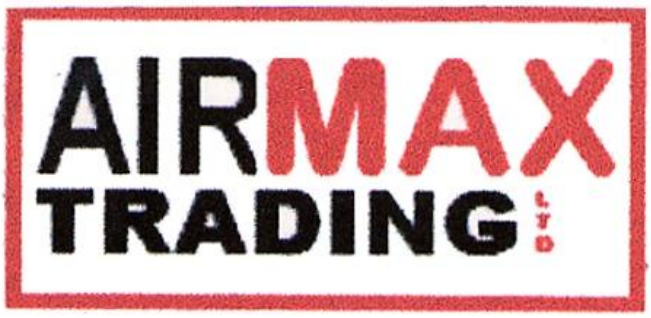
O-563-14

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO 2473622
FOR THE SERIES OF TWO TRADE MARKS

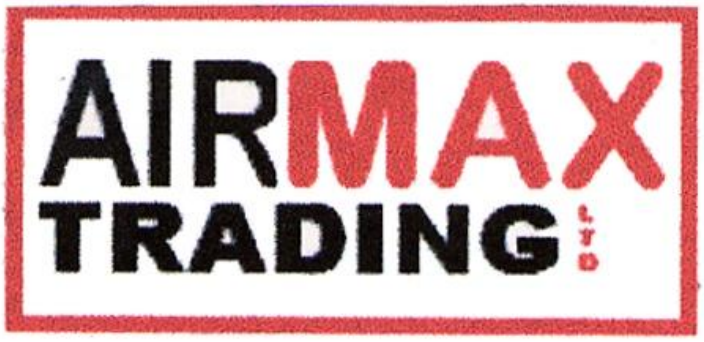


AND

IN THE NAME OF MOHAMMAD ASIM KHAN
AND THE APPLICATION FOR REVOCATION THERETO
UNDER NO 500083
BY NIKE INTERNATIONAL LIMITED

BACKGROUND

1) On 2 July 2013, Nike International Limited ("the applicant") filed an application for the revocation of registration number 2473622. The registration is in respect of the following series of two marks ("the marks"):



and

2) The revocation is directed to all of the goods covered by the registration, namely, *clothing* in Class 25.

3) Completion of the registration procedure for the registration took place on 23 May 2008.

4) The applicant seeks revocation of the registration under Sections 46(1)(a) of the Trade Marks Act 1994 ("the Act"). It claims that the marks have not been put to genuine use in the United Kingdom by the proprietor or with his consent between 24 May 2008 and 23 May 2013. Success for the applicant would mean revocation taking effect on 24 May 2013.

5) Mohammad Asim Khan (hereafter "the proprietor") filed a counterstatement claiming that he has used the marks in respect of clothing. He therefore denies that there has been no use of the marks in respect of the relevant goods during the five year period between 24 May 2008 and 23 May 2013.

6) Both sides filed evidence and the applicant also filed written submissions. Both parties seek an award of costs. The applicant requested a hearing and the matter came to be heard on 15 December 2014 when the applicant was represented by Mr Benet Brandreth of Counsel instructed by Charles Russell LLP. The proprietor was represented by his brother, Mr Adil Khan (hereafter, references to "Mr Khan" will be to the proprietor's brother).

7) The applicant requested leave to cross examine the proprietor and this was granted. However, the proprietor declined to attend and cited medical reasons. Whilst it is not necessary to detail these medical reasons, he subsequently provided a letter from his doctor who concluded "he would struggle greatly if being cross examined and don't feel this would be in his best interest in view of [his] conditions".

The Proprietor's Evidence

8) This consists of a witness statement by the proprietor, dated 8 October 2013. He states that he has been unemployed for six months. He explains that he uses the marks when selling clothing through market trading and word of mouth.

9) The proprietor states that he buys stock from various suppliers and he then takes the stock "to be printed at a market stall at Wellesbourne Market near Stratford-upon-Avon".

10) He confirms that he has provided evidence of his marks in use. This evidence includes the following hand-written receipts all in the same hand-writing relating to sales made by the proprietor. They all record "Cash Paid" and all bear the same illegible signature:

> **Exhibit MAK1**: dated "07/06/2008" and headed "Wellesbourne Market". It records that £45 was paid in cash in respect of two items identified as "Airmax Trading Ltd T-Shirts x 10" and an Airmax Trading Ltd tracksuit;
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> **Exhibit MAK2:** dated "08/06/2008" and headed "Bristol Fruit Market". It records "paid cash". It is in respect of "1 Airmax Trading Ltd Hoody x £20";
>
> **Exhibit MAK3:** dated "17/06/2009" and headed "Cash Sale (friend)". It is in respect of "3 Tracksuit x 20 = £60";
>
> **Exhibit MAK4:** dated "24/02/2013" and headed "Bristol Fruit Market". It is in respect of sales totalling £45, as follows:
>
> > "1 Airmax Trading Ltd Jumper x £15
> > 1 Jacket " " x £20
> > 1 Tracksuit bottom £10"

11) Exhibit MAK5 consists of a photocopy of two hand-written delivery notes relating to stock purchased by the proprietor. Once more, these are in the same hand-writing and bear the same signature. The first is dated "6.5.08" and records that it was delivered to "Mr M Khan" and an address is listed. Under the heading of "Description of Goods" the following appears: "2 boxes assorted T-shirts (clearance) no return C.O.D. £230". The second is dated "17.11.2009" and

records that it was delivered to the same address as the first, but no individual is identified. The goods are listed as “48 – tracksuits” and “1 carton”.

12) Exhibit 6 consists of an undated photograph of a t-shirt where the proprietor’s first mark appears on the left breast.

The Applicant’s Evidence

13) This consists of a witness statement by Catherine Margaret Richardson, solicitor and associate at Charles Russell LLP, the applicant’s representative in these proceedings. This consists of a number of criticisms and analysis of the proprietor’s evidence. I will not detail these here, but I will keep them in mind when making my decision.

14) In addition, At Exhibit CMR1, Ms Richardson provides an extract from an article that appeared in *Retail Week* magazine, dated 13 June 2012. It states that “retail sales in the clothing sector reached £37.9bn in 2011, according to Verdict”. Ms Richardson explains that Verdict is a specialist market researcher and analyst.

15) Exhibit CMR2 consists of sales data regarding the sports apparel market in Great Britain compiled by NPD. Ms Richardson explains that this is a leading consumer market research company. These figures illustrate that over the relevant five year period, annual retail sales of sports apparel in Great Britain was consistently over €3.1 billion.

The Proprietor’s Evidence-in-reply

16) This consists of a further witness statement by the proprietor. He states that he has been purchasing a quantity of clothing, in bulk, on a regular basis, from various suppliers and that all these items of clothing bear his marks.

17) He states that the volume of sales, value of sales, number of customers and frequency of sales are all dependent upon how many customers attend the markets on weekends. He states sales are frequent but “as [he] does not have a multi-million pound business it is impossible [...] to assess the level of frequency of sales”.

18) The proprietor also states that due to “the current economic climate it is extremely difficult and vastly expensive” to promote his marks, but that he continues to promote them through family, friends and word of mouth “on as many markets as possible around the United Kingdom”.

19) Exhibits AK1 and AK2 consist of undated photocopies showing different labels all bearing the proprietor’s first mark.

20) Exhibit AK2 consists of a photograph of what appears to be a market stall displaying predominantly polo shirts. It is not possible to ascertain any mark that appears with or on these items.

21) Exhibits AK3 to AK13 all consist of photographs of either t-shirts, polo shirts, a padded jacket and a padded gilet, tracksuit bottoms, babies/toddlers onesies, a dressing gown and a hooded top. These all have the proprietor's first mark appearing on at least one of the neck label, swing tag or left breast.

The Proprietor's additional evidence

22) The proprietor sought leave to admit further evidence. The admissibility of this is discussed later. In summary, this evidence consists of an additional witness statement from the proprietor that introduces the following further exhibits:

> **Exhibits AK10**: This consists of a letter from a fellow market trader confirming that the proprietor has been selling Airmax Trading Ltd clothing "on the markets" every weekend for the last five years. The proprietor has indicated that this letter was accepted by the Registry (as confirmed in its letter of 23 April 2014). The confirmation letter related to the admissibility of a witness statement dated 8 April 2014. The Registry has no record of these exhibits being part of that witness statement (or any other witness statement for that matter). Further, when the proprietor first attempted to file this additional evidence, it was returned with a request to re-submit it under cover of a witness statement. At this time, it was pointed out that there was an inconsistency between the date on the letter and the date of the witness statement that it was purportedly originally filed with and could therefore, not have been an exhibit to that witness statement. It was subsequently re-filed under cover of a witness statement but with the original date erased and a new date of 9 March 2014 being overwritten by hand. He explained that the date was erroneous and it had been corrected.
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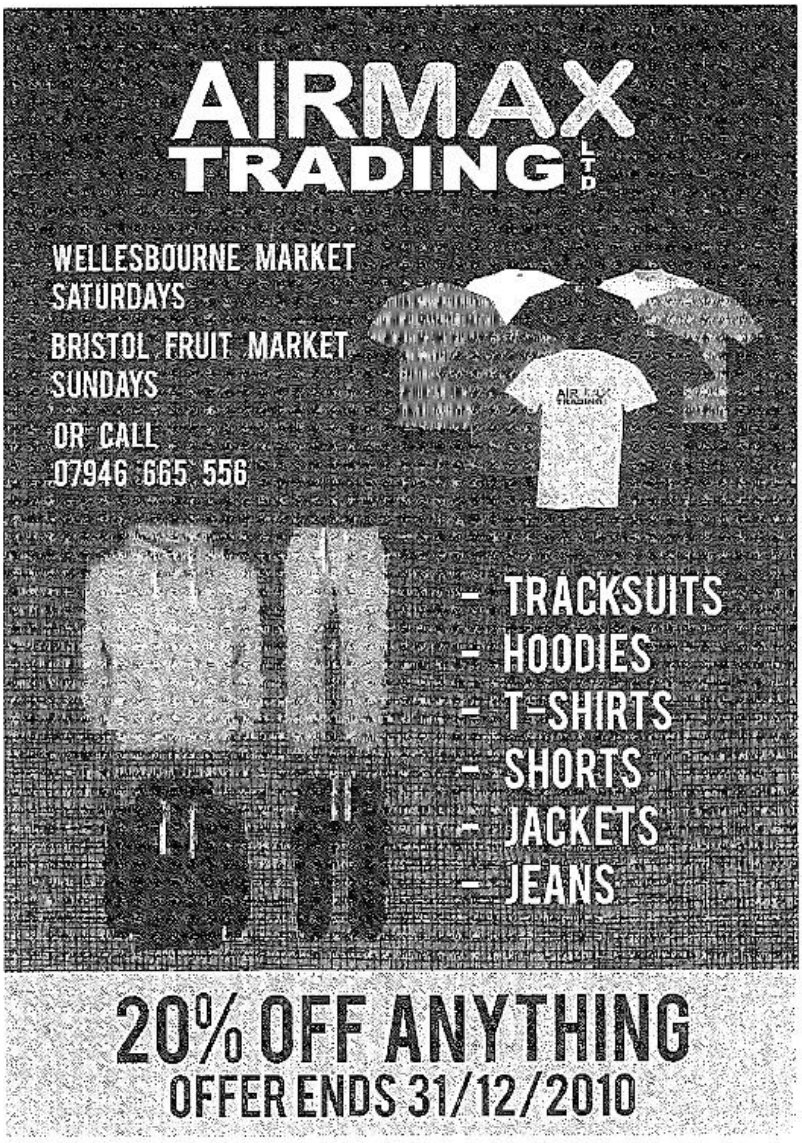
> **Exhibit AK11:** A letter from another market trader, dated 2 April 2014. It states that the proprietor has been selling "a very large number of Airmax Trading Ltd clothing on the markets", including Wellesbourne Airfield Market every Saturday and every Sunday at the Bristol Fruit Market.
>
> **Exhibits AK10 and 11**: These consist of photocopies of three promotional flyers (some duplicated) that make reference to a sales offer that expires on 31/12/2008, 31/12/2010 and 31/12/2012 respectively. Other than the date, they appear identical or virtually identical and I reproduce one below:



DECISION

Preliminary Issue

23) The proprietor has sought leave to admit further evidence. Whilst the case files do not indicate such, the proprietor maintains that this evidence consists of exhibits that he had already provided for the purpose of the proceedings. However, there is no evidence that supports this contention and the exhibits are not present on the registry's case file. In case I was minded not to accept his claim that they had been already filed, the proprietor asked me to take account of the following:

- He suffers with a mental health condition and attention deficit disorder and despite this, he has given his best to try and ensure that the Registry and

the applicant have received the evidence and that, to his mind, it was filed and if, for whatever reason, it was not, he apologises;

- He has suffered an unexpected family bereavement that, he claims, has resulted in him "not thinking straight" and not having time to think about the proceedings;
- He has been suffering financial hardship and was unable to seek professional assistance and only enlisted the help of his brother in recent months.

24) At the hearing, Mr Brandreth submitted that no good reasons for the lateness have been provided and that the lateness of this evidence places a serious barrier to it being properly investigated by the applicant. This is particularly so in relation to the letters from the proprietor's fellow market traders.

25) At the hearing, Mr Khan submitted that it was the proprietor's belief that the exhibits had already been provided for the purpose of the proceedings and that the new exhibits identified as Exhibit AK10 and Exhibit AK11 were actually part of the exhibits of the same numbers submitted with the proprietor's witness statement of 29 June 2014. Mr Khan also explained that the proprietor's medical condition affects his cognitive ability. It was conceded that the two letters written by fellow market traders were not specifically referred to in a witness statement but that they filed as part of evidence sent to the Registry.

26) Mr Brandreth identified an apparent inconsistency between the wording of the proprietor's witness statement when referring to Exhibits AK10 and Exhibit AK11 and the content of the exhibit itself. Paragraph 10 of the witness statement identifies various exhibits as showing use of specific types of clothing such as jackets, tracksuit bottoms and t-shirts. Exhibits AK10 and AK11 are identified as showing "other clothing", but Mr Brandreth submitted that the exhibits show only t-shirts, jackets and tracksuit bottoms and not any "other clothing". I see nothing in this point because the additional exhibits include a picture of hooded tops and also refer to "shorts" and "jeans". These could all be classified as "other clothing" by the proprietor when making his statement.

27) After taking all of the above into account, I admitted the evidence into the proceedings. In doing so, I take account that during the evidence rounds, on a number of occasions, the proprietor attempted to file evidence that was returned by the Registry because it was not in the correct format. A somewhat confused picture emerged as to what was filed and when. As a result, I am unable to say categorically that at some stage these exhibits were not in possession of the Registry. In light of this, I accept that the proprietor genuinely believed that he had already filed the exhibits despite there being no record of this on the case file. Whilst the onus remained with the proprietor to re-submit his evidence correctly, I accept that as a result of his medical condition, he may not have been effective at doing this and that the re-submitted evidence may not have included all of the same exhibits as originally filed. As a consequence, I was prepared to

permit the proprietor some additional leeway when considering the merits of admitting the evidence.

28) Having admitted the evidence, Mr Brandreth helpfully indicated that the applicant would not pursue an adjournment to investigate a possible evidential response to this late evidence.

Proof of Use

29) Section 46 of the Act reads as follows:

> "(1) The registration of a trade mark may be revoked on any of the following grounds—
>
> > (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;
> >
> > (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
> >
> > (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;
> >
> > (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."

30) Consideration has to be taken, also, of Section 100 of the Act which states:

"100. 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."

Consequent upon Section 100 the onus is upon the registered proprietor to prove that it has made use of the mark in suit, or that there are proper reasons for non-use.

31) The application for revocation is based on Section 46(1)(a). In *Philosophy di Alberta Ferretti Trade Mark* [2003] RPC 15, the Court of Appeal held that an application for revocation on the grounds of non-use may be made only after the five years following completion of the registration procedure has ended. In *WISI* Trade Mark [2006] RPC 22, Geoffrey Hobbs QC, sitting as the Appointed Person said:

"…This permits revocation with effect from the day following the fifth anniversary of completion of the registration procedure in the case of an application which succeeds under s.46(1)(a) …"

32) The applications for revocation were made after the fifth anniversary of completion of the registration of the contested marks, namely 23 May 2013. Therefore, I have to consider whether there was genuine use of the mark by the proprietor or with his consent in the UK for all, or any of the goods between 24 May 2008 and 23 May 2013.

33) In *Stichting BDO v BDO Unibank, Inc.,* [2013] F.S.R. 35 (HC), Arnold J. stated as follows:

> "51. Genuine use. In *Pasticceria e Confetteria Sant Ambreoeus Srl v G & D Restaurant Associates Ltd* (SANT AMBROEUS Trade Mark) [2010] R.P.C. 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439; [2003] R.P.C. 40 ; *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159; [2004] F.S.R. 38 and *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759; [2009] E.T.M.R. 28 (to which I have added references to *Sunrider v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (C-416/04 P) [2006] E.C.R. I-4237):
>
> (1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].
>
> (2) The use must be more than merely token, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].
>
> (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, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider* [70]; *Silberquelle*, [17].
>
> (4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].
>
> (a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].
>
> (b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21]

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22] -[23]; *Sunrider*, [70]–[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating 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: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]".

34) Although minimal use may qualify as genuine use, the Court of Justice of the European Union ("the CJEU") stated in Case C-141/13 P, *Reber Holding GmbH & Co. KG v OHIM* (in paragraph 32 of its judgment), that "*not every proven commercial use may automatically be deemed to constitute genuine use of the trade mark in question".* The factors identified in point (5) above must therefore be applied in order to assess whether minimal use of the mark qualifies as genuine use.

35) In considering the proprietor's evidence, it is a matter of viewing the picture as a whole, including whether individual exhibits corroborate each other. In Case T-415/09, *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, in relation to the need to get a sense from the overall picture of the evidence, notwithstanding that individual pieces may not, of themselves, be compelling, the General Court ("GC") stated:

"53 In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (COLORIS, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07 P Ferrero Deutschland v OHIM, not published in the ECR, paragraph 36)."

36) Mr Brandreth also referred me to the following comments of Daniel Alexander QC, sitting as the Appointed Person in *Plymouth Life* (BL O-236-13):

> "…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."

37) Finally, I also take account of the following comments of Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person in *Dosenbach-Ochsner AG Schuhe und Sport v Continental Shelf 128 Ltd*, BL O/404/13:

> "21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. Observed in Matsushita Electric Industrial Co. V. Comptroller-General of Patents [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:
>
> > [24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.
>
> 22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a

trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not 'show' (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

38) Taking account of this guidance, it is clear that genuine use does not need to be quantitatively significant but that every proven commercial use may not necessarily constitute genuine use. When asking if the use is genuine, it is necessary to assess all the surrounding circumstances.

39) The thrust of the proprietor's submissions, insofar as they are relevant, were:

- that the CJEU in *Ansul* defined genuine use as "actual use" and that the evidence provided does illustrates "actual use". The use shown is more than token use;

- the two letters from fellow market traders attest to the fact that the proprietor sells his goods every weekend at two different markets. The two different locations are also indicated on the flyers exhibited;

- it was accepted that use may be small, but nevertheless, there was use consistent with the business of a small market trading business;

- the flyers exhibited and also the photograph of the proprietor's market stall (Exhibit AK2) are evidence that he promoted his mark;

- the proprietor believed he had to do no more than illustrate that his mark was being used. It was contended that he had done this;

- it was admitted that the proprietor changed the date of the first letter exhibited from a fellow market trader, but it was submitted that this was done merely to show the correct date and was done under the misapprehension that this could be verified by the Registry contacting the letter writer;

- Mr Khan was only made aware of the proceedings by the proprietor after the proprietor's mother-in-law past away in July 2014 and has assisted him since then and ensured that he attended the hearing.

40) Mr Brandreth set out the applicant's case by first referring to the decision *JUMPMAN* (BL O-451-14) where a fellow hearing officer summarised what he submitted was the relevant case law in support of the applicant's position. In particular he drew my attention to the judgment of Mr Henry Carr QC (sitting as a

Deputy High Court Judge) in the *Healy* case (2014 EWHC 24 (Pat)) where it was stated:

> "In my judgment, acts which were not done merely to preserve the rights conferred by the registration may nonetheless be insufficient to constitute use within the meaning of section 46(1)(a). This is clear from the requirement to take all relevant facts and circumstances into account."

41) He also relied upon the comments of the CJEU in *Reber* (see paragraph 12, above). The thrust of these decisions is that minimal use may be insufficient to constitute genuine use. In this context, Mr Brandreth noted the comments made by the Appointed Person in *Plymouth Life* that the "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" and that "the evidence must be sufficiently solid and specific". The proprietor's evidence was roundly criticised by Mr Brandreth for not achieving this.

42) As Mr Brandreth pointed out, the proprietor's evidence can be summarised as showing sales to only four people during the relevant period, two in 2008, one in 2009 and one in 2013 totalling £170 (see paragraph 10 above);

43) The hand-written delivery notes purportedly relating to the proprietor's purchase of stocks of clothing that would bear the contested marks. However, there is no corroboratory evidence to support this claim. There is nothing before me, beyond a statement that such stock related to goods sold under the contested mark. The photographs of items of clothing bearing one of the contested marks are undated. These are likely to have been taken after the relevant date for the purposes of providing evidence in the proceedings. Whilst I do not suggest that there is anything underhand in this, the photographs simply do not support the claim to use of the marks during the relevant period.

44) In respect of the two letters from fellow market traders, these are provided as exhibits to the proprietor's last witness statement. The authors of these letters have not provided them under cover of a statement of truth and, as such, must be considered as hearsay. In *DUCCIO Trade Mark* BL O-343-09, Professor Ruth Annand, sitting as the Appointed Person, observed:

> "There are two ways in which "to whom it may concern letters" can be introduced in Registry proceedings. First, the writer of the letter can provide a verifying affidavit, statutory declaration or witness statement to which his or her letter is exhibited. Second, the party seeking to rely on the letter can provide an affidavit, statutory declaration or witness statement to which the third party letter is exhibited. In the first case, the letter is part of the writer's own evidence. In the second case, the letter is hearsay evidence admissible by virtue of section 1 of the 1995 Act."

45) Hearsay evidence should not be discounted simply because it is hearsay. However, in this case, I note that the letters were not in existence at the time of the use claimed, but rather they were solicited for the purpose of these proceedings. Further, I am unable to say under what conditions the letters were obtained and whether the authors had any reason to misrepresent matters. Finally, the date on one of the letters has been changed by the proprietor. This occurred after it was pointed out by the Registry that the date of the letter appeared inconsistent with the time that the proprietor claimed to have first filed it. Whilst a reason was provided at the hearing, it illustrates to me that the proprietor was prepared to tamper with evidence in order to make it fit the facts as he remembers them. Taking all of this into account, in the absence of a statement of truth, I find that these two letters are of little value in supporting a claim of genuine use during the relevant five year period.

46) Further, I do not find it credible that if, as the proprietor wishes me to believe, he sells goods bearing the mark most weekends at least two different markets, he cannot provide information regarding the number of sales he makes, the value of such sales and the number of customers. When addressing this criticism made by the applicant in his evidence-in-reply, he merely stated that he does "not have a multi-million pound business [and] it is impossible [...] to assess the level of frequency of sales". This is unconvincing. The fact that he has a small business would, to my mind, make it easier, not more difficult to assess the level and frequency of sales.

47) A defence repeated a number of times by the proprietor in written communication and on his behalf at the hearing, is that he has a medical condition that has had an impact on his ability to collate and present his evidence. In effect, I was being asked to "fill in the blanks" around the evidence provided in order to conclude that the use was more than the evidence showed and to find for the proprietor. Whilst I accept that the proprietor's ability to collate and present his evidence may be affected by his medical condition, it does not follow that the use is greater than that illustrated in the evidence. The mere assertion that the sales were greater than demonstrated is not persuasive. Section 100 places a burden of proof upon the proprietor and this burden has not been met.

48) Further, the proprietor has stated on a number of occasions that he sells clothing to "friends, family and members of the public". Sales to family and friends is suggestive that the proprietors activities are small scale and consistent with the small level of use shown in the evidence.

49) The proprietor declined to make himself available on medical grounds for cross examination. He produced a letter from his doctor where he stated that the proprietor had asked him to make me aware of his diagnosis (see paragraph 7, above). Whilst I note the reason, it does not detract from the fact that the evidence submitted by the proprietor was not able to be tested under cross

examination. This is particularly relevant in light of the tension between the proprietor's assertions as to the level of use and the level of use actually demonstrated in the exhibits.

50) I cannot conclude that the use is greater than illustrated by the exhibits. Beyond the mere assertion that use was greater, the only corroboratory evidence is in the form of the two letters solicited for the proceedings. I have already found these to be of little evidential value. There are also a number of inconsistencies in the evidence that give me cause to treat it with caution. Firstly, there is an assertion in the proprietor's second witness statement that his promotion of his goods takes place "on as many markets as possible around the United Kingdom". In light of the other evidence filed, this appears to be somewhat of an exaggeration. Secondly, and as pointed out by Mr Brandreth, the proprietor states in his first witness statement that he takes stock to be printed at a market stall at Wellesbourne Market, yet the exhibits provided illustrate that the labels bearing the mark are sown unto the clothing. Once again, an explanation was provided at the hearing, but there is no corroborative evidence to support the explanation. Finally, despite claiming that the hearsay letters were provided with an earlier witness statement, they are not referred to in either of the proprietor's witness statements filed during the evidence rounds.

51) Taking all of the above into account, I conclude that the evidence provided illustrates a level of use that is so small and erratic that it is not sufficient to constitute use within the meaning of section 46(1)(a).

52) The application for revocation is therefore successful in respect of the whole registration with effect from 24 May 2013.

COSTS

53) At the hearing, it was submitted on behalf of the proprietor that because he has very little money, any award against him should be at the bottom of the scale of costs. I note this, but I must base the award on the costs of the proceedings and not on financial position of the parties.

54) Nike International Limited has been successful in its application for revocation and is entitled to a contribution towards its costs. I award costs on the following basis:

Preparing and filing a statement & consideration other side' statement (including official fee)	£500
Filing evidence and considering other sides's evidence	£500
Preparation for, and attending hearing	£800
TOTAL	**£1800**

55) I order Mohammed Asim Khan to pay Nike International Limited the sum of £1800. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 23rd day of December 2014

Mark Bryant
For the Registrar,
the Comptroller-General