

O-671-18

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION 2572807

IN THE NAME OF

PHIL SMITH BE GORGEOUS LIMITED

FOR THE MARK:

P.S Love your hair

AND

AN APPLICATION FOR REVOCATION THEREOF (NO. 501805)

BY

PRIMARK STORES LIMITED

Background and pleadings

1) Phil Smith Be Gorgeous Limited (“the Registered Proprietor”) is the proprietor of UK trade mark registration 2572807 for the trade mark shown below:

P.S Love your hair

It was filed on 21 February 2011 and completed its registration procedure on 08 July 2011. It is registered in respect of the following goods:

Class 3: *Hair shampoo; conditioners; cosmetics; creams; moisturisers; styling aids; hair care products; skin care products; bath and shower gels; soaps; essential oils; perfumes.*

2) By an application filed on 25 August 2017 Primark Stores Limited (“the Applicant”) seeks revocation of the registration in respect of all the goods for which it is registered. It bases this application on non-use under section 46(1)(a) of the Trade Marks Act 1994 (“the Act”). The relevant period when the Applicant claims non-use is 9 July 2011 to 8 July 2016. Revocation is sought with effect from 9 July 2016.

3) The Registered Proprietor filed a counterstatement¹, denying that there had been no use of the contested mark within the relevant period. In the alternative, it contended that there had been proper reasons for non-use, and that the Applicant had used its market power to stifle the Registered Proprietor’s ability to come to market. In its evidence the Registered Proprietor also made it explicit that it also relied on a defence under section 46(3) of the Act. The Applicant filed submissions in reply. Neither party requested a hearing. The Registered Proprietor filed written submissions in lieu of attendance at a hearing. I therefore give this decision after a careful review of all the papers before me. The Applicant is represented by Addleshaw Goddard LLP. The Registered Proprietor is represented by Mishcon De Reya LLP.

¹ In its application of 25 August 2017 for revocation the Applicant gave Roger Philip Smith as the Registered Proprietor of the contested mark. In fact, Mr Smith had assigned the mark to Phil Smith Be Gorgeous Limited on 10 August 2017. The counterstatement was filed in the name of Phil Smith Be Gorgeous Limited, from which point the proceedings were conducted by both parties on the basis that Phil Smith Be Gorgeous Limited is the Registered Proprietor.

The law

4) The relevant parts of section 46 of the Act provide as follow:

“(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)

(c).....

(d).....

(2) For the purpose 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 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.”

5) Section 100 is also relevant; it reads:

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

6) In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU [i.e. the Court of Justice of the European Union] has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07

Verein Radetsky-Order v Bunderversammlung 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 Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

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

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

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

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

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which

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

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

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

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is

genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

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

The Evidence

7) I note at the outset that in its written submissions in lieu of attendance at a hearing the Registered Proprietor makes certain statements, and appends certain material, concerning the alleged conduct of the Applicant with regard to the intellectual property rights of third parties. It also makes statements relating to the alleged infringement of the contested mark by the Applicant and resulting proceedings. In order to be considered in these proceedings these statements and material would need to have been filed in proper evidential format, i.e. contained in, or accompanied by, a witness statement, statutory declaration or affidavit. They were not so filed. Accordingly, they have not been admitted as evidence in these proceedings, and I have taken no account of them in reaching my decision.

8) I do not in any case consider that evidence relating to the alleged conduct of the Applicant with regard to the intellectual property rights of third parties would have been material to the question of whether or not the Registered Proprietor used its mark during the relevant period, or had reasonable grounds for its non-use. The potentially inhibiting effect which a running dispute with the Applicant might have on the Registered Proprietor’s freedom to deploy its mark, on the other hand, is a matter which might be of potential relevance. This latter point has been addressed in general terms in Mr Smith’s witness statement, however, and I shall deal with it when considering the Registered Proprietor’s evidence.

9) In a witness statement of 16 March 2018 Mr Roger Philip Smith states that he is the founder, a director and 50% shareholder, and in day-to-day control of, the

Registered Proprietor. He sets out his record of experience of the haircare industry, and of building brands within that industry.

10) His further statements can be summarised as follows:

11) The *Phil Smith* range of hair care products was launched in Sainsbury's in or around October 2006, the range currently being sold in approximately 700 Sainsbury's stores, and online. In 2015 he created the *Phil Smith Be Gorgeous* brand, which now accounts for a substantial proportion of sales of haircare products in Sainsbury's. He had always planned to launch a range of complementary and related brands. *Phil Smith Be Gorgeous* is mid-range in price, and his intention was to launch a higher end range, a lower end diffusion brand, and a children's brand as soon as the core brand became established. Accordingly, he applied for trade marks covering a portfolio of brands as he developed them conceptually. On 21 February 2011 he applied for UK trade marks for *PHIL SMITH BE GORGEOUS* (mid-range), *LITTLE SMITH* (a children's range) and for the mark contested in these proceedings, *P.S Love your hair* (a diffusion brand aimed at a younger market, with less disposable income), and on 4 June 2013 for a UK trade mark for *SMITH'S ENGLAND* (a higher-end range).

12) In October 2016 (which I note is approximately three months after the end on 8 July 2016 of the five-year period allowed for use of the mark under section 46(a)) he decided to "*float the idea*" of *P.S. Love Your Hair* as a line aimed at a younger market, with less disposable income, than that of the *Be Gorgeous* brand. He introduced this idea to his contact in the buying team at Sainsbury's, over a series of meetings in late 2016. She liked the idea, but mentioned at one of these meetings having seen a Primark product on the market with similar branding. He was told that Sainsbury's would be unable to proceed to make purchases of the *P.S. Love Your Hair* brand because the Applicant was using a brand with the same name for identical products. Following that meeting he found ranges of *P.S. Love Your Hair* branded hair care products being sold in the Applicant's stores, and commissioned a report, dated 8 February 2017, on the Applicant's use of the brand.

13) Having had legal advice that he was in a position to stop such use by the Applicant, Mr Smith determined to launch the brand and announced in early February 2017, via

his website, that the *P.S. Love Your Hair* brand was "Coming Soon" (attached as Exhibit 3 to his witness statement), and on 16 August 2017 put a *PS. Love Your Hair* image on Instagram (Exhibit 4). He also started to plan the launch of the new brand, liaising with designers and suppliers. On 28 February 2017, Design 16 provided a variety of designs for the *P.S. Love Your Hair* brand (Exhibit 5). The Registered Proprietor's correspondence with Design 16 continued into August 2017 (Exhibit 6), discussing packaging for the new brand (Exhibit 7). He spent approximately £7,500 with Design 16 on this project. Also in February 2017 two care and beauty product development and production companies were approached, detailing the product proposition ("hair paste" and "texturising cream" respectively), and requesting minimum order quantities and costs. Quotes were received on 27 February and 7 March respectively (Exhibits 8 and 9).

14) With the object of demonstrating to any potential partner that he was "in a position to launch the *P.S Love Your Hair brand* as soon as possible" he issued a purchase order for 10,000 units in May 2017 (this would apparently have been for texturising cream, as quoted for in Exhibit 9), representing an investment of £12,500 – but placed a stop on the order pending resolution of the dispute with the Applicant.

15) Meetings were arranged for Mr Smith at the appropriate level with representatives of *Boots* and *Superdrug* for June 2017, and took place in July 2017. At these meetings Mr Smith pitched a number of brands, including *P.S Love your hair*. He emphasises that the process of interesting retailers such as Sainsbury's, Boots and Superdrug in stocking a brand is a long and difficult one. He states that as a result of his ongoing work with Sainsbury's he has very regular contact with them, and that in September 2017 Sainsbury's Head of Category for Baby & Beauty contacted him to make what Mr Smith describes as a firm offer to sell the *P.S. Love Your Hair* range, the commercial terms of the arrangement being under discussion at the time of Mr Smith's witness statement. On resolution of the issue with the Applicant Mr Smith expected to be able to proceed to launch the brand quickly.

16) The Applicant filed no evidence. Instead, it filed written submissions briefly criticising the Registered Proprietor's evidence. I have borne these submissions in mind, but do not consider it would be of assistance to reproduce them here.

Has there been genuine use of the mark?

17) I remind myself that in accordance with section 100 of the Act it is the Registered Proprietor which bears the burden of proving use. I also bear in mind that in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person observed:

“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.”

18) I must take into account that trade marks are not only used on the market in which goods bearing the mark are sold to consumers and end-users. A market also exists, for example, in which goods bearing the mark are sold to retailers for onward distribution to consumers².

19) The first mention of anything that might be considered external use of the contested mark is Mr Smith’s statement that in October 2016 – approximately three months after the end of the period allowed for use of the mark under section 46(a) – he decided to “float the idea” of the mark as a diffusion line, and introduced this idea to his contact in the buying team at Sainsbury’s during meetings in late 2016. The Registered Proprietor has provided no evidence of any external use of the mark, let alone genuine use within the meaning of section 46(1)(a) of the Act, during the period 9 July 2011 to 8 July 2016. Accordingly, I find that there was no genuine use of the mark within that period.

² See *Laboratoires Goemar SA v La Mer Technology Inc.* [2005] EWCA (Civ) 978 at paragraph 49.

20) I must also consider section 46(3) of the Act, which makes provision for the situation where use is commenced or resumed after the expiry of the five year period and before the application for revocation is made. I note that Mr Smith's approaches to designers and product development and production companies did not constitute use of the mark "in order to create a market for the goods", but rather use of the mark for the purpose of creating the goods to be marketed, so that this could not in itself amount to genuine use for the purposes of section 46(3).

21) The core of the Registered Proprietor's case is therefore the contention that although it did not succeed in selling any products under the contested mark before the application for revocation was made (and, as I shall find below, at the time of Mr Smith's witness statement it had still not succeeded in so doing), it had nevertheless before the application for revocation put that mark before the public and certain potential retailers in relation to the relevant products in a way that can properly be described as genuine use.

22) There is no evidence before the Tribunal as to how many of the relevant public may have been exposed to Mr Smith's announcement on his website in early February 2017 that the *P.S. Love Your Hair* brand was "Coming Soon", or what impression it may have created. Moreover, although the CJEU accepted that where preparations to secure customers are under way, particularly in the form of advertising campaigns, this may constitute use, this was subject to the qualification that such preparations must relate to goods which are already marketed or which are about to be marketed. In this case the goods did not even exist yet, and their potential availability to the consumer was contingent on an arrangement of some kind being reached with at least one wholesaler. The announcement was thus at best a piece of news about future plans rather than an advertisement of goods "about to be marketed" in the sense envisaged in *Ansul*. The same considerations apply with regard to the *P.S. Love Your Hair* image on Instagram (which is marked as having "28 likes" as at 16 August 2017).

23) Mr Smith states that a number of brands, including *P.S Love your hair*, were pitched at respective meetings with appropriate representatives of Boots and Superdrug in July 2017 (before the application for revocation) and September 2017 (after the application for revocation), and that correspondence with them continued

throughout 2017. Beyond his remark that Superdrug showed particular interest, I have no further evidence as to the content and outcome of these meetings. No doubt there may be cases of genuine use where a mark is used to inform potential customers of the forthcoming – and definite – availability of relevant goods in the future. The evidence does not establish, however, that what was discussed at these meetings went beyond simply sounding out retailers about their potential receptivity to the idea of a new line, rather than canvassing orders for goods to be made available imminently. In other words, it has not been shown that the discussions related to goods which were “about to be marketed” in the sense envisaged in *Ansul*. The stopped order for units of texturising cream does not alter this. The packaging designs served to illustrate the concept of the brand that was being floated.

24) The reported offer from Sainsbury’s is referred to as having been made in September 2017, so it was made after the date of application for revocation. However, the CJEU made clear in *La Mer*³ that events subsequent to the relevant period are admissible as evidence to corroborate genuine use during that period. Nevertheless, I consider that essentially the same considerations which I have discussed in relation to the meetings with Boots and Superdrug also apply in respect of the Sainsbury’s offer.

25) I wish to make it quite clear that I have no doubt whatever that Mr Smith has been completely honest and truthful in his witness statement. However, though I fully accept the sincerity of his statement that in September 2017 Sainsbury’s made a “*firm offer to sell the P.S. Love Your Hair range*”, more solid information than that is needed to support a finding of genuine use. Mr Smith’s concept of what constitutes a “firm offer to sell the range” may well differ significantly from that of the Tribunal (or the Applicant). The decision is one for the Tribunal, and concrete, objective data from which I could assess the precise nature and content of this offer is lacking.

26) Mr Smith states:

³ *Laboratoires Goemar SA’s Trade Marks*, Case C-259/02 at paragraph 33.

“I have a stop on this purchase order [i.e. for 10,000 items of texturising cream bearing the mark] pending the resolution of the dispute with Primark, but the brand is in a position to be manufactured and sold; I could not have done any more to develop it, prepare it for market, or liaise with potential resellers. It is not uncommon to pitch a brand to a reseller and to be told that the time is not right, but it is important to be ready to launch the brand at a moment's notice should an opportunity arise particularly where, as here, there is one issue clearly blocking the launch.”

27) This leaves many questions open. Did Sainsbury's agree to stock any specific products from among those covered by the Registered Proprietor's specification? If so, which? What would be the timescale for the development and production of those of products? Did they include texturising cream? Mr Smith is clearly speaking figuratively when he observes that “... *it is important to be ready to launch the brand at a moment's notice*”. What timescale would be in contemplation for the supply of a potential customer if the suspension of the Registered Proprietor's own order for 10,000 units of texturising cream were to be lifted? Mr Smith states that “*It is not uncommon to pitch a brand to a reseller and to be told that the time is not right*”. In this context a “firm offer” from Sainsbury's might, for example, have consisted of an indication that it considers the time is right to launch the brand and that it would be willing in principle to participate in such a launch in the event that a satisfactory agreement could be reached.

28) In the light of Mr Smith's statement that “*The commercial terms of that arrangement are under discussion, but on resolution of the issue with Primark I expect to be able to launch the brand quickly*” it would seem in any event that the reported offer from Sainsbury's could not be categorised as an agreement enabling the brand to be launched without further ado – even leaving out of account the dispute with the Applicant. It seems that the offer might still have come to nothing. The evidence is simply not sufficiently solid to enable me to conclude that the reported offer relates to goods which are “about to be marketed” in the sense envisaged in *Ansul*. The Registered Proprietor might have hoped to create an outlet for the proposed range, but things had not yet reached that stage.

29) In the light of all these considerations I am unable to conclude that any of the actions undertaken by the Registered Proprietor after the expiry of the relevant period but before the application for revocation amounted to preparations to secure customers in relation to goods which were about to be marketed within the meaning of the relevant case law. Accordingly, I find that there was no genuine use of the contested mark in the period provided for under section 46(3).

Were there proper reasons for non-use?

30) As an alternative defence the Registered Proprietor pleads that there were proper reasons for non-use. The particularisation of these reasons in the Registered Proprietor's evidence is not very focused, but two reasons emerge. The first reason put forward is essentially that although it wished to protect a portfolio of brands, it did not have the resources to launch them all at once, and – implicitly – that this is the reason why the *P.S Love your hair* brand was not launched within the five-year period prescribed under section 46(1)(a).

31) As the Registered Proprietor's submissions put it: "*...the application for the Mark was one of a range of contemporaneous trade mark applications made by Mr Smith, with the intention of launching these brands as a portfolio, whilst acknowledging that it was unfeasible (both financially and from the perspective of commercial sense) to launch the brands simultaneously*". Mr Smith states that "*The Proprietor is an owner managed business and does not have unlimited resources. The launch and development of a new brand takes a huge amount of my time and the investment of approximately £50,000 of working capital. Accordingly, I have sought to launch each of my brands individually so that I can devote adequate time and attention to bringing the brand successfully to marketeven with such time and effort not every idea is successful, so I have to manage my time and resources*".

32) The CJEU has laid down clearly that "*only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as*

*“proper reasons for non-use” of that mark*⁴. It has also observed that *“the concept of “proper reasons”... refers essentially to circumstances unconnected with the proprietor of the trade mark which prevent him from using the mark...”*⁵. Having access to the means and resources required to bring the goods to market is a normal business requirement. If those resources are not brought to bear so as to produce genuine use within five years of registration, the mark may be revoked. The restricted availability of such resources during that time owing to the Registered Proprietor’s having devoted them to the launch of other brands cannot reasonably be described as an obstacle arising independently of the proprietor’s will, and thus cannot constitute a proper reason for non-use of the mark.

33) The second justification put forward by the Registered Proprietor as a proper reason for its non-use of its mark is essentially that its dispute with the Applicant had inhibited its launch of products under the contested mark. Mr Smith comments: *“on resolution of the issue with Primark I expect to be able to proceed to launch the brand quickly”*. He further remarks: *“were it not for Primark, the P.S. Love Your Hair brand would almost certainly already be available for sale”*, and observes *“... there is one issue clearly blocking the launch”*.

34) This second justification relates to events in the period covered by section 46(3). I note that this section provides a defence that a mark shall not be revoked as a consequence of non-use if use is commenced or resumed after the expiry of the five-year period and before the application for revocation is made; it makes no provision for “proper reasons”. In any event, however, the defence of the proprietor’s mark against infringement, and the resolution of disputes which may impede its use, are part and parcel of running the business of supplying branded goods. It is the business of an enterprise in the Registered Proprietor’s position to take the steps necessary to defend its brand so as to make the goods bearing its mark attractive to its wholesale customers. Such steps do not lie outside its control. It is conceivable that the Registered Proprietor may have felt inhibited about taking such steps owing to the very real possibility that this might provoke an application for revocation. If so, that

⁴ See *Armin Häupl v Lidl Stiftung & Co. KG*, Case C-246/05, at paragraph 54.

⁵ See *Il Ponte Finanziaria SpA v OHIM* Case C-243/06P, at paragraph 102.

consequence (or, for that matter, any constraint on use of the mark caused by the dispute) flowed from the Registered Proprietor's own failure to make genuine use of the mark during the five-year period following its registration. It was within its power to have prevented that possibility from arising. The Registered Proprietor's dispute with the Applicant cannot constitute a proper reason for non-use of the mark.

35) I should mention in conclusion that in the submissions which it filed in lieu of attendance at a hearing the Registered Proprietor contended that the Applicant had no interest in the outcome of these proceedings other than as a tactic to apply pressure to the Registered Proprietor in other litigation with the Applicant; the application had therefore been disingenuous and made in bad faith. This was not pleaded in the Registered Proprietor's counterstatement, but the Applicant's motives in bringing these proceedings are in any case irrelevant. Anyone can make an application under section 46(1) of the Act. The Applicant was as entitled as anyone else to do so.

Conclusion

36) I have found no genuine use of the contested mark within the meaning of section 46(1)(a) of the Act during the period 9 July 2011 to 8 July 2016, or in the period after the expiry of that period but prior to the application for revocation on 25 August 2017 provided for under section 46(3). I have found no proper reasons for non-use of the mark.

Outcome

37) The registration is hereby revoked in its entirety under the provisions of section 46(6)(a) of the Act with effect from 9 July 2016.

Costs

38) The pleadings, evidence and submissions in reply were relatively brief and straightforward. The Applicant has been successful and is entitled to a contribution towards its costs. I hereby order Phil Smith Be Gorgeous Limited to pay Primark Stores Limited the sum of £1,000. This sum is calculated as follows:

Application fee	£200
Preparing a statement and considering the other side's statement	£300
Considering and commenting on the other side's evidence	£500

The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 23rd day of October 2018

Martin Boyle

**For the Registrar,
The Comptroller-General**