

**O/0189/25**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003901895**

**BY WRIGGLE FOODS LIMITED**

**TO REGISTER:**

**WRIGGLE**

**Wriggle**

**(SERIES OF TWO)**

**AS TRADE MARKS IN CLASSES 18, 25 & 35**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 442715 BY**

**WIGGLE LIMITED**

## BACKGROUND AND PLEADINGS

1. On 18 April 2023, Wriggle Foods Limited (“the applicant”) applied to register the series of trade marks on the cover page of this decision in the UK (“the application”). The application was published for opposition purposes on 26 May 2023 and registration is sought for the following goods and services:<sup>1</sup>

Class 18: Bags; leisure bags; cloth bags; casual bags; canvas bags; shoulder bags; travel bags; tote bags; rucksacks; satchels; shopping bags; straps for bags; sports bags.

Class 25: Clothes; clothing; men's clothing; women's clothing; sportswear; shirts; t-shirts; casual shirts; tops; jumpers; hoodies; coats; jackets; sweaters; socks; sweatshirts; knitwear; trousers; jeans; shorts; tracksuits; tracksuit bottoms; scarves; gloves; hats; footwear; wrist bands.

Class 35: Retail services, online retail services and wholesale services relating to insect-based food and drink products; marketing and advertising relating to the aforementioned goods.

2. On 25 August 2023, the application was partially opposed by Wiggle Limited (“the opponent”). The opposition was initially brought under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”) and was reliant upon three earlier marks, two of which were subject to a proof of use request from the applicant. However, the opponent did not file evidence in these proceedings meaning that, in accordance with Rule 20(3) of the Trade Marks Rules 2008, the section 5(3) ground and the reliance upon the two earlier marks subject to proof of use were deemed withdrawn. Further, in light of the division of the application discussed at footnote

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<sup>1</sup> The application was initially sought for a wider list of goods and services than those listed here. However, the applicant made a request to divide the application via Form TM12. The nature of the request was to divide the application in a way so that the goods and services that were not initially opposed in these proceedings could proceed to registration unopposed. This was accepted and the separate trade mark registration was ultimately granted registration (in respect of those goods and services that were not subject to this opposition) under trade mark number 4052447.

one of this decision, the present proceedings were converted from a partial to a full opposition.

3. As a result of the above, the opposition proceeds only on the basis of the section 5(2)(b) ground and in reliance upon the following mark:



UK registration no. 3834865

Filing date 30 September 2022; registration date 23 December 2022

Relying on all goods and services, being those set out in the **Annex** of this decision. (“the opponent’s mark”)

4. The opponent claims that the highly similar nature of the marks coupled with the identical nature of the goods and services will result in the application causing a likelihood of confusion on the part of the relevant public. In its pleadings, it is noted that the opponent also claimed to benefit from an enhanced degree of distinctiveness as a result of the use made of its mark. Given that no evidence was filed, this claim is not supported and is, therefore, of no assistance.
5. The applicant filed a counterstatement wherein it, generally, denied the claim against it. That being said, I do note that it did accept that the goods relating to sports (such as sport bags and sports clothing) were similar to a degree.
6. The opponent, whilst initially professionally represented, is presently unrepresented and the applicant is represented by Briffa. Neither party filed evidence. No hearing was requested and neither party filed written submissions in lieu. This decision is taken following a careful consideration of the papers.
7. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the

Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

## **DECISION**

### **Section 5(2)(b): legislation and case law**

8. Section 5(2)(b) of the Act reads as follows:

“(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 or association with the earlier trade mark.”

9. Section 5A of the Act states as follows:

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

10. 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 or international trade mark (UK) 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.

11. The opponent's mark qualifies as an earlier trade mark under the above provisions. However, the opponent's mark had not completed its registration process more than five years before the filing date of the application. This means that it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent may rely on all of the goods and services highlighted in its notice of opposition.

12. The following principles are gleaned from the decisions of the EU courts 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) ("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:

- (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.

## Comparison of the goods and services

13. The applicant's goods and services are set out at paragraph 1 above whereas the opponent's goods and services are set out in the Annex of this decision.

14. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. 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 that:

"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".

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) 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;
- (f) 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.

16. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that:

“29. 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 trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

17. As above, the applicant has conceded to some similarity where the goods relate to sports goods. That being said, it has not indicated the level of similarity it considers to exist. As such, whilst I will bear the concession in mind, it remains necessary for me to proceed to consider a full goods and services comparison in the ordinary way.

18. For the purpose of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way for the same reasons.<sup>2</sup>

### Class 18

19. “Sports bags” appears identically in both parties’ specifications. As such, these goods are self-evidently identical.

20. “Bags” in the applicant’s specification encompasses any type of bag, including bags for sports. As such, I find that this term of the applicant encompasses the term “bags for sports and outdoor pursuits” in the opponent’s specification. These goods are, therefore, identical under the principle outlined in *Meric*.

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<sup>2</sup> *Separode Trade Mark* BL O-399-10 and *BVBA Management, Training en Consultancy v BeneluxMerkenbureau* [2007] ETMR 35 at paragraphs 30 to 38.

21. The applicant's terms of "leisure bags", "cloth bags", "casual bags", "canvas bags", "shoulder bags", "travel bags", "tote bags", "rucksacks" and "satchels" are all without limitation and, therefore, can be used as bags for sports or to carry sports equipment (on this point, travel bags can include bags that a user will use to transport their skis or golf clubs, for example, when travelling to partake in those sports). As such, I find that these goods all fall within the opponent's terms of "sports bags" and "courier bags for sports and outdoor pursuits". These goods are, therefore, identical under the principle outlined in *Meric*.
22. "Shopping bags" in the applicant's specification cannot, in my view, be said to be a type of bag that it used for sports purposes. That being said, I consider that there exists a degree of similarity between this term and "sports bags" in the opponent's specification. I say this because their natures may overlap in that they may be bags made of the same materials. The method of use will differ but there is some overlap in purpose on the basis that, at their cores, both goods will be used for carrying something. Given that this relates to their core purposes, I find that the overlap here is limited. As for trade channels, I am not aware that it is common in the trade for undertakings who produce and sell shopping bags to also deal in a range of sports bags. Further, such goods are likely to be available via different distribution channels but, even where they may be sold in larger stores, they will be found at different locations in said stores. The goods are not complementary. As for competitiveness, I appreciate that a user, when going shopping, may take a sports bag to carry their goods though I do not consider that this necessary results in a complete overlap. Taking all of this into account, I consider that these goods are similar to between a low and medium degree.
23. The applicant's term of "straps for bags" is not subject to any limitation and can, therefore, cover a strap for a sports bag. On this point, I note that the opponent's specification includes "parts and fittings for the aforementioned goods included in this class". As "sports bags" is an 'aforementioned good', I find that the opponent's goods fall within the applicant's meaning that these goods are identical under the principle outlined in *Meric*.

## Class 25

24. "Sportswear" appears identically in both parties' specifications. As such, these goods are self-evidently identical.

25. I note that the applicant's specification includes a range of general terms, namely "clothes", "clothing", "men's clothing", "women's clothing" and "footwear". These are not subject to any limitation and can therefore cover a range of clothing or footwear for use in sport. As such, I find that all of these terms encompass the opponent's term of "clothing, footwear and headgear for use in sport". These goods are, therefore, identical under the principle outlined in *Meric*.

26. Following on from the above, I consider that the applicant's terms of "shirts; t-shirts", "tops", "jumpers", "hoodies", "coats", "jackets", "sweaters", "socks", "sweatshirts", "trousers", "shorts", "tracksuits", "tracksuit bottoms", "gloves", "hats" and "wrist bands" can all be said to cover goods that can be worn during sporting activities. As such, I find that they all fall within the opponent's term of "clothing, footwear and headgear for use in sport". These goods are, therefore, identical under the principle outlined in *Meric*.

27. Despite a range of the goods in the applicant's specification being those that can be used during sport, I consider that there are some terms that would not. These terms are "casual shirts", "jeans" and "knitwear". In my view, it is not common for someone playing sport to wear such goods. That being said, I consider that there still exists a degree of similarity between such goods and "clothing, footwear and headgear for use in sport" in the opponent's specification. I say this because while the goods may be made of different materials, they are all types of clothing and, therefore, may overlap in their natures. They will all be worn in the ordinary way and, therefore, share a method of use. As for purpose, while the opponent's goods will specifically be worn during sporting activity, they are ultimately for the protection of the user against the elements. The same can be said for the applicant's goods meaning that their core purposes are the same. As for trade channels and user, I consider that these overlap because it is common for clothing brands to offer both casual and sporting clothing and such goods will, clearly, be

selected by the same group of consumers. Taking all of this into account, I find that these goods are similar to between a medium and high degree.

28. “Scarves” in the applicant’s specification is a term that would not ordinarily be associated with sports. However, it is my understanding that when playing sports in cold weather, a player may wish to wear a type of scarf in order to keep their neck or face warm. As a result, I consider that the applicant’s term can be said to include goods that may be a type of sports clothing. As such, I find that this term can be said to fall within the opponent’s term of “clothing, footwear and headgear for use in sport” meaning that they are identical under the principle outlined in *Meric*. Failing that, these goods are clearly similar to one another as, following a similar reasoning to that discussed above, “scarves” and “clothing, footwear and headgear for use in sport” overlap in trade channels and user as well as some degree of overlap in nature, method of use and purpose. As such, if these goods are not identical then they are similar to between a medium and high degree.

#### Class 35

29. I will compare the applicant’s “retail services, online retail services and wholesale services relating to insect-based food and drink products” with the opponent’s terms of “retail services connected with [...] energy and recovery foods [and] energy and recovery drinks and gels” and “online retail services connected with [...] energy and recovery foods [and] energy and recovery drinks and gels”. While I have no submissions before me as to what ‘insect-based’ food or drink products are likely to be, it is my understanding that they will include consumable products that consist of insects such as crickets. Crickets, as a food, are high in protein meaning that food or drinks consisting of crickets can reasonably be said to be a type of recovery food or drink.<sup>3</sup> As such, the retail of such goods can be said to fall within the category of the retail of energy and recovery foods and drink. Therefore, the applicant’s term is encompassed by that of the opponent. On this point, I note that wholesale services are not expressly covered by the opponent’s terms, however, I consider that it is a form of retail and, therefore, is encompassed by the

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<sup>3</sup> I say this because it is my understanding that foods or drinks high in protein are commonly consumed by those looking to speed up the body’s recovery process after a workout.

term 'retail' generally.<sup>4</sup> Therefore, I find that these services are identical under the principle outlined in *Meric*.

30. Lastly, the applicant's term of "marketing and advertising relating to the aforementioned goods" specifically relates to "insect-based food and drink products". While the opponent's specification does not include marketing and advertising services, I note that it does include "information, advice and consultancy services related to the aforesaid services" with the *aforesaid services* being "recovery foods [and] recovery drinks". Plainly, these services are not the same. However, I do consider that there is some degree of similarity between them. I say this because while the natures, methods of use and purposes all differ, the trade channels and user will overlap. This is on the basis that an undertaking that offers marketing and advertising in relation to insect-based foods and drinks is also likely to provide information, advice and consultancy in relation to the retail of the same (on the basis that they are high protein recovery foods). For example, an advertising agency may also offer advice and consultancy on how to retail the relevant goods in order to maximise their exposure to the relevant public. Further, a user that retails in the relevant goods that will seek the advertising services of the applicant will also seek advice in respect of the retail services and the goods themselves. While the services are not complementary or competitive in nature, I consider the aforementioned overlaps in trade channels and user result in a finding that the services are similar to a low degree.

### **The average consumer and the nature of the purchasing act**

31. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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. (as he then was) described the average consumer in these terms:

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<sup>4</sup> In the event that this is incorrect, then the services will be similar to at least a medium degree based on overlaps in method of use, purpose, trade channels and user.

“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.”

32. The applicant claims that the average consumer for the goods and services at issue will be members of the general public at large who will pay an average degree of attention. I agree to some extent and I will expand upon this further below.

33. The goods at issue are ordinary consumer goods that will be selected by the general public at large. The goods will be selected via general retailers and their online equivalents. In physical stores, the goods will be displayed on shelves or racks where they will be self-selected by the consumer. When the purchase takes place online, the goods will be selected after viewing an image on a webpage. Clearly, the visual component will dominate the selection process, though I do not discount the aural component entirely as suggestions may come via word of mouth recommendations or advice from sales assistants.

34. The goods at issue are likely to be selected on a fairly frequent basis and at a low to moderate cost. When selecting the goods, consumers are likely to consider factors such as the materials used, suitability, style and fit (for goods that are worn on the person). In my view, these are ordinary factors that will attract a medium degree of attention.

35. Turning now to the services at issue, these will attract different groups of consumers and considerations depending on the services selected. I will deal with these in turn. For the retail services at issue, I consider that the average consumer base will consist of members of the general public at large. Such services are most likely to be selected having considered, for example, promotional material (in hard copy or online) and signage appearing on the high street. The selection of these

services is likely to be predominantly visual, though I do not discount an aural component playing a role via word of mouth recommendations or advice from sales assistants. When selecting these services the average consumer is likely to consider such factors as stock, price of goods offered in comparison to other retailers and expertise/knowledge of staff. These are relatively ordinary factors and, as such, I am of the view that the consumer will pay a medium degree of attention during the selection process for these services.

36. Turning to the average consumer for the marketing/advisory services of the parties, I consider that this will be business users. I appreciate that these services will be selected after the consumer considers them on lists, in pamphlets or on placards. However, they are also likely to be chosen after detailed discussions with sales assistants or the professionals that provide the services themselves. As such, I consider that the visual and aural components will play an equal role in the selection process for these services. In terms of the level of attention paid, the consumer is likely to consider factors such as the expertise of the provider, previous advertising campaigns and testimonials from previous customers. The consumer for such services is likely to pay a higher than medium degree of attention (though not outright high) on the basis that the selection is likely to be an important factor for their business.

### **Comparison of the marks**


37. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

38. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

39. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

40. The respective trade marks are shown below:

The opponent's mark	The application
	WRIGGLE Wriggle (series of two)

41. The marks in the application are word only marks consisting of the same word, being 'Wriggle'. The first mark is presented in upper case and the second is in title case. As word only marks, both are capable of being used in any standard typeface including use in any case, be that upper case, lower case or any customary combination of the two (such as title case). As a result, the difference in the use of case across these marks is of no real consequence. Therefore, for ease of reference during the comparison of the marks, I will consider the second mark in the application only, being 'Wriggle', which I will refer to as the applicant's mark for the purpose of this assessment.<sup>5</sup>

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<sup>5</sup> For the avoidance of doubt, the findings I make here as to cover both marks in the application.

42. I have comments from both parties in respect of the similarity of the marks. While I do not intend to repeat those comments here, I confirm that I have taken them into account in making the following comparison.

#### Overall impression

43. The opponent's mark is a figurative mark that consists of the word 'Wiggle' in a cursive stylised typeface. While the stylisation will be noticed, the consumer will still clearly read the mark as 'Wiggle'. I consider that it is the word 'Wiggle' that will dominate the overall impression of the mark with the typeface used playing a lesser role. Turning to the applicant's mark, this is a word only mark that consists of the word 'Wriggle'. These are no other elements that contribute to the overall impression of the mark which lies in the word itself.

#### Visual comparison

44. Visually, the marks share the letters 'W-I-G-G-L-E', which form the entirety of the sole word element of the opponent's mark and all but one letter of the word in the applicant's mark. The marks differ in the presence of the letter 'R' as the second letter in the applicant's mark. As for the stylisation used in the opponent's mark, I remind myself that this plays a role in the overall impression of the mark. Regardless of the size of its role within the mark, I find that it constitutes a point of visual distinction between the marks. On this point, I appreciate that it is not appropriate to hypothesise the way in which the applicant's mark (being a word only mark) may be stylised.<sup>6</sup> However, I am of the view that even if it were to be presented in a cursive typeface, fair and notional use would not cover the exact typeface used by the opponent. So while I accept that the stylisation used is a point of difference, its impact is only slight one on the basis that the word 'Wiggle' is still clearly identifiable in the mark. Taking all of this into account, I find that the marks are similar to a high degree.

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<sup>6</sup> See *HERNO S.p.A. v Miss Sparrow Ltd*, BL O/954/22

### Aural comparison

45. The opponent's mark consists of two syllables, being 'WIG-UHL'. The applicant's mark also consists of two syllables that will be pronounced as 'RIG-UHL'. I appreciate that the first sound of the first syllables differ, however, the remaining aural elements of the mark are identical. Overall, I consider that the marks are aurally similar to between a medium and high degree.

### Conceptual comparison

46. The concept of the marks at issue lies solely in their word elements. The applicant's mark, being 'Wriggle', means '*to make or cause to make twisting movements*'.<sup>7</sup> The opponent's mark, being 'Wiggle', means to '*move or cause to move with jerky movements, especially from side to side*'.<sup>8</sup> I note that these definitions are mirrored, to some degree, in the applicant's counterstatement wherein it states that 'Wriggle' is a word commonly associated with the movement of bugs and/or twisting and turning whereas 'Wiggle' is associated with back and forth motions and is more associated with human movement and sports. While I accept that 'Wriggle' may have a connection to the movement of bugs, it is also capable of being a reference to a form of human movement. As for 'Wiggle' being more associated with sports, I have nothing before me by way of evidence or submission to suggest that it would be. Without such, I am not willing to find that it does and instead, I consider that it would simply be understood as a non-specific reference to a form of movement.

47. In comparing the concept of these marks, I appreciate that both words have different dictionary definitions. However, I am not convinced that the average consumer would necessarily be aware of the exact meaning of the words.<sup>9</sup> Instead, I consider that the consumer will simply understand that both words have some meaning associated with *a form of movement*. So while the marks technically have different meanings, this connection to a form of movement will be the key concept

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<sup>7</sup> <https://www.collinsdictionary.com/dictionary/english/wriggle>

<sup>8</sup> <https://www.collinsdictionary.com/dictionary/english/wiggle>

<sup>9</sup> For example, 'Wriggle' being a specific reference to a twisting/turning movement and 'Wiggle' being a specific reference to a back and forth/side to side movement may not necessarily be understood.

grasped by the consumers. As such, I find that the marks share a high degree of conceptual similarity.

### **Distinctive character of the opponent's mark**

48. 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).”

49. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Despite its initial pleading to enjoy an enhanced degree of distinctiveness, the opponent has not filed any evidence of use. Therefore, I have only the inherent position to consider.

50. The opponent's mark is a figurative mark that consists of a word in a stylised typeface. While the stylisation will be noticed (and play a role within the mark), I do not consider that it impacts on the mark to any material degree which could be said to contribute to its overall distinctiveness beyond that which is created by the word 'Wiggle'. As such, I find that the distinctiveness of the opponent's mark lies in its word element. As I have discussed above, the word 'Wiggle' in the opponent's mark is a dictionary defined word. While I do not consider that its precise definition will be known, it will still be understood as having a connection to a form of movement. On this point, I appreciate that the goods and services relied upon relate to sports, which cover a range of activities that require movement. However, I do not consider that the average consumer will understand 'Wiggle' to be a specific movement reserved for sporting activities but will, instead, view it as a non-specific type of movement. As such, 'Wiggle' will not be descriptive of or allusive to the goods or services relied upon. That being said, it is an ordinary word so is not particularly remarkable from a trade mark perspective. As a result, I find that the word 'Wiggle', and therefore the opponent's mark as a whole, enjoys a medium degree of inherent distinctive character.

### **Likelihood of confusion**

51. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. 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. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between

trade marks and must instead rely upon the imperfect picture of them that they have retained in their minds.

52. I have found the goods and services to be identical or similar to various degrees, including low. The average consumer base is formed of members of the general public and business users. Members of the public will select the goods via primarily visual means (although I do not discount an aural component) after having paid a medium degree of attention. As for the business user, these will select the goods via both visual and aural means but will pay a higher than medium degree of attention (though not outright high) in doing so. I have found the marks at issue to be visually and conceptually similar to a high degree and aurally similar to between a medium and high degree. Lastly, I have found that the opponent's mark enjoys a medium degree of inherent distinctive character.

53. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I am of the view that the marks at issue are likely to be misremembered or inaccurately recalled for one another. I say this because the marks share six letters, which forms the entirety of the opponent's word element and six of the seven letters of the word that makes up the marks in the application. On this point, I appreciate the presence of a different second letter in the applicant's marks (being 'R'), however, this point of difference is subsumed into the body of the marks and, therefore, is likely to be overlooked when consumers are looking to recall the parties' marks. Additionally, I accept that the concept of the marks may not be identical, however, there is a shared conceptual hook (in the form of a connection to a form of movement) that, in my view, further supports the finding that consumers will be unable to recall the marks for one another. In addition, I do not consider that the stylisation element of the opponent's mark is something that consumers will look to pin their recollection of the marks upon and, as such, I do not consider it will assist them in recollecting the marks accurately. Consequently, I find that there exists a likelihood of direct confusion. For the avoidance of doubt, the high level of similarity between the marks is such that I consider confusion exists regardless of the level of similarity between the goods or services at issue and the level of attention paid by the consumer.

## **CONCLUSION**

54. The opposition succeeds in its entirety and, subject to any successful appeal of my decision, the application is refused for all of the goods and services applied for.

## **COSTS**

55. The opponent has succeeded in opposing the application in its entirety. The opponent would, therefore, in the ordinary course of these proceedings, be entitled to a contribution towards its costs. However, the opponent is unrepresented meaning that, in order to claim their costs, it was required to file a completed costs pro-forma. It did not do so. On this point, I note that a blank costs pro-forma was provided to the opponent under the cover of a letter from the Tribunal dated 11 June 2024. This letter set out that:

“If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded.”

56. While no costs pro-forma was filed, the opponent incurred official fees arising from this action. On this point, I appreciate that the official fees were paid on the basis that the opponent relied upon section 5(2)(b) and 5(3) grounds. While the inclusion of additional grounds beyond section 5(2)(b) attract a £200 application fee, the opponent failed to file evidence in support of the same. As such, I only consider it appropriate to award the opponent the sum of £100 which would be the ordinary fee for filing an opposition based on section 5(2)(b) only.

57. I hereby order Wriggle Foods Limited to pay Wiggle Limited the sum of £100. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 3<sup>rd</sup> day of March 2025**

**A COOPER**  
**For the Registrar**

## ANNEX

### Class 12

Bicycles; bikes; mountain bikes; racing bikes; road bikes; hybrid bikes; cyclo-cross bikes; trail bikes; track bikes; parts and components for bicycles; parts and components for bikes; parts and fittings for bicycles; bicycle chain wheels; bicycle cranks; bicycle crank sets; bicycle saddles; spokes; spoke clips; bicycle chains; chain deflectors; shift cables; handlebar grips; wheels; tyres; bicycle hubs; hub quick release levers; gear shift levers; brake levers; brakes; brake cables; brake shoes; chain guides; sprockets; handlebars; handlebar stems; freewheels; bicycle pedals; front forks; headsets; rims; bottom brackets; seat pillars; seat pillar quick release levers; derailleurs; front derailleurs; rear derailleurs; bicycle seats; bags for bicycles; bicycle racks for vehicles; panniers adapted for use with bicycles; saddlebags for use with bicycles; trailers for use with bicycles; repair kits for bicycles; puncture repair kits for bicycles; bicycle pumps; parts and fittings for the aforementioned goods included in this class.

### Class 18

Bags for sports and outdoor pursuits; backpacks for sports and outdoor pursuits; courier bags for sports and outdoor pursuits; sports bags; bags for sports; kit bags; hiking bags; running bags; swimming bags; waterproof bags for sports and outdoor pursuits; cycling bags; bags for cyclists; bags adapted for hydration purposes; parts and fittings for the aforementioned goods included in this class.

### Class 25

Clothing for sports and outdoor pursuits; footwear for sports and outdoor pursuits; headgear for sports and outdoor pursuits; sportswear; sports shoes, vests, socks, jackets, shirts, shorts, caps, footwear, headgear, jerseys, singlets; cycling shoes, shorts, shirts, suits, jerseys, tracksuits, socks, gloves, tops, pants; clothing for cycling; running shoes, shorts, shirts, suits, socks, gloves, tops, pants; clothing for running; swimming shorts, costumes, suits, tops, pants; swimwear; wetsuits; clothing for swimming; clothing, footwear and headgear for cycling; clothing, footwear and headgear for running; clothing, footwear and headgear for swimming; clothing,

footwear and headgear for use in sport; parts and fittings for the aforementioned goods included in this class.

### Class 28

Sporting goods; sporting equipment; sports and fitness training equipment; home training equipment; home and gym exercise equipment; home and gym fitness equipment; exercise bikes; stationary bikes; spinning bikes; rollers for stationary exercise bicycles; turbo trainers for bicycles; protective pads for cycling; protective knee pads for cycling; protective arm pads for cycling; protective elbow pads for cycling; protective wrist pads for cycling; protective pads for sport; protective knee, arm, elbow and wrist pads for sport; parts and fittings for the aforementioned goods included in this class.

### Class 35

Retail services connected with cycles, cycling apparatus, cycling equipment, cycling tools and accessories, parts and fittings for cycles, cycling and sporting clothing, cycling and sporting footwear and headgear, sportswear, sporting goods and equipment, sporting articles and apparatus, beverage containers and hydration systems, audio and video equipment, bags and rucksacks, swimwear and wetsuits, sports watches, swimming articles and accessories, camping goods, equipment and accessories; retail services connected with sunglasses and eyewear, energy and recovery foods, energy and recovery drinks and gels, nutritional supplements, first aid kits, medical straps and supports, body sprays, body creams, body gels and lotions, sunscreens and sun protection preparations; retail services connected with navigation equipment, sports and fitness training equipment and aids, sporting electronic goods and equipment, maps, media relating to sports and fitness being books, magazines, printed and electronic publications, printed matter, DVDs and other digital recording media, parts and fittings for all the aforesaid; online retail services connected with cycles, cycling apparatus, cycling equipment, cycling tools and accessories, parts and fittings for cycles, cycling and sporting clothing, cycling and sporting footwear and headgear, sportswear, sporting goods and equipment, sporting articles and apparatus, beverage containers and hydration systems, audio and video equipment, bags and rucksacks, swimwear and wetsuits, sports watches, swimming articles and accessories, camping goods, equipment and accessories; online retail services

connected with sunglasses and eyewear, energy and recovery foods, energy and recovery drinks and gels, nutritional supplements, first aid kits, medical straps and supports, body sprays, body creams, body gels and lotions, sunscreens and sun protection preparations; online retail services connected with navigation equipment, sports and fitness training equipment and aids, sporting electronic goods and equipment, maps, media relating to sports and fitness being books, magazines, printed and electronic publications, printed matter, DVDs and other digital recording media, parts and fittings for all the aforesaid; information, advice and consultancy services related to the aforesaid services.

#### Class 36

Insurance; insurance services; insurance information; insurance advice; insurance for cyclists; insurance for bicycles; accident insurance; insurance for the loss of possessions; insurance for the theft of possessions; insurance administration, arrangement, brokering management; insurance management services; insurance claims administration, management, processing; legal expenses insurance; information, advice and consultancy services related to the aforesaid services.

#### Class 41

Sporting activities; arranging, organising and managing cycling, athletic and sporting events, competitions, races, contests and activities; provision and management of sporting events; information, consultancy and advisory services relating to the aforesaid.

#### Class 45

Legal services; legal advice and consultancy services.