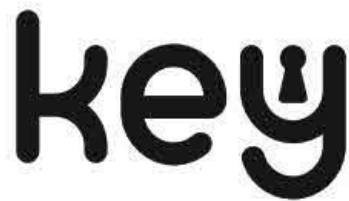


O/1061/24

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NUMBER UK00003704439
BY FEMTECH HEALTHCARE LIMITED
TO REGISTER THE FOLLOWING TRADE MARK:**

The word "key" is written in a lowercase, rounded, sans-serif font. The letters are thick and black, with a slightly irregular, hand-drawn appearance. The 'k' has a short vertical stem, the 'e' is a simple oval, the 'y' has a small loop at the top and a tail that curves to the right.

IN CLASSES 3, 5, 9, 38, 41, 42 AND 44

AND

**AN OPPOSITION THERETO UNDER NUMBER 430729
BY CHRISTINE MCGRORY**

BACKGROUND AND PLEADINGS

1. On 30 September 2021, Femtech Healthcare Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK under number 3704439 (“the contested mark”). The application was accepted and published for opposition purposes on 5 November 2021 and registration is sought for goods and services in Classes 3, 5, 9, 38, 41, 42 and 44.¹

2. On 2 February 2022, Christine McGrory (“the opponent”) opposed the application, in full, based upon sections 5(1), 5(2)(a), 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”).²

3. The trade marks relied upon by the opponent (collectively, “the earlier marks”), as well as the grounds for which they are relied upon, are listed below:

(i) UK00002531459 (“the 459 mark”)

Representation: The Key

Filing date: 13 November 2009

Registration date: 12 March 2010

Services relied upon: All in Class 41

Grounds: 5(1), 5(2)(a) and 5(3)

(ii) UK0003045211 (“the 211 mark”)

Representation: The Key

Filing date: 5 March 2014

Registration date: 8 August 2014

Services relied upon: All in Class 35

Grounds: 5(1), 5(2)(a) and 5(3)

¹ These are listed in Annex 1 to this decision.

² 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.

(iii) UK00002630763 ("the 763 mark")



Representation:

Filing date: 6 August 2012

Registration date: 18 January 2013

Services relied upon: All in Classes 35 and 41

Grounds: 5(2)(b) and 5(3)

(iv) UK00003001525 ("the 525 mark")

Representation: The Key New Generation/THE KEY NEW GENERATION

Filing date: 11 April 2013

Registration date: 2 August 2013

Services relied upon: All in Class 41

Grounds: 5(1), 5(2)(a) and 5(2)(b)

(v) UK00003047701 ("the 701 mark")



Representation:

/

Filing date: 19 March 2014

Registration date: 13 June 2014

Services relied upon: All in Classes 35 and 41

Grounds: 5(1), 5(2)(a) and 5(2)(b)

4. The marks relied upon by the opponent are considered earlier marks in accordance with section 6(1)(a) of the Act given that they were filed for registration earlier than the date of application for the contested mark.

5. The earlier marks had all been registered for more than five years at the date of application for the contested mark and so, in accordance with section 6A of the Act,

they are subject to proof of use; the opponent made a statement of use in relation to all the services relied upon, which are listed in Annex 2 to this decision.

6. Under section 5(1), the opponent claims that the contested mark is identical to the 459, 211, 525 and 701 marks and that the parties' respective goods and services are identical, meaning the contested mark should be refused registration.

7. Under section 5(2)(a), the opponent claims that the contested mark is identical to the 459, 211, 525 and 701 marks and that the parties' respective goods and services are similar, resulting in a likelihood of confusion.

8. Under section 5(2)(b), the opponent claims that the contested mark is similar to the 763, 525 and 701 marks and that the parties' respective goods and services are similar, resulting in a likelihood of confusion.

9. Under section 5(3), the opponent claims that the 459, 211 and 763 marks have a reputation in the UK and that use of the contested mark, without due cause, would take unfair advantage of, or be detrimental to, the distinctive character or reputation of the earlier marks.

10. The applicant filed a defence and counterstatement denying each ground of opposition. The applicant requested proof of use of the earlier marks and put the opponent to proof of its claimed reputation in the relevant earlier marks.

11. During the evidence rounds, both parties filed evidence in chief and the opponent filed evidence in reply. A hearing took place before me on 17 April 2024. The opponent represented herself and the applicant was represented by Carla MacLachlan of Ansons.

PRELIMINARY ISSUE

12. In its evidence and submissions, the opponent makes reference to "passing off". Passing off is provided for under section 5(4)(a) of the Act; the opponent has not raised

this ground in its notice of opposition and so I will say no more about submissions relating thereto.

EVIDENCE AND SUBMISSIONS

13. The opponent filed evidence in chief in the form of the first witness statement in her own name, Christine McGrory, dated 30 May 2023, and its corresponding 72 exhibits (CM00 – CM71). The witness statement is, *inter alia*, a vehicle for introducing the exhibits; it also contains narrative evidence of the opponent’s business as well as submissions going to each ground of opposition.

14. The applicant filed evidence in chief in the form of the witness statement of Carla MacLachlan, dated 29 August 2023, and its corresponding four exhibits (KEY1 – KEY4). The exhibits include screenshots of the applicant’s and opponent’s respective websites, intending to show use of the parties’ goods and services. The applicant also filed written submissions on 29 August 2023.

15. The opponent filed evidence in reply in the form of the second witness statement of Christine McGrory, dated 4 December 2024, and its corresponding 16 exhibits (CM00 – CM15). The witness statement replies to the applicant’s written submissions: it includes narrative evidence and submissions.

16. I have considered the evidence and submissions in their entirety and will refer to them where necessary throughout this decision.

DECISION

Proof of use

Statutory provisions

17. Section 6A of the Act is as follows:

“(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.”

18. 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.”

Relevant case law

19. 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 Bunderversvereinigung 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].”

20. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander QC (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.”

21. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs QC (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."

22. What I take from this case law is that there is no requirement to produce any specific form of evidence, but that I must consider what the evidence as a whole shows me and whether on this basis I can reasonably be satisfied on the balance of probabilities that there has been genuine use of the mark.

Relevant period

23. For the purposes of these proceedings, the relevant period in which the opponent must demonstrate genuine use of its earlier marks is the five-year period ending with the date of application for the contested mark, i.e., 1 October 2016 to 30 September 2021 ("the relevant period").

Preliminary points

24. The opponent filed evidence in chief and evidence in reply. However, the evidence in reply does not contain any evidence of use of the earlier marks. As such, any references I make in this section to the opponent's witness statement and exhibits

relate to the opponent's evidence in chief, i.e., Christine McGrory's first witness statement and the corresponding exhibits, CM00 – CM71.

25. The opponent filed over 300 pages of evidence, the majority of which is not useful for demonstrating proof of use of the earlier marks. There are multiple issues with the evidence: I will set out the main ones under separate headings. Given the volume of irrelevant evidence, I do not intend to refer to it all, nor to explain why individual pieces of evidence are not useful, beyond what I set out in this section. However, I have carefully considered the evidence in its entirety and, later in this section, will refer to the evidence that is relevant and make the appropriate assessments of the evidence overall.

a) Submissions

A large proportion of the witness statements and exhibits contain submissions, in which the opponent argues its case, as opposed to evidence of fact.³ This does not assist in demonstrating genuine use.

b) Undated evidence

Of the exhibits that do constitute evidence of fact, a large proportion are undated.⁴ Where the evidence is not dated, nor explained in the witness statements as pertaining to a particular date, it is not open to me to assume it is dated within the relevant period. Even if I were to infer that some of the undated evidence was created shortly before the evidence was filed (May 2023 for the opponent's evidence in chief), that still falls approximately 20 months after the end of the relevant period. Accordingly, any undated evidence does not assist in demonstrating genuine use.

c) Evidence featuring none of the earlier marks

³ CM04-07, for example.

⁴ CM20, for example.

There are multiple pages of evidence that do not feature any of the earlier marks relied upon.⁵ The purpose of these exhibits is unclear, as they do not contribute towards showing use of the marks.

d) Hearsay

Several letters have been filed as evidence, purportedly written by individuals with an interest in the opponent's company – clients and business associates, for example.⁶ There are other pieces of evidence of a similar nature: an email referring to the intended concept of one the earlier marks and an email regarding the author's views on the likelihood of confusion,⁷ amongst others. These documents have all been solicited for the purpose of the proceedings, without the individual having given evidence in the form of a witness statement, affidavit or statutory declaration. In accordance with the Civil Evidence Act 1995 and the Civil Procedural Rules ("CPR") I will treat this evidence as hearsay and, in line with the considerations set out therein, give very little weight to it.

e) Without prejudice correspondence

The opponent has filed email correspondence between the parties.⁸ This constitutes without prejudice material, and it will not be taken into account in determining these proceedings.

f) Illegible evidence

There are several exhibits containing screenshots that are so small their content is not clear enough to be read, even when zoomed in.⁹ It is self-evident that this evidence is not sufficient.

⁵ CM18-19, for example.

⁶ CM10.

⁷ CM09 and CM10, respectively.

⁸ CM40.

⁹ CM33, 42 and 58, for example.

g) Variant use

Throughout the evidence, including within the few exhibits that are dated within the relevant period, a sign different to the earlier marks relied upon is used: “Unlock The Key/UnlockTheKey”.¹⁰ This features in multiple exhibits, including the majority of the social media evidence.¹¹ Where there is use of a sign in a differing form to the mark/s, as registered, it is necessary to decide whether that sign constitutes genuine use of the registered mark/s. In making that decision, I have borne in mind the following case law.

i. In *Colloseum holdings AG v Levi Strauss & Co.*,¹² the CJEU found that:

“[...] 35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1).”

ii. In *Lactalis McLelland Limited v Arla Foods AMBA*,¹³ Phillip Johnson, sitting as the Appointed Person, said:

“16. [...] Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 [*Arktis*], EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).”

¹⁰ Other signs are used throughout the evidence but given their sparsity I do not intend to assess them for variant use as it would not improve the opponent's case.

¹¹ CM16, CM25 and CM27, for example.

¹² Case C-12/12.

¹³ BL O/265/22.

- iii. In *Austria Tabak GmbH v EUIPO*,¹⁴ the GC upheld the finding that the differences between the registered word mark AIR and the marks actually used – MEMPHIS AIR BLUE and MEMPHIS AIR BLUE 100 (as well as figurative marks) – were differences which altered the distinctive character of the registered trade mark.

The addition of the word ‘unlock’ to the registered word mark “The Key” (the 459 and 211 marks) changes the concept and alters the distinctive character of the registered trade mark; it is not a descriptive, suggestive, or non-distinctive addition. Therefore, use of “Unlock The Key/UnlockTheKey” (whether word-only or stylised) does not constitute genuine use of any of the earlier marks relied upon.

Assessment of the evidence

26. Having set out the main issues with the evidence, I will now proceed to consider the evidence that is relevant to the assessment of genuine use. There are only a limited number of exhibits which are unaffected by the issues discussed at paragraph 25, above.

27. The evidence that contains one of the earlier marks, as well being dated within the relevant period, can be summarised as:

- a) A screenshot of an email campaign titled “THE KEY ONLINE WELCOME” which started on 28 October 2019.¹⁵ Ms McGrory explains that this email is sent to “anyone who registers and purchases one of our online training and education services”, though there is no evidence as to how many people received the email.

¹⁴ Case T-800/19, EU:T:2020:324.

¹⁵ CM17.

- b) The images shown below, which have been inserted into an exhibit and titled “A] Key to Health FOR LIFE course [Image date 2018] – 6 month Health Programme Women Only”.¹⁶ It is not clear where these images have been taken from, or who has seen them, only that they relate to “online courses”.¹⁷

A] Key to Health FOR LIFE course [Image date 2018] - 6 month Health Programme Women Only



- c) Social media posts and photographs relating to campaigns in 2018 and 2019,¹⁸ the purpose of which was for women involved with the opponent’s company to share their stories. Only one social media post features the mark “The Key”: a post, dated 1 March 2018, which is written by someone seemingly involved with the opponent’s business, and refers to “[being] involved with The Keys All Women campaign[...]”. All other posts do not feature any of the earlier marks; they refer to the campaign as the “ALL WOMEN” campaign and/or refer to “UnlockTheKey”. Two photographs of the 2019 event, shown below, feature the mark “The Key”.¹⁹



¹⁶ CM29.

¹⁷ Christine McGrory’s witness statement at [26].

¹⁸ CM31-32.

¹⁹ CM32.

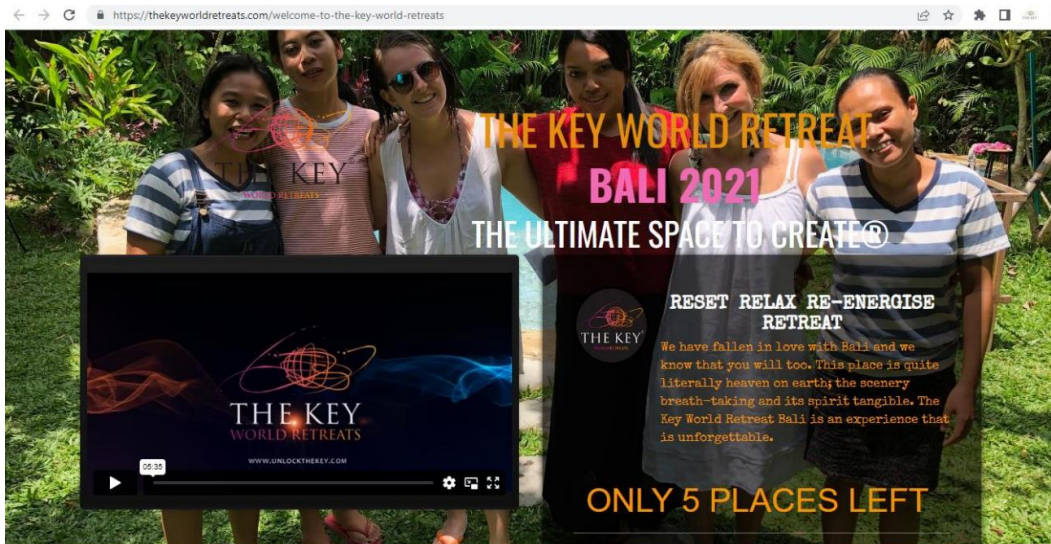
- d) An article in Scotland's newspaper, The Sunday Mail, dated February 2018.²⁰ The article relates to a TV presenter named Jean Johansson and refers to a course she attended the previous year. Due to the size of the screenshot of the article, the text is not easily discernible, but the following is visible from the start of the article: "I had a brilliant experience learning to 'unlock the key' with The Key course in London last year and I'm happy to tell you there's a workshop coming to Glasgow."
- e) The description of a podcast episode dated February 2020, which is titled "The Key has taught me to be brave again."²¹ The episode featured on the "Unlock The Key" podcast.
- f) A social media post from an account named "The Natural Exhibition", dated 28 May 2017, which reads "Another fantastic speaker joining us is Lauren Taylor from The Key to Health & Wellbeing[...]" In this context, the mark "The Key" is not used solus. In accordance with the variant use case law cited at paragraph 25(g), above, 'The Key to Health & Wellbeing' does not constitute use of the mark "The Key", since the additions alter the distinctive character of the mark.
- g) Narrative evidence referring to "Key World Retreats" in Morocco, Bali, Ibiza and Scotland between 2017 and 2020,²² which "approximately 60 women have attended". These are described as health retreats for women involving detoxing, healthy eating, adventure trips and walking.²³ It is not clear from the evidence whether the women who attended were from the UK, which is the relevant territory in these proceedings. Neither is it clear which services from the opponent's specifications are offered as part of these retreats. The marks shown on the content relating to the retreats are shown below.

²⁰ CM33.

²¹ CM38, page 3.

²² CM51.

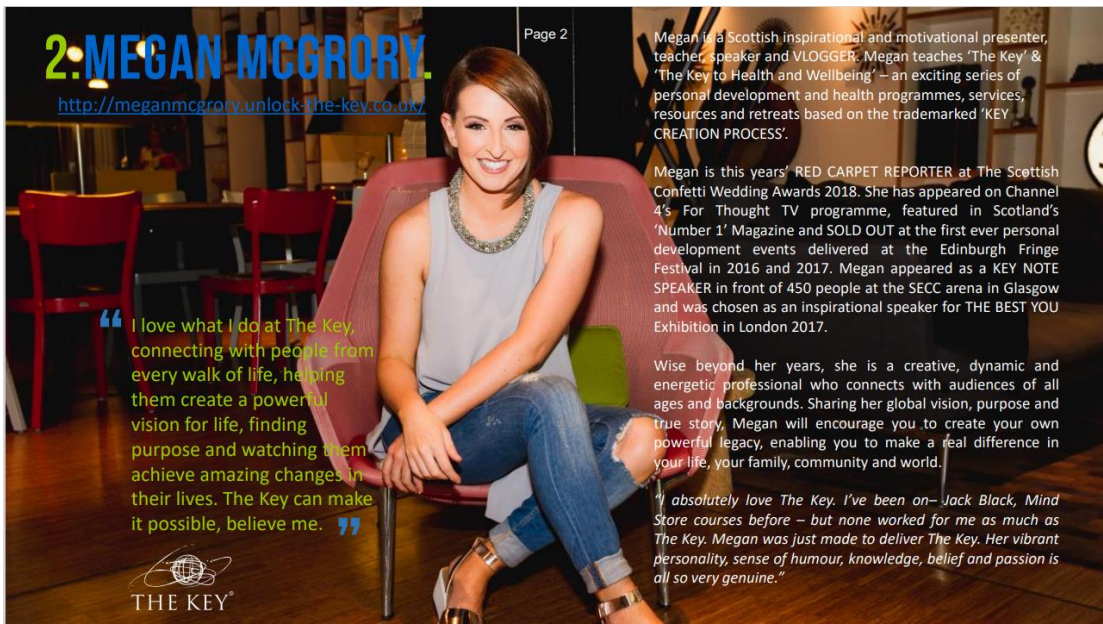
²³ CM51, page 3.



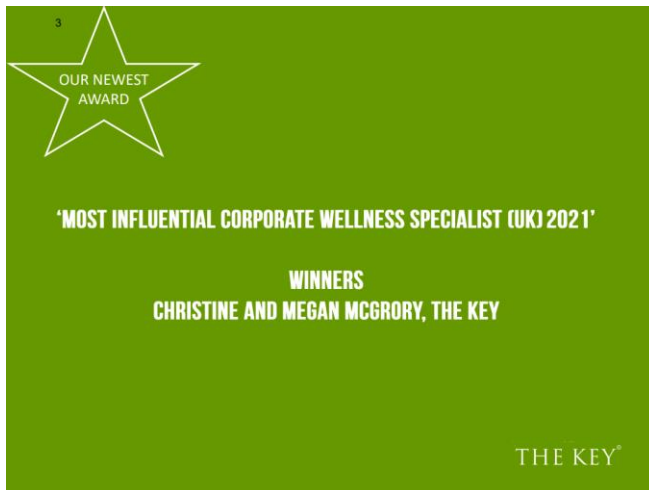
- h) An Amazon review, dated 31 January 2021, of a book titled “Grace” which was written by the opponent.²⁴ The review includes the following: “[...] The Key has changed my life [...]”. It is not clear whether, in the context of the book, “The Key” is being used as a trade mark in relation to specific services.
- i) What appears to be an article relating to Megan McGrory, the daughter of the opponent.²⁵ It is not dated but given the text reading “Megan is this years’ [sic] RED CARPET REPORTER at The Scottish Confetti Wedding Awards 2018” it seems as though the article was written in 2018. The text also reads “Megan teaches ‘The Key’ & ‘The Key to Health and Wellbeing’ – an exciting series of personal development and health programmes, services, resources and retreats based on the trademarked ‘KEY CREATION PROCESS’”. It is not clear where the article featured or the identity or size of the audience, but the content is shown below.

²⁴ CM53, page 2.

²⁵ CM54, page 2.



j) Narrative evidence that the opponent won 'Most Influential Corporate Wellness Specialist (UK) 2021'.²⁶ It is not clear in the exhibit, nor explained in the witness statement, what award this relates to or who awarded it to the opponent. The content of the exhibit is shown below.



28. From the evidence above, where it is not obvious where it originated from or who has viewed it, it does not assist me in concluding genuine use.

²⁶ CM57.

29. In addition to the evidence detailed in the previous paragraph, there is some evidence dated 2010 and 2011, referring to the launch of the opponent's business – approximately five years before the start of the relevant period.²⁷ There is also a reference to “The Key” on Channel 4 in 2013 – two years before the start of the relevant period. There is also evidence dated after the relevant period: an article on LinkedIn refers to product diversification in 2022.²⁸ Whilst evidence prior to the relevant period may be sufficient to indicate preparation for the use of marks, and evidence dated shortly after the end of the relevant period may cast light backwards, the evidence needs to be sufficiently solid for me to be able to build a picture of what was happening during the relevant period. Whilst the opponent clearly has a business, whether each of the marks are used, in accordance with the essential function of a trade mark,²⁹ in relation to that business and for what services, is not as clear. There are no sales figures, invoices for services, or details on the opponent's marketing spend, during the relevant period or otherwise, that evidence actual trade. Whilst this is not fatal, it is evidence that would have been available to the opponent but has not been provided.

30. Whilst I am cognisant of the need not to look at each piece of evidence individually but consider what they collectively show, the evidence does not build a clear picture of which earlier marks are used to identify which services. The social media accounts (Facebook, Instagram and YouTube) as well as online community groups, the printouts of the opponent's website and the opponent's podcast are all in the name “Unlock The Key”, which I have already found not be acceptable use of any of the earlier marks.

31. The high point of the opponent's evidence is that which relates to health retreats, addressed in my paragraph 27(g), above. The narrative evidence and the corresponding images appear to show that 60 women attended retreats under the mark ‘The Key’ during the relevant period. However, as I explained in the same paragraph, it is not clear whether the consumers were from the UK, nor whether the services offered at those retreats correspond with the services in the earlier marks’

²⁷ CM02, CM20 and CM26, for example.

²⁸ CM08.

²⁹ See *easyGroup Ltd*, cited above.

specifications. This evidence falls short of being sufficiently solid to demonstrate genuine use.

32. Much of the remainder of the evidence is either undated or dated outside the relevant period, or is affected by the issues discussed earlier in this decision. What remains is very limited evidence, from which I would have to draw multiple inferences to consider it sufficiently solid. It is for the opponent to file its best evidence up front,³⁰ however, what has been filed is difficult to follow. The evidence as a whole lacks clarity and specificity and I cannot conclude with any certainty that there has been genuine use of the earlier marks and on what services.

Conclusion

33. Since the opponent has not demonstrated proof of use of any of its earlier marks, the opposition under sections 5(1), 5(2) and 5(3) fails in its entirety and the application will proceed to registration.

COSTS

34. The applicant has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice (“TPN”) 2/2016. I award the applicant the sum of £1950, calculated as follows:

Preparing a statement and considering the other side’s statement:	£350
Preparing evidence and considering and commenting on the other side’s evidence:	£800
Preparing for an attending a hearing:	£800
Total	£1950

³⁰ *Guccio Gucci SPA v Gerry Weber International AG*, BL O/424/14.

35. I therefore order Christine McGrory to pay Femtech Healthcare Limited the sum of £1950. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the final determination of the appeal proceedings.

Dated this 8th day of November 2024

MRS E FISHER

For the Registrar

Annex 1 – The applicant’s specification

Class 3: Cosmetics; skincare; make up; nail care; body and beauty care; soaps; haircare preparations; perfumery.

Class 5: Vitamin and mineral supplements; vitamin and mineral preparations; dietary supplements and preparations.

Class 9: Computer software; computer application software; downloadable computer software applications; computer application programmes for smartphones, tablet computers, mobile devices; computer databases; computer network hubs.

Class 38: Providing online forums; providing online discussion services; providing online chatroom services; providing access to online forums; providing access to online chatrooms; providing access to databases; providing online access to data; providing access to multimedia content online; providing user access to online sites containing information on a wide range of topics; providing user access to a global computer network and online sites containing information on a wide range of topics; providing online chat rooms and electronic bulletin boards for transmission of messages among users in the fields of general interest.

Class 41: Training and educational services in connection with woman's menstruation cycles, fertility and menopause.

Class 42: Hosting online facilities for conducting interactive discussions.

Class 44: Medical services and healthcare services; medical and healthcare services relating to woman's health; medical and healthcare services relating to woman's health during all stages of life; advisory services relating to female health; advisory services relating to medical issues in connection with female health; advisory services relating to woman's health during the different stages of life.

Annex 2 – The opponent’s specifications

The 459 mark

Class 41: Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, workshops and conferences in the field of law of attraction, education and training; computer assisted education services; computer based education services; education services relating to vocational training; information relating to entertainment or education provided on-line from a computer database or the Internet; organisation of shows; presentation of live performances; production of shows; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices); provision of information, advisory and consultancy services; consultancy and advice relating to all the aforesaid services.

The 211 mark

Class 35: Franchising and franchise consultancy services, business and management advice and provision of information relating to franchising and licencing; all relating to educational services in the nature of personal development courses, mentoring, corporate training; excluding any such services relating to publishing, digital publishing, online publishing via the Internet and social media.

The 763 mark

Class 35: Franchising and franchise consultancy services, business and management advice and provision of information relating to franchising.

Class 41: Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, workshops and conferences in the field of law of attraction, education and training; computer assisted

education services; computer based education services; education services relating to vocational training; information relating to entertainment or education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials and educational texts; organisation of shows; presentation of live performances; production of shows; publishing services, including publishing services in relation to electronic publications in the field of law of attraction, education, training and the organisation of seminars; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices).

The 525 mark

Class 41: Provision of education and training; educational services; training services; arranging and conducting of shows, conferences, congresses, seminars, symposiums and workshops for educational purposes; organisation of seminars, workshops and conferences in the field of law of attraction, education and training; computer assisted education services; computer based education services; education services relating to vocational training; information relating to entertainment or education provided on-line from a computer database or the Internet; publication of education materials; publication of educational printed matter, educational teaching materials and educational texts; organisation of shows; presentation of live performances; production of shows; publishing services, including publishing services in relation to electronic publications in the field of law of attraction, education, training and the organisation of seminars; providing digital audio and video (not downloadable) from a global communications network (including, but not restricted to, the Internet, websites and mobile communication devices).

The 701 mark

Class 35: Arranging and conducting seminars and exhibitions for business purposes; franchising and franchising consultancy services; business advice relating to franchising; provision of business information relating to franchising; market research and analysis; marketing services and marketing studies; business management

services; business advice and investigation services; administrative services for business; counselling services; arranging and conducting conferences, congresses, seminars, symposiums, workshops and exhibitions for business purposes.

Class 41: Arranging and conducting seminars and exhibitions for business purposes; franchising and franchising consultancy services; business advice relating to franchising; provision of business information relating to franchising; market research and analysis; marketing services and marketing studies; business management services; business advice and investigation services; administrative services for business; counselling services; arranging and conducting conferences, congresses, seminars, symposiums, workshops and exhibitions for business purposes.