

O/0099/25

CONSOLIDATED PROCEEDINGS

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3919144
IN THE NAME OF THE LANCASHIRE MEAD COMPANY LIMITED
FOR THE MARK**

Viking's Blood

**IN CLASS 33
AND THE OPPOSITION THERETO UNDER NO. 442430 BY DANSK MJØD A/S**

**AND IN THE MATTER OF REGISTRATION NO. 915834518
IN THE NAME OF DANSK MJØD A/S FOR THE MARK**

VIKING BLOD

**IN CLASS 33
AND THE APPLICATION FOR A DECLARATION OF INVALIDITY THEREOF
UNDER NO. 506498 BY THE LANCASHIRE MEAD COMPANY LIMITED**

Background and pleadings

1. On 5 June 2023, The Lancashire Mead Company Limited (“Lancashire”) applied for the trade mark Viking’s Blood (number 3919144) for the following goods in class 33:

*Mead [hydromel]; Hydromel [mead]; mead made with fruit [melome].*¹

2. Following publication, the application was opposed by Dansk Mjød A/S (“Dansk”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), based upon the following earlier mark:

915834518

VIKING BLOD

Filing date: 16 September 2016; registration date: 15 September 2017

Class 33: *Mead [hydromel]; Sweet wines.*

3. Dansk claims that there is a likelihood of confusion owing to the similarities between the marks and the identical goods. It made a statement that it has made genuine use of its mark.

4. Lancashire filed a defence and counterstatement on 16 October 2023. It puts Dansk to proof of use of its mark and refers to an application to invalidate Dansk’s mark (see below). It denies a likelihood of confusion.

5. Lancashire filed an application for a declaration of invalidity against Dansk’s mark on 7 September 2023 under section 5(4)(a) of the Act. Lancashire claims that it has used the sign Viking’s Blood in relation to *Mead [hydromel]; Hydromel [mead]; Sweet*

¹ This is the specification as it now stands following a voluntary restriction by Lancashire by filing a Form TM21B on 19 September 2023.

wines; alcoholic beverages; fruit wine throughout the UK since November 2015. Use of Dansk's mark would constitute misrepresentation and Lancashire would suffer loss and damage as a result (which would be contrary to the law of passing off). It makes the same claim about the sign Vikings Blood (without an apostrophe) which it says it has used in relation to the same goods since December 2014 throughout the UK.

6. Dansk filed a defence and counterstatement, denying the ground. It claims that it has used VIKING BLOOD in the UK since mid-February 2016 and that Lancashire did not have sufficient goodwill at this date to mount a passing off action.

7. At this point, the proceedings were consolidated. Both parties filed evidence and Dansk filed submissions with its evidence. Neither party asked to be heard and only Lancashire filed written submissions in lieu of a hearing. Lancashire is represented by Harper James Ltd. Dansk is represented by Patrade A/S. I will refer to the evidence and submissions where relevant to the issues I have to decide and I confirm that I have carefully considered all the papers on file.

Evidence

8. Lancashire's evidence comes from Gordon Baron, one of its owners and shareholders.² His evidence is aimed at proving goodwill in the business distinguished by the signs relied upon. Dansk's evidence comes in the form of a very brief statement of use pro forma, signed by Michael Brogaard, its Founder and CEO, along with two exhibits consisting entirely of redacted invoices.³

9. I will begin with the invalidation application because the outcome of that will affect whether and/or to what extent Dansk can rely upon its mark to oppose Lancashire's application.

² Witness statement dated 15 January 2024 and 15 exhibits.

³ Dated 11 January 2024.

Legislation

10. Section 47(2)(a) of the Act states:

“47. (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) [...], or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.”

11. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

12. Subsection (4A) of Section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of

application for registration of the trade mark or date of the priority claimed for that application.”

13. Section 5A states:

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”⁴

14. The three elements which Lancashire must show are well known. In *Discount Outlet v Feel Good UK* [2017] EWHC 1400 (IPEC), Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56 In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

15. The concept of goodwill was explained in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217 at 223:

⁴ This section also applies to the section 5(2)(b) ground raised in Dansk’s opposition.

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

Relevant date

16. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, Case BL O/410/11, Mr Daniel Alexander QC, sitting as the Appointed Person, endorsed the registrar’s assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM O-212-06* Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’ ”

17. The date of application of the contested registration is 16 September 2016. However, Dansk claims that it has used its mark in the UK before that date: since mid-February 2016. In the same case, Mr Alexander considered the relevant date for the purposes of section 5(4)(a) of the Act where one or both of the parties have used the mark at issue prior to the date of the application to register the contested mark. He explained that:

“41. There are at least three ways in which such use may have an impact. The underlying principles were summarised by Geoffrey Hobbs QC sitting as the

Appointed Person in *Croom's TM* [2005] RPC 2 at [46] (omitting case references):

- (a) The right to protection conferred upon senior users at common law;
- (b) The common law rule that the legitimacy of the junior user's mark in issue must normally be determined as of the date of its inception;
- (c) The potential for co-existence to be permitted in accordance with equitable principles.

42. As to (b), it is well-established in English law in cases going back 30 years that the date for assessing whether a claimant has sufficient goodwill to maintain an action for passing off is the time of the first actual or threatened act of passing off: *J.C. Penney Inc. v. Penneys Ltd.* [1975] FSR 367; *Cadbury-Schweppes Pty Ltd v. The Pub Squash Co. Ltd* [1981] RPC 429 (PC); *Barnsley Brewery Company Ltd. v. RBNB* [1997] FSR 462; *Inter Lotto (UK) Ltd. v. Camelot Group plc* [2003] EWCA Civ 1132 [2004] 1 WLR 955: "date of commencement of the conduct complained of". If there was no right to prevent passing off at that date, ordinarily there will be no right to do so at the later date of application."

18. In *Smart Planet Technologies, Inc. v Rajinda Sharma*, Case BL O/304/20, Mr Thomas Mitcheson QC, sitting as the Appointed Person, pointed out that "*the start of the behaviour complained about*" is not the same as the date that the user of the applied-for mark acquired the right to protect it under the law of passing off. Rather, it is the date that the user of that mark committed the first external act about which the other party could have complained (if it knew about it) as an act of actual or threatened passing off. Typically, this will be the date when first offer was made to market relevant goods or services under the mark. However, it could also be the date the first public-facing indication was made that sales were proposed to be made under the mark in future. If the user of the applied-for mark was not passing off at the time such use commenced (usually because no one else had acquired a protectable goodwill under a conflicting mark at that time), they will not normally be passing off by continuing to use the mark.

Goodwill

19. Mr Baron states that he is the founder of Lancashire, which he started in April 2013 as a sole trader. In November 2013, he established a partnership with his wife, Ann Farrell, formalised on 1 April 2017. They continued to trade as a legal partnership until 30 June 2021 when they incorporated a UK limited company. The partnership was formally dissolved on 30 June 2021. Lancashire is wholly owned by Barrell Holdings Limited of which Mr Baron and his wife are the joint shareholders and owners, each with an equal stake in the company. Goodwill in the two signs relied upon was transferred from the partnership to Lancashire, confirmed in a deed of assignment exhibited at Annex GRB1. There is no challenge to this from Dansk.

20. Mr Baron explains that his motivation for beginning Lancashire was to supply pure mead, not the honeyed meads available at the time from large mead producers such as Lindisfarne, Cornish Mead and Lyme Bay. This is because Mr Baron is a practising Druid and requires the purest mead possible for use in the rituals and ceremonies that he attends. He states that the majority of the early events he attended to supply with mead were pagan or Viking-related, such as the Jorvik Viking Festival, in York. Mr Baron states that up to 2015/2016 the market was mostly comprised of pagan/Viking-event customers, other than tourist customers, such as those visiting Lindisfarne. He states that mead has a long and well-documented history and connotations with the Vikings and with paganism.

21. Mr Baron states that Lancashire began to supply Viking's Blood to a pub called the George and Pilgrim, in Glastonbury, in 2015. He states:

"We have marketed and promoted Viking's Blood through participation at numerous events and festivals across the country, as well as through social media. We have also been featured in the Lancashire Life magazine in 2014, where we came to the attention of Mark Birchall, one of the former chefs working with Simon Rogan at L'Enclume. Simon Rogan is an award-winning British chef and restaurateur known as one of the pioneers of the farm-to-fork movement in the UK and the co-owner of three-time Michelin starred restaurant, L'Enclume, in the Lake District. Viking's Blood was previously stocked in 2015

at Fera in Claridge's, London, which Simon Rogan previously ran until April 2017. Mark Birchall (who now has his own Michelin starred restaurant, 'MoorHall'), saw the article whilst sitting in the dentist's waiting room around 6 months after publication and got in contact with us. This relationship has further increased the profile of our Viking's Blood mark."

22. Mr Baron provides a table of pubs and stockists who have stocked Viking's Blood:

Venue	Location	Year	Year Viking's Blood was supplied
Ye Olde Man and Scythe Pub	Bolton	2014, 2015 and 2016	2015 and 2016
George & Pilgrim Inn	Glastonbury	2014 and 2015	2015
Knight Shop International	Conwy	2014, 2015 and 2016	2015 and 2016
Dog n Partridge Pub	Bolton	2014	
Fera at Claridge's, (Simon Rogan, Michelin Chef)	London	2014,2015	2015
L'Enclume, (Simon Rogan, Michelin Chef)	Cartmel, Lake District	2014, 2015 and 2016	2015 and 2016
Wellocks - wholesaler to Simon Rogan and Matt Gillan	London	2014,2015	2015
Crimson Moon Tavern, (travelling tavern)	Durham	2015,2016	2015 and 2016
The House of Trembling Madness	York	2016	2016
Bunburys	Bolton	2016	2016
A P Harvey	Coventry	2016	2016
King Arthur Pub	Glastonbury	2016	2016
Kellen Tay Beers	Derby Market	2014, 2015	2015
Beer Circle	Adlington	2014	
More Mead, (travelling tavern)	Devon	2016	2016
Bare Arts	Todmorden	2014	
Malt & Hops	Chorley	2014	
Blackedge Brewery Tap	Horwich	2015 and 2016	2015 and 2016
Middle Farm	Lewes	2015 and 2016	2015 and 2016
Not Just Jams / Container No 8	Coventry	2016	2016

23. Mr Baron states that the first sale of Viking's Blood was made on 21 January 2015. A copy of an invoice showing a sale from that date is included in Annex GRB5, along with four other invoices to UK addresses in 2015 from Lancashire, all referring to Vikings Blood at a price of £22. Annex GRB6 comprises almost 100 invoices from between 2 February 2015 to 7 July 2016. It seems from the invoices that the spelling changed from Vikings Blood to Viking's Blood in December 2015 (the first invoice to

show the apostrophe is dated 7 December 2015), although it is spelled without an apostrophe on invoices dated 15 December 2015, 21 December 2015 and 3 February 2016. Nothing turns upon this: in the context of Vikings Blood, it is likely to be read or at least understood as the possessive form. The contested mark having been filed on 16 September 2016, Mr Baron has provided detailed tables for 2015 and 2016 giving breakdowns of the number of bottles, the value of sales and the locations of those sales. The tables are shown below. For the remaining years, I will give a summary of the facts provided by Mr Baron.

Date	No of bottles sold	Value (ex VAT)	Mode of sale	Event/Stockist	Locations
January 2015	7	£116.69	Website		Nottingham, Grimsby, Chelmsford, Essex and Wellingborough
February 2015	27	£450.09	Website and offline		Hampshire, Swanage, Dorset, Nottingham
				NLHF SW	Dorset
				KSI	Bristol
				Blackedge Brewery Bar	Bolton
March 2015	97	£1616.99	Website and offline		Bristol, North Shields, Northallerton, Bolton, Alloa, Nottingham
				NLHF	Rugby

				Meadery	Bolton
				The Original Re-enactors Market (TORM)	Ryton-on-Dunsmore; Coventry
December 2015	108	£ 1800.36	Website and offline		Chester, Clitheroe, Nottingham, Jarrow, Felixstowe, Thornton-Cleveleys, Birmingham, Sheffield, Long Eaton, Cannock, Sutton in Ashfield
			Telephone		Bolton
			Website and offline		Hucknall, Nottinghamshire, Sale, Greater Manchester, Whitchurch, Cardiff, Oakham, Rutland, Swinton, Petersfield, Hampshire, Cradley Heath, West Midlands, Trowbridge, Derby
				Meadery	Bolton
				Bede's World Christmas Event	Jarrow Hall, South Tyneside
Total	239	£3,984.13			

1 January 2016 to 24 September 2016

Date	No of bottles sold	Value (ex VAT)	Mode of sale	Event/Stockist	Locations
January 2016	12	£200.04	Website		Wolverhampton, Clitheroe, Richmond upon Thames, Jarrow, Sheffield, North Shields, Sunderland
February 2016	46	£766.82	Website		Redcar, Teesside Jarrow, Clitheroe, London, Cramlington, Northumberland Loughborough, Sheffield Uddingston, South Lanarkshire

					Oldham
				Kellenay Beers	Derby
				More Mead	Devon
				Knight Shop International (KSI)	Conwy
March 2016	2	£33.34	Website		Durham
April 2016	42	£700.14	Website		Sherston, Wiltshire, North Shields, Oswaldtwistle, Brierley Hill, West Midlands, Holywell, T&W Monmouth, Birmingham, South Shields, Liverpool, Preston, Durham
				Easter Market, The Centre @Birchwood	Warrington
				King Arthur Pub	Glastonbury
30 April – 2 May 2016	19	£316.73	Offline	Beltane at Thornborough	Thornborough, Henge, West Tanfield
2 May – 31 May 2016	35	£583.45	Offline	Viking Medieval Market	Knolly ash, Liverpool
				Totally Local Market	Sowerby Bridge
June 2016	65	£1063.55	Website and offline		Formby, Clitheroe, Abercrom, Moray, Camforth, Wimslow, Thornton-Cleveleys, Reading, Redcar, Teesside
				Splendid Day Out, Steam punk Festival Morecambe pavilion	Morecambe
				Medieval Display, Castle Keep	Newcastle
				Living History Fayre, Wellingborough	Wellingborough
July 2016	4	£ 68.68	Website and offline		Wolverhampton, Nottingham
				Vulcan Steampunk	Doncaster
August 2016	41	£ 683.47	Offline	Pagan Pride South	Southampton

				Herstmonceux Medieval Festival	Herstmonceux, Sussex
September 2016	57	£ 800.16	Offline	Viking Medieval Market	Warrington
				Air ambulance fundraiser	Coombe Abbey, Coventry
				Mabon at Thornborough	Thornborough Henge, West Tanfield
				Viking Medieval Market	Gild Hall, Formby
Total	323	£5,234.38			

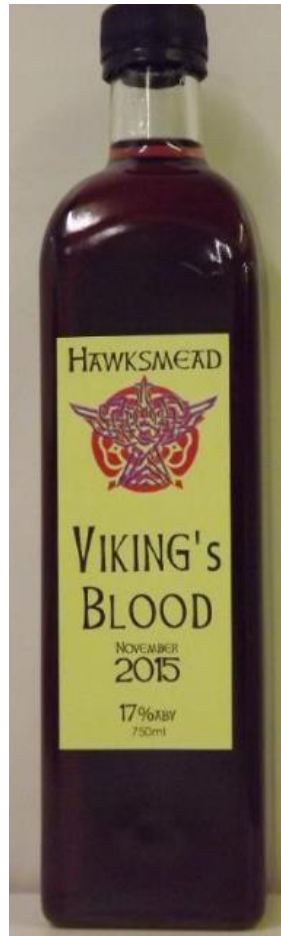
24. For 2017 to 2022, only sales figures are given by Mr Baron:

Date	Units sold	Sales
1.11.2016 to 31.03.2017	785	£10,487.13
1.04.2017 to 31.03.2018	1113	£16,440.33
1.04.2018 to 31.03.2019	1994	£29,088.12
1.04.2019 to 31.03.2020	2283	£36,604.59
1.04.2020 to 31.03.2021	1135	£18,525.62
01.04.2021 to 30.06.2022	619	£9,487.17

25. Some of these figures are identified in Mr Baron's evidence as being "TRADE". He states that there has been a clear increase in turnover since Lancashire began actively marketing and selling Viking's Blood, targeting sales at pagan, Viking and medieval re-enactment events. Mr Baron gives details of several of these which Lancashire attended in 2016. The visitor numbers were either in the several hundreds or in the several thousands (the Jorkvik Viking Festival, in York, had 200,000 visitors).

26. Annex GRB2 (and Annex GRB4) comprise Facebook images of the Viking Blood mead bottles in January 2015. Mr Baron confirms that the design of the labels has been updated over the years but the name Viking's Blood or Vikings Blood has

remained consistent. The bottles (750ml) looked like this in January 2015 and December 2015, respectively:



27. Annex GRB10 contains screenshots of Lancashire's website using the internet archive, the Wayback Machine, from 12 March 2015 showing the pricing of Vikings Blood at £22, and another screenshot from 21 December 2015:



28. Annex GRB11 comprises a number of archived internet screenshots of Lancashire's website from 25 June 2016, 18 October 2017, 12 July 2018, 22 June 2021 and 9 September 2022 showing Viking's Blood mead for sale.

29. Mr Baron provides a selection of press articles about the UK mead industry in Annex GRB15, dated between 22 June 2014 and 17 April 2023. An article in the *Independent*, dated 22 June 2014, reports that mead is an ancient drink making a comeback, led by Tom Gosnell who was building on decades of groundwork done by the Cornish Mead Company and in Sussex. The article refers to the growing number of chefs who use mead in sauces, including Simon Rogan, one of the UK's top chefs. Mr Gosnell is quoted as producing about 2,500 bottles of mead a month. The director of Lurgashall winery is quoted as saying that mead was an "underground drink, popular with medieval re-enactment groups, pagans, and students" when she took over the meadery four years prior to the article, but attitudes were shifting. The Cornish Mead Company is quoted as selling 50,000 litres a year to local supermarkets and restaurants; that company was trying to start a trend for using mead in cocktails to find a new, younger market. Another article, @foodismUK dated 3 August 2022,

records that whilst some producers are aiming for the more modern image, others, including Lancashire/Mr Baron, are positively seeking the Viking/pagan image. An article dated 27 March 2023 in the *Morning Advertiser* says that two companies, Gosnells and Lyme Bay, represent about 80% of the UK's mead production. The article says that Lyme Bay sells 116,000 bottles per annum and that 90% of its sales are off trade. It is the sole supplier to English Heritage. An article dated 17 April 2023 in the *Brewers Journal* says that there are 30 professional meaderies in the UK and that the market might still be seen as niche. The CEO of Lyme Bay is quoted as saying that it is difficult to define the consumer for mead.

30. Based upon these articles, Mr Baron states:

“46. ... Two mead producers (Gosnells and Lyme Bay) have 80% of the market. The biggest, Lyme Bay, sells 116k bottles per annum. That suggests that the market for mead in 2023 was small. At an estimate, proceeding on the assumption that Lyme Bay has 50% of the market, the total market in 2023 would appear to be around 200-250k bottles per year in total.

47. The market for mead in 2014 - 2016 was likely to have been even smaller, given the 10-20% year-on-year growth mentioned. The article in the *Independent* dated 2014, quotes Tom Gosnell or Gosnells as saying "I wanted a modern twist; something that was easier to drink and more accessible," he said. He makes around 2,500 bottles a month, but has capacity for double that amount. Tom Gosnell, who started brewing his Gosnells London Mead at the end of last year." Gosnells are now according to the *Brewers Journal* article, one of the two leading producers of mead in the United Kingdom, with approximately 30% share of market. In 2014 Gosnells was making 2,500 bottles of commercially produced (not craft) mead.

48. In the light of these figures, the amount of Viking's Blood product sold by us between 1 January 2015 - September 2016, although modest, was significant in the context of the very small and niche craft mead market that existed in the United Kingdom as at January 2015/in that period.”

31. A small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing off even though its goodwill and reputation may be small. In *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, the Court of Appeal in England and Wales held that the defendant had passed off its LUMOS nail care products as the claimant's goods. The claimant had been selling LUMOS anti-ageing products since 2007. The goods retailed at prices between £40 and £100 per bottle. The Claimant's sales were small, of the order of £2,000 per quarter from early 2008 to September 2009, rising to £10,000 per quarter by September 2010. The vast majority of these sales were to the trade, including salons, clinics and a market. As at the relevant date (October 2010) the Claimant had sold to 37 outlets and by that date it was still selling to 25 outlets. There was evidence of repeat purchases. Although the number of customers was small, or, as the judge at first instance put it, "*very limited*", the claimant's goodwill was found to be sufficient to entitle it to restrain the defendant's trade under LUMOS.

32. At the prima facie relevant date of 16 September 2016, Lancashire had sold 562 bottles according to the tables of sales provided by Mr Baron. It may have sold more to the pubs, but there are no figures given for the table of pubs. Mr Baron states that there were sales to the restaurant in Claridge's in 2015, listed in the pub table for 2015 (as shown at paragraph 22 above), but not listed as a 'London' location in the sales table for 2015 (shown at paragraph 23 above); and Mr Baron states that there were sales to the George & Pilgrim pub in 2015, listed in the pub table in 2015, but not shown in the sales table as a 'Glastonbury' or 'Somerset' location for 2015.

33. In its counterstatement, Dansk refers to the following quotation from *Smart Planet Technologies, Inc. v Rajinda Sharma*:

"... a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon."

34. That case involved 10 invoices to two customers for 40,000 disposable cups in a market worth 2.5 billion cups per year. There was no evidence about how the business

in the UK had been won, what goodwill could be attributed to the word reCUP and one of the considerations was that the sign was very low in distinctiveness for a recyclable cup.

35. In *Wadlow on the Law of Passing-Off 6th Ed.*, Professor Wadlow says at 3-32, citing *Lumos*:

“The mere fact that the claimant’s business is very small does not prevent it having a goodwill. A fortiori, the scale of the claimants’ business in relation to the market as a whole is not determinative.”

36. In *Ben Arnold v Aikon International Limited*, BL O/0408/23, Dr Brian Whitehead, sitting as the Appointed Person, considered the use of a sign by a small business in a large market. He said:

“43. Fourthly and finally, the Hearing Officer fell into error when stating “The global turnover figures are limited in the context of a substantial market”. Of course, the UK market for clothing is vast (in the tens of £ billions), and the Appellant’s annual sales figures – averaging a little over £110,000 for the years 2017-2019 – are small. However, in *Lumos Skincare Ltd v Sweet Squared Ltd & Ors* [2013] EWCA Civ 590, Lloyd LJ said (63-64):

“63. Having referred to this passage [in *Neutrogena Corporation v. Golden Limited* [1996] RPC 473] it is also appropriate to mention here what Morritt LJ said in the Court of Appeal in a passage relied on by Ms McFarland for the Defendants, at [1996] RPC 493-4, about a proposition advanced by the Defendants in that case that the judge had wrongly treated “a substantial number” of the Claimant’s customers or potential customers as being equivalent to “more than de minimis” or “above a trivial level”. The passage follows one cited by the judge in the present case at paragraph 83. It is as follows:

44. “In reality this issue is inseparable from the second. Did the evidence before the judge when properly evaluated demonstrate

on a balance of probabilities that if Garnier are not restrained a substantial number of members of the public will be misled into buying Garnier's products in the belief that they are the products of the plaintiffs? If it did then that will also demonstrate that in his references to "de minimis" and "trivial" the judge posed a genuine antithesis. If it did not then that will suggest that the test adopted by the judge had been reduced below that required by the law. But such reduction will then be irrelevant as the appeal will have succeeded on the second ground.

45. Nevertheless, for my part, I think that references, in this context, to "more than de minimis" and "above a trivial level" are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993). It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion."

64. One point which emerges clearly from what was said in that case, both by Jacob J and by the Court of Appeal, is that the "substantial number" of people who have been or would be misled by the Defendant's use of the mark, if the Claimant is to succeed, is not to be assessed in absolute numbers, nor is it applied to the public in general. It is a substantial number of the Claimant's actual or potential customers. If those customers, actual or potential, are small in number, because of the nature or extent of the Claimant's business, then the substantial number will also be proportionately small. That is another reason why the judge's reference to the Claimant's share of the overall UK skincare beauty market seems not only inapposite but also potentially misleading." (my underlining)

46. The above passage was in relation to misrepresentation, rather than goodwill, but illustrates the point – it is not necessary for a party’s activities to be large, in the context of the overall market, for actionable goodwill to arise.”

37. Mr Baron makes the point, in his evidence, that, in fact, the market for mead is not large and that in 2015 it was much smaller than in 2023, so Lancashire’s sales were proportionately larger at that point. The Brewers Journal article still described the market for mead as niche even in 2023. In 2014, mead is described by Lugashall Winery in Sussex as an underground drink, popular with medieval re-enactment groups, pagans and students. Mr Baron’s evidence bears this out: this was his customer base in 2015 and 2016. He states that Lancashire promoted Vikings Blood or Viking’s Blood by targeting sales at pagan, Viking and medieval re-enactment events. Some are listed in the sales tables and Mr Baron provides a list of twelve obviously historically or pagan-inspired events attended in 2016 prior to the prima facie relevant date. Apart from the York festival, the events are not huge events; typically in the low thousands or hundreds of visitors. This means, going back to *Lumos* and *Neutrogena*, that Lancashire’s actual or potential customers are likely to be small in number because of the nature or extent of the business and also the market itself. The substantial number of actual or potential customers will also be proportionately small.

38. Mr Baron’s business began because so many people liked the mead he made and wanted to be able to buy it. A 2014 article in the Great British Life Magazine quotes Mr Baron as saying:

“People at the [Pagan] ceremonies liked my mead and wanted to buy it from me ...I got a really good following from the Pagan community and they all liked the fact that it was made in the traditional way. It reached the stage where that many people wanted to buy it I realised I was going to have to do it properly and make a business of it.”

39. Recalling that goodwill is “the attractive force which brings in custom”, Mr Baron’s description of the genesis of his company is that there was a force which was attracting so much custom that Mr Baron created a business on the strength of it. This attractive

force was evident throughout 2015 and 2016 in the tables of sales. There were not just a couple of sales in those years: there were website and offline sales in January, February and March 2015 from 22 locations, and website, offline and telephone sales in December 2015 from a further 31 locations. I have already mentioned over 100 invoices in the evidence. The sales grew in quantity as the year progressed. Sales were made regularly and consistently throughout 2016 (to the prima facie relevant date of 16 September 2016) in January, February, March, April, May, June, July, August and September, from a variety of locations, online and offline and at various events. There was also repeat custom, which is a hallmark of goodwill: the sales tables shows that the Knight Shop International bought bottles in February 2015 and February 2016.⁵ By the end of September 2016, Lancashire's takings had increased by over 25% from the total achieved for 2015.

40. I must decide whether Lancashire has shown a small goodwill (which the law will protect) or only a trivial goodwill (which it will not). I recognise that this is a borderline case. However, I do not think that this case boils down to just a question of numbers (as was said in *Lumos*). Unlike *Smart Planet Technologies, Inc. v Rajinda Sharma*, Lancashire's own competitors, of whom there are not many, acknowledge that the market is niche and that the drink was 'underground' in around 2015. Unlike *Smart Planet Technologies, Inc. v Rajinda Sharma*, the signs are not low in distinctiveness. Also unlike *Smart Planet Technologies, Inc. v Rajinda Sharma*, the evidence sets out clearly how the business started and how it grew. The evidence shows a steady and regular pattern of sales in 2015 and 2016, a variety of customers from a variety of UK locations, with repeat custom and some high profile customers in the hospitality business. Comparisons with the facts of other cases only get one so far. It is all the facts and circumstances of the evidence before me that I must assess. I find that, at the prima facie date of 16 September 2016, the combination of factors in Lancashire's evidence which I have discussed above means that, at that date, Lancashire has established that it had a small, but protectable goodwill in its business of mead, of which Vikings Blood and Viking's Blood were distinctive.

⁵ Mr Baron states that this shop is known as The Knight Shop in Conwy and has an online address of thevikingshop.co.uk; it began stocking Viking's Blood prior to September 2016.

41. However, that is not the end of the matter because Dansk claims that it made sales in the UK at an earlier date, in mid-February 2016. I now turn to Dansk's evidence to see if that claim is made out and, if so, whether Lancashire also had sufficient goodwill to prevent passing off at that date.

42. Exhibit 2 to Dansk's evidence comprises several redacted invoices, which feature VIKING BLOD, made out to a location in Buckinghamshire. The earliest of these is dated 16 February 2016. A certified translation has been provided by Rune Nygaard Larsen, an assistant attorney at the firm of attorneys representing Dansk.⁶ From this, I can ascertain that the invoice records the sale of 24 FL. VIKING BLOD, 70cl., 19%vol, at a unit price of 52 DKK and an overall cost of 1,248.00.⁷ Lancashire submits that all the UK invoices in Dansk's evidence amount to no more than 66 units, totalling £377.52 GBP (at the highest). However, as the Appointed Person pointed out in *Smart Planet Technologies, Inc. v Rajinda Sharma* (at paragraph 18 of this decision), it is not relevant whether Dansk had its own goodwill at this point; what is relevant is whether it was actionable use which Lancashire could have prevented under the law of passing off because Lancashire had sufficient goodwill of its own. The next invoice is dated 11 May 2016, and there are others in 2016, all to an address in Buckinghamshire. I find that the sale made on 16 February 2016 was actionable use.

43. At that date, it is not possible to say with certainty exactly how many bottles Lancashire had sold. From the sales tables, by the end of February 2016, it had sold 297 bottles. If, for the sake of fairness, I assume that the figure given for February 2016, which is 46 bottles, is halved (because 16 February is halfway through the month), that equates to 274 bottles, about half of the amount up to the prima facie relevant date. The question now is, how much of a difference does that number make?

44. I recognise that a 50% drop feels significant when the original number was relatively small. However, most of the other factors which I have found were in Lancashire's favour were as present on 16 February 2016 as they were on 16 September 2016. That is to say:

⁶ Witness statement dated 24 January 2024.

⁷ 'FL' is not explained, but appears to denote the amount, e.g. the number of units or bottles from other data which is explained.

- it is not necessary for Lancashire’s business to be large, in the context of the overall market, *per Lumos*;
- in any event, the market then and even in 2023 was recognised by Lancashire’s competitors as niche;
- the way in which the business started and how it grew is explained by Mr Baron and documented in the press articles;
- sales occurred throughout 2015 and increased in number, into 2016, taking place across the UK; including to Claridge’s.

45. Again, whilst recognising that this is a borderline case, I consider that all the facts and circumstances of the evidence show that there was a small but undeniable attractive force bringing in regular, UK-wide custom in relation to mead by 16 February 2016, distinguished by the signs Vikings Blood and Viking’s Blood. This is enough to give rise to a small but protectable goodwill at that date as well as at 16 September 2016.

Misrepresentation and damage

46. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

“There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] *R.P.C.* 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]”.

47. I have already referred above to what is meant by ‘substantial number of members of the public’, as explained in *Lumos* in the context of misrepresentation. It is not the public in general, but is Lancashire’s customers or potential customers.

48. Lancashire’s goodwill is in respect of mead. Mead [hydromel] is one of the two items in Dansk’s specification.⁸ The other item is *sweet wines*. This is a type of alcoholic drink not dissimilar to mead; especially sweet wine made with honey. One of the reasons Mr Baron decided to make his own mead in the first place was because he wanted to supply pure mead not the honeyed wines which were available at the time from large mead producers. The signs and Dansk’s mark are visually similar to a medium to high degree. The only difference between the first word is the absence of the letter S and/or the apostrophe. The only difference between the second word is the number of letter Os in BLOOD/BLOD. Aurally, they are similar to a high degree. The additional S is a slight difference, being a soft sound at the end of the first word and, in some parts of the UK, the pronunciation of BLOOD and BLOD will be almost indistinguishable. Lancashire’s signs mean the blood of a Viking and Dansk’s mark is likely to be viewed as a Scandinavian reference to the same concept; to the average UK consumer, they are likely to interpret BLOD in conjunction with VIKING as a Scandinavian language spelling of BLOOD. As a consequence, there is no doubt in my mind that a substantial number of Lancashire’s actual and potential customers would believe that Dansk’s goods were those of Lancashire.

49. Damage, such as diversion of trade and/or injurious association, is inevitable. Lancashire was entitled to restrain Dansk under the law of passing off, at both relevant dates, from using its trade mark. This means that registration of the mark in the UK was contrary to section 5(4)(a) of the Act.

Invalidation outcome

50. The application for a declaration of invalidity is successful under section 47(2) of the Act.

⁸ Hydromel is another name for mead.

Dansk's opposition to Lancashire's application

51. As I have found that Dansk's mark is invalid, it is not a valid basis for the opposition it has brought against Lancashire's trade mark application. The opposition therefore fails.

Overall outcome

52. The application for a declaration of invalidity is successful. Under section 47(6) of the Act, registration 915834518 is deemed never to have been made.

53. The opposition against application 3919144 fails. The application may proceed to registration.

Costs

54. Lancashire has been successful and is entitled to a contribution towards its costs, based on the scale published in Tribunal Practice Notice 1/2023. The breakdown of the award is as follows:

Statutory fee for the invalidation application	£200
Filing the invalidation application and considering the counterstatement	£250
Considering the opposition and filing a counterstatement	£250
Filing evidence and considering the other side's evidence	£900
Filing written submissions in lieu of a hearing	£350
Total	£1950

55. I order Dansk Mjød A/S to pay to The Lancashire Mead Company Limited the sum of £1950. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 4th day of February 2025

Judi Pike

For the Registrar