

**O/0533/23**

**TRADE MARKS ACT 1994**

**TRADE MARK APPLICATIONS 3649145/6**

**BY CORRY DISTILLERY LTD**

**AND**

**OPPOSITIONS 428052 & 428237**

**BY THE CHAPEL GATE IRISH WHISKEY CO**

## Background and pleadings

1. This is an opposition by The Chapel Gate Irish Whiskey Co (“the opponent”) to two trade mark applications filed on 31<sup>st</sup> May 2021 (“the relevant date”) by Corry Distillery Ltd (“the applicant”) to register the trade marks **CORRY DISTILLERY** and **THE LOST CORRY DISTILLERY** in relation to *distilled spirits* in class 33.

2. The opponent’s claim to own an earlier unregistered right to the mark **J.J. Corry**. This is as a result of the use of that mark throughout the UK since 2018 in relation to beverages, including distilled spirits. The opponent claims to have thereby acquired goodwill in the UK under the name. According to the opponent, use of the opposed trade marks by the applicant would constitute a misrepresentation that it is, or will be connected with, the opponent and this would damage the opponent’s goodwill. Therefore, the opponent claims that registration of the opposed marks would be contrary to section 5(4)(a) and (4A) of the Trade Marks Act 1994, which are as follows:

*“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-*

*(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,*

*(aa) [...]*

*(b) [...]*

*A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”*

*“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”*

3. The applicant filed counterstatements denying the claims made. In particular, the applicant denied the opponent had acquired sufficient goodwill in the UK under J.J. Corry to justify protection under the law of passing off. The applicant further denied that use of the opposed marks would constitute a misrepresentation to the public, as alleged by the opponent.

4. Both parties seek an award of costs.

5. The opposition proceedings are consolidated.

### **Representation**

6. The applicant is represented by Keltie LLP. The opponent is represented by Michcon de Reya LLP. Both sides filed evidence, but neither party requested a hearing. The applicant provided submissions in lieu. Consequently, I have taken this decision after a careful review of all the papers.

### **The evidence**

7. The opponent's evidence consists of two witness statements by Louise McGuane, who is the founder and CEO of the opponent. The first witness statement (with 18 exhibits) is intended to support the opponent's claim to have acquired a protectable goodwill in the UK prior to the relevant date under the sign J.J. Corry. The second witness statement (with 4 exhibits) replies to, and challenges the significance of, the applicant's evidence.

8. The applicant's evidence consists of a witness statement by Benjamin Britter, who is a trade mark attorney at Keltie LLP. The purpose of Mr Britter's evidence is to establish that Corry is a village on the Isle of Skye with an old distillery dating back to 1816/18. The applicant attaches particular significance to the fact that Corry is a geographical name in the context of the opponent's claim that use of the opposed marks would constitute a misrepresentation to the public.

## The relevant case law

9. In *Discount Outlet v Feel Good UK*,<sup>1</sup> Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

*“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the Jif Lemon case (Reckitt & Colman Product v Borden [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.*

*56. In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per Interflora Inc v Marks and Spencer Plc [2012] EWCA Civ 1501, [2013] FSR 21).”*

10. The relevant date for establishing a passing off right in opposition proceedings is the date of the application for registration. If the applicant used the applied for mark(s) from an earlier date it also necessary to consider whether a passing off claim would also have succeeded at that earlier date.<sup>2</sup> The applicant has not claimed to have made any use of the opposed marks. Consequently, the date of filing the applications for registration is the only relevant date in this case.

11. The goodwill required to support a passing off right must be situated in the territory of the UK. This requires the opponent to show that it had customers in the UK under the sign J.J. Corry prior to the relevant date.<sup>3</sup> Showing that the opponent had customers in other places is irrelevant.

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<sup>1</sup> [2017] EWHC 1400 IPEC

<sup>2</sup> *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, as the Appointed Person

<sup>3</sup> *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31

12. In *Hart v Relentless Records*,<sup>4</sup> Jacob J. (as he then was) stated that:

*“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge’s finding). Again that shows one is looking for more than a minimal reputation.”*

13. However, a small business with a more-than-trivial goodwill can protect signs which are distinctive of its business under the law of passing off. In *Lumos Skincare Limited v Sweet Squared Limited and others*,<sup>5</sup> the Court of Appeal in England and Wales held that the defendant had passed off its LUMOS nail care products as the claimant’s goods. The relevant date was October 2010. The claimant had been selling LUMOS anti-ageing products since 2007. The goods retailed at prices between £40 and £100 per bottle. The claimant’s sales were small. Around £2,000 per quarter from early 2008 through to September 2009, rising to £10,000 per quarter by September 2010. The vast majority of these sales were made to the trade, including salons, clinics and a market. As at the relevant date, the Claimant had sold to 37 outlets, and was still selling to 25 of them. There was evidence of repeat purchases. Although the number of customers was small or, as the judge at first instance put it, “*very limited*”, the claimant’s goodwill was found to be sufficient to entitle it to restrain the defendant’s trade under LUMOS. The line that divides those

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<sup>4</sup> [2002] EWHC 1984 (Ch),

<sup>5</sup> [2013] EWCA Civ 590

entitled to protect their goodwill under the law of passing off from those that are not, is drawn between those with a small business in the UK and those with only a trivial level of UK business under the sign.

14. In *Lumos Skincare Limited*, Lord Justice Lloyd commented on the requirement for ‘a substantial number’ of members of the public to be misled per *Neutrogena Corporation v Golden Limited*<sup>6</sup> and earlier case law. He said:

*“64. One point which emerges clearly from what was said in that case, both by Jacob J and by the Court of Appeal, is that the “substantial number” of people who have been or would be misled by the Defendant’s use of the mark, if the Claimant is to succeed, is not to be assessed in absolute numbers, nor is it applied to the public in general. It is a substantial number of the Claimant’s actual or potential customers. If those customers, actual or potential, are small in number, because of the nature or extent of the Claimant’s business, then the substantial number will also be proportionately small.”*

15. Accordingly, once it is established that the party relying on the existence of an earlier right under section 5(4)(a) had sufficient goodwill at the relevant date to found a passing-off claim, the likelihood that only a relatively small number of persons would be deceived does not mean that the case must fail. It is sufficient that a substantial proportion of the customers, or potential customers, of the claimant’s actual business would be likely to be deceived.

16. Halsbury’s Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

*“The question whether deception is likely is one for the court, which will have regard to:*

*(a) the nature and extent of the reputation relied upon,*

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<sup>6</sup> [1996] RPC 473

- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;*
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;*
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and*
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.*

*In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”*

17. According to paragraph 5-22 of Wadlow on the Law of Passing Off 6<sup>th</sup> Edition, it is well settled that the test for whether a representation is true or not is based on the objective effect it had, or will have, on the relevant public. As Lord Davey said in *Grand Hotel Co of Caledonia Springs v Wilson*:<sup>7</sup>

*“Even a description of goods which is literally true may be so framed as to mislead.”*

18. Therefore, if use of the opposed marks at the relevant date would have deceived a substantial number of the opponent’s actual or potential customers, it is no defence that the representation made by the applicant’s marks was literally true.

19. With these cases in mind I turn to the facts.

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<sup>7</sup> 21 R.P.C. 117 PC

## Goodwill

19. The opponent operates a website at jjcorry.com and trades internationally.

20. According to Ms McGuane, the opponent started selling whiskey in the UK in 2017 under the name J.J. Corry, which appears prominently on the labels of the opponent's whiskies. The products typically retail at between £50 and £110.

21. The opponent has numerous social media accounts and says that a substantial proportion of its followers are based in the UK. Ms McGuane supports this with demographic data<sup>8</sup> showing that (at the date of her statement in May 2022) 16.5% of the opponent's audience on Instagram were based in the UK, and the third highest number (269) of its 'fans' on Facebook were based in the UK (Ireland and the USA both having more of its 'fans').

22. Historical pages from the Wayback machine website show the opponent's J.J. Corry whiskies on sale on the website of the Celtic Whisky Shop in February 2021 priced in Pounds Sterling.<sup>9</sup>

23. An article posted on the website barmagazine.co.uk on 13<sup>th</sup> November 2017 covered the launch of J.J. Corry whiskey in the UK market. An article about Irish-made drinks in the Sunday Times published in August 2018 also included coverage of the launch of the first J.J. Corry whiskey in 2017. An article on the website of the Daily Mail in January 2020 covered the opponent's business, including pictures of its J.J. Corry whiskey, and mentioned that it was stocked at two places in London. A review of the opponent's J.J. Corry 'The Battalion' whiskey was included on the BBC Good Food's website in April 2021. The article included links to the websites of Amazon and Masters of Malt where the product was on sale priced in Pounds Sterling. J.J. Corry whiskey was also mentioned in further articles in The Times (31<sup>st</sup> May 2020), The Sunday Times (17<sup>th</sup> January 2021), Drinks International (5<sup>th</sup> January 2021), and The Independent (15<sup>th</sup> May 2021), the last under the heading 'Best Whiskies from Around the World'.<sup>10</sup>

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<sup>8</sup> See exhibit LM5

<sup>9</sup> See exhibit LM7

<sup>10</sup> See exhibit LM9



24. The opponent works with Axiom Brands who distribute and market its whiskies in the UK. Reports provided by Axiom Brands for the periods April – November 2019 and January 2020 show that the opponent’s whiskies were sold to 14 UK drinks retailers and hotels in the UK.<sup>11</sup> The whiskies were also marketed at five named events in the UK prior to the relevant date.<sup>12</sup>

25. Sales figures provided by Ms McGuane from the opponent’s records indicate that it sold just under 4k bottles of whiskey to the UK market between November 2017 and the end of 2020 generating income of around £180k. Sales in 2021 amounted to nearly 3k bottles generating around £170k further income. However, only the sales made prior to the relevant date at the end of May 2021 count for establishing UK goodwill for the purpose of these oppositions. The sales figures are supported by purchase orders from Axiom Brands dated prior to the relevant date.<sup>13</sup>

26. Ms McGuane says that the opponent spent around 180k promoting its whiskies in the UK between November 2017 and the relevant date. It is not clear which currency this figure is in. The claim is supported by copies of three invoices for promotions held prior to the relevant date. Two are from traders in the UK. They amount to around £3300. The third is from a USA retailer for \$1400.

27. The applicant disputes that the opponent’s evidence shows it had acquired more than a trivial level of goodwill under J.J. Corry prior to the relevant date. It points out that much of the evidence shows trading outside the UK. It makes a number of other points about the individual exhibits to Ms McGuane’s statement, including that:

- (i) some of the material is undated or dated after the relevant date;
- (ii) although there are purchase orders there are no sales invoices in evidence;
- (iii) the sales and marketing figures provided come from the opponent’s internal records and are not independently verified.

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<sup>11</sup> See exhibit LM13

<sup>12</sup> See exhibit LM14

<sup>13</sup> See exhibit LM16

28. The applicant did not request a hearing or seek leave to cross examine Ms McGuane on her evidence. Nor did it challenge the truth of her written evidence prior to making final written submissions. It therefore failed to put the witness on notice that the truth of her evidence was going to be challenged. In these circumstances it is not open to the applicant to ask me to disbelieve Ms McGuane's evidence. That does not mean that I must accept it uncritically. It is still necessary to evaluate the weight of the evidence in question, including the fact that it comes from internal records. I am satisfied that the sales figures provided are accurate. They are consistent with the picture painted by the evidence as a whole. There is nothing to suggest they are wrong or inflated. By contrast, I am not satisfied about the accuracy of the UK marketing figures provided. This is because:

- (i) They appear unduly high in comparison with the UK sales figures;
- (ii) In contrast to the sales figures, the opponent's witness conspicuously fails to indicate which currency they are in;
- (iii) Of the three invoices provided to support the claimed UK marketing figures, one is an invoice from a retailer based in the USA priced in US Dollars.

29. However, even without the marketing figures provided for the UK, and after taking account of the applicant's legitimate criticisms of the opponent's evidence of its trade in the UK prior to the relevant date, I find that the evidence is sufficient to show that the opponent had established a small and growing (i.e. more than trivial) UK business in whiskey by the relevant date. Accordingly, I find that the opponent has established that it owned a protectable goodwill in the UK.

### **Misrepresentation**

30. The applicant denies that use of the opposed marks would constitute a misrepresentation to the relevant public for three reasons. Firstly, the visual and aural differences between, on the one hand, J.J. Corry and, on the other hand, CORRY DISTILLERY and THE LOST CORRY DISTILLERY. Secondly, that when used in the opposed marks the word CORRY has the character and appearance of a placename, whereas in the opponent's earlier right it has the character and appearance of a

surname. Thirdly, that there is in fact a place called CORRY on the Isle of Skye which was the location of a distillery from 1818.

31. Mr Britter's evidence is intended to support the second and third points. He provides extracts from Google and Ordnance Survey Maps showing that Corry is indeed a place on the Isle of Skye.<sup>14</sup> He also provides a copy of a PhD thesis submitted by Iseabal Ann Glen entitled 'An Economic History Of The Distilling Industry In Scotland 1750 – 1914', and a printout from the website flaviar.com, both of which reference a Corry Distillery going back to 1818 or 1816. I note the latter records that the Corry distillery closed in 1826. Mr Britter adds the following bit of hearsay evidence:

*"I am advised by the Applicant that the original Corry distillery buildings referenced at paragraphs 4 and 5 above will form part of its renovated distillery."*

32. Exhibited to Ms McGuane's second witness statement are printouts from various websites, including the Isle of Skye tourist information website, TripAdvisor and Wikipedia. They focus on the Isle of Skye and places to visit there. None of them mention a village called Corry.<sup>15</sup>

33. Given (1) the small size of the village of Corry, (2) the apparent lack of any reputation outside the locality, (3) the fact that the distillery that operated there for about 10 years appears to have closed nearly two hundred years ago, and (4) that there was no distillery operating in Corry at the relevant date, it is clear that the vast majority of the relevant public in the UK would not have known that Corry is a place, let alone that it is a place where whisky products were once produced. It follows that even if the applicant's products will be sourced from the village of Corry on the Isle of Skye (which is not apparent from the applicant's specification of goods), this can have no real bearing on the likelihood of the opposed marks deceiving the opponent's customers or potential customers. It follows that the applicant's third submission on misrepresentation – that the opposed marks tell the literal truth – must be rejected.

34. The applicant's second submission – that the relevant public will, in any event, see the word CORRY in the opposed marks as a placename - must be rejected for the

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<sup>14</sup> See exhibit BNB1

<sup>15</sup> See exhibit LM19

same reason: unless one knows of a place called CORRY there is no reason to conclude that it *must* be a placename. The applicant effectively acknowledges as much by clarifying that its submission that CORRY is a placename does not mean that it accepts that it lacks distinctive character.<sup>16</sup> In this connection, the applicant relies on the judgment of the EU's General Court in *Peek v Cloppenburg*<sup>17</sup> as authority for the proposition that a mark corresponding to a placename is not to be regarded as descriptive and non-distinctive if the place is unknown.

35. In my view, the meaning of the word CORRY in the trade marks CORRY DISTILLERY and THE LOST CORRY DISTILLERY is not entirely clear. A significant section of the relevant public may speculate that it is a placename. Another significant section of them will reason that because CORRY DISTILLERY means 'distillery of Corry', CORRY may be the name of the person or business that operates (or once operated) the distillery. A further significant section of the relevant public is unlikely to think about what the marks mean deeply or long enough to arrive at either understanding.

36. It seems to be common ground that J.J. CORRY will be seen by the relevant public as the name of a person. In any event, that is my view because it looks (and sounds) like a personal name. Based on the above analysis of the meanings likely to be conveyed by the parties' marks, I find that:

- i) There is no obvious conceptual distinction between the meanings of J.J. Corry and CORRY DISTILLERY that will be universally understood by the relevant public;
- ii) A significant section of the public will regard all the marks at issue as, or including, the name of a person or of a business named after him/her;
- iii) Consumers in this category are likely to perceive the word Corry in the mark THE LOST CORRY DISTILLERY as a reference to the person or business that historically operated the distillery before it ceased operation and became 'lost' through the passage of time.

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<sup>16</sup> See paragraph 35 of the applicant's written submissions

<sup>17</sup> Case T-379/03

37. The applicant's first submission - that the visual and aural differences between the opposed marks and the J.J. CORRY marks are sufficient to avoid any likelihood of deception – requires assessment of the following factors.

*The nature and extent of the reputation relied upon*

38. At the relevant date, the opponent's mark had a small reputation in the UK for whiskey.

*The closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business*

39. Whiskey is a distilled spirit. The parties are therefore trading or proposing to trade in the same field of business.

*The similarity of the mark, name etc used by the defendant to that of the claimant*

40. The mark J.J. Corry starts with the letters J.J., which are obviously the initials of the person whose surname is Corry. The marks CORRY DISTILLERY and THE LOST CORRY DISTILLERY obviously do share this opening individualisation of CORRY and therefore start differently, with CORRY.. and THE LOST.., respectively. Unlike the opponent's mark, the opposed marks also include the word DISTILLERY.

41. The similarity between the parties' marks arises from the common use of the word CORRY. I have found that a significant section of the relevant public is likely to perceive this word as a surname. Surnames are not very distinctive because they are naturally capable of distinguishing the goods/services of different people of the same name. The potential for goods bearing the same surname to originate from different businesses generally increases in line with the commonness of the name (and vice versa). It is therefore necessary to consider the commonness or otherwise of the name Corry. There is no relevant evidence before me. Based on my own experience, I do not consider that CORRY is a common surname in the UK. The variant CORY may be more common, but I doubt it is very common. I therefore accept that, in principle, the section of the public familiar with J.J. Corry as a mark for whisky could see CORRY in third party marks as indicating a connection to the opponent's business. And I can

attach little weight to the distinguishing effect of the word DISTILLERY in the opposed marks in the context of a proposed trade in distilled spirits.

42. Unlike in the opponent's earlier right, the reference to CORRY in the opposed marks is not qualified by a given name or any initial(s) capable of signalling to those who see it as a name that it is not a reference to J.J. Corry. There is, therefore, a serious risk that a substantial number of the opponent's customers or potential customers will be deceived into believing that J.J. Corry whiskey and CORRY DISTILLERY whisky originate from the same or connected trade source(s).

43. By contrast, I find there is no serious risk of deception arising from the use of the second opposed mark - THE LOST CORRY DISTILLERY. The visual and aural differences resulting from the additional words THE LOST (and DISTILLERY), and the absence of J.J., are sufficient to rule out any likelihood of direct confusion. Further, there is no likelihood of deception from consumers who recognise the marks are different assuming that the shared CORRY element indicates a common user. This is because THE LOST.. indicates that the CORRY identified by this mark (even if it was a person or business) was one that operated a distillery in the distant past. Therefore, if THE LOST CORRY DISTILLERY is used in relation to a new trade in distilled spirits the public will understand the CORRY referenced in this mark to be an historic reference. There is therefore no reason for the public to regard this mark as representing the CORRY in question to be connected to J.J. Corry. To sum up, I find there is a significant degree of visual, aural and conceptual similarity between J.J. Corry and CORRY DISTILLERY, but little relevant similarity between J.J. Corry and THE LOST CORRY DISTLLERY.

*The manner in which the defendant makes use of the name, mark etc complained of and collateral factors*

44. There is nothing to suggest that the applicant adopted the contested mark with the intention of deceiving the public. However, as the applicant acknowledges, it is not necessary for the misrepresentation to be deliberate.

*The manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.*

45. The applicant's submits that the average consumer of distilled spirits pays an above average degree of attention during the selection process and this will help to avoid any deception. In this connection, the applicant points out that in *The Malt Whisky Company Ltd v The Vintage Malt Whisky Company Ltd*<sup>18</sup> another Hearing Officer held that average consumers of whisky pay a "slightly above average" level of attention during the selection process. In my view, the applicant is trying to attach more weight to the quoted words in the earlier decision than they are capable of carrying. The classifications 'low', 'medium' and 'high' degrees of attention are imprecise. These terms are intended to convey the general idea behind the decision maker's reasoning. It is even harder to make any meaningful distinction between 'average' and 'slightly above average'. I agree with my fellow Hearing Officer that average consumers of whisky pay an 'around normal' degree of attention when selecting such products. This may help to avoid some consumers directly mistaking CORRY DISTILLERY for J.J. Corry. However, it provides no basis for supposing that such consumers will undertake detailed research into the meaning and origin of the brand names they encounter and thereby discover that CORRY DISTILLERY is in fact the name of an old distillery on the Isle of Skye.

#### *Conclusion on misrepresentation*

46. For the reasons given above, I find that there is a likelihood that a substantial number of the opponent's customers and potential customers will be deceived into believing that whisky sold under the name CORRY DISTILLERY originates from, or is connected with, the opponent. This will be caused, in part, by such consumers imperfectly recollecting the earlier mark and thereby correlating CORRY DISTILLERY with J.J. Corry. However, it will also arise from consumers assuming that, although different, CORRY DISTILLERY and J.J. Corry identify whisk(e)y from the same or related undertaking(s).

47. On the other hand, I find that use of THE LOST CORRY DISTLLERY will not cause deception among any significant number of the opponent's customers and potential

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<sup>18</sup> BL O/239/21

customers. It follows that use of the former mark at the relevant date would have constituted a misrepresentation to the public, but use of the latter mark would not.

### **Damage**

48. In circumstances where the parties trade in the same or substantially the same goods, damage will readily be inferred where misrepresentation is established. In this case damage is likely through diversion of sales and/or loss of control of reputation.

### **Outcome**

49. The opposition to CORRY DISTILLERY succeeds. The application to register that mark will be refused.

50. The opposition to THE LOST CORRY DISTILLERY fails. That mark will proceed to registration.

### **Costs**

51. Both sides have achieved a roughly equal measure of success. I therefore order the parties to bear their own costs.

**Dated this 8<sup>th</sup> day of June 2023**

**Allan James**  
**For the Registrar**