compared are as below:

Samworth’s mark	Fraser’s mark
SEASONS	

23. The case law makes it clear that I must undertake a full comparison of both marks in their totalities, taking account of all differences and similarities. The comparison needs to take account of the visual, aural and conceptual similarities and dissimilarities of the marks.
24. In terms of visual appearance, Samworth's mark presents as a single word mark, that word being in plain upper case script and seven letters in length. Fraser's mark, which comprises a series of two, one being in black and white and the other a colour version with red lettering and a green leaf device enveloping the 'O' in SEASONS, will present visually as the same word as Samworth's mark but with an additional device, being the leaf. In terms of the script used in Fraser's mark this is also upper case but slightly stylised, unlike Samworth's mark which is in ordinary type. Bearing in mind the similarities and dissimilarities, including of course the device and the use of colour, I conclude that, visually, the marks are highly similar.
25. Aurally, Samworth's mark will be pronounced 'SEE-ZUNS'. Fraser's mark will be pronounced in exactly the same way, as plainly, it is not possible to enunciate, in the normal course of trade, the device element. I would reject the submission by Fraser's attorneys, if I have understood it correctly, that in aural use Fraser's mark will be pronounced 'SEE-ZUNS SEE-ZUNS', the word SEE-ZUNS being repeated. The mark applied for by Fraser is a series of two which plainly does not mean that the two 'versions', the one in black and white and the other in colour, will be used together as a single mark. Fraser's application Form TM3 plainly states at section 6 that that the application is for a series of two marks. The purpose behind registering as a series is to acquire protection for acceptable variants which do not alter the distinctive character of the underlying mark. Such variants are not thereby assumed to be used alongside each other as a single mark. I conclude that the respective marks are aurally identical.
26. The question of conceptual similarity or dissimilarity hinges around the effect, if any, of the device element. As regards the differences in colour and script I would say that these will not be material in terms of varying the underlying concept behind the respective marks. Both marks comprise the known dictionary word, SEASONS, being the plural of SEASON, which has the following definition:

season → **noun** *the rainy season* PERIOD, time, time of year, spell, term. → **verb** **1.** *season the casserole to taste* FLAVOUR, add flavouring to, add salt/pepper to, spice. **2.** *his albums include standard numbers seasoned with a few of his own tunes* ENLIVEN, leaven, spice (up), liven up; *informal* pep up.

in season AVAILABLE, obtainable, to be had, on offer, on the market; plentiful, abundant.¹

27. As can be seen from the definition, in use as a noun the word 'SEASONS' will convey the meaning of a period or time of the year: winter, spring, summer and autumn. This, in my opinion, will inevitably be the meaning conveyed to the average consumer when the respective marks are used on the relevant goods and services. Such goods as are covered by both parties' specifications are not associated in the consumer's mind with salt or pepper at all. Not only are they not associated, they are positively antagonistic; the thought that you may 'season' a drink would be abhorrent to most. I therefore reject the submission that Samworth's mark will somehow convey the verb, 'seasoning' or 'to season', whereas Fraser's, by virtue of the device, will inevitably convey the noun meaning, to which I have referred. Whilst the leaf device reinforces the noun meaning, in terms of it depicting a leaf which may be associated with one or more of the seasons of the year, I think *both* marks will convey that meaning in relation to the goods respectively specified. On that basis I conclude that conceptually the marks are identical.
28. Bringing the visual, aural and conceptual analysis together, taking account of similarities and dissimilarities, I find that the respective marks share a high level of similarity.

The average consumer and nature of purchase

29. As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23), it is important that I assess who the average consumer is for the goods at issue in class 32, and whether there is anything about the nature of transactions under the respective marks that may lead me to conclude that the average consumer is other than someone "deemed to be reasonably well informed and reasonably circumspect and observant" (see authority (b) in para 13 above).
30. In my analysis above I have found the respective goods to be identical and it follows that the identities of the respective average consumer will also be identical. For the most part these will be members of the public, but given the inclusion of syrups and concentrates used in the preparation of beverages, the consumer for these products will be manufacturers or producers of drink.

¹ "season *noun*" *The Oxford Paperback Thesaurus*. Ed. Maurice Waite. Oxford University Press, 2006. *Oxford Reference Online*. Oxford University Press. Intellectual Property Office. 22 April 2010 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t24.e11296>>

31. The goods concerned are everyday purchases in terms of the finished drink products and not a great deal of care or attention will be paid in the purchasing act. Manufacturers or producers may however pay more attention when purchasing their ingredients.

Use and distinctive character of the earlier trade mark

32. Before I bring my findings together in an overall assessment, I have to consider whether Samworth's mark has a particularly distinctive character, either arising from the inherent characteristics of the trade mark or because of the use made of it. In terms of its inherent distinctiveness I consider it to be of low to moderate distinctiveness. It is a known word which alludes to the goods in question, namely reflecting the fact that ingredients such as, eg fruit, come into and out of season. There is no evidence of use of the earlier mark and so I cannot conclude that this level of inherent distinctiveness is enhanced through use.

Likelihood of confusion

33. The various findings I have arrived at above need now to be factored into an overall assessment of likelihood of confusion. I need to adopt a global approach, which takes into account 'imperfect recollection' on the part of the consumer, as advocated by the ECJ in *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* I would also note that the authorities referred to me by Samworth's attorneys, draw attention in the analysis of likelihood of confusion to what the average consumer would take to comprise the distinctive and dominant element in a composite mark. That is to say that if I were to regard Fraser's mark as a composite mark (ie having a number of potentially different elements) then inevitably the average consumer would regard the word SEASONS as the dominant element. It is questionable that it is a 'composite' mark in the strict sense as the elements that are present actually blend together into one single 'image'. Whether it technically is or not, I would unhesitatingly agree with Samworth's attorneys that it is the word 'SEASONS' which will overwhelmingly be regarded as the distinguishing 'feature' or 'core' of Fraser's mark. At most, the leaf device will simply be regarded as an artistic embellishment which, although it may be noticed visually, will in effect 'reinforce', or further visually embody, the meaning of the word 'SEASONS'.

34. Further, the question has to be addressed, based upon notional and fair use across the range of services covered by the parties' respective specifications, and not upon any research or assertion as to what Samworth may *actually* and at this point in time, produce. As I have said above in para 12, Samworth are under no obligation in this case to prove their use. This is a well established principle of law, see eg *Origins Natural*

Resources Inc v Origin Clothing Ltd [1995] FSR 280 at page 284, which although referring specifically to section 10 of the Act, nevertheless applies also to the likelihood of confusion test I am required to undertake in this case. Moreover, the test is *mark against mark* and, to the extent that Fraser's attorneys may be inviting me to assume that Samworth's mark will inevitably be used alongside their familiar GINSTERS mark (thus reducing the likelihood of confusion as GINSTERS will be the dominant brand), this submission too must be rejected.

35. I have decided the respective marks are very close to being identical. The respective goods in Class 32 are identical. The respective average consumers' are identical and the earlier mark has a low to moderate inherent distinctiveness. Taking all this into account, I conclude that there is a likelihood of confusion.

36. In all the circumstances of this case, I find that the opposition succeeds in its entirety.

Costs

37. Samworth has been totally successful in their opposition. Accordingly, it is entitled to a contribution towards its costs. I take account of the fact that that the decision has been reached without a hearing taking place. In the circumstances I award Samworth the sum of £1200 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

1. Filing fee for opposition - £200
2. Preparing a statement and considering counterstatement - £200
3. Preparing evidence and considering and commenting on other sides evidence - £500
4. Preparing submissions - £300

Total £1200

38. I order Fraser & Neave to pay Samworth Brothers Ltd the sum of £1200. The sum should 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 27 day of May 2010

Edward Smith
For the Registrar, the Comptroller General