

**BL O/0362/24**

**TRADE MARKS ACT 1994**

**CONSOLIDATED PROCEEDINGS**

**IN THE MATTER OF APPLICATION NOS. UK00003795378 AND UK00003831826**

**BY STEPHEN ROYCE TEWKESBURY**

**TO REGISTER THE TRADE MARKS:**

**Pinnacle Gin**

**IN CLASS 33**

**AND**

**PINNACLE IOW GIN**

**IN CLASS 33**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NOS. 437090 AND 437880**

**BY JIM BEAN BRANDS CO.**

## BACKGROUND AND PLEADINGS

1. On 4 June 2022, Stephen Royce Tewkesbury (“the applicant”) applied to register the **Pinnacle Gin** mark (“**378 Mark**”) shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 22 July 2022. The applicant seeks registration for the following goods:

Class 33      Gin.

2. On 21 September 2022, the applicant also applied to register the **PINNACLE IOW GIN** mark (“**826 Mark**”) shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 7 October 2022. The applicant seeks registration for the following goods:

Class 33      Beverages (Alcoholic -), except beer; Alcoholic beverages (except beer).

3. The applications were opposed by Jim Bean Brands Co. (“the opponent”) on 24 October 2022 and 7 December 2022. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and the opponent relies upon the following trade mark:

# PINNACLE

Comparable UK trade mark (EU) registration no. UK00909610015<sup>1</sup>

Filing date 20 December 2010.

Registration date 16 November 2011.

Relying upon all of the goods for which its mark is registered, namely:

Class 33      Vodka.

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<sup>1</sup> Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

4. The opponent claims there is a likelihood of confusion because the marks are “near identical” and the goods are identical/highly similar.

5. The applicant filed a counterstatement in both proceedings denying the claims made and put the opponent to proof of use.

6. On 13 January 2023, the Tribunal wrote to the parties informing them of the consolidation of the opposition action no. 437090 and opposition action no. 437880.

7. The opponent is represented by Haseltine Lake Kempner LLP and the applicant is unrepresented. Neither party requested a hearing, however, the opponent firstly filed evidence in chief and then additional witness statement evidence. This was followed by the applicant filing written submissions, then both parties filed submissions in lieu of a hearing. Lastly, the applicant filed further written submissions. I make this decision having taken full account of all the papers, referring to them as necessary.

8. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

## **EVIDENCE**

9. The opponent’s evidence consists of the witness statement of Flora Hachemi dated 13 April 2023. Ms Hachemi is a Chartered Trade Mark Attorney at Haseltine Lake Kempner LLP, the representatives for the opponent. Ms Hachemi’s statement is accompanied by 5 exhibits (FH1-FH5).

10. The opponent’s evidence also consists of the witness statement of Sarah McGurk dated 26 April 2023. Ms McGurk is the Senior Manager of Global Intellectual Property for the opponent. Ms McGurk’s witness statement is accompanied by 3 exhibits (SM1-SM3).

11. Whilst I do not propose to summarise it here, I have taken all of the evidence and the parties' submissions into consideration in reaching my decision and will refer to them where necessary below.

## **DECISION**

### **Section 5(2)(b)**

12. Section 5(2)(b) reads as follows:

“5(2) A trade mark shall not be registered if because –

(a)...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

13. The opponent's mark qualifies as earlier mark in accordance with section 6(1)(aa) as its filing date is earlier than the filing dates of the applicant's marks. As the opponent's mark has completed its registration process more than five years before the filing dates of the marks in issue, it is subject to proof of use pursuant to section 6A of the Act.

### **Proof of use**

14. I will begin by assessing whether there has been genuine use of the earlier mark. The relevant statutory provisions are as follows:

15. Section 6A of the Act states:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

- (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or

not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

16. Pursuant to section 6A of the Act, the relevant periods for assessing whether there has been genuine use of the earlier mark are the five years ending on the filing dates of the applicant’s marks, i.e. 5 June 2017 to 4 June 2022 for the 378 Mark, and 22 September 2017 to 21 September 2022 for the 826 Mark.

17. By virtue of paragraph 7 of Part 1, Schedule 2A of the Act, use within the EU is relevant for the entirety of the relevant period which falls prior to IP Completion Day (31 December 2020). After that date, only use in the UK will be relevant.

18. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v 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 Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*

at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

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

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

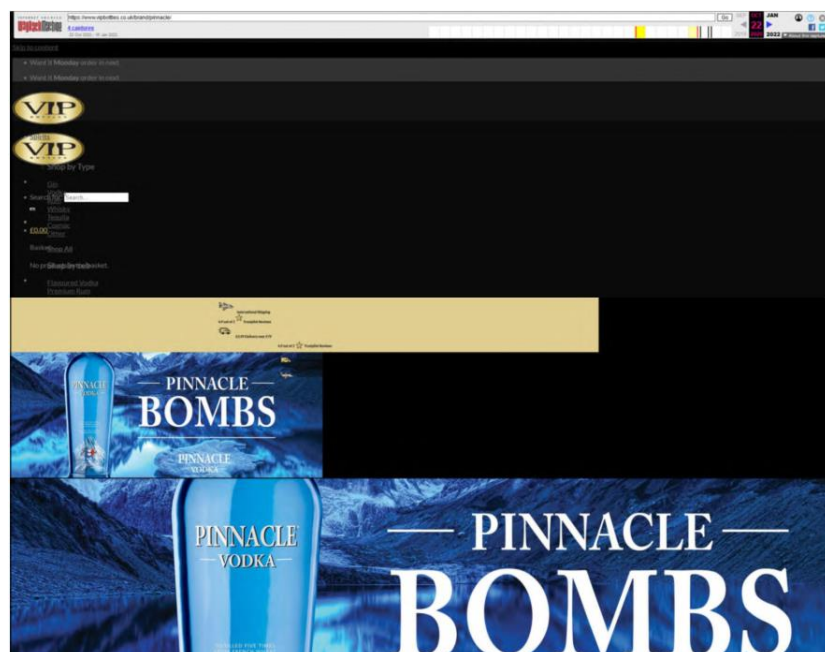
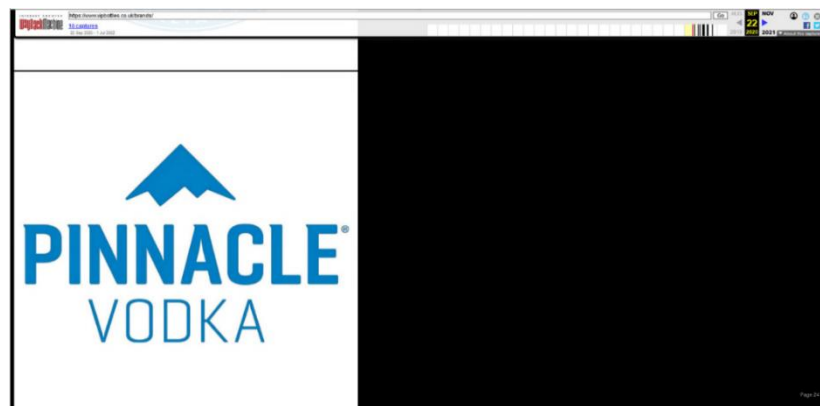
(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

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

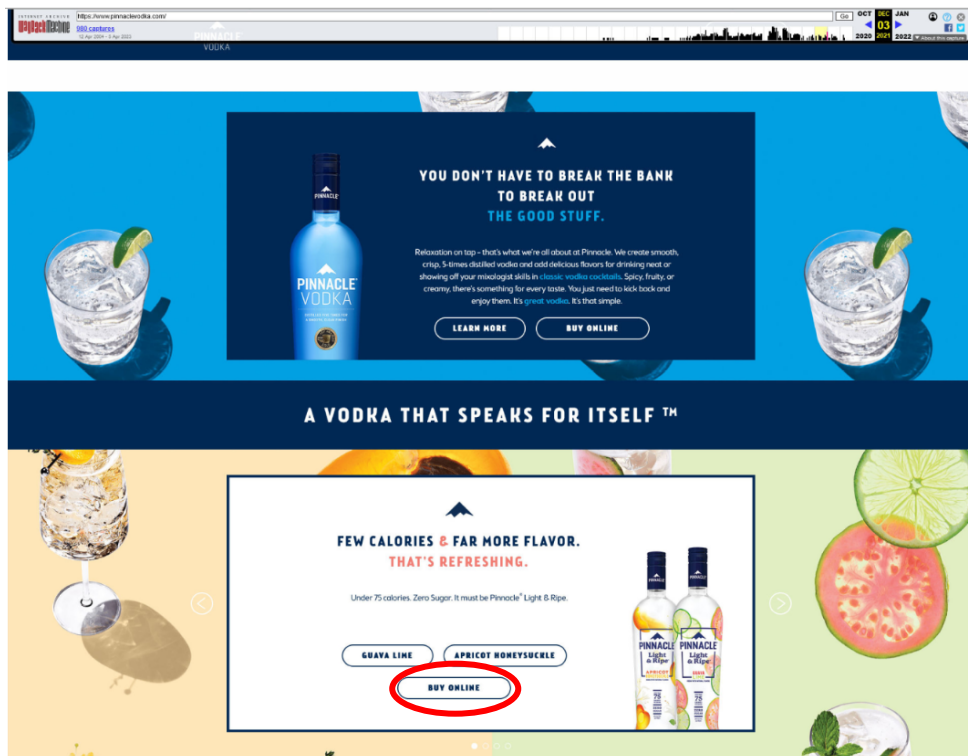
Evidence of use

19. I note the following from the opponent’s evidence:

- a) Ms Hachemi states that the opponent’s goods have been sold under its mark in the UK through a number of third parties (including VIP Bottles UK and Liquor Ltd), and that screenshot examples of this have been provided at **exhibit FH2**. However, I note that one screenshot just shows a “pinnacle vodka uk” google search which is dated between 3 June 2017 and 2022. 3 screenshots show only the mark “PINNACLE VODKA” from vipbottles.co.uk/brands dated 2020, 2021 and 2022 (as shown below), and a screenshot from vipbottles.co.uk/brands dated 22 October 2022 shows PINNACLE VODKA being used on a bottle (as also shown below).



b) **Exhibit FH5** contains screenshots from the opponent’s pinnaclevodka.com website dated between 2017 to 2022. The screenshots simply show the use of the mark on the vodka bottles (as demonstrated below). It does not show a price for these goods, and the only evidence I have in relation to the goods being available for purchase online is from the second screenshot which has an option to “BUY ONLINE” (as circled in red). However, it is not clear whether these goods can be specifically brought through the opponent, or whether it redirects you to another website.



c) **Exhibit FH3** contains screenshots of posts from vipbottlesuk and liquorltduk Instagram pages. I note that Ms Hachemi has provided the follower numbers for these pages, however, these screenshots are not dated and therefore I am unable to determine the amount of followers these pages had during the relevant periods. Furthermore, it is clear that from the vipbottlesuk Instagram screenshots that the opponent's pinnaclevodka Instagram page was tagged, but I have not been provided with any evidence from this page. Nonetheless, the posts are dated between May 2019 to September 2021, and shows the opponent's PINNACLE VODKA goods as follows:



d) **Exhibit SM2** contains screenshots from the “UK-based website VIP Bottles Ltd” (vipbottles.co.uk). I note that these are dated between 24 October 2020 to 27 June 2022. I note that some of the screenshots simply show a picture of PINNACLE vodka on a black screen, however, I have also been provided the following screenshots dated 25 January 2021 and 20 October 2021 showing Pinnacle Tropical Punch Vodka (75cl) for sale, for either £17.99 or £24.99:

This screenshot shows a product page for Pinnacle Tropical Punch Vodka 75cl. The breadcrumb trail is "SPIRITS / VODKA / FLAVOURED". The product image shows a clear bottle with a blue label featuring a mountain peak and tropical fruits. The price is £17.99. The description states: "A naturally flavoured french vodka, Pinnacle Tropical Punch Vodka is bright orange in colour and flavoured with juicy pineapple and natural tropical tastes. smooth from start to finish, Pinnacle Tropical Punch Vodka is great for cocktails." It is in stock. There are options for a gift box (£5.99) and a gift message (£0.99). A yellow "ADD TO BASKET" button is visible. The product details sidebar lists: Size 75cl, Country France, ABV 30%, Brand Pinnacle, Colour Clear, Type Flavoured, and Closure Screwcap.

This screenshot shows a product page for Pinnacle Tropical Punch Vodka 75cl. The breadcrumb trail is "HOME / SPIRITS / VODKA / FLAVOURED VODKA". The product image is the same as in the previous screenshot. The price is £24.99. There is a "View Giftbox" link. There are options for a gift box (£5.99) and a gift message (£0.99). It offers "Free Delivery on orders over £100!". A yellow "ADD TO BASKET" button is visible. Below the button, it says "or 4 interest-free payments of £6.25 with clearpay". The description states: "Pinnacle Tropical Punch Vodka is an award-winning blend of five-times distilled French vodka, cherries, oranges, pineapples and other tropical fruits." The "Perfect Serve" section says: "Pinnacle Tropical Punch Vodka is an award-winning balance of five-time distilled French vodka and a vivacious blend of cherries, oranges, pineapples and other tropical fruits. Clean, bright, punchy and super smooth. Perfect Serve – Pinnacle Tropical Punch Vodka is perfect served on its own, chilled and with tons of ice. Add to lemonade or tropical juice for a tropical extravaganza!" The product details sidebar lists: Size 75cl, Country France, ABV 30%, Brand Pinnacle, Colour Clear, Type Flavoured, and Closure Screwcap.

- e) **Exhibit SM2** also contains the following:
- a. Screenshots from the UK retailer Regalo and its Amazon.co.uk store, where PINNACLE Tropical Punch vodka is being sold alongside a personalised glass for between £40.99 and £46.99.
  - b. Screenshots from Pinnacle’s amazon.co.uk store, where its cucumber watermelon vodka is for sale for £38.91. Whilst this page is not dated, it says it was first available on 8 July 2020.
  - c. Screenshots from Instagram for the shop Drinks For Less, a specialised off licence based in Wolverhampton. One of the screenshots dated 21 March 2021 shows the opponent’s PINNACLE Tropical Punch vodka, and in the caption it says it is available at #drinksforless.
  - d. Screenshots of google searches dated between 4 June 2017 and 21 September 2022. I note that the first 4 results shows Pinnacle vodka (including cake and blueberry flavours) for sale on “VIP Bottles” and “Liquor Ltd” for either £22.49 or £32.99.
- f) Ms Hachemi states that **exhibit FH4**<sup>2</sup> contains a sample of third party UK and EU publications advertising the opponent’s PINNACLE VODKA. However, this exhibit only contains one article about the opponent’s Pinnacle Light and Ripe range of vodka, from thespiritsbusiness.com dated 6 April 2021. Furthermore, the article details that the range “is available across the US and online through Drizly and Reserve Bar priced at RRP US\$10.00 per 750ml”. It also states that “Pinnacle vodka has reported stagnant sales over the last five years, according to Brand Champions 2020 data. The brand reported a 1.6% decline to 2.5 million nine-litre cases in 2019”. However, I note that no information is provided as to where, geographically, these sales relate to.
- g) **Exhibit FH1** contains the following examples of international awards won for its Pinnacle Vodka:
- a. In 2018 it won a silver medal from The Vodka Masters.

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<sup>2</sup> The same article is also exhibited in **SM3**.

- b. In 2018 and 2019 it won a SIP award (and its goods are priced at \$12.99).
  - c. In 2020 it won a 2020 “DOUBLE GOLD” SIP award.
  - d. In 2019 it won an IWSC Trophy.
- h) **Exhibit SM1** contains an article from “Money Inc” dated 8 April 2020. It details the following:
- a. That Pinnacle Vodka is distilled in France, flavoured in the United States and bottled for distribution worldwide.
  - b. The opponent acquired Pinnacle Vodka in 2019 for \$600 million when it was “already the fastest growing vodka brand in the world”.
  - c. It has more than 30 flavours available.
  - d. During 2009/2010 a 1.75 litre bottle was priced between \$19.99 to \$22.99.
  - e. 750,000 cases of “Pinnacle Whipped” were sold in 2011 in the US.
  - f. Pinnacle has won more awards than any other French vodka, however, the examples of the awards won are dated between 2007 to 2011.
- i) Lastly, **exhibit SM3** contains The Spirit Business’ “top 150 spirit brands by volume (figures: million 9l-cases sales)” dated 20 June 2022. I note that Ms McGurk highlights the following from this table:

Rank	Brand	Owner	Category	2017	2018	2019	2020	2021	%+/-
87	Pinnacle	Beam Suntory	Vodka	2.5	2.5	2.5	2.5	2.3	-7.8%

Conclusions from the evidence on genuine use

20. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.<sup>3</sup>

<sup>3</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

21. As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

22. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. (as he then was) as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

23. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person stated that:

“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.”

24. The mark upon which the opponent is relying is the word mark “PINNACLE”. The distinctive character therefore lies in this word as a whole.

25. I note that the majority of the evidence shows use of the word PINNACLE presented in a minimally stylised, capitalised and bolded typeface, underneath a mountain peak device, all presented in white. I note that the word PINNACLE is an ordinary dictionary word which means a pointed piece of stone or rock that is high

above the ground. I therefore consider that the mountain peak device depicts a “PINNACLE” and reinforces the meaning of the word. I also bear in mind that in *Lactalis McLelland Limited v Arla Foods AMBA*,<sup>4</sup> Phillip Johnson, sitting as the Appointed Person, noted that where a mark contains both words and a figurative element, the word element will usually be more distinctive. I therefore consider that the addition of the peak device does not alter the distinctive character of the mark. I also note that the evidence shows the use of the above, with the word VODKA underneath (presented in a minimally stylised, white, capitalised typeface). This word is descriptive of the opponent’s vodka goods, and thus does not alter the distinctive character of the mark.

26. Consequently, as far as the form of the mark is concerned, I am satisfied that the mark has been used as registered.

27. The case law summarised in the passage from *easyGroup* quoted above makes it clear that real commercial exploitation of the trade mark must be shown. Even in a case where the use is not sham, i.e. it is not use engineered solely to preserve the trade mark registration, the use must be more than trivial if it is to be considered genuine. An example of this can be seen in *Memory Opticians Ltd’s Application*, BL O/528/15, where the Appointed Person, Professor Ruth Annand, upheld the decision to revoke the protection of the mark STRADA on the grounds that it had not been put to genuine use within the requisite 5-year period. There had in fact been sales of goods bearing the mark, but these were very low in volume (circa 40 pairs of spectacles per year) and all the sales were local, from 3 branches of an optician. There was no advertising of the goods under the mark, and the evidence indicated that they were only displayed in-store on occasion. The mark was said to have been applied to the goods via a sticker applied to the arms of a dummy lens. This level of use was held to be insufficient to create or maintain a market under the mark. Consequently, it was not genuine use.

28. Where proof of use is required, it is typical to see evidence such as turnover figures and invoices showing the sale of goods to customers in the EU and UK, whether retail

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<sup>4</sup> BL O/265/22, paragraph 15

or wholesale. I have not been provided with any evidence of this, which is plainly information which should have been readily available and relatively easy to provide.

29. Furthermore, the evidence that I have been provided in relation to the opponent's sales is extremely limited. Firstly, The Spirit Business article<sup>5</sup> which lists "Pinnacle" as number 87 out of the top 150 spirit brands is based on the fact that in each year, from 2017 to 2020, the opponent sold 2.5 million 9l-cases of its vodka, and in 2021, the opponent sold 2.3 million.<sup>6</sup> However, as shown in paragraph 19(f), The Spirit Business is a dot com website and therefore could pertain to the whole world, and the table itself does not break the sales down by territory. I therefore do not have any information as to where these sales relate to. Secondly, the only other information I have in regard to sales is that "750,000 cases of "Pinnacle Whipped" were sold in 2011 in the US"<sup>7</sup>, and that the Pinnacle Light and Ripe range "is available across the US and online through Drizly and Reserve Bar priced at RRP US\$10.00 per 750ml".<sup>8</sup> These sales therefore either fall outside of the relevant periods, or outside of the relevant territories (EU/UK).

30. It is not necessarily fatal to the assertion of genuine use that there is no evidence of sales, if other material filed by the opponent is sufficient to show that there has been a real attempt to exploit the mark in the sector. However, there is very little evidence of other activity in this case.

31. I have been provided with screenshots of the opponent's website and UK third party websites (VIP Bottles UK, Liquor Ltd, Regalo and amazon.co.uk) showing PINNACLE VODKA for sale, priced between £17.99 to £46.99. However, I have not been provided with any evidence of actual sales made via these websites or even the number of visitors that these websites had. The opponent has also not provided any advertising figures, and the examples I have of its advertising is minimal. For example, the screenshots of its distributors Instagram pages clearly show the opponent's PINNACLE bottles, with one screenshot showing the caption "don't miss out on the

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<sup>5</sup> Exhibit SM3

<sup>6</sup> I also note that within the table which provides these sales figures is the heading "%+/-" with the number "-7.8%" shown for PINNACLE. However, there is no explanation within the exhibit what the heading or the percentage number means.

<sup>7</sup> Exhibit SM1

<sup>8</sup> Exhibit FH4, article dated 6 April 2021

@pinnacle range onside now...” dated 18 May 2019. However, another post which is dated 22 September 2020 uses the hashtag “#onlyexclusivearoundhere” implying that these goods are not readily available across the UK. Furthermore, and as noted above, the screenshots of the Instagram pages followers are undated, and therefore I am unable to determine the amount of followers these pages had during the relevant periods. I have also only been provided with one third party article advertising the opponent’s Pinnacle Light and Ripe range dated 6 April 2021, but I note that this only makes specific reference to it being available in the US and online.

32. Lastly, as noted in paragraph 19(g), the opponent has won a list of international awards. However, I have not been provided with any evidence as to where, geographically, these awards originate from. Furthermore, included within the SIP award evidence is the opponent’s goods (and its competitors goods) priced in dollars. On this basis, it is likely that these awards related to activities in the US, and therefore do not assist in demonstrating use in the relevant territories.

33. I accept that there has been some commercial activity under the mark (predominantly in the US), and whilst Ms Hachemi states that the goods have been available and sold in the UK, taking the evidence as a whole into account, I consider that it fails to show real commercial exploitation of the opponent’s mark to create or maintain a share of the EU or the UK market for the opponent’s class 33 vodka goods.

34. The consequence of my finding on use is that UK00909610015 may not be relied upon in these proceedings. As there is no other basis for the oppositions, the opponent’s claims under section 5(2)(b) must fail.

## **CONCLUSION**

35. The opposition is unsuccessful, and the applications may proceed to registration.

## **COSTS**

36. Award of costs are governed by TPN 2/2016. The applicant has been successful and would normally be entitled to a contribution towards its costs.

37. However, as the applicant is unrepresented, at the conclusion of the evidence rounds the tribunal wrote to the applicant and invited them to indicate whether they intended to make a request for an award of costs. The applicant was informed that, if so, they should complete a Pro Forma, providing details of their actual costs and accurate estimates of the amount of time spent on various activities associated with the proceedings. They were informed that “if the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time) may not be awarded”.

38. The applicant did not file a completed Pro Forma and paid no official fees. That being the case, I make no award of costs in this matter.

**Dated this 19<sup>th</sup> day of April 2024**

**L FAYTER**

**For the Registrar**