O/005/21

IN THE MATTER OF THE TRADE MARKS ACT 1994

-and-

IN THE MATTER OF TRADE MARK APPLICATION No. 3282628

in the name of AMAZON TECHNOLOGIES INC

to register the trade mark

DAILY RITUAL

in classes 18 and 25

-and-

OPPOSITION No. 412208

by RITUALS INTERNATIONAL TRADEMARKS B.V.

APPEAL TO THE APPOINTED PERSON FROM THE DECISION OF MS TERESA PERKS, HEARING OFFICER, ACTING ON BEHALF OF THE REGISTRAR OF TRADE MARKS DATED 10 OCTOBER 2019

DECISION OF THE APPOINTED PERSON

1. This is an Appeal by the Applicant.

2. The Applicant seeks registration of the word mark DAILY RITUAL in respect of the following goods in classes 18 and 25:

   (i) Class 18: *Purses, handbags, all-purpose carrying bags, tote bags, traveling bags, shoulder bags, clutch purses, backpacks, athletic bags, wallets, coin purses and cosmetic bags sold empty*

   (ii) Class 25: *Clothing, footwear and headgear, namely blouses, shirts, t-shirts, pants, denim jeans, slacks, shorts, skirts, tunics, tank tops, dresses, jumpsuits, leggings, sweaters, scarves, jackets and coats,*

raincoats, fashion headbands and hats, sleepwear, lingerie, gloves and hosiery.

3. The Application was opposed by the Opponent under s5(2)(b) and 5(3) of the Act on the basis of the following registered marks:

   (i) UK mark 2196518B for the word RITUALS for various goods in classes 3, 4 and 30

   (ii) EUTM 1857465 for the word RITUALS for various goods in class 25

   (iii) International Registration 1195700 for the stylized word

   RITUALS...

   In classes 3, 4, 25, 30, 35 and 44

4. The first two of these were registered more than 5 years before the publication date of the Application and therefor the Opponent was obliged to establish use under s6A of the Act. This did not apply to the International Registration.

5. Having considered the evidence, the Hearing Officer found that genuine use had been shown by the Opponent of the word mark RITUALS in the relevant 5 year period in respect of the following goods within the scope of the UK and EUTM registrations:

   (i) For the UK mark 21965518B *'perfumery, essential oils, cosmetics'* in class 3

   (ii) For the EUTM 1857465 *'clothing'* in class 25.

   She considered that those were fair specifications representing the categories of goods for which the mark had been used in that period, following the guidance of Mr Justice Henry Carr in Property Renaissance Ltd (trading as Titanic Spa) v. Stanley Dock Hotel Ltd (trading as Titanic Hotel Liverpool) and others [2016] EWHC 3103 (Ch).

6. She proceeded to assess whether the goods which were the subject of the Application were *'similar'* or *'identical'* to these goods or the goods of the International Registration. She concluded that there was identicality or similarity to some degree in the case of all the goods of the Application apart from *'traveling bags'.*

7. Turning to consider the likelihood of confusion under s5(2)(b) she concluded that there was a likelihood of indirect confusion between the Applicant's Mark DAILY RITUAL and all the Opponent's marks when used in relation to any of the identical or similar goods which it was applied for. She considered that DAILY RITUAL would be taken as a brand extension of the brand RITUALS *'along the line of the DAILY RITUAL mark being seen as the everyday range of the brand RITUALS.'* She therefore upheld the Opposition under s5(2)(b) in respect of all the goods which are the subject of the Mark applied for except for *'traveling bags'.*

8. As for the objection under s5(3), the Hearing Officer considered that the Opponent had only established the required reputation in the UK to support such an objection in respect of *'cosmetics'* in class 3 of the UK and International registrations. There was insufficient close relationship between the goods of the Application and cosmetics to stimulate the necessary 'link' in the public mind between DAILY RITUAL and RITUALS (giving rise to an unfair advantage to the Applicant), save in the case of *'cosmetic bags sold empty'* in class 18. As a result, the s5(3) objection only succeeded in relation to *'cosmetic bags sold empty'*. Of course this was largely academic since those goods were already covered by the finding of likelihood of confusion under s5(2)(b).

9. There are two Grounds of Appeal.

10. The first ground concerns the Hearing Officer's findings on 'proof of use' under s6A in relation to the EUTM registration for clothing in class 25 in the relevant period 15 February 2013 to 16 February 2018. This seems to me a fairly pointless appeal since the Hearing Officer also upheld the

Opposition on the basis of the International Registration which covered the same goods and was not the subject of a s6A requirement. However, I will deal with it nonetheless.

11. The evidence of use consisted of a witness statement of Mr Raymond Cloosterman, the founder and CEO of the Opponent. It explained that the Opponent sold not only cosmetics, perfumery and the like under its RITUALS brand, but also a clothing range which he called *'Soulwear'* and comprised *'yoga wear; lounge wear; and sleep wear, including pyjamas, underwear and dressing gowns.'* Soulwear was said to be a *'more recent*' addition to the RITUALS range of products, though it is clear from his evidence that it has been part of the range since at least 2013.

12. He gave evidence that the RITUALS range of products were sold in the UK through his company's website and since 2016 through a range of stores, of which there are now 21. He gave evidence of overall sales of the RITUALS range in the UK for each of the trading years to December from 2013 to 2017, which showed sales increasing year on year from around €7M to around €12M. He also gave evidence of the sales figures for the UK of the Soulwear range. These figures were substantially less, varying from a low of €76,107 in 2016 to a high of €171,738 in 2013.

13. To demonstrate the nature and existence of the Soulwear range, Mr Cloosterman exhibited screenshots of the Opponent's website as at the date of his Statement in September 2018 (6 months after the end of the 5 year period). He also exhibited the relevant pages from the website accessed through the internet archive facility the waybackmachine as they existed in July 2017 (during the 5 year period). These pages show pyjamas, sweaters, scarves, bathrobes and sweat jackets. One of the pages says this:

'CLOTHING. MEN'S AND WOMEN'S CLOTHING BY RITUALS.
Discover RITUALS Soulwear – a range of men's and women's leisurewear created to combine next-to-skin comfort with effortless style. After all, it

makes sense that a brand with well-being at its core would want you to feel your best when time's your own. Read on for relaxed, comfortable clothing that's ideal as homewear, activewear, post workout…whenever there's a chance to take your foot off the pedal.'

14. Mr Bragiel, who appeared before me for the Applicant, contended that I should reverse the finding of the Hearing Officer that this evidence, taken as a whole, demonstrated genuine use of the mark in relation to clothing.

15. It should be noted at the outset that he did not take issue with her implicit finding that the sales figures contained in Mr Cloosterman's evidence were sufficient in scale to 'count' as genuine use in the sense that they served to create a market share for the goods. His point was that the evidence should not have been accepted as proving on the balance of probabilities that these sales had been made as part of the Rituals business in the UK at all.

16. Essentially his complaint came down to the fact that the Opponent must have been able to exhibit documentary evidence in the forms of sales receipts, invoices, accounting records etc. in support of the figures put forward by Mr Cloosterman. It was a large organization, he said, and therefore to find this kind of information would not have been particularly difficult. In the absence of such documentary evidence (digital or otherwise), he contended, the Hearing Officer should have rejected the evidence as insufficiently solid to justify a finding of use.

17. I disagree.

18. In the present case, the evidence of use is provided by a witness who was plainly qualified, as the CEO and founder of the Opponent, to give it. He has listed the items of clothing which he says have been sold as part of the Rituals range. He has produced an archived page from his company's website which shows the items which were being sold in the 5 year period, and that they were being sold under the Rituals brand. He has provided a table of sales figures for clothing under the Rituals brand in

the UK for each year in the 5 year period. The figures are given to the nearest €. None of this appears remotely incredible.

19. Mr Bragiel quite rightly shied away from alleging that this evidence was untrue. This was inevitable since the Applicant had not made any such allegation before the Hearing Officer and had not sought to cross-examine Mr Cloosterman. But if the evidence is not untrue, it is difficult to see on what basis the Hearing Officer could be said to have erred by accepting it.

20. Mr Bragiel was saying, as I understand it, that without documentary support evidence of this nature simply cannot not be given sufficient 'weight' to satisfy the balance of probabilities test. But that is plainly not the law. The judgment of Kitchin J in Moo Juice [2006] RPC 18 at [16] (in the context of Rule 31(3) of the Trade Marks Rules) that *'a bare assertion would provide no evidence as to the actual use made by the proprietor'* is plainly correct, but as Arnold J made clear in Pan World Brands v Tripp [2008] RPC 2 at [31] that passage had to be read in context which was the suggestion that a simple statement that the mark had been used would be enough. Arnold J went on to note that:

'A statement by a witness with knowledge of the facts setting out in narrative form when, where, in what manner and in relation to what goods or services the trade mark has been used would not in my view constitute bare assertion.'

21. It seems to me that this evidence from Mr Cloosterman is of the nature anticipated by Arnold J. Mr Bragiel placed some reliance on passages from the decision of Mr Daniel Alexander QC sitting as the Appointed Person in Plymouth Life Centre (BL/O/236/13). At [19] he stated that:

'For the tribunal to determine in relation to what goods and services there has been genuine use of the mark during the relevant period, it should be provided with clear, precise, detailed and well-supported evidence as to the

nature of that use during the period in question from a person properly qualified to know'.

He went on to say the following in [22] on the subject of documentary evidence:

'it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive.'

22. Mr Bragiel placed emphasis on the latter of these passages. However, there is a danger of reading into these words a suggestion that the tribunal should actively disbelieve perfectly credible evidence from an informed witness who has provided a coherent narrative account including detailed figures for sales and evidence of the nature of the use, simply because more documentation could have been provided.

23. I see no difficulty with an informed witness summarizing in tabular form the records of his company as to the sales of a particular brand in the UK without exhibiting the actual records. Nor do I see any difficulty with them giving a general account of the lines of products sold under a brand, with some support in the form of archived website extracts, without providing documentation showing each and every item, when it was sold and for what price.

24. I consider that Mr Cloosterman's evidence is perfectly adequate to support the case being advanced by the Opponent, namely that they were selling a relatively small but not insignificant line of clothing under the

RITUALS branding throughout the relevant 5 year period. There is no reason to be sceptical of his evidence, let alone to find that it failed to satisfy the burden of proof in this case.

25. The second Ground of Appeal concerns the Hearing Officer's approach to the similarity between the marks. Mr Bragiel contended that the Hearing Officer was wrong to find a high degree of conceptual similarity. His point was that the addition of the word DAILY to the word RITUAL or RITUALS changed its meaning in a fundamental way. The word RITUAL on its own conveys a spiritual or religious ceremony of some kind. Whereas DAILY RITUAL uses RITUAL in an ironic way to convey the idea of a mundane repetitive activity.

26. Whilst I can understand that a DAILY RITUAL could be a mundane activity, I do not see why it cannot also be a perfectly good way of describing a spiritual or religious activity carried out on a daily basis. For example a monastic life involves a series of repeated services and ceremonies many of which are carried out on a daily basis. I see no reason not to describe them as daily rituals.

27. Conversely, the word RITUAL may be used to describe non-spiritual or religious activities, such as the actions of a footballer who always puts on his boots in a particular order before a match, or even someone's standard morning actions ('get up, make tea, eat cereal, brush teeth, put on suit' would be a morning ritual).

28. So I do not accept Mr Bragiel's argument that the word DAILY transforms the word RITUAL into something which the average consumer would understand in a different way. I believe the Hearing Officer was perfectly entitled to find that there was a high degree of conceptual similarity and that, as a result, there was a likelihood that the DAILY RITUAL brand would be seen as the everyday range of the brand RITUALS.

29. I therefore reject both Mr Bragiel's attacks on the Decision of the Hearing Officer.

30. I should add that a number of further arguments, not advanced in the Grounds of Appeal, were sought to be run by Mr Bragiel at the hearing although there was no application to amend the Grounds. I did not call on Mr Aikens (who appeared for the Opponent) to answer these arguments, for reasons which I gave in the course of the hearing. None of them appeared to me to have any merit.

31. I will award £800 towards the Opponent's costs of the Appeal.

IAIN PURVIS QC
THE APPOINTED PERSON

5 January 2021