OUTER HOUSE, COURT OF SESSION

[2026] CSOH 85

A204-26

OPINION OF LORD SANDISON

In the cause

(FIRST) McCANDLISH FARMHOUSE CONFECTIONERY LIMITED and
(SECOND) ANDREW SNODGRASS McCANDLISH

Pursuers

against

(FIRST) MICHAEL MALONE and (SECOND) DEBBIE WATT

Defenders

Pursuers: Grieve, MBM Commercial LLP
Defenders: Parties

8 September 2026

Background

[1] On 13 March 2026 I granted leave in terms of RCS 4.2(5) for a summons to be presented for signeting in the name of McCandlish Farmhouse Confectionery Limited seeking relief for alleged trademark infringement and passing off against Michael Malone and Debbie Watt, said to be trading as "Wee Troon Candy" amongst other names.

[2] The summons passed the Signet on 16 March 2026. It in essence narrated that in 1994 one Allan McCandlish had, as an individual, acquired the recipe for and the goodwill and

associated rights in a confectionery product known as the "Chelsea Whopper", first produced by others shortly after the Second World War. Chelsea Whoppers were described as cocoa-dusted fudge-like fingers produced in bars marked into strips, cut and wrapped in clear plastic packaging with branding labels attached featuring a red, yellow and black colour scheme, a "Chelsea" script mark and a cartoon-style Chelsea pensioner figure. It was averred that goodwill had been built up in the name and get-up of the Chelsea Whopper over many years.

[3] It was further narrated that UK Trade Mark UK00002422970 was registered on 6 April 2007 consequent upon an application made on 26 May 2006. The mark consists of a pictorial representation of a smiling Chelsea pensioner above the words "'Chelsea' Chocolate Flavoured Whoppers", and is registered in relation to Classes 29 and 30. The word "Chelsea" is in Gothic script on a black background, the other words in different fonts and sizes on a white background. The general background to the representation is yellow in the top half and red in the bottom half.

[4] The summons claimed that it was discovered in 2006 that the defenders were producing and selling a confectionery product named "Chelsea Whoppers" similar to that being produced and sold by Mr McCandlish, and in a similar get-up. Proceedings were said to have been raised by Mr McCandlish in Ayr Sheriff Court in 2009 to seek to restrain the defenders from doing so, but to have been dismissed. It was said that the defenders had continued to trade thereafter in Chelsea Whoppers.

[5] Additionally, it was stated that UK Trade Mark UK00003429251 was registered on 20 December 2019 consequent upon an application made on 19 September 2019. The mark is for the words "Chelsea Chocolate Flavoured WHOPPERS" and is registered in Class 30.

[6] It was claimed that the defenders' conduct constituted infringement of the trademarks and passing off, and that the pursuers as the entity entitled to the marks should be awarded damages from the defenders, jointly and severally, conservatively estimated in the sum of £1,100,000 for loss of profits (£700,000), brand dilution and reputational erosion (£280,000), and the cost of rebranding and market re-education (£120,000). The summons additionally concluded for interim interdict, declarator of infringement and passing off, delivery up under sections 14 and 15 of the Trade Marks Act 1994, authorisation for recovery of infringing goods from third parties in terms of sections 14 to 16 of the 1994 Act, aggravated damages and expenses. For the avoidance of doubt, it was not contended that the pursuer had any intellectual property rights in cocoa-dusted fudge-like fingers *per se*, or that the product complained of infringed any such rights as may exist in the recipe for the pursuer's product.

[7] At an *ex parte* hearing on 20 March, I gave permission for a lay representative, Agnes Gough (a director of the pursuer), to conduct the proceedings on its behalf, against a narration that the company was a small family-owned confectionery manufacturer operating on a limited commercial scale and that the cost of instructing suitable legal representation in the action was beyond its financial resources. I also appointed parties to be heard on 1 April 2026 on the pursuer's motion for interim interdict, considering that, given the length of the period during which it was alleged that the defenders had been engaged in the conduct complained of, there was no pressing need for that matter to be determined on an *ex parte* basis. It also transpired that mark UK00002422970 remained registered in the name of (the now late) Allan McCandlish and that mark UK00003429251 was registered in his name and that of Mrs Gough. I indicated that that might be a matter which could usefully be attended to before matters proceeded much further.

[8] On 1 April 2026, the defenders, having been served with the summons and motion for interim interdict, appeared in person and unrepresented. The first defender accepted that he had run a business producing a chocolate-flavoured fudge bar confection under the name "Chelsea Whoppers" since the early 2000s, but claimed in effect that that was a generic term for the product in question, and gave an account of its history which, it seemed to me, might if made out form a proper basis for revocation of the marks relied upon in the action. The second defender (with the first defender's support) denied being part of his confectionery business, claiming that she was his girlfriend, had set up a promotional Facebook page for that business to help him out, and had taken only one telephone call on the number advertised on that page (which, it transpired, was from Mrs Gough pretending to be a customer) and had produced, marketed or sold nothing at all.

[9] I began to form doubts as to just how accurate much of the material presented by the pursuer (and in effect, by Mrs Gough) in support of its motion was. A great deal of it had every appearance of being abstract and generic content produced by artificial digital means, and the presentation of the case appeared to be influenced at least as much by what that content indicated should be said as by demonstrable facts. One example was the willingness of both Mrs Gough and her brother Andrew McCandlish, in affidavits lodged on their behalf, to claim that both defenders had been involved in the manufacture of Chelsea Whoppers for many years, and indeed that the 2009 proceedings in Ayr Sheriff Court had been against them both, when the court documents actually produced showed that the action had been against Mr Malone alone and it became evident that the pursuer had no evidence whatsoever against Ms Watt other than the single telephone call to her placed by Mrs Gough in 2025.

[10] A further example was that, despite repeated claims of market confusion being advanced by the pursuer, no evidence supporting that claim from any source other than members of the McCandlish family was advanced. Much stress was placed on an email sent to Mrs Gough by John Bain of Bains Retro Sweets dated 24 February 2026 in response to a series of questions posed by her alongside the observation that "Even half a page signed and dated is extremely powerful at interim stage. Judges react strongly to actual consumer confusion", but the first sentence of Mr Bain's email included the statement "I'm afraid that I don't think I can be of any great help", noted that he did not know whether the entity from which he had bought Chelsea Whoppers had been associated with the defenders or not, and finally observed "As far as the answers to the other questions in your file, I do not feel that I am qualified or comfortable enough to give answers or make assumptions …". This material, put forward at this stage as the sole external evidence of market confusion, failed for obvious reasons to make the impression on me for which Mrs Gough had evidently hoped.

[11] I was able to examine the respective products of the pursuer and the first defender in their then get-up. The former closely followed the style anticipated by mark UK00002422970; the first defender's was in packaging with a broadly similar (though far from identical) overall appearance; an oval sticker label applied to clear plastic packaging with the top two-thirds being on a yellow background and the bottom third on a red background, with a thin intervening white strip. The upper section of the sticker was very largely occupied by a cartoon rendering of the pictorial content of the well-known "Your country needs you" First World War propaganda poster featuring a uniformed and moustachioed Lord Kitchener pointing at the viewer, with the legend "The Original Chelsea Cocoa Dusted Chocolate Fudge Whoppers". Each of the get-ups additionally bore the name

or trading style of the manufacturer of the respective product, a barcode, a list of ingredients and the product weight (85g in the case of the pursuer, 95g in the case of the first defender). Although the similarities in name and get-up led me to form the impression that the possibility of confusion between the two products could not be ruled out, nothing that I saw or heard at the hearing on 1 April demonstrated clearly that this was anything other than a case of two separate producers manufacturing and selling a product with a generic name, that the possibility of confusion cut both ways, and that the trademarks relied upon might well be susceptible to revocation. I refused the pursuer's motion for interim interdict *in hoc statu*, leaving open the possibility of further and better evidence being presented in advance of any renewal of that motion.

[12] On 10 April 2026 the pursuer enrolled a new motion for *interim* interdict and substantive orders under sections 14, 15 and 16 of the Trade Marks Act 1994 and section 47(2) of the Court of Session Act 1988, seeking warrant for seizure by the pursuer of the defenders' products from retailers and distributors and their substitution with the pursuer's product, and to require the defenders to disclose where their products might be found and in what quantities. Before that motion could be heard the pursuer enrolled a substitute motion for decree in absence in respect of all conclusions of the summons, the period of notice for the lodging of defences having expired on 22 April, seeking *inter alia* permanent interdict; delivery up of all the defenders' products, raw materials, packaging, manufacturing equipment, business records and electronic devices; seizure of the defenders' product from all retailers or distributors, etc.; disclosure of the names of all such persons, of property owned by either of the defenders, their bank accounts, vehicles, etc; joint and several decree for £1,100,000 together with interest and without inquiry as to any actual loss and damage suffered; the reservation of the question of additional damages

under section 97(2) of the 1994 Act; the expenses of the action on an agent and client basis; and arrestment and inhibition, supposedly on the dependence of the action.

[13] In the meantime, the first defender had on 10 April 2026 intimated that he had redesigned the packaging of his Chelsea Whoppers and produced a photograph of that new packaging. It was radically different from the previous get-up, and on a brown paper background bore on the front side the legend "The Wee Copper Pot" with a representation of a cooking pot with a tartan heart emerging from it, below which appeared "Luxury Chelsea Whopper" and on the back the same design and wording with the addition of the producer's address, barcode, product weight, ingredients and nutritional information. There appeared to be no further prospect of any confusion between the products arising from their respective get-ups.

[14] The pursuer had also attended to the recording on the register of a transfer of the two marks in question, on the basis of an application made to the IPO on 27 March 2026, but instead of reflecting what I had been told about the marks, namely that they had been transferred by Allan McCandlish to the pursuer alone by way of a business sale agreement (an explanation which ignored the involvement of Mrs Gough as one registered proprietor of mark UK00003429251, seemingly since it was first registered in 2019), the new registrations were effected in the joint names of the pursuer and Andrew McCandlish. The form submitted to the IPO claimed that that transfer had occurred on 14 February 2020. No explanation as to the discrepancy between what I had been told had occurred in 2020 and the claim made to the IPO was offered.

[15] The pursuer's motion claimed that

> "independent survey evidence addressing the depth of consumer and trade confusion and the extent of market loss suffered … [had] been commissioned and

> conducted by independent interviewers engaged through a third-party employment agency with no connection to either party"

and that the survey methodology and results would be produced. Although further inventories of productions were indeed lodged in advance of the hearing of the motion, one of which (the third) bore to include the methodology and results, no such documents accompanied the inventory and nothing of the sort was in fact produced at this or any subsequent stage of the litigation. There accordingly remained no independent evidence of any confusion between the parties' respective products before the court.

[16] At the hearing of the motion on 1 May, I explained to Mrs Gough that, as what was now being sought from the court were substantive and not interim orders, because the marks were now registered in the names of both the pursuer and Andrew McCandlish, and because I did not consider that there were any circumstances justifying the grant of special leave for any other course of action to be adopted, section 23(5) of the 1994 Act required Mr McCandlish to be added as either an additional pursuer or additional defender to the action before matters could proceed further.

[17] Also at the hearing, Mr Malone indicated that he did not intend to seek revocation of the marks or to seek any legal assistance, on the basis that he lacked the means to take either course of action and that the pecuniary return to him from the production of Chelsea Whoppers was so small that he would prefer to cease the manufacture of any product under that name rather than try to maintain that he enjoyed a right to do so. I suggested to him that that left him with no obvious defence to the case based on infringement of mark UK00003429251, in response to which he offered, and I accepted, an undertaking to the court that he would not himself, or through anyone acting on his behalf, manufacture, produce, market, offer for sale or otherwise deal in confectionery goods under reference to

the words “Chelsea” or “Whopper” or any combination thereof. It was clear that, as with most undertakings, this looked to the future only, and that Mr Malone was not thereby obliged to seek to recall products already sold or supplied by him to the market. I also allowed the defenders a further period, to 22 May 2026, to lodge defences with the court.

[18] On 19 May I allowed Andrew McCandlish to be sisted as an additional pursuer to the action and a consequential amendment to the summons. On the following day defences were lodged on behalf of both defenders. The defences stated in essence that Mr Malone had made Chelsea Whoppers since 2002 and had built up reputation and goodwill in his own product. He believed that the name was a generic one for chocolate fudge dusted with cocoa powder, and the person who taught him how to make them had been producing them himself since the 1960s, before any involvement from the McCandlish interest. That person, Stewart Howat, had himself learned how to make Chelsea Whoppers from their original “inventor”, a Colonel Hunt. He claimed to have been unaware of McCandlish Farmhouse Confectionery Limited being the owner of any trademark before 9 April 2026, when its name first appeared on the register. At the end of the court case in 2009 he had been told that he could continue making Chelsea Whoppers. He had adopted the get-up complained of in about 2014 so as better to represent the original packaging dating from around 1945. No one had complained about confusion with the McCandlish product, or about his product more generally. In the past five years he had sold 3303 boxes of Chelsea Whoppers at a total profit of £12,122. Ms Watt had nothing to do with his business; he was a sole trader and had only been dating her for two years. Since the hearing on 1 May 2026, he had totally rebranded and changed the name of his product.

[19] On 16 June I heard a motion enrolled by the pursuers in which they sought an order for Mr Malone to appear to respond to an alleged breach of the undertaking given by him on

1 May. This was supported by a narration that the entire stock of the defenders' Chelsea Whoppers held by a shop in Helensburgh had been bought on 14 May by a friend of Mrs Gough and at her instigation. When the same person attended at the shop again on 28 May, it had restocked with a further 37 units of that product, which was claimed by the pursuers to be conclusive evidence that Mr Malone had breached the undertaking. Given that the undertaking did not apply to goods already in circulation at the time it was given, and there was no evidence at all that the goods in the shop on 28 May had been produced or put into circulation after 1 May, what was claimed was entirely irrelevant. There was no prospect whatsoever of it being shown beyond reasonable doubt on the evidence available that Mr Malone had breached the undertaking, even if I had regarded contempt proceedings in respect of 37 bars of chocolate fudge as being an appropriate way of using the court's time and resources (which I did not). Mr Malone denied having breached his undertaking and produced what bore to be a letter from the owner of the shop in question consistent with no breach having taken place. I was entirely unpersuaded that there was anything at all in the pursuers' minute for breach, or that anything might in due course be properly or proportionately made of it, and I accordingly dismissed it.

[20] The pursuers had also enrolled a motion seeking the same range of final orders as they had sought by the motion disposed of on 1 May, this time by way of summary decree rather than by way of decree in absence, with no further relevant evidence adduced in support of that motion. It was plain that Mr Malone's cessation of production of anything that might infringe the pursuers' trademarks or confuse their customers had failed to inject any element of proportionality into their attitude or approach to the litigation, and that they were, come what may, determined to seek a substantial monetary award against the defenders. I accordingly decided that they should be given an early opportunity to establish

any such claim. The material lodged in support of the pursuers' motion for summary decree made it explicitly clear that they elected to seek compensatory damages rather than an account of profits from the defenders. I refused summary decree and warrant for diligence on the dependence of the action, and fixed a proof on the extent, if any, to which the actions of the defenders had caused the pursuers loss and damage.

[21] That proof was, with the agreement of the pursuers, fixed to take place on 5 August 2026 and was to have a duration of one day. All parties were required to lodge lists of witnesses and any expert report by 26 June, with full witness statements to follow by 24 July. As the summons had contained a formulated claim for damages since it passed the Signet on 16 March 2026, I did not consider that there would be any hardship in the pursuers being required to substantiate that claim in short order, and they did not object to any aspect of the timetable which I fixed. I also had in mind the need, exemplified in the very sensible practice of the English intellectual property courts, to make robust use of case management powers to monitor and control trial processes carefully, proportionately and in a streamlined manner in cases where, as here, the amount of damages in prospect did not seem likely to be very great, whatever ideas the pursuers might entertain on the subject: *Reed Executive Plc* v *Reed Business Information Ltd* [2004] EWCA Civ 159, [2004] RPC 40; *Lifestyle Equities CV* v *Amazon UK Services Ltd* [2022] EWCA Civ 552; [2023] Bus LR 1010.

[22] The pursuers lodged no witness list or expert report by 26 June; the defenders lodged a witness list containing only their own names, and had already made it clear at the hearing on 16 June that they did not intend to lead any expert evidence. On 25 June the pursuers enrolled a motion seeking to have the timetable altered so as to extend the date for lodging their list of witnesses to 17 July, and to extend the time for lodging any expert report (which was intended to come from an accountant) to the same point. I was not prepared to

alter the timetable as requested. The pursuers' claim for a very significant sum in damages had been hanging over both defenders for some time, carrying the potential for the ruination of them both, with no sign of the availability of relevant evidence of any materiality in support of the claim. I was beginning to be sceptical that any such evidence actually existed. For example, and as already noted, independent survey evidence supposed to demonstrate market confusion had been promised in April 2026 and had not materialised. It was accepted at the hearing of the motion that the pursuers did not have, and never had had, any expert evidence in support of their claim. It did not appear to me that it was in the interests of justice to postpone the point in time at which the pursuers should disclose the sources of any evidence which they did have. As to expert accountancy evidence, it seemed to me that the real issue facing the pursuers was the apparent absence of any primary evidence in support of their pecuniary claim, rather than how any such evidence might be interpreted or presented, and that permitting further time to the pursuers to vouch a case which they had stated confidently for months would be likely to result in a nothing other than the prolongation of proceedings for no good reason. At the hearing of the motion on 7 July, Mrs Gough stated that a potential expert witness had lately been identified, that he would require more time to consider matters than was available before the proof diet, that it would cost approximately £17,000 to instruct him, and that Mr Malone should be ordered to pay that fee upfront. I refused the pursuers' motion and appointed them to intimate their list of witnesses that day, which they did.

[23] On 24 July the parties lodged their witness summaries as they had been ordained to do. The pursuers did not produce witness statements from two trading standards officers on their witness list. They did produce a witness statement from Mrs Gough, who was not on their list. The defenders lodged brief statements from themselves, setting out the same

positions as they had previously advanced orally at the various hearings in the action and in their written defences. On the same day, it was intimated to the court that the pursuers had instructed solicitors to represent them for the first time in the proceedings.

[24] On 27 July the pursuers' agents enrolled a motion seeking to have the proof diet due to take place the following week discharged "with a view to providing clarity on the case, and to streamline matters for presentation to the court". It was somewhat boldly asserted that a discharge of the proof would cause no prejudice to the defenders. It was proposed to amend the summons so as to reduce the sum sued for to £593,877 (made up of £315,918 in lost profits since 2006, £157,959 in respect of loss of goodwill, brand dilution, etc., and £120,000 in marketing and rebranding) but these figures appeared no less randomly generated than those which they were proposed to replace. The motion also sought sanction to appoint an expert forensic accountant and the grant of commission and diligence in respect of a specification of documents covering the defenders' sales, cost of sales and profit. By this stage I had had the advantage of reading the witness statements lodged on behalf of the pursuers. It was apparent that their case had not materially advanced from the sort of vague assertion which had characterised it throughout and that there remained effectively no relevant evidence in support of their pecuniary claim. I was not prepared to provide the pursuers with an opportunity effectively to start the quantification of their claim afresh at the stage in proceedings that had been reached. The documents at which the specification was directed, though they might have informed a demand for an account of profits from the defenders, had no obvious connection to the damages claim for which the pursuers had already definitively elected. I refused the motions and directed the proof to proceed as scheduled.

The proof

[25] The following witnesses gave evidence at the proof:

Pursuers' proof

Sharleen Stevenson (33)

[26] Ms Stevenson adopted a witness statement in which she noted that she was a friend of Mrs Gough and had previously worked for the first pursuer in its shop. She had been asked by Mrs Gough to go to a sweet shop and café in Helensburgh called "Vanilla" for the purpose of identifying and purchasing any Chelsea Whoppers there which had been manufactured by the defenders, and she did so on 14 May 2026. She asked to purchase all of the shop's stock of (the defenders') Chelsea Whoppers. The person serving her agreed to sell her 26 units at £3.00 per unit and confirmed that that was all the stock in the shop. Ms Stevenson provided the goods and the receipt to Mrs Gough.

[27] She returned to the shop on 28 May 2026, again at the request of Mrs Gough, and observed that it had been restocked with the defenders' Chelsea Whoppers. A different person sold her 37 units, which she again delivered to Mrs Gough. When she did so, Mrs Gough was with a trading standards officer, Matthew Corns, to whom she explained what she had done and showed the receipts.

Matthew Corns

[28] Mr Corns gave evidence that he had been a trading standards officer since 1997 and currently worked for Argyll & Bute Council. He had visited the first pursuer's premises in May 2026 and had spoken to Mrs Gough about the case. He had seen the first pursuer's Chelsea Whopper product. He had not spoken to either of the defenders.

[29] In cross-examination by Mr Malone, Mr Corns stated that he had first dealt with Mrs Gough in 2021 on a routine matter, and had not previously been aware of her.

Fiona Docherty (47)

[30] Ms Docherty stated that she had been a trading standards officer with South Ayrshire Council for 2½ years. She had dealt with Mrs Gough since October 2025, but could not recall who had initiated that contact. She had also met with Mr Malone. Mrs Gough had not wanted Trading Standards to contact him initially. She felt that he was infringing a trademark and wanted criminal proceedings to be taken, but Trading Standards was very much of the view that it was a civil matter. In or around February or March 2026, Mrs Gough had requested that Trading Standards officers speak to Mr Malone, although by that stage they did not wish to do so. She expressed disappointment at that, so they agreed to speak to him and pass on to him her views on the matter in dispute. He had mentioned an earlier case and that it had been decided in his favour. The witness had some recollection of that case, which she thought had occurred around 2013. The situation then seemed similar to that which pertained in 2025/6, and again was deemed a civil matter only.

Rana Ahmed (55)

[31] Mr Ahmed gave evidence that he had been employed by the first pursuer for a couple of months about 3 years previously as a salesman, visiting ten to fifteen retail outlets across the Central Belt every day. He had kept in touch quite a bit with Mrs Gough after he left. He was currently employed as a business development manager doing the same sort of work for another company in the Motherwell and Glasgow postcode areas. In the course of his present work, he had seen the defenders' Chelsea Whoppers on sale in about 60% of the

250 or so shops that he visited. It appeared that that stock was sold from vans, and he had seen the first defender, but not the second defender, on the road selling and distributing stock. He understood that the stock was sold on a cash basis at a price between £21.00 and £24.00 per box. He had tasted the Chelsea Whoppers produced by both the first pursuer and the defenders and preferred that of the first pursuer, but accepted that that was a matter of personal taste and that the fact that the defenders were apparently able to sell their product well indicated that some people must like it.

Kevin McKnight (41)

[32] Kevin McKnight adopted a witness statement in which he stated that he was a qualified accountant but did not provide accountancy services to the first pursuer. He had inspected the manufacturing and order management system used by that pursuer and was able to identify certain documents, being the pursuers' productions 45 to 49, as having been extracted from that system. He was not in a position to speak to the truth or accuracy of any matter appearing on those documents, merely that they had been extracted from the first pursuer's systems.

[33] Production 45 was an undated document bearing to show that a box of 24 of the first pursuer's 85-gram Chelsea Whoppers, with an overall weight of 2.04kg, had a selling price of £28.42, a net cost of £4.81, and a shelf life of 182 days.

[34] Production 46 was another undated document apparently showing a list of the ingredients which were used in making the first pursuer's Chelsea Whoppers, and the cost of those items, bringing out an average cost of £4.48 per box of 24 items. The actual ingredients were redacted from the version lodged in court.

[35] Production 47 was a partial copy of a manufacturing order for boxes of the first pursuer's Chelsea Whoppers, apparently created by Mrs Gough on 21 April 2026, with the products ordered seemingly manufactured at a total cost of £515.51, said to amount to £4.30 per box. It bore to record orders for a total of 62 boxes, being three orders for 6, 22 and 15 boxes respectively from World of Sweets (Hancocks) Ltd of Glasgow, and further orders for two boxes from "Mrs Mitchell"; one box from "The Fudge Lass"; six boxes from the Highland Folk Museum, four boxes from "Sweet Memories"; and six boxes from "Mr Simm's Olde Sweet Shoppe" of Aviemore. That would account for a cost of £266.60 at the narrated cost per box of £4.30, suggesting that further orders for around another 58 boxes were missing from the document but would be required to bring the total cost to an approximation of the stated total order value of £515.51.

[36] Production 48 was a further manufacturing order for 24-item boxes of Chelsea Whoppers, apparently created on 27 May 2026 by Mrs Gough. The order bore to be from World of Sweets (Hancocks) Ltd, and to be for either 12 or 16 boxes, the asserted total cost of £69.02 at a cost per box of £4.31 suggesting that the latter figure is more likely to be the correct one.

[37] Production 49 was made up of four invoices apparently issued by the first pursuer. The first, dated 2 March 2026, was addressed to a customer whose identity had been redacted and bore to be for five different products at a total cost of £749.00 excluding VAT, of which one order was for four 24-item boxes of Chelsea Whoppers at a price of £113.68 excluding VAT. The second was dated 26 March 2026, was again addressed to a customer whose identity had been redacted, and included an order for 24 boxes of 24-item Chelsea Whoppers at a price excluding VAT of £682.08, the rest of the order being redacted. The third was dated 10 June 2026, was addressed to a Melissa Whitehouse, and bore to be for six

different products at a total cost of £117.57 excluding VAT, of which one order was for one 24-item box of Chelsea Whoppers at a price of £28.42. The fourth was also dated 10 June 2026, was addressed to a customer whose identity was redacted, and bore to be for eight different products at a total cost of £455.54 excluding VAT, one of which was for four 24-item boxes of Chelsea Whoppers at a price of £113.68 excluding VAT.

[38] No other productions were referred to in the course of the evidence of any of the pursuers' witnesses.

Andrew McCandlish (63)

[39] The second pursuer adopted a witness statement in which he stated that he was an agricultural engineer and was the son of the late Allan McCandlish, who died in 2020, and the brother of Mrs Gough. Allan McCandlish had always been out on the road selling confectionery products all over Scotland. From talking to his brother Gus, the witness considered that the activities of the defenders were having an effect on the business and on Chelsea Whopper sales in particular. He had been involved in the family confectionery business since he was young, but less so after age 20, when he left home and was more concerned with his own engineering business, until he became more heavily involved again with his sister after his father fell ill in 2019. In autumn 2019 his father wanted him and his sister to buy the confectionery business from him, and this was done through a solicitor. The business was transferred to the first pursuer.

[40] The Chelsea Whopper product had been created after the Second World War by a Colonel Hunt, and the name and get-up were intended to evoke the Chelsea Pensioners. The product was passed from person to person and had been bought by his father from a Bill Williamson of Dundee around 1994. His father had told the witness that he had lost a

court case against the defenders concerning the use of the name Chelsea Whoppers, but did not really understand what had happened, and did not have any legal representation. He would not discuss the matter in any detail. Mark UK00002422970 had been registered by his father on 26 May 2006. Mark UK00003429251 was registered in 2019 in the names of his father and Agnes. The first pursuer was incorporated in December 2019. In February 2020, his father had executed an agreement through his solicitors assigning his entire interest in the business, trademarks and associated goodwill, to the company.

[41] The current pursuers were recorded in the Trade Mark Register as the proprietors of the marks on 9 April 2026 consequent upon an application submitted in March 2026.

[42] The witness had travelled widely across Scotland in the course of his work as an engineer for the last 15 to 20 years and had seen the defenders' Chelsea Whoppers for sale in all areas except the Highlands and Islands. He would telephone his sister and tell her what he had seen, so that she could tell the retailers to stop selling the product. On the one occasion on which he had personally confronted the manager of a shop, he had been aggressively asked to leave.

[43] People tended to recognise the Chelsea Whopper name rather than the McCandlish brand. One person had told him that she had bought one of his company's Chelsea Whoppers, only for it to turn out to be one of the defenders' products. After his father died, it seemed that the defenders had ramped up their sales efforts and when sellers were challenged, they said that they had been told that the McCandlish firm had gone out of business, that Mr Malone had bought their company, or that Mr Malone had the right to sell Chelsea Whoppers as he had won in court. Trading Standards had been contacted and had also said that Mr Malone had won in court. Once Mrs Gough had obtained the full court papers showing that he had not won the right to use the Chelsea Whopper name and logo,

as he had stated to everyone, Trading Standards said that they did not have the funds to pursue the matter.

[44] Since Mr Malone had undertaken not to produce Chelsea Whoppers, there had been an upward move in the first pursuer's sales, requiring increased production.

Agnes Gough (59)

[45] Mrs Gough adopted a witness statement in which she stated that she was a director of the first pursuer and managed its affairs. It was a small family business with three full-time employees and made its products by hand. She had grown up in the confectionery trade working with her parents, but had moved away to work in England for a time before returning north.

[46] Mrs Gough narrated that the Chelsea Whopper product had been created by Colonel Hunt and had passed through various hands until acquired by her father Allan McCandlish in the mid-1980s. He had registered mark UK00002422970 in his name on 26 May 2006. Mark UK00003429251 had been registered in the name of Mrs Gough and her father in 2019. Prior to her father's death on 19 February 2020, the company's solicitors prepared formal transaction documents to transfer his business and all intellectual property to the first pursuer, and for £500 he thereby irrevocably transferred and assigned the goodwill, trading stock, recipes and trademarks to the company.

[47] For over a decade, Mr Malone had operated under the false pretence that he had won the right to use the trademark in an action in Ayr Sheriff Court in 2009. Trading Standards had requested that the original court papers be retrieved, which Mrs Gough had done in September 2025. It transpired that the case had been dismissed with expenses on the ground of lack of specification. Trading Standards had refused to prosecute.

[48] Mr Malone had intentionally appropriated the protected name, script, yellow and red colour scheme, and military pensioner character for his own product. After the death of Allan McCandlish, he had expanded his operation and falsely informed stockists that the McCandlish firm was out of business, or that he held the sole rights to the Chelsea Whopper. His online presence was restricted to a Facebook page which was operational from about March 2025 to May 2026, containing the telephone number of the second defender. Trading Standards had met with Mr Malone in March 2026, and he refused to stop calling his product a Chelsea Whopper, claiming that that was a generic term. He did not only deal through distributors, but in some instances at least dealt directly with retailers.

[49] In March 2026 Mrs Gough had gone into twenty stores selling confectionery across Helensburgh, Dumbarton, Cardross and Glasgow, and found that eight of them were stocking the defenders' product. After Mr Malone had undertaken on 1 May 2026 not to produce Chelsea Whoppers, demand for the McCandlish product exploded, even though Mr Malone continued to produce his product, as evidenced by the fact that Ms Stevenson had been able to obtain further stock from Vanilla in Helensburgh at the end of May.

[50] Mrs Gough had calculated a net margin contribution of £24.04 per box of the McCandlish product, based on figures which had been independently reviewed and verified by Mr McKnight. The sales made by the defenders would all have been made by the pursuers had the defenders not been selling their products as Chelsea Whoppers. The defenders continued to act in bad faith. She had redacted the material spoken to by Mr McKnight because she did not want the defenders to know the redacted details. She had not asked customers who had increased their orders for Chelsea Whoppers after 1 May 2026 to give evidence as she wanted to preserve relations with them.

Debbie Watt

[51] Ms Watt adopted a witness statement in which she said that she had not traded in the confectionery business; she was employed as a golf starter by South Ayrshire Council. At some point in 2025 she had created a Facebook page called "Wee Troon Candy". It did not offer products for sale, but simply featured an email address operated by Mr Malone, together with Ms Watt's telephone number. The page was created as a placeholder for Mr Malone as he had no online presence. She had used her telephone number as he was not very diligent at answering the telephone. She had only ever received one telephone call, which was from Mrs Gough pretending to be a customer and asking what products were for sale. Ms Watt had told her what products were for sale, that the business was operated by her boyfriend Mr Malone, and that any further enquiry should be made via the email address. She was not involved with the business. Mr Malone had been running it for 24 years and she had only known him for two years. She and he lived separately and had no financial connection.

Michael Malone

[52] Mr Malone provided a witness statement in which he noted that he had made Chelsea Whoppers since 2002, and a previous court action at Ayr Sheriff Court in 2009 had determined that he could continue to make and sell them. He had done so since then with no complaints from customers. He had received a "cease and desist" letter from the first pursuer in 2025 and had a visit from Trading Standards, who had not required him to stop his activities. He had always been a sole trader, and his girlfriend Ms Watt had never had anything to do with the business. After the present action commenced, he agreed to change the name and branding of his Chelsea Whoppers and had done so.

[53] In cross-examination, Mr Malone maintained that, after the previous court case, nobody had told him to stop what he was doing with Chelsea Whoppers. He didn't really understand what had been going on in the action. Trading Standards had not told him to stop. He had agreed to stop dealing by reference to the name "Chelsea Whoppers" in the course of the current action. The evidence given by Ms Stevenson about the shop "Vanilla" had been lies. He had not produced any paperwork relating to his business because he had not been ordered to do so and was not otherwise obliged to do so. His products were sold through distributors, and he could not say where they all ended up. The date stamp on a product would indicate what batch it came from. He did not know how many Chelsea Whoppers he had sold since 2002.

[54] The defenders offered no further evidence.

Submissions for the pursuers

[55] On behalf of the pursuers, counsel tendered written submissions in relation to two matters which had been identified earlier in the course of the action as of potential significance, namely the questions of title to sue and of the operation of prescription on the pursuers' claim for damages. In relation to title to sue, the submission was that the right to the trademarks had been assigned to the first pursuer prior to the death of Allan McCandlish. Reference was made to sections 24(1A) and 25(3) of the Trade Marks Act 1994. It was submitted that it followed that the pursuers had a continuous right to claim damages for infringing conduct of the defenders from 2006 to date. No separate submission was made in relation to the acquisition of any rights to claim damages in respect of passing off.

[56] In relation to prescription, it was submitted that previous proceedings at the instance of Allan McCandlish had been raised and dismissed in 2009. Afterwards, the defenders had repeatedly presented the outcome as a substantive victory confirming their legal entitlement to continue trading under reference to the Chelsea Whopper name. Those representations were made to Trading Standards, retailers, consumers and journalists. The pursuers were said to have sent cease and desist letters on multiple occasions from 2009 to 2025; they had not acquiesced in the defenders' conduct. Rather, they actively sought to prevent the continued use of branding and trademarks which they believed infringed their rights. As a consequence of the defenders' representations, however, Trading Standards had not taken any enforcement action. The pursuers only obtained the full court papers in the previous proceedings in September 2025, and only then fully appreciated the situation. The pursuers relied on section 6(4) of the Prescription and Limitation (Scotland) Act 1973. They wrongly believed, as a consequence of the misrepresentations made by the defenders, that the matter had been judicially determined and that there were no other remedies available to them, until September 2025.

[57] In brief oral submissions, counsel noted that it was undisputed that the trademarks founded upon existed, that Mr Malone had manufactured products under the name "Chelsea Whoppers", and that Ms Watt had set up a Facebook page with her telephone number on it. Witnesses had seen the defenders' Chelsea Whoppers in many shops across Scotland. The defenders had provided no financial information about their business, and the pursuers maintained that sales of their Chelsea Whoppers had increased after Mr Malone undertook not to manufacture them. Decree for payment should be awarded for such sum as the court saw fit, with expenses.

[58] The defenders made no submissions.

Decision

[59] The pursuers at proof fell well short of making out their pleaded case. The hearing was a salutary lesson in how AI may prompt lay persons to say the right things in pleadings, but cannot furnish the evidence needed to establish those statements. The pursuers seemed, further, to be under the misapprehension that any production lodged by them should be regarded, not only as self-proving, but as demonstrating the truth of any matter which it narrated, regardless of the absence of any joint minute of agreement, or of the document being spoken to by anyone at proof.

[60] The two trading standards officers called to give evidence were evidently mystified as to why they had been summoned to court. One of them vocalised that puzzlement before giving her evidence. I was equally mystified, both before and after their evidence had been given. The remaining witnesses were either McCandlish family members or their former employees, friends or associates, immediately raising the question of the independence of their evidence. Ms Stevenson's presence illustrated the pursuers' apparent ongoing fixation on the Vanilla incident, despite a lack of any connection between that incident and the matters for consideration and decision at the proof diet. Mr McKnight's evidence was evidently intended to provide some sort of independent status to the financial aspects of the claim, but all that it amounted to was that he had seen, but could not vouch for the accuracy of, a very limited range of documents on the first pursuer's ordering system, which even taken at face value established little or nothing of materiality to the pursuers' claims. His evidence was of no worth to the pursuers. Mr Ahmed's evidence was credible and reliable enough, but other than vouching the undenied proposition that the first defender's product was widely distributed, again added next to nothing to their case. Given what I regarded as

the demonstrated propensity of Mrs Gough and Mr McCandlish to partiality, inaccuracy and overstatement, I was generally unwilling to accept their evidence in the absence of support for it from other sources, of which there were usually none.

Passing off

[61] The evidence led entirely failed to establish the existence of any substantive goodwill attaching to the first pursuer's product. No doubt there are people who like to buy and consume chocolate-flavoured fudge fingers covered in cocoa powder, but nothing was adduced to show that at least some of those people have sought out the first pursuer's product in preference to others. It is not beyond the bounds of possibility that some consumers do prefer it, perhaps to the exclusion of other brands of the same or a similar thing, but there was no evidence of the extent of any such preference so as to enable a conclusion to be reached that the product enjoyed any material goodwill, as opposed to simply being one available brand in a market where any consumer choice might be made simply on the basis of what brand was available in the retail outlet being visited when the fancy arose. One would not have thought, if goodwill really existed in relation to the first pursuer's product, that it would have been difficult to establish that by satisfactory and independent evidence, most obviously by way of retailers explaining their customers' apparent preferences. To the extent that Mrs Gough or Mr McCandlish might be thought at least implicitly to have asserted (in their evidence, as opposed to in their pleadings) the existence of material goodwill in the first pursuer's product, I was not prepared, given what I have already observed about the unsatisfactory quality of that evidence, to accept any such suggestion standing alone.

[62] Similarly, there was no direct evidence of confusion between the parties' products on the part of consumers or retailers; the only evidence of supposed confusion again came through the evidence of Mrs Gough and Mr McCandlish, which – for the reasons already stated – I was not prepared to accept on its own. Mrs Gough appeared at points in her evidence to suggest that the lack of independent evidence of confusion (amongst other things) was because she had chosen not to ask third parties outside the family and friends circle to give evidence in order to avoid souring commercial relationships. If so, that was a matter of choice for her and cannot be regarded as filling the evidential gaps which exist in the pursuers' case.

[63] The absence of any direct evidence of relevant confusion is not necessarily determinative of its existence, as whether or not confusion was apt to be created by the circumstances complained of in the mind of the average consumer is ultimately a matter for the court. In the present case there was uncontroversial evidence that the "Chelsea Whopper" name was deliberately chosen by the product's originator, Colonel Hunt, in order to evoke a connection with the Chelsea Pensioners, and in such circumstances it is not surprising that any brand of the product continues, and would be expected by consumers, to bear some militaristic allusion, any more than it would be surprising if the packaging of different brands of pear or lemon drops bore representations of the appropriate kind of tree. I have already indicated that my view of the packaging respectively in use by the parties at the start of the litigation was that the case for confusion was a marginal one. In such a case, an absence of evidence supporting an inference of the likelihood of actual deception may be decisive: *Neutrogena Corp* v *Golden Ltd (t/a Garnier)* [1996] RPC 473, per Jacob J at 482. I consider that to be the case here.

[64] Absent the establishment of goodwill and likely confusion, the pursuers have no proper basis for claiming any relief in respect of the passing off element of their case, and I shall absolve the defenders from the relative conclusions.

Trademark infringement

[65] In this branch of their case, the pursuers complain that the defenders have infringed their registered marks by using identical or similar marks, and rely on their statutory title to the exclusive use of the mark in question for the goods or services specified in their registration, which includes the kind of confectionery in issue. The establishment of the existence of goodwill in the pursuers' product is therefore not required. In relation to the question of whether the respective marks in use are deceptively or confusingly similar to each other, essentially the same issues arise as in relation to the conceptually distinct but practically similar question of the likelihood of confusion in the passing off context. As regards mark UK00002422970, the same conclusion falls to be reached. In the absence of any evidence of actual confusion, and having regard to the very particular background circumstances to the Chelsea Whopper name already canvassed, I am not persuaded that the get-up formerly in use by Mr Malone met the required standard of similarity to warrant the conclusion that it infringed the registered mark. No question of the get-up presently in use by Mr Malone infringing that mark arises.

[66] Turning to mark UK00003429251 in the words "Chelsea Chocolate Flavoured WHOPPERS", there is, by contrast, clearly sufficient similarity to the words previously in use by Mr Malone, namely "The Original Chelsea Cocoa Dusted Chocolate Fudge Whoppers" to warrant the conclusion that it was infringed from its effective date of registration until 1 May 2026. The pursuers are entitled to declarator to that effect.

[67] They are not, however, entitled to permanent interdict. Given the undertaking offered to and accepted by the court on 1 May 2026, there is no reasonable basis for any apprehension that the previous infringement will continue. They can apply to the court for appropriate relief should objectively satisfactory evidence of any material breach of the undertaking come to light.

[68] So far as damages in respect of the established infringement are concerned, I do not consider that it is in accordance with general principles of Scots law to award nominal damages in the absence of proof of loss. Such a case is one of *iniuria sine damno*, and *damnum* is an essential feature of any valid claim to damages: *Aarons & Co Ltd* v *Fraser* 1934 SC 137 at 143, 1934 SLT 125 at 128; *Wilkie* v *Brown* 2003 SC 573 at [21], and no claim was advanced in respect of any general trouble and inconvenience.

[69] The onus of showing what loss has actually been sustained by reason of the established infringement rests on the pursuers. There is no presumption of fact or law that, absent the infringement, any sales made by a defender would instead have been made by a pursuer. A pursuer requires to prove what award is necessary to put him in the same position as he would have been in had the infringement not taken place. In theory, that might consist in lost sales, lost profit on retained sales that could have been made at a higher price without the infringement, the cost of damage to the reputation of a pursuer's product or of putting right that damage, or loss of royalties in a case where licensing was a reasonable possibility.

[70] In the present case, although the pursuers in point of form advanced claims in respect of brand dilution and reputational erosion, no relevant evidence was advanced that either of these things had in fact happened or that any particular cost would reasonably be incurred in addressing them if they had. Similarly, a claim in respect of the cost of

rebranding and market re-education was maintained, but no evidence that the pursuers intended to do any such thing, or what the costs of such a wholly imaginary exercise might be, was adduced. There was some suggestion in the pursuers' pleadings that the defenders' pricing policy had been aggressive and had prevented price increases being implemented by the pursuers, but again no actual evidence of any of that was led. All of these claims existed in the AI realm only. There was never any prospect of the pursuers' intellectual property in the Chelsea Whoppers name or get-up being licensed to the defenders or anyone else, and no suggestion that an approach to damages based on a notional licensing or royalty arrangement was made.

[71] What remained as a possibility was an assessment of damages for sales lost to the first pursuer in consequence of the infringement. In order to make any award in that regard, the court would require to be furnished with material enabling it to determine on a more than merely speculative basis what proportion of Mr Malone's customers had been confused by his infringement of mark UK00003429251. Damages in respect of his sales to customers who were not misled by that infringement would represent over-compensation for the first pursuer. In this respect, the pursuers again led no relevant evidence. Although the court may be expected in a case such as this to be familiar in general terms with the manner in which the goods in question are sold, there was no evidence, for example, from retailers of how customers tended to ask for those goods, or to what extent there was any awareness amongst consumers of brand distinctions. The long-promised survey evidence again failed to appear. Not a single piece of direct evidence of actual confusion amongst customers was adduced. In a case where the parties' respective marks have been in use alongside each other in the market and there is no evidence other than that of the pursuers themselves that anyone at all was misled, it is difficult for the court to conclude that the infringement in

question actually misled any material element of the available customer base. The same would apply had there been (contrary to my finding) infringement of mark UK00002422970.

[72] The only evidence adduced at proof relating to any financial loss that might have been suffered by the first pursuer (on the assumption, unestablished in fact, that any proportion of the market was indeed misled by the relevant infringement) were the five extracts from the first pursuer's production logs which were spoken to by Mr McKnight, and then only because I required him to identify in his oral evidence specifically which documents were being referred to in general terms in his witness statement. With typical overstatement, Mrs Gough referred to these documents having been "independently reviewed and verified by chartered accountant Kevin McKnight ", whereas in fact Mr McKnight had only seen the unredacted versions of the five documents on the first pursuer's systems and noted specifically that he could not vouch for the accuracy of their contents, on which he made no substantive comment. Most of the documents bear to have been created by Mrs Gough, to whom they refer as "The Boss". Mr McKnight's evidence added nothing to them. Their contents are set out in full in the account of Mr McKnight's evidence given above, and they establish nothing of relevance to any damages claim beyond suggesting that at some unspecified point in time, presumably recently, a gross profit of £23.61 was to be made by the first pursuer in the production of a 24-item box of Chelsea Whoppers. The documents pertaining to orders placed recently certainly do not vouch the proposition for which Mrs Gough and Mr McCandlish contended, that orders for Chelsea Whoppers had skyrocketed since Mr Malone's undertaking not to use that name for his own product was given on 1 May 2026; if anything, they rather suggest the contrary.

[73] Taking all the evidence in relation to a potential damages claim for lost sales into account, at best one might arrive at a multiplier per box of lost sales in the region of £20, but

no multiplicand is furnished by the evidence or could be anything other than pure speculation plucked from the air. It follows that the pursuers' claim for damages fails in its entirety. Again, the same conclusion would necessarily follow had there indeed been infringement of mark UK00002422970.

[74] I add finally that it was not suggested that the case fell within the category contemplated by Regulation 3 of the Intellectual Property (Enforcement) Regulations 2006. I would not myself have regarded it falling into that category in the particular background circumstances of the case already described, and in any event the lacunae in the evidence could not have been supplied by the approach to damages which the regulation advances.

Title to sue

[75] The 1994 Act implies (because of the use in sections 9, 10 and 14 of the words "the proprietor" rather than "the registered proprietor", and because of the terms of section 25 later to be mentioned) that the unregistered assignee of a registered mark can make a claim for infringement of that mark. That accords with the pre-1994 law. However, whereas registration as proprietor of a mark provides a presumption of the validity of the mark and any assignation after the initial registration, a person not on the register as a proprietor must establish his title by other means. In the present case it was asserted by Mrs Gough and Andrew McCandlish that the benefit of the marks had been assigned to the first pursuer by the late Allan McCandlish in 2020 by way of a written contract drawn up by his solicitors but, in accordance with the pursuers' generally haphazard approach to proof, no actual attempt was made to have that contract admitted into evidence for examination and construction, as the best evidence rule undoubtedly requires. For whatever reason, no proof of any entitlement to the marks on the part of the pursuers prior to their registration as the

proprietors in consequence of their application to that end dated 27 March 2026 was essayed. Any remedy which might have been available to them in respect of infringement of the marks would accordingly have been restricted to the period from that date.

Prescription

[76] The fact that the only remedy being granted is declarator of infringement of mark UK00003429251 makes the issue of prescription of any right which the pursuers might have had to damages for infringement immaterial in practical terms. Further, that mark was only registered with effect from 19 September 2019 and service of the summons in this case was effected on 24 March 2026, meaning that prescription could only bar any claim which might otherwise exist in relation to a period of approximately 18 months.

[77] That said, I reject the submission that section 6(4) of the Prescription and Limitation (Scotland) Act 1973 as it was framed during the relevant periods operated to postpone the start of the quinquennial period in respect of either mark until the true facts of what had happened in the action at Ayr Sheriff Court were apparently discovered by Mrs Gough in September 2025. That is because, firstly, it is not at all clear quite what the defenders are supposed to have said about the outcome of the Ayr action which resulted in error on the part of the pursuers. No specific representation was proved, and if all Mr Malone said (it being plain that Ms Watt said nothing at all) was that he had won the Ayr action and had not been prevented thereby from continuing to produce and market Chelsea Whoppers, any such statement would have been quite true and could not have caused any relevant error in the minds of the pursuers. More substantively, I do not accept the claim that the proprietors of the marks from time to time were in fact in any relevant error about the outcome of the Ayr action as a result of something said by Mr Malone. That action, in 2009/10, plainly had,

and could have had, nothing to do with mark UK00003429251, which was not registered for the first time until September 2019. To the extent that it was claimed that Allan McCandlish (who was himself a party to the Ayr action), Mrs Gough or Andrew McCandlish believed as a result of anything said by Mr Malone about the action that they had no enforceable trademark rights in the Chelsea Whopper name or get-up, I simply do not accept that claim as credible or reliable. It is entirely at odds with the consistent behaviour of Mrs Gough and Andrew McCandlish over the years in attempting to stop retailers selling the competing product, complaining to Mr Malone, and ultimately trying to have Trading Standards intervene.

[78] Finally, section 6(4) does not suspend the prescriptive period after the point at which a creditor could with reasonable diligence have discovered the error under which he claims to have been labouring. The facts of the matter about the judgment in the Ayr action could have been discovered, if they needed to be, at any time after it was issued, and if Mr Malone was indeed making representations about the outcome which were affecting the pursuers' understanding of their continuing intellectual property rights, it would have been entirely within the ambit of reasonable diligence for them to have ascertained the truth directly from the court from 2010 onwards, as Mrs Gough eventually did. No element of the pursuers' submission about the application of section 6(4) to their case had any validity at all. No claim for damages advanced by them, in respect of infringement of either mark, could have addressed any longer period than the quinquennium immediately preceding the service of the action on 24 March 2026.

Position of second defender

[79] I entirely accept Ms Watt's evidence, supported by that of Mr Malone, that the sum total of her involvement with the confectionery business being carried on by him was the creation of a very basic Facebook page for the business, the taking of a single telephone call enquiring about the products for sale, and the direction of the caller (Mrs Gough) to an email address where enquiries would have been responded to by Mr Malone. Ms Watt took no part in the actual conduct of Mr Malone's business, which he operated as a sole trader. It should also be borne in mind that that business had many legitimate aspects that had nothing to do with Chelsea Whoppers or infringement of the pursuers' trademarks. The extremely limited involvement of Ms Watt in no way justifies any conclusion that she has used in the course of trade a sign which infringed the pursuers' marks within the meaning of section 10 of the 1994 Act. Indeed, no material was available to the pursuers which would have caused a reasonable person in their position to institute proceedings against Ms Watt at all. She will be assoilzied from all of the conclusions of the summons.

Expenses

[80] The issue of expenses as between the pursuers and Ms Watt is straightforward. It was entirely unreasonable for the action to have been raised and maintained against her, for the reasons just stated. The first pursuer will be found liable to her in the expenses of the action on an agent and client, client paying basis, individually from the raising of the action until 19 May 2026 and jointly and severally with the second pursuer (on the same scale) thereafter.

[81] Turning to the question of the expenses as between the pursuers and Mr Malone, it is necessary first to observe that, given that the first pursuer commenced this action on

24 March 2026 and claims to have become the proprietor of the marks in question by virtue of a transaction that occurred in February 2020, but did not see to it that that transaction was reflected on the register within six months of its date and has not claimed that it was not practicable for that to be done, and given further that the summons alleges infringement of the marks before the consequences of the supposed transaction were ultimately registered on 9 April 2026, the court is precluded by section 25(4) of the 1994 Act (read with section 102 for Scotland) from awarding expenses to it in respect of the period before that latter date insofar as the action was concerned with trademark infringement. On 10 April, the very next day, Mr Malone intimated that he had changed his packaging from the get-up complained of and the first pursuer had no sufficient ground for complaining of continuing infringement of mark UK00002422970 thereafter. It did have proper grounds for complaining of infringement of mark UK00003429251 (but not for any further remedy in respect of that infringement) until 1 May, when Mr Malone undertook to cease using the words "Chelsea" or "Whopper" in relation to his product. By the time the second pursuer joined the action on 19 May 2026, he had no grounds for complaining of continuing infringement, or seeking any remedy, in respect of either mark. The passing-off element of the case failed in its entirety. In all of these circumstances, I consider that a finding that no expenses should be due as amongst Mr Malone and the pursuers adequately reflects the fact that he had been infringing mark UK00003429251 until 1 May, but that the actions of the pursuers in pursuing him to the extent to which they did, on a wider front and over the entire period during which they did so, were unjustified. I shall so order.

Disposal

[82] I shall find and declare that the first defender's former use of the sign "Chelsea Whoppers" infringed the pursuers' UK Trade Mark UK00003429251, granting decree in terms of the fourth conclusion of the summons to that extent only, and sustaining to the same extent the pursuers' first plea-in-law. I shall absolve the defenders from the remaining conclusions of the summons and repel the pursuers' remaining pleas. The defenders have no pleas-in-law to be dealt with. I shall find no expenses due amongst the pursuers and the first defender, and find the first pursuer liable to the second defender in the expenses of the action on an agent and client, client paying basis, individually until 19 May 2026 and jointly and severally with the second pursuer, on the same scale, thereafter.