O/0202/23

TRADE MARKS ACT 1994

IN THE MATTER OF
an Appeal to the Appointed Person

AND IN THE MATTER OF
UK Trade Mark No. 3093954 in the name of Scottish Seafood Investments Limited

AND IN THE MATTER OF
Cancellation No. CA000503234 in the name of Cooke Aquaculture Scotland Limited

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DECISION

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1. This is appeal from the decision of Mr Andrew Feldon, acting for the Registrar. I shall refer to the proprietor as "**SSI**" and the appellant and applicant for cancellation as "**Cooke**".

BACKGROUND

2. SSI is the proprietor of UK Trade Mark 3093954 for "TRUE NORTH" in class 29 (the "**Trade Mark"**). As registered, the specification of goods in class 29 covered a range of salmon, salmon related, and other seafood products.

3. Cooke seeks revocation of the Trade Mark in its entirety for non-use, pursuant to section 46 of the Trade Marks Act 1994.

4. The Hearing Officer found that the evidence demonstrated there had been genuine use in relation to salmon and related salmon products ("Salmon") during the relevant period. On this basis, the Trade Mark was maintained in relation to the Salmon only.

5. Before the Hearing Officer SSI also argued that if and insofar as the Trade Mark had not been subject to genuine use, there were bona fide reasons for its non-use. The Hearing Officer rejected this submission.

ISSUES ON APPEAL

6. Cooke submits that the Hearing Officer was wrong in his assessment of the evidence and that if he had directed himself correctly, he would have found that there was no genuine use in relation to Salmon. That being the case, Cooke submit that the Trade Mark should be revoked in its entirety. If the trade mark is not revoked in its entirety, Cooke submit that the Hearing Officer's upheld an unduly wide specification and seek to have this further narrowed on appeal.

7. SSI seek to uphold the Hearing Officer's decision on genuine use. SSI also seek to overturn the Hearing Officer's decision in relation to the existence of a bona fide reason for non-use.

STANDARD OF APPEAL

8. The principles I must apply are summarized by Joanna Smith J in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch) as follows [24]:

> "(i) the appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd (*O/017/17) at [52(i)]);
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> (ii) the appeal court will allow an appeal where the decision of the lower court was "wrong" (see CPR 52.11). Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS* O/039/21 at [14]);
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> (iii) the decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 at [81]);
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> (iv) the approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mar*k [2003] RPC per at [26]). There is a "spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision" (*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum;
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> (v) in the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country v Okotoks Ltd* [2014] FSR 11 at [50]-[51]);

(vi) an error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible (*Actavis Group* at [80]);

(vii) another variable to be taken into account will be "the standing and experience of the fact-finding judge or tribunal" (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts (*Shanks v Unilever Plc* [2014] RPC 29 at [28] citing the warning given by Baroness Hale in AH *(Sudan) v Secretary of State for the Home Department* [2007] UKHL 49);

(viii) the appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; "The duty to give reasons must not be turned into an intolerable burden" (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English v Emery Demibold & Struck* [2002] 1 WLR 2409 at [17], Fage at [115]). The issues the resolution of which were vital to the judge's conclusions should be identified and the manner in which she resolved them explained (*English* at [19]);

(ix) in evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*TT Education* at [52(vi)]).

LAW

Statutory Framework

9. Section 46 of the Act provides:

> "(1) The registration of a trade mark may be revoked on any of the following grounds—
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> (a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;
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> (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
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> (c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;
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> (d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purposes of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made.

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made either to the registrar or to the court, except that——

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from——

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date."

10. The onus is on the proprietor to prove use. Section 100 of the Act provides:

"If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

Proof of Use

11. The Hearing Officer took the summary of the principles to be applied from the decision of Arnold J (as he then was) in *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) at [114] and [115]:

114. *The law with respect to genuine use*. The CJEU has considered what amounts to "genuine use" of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH*[2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

12. In addition, Cooke submitted the following.

    a. *Ansul* required that genuine use of the mark entailed use of the mark on the market for the goods or services protected by that mark, not just internal use by the undertaking concerned. SSI did not dispute this proposition.

    b. the decisions of the Appointer Person in *Awareness Limited v Plymouth City Council* (BL O 236/13) and *Dosenbach-Ochsner AG Schuhe Und Sport v Continental Shelf 128 Ltd* (BL O/4040/13) require that when considering the evidence as a whole the following must also be considered:

i. is it likely that there is material that the proprietor could have provided but has not done so (per *Awareness* at [22]);

ii. what the evidence shows and what it does not show (per *Dosenbach* at [22]),

iii. is the evidence sufficiently solid and specific to enable the evaluation of the scope of protection, having regard to the interests of the proprietor, the opponent, and the public (per *Awareness* at [22]).

13. Finally, Cooke drew my attention to the decision of Mr Daniel Alexander QC sitting as the appointed person in James Arthur O/543/20 and, in particular, to the following passages:

> 15. While the Appellant is right to say that trade mark law should protect small traders as much as large, it does do so, even if applied in the way that the hearing officer did. In particular, where there is a good explanation for why sales are very small in circumstances where a trader has undertaken real efforts to create or maintain a market under the mark, the fact that he or she has not succeeded in doing so will not be fatal to maintaining registration. Trade marks are, however, designed to protect a real and substantial existing or future business. A registered proprietor who is given wide rights by registration can reasonably be expected to engage or have engaged in sufficiently solid activity in order to justify the continued existence of such rights or for there to be a sufficiently solid explanation for why that has not been possible.
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> 16. The case law both in the EU courts and in the UK therefore recognises that there are situations in which the evidence of actual sales is so thin and the evidence of serious efforts being made to make sales virtually non-existent that, taken as a whole, it does not appear that a person has been using the trade mark to assist the sales. In such cases, it can appear that a trader may be hoping that sales might prove sufficient to avoid revocation of the mark. A tribunal in applying the provisions of the Act must look at the whole of the evidence and the efforts made by a trader, not just a tiny number of sales over a lengthy period. That is what the hearing officer did.
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> 20. In addition to the case law referred to above, *Abanka dd v Abanca Corporación SA* [2017] EWHC 2428 (Ch), [2018] Bus LR 612 which was approved in *Walton*, emphasised the importance of showing some steps taken by the proprietor to develop the market for its products (see paragraphs [91] and [102] referring to the need to show serious efforts to develop the market and that very limited use may itself be evidence that the proprietor has not taken steps to develop the market for the goods in question). In this case, there was no evidence that this had been done in any meaningful way.

14. SSI did not take issue with any of these principles.

Proper Reasons for Non-Use

15. Application of section 46(1)(b) requires the assessment of whether there are proper reasons for non-use. The law relating to this section was not the subject of any substantive treatment in the Hearing Officer's decision.

16. Cooke submitted, and I accept, that the principles to be applied when considering proper reasons for non-use are as set out by the CJEU in *Armin Hauple v Lidl Stiftung & Co KG* (C-246/05) and, in particular, that only obstacles having a sufficiently direct relationship with the trade mark, making its use impossible or unreasonable, and which arise independently of the

will of the proprietor of the mark, may be described as *"proper reasons for non-use of that mark"*.

17. SSI submitted that it was enough to show that there was a period (which, SSI submitted could be as little as day) in the relevant period in which the proprietor was prevented from using the mark and that it did not matter or not whether there was evidence demonstrating that during the period in question that the proprietor, absent the obstacle in question, intended to use the mark. SSI were unable to cite authority supporting this proposition – relying instead upon the wording of section 46 itself.

18. In my view the key difficulty with SSI's contention is that it seeks to remove any consideration of the will of the proprietor of the mark to use the mark. Taken to its logical conclusion, it is a submission which would allow there to be a finding of a proper reason for non-use in the case where the proprietor had no intention to use at any point in the five-year period.

19. I do not believe that this is either what the statute intends to protect, nor that it consistent with the way in which the law has developed.

20. The reference in section 46 "proper reasons for non-use" must be interpreted in accordance with art.19(1) of the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS") which uses the expression "valid reasons based on the existence of obstacles" to the genuine use which is required. The provision continues:

> "If use is required to maintain a registration, the registration may be cancelled only after an uninterrupted period of at least three years of non-use, unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner.
>
> Circumstances arising independently of the will of the owner of the trademark which constitute an obstacle to the use of the trademark, such as import restrictions on or other governmental requirements for goods or services protected by the trademark, shall be recognized as valid reasons for non-use."

21. Thus, Article 19(1) not only requires the existence of obstacles to use, but also the existence of valid reasons based on the existence of such obstacles.

22. The necessity for their being proper reasons for non-use was spelt out in INVERMONT Trade Mark [1997] RPC 25 as follows:

> "… [B]earing in mind the need to judge these things in a business sense, and also bearing in mind the emphasis which is, and has always been placed on the requirement to use a trade mark or lose it, I think the word proper, in the context of section 46 means: apt, acceptable, reasonable, justifiable in all the circumstances.
>
> I do not think that the term 'proper' was intended to cover normal situations or routine difficulties. I think it much more likely that it is intended to cover abnormal situations in the industry or the market, or even perhaps some temporary but serious disruption affecting the registered proprietor's business. Normal delays caused by some unavoidable regulatory requirement, such as the approval of a medicine, might be acceptable but not, I think, the normal delays found in the marketing function. These are matters within the businessman's own control and I think he should plan accordingly."

23. In MAGIC BALL Trade Mark [2000] RPC 439, Park J commented that whilst the adjectives "apt, acceptable, reasonable, justifiable in all the circumstances" used by the Hearing Officer in INVERMONT were well chosen, but it must not be forgotten that the statutory word to be applied was "proper" and not any of these near-synonyms.

24. In *Haupl v Lidl Stiftung & KG* (C-246/05) the CJEU held:
    a) valid reasons for non-use could arise where independent events created an obstacle to the use of the trade mark;
    b) such obstacles would have to be substantial enough to justify non-use and only those having a sufficiently direct relationship with a trade mark, making its use impossible or unreasonable and arising independently of the will of the trade mark proprietor, could be described as "proper reasons for non-use" of that mark, and
    c) it was then a matter for the national courts to assess whether a change in strategy to circumvent the obstacle would make the use of that mark unreasonable.

25. Neither MAGIC BALL, nor *Haupl*, directly address the question of whether the proprietor is required to have an intention to use the trade mark in the period when there was an obstacle to its use. However, both cases make it clear that the tribunal is required both to consider (a) the obstacle and (b) the behaviour of the proprietor when considering whether reasons for non-use are "proper reasons". As the purpose of section 46 is to promote the use by a proprietor of its trade marks, it is in my view very difficult to see how there could be proper reasons for non-use in the total absence of any intention to use. In those circumstances the real reason the mark has not been used is because the proprietor had no intention to use it, not that an intervening act prevented such use.

THE EVIDENCE

26. SSI's evidence stated that the brand True North was developed in 2015. In a document dated March 2016 (the "Presentation") it set out proposed plans for a product launch involving various steps leading up to a "UK & International launch" in 2019. The steps were
    a. Initial in-store on shelf testing (Dec 2015);
    b. Begin LFP retail "Fresh" packaging sales test (Spring/Summer 2016);
    c. Review results with LFO management (Oct 2016);
    d. Brief True North product development (Feb 2017);
    e. Internal Smoked taste trials (Apr-May 2017);
    f. Agree Smoked taste profile and production spec (Jun-July 2017);
    g. Recruit True North Sales Manager (Sept 2017);
    h. Limited sales and distribution retail and restaurant test (Nov-Dec 2017);

i. Review production plan with Harris & Lewis Smokehouse opening update (Qtr 1, 2018);
j. Scottish launch of TN Fresh & Smoked (Qtr 4, 2018), and
k. UK & International Launch (2019).

27. SSI's evidence in relation to the use that was, in fact, made of the True North brand:
    a. approximately 100-200 True North branded Salmon sides were sold in a its company deli at Clachan Farm Loch Fyne over a 2-month period during the winter of 2015 – 2016. Further sales were not repeated;
    b. during 2016/2017 True North branded Salmon products appeared on the menu at an oyster Bar, also located at Clachan Farm.
    c. in August 2016 a presentation was given to Waitrose which included the True North Brand.
    d. SSI's trade was significantly disrupted by the Covid pandemic during 2020.

28. Cooke criticised each of these lines of evidence and submitted that overall, the evidence was too scant and insufficient to show genuine use across the UK or in a significant part of the UK. Amongst other criticisms it submitted that:
    a. no transactional evidence such as dated invoices or purchase orders clearly showing the sales of goods have been provided;
    b. the use of the Trade Mark in a single shop for a short period of time is no more than token use in the context of the market for Salmon
    c. use of the Trade Mark on a menu in location in North West Scotland is too insignificant to constitute proper use, and, in any event, was not substantiated;
    d. the March 2016 presentation was internal;
    e. the presentation to Waitrose in August 2016 has no more than one reference to True North in a document otherwise directed to SSI's other products.

29. The Hearing Officer consider each of these criticisms in depth his decision. His analysis makes clear that:
    a. he considered the lack of transactional evidence;
    b. accepted that sales in a single location in North West Scotland was to be judged more than token;
    c. reject that the total volume of sales was token;
    d. rejected the submission that use in the oyster bar was not substantiated;
    e. found that the March 2016 presentation was external, and
    f. gave weight to the presentation to Waitrose as evidence of promotion of the True North Brand to a large UK supermarket chain.

COOKE'S SUBMISSIONS ON APPEAL

Failure to give weight to the "Missing" Evidence

30. Cooke submits that the Hearing Officer failed to direct himself properly by failing to consider what other evidence should have existed and therefore should have been produced by SSI. In particular, Cooke submitted that the Hearing Officer failed to take into adequate account the fact that SSI had produced no evidence of sales or advertising data. I reject these submissions. In my view, it is clear from the decision that the Hearing Officer had firmly in mind the issue of what other evidence might have been produced and took this into account as a factor in his decision making process.

The March 2016 Presentation

31. Cooke submits that the Hearing Officer was clearly wrong to conclude it was "clear that the [March 2016 Presentation] was not for internal use purposes". He was also, it says, wrong to conclude that the March 2016 presentation demonstrates that True North branded products were on sale.

32. In my view the Hearing Officer had no proper basis to conclude that the presentation was clearly an external document or that it showed that True North product were on sale. Neither of these propositions was advanced by SSI in its evidence. All that is said in SSI's evidence is it *"comprises a brand review document/presentation showing the proposed plans for the True North product launch".* Second, the title and content of the document do not materially support the proposition that this was a document that was externally circulated (and in this respect the Hearing Officer's conclusion on this point is not explained) or that products were already on sale. Finally, there is no evidence that the document was externally circulated.

The August 2017 presentation to Waitrose

33. The purpose of the presentation is stated to be *"To offer Waitrose the opportunity to have exclusive access to the Loch Fyne brand in the UK multiple retail sector".* It consists of 44 power point slides. There is one reference to "True North" in a list of nine bullet points set out on slide 44. This states as follows: *"Native strain Scottish salmon – Dual brand True North$_{TM}$ from SSI".*

34. Cooke submit that the Hearing Officer as wrong to find that the presentation provided any evidence of genuine use. In particular, it submits that this document does not show use in relation to the Trade Mark of goods already marketed, or about to be marketed.

35. I accept the submission that the presentation does not show any direct use of the Trade Mark. However, I reject the submission that the Hearing Officer should have entirely discounted this evidence. He was in my view, entitled to consider it as part of the wider evidential picture. A point I will refer to below.

Sales in the Deli

36. Cooke make three criticisms of the Hearing Officer's approach to this evidence.

37. First, it submits that the witness evidence (from Mr Brown, the managing director of Loch Fyne Oysters) in relation to the sales in the deli should be rejected as circumstantial and unsupported by any form of documentary verification beyond a picture of True North branded Salmon apparently on sale in the deli. I reject this criticism. In the round there is nothing incredible about Mr Cameron's evidence. He gives detailed evidence as to when the branded products went on sale, how long they were on sale, their price and the fact that sales were not later repeated. He does not attempt to give precise number of sales – but rather suggests that sales were in the range of 100-200 units. This, it seems to me is entirely consistent with SSI's case that these sales were made on a small scale to, in effect, "test the water" for the brand.

38. Second, Cooke submits that the Hearing Officer wrongly relied upon the assumption that SSI was a small local business in rural Scotland. First, Cooke say this is wrong in fact and SSI are in fact a substantially large concern. Second, Cooke say that the correct economic sector to be considered is that of sales of Salmon and this is a substantially large market. In my view there is some force in Cooke's criticisms. However, I do not think that the Hearing Officer's decision in this respect, and in particular the manner in which he applied the test in *Ansul*, is manifestly wrong.

Use on Menus

39. The Hearing Officer found that:

> The proprietor has not provided any sales invoices showing sales of TRUE NORTH products. It has however, provided evidence by way of restaurant menus and till summaries, showing that sales of TRUE NORTH products have taken place at least in 2015 and 2016. Exhibits CMB3 and CMB4 show that the proprietor's restaurant included a main meal called 'True North Lightly Smoked Salmon' on its menu in 2016. However, the claim of Mr Brown that the till summary from June 2016 shows sales of TRUE NORTH meals is not entirely correct. In fact, the brand name TRUE NORTH is not shown on the till summary, rather the till summary for June 2016 lists 'Lightly Smoked' under the list of main meals ordered for that month. There were 269 'Lightly Smoked' meals ordered, with a total value of £5102.55. Whilst the trade mark is not provided on the till summary, I note that no other main meal or starter containing the words 'Lightly Smoked' is listed on any of the menus that have been provided by the proprietor, other than the 'True North' branded products. I think it is reasonable therefore, to accept that the 269 'Lightly Smoked' meals sold in June 2016 are the 'True North Lightly Smoked Salmon' meals listed on the proprietor's menus.

40. Cooke submits that the Hearing Officer had no proper basis to accept that 216 meals had been sold. In particular, it submits that the till receipts refer to other items (such as Fillet Steak and Monkfish) which do not appear on the menus provided in evidence. Furthermore, Cooke submits that the use on the menu is of such a nature that it is not trade mark use.

41. There is, in my view, force in the criticisms made of the evidence of use on menus. However, I do not believe that the Hearing Officer was wrong to accept that 269 dishes of True North Lightly Smoked Salmon were sold in the Oyster bar. In this regard, he was entitled to take the evidence in the round, including the witness evidence which supported the assertion that sales had been made in the Oyster bar.

The Evidence in the Round

42. Whilst I have addressed Cooke's specific criticisms of the Hearing Officer's finding above, it is important to keep in mind that the question on appeal was whether the Hearing Officer's overall finding in relation to genuine use was wrong.

43. Cooke submit that it clearly was. First, because of the specific matters I have discussed. Second, because the Hearing Officer failed to give sufficient weight to the evidence that could and, it says, should have been produced. Third, because the Hearing Officer failed to give sufficient weight to the size of the economic sector for Salmon.

44. It appears to me that the fundamental question before me is whether the Hearing Officer was entitled to conclude that the evidence demonstrates, despite the existence of what, in the wider context of the market for Salmon, were very small sales, amounted to real efforts to create or maintain a market under the mark (*per* James Arthur).

45. It appears clear that in March 2016 SSI intended to take real efforts to create or maintain the mark. However, the evidence of what they did falls far short of what they appear at that stage to have intended. In my view all that can be properly concluded from the evidence for actual sales is that:
    a. 100-200 sales were made in the deli over 2 months in winter 2015-2016;
    b. its expressly accepted that no sales were made in the deli thereafter;
    c. c. 250 sales were made in the Oyster bar in June 2016;
    d. there is no substantiated evidence of sales in the Oyster bar for any other date;
    e. these sales activities took place in one location in North West Scotland

46. The presentation to Waitrose has, in my view, little evidential weight and can therefore add little to the overall picture.

47. I have considerable sympathy with the submissions of Cooke. The evidence of use is both small in quantity, and not well proved in documentary evidence. Furthermore, for the reasons I have set out above, the Hearing Officer did, in my view, mischaracterize the March 2016 presentation. However, having said all of this, I do not believe that the matters raised by Cooke demonstrate that the Hearing Officer made a material error which justifies me overturning his decision on non-use.

48. Cooke's appeal is therefore dismissed.

Proper Reasons for Non Use

49. As I was addressed on the issue of proper reasons for non-use I will deal with them briefly.

50. SSI argued that it was enough that as a result of the Covid pandemic it had not had five years of normal trading conditions.

51. The Hearing Officer's decision is set out at paragraph 78 of his decision as follows

> I briefly turn to the issue of disruption of trade due to the Covid-19 pandemic. The proprietor has made submissions to the effect that the pandemic has had a significant impact on its ability to conduct business. In his second witness statement Mr Brown has provided financial figures that show the turnover of his company. It is clear that the turnover of Mr Brown's company dropped significantly from 2019 to 2020. I note for example, that the company turnover more than halved between March-May 2020 from the same period in 2019, going from almost £2.5 million to just over £1 million.
>
> However, in this regard, the applicant has rightly pointed out that in fact the period of disruption overlaps with the relevant period in this matter, for no more than 4 months.The majority of the relevant period was unaffected by the pandemic. I conclude that whilst clearly the pandemic has had an impact on Mr Brown's company in the first half of 2020, this is largely academic, as the majority of evidence to which I have attached significance and weight predates the pandemic entirely.

52. The facts set out by the Hearing Officer were not contested on appeal. It follows that whilst there is no doubt that SSI, as a company, was seriously impeded by the pandemic, it did continue to trade. More importantly, there was no evidence that SSI would, absent the pandemic, have used, or made preparations to use, the mark to a greater extent than I have discussed above. Put simply, whilst there is good evidence that SSI's trading position was materially affected during this period, there is no good evidence that its trade in, or preparations to trade in, goods under the mark were affected. In such circumstances, I find no reason to interfere with the Hearing Officer's decision on this issue.

Conclusions

53. For the reasons given above I dismiss this appeal.

54. Since the appeal has been dismissed, and in large part the Respondent has succeeded, I find that Respondent is entitled to a contribution towards its costs. I will therefore make an order that the Appellant pay to the Respondent a contribution of £1,000 toward its costs of the appeal. There was no order as to costs below.

55. I therefore order Cooke to pay SSI the sum of £1,000 by 4pm on Tuesday 14 March 2023.

GEOFFREY PRITCHARD

The Appointed Person

22 February 2023

56.