O/0391/25

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF

TRADE MARK REGISTRATION NOS.

3103189, 3130377 AND 3129928

IN THE NAME OF

HARRY RICHARD FISHER

AND

APPLICATIONS FOR REVOCATION FOR NON-USE

UNDER NOS.

CA000505867, CA000505869 & CA000505870

BY JAMES MOODY

Background and pleadings

1. Harry Richard Fisher ("the proprietor") is the registered proprietor of the following trade marks:

   UK registration no. 3103189
   "It's all gravy"
   Filing date: 9 April 2015
   Registration date: 4 September 2015
   ("The first registered mark")

   UK registration no. 3130377
   "It's all gravy."
   Filing date: 7 October 2015
   Registration date: 1 January 2016
   ("The second registered mark")

   UK registration no. 3129928

   

   Filing date: 4 October 2015
   Registration date: 1 January 2016
   ("The third registered mark")

2. The first registered mark is registered in respect of the following goods:

   Class 30: Gourmet gravy, gravy

3. The second registered mark is registered in respect of the following goods and services:

Class 21: Household or kitchen utensils and containers; combs and sponges; brushes (except paintbrushes); brush-making materials; articles for cleaning purposes; steel wool; articles made of ceramics, glass, porcelain or earthenware which are not included in other classes; electric and non-electric toothbrushes; gravy boats; spoons; plates; mugs; ladles; jugs.

Class 25: Clothing, footwear, headgear; t-shirts; jumpers; hoodies; hats; socks; tops; knitwear; shorts; jeans; tracksuit bottoms.

Class 43: Services for providing food and drink; temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; creche services; restaurant; catering service; mobile catering stall; food stall.

4. The third registered mark is registered in relation to the following goods and services:

Class 21: Ceramic Products; Plates; Gravy Boats; Gravy Jugs; Ladles; Spoons; Mugs; Teapots.

Class 25: Clothing; Footwear; Headgear.

Class 30: Gravy; Gourmet Gravy; Sauces; Condiments.

Class 43: Restaurant; Catering Services; Catering Stall; Mobile Catering Stall.

5. In relation to the first registered mark, revocation is sought in respect of all of the goods for which the mark is registered, namely:

Class 30: Gourmet gravy, gravy.

6. As for the second registered mark, revocation is sought for some of the services for which the mark is registered, namely:

Class 43: Restaurant; catering service; mobile catering stall; food stall.

7. With regards to the third registered mark, revocation is sought in respect of some of the goods and services for which the mark is registered, namely:

Class 30: Gravy; Gourmet Gravy; Sauces; Condiments.

Class 43: Restaurant; Catering Services; Catering Stall; Mobile Catering Stall.

8. On 27 February 2023, James Moody, ("the applicant") applied to fully revoke the first registered mark and partially revoke the second and third registered marks under section 46(1)(b) of the Trade Marks Act 1994 ("the Act"). The dates relevant to this claim are detailed below.

9. In respect of the first registered mark, non-use is alleged under section 46(1)(b) for the following 5 year periods:

- Between 5 September 2015 and 4 September 2020 seeking an effective revocation date of 5 September 2020;

- Between 27 February 2018 and 26 February 2023, seeking an effective revocation date of 27 February 2023;

- Between 21 March 2017 and 20 March 2022, seeking an effective revocation date of 21 March 2022.

10. As for the second and third registered marks, non-use is alleged under section 46(1)(b) for the following 5 year periods:

    - Between 2 January 2016 and 1 January 2021, seeking an effective revocation date of 2 January 2021;

    - Between 2 January 2017 and 1 January 2022, seeking an effective revocation date of 2 January 2022;

    - Between 27 February 2018 and 26 February 2023, seeking an effective revocation date of 27 February 2023.

11. The registered proprietor filed defences to all three revocation applications, in the form of a TM8(N) along with witness statements and exhibits, defending its registered marks. The registered proprietor did not file a counterstatement in any of the filed TM8(N) forms, but the Registry accepted the witness statements, as it was considered that these contained the information sought within the counterstatement[1].

12. On 7 February 2024 the revocation proceedings were consolidated pursuant to Rule 62(1)(g) of the Trade Marks Rules 2008.

13. The cancellation applicant represents itself and the registered proprietor represented itself throughout these proceedings until 4 April 2025 when the Tribunal received a Form TM33 (a form for the appointment or change of representative) confirming that it was now represented by Katrina Brownrigg.

[1] See official letter dated 7 February 2024

14. Both parties filed evidence in these proceedings.[2] This will be summarised to the extent that it is considered appropriate. No hearing was requested and neither party filed written submissions in lieu of a hearing. This decision is taken following a careful consideration of the papers.

Relevance of EU law

15. 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

16. The proprietor's evidence comprises of a witness statement of Harry Richard Fisher, filed for each registered mark, signed and dated 10 January 2024. The witness statements are accompanied by Exhibits 01-05. Harry Richard Fisher is the registered proprietor of the marks. The purpose of the evidence is to demonstrate use of the registered marks.

17. The applicant's evidence comprises of the witness statement of James Moody, signed and dated 6 April 2024. The witness statement is accompanied by Exhibits 1-5. James Moody is the cancellation applicant and the owner and founder of London based Street Food Business "It's All Gravy".

[2] I acknowledge that the applicant attempted to file further evidence on 1 September 2024. The applicant was informed by letter on 5 September 2024 that the evidence would not be accepted as the evidence rounds had concluded, but that if the applicant still wished to file this evidence a formal request must be made containing reasons why this evidence was not filed during the evidence rounds. I observe from the file that the applicant did not make a formal request to admit the evidence. Furthermore, I note that the evidence that the proprietor wished to submit relates to the sale of clothing, i.e. goods that are not subject to this revocation, consequently, they would have had no bearing on the outcome of this case.

LEGISLATIVE PROVISIONS

18. Section 46 of the Act states that:

> "(1) The registration of a trade mark may be revoked on any of the following grounds–
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> (a) …
>
> (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
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> (c)…
>
> (d)...
>
> (2) For the purpose of subsection (1) 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 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.

[…]

(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."

19. Section 100 of the Act is also relevant, which 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."

CASE LAW

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

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-

9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

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

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

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

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

> '19. For the tribunal to determine in relation to what goods or services there has been genuine use of a mark during the relevant period, it should be provided with clear, precise, detailed and well-supported evidence as to the nature of that use during the period in question from a person properly qualified to know.
>
> …
>
> 22. … it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal … comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard

to the interests of the proprietor, the opponent and, it should be said the public.'"

21. Therefore, proven use of a mark which fails to establish that the "commercial exploitation of the mark is real" because the use would not be viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services protected by the mark is not, therefore, genuine use.

DECISION

Genuine use

22. Mr Fisher asserts within his witness statement that "It's all gravy" is an active brand.[3] He explains that it is a live clothing and accessory brand, and you can already buy "It's all gravy" branded kitchen items and clothing.[4] To support this, the proprietor provides screenshots of the "It's all gravy" mark on an apron and mug that are for sale online.[5] However, use on these goods is not being contested. Whilst Mr Fisher explains that this is just one example of the products available for sale, he has not provided any evidence of the mark being used on the goods that are contested such as gravy, sauces and condiments, or the services such as restaurants, catering services, mobile catering stalls, or food stalls.

23. Mr Fisher confirms that he has extended the brand to an "It's all gravy" branded cooking channel,[6] and has provided a screenshot of his "It's all gravy" Youtube channel which shows stills of cooking videos.[7] Nevertheless, this is not a service that is either protected under the mark or is being contested by the applicant, therefore it has no bearing on the assessment that I must make.

[3] Witness statement of Harry Richard Fisher, paragraph 2.
[4] Ibid paragraph 3
[5] Exhibits 01 and 02
[6] Witness statement of Harry Richard Fisher, paragraph 4.
[7] Exhibit 03

24. It is claimed that the Youtube channel is being used as advertising for the services, and to further support this, LinkedIn evidence is also provided.[8] The difficulty with this assertion is that the evidence does not show advertising of the mark, "It's all gravy", in connection with the contested services such as restaurants, catering services, and mobile catering stalls.

25. Furthermore, whilst I note that Mr Fisher is planning to provide food stall pop ups in the future using his brand,[9] it does not appear that these services have been provided within the relevant dates that I must consider as set out above at paragraphs 9 and 10.

Sufficient use

26. An assessment of genuine use is a global assessment, which involves looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[10] As indicated in the case law above, use does not need to be quantitively significant to be genuine, however it does need to be shown that there has been real commercial exploitation of the marks.

27. Having looked at the evidence, in my view, there is no evidence to demonstrate that the "It's all gravy" brand has been commercially exploited on the market for the goods and services being contested, i.e. gravy, sauces and condiments in class 30 and restaurant and catering services in class 43, within the relevant periods. From the evidence provided I cannot see that the "It's all gravy" marks have actually been used on the goods or services at issue. Further, there is insufficient evidence or information that would enable me to assess the scale and extent of the use of the proprietor's mark, the territory in which the use has occurred, or how geographically widespread any such use has been. Therefore, I am unable to conclude with any degree of certainty that the proprietor has attempted to create or maintain a commercial outlet for its goods and services within the UK.

[8] Exhibits 04 and 05.
[9] Witness statement of Harry Richard Fisher, paragraph 7.
[10] New Yorker SHK Jeans GmbH & Co KG v OHIM, Case T-415/09

28. The evidence provided falls far short of the sufficiency and solidity needed to meet the standard of proof required. Consequently, in my view, I am not satisfied that the proprietor's marks have been genuinely used in relation to the contested goods and services within the UK during the relevant periods.

CONCLUSION

29. The applications for revocation or partial revocation on grounds of non-use under section 46(1)(b) have been successful.

30. Consequently, UKTM No. 3103189, the first registered mark, is revoked entirely with effect from 5 September 2020.

31. With effect from 2 January 2021, UKTM No. 3130377, the second registered mark, is revoked with respect to the following services:

    Class 43: Restaurant; catering service; mobile catering stall; food stall.

32. With effect from 2 January 2021, UKTM No. 3129928, the third registered mark, is revoked with respect to the following goods and services:

    Class 30: Gravy; Gourmet Gravy; Sauces; Condiments.

    Class 43: Restaurant; Catering Services; Catering Stall; Mobile Catering Stall.

COSTS

33. As the cancellation applicant has been successful, it is therefore, entitled to a contribution towards its costs. As the applicant is unrepresented, it was invited by the Tribunal on 28 July 2024 to indicate whether it intended to make a request for an award of costs in the event that it was successful, and if so, it was requested

to complete a costs proforma including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. The deadline for providing the costs proforma was 27 August 2024. However, the applicant failed to file a completed cost proforma with the Tribunal. Consequently, no award for costs will be made other than for the official fees. I therefore award costs to the applicant on the following basis:

Official fees £200 x3:	£600
Total:	£600

34. I order Harry Richard Fisher to pay James Moody **£600**. 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 30th day of April 2025

Sarah Wallace
For the Registrar