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TRADE MARKS ACT 1994  
IN THE MATTER OF APPLICATION No 2130853  
BY AGREVO UK LTD  
TO REGISTER THE TRADE MARK  
**GALAXY**  
IN CLASS 5

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AND IN THE MATTER OF OPPOSITION THERETO  
UNDER NUMBER 47746  
BY MARS UK LTD

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IN THE MATTER OF APPLICATION No 2130853  
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## BACKGROUND

On 25 April 1997, AgrEvo UK Limited of N D Wells, Patent Department, Chesterford Park, Saffron Walden, Essex, CB10 1XL applied under the Trade Marks Act 1994 for registration of the mark **GALAXY** in respect of the following goods in Class 5:

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“Preparations for killing weeds and destroying vermin; pesticides, insecticides, herbicides, fungicides.”

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On the 6 November 1997 Mars UK Ltd filed notice of opposition to the application. The grounds of opposition are:

1) The opponent is the proprietor of the following UK trade mark registrations

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Trade Mark	Number	Date of Registration	Specification
GALAXY	1383301	8 / 5 / 89	Meat, fish, poultry and game; sea foods; fruit and vegetables, all being preserved, dried, cooked or processed; preparations made from all the aforesaid goods; dairy products; drinks made from dairy products; soups; salads, salad dressings and mayonnaise; drinks, fillings, spreads and snack foods; meals and constituents for meals; proteinaceous substances; all included in Class 29.
GALAXY	802913	9 / 3 / 60	Non-medicated confectionery (Class 30).
GALAXY	1096027	24 / 5 / 78	Rice, pasta; cereals and cereal preparations, all for food for human consumption; tea, coffee, cocoa, coffee essences, coffee extracts, mixtures of coffee and chicory; chicory and chicory mixtures, all for use as substitutes for coffee; non-medicated confectionery; bread; prepared meals, constituents for meals, snacks and fillings, all included in Class 30; chocolate sauces.

GALAXY	1381869	27 / 4 / 89	Rice, pasta, cereals and cereal preparations; tea, coffee, cocoa, coffee essence, coffee extracts, mixtures of coffee and chicory, chicory and chicory mixtures, all for use as substitutes for coffee; non-medicated confectionery, pastries, cakes, biscuits; ices, ice-cream, ice-cream products and frozen confections; bread, pastry; drinks, fillings, spreads, snack foods, meals and constituents for meals; chocolate, sauces; all included in Class 30.
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5           2) The opponent is also the proprietor of Community Trade Mark Application number 1280 for the mark GALAXY filed on 1<sup>st</sup> April 1996.

10          3) The opponent has used its marks in the UK in relation to confectionery, frozen confections and other goods for a period of many years such that a substantial reputation attaches to the mark.

15          4) The opponent considers that there is a serious public health risk if the subject mark is registered in view of its prior use of the mark GALAXY in relation to products for human consumption.

20          5) Registration of the subject mark will prejudice the opponent in the lawful execution of its business.

25          6) The mark the subject of application number 2130853 is identical to the opponent's marks. Use of the subject mark would take unfair advantage or be detrimental to the distinctive character of the opponent's mark. Registration of the mark should be refused under the provisions of Section 5(3) of the Trade Marks Act.

30          7) The opponent's mark is the subject of huge reputation. Registration of the subject mark should be refused under the provisions of Section 5(4) of the Trade Marks Act 1994.

35          8) Registration of the subject mark should be refused under the provisions of Section 3(3)(b) of the Trade Marks Act 1994.

40          9) Registration of the subject mark should be refused under the provisions of Section 3(4) of the Trade Marks Act 1994.

45          The applicants subsequently filed a counterstatement denying all of the grounds of opposition. Both sides ask for an award of costs.

50          Both sides filed evidence in these proceedings and the matter came to be heard on 28 January 2000 when the applicants were represented by Mr Wells, their Trade Marks Manager, and the opponents by Mr Alexander of Counsel instructed by Grant Spencer Caisley & Porteous.

## OPPONENTS' EVIDENCE

This consists of four statutory declarations. The first is by Ms Fiona Jane Lawlor, dated 20 February 1998, the Marketing Property Manager for companies within the Mars Group in Europe of which Mars UK Ltd is one. Ms Lawlor held this position between 1992 and 1997 and now carries out the same function as an external consultant. She states that the facts set out in her declaration are from within her personal knowledge or taken from the records and files of Mars UK Ltd.

Ms Lawlor states that:

“My company has sold confectionery manufactured under the GALAXY brand continuously since 1960. We have sold a variety of confectionery, drinks and ice-cream products in a variety of different sizes and shapes such that the public is well used to seeing a wide range of different products bearing the GALAXY brand, manufactured in a variety of sizes.”

At exhibit FJL1 are photocopies of examples of packaging on which representations of the trade mark have appeared. These all show the word GALAXY prominently.

Ms Lawlor provides turnover and advertising figures for the trade mark GALAXY in the UK.

YEAR	TURNOVER US\$ million	ADVERTISING US\$ million
1987	66	2.2
1988	59	2.5
1989	67	4
1990	83	6
1991	91	3.8
1992	98	5.2
1993	111	6
1994	142	9.6
1995	153	13
1996	161	11
1997	178 (estimated)	16 (estimated)

Ms Lawlor claims that the products have been sold throughout the UK from supermarkets and corner stores to pharmacies and petrol stations. She states that the GALAXY brand has been used on a wide range of products, including:

Easter eggs (variety of sizes), Truffle eggs, heart-shaped confectionery, Milk chocolate bars (58g to 1 kilo), Caramel bars (variety of sizes), Fruit and Nut bars (variety of sizes), Hazelnut bars (variety of sizes), Individual caramel chocolates sold in bags, Ice cream, Ice cream lollies, Milk drinks, Chocolate coated Brazil nuts, Chocolate coated mixed nuts.

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Ms Lawlor then states:

10 “We have expressed our extreme concern to the applicant with regard to possible public health risks if our well-known mark is used on the goods encompassed by the subject application. The public is used to new presentations of the product and confusion could have very serious consequences if an adult or child unwittingly consumes the products designated in the specification of the opposed application believing them to be our products.”

15 “We have asked the applicant to reassure us with regard to the nature of their proposed use but the applicant has refused to provide any information. We have conducted our own enquiries without obtaining any useful information.”

20 “Products such as those designated in the specification for the subject application are often stored in the kitchen when used in domestic locations. It is well documented that there have been numerous instances of small children consuming toxic or poisonous substances in the home. The risks are increased immeasurably when the name of such products is identical to a well-known confectionery or drink product.”

25 “The surveys which we have conducted and which are the subject of separate statutory declarations show that the public immediately associate the word GALAXY with our chocolate products.”

30 “In my view the subject mark is instantly recognized by the public and trade as our trade mark and use of the trade mark in the way proposed will both lead to confusion and endanger the public. Association with our most valuable mark with the products on which the subject mark is proposed to be used will be extremely damaging to our goodwill and we ask that the mark is refused with an award of costs in our favour.”

35 The second statutory declaration, dated 20 February 1998 is by Ms Melanie Tate. Ms Tate states that she is employed by Grant, Spencer, Caisley & Porteous Ltd, the Trade Mark Agents for the opponent. She states that:

40 “On the instructions of Claire Hutchinson, a trade mark attorney in my company, I conducted public surveys on 17<sup>th</sup> & 18<sup>th</sup> February 1998. The surveys were conducted on Tottenham Court Rd W1, and Charing Cross Rd. These venues were selected purely on the basis that shopping areas are usually guaranteed to have a significant flow of persons representing a reasonable cross section of the public. The individuals questioned were selected on a random basis except that I did not approach persons

45 obviously less than eighteen years of age. In respect of each survey I asked whether the individual concerned would be prepared to participate in the survey but gave no other information about the purpose of the survey until after the survey was completed.”

At exhibit MT1 is a copy of the blank questionnaire, and at exhibit MT2 are photocopies of the results of the surveys which Ms Tate says she recorded on each form. Each individual was asked a single question; “What would you think of if I said GALAXY to you?”. Of the forty-four people interviewed twenty-one (47.7%) referred solely to chocolate. An additional eleven  
5 people (25%) gave two or more responses amongst which was a reference to chocolate.

The third statutory declaration, dated 20 February 1998, is by Mr David Alexander Kemp. Mr Kemp is also employed by the opponent’s trade mark agent. He states that using the same  
10 criteria as Ms Tate he carried out a survey on 17<sup>th</sup> and 19<sup>th</sup> of February 1998 on Islington High St. and High Holborn in London. Mr Kemp used the same questionnaire which is filed at exhibit DAK1 and photocopies of the answers are at exhibit DAK2. . He questioned forty-three people, of whom twenty-seven (62.8%) referred solely to chocolate. An additional four  
15 people (9.3%) gave two or more responses amongst which was a reference to chocolate.

The fourth statutory declaration, dated 20 February 1998, is by Emily Jane Keaney. Ms Keaney is employed by the opponent’s trade mark agent and carried out a similar survey to her  
20 two colleagues. The same criteria as Ms Tate and Mr Kemp were used with the survey being carried out on 17<sup>th</sup> February 1998 outside Charing Cross Station. Of the five people interviewed four (80%) referred solely to chocolate.

Putting the results of the surveys together, of the 92 persons questioned 54 (58%) referred  
25 solely to chocolate, whilst another 15 (16%) gave two or more responses amongst which was a reference to chocolate.

### 30 APPLICANTS’ EVIDENCE

This consists of a statutory declaration, dated 7 May 1998, by Norman David Wells the Trade  
Marks Manager at AgrEvo UK Ltd (the applicant).

35 Mr Wells states:

“ I have carried out on-line searches in the UK on the mark GALAXY using the  
Waterlow search system, and have found that there are some 51 live registrations of  
40 word marks containing that word as a discrete element. These are in the names of 40 different companies, not including the opponents or any company whose name includes the word Mars. They fall in 21 different classes, and 29 of the registrations are of the mark GALAXY alone. All of the registrations are of an earlier date than the present application. Brief details of all 51 registrations are given in exhibit NDW1 hereto, together with a list of their different registered proprietors and the classes of  
45 registration. Also given in exhibit NDW1 are OPTICS details of live registrations Nos 860633, 1180706 and 1346264, and of expired registration no 1311973.”

5 “The applicant company’s business is that of manufacture and marketing of chemical products for use in crop protection. Its products are used exclusively on farms by farmers, and the manufacture, sale, storage and use of such products are all highly regulated by law. In all my years of employment with the applicant and its predecessors, I have never become aware of even a single instance of confusion of any of my company’s products with any comestible goods. Nor, given the regulations which exist, do I consider the possibility of any such confusion to be even remotely likely.”

10 Exhibit NDW1 shows a list of application numbers, the trade mark, an update code and a pin number. It also includes details of an expired Galaxy mark for Class 5 goods pesticides, vermin control etc., two for goods in Class 3 (detergents, household cleaning items etc.) and one in Class 5 (oil, petroleum etc.).

15 Exhibit NDW2 is a copy of the cross search list used by the Trade Marks Office for goods in Class 5.

#### 20 OPPONENT’S EVIDENCE IN REPLY

25 This consists of a statutory declaration, dated 24 August 1998, by Claire Christina Hutchinson. Ms Hutchinson is employed by Grant, Spencer, Caisley & Porteous. She comments on the claims made by Mr Wells in his evidence for the applicant. Ms Hutchinson states that the application in suit “extends to all preparations for killing weeds and destroying vermin; pesticides, herbicides and fungicides, which would encompass each of the third party products listed below and shown exhibited to this declaration.”

30 Ms Hutchinson then lists and provides (at exhibits CCH1 - CCH7) examples of the following products:

35 Nippon Ant Killer Powder  
Zeneca ‘Pathclear’ weed killer  
Vapona small space fly killer  
Rentokil fly papers  
Rentokil rat and mouse killer  
Weedol fast acting weed killer  
Alphakil mouse killer.

40 Ms Hutchinson states that all of the above products are for domestic use and can be found in any household garage or kitchen. She claims that each is provided in a small packet or container similar in size to the confectionery and drinks products provided by the opponent’s under their GALAXY mark.

45 At exhibit CCH8 is a copy of the AgrEvo Home and Garden catalogue and the AgrEvo Product Catalogue for the 1998 season. Ms Hutchinson states that this:

“Clearly illustrates products sold by the AgrEvo company for domestic use in the UK

which would be stored in an ordinary household garage or kitchen. It is clear that the proposed registration of GALAXY by AgrEvo will extend to products for domestic use and that the AgrEvo company does manufacture and sell such products.”

5 The catalogues at exhibit CCH8 show products clearly designed and packaged for use in the home and garden.

10 That concludes my review of the evidence. I now turn to the decision.

## 15 **DECISION**

At the hearing the opponent withdrew the grounds of opposition under Sections 3(4) and 5(4)

15 The first ground of opposition is under Section 3(3)(b) which states:

(3) *A trade mark shall not be registered if it is -*

20 (a) *.....*

(b) *of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or service).*

25 At the hearing Mr Alexander agreed that Section 3 deals with absolute grounds. However, he also invited me to consider that it should be viewed in the context of other factors such as public policy. He referred to the dangers inherent to the public, particularly young children, of association between the products of the opponent, primarily chocolate based, and those of the applicant, chemicals generally harmful to humans if ingested. Referring to the 1938 Act and the Jardex case [1946] RPC 63, Mr Alexander contended that, if there was a risk to the public,

30 the authority to refuse a trade mark was still available to the Registry.

Section 3(3)(b) is intended to protect the public from deception. However, I note that Section 3 of the Act has the words “Absolute grounds for refusal of registration” printed alongside it. I must therefore consider only the mark in suit and determine whether it alone is capable of

35 deceiving the public. I cannot take account of any confusion which may occur if there were to be association with another existing trade mark. I do not accept that the mark GALAXY when used on the goods covered by the applicant’s specification, in itself would deceive the public. The ground of opposition under Section 3(3)(b) therefore fails.

40 Next, I turn to the grounds of opposition under Section 5(3) which states:

5 (3) *A trade mark which -*

45 (a) *is identical with or similar to an earlier trade mark, and*

(b) *is to be registered for goods or services which are not similar to those for which the earlier trade mark is protected,*

5 shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

An earlier right is defined in Section 6, the relevant parts of which state

10 6.- (1) In this Act an 'earlier trade mark' means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark 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,

15 (b)...

(c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention as a well known trade mark.”

20 Section 5(3) of the Act is identical in all material respects to Section 10(3) of the Act. Throughout my decision I therefore intend to look to the comments of Neuberger J. dated 21 January 2000 in the, as yet, unreported case of Premier Brands UK Ltd v Typhoon Europe Ltd, hereinafter referred to as “Typhoon”.

### 25 **CONFUSION**

The issue of whether it was necessary to show confusion was raised at the hearing. In Typhoon Neuberger J stated:

30 “It appears tolerably clear to me from the terms of Section 10, that confusion is not a necessary ingredient to establishing infringement under Section 10(3). Indeed, this now seems to be established by authority: see Sabel [1998] RPC 199 at 223: the same view was taken by Advocate -General Jacobs in General Motors [1999] All ER (EC)865 when he said at 870 (paragraph 26)

35 ‘[T]he issue was resolved by the [ECJ] in its judgment in Sabel....., which made it clear, when ruling on Article 5(1)(b) that Article 5(2) did not require confusion.’

40 (This is also consistent - or at least not inconsistent - with the view expressed obiter by Aldous LJ in British telecommunications Plc v One in a million Ltd [1999]FSR 1 at 25.)”

45 The absence of instances of actual confusion in the opponent’s evidence is not therefore fatal to their case.

## Without due cause?

At the hearing Mr Wells queried the meaning of the words “without due cause”. In Typhoon Neuberger J stated:

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“The purpose of Section 10(3) is, as I have indicated, to protect the value and goodwill of trade marks, particularly in cases where they are well known, from being unfairly taken advantage of or unfairly harmed. I accept, of course, that, as the very use of the word “unfairly” demonstrates the section is not intended to confer absolute rights on trade mark proprietors in all circumstances. However, it does not appear to me likely that it could have been envisaged that the use of a sign for goods which may in practice very heavily damage the value of a mark, whose development and exposure has been the subject matter of considerable effort and expense by the proprietor, should be immune from attack by the proprietor of the mark simply because the sign was innocently adopted. Such a construction of Section 10(3) would not only be capable of producing an unfair, even capricious, result so far as the proprietor of the trade mark is concerned, it would also encourage those considering adopting new signs to carry out a minimum amount of research, and could fairly be said to be conferring an advantage on the ignorant and lazy over the well-informed and careful.

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Furthermore, it seems to me undesirable that the outcome of a case where the court is satisfied that the allegedly infringing sign will seriously damage the reputation of the registered mark should depend on the view which the court forms as to the knowledge, subjective intentions, and even the unconscious desires, of the owner of the allegedly infringing sign.”

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“Secondly, although I accept that the words “being without due cause” are somewhat opaque in their effect, I consider that they have to be read as not merely governing the words “the use of the sign”, but also as governing the words “takes unfair advantage of, or is detrimental to”. Section 10(3) must be read in a commercially sensible way. Bearing in mind its overall purpose, it appears to me that (without at this stage intending to indicate where the burden of proof lies) it requires the defendant to show not merely that the use of the allegedly infringing sign in connection with the defendant’s goods is “with due cause”, it also requires him to show that although the use of the sign might otherwise be said “to take unfair advantage of or is detrimental to” the mark, the advantage or detriment are not “without due cause”.

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“Thirdly, it appears to me that this conclusion is consistent with the view of the Benelux Court in Lucas Bols [1976] IIC 420 at 425, where, when discussing the meaning of “without justifiable reason” which appeared in a similar context in the Uniform Benelux Trade Mark Act as “without due cause” in Section 10(3), the Court said this:”

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“What this requires, as a rule, is that the user (of the mark) is under such a compulsion to use this very mark that he cannot honestly be asked to refrain from doing so regardless of the damages the owner of the mark would suffer from such use, or that the user is entitled to the use of the mark in his own right and does not have to yield this right to that of the owner of the mark....”.

5 “On the same page, the court went on to suggest that a ‘justifiable reason’ may be ‘if the user can assert an older right than that of the [registered proprietor]’ but went on to emphasise that whether the alleged infringer can establish a ‘justifiable reason’ must be ‘resolved by the trial judge according to the particular facts of each case.’.”

10 Given the comments above it is clear that the words “being without due cause” do not assist AgrEvo in the present case. The applicant has not shown evidence that it has used the mark, nor has any explanation of how the name came to be adopted been given. In contrast the opponent has used its mark for nearly forty years. Although evidence of use for this period was not filed the applicant did not challenge the issue in its evidence, and although it was raised as a point at the hearing no cross examination had been requested.

15 In these circumstances I have no hesitation in reaching the conclusion that, if Mars UK Ltd can otherwise succeed in its claim under 5(3) AgrEvo can obtain no assistance from the words “without due cause” in that section.

### **Taking unfair advantage**

20 In the pleadings the opponent included the issue of unfair advantage. However, this was not covered in their evidence and at the hearing Mr Alexander made it clear that the opposition were not pursuing this ground.

### **Detriment**

25 In summary, the opponent’s case that AgrEvo’s use of the GALAXY trade mark causes and will cause detriment to the distinctive character or repute of the Galaxy trade mark is as follows:

30 1) The identical nature of the trade marks will, despite the differences in the goods, result in members of the public associating the goods of the applicant with those of the opponent.

35 2) The use of the mark by the applicant on the goods covered by its specification will lead to tarnishing, as the mark’s brand image is associated with , to quote Mr Alexander, “yummy chocolates”. Whereas the applicant’s goods cover items such as rat poison and fly killer.

40 I shall consider these contentions in turn.

### **Association**

45 The opponents contend that most people seeing the applicants’ mark will think of them. Mr Alexander, if I understood him correctly, contends that this, of itself, takes unfair advantage of the opponents’ goodwill and reputation. Mr Alexander pointed to the very substantial sales

and advertising figures for the ten years prior to the relevant date. These figures are said to relate to the sale of confectionery, drinks and ice-cream under the GALAXY mark in the UK. In the ten years prior to the relevant date sales averaged over US\$100million (approximately £67million) per annum.. Evidence of advertising averaging over US\$6million per annum  
5 (approximately £4million) was provided. No figures are given for the total confectionery, drinks and ice-cream market or the opponents' market penetration

However, he also made reference to the survey carried out which indicated that of the ninety-two persons asked "What would you think of if I said GALAXY to you?", seventy-four  
10 percent responded with an answer related to chocolate. This survey was heavily criticised at the hearing by Mr Wells, and some of his points were well made. However, despite not being beyond criticism, the survey does, in my opinion, confirm that the opponent's mark is well known.

At first glance the products of the parties would seem at opposite ends of the spectrum. The opponent's contend that there are similarities in that both sets of goods are "household consumer products". The applicant originally claimed in evidence that its' products were solely for use by the farming industry. However, at the hearing Mr Wells accepted that the applicant's specification did not exclude retail sales to the general public and that the evidence  
20 provided by the applicant made it clear that such products were manufactured by them. Although I do accept their contention that confectionery and pesticides are not usually sold in the same outlet.

Further, the applicant claimed that there are a number of GALAXY trade marks registered.  
25 However, such registrations are not evidence of use and therefore are of no assistance to the applicant.

I am prepared to accept that the applicant's mark may remind some people of the opponent's mark. Others may think of the astral meaning of the word, whilst others will be reminded of  
30 both.

I do not consider that simply being reminded of an identical trade mark with a reputation for dissimilar goods necessarily amounts to taking unfair advantage of the repute of that mark. The opponent has to establish that the association is such as to be "detrimental as to the character or repute of the [GALAXY] mark". I must therefore consider the opponent's  
35 contention that the applicant's use of GALAXY on pesticides, insecticides, herbicides and fungicides will, by association, tarnish the opponent's brand image for confectionery.

### **Tarnishing**

  
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The concept that use of a similar or identical sign on dissimilar goods could damage or tarnish, due to potentially damaging connotations, an earlier mark is not an unfamiliar one. In the case of *Claeryn / Klarein* [Benelux Court of Justice 1.3.1975 NJ 1975,472] a mark for gin was said to be damaged by an identical sounding mark for detergent.  
45

Similarly, in *Hack's application* (1941 RPC 91) the proprietors of a well known mark (BLACK MAGIC) which was registered for chocolate and chocolates succeeded in opposing

an application to register the same mark for “laxatives other than laxatives made with chocolate”. Morton J. found in favour of the proprietors of the earlier mark under Section 11 of the Trade Marks Act 1938 on the basis that there might be confusion in the sense that people might be ‘caused to wonder’ whether there was a connection in trade between the parties. The circumstances appear similar to those in the *Claeryn / Klarein* case. In both cases the potential for damage to the reputation of the earlier trade mark with consequent damage to its ability to add value to the goods in respect of which the mark had been used is manifest. The case in suit appears to be on all fours with these earlier cases. As Mr Alexander put it, “Who would wish to be reminded of rat poison when eating GALAXY chocolate?”. Should GALAXY become an established trade mark for herbicides, insecticides and other toxic products then the question of damage to the value of the GALAXY chocolate mark has to be considered. In my view the unpleasant association would cause the value of the GALAXY chocolate brand to be diminished.

I cannot conceive of a more damaging association for a manufacturer of confectionery than products which are designed to kill. Mr Wells reluctantly accepted that young children are killed or injured each year through contact with such chemicals as those included in the applicant’s specification. Even if I were to accept Mr Wells’ contention that such children would have to be “devoid of common sense” and also “unsupervised” in order to consume such products, the fact is that such tragic accidents do happen every year. Inevitably, such incidents generate considerable publicity, albeit local. In my opinion use of the mark GALAXY on the goods covered by the applicant’s specification would, without due cause, be detrimental to the distinctive character and repute of the earlier trade

I therefore find that the opposition succeeds on the ground under Section 5(3).

The opposition having succeeded the opponents are entitled to a contribution towards their costs. I order the applicants to pay them the sum of £1635 This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 19 day of May 2000

George W Salthouse  
For the Registrar  
The Comptroller General

