

**O/0455/25**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION  
NO. 3918484 BY  
KEVIN VERRALL  
TO REGISTER THE TRADE MARK:**

**DREACOSS**

**IN CLASS 6**

**AND**

**OPPOSITION THERETO  
UNDER NO. 442349  
BY  
HENANCHENGZHIHAISHANGMAOYOUXIANGONGSI**

## BACKGROUND & PLEADINGS

1. Kevin Verrall (“the applicant”) applied to register the trade mark (“contested mark”) shown on the front page of this decision in the United Kingdom on 2 June 2023. It was accepted and published in the Trade Marks Journal on 16 June 2023 for the following goods:

**Class 6:** Metal Signs.

2. On 7 August 2023, HeNanChengZhiHaiShangMaoYouXianGongSi (“the opponent”) opposed the application on the basis of Section 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the sign “Dreacoss” which it claims to have used throughout the UK since June 2021 in relation to “*Advertising hoardings [structures] of metal; Doorplates of metal; House numbers of metal, non-luminous; Identification plates of metal; Memorial plaques, of metal; Metal license plates; Metal name plates; Metal nameplates and door nameplates; Nameplates of common metal; Placards of metal; Signboards of metal; Signplates made of metal; Stoppers of metal*”.
3. The opponent claims that use of the contested mark would be contrary to the law of passing off. It contends that the sign “Dreacoss” has been employed in the UK since 2020 and has managed to accrue “*considerable goodwill*”, with the company seeing a significant increase in sales volume for products under the mark. I note that this statement contradicts what the opponent said in response to Q2 of the form, i.e. that the sign was first used in the UK in June 2021. In this respect, the opponent claims that use of the contested marks would constitute a misrepresentation to the public that the applicant’s goods were either produced by, or associated with, the opponent in some way. The opponent argues that such a misrepresentation would damage its reputation, incurring loss of profits and eroding its goodwill.

4. The applicant filed a counterstatement denying the claims made. It also claimed to have used the sign in respect of which registration is sought for the goods in the specification since 2021.

### **Papers Filed and Representation**

5. The opponent's evidence consists of a witness statement dated 8 January 2023 from Ms Manman Li. Her evidence is accompanied by two exhibits (Exhibit 2 – Exhibit 3). Although the witness statement makes reference to Exhibit 1, it is noted that the opponent only provided the header sheet for the said exhibit without any accompanying documents. The Registry allowed the opponent to refile the evidence to address this issue; however, the opponent elected not to do so. Consequently, the Registry issued a preliminary view on 25 March 2024, admitting the witness statement of Ms Li together with Exhibits 2-3, which was not challenged by the opponent.
6. The applicant also filed evidence in these proceedings. This comes in the form of two witness statements from: 1) Noel James Akers, a Chartered Trade Mark Attorney of the representative of the opponent in these proceedings, whose witness statement is dated 22 May 2024 and is accompanied by five exhibits (NJA001-NJA005); and 2) Kevin Verrall, the applicant in these proceedings, whose witness statement is dated 22 May 2024 and is accompanied by nine exhibits (KV001- KV009). The applicant also filed submissions in lieu of a hearing.
7. I have taken the evidence and submissions into account in reaching my decision and will refer to them below, where necessary.
8. No hearing was requested and so this decision is taken following a careful consideration of the papers.
9. In these proceedings, the opponent is represented by Paweł Wowra and the applicant by N.J. AKERS & CO.

## EVIDENCE

### The opponent's evidence

10. In her witness statement Ms Li states the following:

“3. My Company have an established business selling metal signs throughout the UK and have done so for a considerable period predating the filing date of the contested application. This use has been continuous under the brand identifier. [...]

5. My Company has been trading in the UK and other regions under the contested sign, Dreacoss, with our range of metal signs, well before the contested application was filed on 19th May 2023. [...]

8. My Company doesn't operate a physical store; instead, we utilize established online platforms like AMAZON, with its broad reach and extensive customer base. This approach has significantly enhanced recognition and sales of My Company's Dreacoss-branded products.”  
(sic)

11. Ms Li mentions that Exhibit 1 “*shows a website printout and a screen shots [sic] taken from the UK e-commerce platform of AMAZON (www.amazon.co.uk), confirming my registration as a business seller under Dreacoss-UK [my seller identity for UK market].*” However, as noted above, the opponent submitted only the header for Exhibit 1 without any other accompanying documents. Therefore, there is no evidence to support the statement that the opponent is trading under the “Dreacoss-UK” business name on Amazon UK.

12. Exhibit 2 is dated with a print date of 7 January 2024 and includes screenshots from four listings on Amazon UK under the brand Dreacoss as delineated below. The first listing is titled “*New Metal Tin Sign Occupational Therapist...*” corresponding to Amazon Standard Identification Number (“ASIN”) B09F92BPHG as shown below.

Home Accessories > Signs & Plaques Sponsored

**New Metal Tin Sign Occupational Therapist You Matter poster Retro Metal Tin Sign Vintage Aluminum Sign for Home Coffee Wall Decor**

Brand: Dreacoss  
4.5 72 ratings

Colour Name:  
**Retro Sign04**

Size Name:  
**8x12inch**

**Colour** Retro Sign04  
**Brand** Dreacoss  
**Theme** Vintage  
**Mounting type** Wall Mount  
**Product dimensions** 30.5L x 20.3W centimetres

**About this item**

- Material: made of tin/metal iron, environmentally friendly and ...


I note that the product is listed under the ‘Dreacoss’ brand. Further, the product has received 72 ratings with an average score of 4.5. The exhibit also provides additional information, such as the ‘date first available’ of the product (recorded as 2 September 2021), along with customer reviews, the earliest of which is dated 20 May 2023. Importantly, the applicant has challenged this listing being offered by the opponent. In more detail, the applicant’s Exhibit NJA003 dated 14 May 2024 demonstrates that this listing, having the identical ASIN, is sold by “Top Banana Gifts”, the applicant’s trading business<sup>1</sup> on Amazon UK. I note that this can be seen in the opponent’s exhibit (reproduced below), which confirms that the given product is indeed sold by “Top Banana Gifts”. Notably, the opponent has

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<sup>1</sup> See Exhibits NJA001, KV001 and KV002.

not challenged Mr Verrall's statement that he operates as Top Banana Gifts.

**This Item**



**Dreacoss New Metal Tin Sign Occupational Therapist You Matter poster Retro Metal T...**

[Add to Basket](#)

<b>Price</b>	£8 <sup>99</sup>
<b>Delivery</b>	Get it 10 – 11 Jan
<b>Customer Ratings</b>	4.5 <span style="float: right;">72</span>
<b>Sold By</b>	Top Banana Gifts
<b>Material</b>	—
<b>Style</b>	Classic
<b>Shape</b>	Rectangular
<b>Mounting Type</b>	Wall Mount

In light of the above, it is clear that there is a significant discrepancy between the evidence and Ms Li's witness statement. Therefore, after considering both parties' evidence, it is reasonable to infer that the above product is offered by the applicant in these proceedings, whilst I cannot draw the same conclusion regarding the opponent.

- The second listing is titled "*Retro Metal Aluminium Tin Sign Let Me Check My...*" with ASIN B09879LDX1. Again, in this case, the applicant's Exhibit NJA004 dated 14 May 2024 shows that this item, bearing the same ASIN, is offered through the applicant's business (Top Banana Gifts). This is further confirmed in the opponent's exhibit presented below. Consequently, I find that, similarly to the previous instance, although the

given product is sold by the applicant, the evidence fails to substantiate the opponent's claim to sell the same product.

### Compare with similar items

This Item



Dreacoss Retro Metal Aluminium Tin Sign Let Me Check My Giveashitometer No..

Add to Basket

Price	£8 <sup>99</sup>
Delivery	Get it 10 – 11 Jan
Customer Ratings	4.6 <span>87</span>
Sold By	Top Banana Gifts
Material	Metal, Tin
Style	Vintage
Shape	Rectangular
Mounting Type	Wall Mount

14. The third listing is titled “*Retro Metal Tin Sign Giraffe...*” with ASIN B09F8YG1N9. I note that in this case, the exhibit shows that the item is sold by a third party, ‘ZhongminkejiUK’.

## Compare with similar items

This Item



**Dreacoss** Retro Metal Tin Sign Giraffe- Today is A Good Day to Smile More Worry Less Metal...

Add to Basket

Price	£11 <sup>99</sup>
Delivery	Get it as soon as <b>Wednesday, Jan 10</b>
Customer Ratings	4.5 <span style="float: right;">72</span>
Sold By	ZhongminkejijUK
Material	—
Style	Classic
Shape	Rectangular
Mounting Type	Wall Mount

In addition, I note that the applicant's Exhibit NJA005 dated 14 May 2024 demonstrates the same item with the identical ASIN sold by the applicant's business. Although I recognise that the product is sold by multiple sellers, there is no evidence that shows that the opponent is among them.

15. The fourth listing is titled "*Funny Cow Live Like Someone Left The Gate Open...*" with ASIN B09FXRZD7X. I note that the listing only includes information about the manufacturer, lacking any details concerning the seller. In his witness statement, Mr Akers mentions that he performed a search on Amazon UK on 14 May 2024 using the same ASIN, yielding no results. I also note that the opponent's exhibit indicates that the item was 'currently unavailable' for purchase from any seller on 7 January 2024. As a result, I consider this listing to have no evidential value for the opponent.
16. Ms Li states that Exhibit 3 consists of screenshots taken from the opponent's "*Amazon Seller Central and confirms that some 171 products have been sold through this site, the majority of which predate the filing date of the contested application.*" The screenshots illustrate search results from the archived order report, covering the period between 1 April

2021 and 2 July 2023. Ten of the 11 orders shown are related to the listings presented in Exhibit 2. Although the applicant, in its submissions and witness statement, highlights that the seller's name is indicated as 'HuoChai,' this is not evident from the exhibit itself. The screenshots appear to be cropped, containing only the relevant product information and delivery details, with the text at the bottom of the first two pages of the exhibit also being cut off. In addition, Ms Li states in paragraph 9(b)(ii) of her witness statement that a particular product, B09879LDX1, has received 231 ratings. However, in paragraph 9(c), she mentions that the opponent has sold 171 units. As a result, it is reasonable to infer that some of the above ratings come from sales from other traders, and I cannot determine from the information provided whether the sales of these products originate solely from the opponent.

### **The applicant's evidence**

#### Witness Statement of Kevin Verrall

17. In his witness statement, Kevin Verrall provides background information about his trading activities selling "*novelty and gift items, including a wide range of metal signage products.*" In this regard, he points out that "*[s]ince 2021, I have been active in the sale of a range of metal signage products under the DREACOSS mark in the UK.*"
18. Exhibit KV001 contains a screenshot of Mr Verall's VAT registration details from the *tax.service.gov.uk* website. Mr Verall mentions that he also trades as 'Top Banana Gifts' on Amazon UK, and to that extent, he provides Exhibit KV002, which comprises undated screenshots from Amazon UK that display various details regarding the Top Banana Gifts seller account. I note that the VAT number listed for this seller corresponds to Mr Verall's VAT number shown in Exhibit KV001.
19. Exhibits KV003 - KV008 are undated screenshots of 91 search results for products bearing the DREACOSS mark available from Top Banana Gifts on Amazon UK.

20. Exhibit KV009 is a screenshot dated 15 May 2024, showcasing the Top Banana Gifts seller account on Amazon UK. I note that the screenshot is a search using “Dreacoss” as the keyword, revealing a total of 1,378 orders between 1 January 2020 and 2 June 2023, with the details from three orders included in this exhibit. These orders pertain to the listing with ASIN B09879LDX1, and the earliest order is dated 27 April 2023.

Witness Statement of Noel James Akers

21. I will briefly summarise the evidence provided with Mr Akers’s witness statement. The first two exhibits, namely NJA001-NJA002 mirror Mr Verall’s Exhibits KV001-KV002. As described above, Exhibits NJA003-NJA005 consist of screenshots demonstrating listings on Amazon UK.

**DECISION**

22. 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.”

23. 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.”

24. 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).”

25. ‘Halsbury’s Laws of England Vol. 97A’ (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently

similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

### **The Relevant Date**

26. I must first determine the relevant date. The prima facie relevant date under Section 5(4)(a) is the filing date but use before the filing date may be relevant. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC (as he then was), as the Appointed Person, 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.

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.”

27. In *Smart Planet Technologies, Inc. v Rajinda Sharma* (BL O/304/20), Mr Thomas Mitcheson QC (as he then was), 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 the 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), he or she will not normally be passing off by continuing to use the mark.
28. The contested mark in suit was applied for on 2 June 2023, and that filing date is the relevant date. However, if the applicant had used the contested mark prior to this date then this use must also be taken into account. It could, for example, establish that the applicant is the senior user, or that there had been common law acquiescence, or that the status quo should not be disturbed; any of which could mean that the applicant’s use would not be liable to be prevented by the law of passing-off – see the comments in *Croom’s Trade Mark Application* [2005] RPC 2 and *Daimlerchrysler AG v Javid Alavi* (T/A Merc) [2001] RPC 42.

29. The onus is on the party claiming antecedent rights to adduce evidence of those rights. In the present case, the applicant, Mr Verrall, states in his witness statement that:

“8. I trade as ‘Top Banana Gifts’ in the UK via [www.amazon.co.uk](http://www.amazon.co.uk) (‘the Amazon UK platform’). [...] As of 13 May 2024, I have 12,814 lifetime ratings on the Amazon UK platform, averaging 4.8 out of 5 stars.

9. Since 2021, I have been active in the sale of a range of metal signage products under the DREACOSS mark in the UK.”

As outlined above, the applicant presented evidence that includes extracts from Amazon UK. While most of the applicant’s evidence is either undated or has a print date of May 2024, some dates can be deduced from the user reviews. In this respect, I note that the earliest review, as indicated in Exhibit NJA003, is dated 14 January 2023. Although Mr Verrall makes an unchallenged statement that he has been using the DREACOSS sign in the UK since 2021, there is no corroborating information for the extent of it. Despite there being 1378 orders, only three of them are visible and there is no information as to when the first one was placed. Based on the evidence before me, I find that the applicant has not shown antecedent use and that the relevant date for assessing whether the opponent had protectable goodwill is the date of application for the contested mark: **2 June 2023.**

### **Goodwill**

30. The opponent must show that it had a protectable goodwill in a business at the relevant date and that the sign relied upon is associated with, or distinctive of, that business.
31. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217, at paragraph [224]:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantages 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. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which it emanates.”

32. In *Smart Planet Technologies, Inc. v Rajinda Sharma* (BL O/304/20), Mr Thomas Mitcheson QC (as he then was), as the Appointed Person, reviewed the following authorities about the establishment of goodwill for the purposes of passing-off: *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31, paragraph 52, *Reckitt & Colman Product v Borden* [1990] RPC 341, HL and *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd* [1980] R.P.C. 31. After reviewing these authorities Mr Mitcheson concluded that:

“[...] 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.”

33. Before my assessment of whether the opponent has accrued a protectable goodwill, I note that the applicant in its submissions in lieu extensively criticised the opponent’s evidence, stating in its closing remarks the following:

“An examination of the evidence of the Opponent, in particular the product listings provided in Exhibit 2, and corresponding Exhibits NJA003 to NJA005 would indicate that, contrary to the assertions in

Section 6 of the Witness Statement, the DREACOSS Mark is not unique to the Opponent.

The evidence provided in the Opponent's Exhibit 3 appears to demonstrate product listings and sales, at least some of which appear to have been made after the relevant date, from the seller 'HuoChai', which has not been demonstrated to be legally related to the Opponent. The Opponent therefore fails to demonstrate that it held protectable goodwill in the DREACOSS Mark at the relevant date, that is prior to 2 June 2023.

Notwithstanding the above, to the extent the Opponent considers total UK sales of significantly fewer than 171 units before the relevant date to be sufficient to establish protectable goodwill in the DREACOSS Mark in the UK, it is noted that the Proprietor in fact boasts significantly more sales over the same period. Accordingly, it follows that it was in fact the Proprietor that held protectable rights in the DREACOSS Mark at the time of filing the Application, which it continues to enjoy. It is therefore submitted that the Trade Mark register should be allowed to reflect this.

Accordingly, we hereby submit that the Opponent has failed to substantiate its grounds for opposition under Section 5(4)(a) of the Act and that the Application should therefore be allowed to proceed to registration."

*Does the evidence show that the applicant had protectable goodwill at the relevant date?*

34. Goodwill, which is protectable under the law of passing off, must be more than trivial. I also bear in mind that a small business may nevertheless establish goodwill.<sup>2</sup> The evidence the opponent has filed is anything but compelling to satisfy me that it had the requisite level of goodwill in the UK

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<sup>2</sup> See *Lumos Skincare Limited v Sweet Squared Limited and others* [2013].

in a business providing any of the goods relied upon. My reasons for this conclusion are given below and, in this connection, I have borne in mind that in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

35. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand

Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application."

36. Further, in *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J. (as he then was) stated that:

"62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used "but had not acquired any significant reputation" (the trial judge's finding). Again that shows one is looking for more than a minimal reputation."

37. Earlier in this decision, I have delineated the various deficiencies in the opponent's evidence. Importantly, even though the opponent had the opportunity to refile its evidence to rectify the issue with the missing Exhibit 1 or to file evidence in reply to address the applicant's criticisms and challenges, it elected not to do so.

38. Upon reviewing the evidence, and as detailed in paragraphs 12-15 of this decision concerning Exhibit 2, it is apparent that there is no evidence to suggest that the products were offered by the opponent.<sup>3</sup> At this point, I also note that the opponent failed to file Exhibit 1, which could have provided corroborative evidence of the opponent's trading activities under the "Dreacoss" brand. Therefore, I cannot but conclude that any sales attributable to the "Dreacoss" sign under Exhibit 2 could not be safely associated with the opponent.
39. In light of the fact that the Amazon listings mentioned in the previous paragraph are not associated with the opponent, it follows that Exhibit 3 lacks evidential value. There is no way for me to determine with precision under which Amazon Seller account such sales were made. This is due to the absence of the seller's identity on the exhibit, coupled with the applicant's direct challenge to Exhibit 3, which the opponent has chosen not to reply to. Even if I were to entertain the possibility that Exhibit 3 reflects sales attributed to the opponent (which I reiterate is not evident from the exhibit itself), I am not prepared to infer that such material alone establishes a protectable goodwill. This is also true even when considering the opponent's documentary evidence that the opponent's sales exceeded 170 units over a two-year period. In accordance with *Recup*, I consider the volume of these sales alone over that period to be insufficient to demonstrate a level of protectable goodwill. Lastly, I also note that there is no other information regarding the opponent's marketing and promotion efforts or the size of the UK market it possesses for the given products, further compounding the deficiencies of the evidential picture in the opponent's case.
40. Bearing in mind all the above, I do not consider that the evidence is sufficient to show that the opponent had the requisite goodwill at the

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<sup>3</sup> For example, the listing with ASIN B09F8YG1N9 was offered by another individual/entity, while the seller's identity for ASIN B09FXRZD7X is not included in the exhibit.

relevant date to succeed in its claim of passing off. The opposition under Section 5(4)(a) fails.

## **OUTCOME**

41. **The opposition under Section 5(4)(a) of the Act fails**, and, subject to a successful appeal against this decision, the application will proceed to registration.

## **COSTS**

42. The applicant has been successful and is entitled to a contribution towards his costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 1/2023. I award costs as follows:

Preparing a counterstatement in the opposition and considering the other side's statement	<b>£300</b>
Preparing evidence and considering and commenting on the other side's evidence	<b>£700</b>
Filing submissions in lieu of a hearing	<b>£400</b>
Total	<b>£1,400</b>

43. I, therefore, order HeNanChengZhiHaiShangMaoYouXianGongSi to pay to Kevin Verrall the sum of £1,400. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 23<sup>rd</sup> day of May 2025**

**Dr Stylianos Alexandridis**  
**For the Registrar,**  
**The Comptroller General**