O/0259/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK4009189
BY PHYTOCEUTICS INTERNATIONAL AG
TO REGISTER THE TRADE MARK:

PHYTOPURE

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 600003296
BY GOVIND THETHY

Background and pleadings

1. On 31 January 2024, PHYTOCEUTICS INTERNATIONAL AG ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 26 April 2024. The goods applied for are as follows:

> Class 5: Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for human beings and animals; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides.

2. The application was opposed by Govind Thethy ("the opponent") on 10 May 2024. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is against all of the applied for goods.

3. The opponent relies on the following trade mark:

UK3327075

purephyto

Filing date: 25 July 2018
Registration date: 26 October 2018

Relying upon all of the goods for which the earlier mark is protected, namely:

> Class 5: Hemp oil, Hemp supplements, Hemp Vaporiser; Food supplements; Food supplements for non-medical purposes; Food supplements for veterinary use.[1]

4. The opponent claims that the marks are 'strikingly' similar. It also claims that the applicant's goods are similar and that this could lead to confusion.[2] Further, as their mark was registered more than five years' prior to the application of the contested mark, the opponent supplied evidence to support proof of use of their mark.

5. The applicant filed a counterstatement denying the claims made and requested that the opponent provides proof of use for the mark.

6. This is an opposition to which the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 No. 2235 applies, Rule 6 of those rules disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20 (4) shall continue to apply. Rule 20(4) states that:

> "(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit."

7. Other than proof of use evidence, the fast track opposition procedure does not include the routine filing of evidence. The net effect of the above rules is to require the parties to seek leave in order to file (further) evidence in fast track oppositions. The applicant initially sought leave to file evidence alongside their Form TM8 and counterstatement, however, this request was later rescinded.

8. Rule 62 (5) of the Fast Track Opposition Rules (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral

[1] Within the Form TM7, I note that the opponent has marked Question 6 as relying upon 'some goods and services' for which their mark is registered however, in the box provided to specify those goods, the opponent has listed all goods for which they are registered.

[2] Within their pleadings, the opponent mentioned that the applied for mark could 'adversely affect our brand recognition' however, this wording appears to be relevant to claims under section 5(3) not section 5(2) and therefore, I will consider this no further.

proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. The opponent filed further submissions. This decision is taken following a careful consideration of the papers.

9. The applicant is represented by Stobbs and the opponent represents themselves.

10. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Preliminary Issue

11. I note that within both the Form TM7F and the submissions from the opponent that they make reference to market disruption, power imbalance and the intent of the applicant. Given this matter is solely in relation to section 5(2)(b) of the Act, the comparisons and decision I must undertake here are notional, comparing one registration to the other and assessing whether the opponent has provided proof of use of their own mark. In these proceedings, it is not for me to assess the intention or behaviour of the parties and therefore, I will consider these comments no further.[3]

Evidence

12. The opponent provided evidence within the Form TM7F together with 10 exhibits. This evidence was provided by Govind Thethy and the Form TM7F is dated 26 April 2024. The purpose of this evidence is to show proof of use of the opponent's mark.

[3] *O2 Holdings Limited & Anor v Hutchison 3G UK Limited*, Case C-533/06, paragraph 66

Decision

Section 5(2)(b)

13. Section 5(2)(b) of the Act is as follows:

> "5(2) A trade mark shall not be registered if because-
>
> (a) [...]
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

14. The opponent's mark qualifies as an earlier mark, in accordance with Section 6 of the Act. The earlier mark is subject to proof of use requirements as it has been registered for five years or more before the application date of the contested mark, as per section 6A of the Act. The applicant has requested that the opponent provides proof of use for the mark.

Proof of use

15. I will begin by assessing whether there has been genuine use of the earlier mark.

16. Section 6A:

> "(1) This section applies where
>
> (a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has 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, or
(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) 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.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services."

17. Section 100 of the Act is also relevant, which reads:

"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."

18. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the opponent's word mark is the five-year period ending with applicant's filing date i.e. 1 February 2019 to 31 January 2024.

19. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], 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], Case C-689/15 W.F. *Gözze*

Frottierweberei GmbH v Verein Bremer Baumwollbörse [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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].”

Evidence

20. I will start with the evidence from the Form TM7F. Mr Thethy states that the mark has been an “integral part of our branding strategy, SEO initiatives, and

comprehensive marketing campaigns since 2017". Further, he states that a google search shows "over 15 reputable stockists".[4]

21. At Q11 of the Form TM7F, Mr Thethy states "2024 FILED ACCOUNTS £44,506" which I assume to mean the sales turnover figure for 2024. As the relevant period ends on 31 January 2024, I cannot be certain what, if any, proportion of this figure was sold in that month. It is for the proprietor to provide the relevant detail needed for me to make a finding of use and I have no further information to assist here.

22. Mr Thethy quotes £20,000 as the amount spent on promoting the mark in the UK at Q12. This does not show a year, so I assume this figure is for the relevant period as a whole.

23. I will now move on to the 10 exhibits attached to the Form TM7F. I do not have a witness statement or any narrative evidence explaining these exhibits.

24. Exhibit 1 is a 'Test Certificate' from ProVerde Laboratories in which has an address in the United States. The certificate appears to show a small dropper bottle and appears to indicate that the sample analysed consisted of 'CBD' (whilst I note that no evidence was provided as to what CBD is defined as, I find that it is fairly well known as a chemical substance found in cannabis which has purported medical benefits). The test date on the certificate is 20 July 2018.

25. Exhibit 2 is a screenshot from CBDBIBLE and is headed 'Purephyto CBD (Our Honest Review'). It states Purephyto CBD are a CBD company based in the UK. Most of the review has not been included and the exhibit is undated. However, Exhibit 5 (which is a google search for 'PUREPHYTO CBD') displays the link to this UK-based webpage. Although the google search is undated, it shows a date for the article, being 9 November 2020.

26. Exhibit 3 is a screenshot from 'Reviews.io' which is a review website. It shows Purephyto CBD as having 158 reviews. The screenshot is undated.

[4] Q10 of the Form TM7F

27. Exhibit 4 is a screenshot from ‘Flori’s Friends Rescue’ which shows the earlier mark and states “we use CBD oil on all of our anxious and ill residents […]”. Again, this is undated and I have no narrative evidence of where this rescue is based.

28. Exhibit 6 is an unknown undated website screenshot showing the ‘PUREPHYTO’ mark under their sponsors and partners section.

29. Exhibit 7 is an extract of the PUREPHYTO Instagram page. It shows 10,000 followers and includes a claim of being the UK’s number 1 CBD brand. This again, is undated.

30. Exhibit 8 is an undated screenshot of the PUREPHYTO website. There is a small pop up that states “Someone in Bradford, United Kingdom purchased a CBD Salmon Oil”. There are headings along the top of the page as shown below:

31. Exhibit 9 is simply a reproduction of the earlier mark.

32. Exhibit 10 is a screenshot of the Trustpilot page for PUREPHYTO CBD OIL. This is, once again, undated. It shows 592 reviews. However, I also note that there is a banner at the top stating “Looks like you are in the United Kingdom. Go to the British Trustpilot site”. Therefore, I cannot confidently say that the site being accessed is from the UK and contains reviews from UK consumers.

Analysis

Form of the mark/how the mark is used

33. The mark as registered is seen throughout the evidence.

Conclusions from the evidence on genuine use

34. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the marks, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the relevant five-year period. In making this assessment, I am required to consider all relevant factors, including:

- The scale and frequency of the use shown;
- The nature of the use shown;
- The goods and services for which has been shown;
- The nature of those goods/services and the market(s) for them; and
- The geographical extent of the use shown.

35. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[5]

36. Most of the evidence provided is undated and, therefore, I cannot say whether it occurred within the relevant period and I have no narrative evidence to confirm whether the evidence is from within the relevant period or might cast light backwards on to the relevant period.

37. I have sales figures of £44,506 for 2024. Only January of 2024 falls within the relevant date and with no further information from the proprietor, I cannot say how many of those sales were made within the relevant period. In any event, I do not consider that amount of £44,506 to be particularly meaningful in the context of genuine use. I have no other sales figures dated within the relevant period. Furthermore, these sales figures are not broken down by product type. As per *Eros Bodyglide* BL O/0984/25, only where there is only one good being sold and it is sold under only one

[5] *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

trade mark can global figures be sufficient.[6] I have no invoice evidence whatsoever, therefore I have nothing before me showing details of sales or geographical distribution of sales across the UK. I do have £20,000 in marketing/promotional expenditure for the relevant period however, I do not consider this to be particularly significant and I have no dated evidence showing any examples of marketing/promotion.

38. Turning next to the products themselves, there are only a few references (in Exhibits 4, 8 & 10) and all refer to 'CBD oil' or 'CBD salmon oil'. Again, none of these references are dated and there is no evidence pointing to actual sales in the UK. I can see nothing in relation to 'hemp vaporisers' or food supplements. I also have not been provided with any evidence or information from the opponent to confirm that CBD oils and hemp oils are one and the same or equivalent goods.

39. I have not been provided with any evidence as to the price point of the goods they are registered for (which might assist in contextualising any sales figures) nor any market share or wider market information. Notwithstanding the reference on their own Instagram page claiming to be the 'UK's #1 CBD brand', there is no corroborating evidence to support this assertion. In the absence of such evidence, I can only assume it is a marketing tag line. I note that within the Form TM7F they state that they have 15 reputable stockists shown on a google search, but that in itself does not show me their sales levels within the UK (particularly as they do not specify if they are UK stockists).

40. Taking all of the foregoing into account, it is my view that the evidence is not sufficiently "solid or specific to enable proper and fair evaluation of the scope of protection to which the opponent is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the [applicant], the opponent and, it should be said, the public".[7] Thus, the evidence is not enough to establish that there has been genuine use of the mark for any of the opponent's goods.

[6] Paragraph 27

[7] See *Awareness Limited v Plymouth City Council,* Case BL O/230/13

41. The consequence of my finding on use is that UK3327075 may not be relied upon in these proceedings. As there is no other basis for the opposition, the action must fail.

Conclusion

42. The opposition is unsuccessful, and the application may proceed to registration.

Costs

43. The applicant has been successful and is therefore entitled to a contribution to its costs based upon the scale published in Tribunal Practice Notice 1/2023. I award the applicant the sum of £150. The sum is calculated as follows:

Considering the notice of opposition and preparing the counterstatement	£150
Total	**£150**

44. I therefore order GOVIND THETHY to pay PHYTOCEUTICS INTERNATIONAL AG the sum of £150. This sum should be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th day of March 2026

L Nicholas
For the Registrar