O/0586/26

TRADE MARKS ACT 1994

IN THE MATTER OF
TRADE MARK APPLICATION NO. 4121897
IN THE NAME OF WALMART APOLLO, LLC
TO REGISTER AS A TRADE MARK

SPARKY

IN CLASSES 9, 35 AND 42

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 453430
BY PRINCE CASH AND CARRY LIMITED

BACKGROUND AND PLEADINGS

1. On 7 November 2024, Walmart Apollo, LLC ("the applicant") applied to register the trade mark shown on the cover page of this decision in the United Kingdom. The application was accepted and published for opposition purposes on 10 January 2025, in respect of goods in classes 9, 35 and 42.

2. The application is partially opposed by Prince Cash and Carry Limited ("the opponent"). The opposition was filed on 8 April 2025 and is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against some of the class 35 services of the application, namely:

Retail, wholesale, online and online virtual store services in relation to both physical and virtual goods for use online and in online virtual worlds including the metaverse and virtual environments featuring a wide variety of consumer goods namely: batteries, battery chargers; Retail, wholesale, online and online virtual store services in relation to both physical and virtual goods for use online and in online virtual worlds including the metaverse and virtual environments featuring a wide variety of consumer goods namely: tobacco, cigarettes, cigars, snuff, smokers' articles, matches, cigarette lighters.

3. The opponent relies upon the following mark:

UK trade mark registration number 3353986

Filing date: 16 November 2018

Registration date: 08 February 2019

Registered in classes 34 and 35
Relying on all goods and services, as listed under paragraph 19 of this decision.

4. The opponent submits that the earlier trade mark on which it relies is phonetically very similar to the opposed mark and that the opposed services are identical and similar to the goods and services covered by the earlier mark. It submits that there is a likelihood of confusion, including a likelihood of association between the trade marks and as such, the application should be refused.

5. The applicant filed a counterstatement denying the claims. It requests that the opposition is dismissed in its entirety and that the application be accepted for registration. The applicant also requests an award of costs is made in its favour.

6. Only the opponent filed evidence. Neither party requested a hearing; both parties filed written submissions in lieu of a hearing. This decision is taken following careful consideration of the papers on file.

7. In these proceedings, the opponent is represented by National Business Register Group Ltd and the applicant is represented by Marks & Clerk LLP.

Preliminary Issues

8. The earlier mark relied upon by the opponent in these proceedings is itself subject to revocation for non-use in a separate action involving the same parties. In related case number CA509712, the TM owner is Prince Cash and Carry Limited ("PCCL") and the cancellation applicant is Walmart Apollo, LLC ("WAL"). The revocation action is brought against all of the goods and services for which the mark is registered, which includes smoker's articles and the retail and wholesale thereof. Should WAL succeed in full in those related proceedings, the earlier mark relied upon by the opponent in the current proceedings before me would be revoked from the earliest date requested, being 9 February 2024. As the relevant date in the current proceedings is 7 November 2024, in these circumstances, the opponent in the matter before me would not be able to rely upon the earlier mark.

9. As such, I will proceed to make an assessment firstly on whether there is sufficient evidence to find that the earlier mark relied upon has been put to genuine use in relation to the goods and services for which use has been claimed. Should this be the case, I will then make an assessment on the likelihood of confusion between the marks at hand. In the event that I proceed to find that there is a likelihood of confusion, then my decision will be issued as a provisional decision only, pending the outcome of CA509712. Should I find either insufficient evidence of genuine use of the earlier mark, or alternatively that there is no likelihood of confusion between the marks at hand, the outcome of the related case will be irrelevant. If required, I will address the above points further when considering any final remarks at the conclusion of this decision.

EVIDENCE

10. The opponent filed evidence in the form of the witness statement of Bhopinder Singh, dated 8 August 2025, which is accompanied by 78 exhibits, labelled PC01 to PC78. Mr Singh is the Managing Director of the opponent, a position he has held since 21 October 2020.

11. The main purpose of the evidence is to demonstrate that the earlier mark has been put to genuine use in the UK in relation to the goods and services relied upon during the relevant period.

12. I have read and considered all of the evidence, as well as the written submissions in lieu of both parties, and I will refer to the relevant parts at the appropriate points in the decision.

DECISION

13. 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.

14. By virtue of its earlier filing date, the trade mark upon which the opponent relies qualifies as an earlier trade mark under Section 6(1) of the Act. As the opponent's trade mark had completed the registration process more than five years before the application date of the contested mark, it is, in principle, subject to the provisions on use under Section 6A of the Act. I note that on filing its Form TM8 Notice of Defence and Counterstatement, the applicant has required the opponent to provide proof of use of the mark for all the goods and services on which it relies. Consequently, I will begin by assessing whether the earlier mark has been put to genuine use.

Proof of Use

15. The relevant statutory provisions under Section 6A of the Act are as follows:

> (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.

16. Section 100 of the Act states that:

"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".

17. The relevant period during which genuine use must be shown is the five years ending with the application date of the contested application, which was 7 November 2024. The relevant period is 8 November 2019 to 7 November 2024. As the opponent's mark is a UKTM, the territory in which use must be shown is the United Kingdom.

18. 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]; *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]; *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].

107. The trade mark proprietor bears the burden of proving genuine use of its trade mark: see section 100 of the 1994 Act and *Ferrari* at [73]-[83]. The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33]. In *Awareness Ltd v Plymouth City Council* [2013] RPC 24 Daniel Alexander QC sitting as the Appointed Person said:

19. For the tribunal to determine in relation to what goods or services there has been genuine use of a 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.

…

22. … 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. By the time the tribunal … comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said the public."

Evidence of use

19. Under the Section 5(2)(b) ground, the opponent has claimed that use has been made of all of the goods and services on which it relies under the earlier mark. I must consider whether, or the extent to which, the evidence shows genuine use of the earlier mark in relation to the goods covered under class 34 and the services covered under class 35, being:

Class 34: *Smokers articles; electronic smokers articles*.

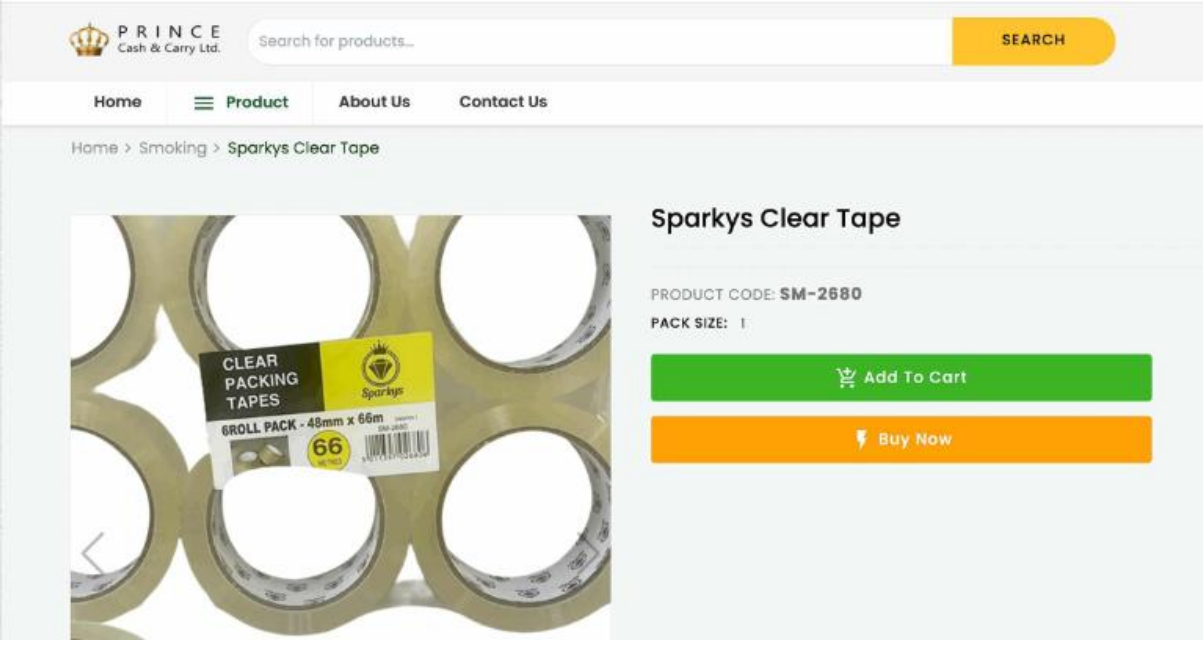
Class 35: *Retail services, wholesale services, mail order services and electronic retail services all in connection with the sale of smokers articles and electronic smokers articles.*

20. I note the following from the opponent's evidence:

- Mr Singh states at points 4 – 5 of the witness statement that the opponent offers a variety of goods for sale in the UK via the 'princecashandcarry.com' website, which includes smoker's articles. As the website employs a .com domain, I note that consumers in the UK are not specifically targeted.

- Exhibits PC64 to PC78 are described as "a website snapshot … advertising goods in class 34 for customers in the UK".[1] However, I note that the goods being advertised in exhibits PC64 to PC74 are all various types of tape, being clear tape, clear (packing) tape, fragile tape, or brown tape, for example:

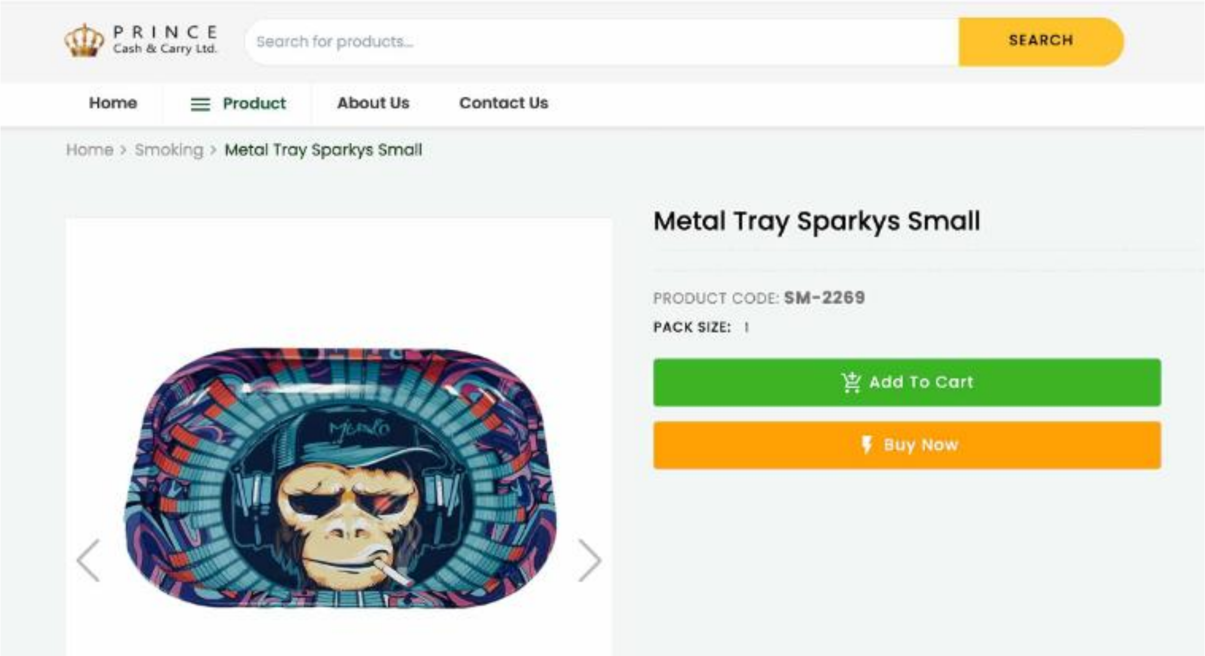
  Exhibit PC74



- Exhibits PC75 to PC78 show a variety of trays being advertised, such as metal trays and 'light-up' trays, for example:

[1] Points 73 – 87 of the witness statement.

Exhibit PC78



I note that adhesive tape as stationery would be proper to class 16, while packing tape falls under class 17. Meanwhile, metal trays are proper to class 6, while trays not of metal fall under class 20. Either way, without evidence to the contrary, I cannot see any direct relevance between the likes of the various smoker's articles relied upon in 34 and the retail thereof in 35, to either the tape or the trays shown in these exhibits. As such, I take no further account of exhibits PC64 to PC78.[2]

- Exhibits PC01 to PC63 comprise a variety of invoices which Mr Singh states are either invoices issued by "a foreign manufacturing company" to the opponent "for the fabrication, shipping and import into the UK of goods in class 34", or that they are invoices issued by the opponent to its customers of the class 34 goods.[3] I note that the invoices contained within Exhibits PC01 – PC03; PC08 and PC34 reference various items which I construe would be encompassed by the broad term *smoker's articles* and which are referred to as

[2] I note the artistic illustration of a primate smoking a cigarette which adorns the metal tray being advertised in exhibit PC78. However, for the avoidance of doubt, I do not consider this in itself to have any bearing in relation to the goods relied upon under class 34 or the retail thereof.
[3] See points 10 – 72 of the witness statement.

“SPARKYS” products. The goods include, inter alia, “SPARKYS PIPE SET” and “SPARKYS GRINDERS”. However, the invoices are each headed as being provided by various different suppliers (including WENZHOU SUNSAIL TRADE CO. LTD.; Wenzhou Yixiang New Industry and Trade Co., Ltd; and D&K Wenzhou dengke electronics co., ltd) with the opponent (i.e. PRINCE CASH AND CARRY LTD.) as the consumer, rather than the supplier of the goods. I find nothing within the evidence to show that the separate undertakings are in any way economically-connected to the opponent, apart from them each enjoying a supplier/consumer relationship. For example:

<u>Exhibit PC03</u>

D&K Wenzhou dengke electronics co., ltd

ADD: No. 2 Baocheng road ,xianyan Industrial District ,ouhai ,Wenzhou 325000

TEL: 0086-577-88915366 88915377 FAX: 86-577-88915510 86198069

E-mail : 13968873088@163.com E-mail : dk13968873088@vip.163.com

INVOICE

Order Date:6th,DEC ,2023 **Deliver Date:6th,FEB, 2023**

Invoice Number: DK20250106 **Contact:AJIT**

Port of Dispatch: Wenzhou **Discharge port : SOUTHAMPRON ,U.K**

Buyer:PRINCE CASH AND CARRY LTD

UNIT 2 B.BEAVER INDUSTRIAL ESTATE BRENT ROAD.

ITEM NO	Art No.	Decsriptions	CTNS	pcs/ctn	q'ty/pcs	Price/USD	Amount/USD
DK8319N	SM–2875	SPARKYS GLASS PIPE	10	240	2400	$0.45	$1,084.8
DK8581A	SM-2360	SPARKYS GLASS PIPE	40	240	9600	$0.25	$2,371.2
DK8320B	SM-1926	SPARKYS GLASS PIPE	50	240	12000	$0.20	$2,364.0
DK8573D	SM-3011	SPARKYS GLASS PIPE	15	240	3600	$0.49	$1,746.0
DK8163E	SM-3020	SPARKYS GLASS PIPE	40	240	9600	$0.26	$2,448.0
DK8582D	SM-2807	SPARKYS GLASS PIPE	15	240	3600	$0.29	$1,036.8
DK8515C	SM-3143	SPARKYS GLASS PIPE	2	240	480	$0.25	$118.6
DK8001L	SM-0227	SPARKYS GLASS PIPE	100	240	24000	$0.17	$3,960.0
DK8581 (带网片)	SM-2193	SPARKYS GLASS PIPE	184	240	44160	$0.21	$9,097.0
DK8320CD	SM-2159	SPARKYS GLASS PIPE	40	240	9600	$0.29	$2,764.8
DK7050	SM-1927	SPARKYS PIPE SET	50	240	12000	$0.26	$3,060.0
DK7048	ITEM NO SM-2687	SPARKYS PIPE SET	40	240	9600	$0.40	$3,792.0
DK7052	SM-2573	SPARKYS PIPE SET	20	240	4800	$0.26	$1,262.4
DK5083BM-4	SM-2956	SPARKYS GRINDERS	10	144	1440	$0.94	$1,350.7
DK5191-4	SM-2888	SPARKYS GRINDERS	10	144	1440	$0.90	$1,291.7

(I have highlighted the pertinent information in yellow).

- Meanwhile, the invoices provided in exhibits PC04 – PC07; PC09 - PC33; and PC35 – PC63 are all headed with the opponent's company name (Prince cash & Carry) as the supplier of the goods. However, the only goods within the description of the items sold which bear the word Sparkys in any of these invoices is either in relation to the various types of tape or the metal trays mentioned previously, none of which are relied upon in these proceedings, and which I have already found to be irrelevant in the matter before me. Any mention of smoker's articles such as Smoking Pipes in the list of invoiced goods have not been described as being branded under the Sparkys trade mark, as per the example shown below:

Exhibit PC52

Prince cash & Carry
Unit 2B,
Beavers Industrial Estate, Brent Rd, Southall, UB2 5FB
Email: info@princecashandcarry.com
Tel: 020-8574-0892
VAT No: GB 948 2142 16
www.princecashandcarry.com

Invoice

Invoice No	13895
Date	01/04/2025
P.O. No	11051

Billing Address
[redacted]

Shipping Address
[redacted]

S.No	SKU	Description	Barcode	Qty	Unit Price	Sub-Total	Tax Rate
1	SM-2193	Smoking Pipe DK8581	5011397021931	2400	£0.55	£1320.00	20.00%
2	SM-1973	Baggy 35X35 Plain	5011397019730	40	£1.40	£56.00	20.00%
3	SM-0097	Grinder No 1 Plastic	5011397000974	960	£0.20	£192.00	20.00%
4	SM-2268	Lighter Windproof Metal	5011397022686	100	£8.50	£850.00	20.00%
5	SM-2267	Lighter windproof Print Pack of 25	5011397022679	160	£4.50	£720.00	20.00%
6	SM-0252	Tin Golden Box Small	5011397002527	240	£0.32	£76.80	20.00%
7	NP-0008	Playing Card Red	5011397070083	60	£3.75	£225.00	20.00%
8	SM-1102	Ashtray Bucket	5011397011024	120	£0.52	£62.40	20.00%
9	SM-2832	Sparkys Fragile Tape Pk-6		30	£2.60	£78.00	20.00%
10	SM-0227	Smoking Pipe YD 300	5011397002275	720	£0.45	£324.00	20.00%

(The redaction of the customer details in purple was made by me, as was the highlighting in yellow, for emphasis).

Assessment on genuine use

21. Whether the use shown is sufficient to constitute genuine use will depend on whether there has been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods and services at issue in the UK during the relevant five-year period. In making my assessment, I must 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 use has been shown;
- the nature of those goods and services and the market(s) for them; and
- the geographical extent of the use shown.

22. 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. It is possible for an accumulation of evidence to show use, even if individual items of evidence would on their own be insufficient proof: see *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, Case T- 415/09, paragraph 53. I acknowledge that, as per the principles outlined under paragraph 18 of this decision, use of the mark must be more than token, although that use need not always be quantitatively significant for it to be deemed genuine.[4] I also bear in mind that it is not for me to assess economic success or large-scale commercial use, and that there is no *de minimis* rule - even minimal use may qualify as genuine use if it is use warranted, in the economic sector concerned, to maintain or create market shares for the relevant goods.[5]

23. In its written submissions in lieu of a hearing, the applicant submits that the evidence submitted by the opponent does not sufficiently demonstrate use of the opponent's mark during the relevant period for any of the goods and services relied upon in the opposition.[6] I note that the applicant proceeds to elaborate as to why it

[4] *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].
[5] *Naazneen Investments Ltd v OHIM*, Case T-250/13 at [49].
[6] At point 13.

considers the same to be true. However, while I take into account the applicant's submissions, I do not consider it necessary to fully reproduce them here.

24. The opponent has filed a large volume of evidence in these proceedings. At point 6 of its written submissions in lieu of a hearing, it contends that "the evidence shown specifically within the exhibits shows use of the Opponent's earlier mark" for a variety of smoker's articles. I note that at point 4 of those submissions, it submits that the proof of use contains evidence relating to the manufacture of, in particular, smoker's articles by manufacturers in China, on behalf of the opponent, for the sale of those goods within the United Kingdom. As already considered, the invoices contained within Exhibits PC01 – PC03; PC08 and PC34 are not supported to show any kind of economical link such as an agreement or contract whereby the class 34 goods which are manufactured by third parties under the "SPARKYS" trade mark are done so on behalf of the opponent. Neither is there any evidence to show that the average consumer of the goods would perceive the opponent as having some responsibility for the quality of those goods. At best, the invoices allude to the opponent as the distributor involved in retailing or wholesaling third party goods bearing the "SPARKYS" trade mark under class 35. However, as outlined above, the evidence provided by way of exhibits PC04 – PC07; PC09 - PC33; and PC35 – PC63, does not actually demonstrate this in relation to the pertinent goods for which the retail or wholesale services rely upon, being various smoker's articles.

25. The opponent has not provided me with any indication of the turnover generated in the UK under the mark for the goods and services at issue during the relevant five-year period. Neither have I been provided with the size of the UK market for smoking-related goods and the retail thereof, or the percentage share of that market enjoyed by the opponent. There is no information in relation to the opponent's marketing spend for the pertinent goods and services, or as to how or where consumers were able to acquire the goods or access the services in the UK, during the pertinent relevant period.[7]

[7] The reference in the witness statement to the princecashandcarry.com website notwithstanding.

26. Where there is no use of the mark in respect of the goods and services as registered, it follows there has been no genuine use of the mark. In *Awareness Limited v Plymouth City Council,* Case BL O/236/13, Mr Daniel Alexander Q.C. (as he then was) as the Appointed Person stated that:

> "22. The burden lies on the registered proprietor to prove use.......... However, 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. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, **the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken**, having regard to the interests of the proprietor, the opponent and, it should be said, the public". (**My emphasis**).

27. I also note Mr Alexander's comments in *Guccio Gucci SPA v Gerry Weber International AG*, Case BL O/424/14, where he stated that:

> "56. The Registrar says that it is important that a party puts its best case up front – with the emphasis both on "best case" (properly backed with credible exhibits, invoices, advertisements and so on) and "up front" (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of procedural error. … . The rule is not just "use it or lose it" but (the less catchy, if more reliable) "use it - and file <u>the best evidence first time round</u> - or lose it". (<u>Original emphasis</u>)

28. For the reasons given earlier in this decision, I do not find that *any* of the exhibits have any direct relevance to the provision of the goods and services for which use is claimed by the opponent under the mark relied upon, during the relevant period, and in relation to the relevant territory of the United Kingdom. Having considered the evidence as a whole, I consider the evidence to be insufficient to support that there has been genuine use of the mark for any of the goods and/or services relied upon, or to allow me to find that the opponent has demonstrated real commercial exploitation of the mark in relation to any of the goods and services for which use is claimed. The consequence of this is that the mark may not be relied upon in opposition of the UK application, and so the opposition under section 5(2)(b) fails.

CONCLUSION

29. As the opponent has fallen at the first hurdle, i.e. insufficient evidence has been provided to support that there has been genuine use of the mark for any of the goods and/or services relied upon, it is unnecessary to issue this decision as a provisional decision only pending the outcome of the related revocation proceedings. Consequently, subject to any successful appeal, the application by Walmart Apollo, LLC may proceed to registration in respect of *all* of the goods and services of the application.

COSTS

30. The applicant has been successful, and is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice ("TPN") 1/2023. Applying the guidance in that TPN, I consider the following to be fair:

Considering the notice of opposition and filing a counterstatement:	£400
Considering the opponent's evidence, and filing written submissions in lieu of a hearing:	£600
Total:	**£1,000**

31. I therefore order Prince Cash and Carry Limited to pay Walmart Apollo, LLC the sum of £1,000. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 7th day of July 2026

Suzanne Hitchings
For the Registrar,
the Comptroller-General