BLO/0563/23

TRADE MARKS ACT 1994
IN THE MATTER OF REGISTRATION NO. 908630832
IN THE NAME OF FUNLINE INTERNATIONAL
FOR THE TRADE MARK JUNGLE JUICE
IN CLASSES 1 & 3
APPLICATION FOR REVOCATION THERETO UNDER NO. 504488
IN THE NAME OF LOCKERROOM MARKETING LTD

DECISION

Introduction

1. This is an application for revocation on the grounds of non-use under s.46 Trade Marks Act 1994. It succeeded before the Hearing Officer, Charlotte Champion, by decision dated 20 February 2023 based on the papers.

2. The Proprietor is Funline International and the mark is Jungle Juice, registered in Classes 1 & 3. The relevant goods for the purposes of this appeal are "perfumery, air fragrances for aphrodisiac purposes" in Class 3. The applicant for revocation is Lockerroom Marketing Ltd.

3. The facts are somewhat unusual as they relate to "poppers" – alkyl nitrites used, legally[1], as recreational drugs, and in particular to enhance sexual pleasure. There is no dispute that Jungle Juice has been used as a trade mark within the relevant jurisdiction. The issue is whether it is has been used for the relevant goods.

4. The complication arises because the Proprietor is not permitted by law to market the goods for the purposes for which they are actually intended to be used – namely as poppers[2]. So the Proprietor has instead marketed them, in common with others in the industry, including the Applicant for revocation, as "room deodorisers". The

[1] They are legal because they are not classed as psychoactive substances – as confirmed by the most recent governmental review in 2016. Their vasodilatory effect is limited to peripheral smooth muscle and they do not have an effect on the central nervous system.
[2] This is because amyl nitrite for consumption is classed as a medicine – e.g. to treat angina- and so can only be dispensed as such by pharmacists.

Hearing Officer found that because the goods were not in fact used as "room deodorisers", but instead as poppers, there were grounds for non-use.

5. Before me at a hearing on 13 June 2023 the Proprietor/Appellant was represented by Sanjay Raphael of TLT LLP. The Applicant/Respondent was represented by David Gwilliam of Adamson Jones. I am grateful to both of them for their assistance.

Standard of Appeal

6. There was no dispute as to the standard of appeal – see *Axogen v Aviv* [2022] EWHC 95 (Ch) at [24]-[25]. I was also referred to the well-known authority O-017-17 *TT Education* where Mr Daniel Alexander KC explained at [52], and in particular (iii) and (v):

> (iii) In the case of conclusions on primary facts it is only in a rare case, such as where that conclusion was one for which there was no evidence in support, which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that the Appointed Person should interfere with it (*Re: B* and others).
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> …
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> (v) Situations where the Registrar's decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong (c) where the view expressed by the Registrar is one about which the Appointed Person is doubtful but, on balance, concludes was wrong. It is not necessary for the degree of error to be "clearly" or "plainly" wrong to warrant appellate interference but mere doubt about the decision will not suffice. However, in the case of a doubtful decision, if and only if, after anxious consideration, the Appointed Person adheres to his or her view that the Registrar's decision was wrong, should the appeal be allowed (*Re: B*).

7. Here it was said that the Hearing Officer had misunderstood the evidence, alternatively was simply "wrong" to conclude as she did.

The Decision

8. Given the narrow and focussed nature of the appeal, it is not necessary to rehearse many of the arguments recorded in the Decision. I will therefore focus on the relevant parts.

9. The Hearing Officer recorded the relevant law on non-use by reference to the summary given by Arnold J. in the Giordiano case, *Walton v Verweij* [2018] EWHC 1608 (Ch) at [115], which I gratefully adopt:

> 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].

10. Before me, sub-paragraph 6 in particular was emphasised.

11. The Hearing Officer then summarised the written evidence submitted on behalf of the Proprietor, in the form of two witness statements from Mr Ludovic Lemoues, its owner and proprietor.

12. I note in particular her summary of the history of poppers at [14]:

14. Exhibit LL2 comprises an article from the website chemistryworld.com, dated 21 September 2021. The article describes the discovery of alkyl nitrates in the 19th Century and their use as a therapy for angina. It explains that by the 1960's the substance became used as a recreational drug and aphrodisiac, popular in the gay community. As recreational use expanded, the article explains that by the 1970's alkyl nitrates ceased to be sold in pharmacies and there remains a question over their legality for human consumption. Manufacturers of poppers are said to market their products as ""cleaning agents", "industrial solvents" or "room odorisers" and state that they are not intended for human consumption." The UK Parliament debated the issue of poppers in 2016 in the passing of the Psychoactive Substances Act. The conclusion was that poppers should not fall within the scope of the definition of a psychoactive substance and therefore they are not banned in the UK.

13. The Hearing Officer then went on to summarise the evidence of use of the mark as follows:

Use of the mark

17. Mr Lemoues provides the following sales and turnover figures for the EU:

Year	Number of bottles
2017	70,414
2018	78,543
2019	74,049
2020	60, 500
2021 (9 months)	38.737

Year	Turnover
2017	€159,254.87
2018	€177,725.17
2019	€164,171.50
2020	€143,174.80
2021 (9 months)	€94, 909.86

18. Sales throughout the period of alleged non use are confirmed by a range of invoices in Exhibit LL3, with additional UK invoices provided in the Proprietor's evidence in reply, at Exhibit LL15. The invoices show sales have been made in many EU countries including France, Ireland, Spain, Greece, Belgium, Bulgaria, Hungary, Poland, Italy, Sweden and Slovenia, with UK sales before and after the end of the transition period. Sales are indicated to be of "JUNGLE JUICE" or "JUNGLE JUICE PLATINUM", with the goods sold mainly in boxes containing 18, 24, or 36 bottles, and being ordered as a single box, or up to 30 boxes in one order. The product labels are shown at Exhibit LL4 and confirmation of label orders are shown at Exhibit LL5, where it is shown that orders were made during the period of alleged non use for tens of thousands of labels:

14. She then went on to assess genuine use. In relation to the law she referred to *Kerly* and a reference to *British Sugar* found therein:

31. Kerly's Law of Trade Marks and Trade Names states the following in respect of revocation and the relevant goods or services:

"The use must be in relation to goods or services within the specification. Use on any other goods or services is irrelevant. If an issue arises as to whether particular goods or services do or do not fall within the specification, it may be necessary to construe what the words used in the specification actually mean. The general approach to construction has been described thus:

> "When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all, a trade mark specification is concerned with use in trade."[20]

The words in the specification must be construed as at the date of application for the mark in question."[21]

[20] *British Sugar Pic v James Robertson & Sons Ltd* [1996] R.P.C. 281 at 288.
[21] Kerly's Law of Trade Marks and Trade Names, 16th Edition, at 12-072.

15. In relation to the classes still live before me, the Hearing Officer held:

Perfumery and air fragrances for aphrodisiac purposes

38. Due to the overlap in these goods, I will deal with them together. Having considered all of Mr Lemoues' evidence, there is no indication that the Proprietor's goods are used in respect of either perfumery or air fragrances. As the Applicant points out, the fact that the words "room odouriser" appears on the bottle does not mean that the goods are room odourisers. Indeed, there is no evidence or information to show how the goods would odourise a room, or that consumers would purchase the goods for this purpose.

39. In Paragraph 5 of Mr Lemoues' first witness statement, he states "The goods sold under the brand JUNGLE JUICE are "poppers" which act as an aphrodisiac". Mr Lemoues therefore confirms the nature of the goods sold as being "poppers" and not perfumery, or air fragrances. Further, Mr Lemoues' evidence describes the nature of poppers as being a substance that was historically used in medicine and more recently is used as a legal high and for its aphrodisiac properties. So the goods are neither perfumery, nor air fragrances and, as the Applicant contends, the goods would appear to be of a nature that would fall within Class 5 of the Nice Classification where pharmaceuticals are classified. Mr Lemoues argues that poppers "can and are used as room odourisers to create a mood, in the same way that incense can be used to create a mood", however, no evidence is provided to support this.

40. Mr Lemoues states that when applying for the mark, it was not possible to apply the word "poppers" to the goods and he implies that it was not possible to classify the goods in Class 5. While it may be that it was not possible to apply the word "poppers" to the goods (though no evidence of this is provided), it is not apparent from the witness statements, or evidence, why the Proprietor's mark could not be registered within Class 5. The evidence suggests that it is a practice in the market for poppers

to describe them as room fragrances, or shoe polish, however this does not alter the position from *British Sugar Pic* (cited above) that the relevant consideration is "*how the product is, as a practical matter, regarded for the purposes of trade*". The Proprietor has not shown genuine use of it's mark either in respect of fragrances or air fragrances for aphrodisiac purposes. The registered mark is therefore revoked in respect of these goods.

The Appeal

16. As noted, the Proprietor's arguments were succinctly put on this appeal. Essentially it was argued that the Hearing Officer had failed properly to assess the evidence in relation to the sale of the Proprietor's goods, and/or that she was wrong to conclude as she did. The Proprietor focussed at the hearing on "air fragrances for aphrodisiac purposes" and I will do the same.

17. It was further suggested that her reliance on the test in *British Sugar* was in error, and that a less strict approach should be adopted in relation to the question of genuine use than for the identity test under s.10(1) of the Trade Marks Act.

18. I shall deal with this latter point first. I do not consider that the Hearing Officer was wrong to refer to *British Sugar* as she did. Further, the guidance referred to seems to be consistent with the more detailed approach summarised in the Giordiano case. However, nor do I think that the test to be applied when assessing non-use is a strict one – it is not necessarily the same as that to be applied in the context of a s.10(1) identical goods/services assessment.

19. In support of this I refer to the summary of the approach taken to partial invalidity through non-use approved by Mr Justice Henry Carr in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch) at [47]:

    iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

    iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.

20. The reason for this is the purpose of the non-use provisions. They are there to allow marks which have not been used to be removed from the register. But where a mark has been used, albeit not in relation to the full breadth of goods/services for which it was registered, the proprietor should be allowed to maintain it on the register. When assessing the description of the goods/services for which the registration should be permitted to continue, the tribunal should take a sensible approach to arrive at a fair and not unduly narrow description of the specification. This will involve an assessment of how the average consumer would fairly describe the goods/services in relation to which the trade mark has been used.

21. With this in mind, the question for me is whether the Hearing Officer was right to conclude that there had been no use of the mark in relation to the classes of goods “perfumery, air fragrances for aphrodisiac purposes”.

22. I acknowledge that the circumstances of this case are unusual. But I have come to the conclusion that the Hearing Officer was wrong to conclude that the mark had not been used in relation to room deodorisers, which is the description on the label. Accordingly, I consider that the Proprietor is entitled to maintain the mark as

registered for air fragrances for aphrodisiac purposes (but not “perfumery”, which is further away from the room deodorisers description on the label).

23. The basis for differing from the view of the Hearing Officer comes down to the assessment of what is a fair description of the goods upon which the mark has been used. The label for the goods is depicted above. From this it is unarguable that the goods have been put forward as “room deodorisers”.

24. The Hearing Officer accepted this, but went on to conclude that in spite of this, because of the ultimate intended use of the goods as poppers, no genuine use had been established.

25. I do not agree with this conclusion for several reasons. If looked at from the perspective of a potential infringement action, it is inconceivable that a defendant selling products labelled as room deodorisers could avoid a finding of infringement by suggesting that even though they were so labelled, there was no actual use because they were intended to be used for another purpose. I do not see how a proprietor facing a non-use challenge could be in a worse position than a potential infringer.

26. Moreover, when the average consumer is taken into account, the same conclusion is reached. Some consumers may not be familiar with or be seeking the recreational results of sniffing the Jungle Juice product. Those consumers would see the product labelled room deodorisers and would be entitled to consider that such a product branded with the mark emanated from a particular source. Indeed, as a result of the label, which also explains to the consumer that the product can be put into a diffuser for use, there may be some customers who buy the products believing them to be room deodorisers alone.

27. Of course, the bulk of the Proprietor’s customers, on the evidence, know that the product has another use, namely as a popper. But they also know that it is customary for such products to be sold as room deodorisers. In these circumstances I do not think it is an answer to an allegation of non-use to say that the products, even the bulk of them, may end up being used for another purpose. The fact that the average consumer would be used to seeing such products on display and being marketed as room deodorisers and labelled as such is sufficient, in my view, to establish use in the course of trade, even if there may be an acknowledged or expected alternative use for them once they have been purchased.

28. I also bear in mind the factors listed under [6] in the quote from the Giordiano case above. There is real commercial exploitation of the mark. Such use in the form of labelling as room deodorisers is viewed as warranted in the sector concerned, by both undertakings and their customers, and has resulted in a share of the market being created. I bear in mind the particular nature of the market and the goods concerned, and the scale of use, which is much more than de minimis.

29. The Applicant sought to emphasise that the goods are not room deodorisers. It may be that ultimately they are not used for that, but the fact that they are labelled and marketed as such, and that the average consumer recognises that style of marketing in the sector means that such use cannot be completely ignored. This is the mistake that I think the Hearing Officer made.

30. I also do not consider it decisive that there might be other (legitimate) descriptions which could be used to describe the goods (e.g. in Class 5). The question for me is whether there has been use of the goods registered, not whether there might be other descriptors which it would have been easier to persuade the Hearing Officer to uphold.

31. Accordingly, I think the Hearing Officer was wrong to dismiss the evidence of use, and in particular the labelling and marketing of the Proprietor's goods and other such products. Bearing in mind the factors identified by Mr Justice Henry Carr, and seeking to arrive at a fair specification in the circumstances, I consider that the use as air fragrances for aphrodisiac purposes has been established.

32. I think the evidence establishes that the average consumer would fairly describe the goods in this way. This is as a result of the custom in the field of selling poppers as room deodorisers and where they are likely to be used recreationally to heighten sexual pleasure. It is this combination of marketed use and ultimate use which justifies the description "air fragrances for aphrodisiac purposes". Their ultimate use is not the only thing which matters and so the goods should not be described in the narrowest possible terms (because that is not what the average consumer would do). The effect of the Hearing Officer's decision is wrongly to strip the proprietor of protection for goods which the average consumer would consider as part of those for which the mark has in fact been used, albeit on the particular (and possibly unique) facts of the present case.

Costs

33. As the Proprietor has been successful on this appeal, I will revisit the costs order made below and make a further order on this appeal.

34. The Hearing Officer awarded the Applicant £1400. I will reverse that and order that there be no costs award below (to reflect the fact that the Applicant was still successful in revoking the bulk of the Proprietor's mark). In relation to this appeal, I will order that the Applicant pays the Proprietor £1200 in relation to the preparation for and attendance at this hearing.

Order

35. In summary, I reverse the decision of the Hearing Officer insofar as it relates to "air fragrances for aphrodisiac purposes", for which JUNGLE JUICE should remain registered in Class 3. I order that the Applicant should pay the Proprietor £1200 within 21 days of the date of this decision.

Thomas Mitcheson KC
The Appointed Person
19 June 2023