

O-185-17

IN THE MATTER OF THE TRADE MARKS ACT 1994

AND IN THE MATTER OF AN APPLICATION UNDER NO 500879

BY DF WORLD OF SPICES GMBH

FOR CANCELLATION OF REGISTRATION NO 2442798

FOR THE TRADE MARK BAMBOO GARDEN (stylised)

IN THE NAME OF LAIN FUNG FOODS LTD

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF

Mrs A CORBETT DATED 23 JUNE 2016

DECISION

1. This is an appeal from a decision of Mrs Ann Corbett the Hearing Officer for the Registrar, in which she found that the registration of a stylised mark, No. 2442798, should be revoked for non-use with effect from 30 June 2012. Lain Fung Foods Ltd, the proprietor of the cancelled mark (“the Proprietor”) appeals that decision.

Background

2. Trade mark No. 2442798 (“the Mark”) was for the trade mark below:



3. The application for the Mark was filed on 2 May 2002 and the Mark was entered on the register on 29 June 2007, for:

Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats.

Class 30: Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice.

Class 31: Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits and vegetables; seeds natural plants and flowers; foodstuffs for animals, malt.

4. DF World of Spices GmbH ("the Applicant") applied for cancellation of the registration, for non-use, pursuant to sections 46(1)(a) and (b) of the Trade Marks Act 1994. The relevant periods within which the Proprietor had to show use were 30 June 2007 to 29 June 2012 and 8 June 2010 to 7 June 2015 respectively. The Proprietor claimed in its Counterstatement at the Mark had been used in relation to all of the goods covered by the registration and filed a witness statement from its Managing Director, Mr King Fai Ng, seeking to prove that it had made genuine use of the Mark during the relevant periods in relation to a somewhat narrower range of foods, namely minced garlic, minced ginger, minced red and green chilli, sliced water chestnuts, various dried bean curd products and "related goods". No evidence was filed by the Applicant.
5. Both sides filed written submissions, and the Hearing Officer determined the application on the papers. In her decision dated 23 June 2016, the Hearing Officer found that the Proprietor had not shown genuine use of the Mark in relation to any of the goods for which it was registered and the registration was revoked in full with effect from 30 June 2012.
6. The Proprietor appealed by a TM55 dated 25 July 2016. The substantive grounds of appeal in essence relate to the Hearing Officer's analysis of the evidence of use. The Proprietor submitted that the Hearing Officer failed to analyse its evidence of use as a whole, and that she had erred in concentrating upon elements which she felt were missing from the evidence, rather than on what was shown by the evidence.
7. The Proprietor annexed some documents to the Grounds of Appeal. First, it attached as Attachment 1 "a further breakdown of sales for reference purposes. The Registered Proprietor submits that this is not new evidence, rather a clearer representation of the previously submitted evidence showing the breakdown of sales on an annual basis." This Attachment consisted of six pages of printouts apparently giving details of

sales of certain products. Attachments 2, 3 and 4 to the Grounds of Appeal were described as clearer images of some of the documents already exhibited to Mr Ng's witness statement. Attachment 5 consisted of a bundle of purchase orders, invoices and shipping receipts which was described in the Grounds of Appeal as "new evidence" which had "only recently been received by the Registered Proprietor." Permission was sought to adduce this evidence on the appeal. However the application was not supported by a witness statement explaining why the evidence was only produced at that stage, nor what its relevance was said to be.

8. The application to adduce fresh evidence was significantly expanded just prior to the hearing of the appeal. The appeal was listed to be heard on 27 January 2017, and on 25 January 2017 the Proprietor's attorneys filed not only their skeleton argument for the appeal but a witness statement of Natalie Salter dated 25 January 2017 with 4 exhibits. The first of these was a copy of an Excel spreadsheet said to illustrate sales of goods under the Mark in the territory within the relevant period. It was said to be the same as the breakdown of sales figures extracts of which had been included in exhibit KN9 to Mr Ng's witness statement. It was, in fact, a far larger document than that which had previously been exhibited, either at KN9 or as Attachment 1 to the Grounds of Appeal, with over 400 pages. Ms Salter also exhibited the same documents as had been attached as Attachments 2 to 5 to the Grounds of Appeal, and lastly produced an exhibit containing some recent e-mail correspondence between the Proprietor and Tesco, with some attached figures.

Standard of review

9. This appeal is by way of review. The principles applicable on an appeal of this kind were recently considered in detail by Daniel Alexander QC sitting as the Appointed Person in *TT Education Ltd v Pie Corbett Consultancy Ltd* (BL O/017/17) at [14]-[52] and his conclusions were approved by Arnold J in *Apple Inc V Arcadia Trading Limited* [2017] EWHC 440 (Ch).

“(i) Appeals to the Appointed Person are limited to a review of the decision of Registrar (CPR 52.11). The Appointed Person will overturn a decision of the Registrar if, but only if, it is wrong (Patents Act 1977, CPR 52.11).

(ii) The approach required depends on the nature of decision in question (*REEF*). There is spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision. At one end of the spectrum are decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum are multi-factorial decisions often dependent on inferences and an analysis of documentary material (*REEF, DuPont*).

(iii) In the case of conclusions on primary facts it is only in a rare case, such as where that conclusion was one for which there was no evidence in support, which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that the Appointed Person should interfere with it (*Re: B* and others).

(iv) In the case of a multifactorial assessment or evaluation, the Appointed Person should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (*REEF, BUD, Fine & Country* and others).

(v) Situations where the Registrar's decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong (c) where the view expressed by the Registrar is one about which the Appointed Person is doubtful but, on balance, concludes was wrong. It is not necessary for the degree of error to be 'clearly' or 'plainly' wrong to warrant appellate interference but mere doubt about the decision will not suffice. However, in the case of a doubtful decision, if and only if, after anxious consideration, the Appointed Person adheres to his or her view that the Registrar's decision was wrong, should the appeal be allowed (*Re: B*).

(vi) The Appointed Person should not treat a decision as containing an error of principle simply because of a belief that the decision could have been better expressed. Appellate courts should not rush to find misdirections warranting reversal simply because they might have reached a different conclusion on the facts or expressed themselves differently. Moreover, in evaluating the evidence the Appointed Person is entitled to assume, absent good reason to the contrary, that the Registrar has taken all of the evidence into account. (*REEF, Henderson* and others)."

10. I have borne these principles in mind on this appeal, and I note that the decision which I am asked to overturn involved a multi-factorial evaluative assessment by the hearing officer, but not findings of fact made with the benefit of oral evidence.

Merits of the application to adduce fresh evidence

11. The circumstances in which fresh evidence will be admitted on appeal are well-established and should have been clear to the Proprietor through its professional representatives. Any such application would have had to be considered in the light of the guidance of May LJ in *Du Pont De Nemours & Company v S.T. Dupont* [2003] EWCA Civ 1368, [2004] FSR 15, [2006] 1 WLR 2793 at [95], that on

“an appeal by way of review the court will not receive evidence which was not before the lower court unless it orders otherwise. There is an obligation on the parties to bring forward all the evidence on which they intend to rely before the lower court, and failure to do this does not normally result in indulgence by the appeal court.”

12. In *Ladd v Marshall* (1954] 1 WLR 1489, [1954] 3 All ER 745, [1954] EWCA Civ 1, three considerations were identified as relevant to the merits of admitting fresh evidence on appeal. These apply equally to trade mark appeals. As May LJ also recognised in *Du Pont* at [103-4], factors other than the three *Ladd v. Marshall* requirements may be relevant to trade mark appeals, but those requirements remain central to the exercise of my discretion. They are: (1) the evidence could not have been obtained with reasonable diligence for use at the hearing below, (2) the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (3) the evidence is such as is presumably to be believed. The additional/overlapping considerations relevant to trade mark appeals are:

1. Whether the evidence could have been filed earlier and, if so, how much earlier.
2. If it could have been, what explanation for the late filing has been offered to explain the delay.
3. The nature of the mark.
4. The nature of the objections to it.
5. The potential significance of the new evidence.
6. Whether or not the other side will be significantly prejudiced by the admission of the evidence in a way which cannot be compensated, e.g. by an order for costs.
7. The desirability of avoiding multiplicity of proceedings.
8. The public interest in not admitting onto the register invalid marks.

13. In addition, where an application is made to adduce fresh evidence on appeal, it should be supported by witness statement dealing at the very least with the first two points on the list above, so that the appellate tribunal has the necessary facts upon which to reach appropriate conclusions. The application should also be made at the earliest possible opportunity. In this case, it was obviously extremely unsatisfactory that the witness statement was not served along with the Grounds of Appeal. It was even more unsatisfactory that the exhibits served with the witness statement were not the same as, and were far more voluminous than, the documents which had been filed with the Grounds of Appeal. It was, in my judgment, extremely unfair to the Applicant to give its representatives so little time before the appeal hearing to consider a substantial amount of new evidence.
14. Mr Harris who appeared for the Proprietor at the appeal had not been involved with the case at an earlier stage and was unable to give me any proper explanation as to why the application to adduce fresh evidence was made in this very unsatisfactory manner. The only explanation which was offered was that the Proprietor had felt constrained to limit the size of the exhibits to Mr Ng's witness statement, in line with TPN 1/2015. However, the TPN makes it plain that in an appropriate case the page limits on evidence may be waived by the IPO. Although the Proprietor had suggested that it reserved the right to file additional documents at a later stage, no application was made by the Proprietor for permission to do so. Plainly, prior to receipt of the Hearing Officer's decision, the Proprietor had taken the decision to rely only upon the extracts from the sales figures which it had produced in KN9.
15. Having heard submissions from both parties, I indicated at the hearing of the appeal that I would refuse the application to adduce fresh evidence. In my judgment the fresh evidence did not satisfy the *Ladd v Marshall* tests, and the manner in which the application was made was inappropriate. In particular, I found it unacceptable that documents were annexed to the Grounds of Appeal without any supporting evidence, and the witness statement in support was filed only at the last possible moment, together with very substantial quantities of additional documents which were not the same as those annexed to the Ground of Appeal. This made it quite impossible for the Applicant to deal with documents properly on the appeal.
16. Some of the "fresh" evidence consisted of fresh copies of existing exhibits. These were produced in order to overcome the poor quality of earlier versions of those exhibits, but remained illegible. Further, I agree with the Applicant that the Proprietor ought to have taken the opportunity to produce better copies of the documents which had been offered to it at an earlier stage.

17. It was clear to me that all of the additional evidence could have been filed earlier. The suggestion that some of it was fresh evidence was misconceived; it was only fresh in the sense that the Proprietor had not bothered to seek it at an earlier stage; had it done so, the evidence would all have been available to put before the Hearing Officer. There was no proper explanation for the delay. There was not even an explanation as to why the documents exhibited by Ms Salter were different from those attached to the Grounds of Appeal. The way in which the application was made seemed to me extremely prejudicial to the Applicant, which simply had not had an adequate opportunity to consider the fresh evidence. Moreover, admitting such evidence on appeal would in my view have required the case to be remitted to the IPO for fresh consideration. This would also have been prejudicial to the Applicant, and I accepted the submission that this was not a matter which would simply sound in costs.
18. The main factor to set against those points was the potential materiality of Ms Salter's exhibit NS1 which was the significantly longer version of Mr Ng's exhibit KN9, the table of sales figures. It seemed to me unlikely that the additional details in NS1 would be likely to be determinative of the appeal, given the fairly significant number of sales described in KN9. Either the Hearing Office was right on the basis of the evidence that was before her, or she was not, and the additional details in NS1 seemed to me unlikely to make any difference.
19. For those reasons, it seemed to me that on balance it would not be proper to permit the Proprietor to rely upon the fresh evidence on the appeal.

Merits of the appeal

20. The Hearing Officer set out the tests which she had to apply in relation to proof of genuine use for the purposes of section 46. The Proprietor submitted that the Hearing Officer had made a number of fundamental errors in her assessment of the evidence before her, even though she had mentioned a number of cases giving guidance as to the way in which evidence of genuine use is to be assessed, such as *Plymouth Life Centre* BL O/236/13 and *Dosenbach-Ochsner AG Schuhe und Sport v Continental Shelf 128 Ltd ("Catwalk")* BL O/404/13.
21. The Proprietor submitted that the Hearing Officer erred in concentrating upon what the evidence failed to show, and did not consider properly what it did show, especially when taking the exhibits in combination. This submission was in line with the guidance of the General Court in Case T- 204/14, *Victor International GmbH v. EUIPO* [EU:T:2016:448] at para. 55 that:

“... each piece of evidence is not to be analysed separately, but rather together, in order to determine the most likely and the most coherent meaning. In the context of that analysis, it cannot be ruled out that a range of pieces of

evidence may allow the necessary facts to be established, even though each of those pieces of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts ...”

22. The Proprietor submitted that that it was clear that there was a “reasonable business” in goods under the Mark for at least some of the goods throughout the relevant period, and that at worst the evidence lacked some detail, such as details of the customers and the problem that the Mark was not visible on some packets. The Proprietor did not suggest that use just of the words “Bamboo Garden” would have amounted to genuine use of the Mark.

23. The Proprietor did suggest that the Hearing Officer should have considered whether this was a case in which evidence post-dating the relevant period was probative in relation to the relevant period, as contemplated by the CJEU in *Case C-259/02 La Mer Technology Inc v Laboratoires Goemar SA* [2004] F.S.R. at [31]:

“the Directive does not expressly preclude in assessing the genuineness of use during the relevant period, account being taken, where appropriate, of any circumstances subsequent to that filing. Such circumstances may make it possible to confirm or better assess the extent to which the trade mark was used during the relevant period and the real intentions of the proprietor during that time.”

This was potentially relevant to the extent that some of the Proprietor’s exhibits post-dated the relevant periods.

24. The Hearing Officer summarised the evidence at paragraphs 8-9 of her decision, and then set out the Applicant’s criticisms of the evidence at paragraphs 10-14. Her conclusions were:

“19. Despite claiming, in its counterstatement, that the mark has been used on each of the goods for which it is registered as set out in paragraph 1 above, the evidence is silent in respect of most of these goods. In his witness statement, Mr King Fai Ng refers only to use of the mark in respect of minced garlic, minced ginger and minced red and green chillis, sliced water chestnuts, various dried bean curd products and “related goods”. He states that sales in respect of all of these products amounts to almost £250,000 in the five year period ending 7 June 2015 but that figure is not broken down in any way which enables me to apportion any volume of sales to any particular goods or types of goods.

20. Absent any indication of what the “related goods” referred to by Mr King Fai Ng might be, it is not possible to find there has been genuine use in respect of them, regardless of how much of the total sales figures may have been made in respect of them. Similarly, whilst, in his witness statement, he claims there has been use of the mark in respect of sliced water chestnuts, he makes no further

reference to such goods, does not provide information regarding the volume or value of such sales and neither is there any corroborating evidential material that would enable me to find there has been genuine use of the mark in respect of such goods within the relevant periods.

21. In respect of the minced garlic, ginger and chillis on the one hand and dried bean curd products on the other, there is some evidence (KN9) that these goods were supplied by Chadha over a period of a few months in 2010 but the volumes of such sales shown in the exhibit is limited. In addition, whilst the names of account holders are provided, in many cases, their identity is uncertain and for none are any address details given. No evidence is provided which shows the size of the market in either of these types of goods though they are goods which, in my own experience, are widely available in shops and supermarkets. There is no evidence which allows me to establish the volume or value of sales of any of these specific goods during either relevant period nor is there any supporting documentation in the form of e.g. invoices, advertising materials or evidence from customers or the trade. That said, Mr King Fai Ng is more specific when he states that “Dried Bean Curd Sticks” to the value of £35,015.12 have been sold by Tesco between February 2013 and June 2015 which is within the latter relevant period. Mr Coult has not provided evidence himself but, whilst the letter written by him does not specify what the product might have been, it does confirm that a product has been sold to Tesco. The printout from the Tesco website at KN8, whilst post-dating the relevant periods, bears a copyright date of 2013 and shows a packet of “Bamboo Garden Bean Curd Sticks”. What is not shown is any evidence that these goods were sold under the mark as registered.”

25. As the Hearing Officer pointed out, a very real difficulty with the evidence is that the Proprietor did not make any attempt to indicate how much of its overall sales related to the range of goods in the specification or even the narrower range of goods identified by Mr Ng. Mr Ng said during the period 8 June 2010 to 7 June 2015, total sales of products under the Mark were £248,478.33, but the Hearing Officer rightly commented that this figure was not broken down in any way. Mr Harris conceded that the evidence was not good enough to sustain the whole specification; he accepted that if the appeal succeeded at all, the specification would have to be restricted and his final fall-back position was that the Mark should be maintained for dried bean curd products.

Goods other than bean curd products

26. No use was shown in relation to many of the goods in the specification. A smaller range of goods, such as minced coriander or minced garlic and ginger, was identified in the sales figures from Proprietor’s distributor, Chadha Oriental Foods Ltd (“Chadha”), at

exhibit KN9. However, the quantities sold were very small. There was no breakdown or other indication of the total quantities of such goods which the Proprietor claims to have supplied in the UK. The only exhibit which showed use of the Mark in relation to such goods consisted of pages downloaded from a Chinese website, which the Hearing Officer plainly considered did not amount to proof of any use of the Mark in the UK. I think that the Hearing Officer was entitled not to accept this exhibit as proving that the Mark was used on any such products sold in the UK. In the circumstances, it does not seem to me that the Hearing Officer can be said to have been wrong in paragraph 20 of her Decision to conclude that the Proprietor had not proved that it had made genuine use of the Mark on such goods.

Bean curd products

27. In paragraph 21 of the decision the Hearing Officer accepted that the Proprietor had proved sales of £35,000 worth of dried bean curd sticks to Tesco during the relevant period. She also accepted that the sales figures at KN9 showed some additional sales of bean curd products, albeit on a limited scale. She noted the lack of supporting documentation in the form of documents such as invoices, advertising materials or evidence from customers or the trade, and she stated that she did not accept that such sales were made under the Mark as registered. She did not, therefore, go on to consider whether the use which had been proved was sufficient to amount to genuine use.
20. The Proprietor submitted that her analysis had failed to take several pieces of evidence into account. I am (as Mr Alexander pointed out, above) entitled to assume, absent good reason to the contrary, that the Registrar has taken all of the evidence into account. Moreover, Lewison LJ held in *Fage UK Ltd v. Chobani UK Ltd* 2014] EWCA Civ 5 that it is not necessary for a tribunal to deal with every argument that was before it as long as the basis for the decision is given:

“... There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. ...”
21. I must consider whether there is good reason to think that the Hearing Officer had not taken account of any potentially significant parts of the evidence now relied upon by the Proprietor.
22. First, the Proprietor suggested that insufficient weight was given to the narrative of Mr Ng’s witness statement which referred to a variety of uses of the mark, and which

it seems to me was intended (taken in context) to refer to the Mark as registered, rather than just to the words Bamboo Garden. I do not accept that criticism. My view is that the Hearing Officer was plainly right to consider the extent to which Mr Ng's comments about use of the Mark in relation to particular goods were supported by the exhibits to the witness statement, especially given the vagueness of some of his evidence.

23. Next, the Proprietor submitted that the Chinese website pages proved use of the Mark. I do not consider that this exhibit proved use in the UK and again I do not think that there was any error in the Hearing Officer's analysis in this respect.
24. Mr Harris placed more weight upon two exhibits which contained pages from Chadha's UK website from various different dates, some during and some after the relevant periods. The Hearing Officer noted in her analysis of the evidence that the 2012-14 webpages included a reproduction of the Mark but they did not show any packets of the products. One of the later pages showed some packets of products, with the Mark shown, as registered, at the top of the page, but the quality of reproduction was so poor that the Hearing Officer could not see whether the Mark was also used on the products. This page does not, therefore, advance the Proprietor's case significantly. The Proprietor also relied on an exhibit which included extracts from Chadha's catalogues for 2013-2015. The 2013 and 2015 catalogues included a page showing pictures of the products under a legible reproduction of the Mark. Unfortunately the reproduction was again too poor for the Hearing Officer to be able to see whether the Mark also appeared on the packets. No use of the Mark could be discerned in the 2014 catalogue.
25. There was no evidence of how many visitors there may have been to the Chadha website, nor as to whether orders could be placed on the site or business was generated by the site. There was no evidence of how many 2013 catalogues were distributed in the UK, and the Hearing Officer noted that Mr Ng's evidence was that 330 customers got the 2015 catalogue. She considered that this did not amount to evidence that any customers received it within the relevant period. That may have been a trifle harsh, as I think it would not have been unfair to infer that some of the 330 were distributed in the relevant part of 2015, but in any event the numbers would have been small.
26. The Proprietor also relied heavily upon the 2010 sales figures shown in KN9. This showed greater sales of bean curd products than of other goods, though many of the sales were on a very modest scale. The Hearing Officer had some concerns about the customers identified in the table, as no addresses were given for them, and some of the accounts were marked "Do Not Use" or "Closed." I also note that much of the

schedule was irrelevant, as it listed many customers who bought no such products during that period. Nevertheless, the Hearing Officer accepted in paragraph 21 that KN9 showed some sales of bean curd products in 2010 in the UK.

27. The Proprietor criticised the Hearing Officer for not inferring that the majority of the Proprietor's sales were of bean curd products and referred me to the decision of Mr Daniel Alexander QC sitting as the Appointed Person in BL O/018/17, *Travel Fox*, where an inference was drawn that a significant proportion of sales were of particular goods. Whether such an inference may be drawn must depend on the evidence in the individual case. As I have said, Mr Ng had provided an overall sales figure, but gave no breakdown of it by product type. He did not say that bean curd products were the Proprietor's best-selling product. The only concrete figure was of the sales to Tesco, which in my view was not high enough (as a proportion of the overall sales) to lead to any such inference. I therefore reject the submission that the Hearing Officer was wrong not to infer that bean curd products were the Proprietor's best-sellers.
28. The Proprietor also submitted that the Hearing Officer was wrong not to find that the bean curd products were sold under the Mark as registered. However, the evidence on this point was limited. There was no evidence showing use of the Mark on packets containing the products, nor was there any evidence that the goods sold by Tesco were sold under the Mark as registered. The Hearing Officer had real difficulties with the quality of the exhibits provided to her. The quality of reproduction was generally extremely poor and the suggestion that one can see the Mark on various pages seems to me wholly speculative.
29. This leaves the question of whether the Hearing Officer took appropriate account of Chadha's web pages and catalogues. Whilst the Hearing Officer described those exhibits when she went through the evidence of use, nothing in her overall analysis of the evidence at paragraphs 19-21 indicates that she considered whether the webpages or catalogues showed genuine use of the Mark, either alone or in conjunction with the other evidence. On the contrary, the Hearing Officer said at paragraph 21 that there were no advertising materials before her, although both the webpages and the catalogues would properly have been described as advertising materials. The fact that she commented on the lack of advertising materials, and did not discuss the impact of the webpages or catalogues suggests to me that she did not take them into account. It is therefore right for me to reconsider whether, taking all of the evidence into account, the Proprietor had proved that it had made genuine use of the Mark in relation to the bean curd products.
30. The Respondent reminded me that whilst an overall assessment must be carried out which takes account of all the relevant facts, 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-356/02 *VitakraftWerke Wührmann v OHIM (Vitakraft)* [2004] ECR II-3445).

31. For the reasons discussed above, some of the evidence in this case fell short of being solid and objective evidence of use of the Mark as registered. The website and catalogues did amount to such evidence, however, but their significance was not explained. In *Vitakraft*, reliance was placed upon use of the challenged mark in a number of trade catalogues. The General Court held:

“34 In the present case, the catalogues submitted to the Board of Appeal establish neither the fact that they were distributed to a potential Spanish clientele, nor the extent of any distribution, nor the number of sales made of goods protected by the mark. The intervener has provided no indication supported by evidence to enable any useful conclusions to be drawn in that regard. The mere existence of those catalogues could, at most, make it probable or credible that goods protected by the earlier marks were sold or, at least, offered for sale within the relevant territory, but it cannot prove that fact.”

32. The evidence here showed use of the Mark on the Chadha website over a number of years, but it did not show how many people had visited the website, nor whether any sales were effected through the website. I have already discussed the lack of evidence as to the scale of use of the catalogues. I presume that if the 2013 catalogue had been used on a greater scale than the 2015 catalogue, Mr Ng would have said so. Again, there was no evidence as to whether any sales of products under the Mark had been effected through use of the catalogues. In those circumstances, it is difficult to conclude that those uses of the Mark alone amounted to genuine use designed to create or maintain a market for the goods.

33. Whilst there was evidence of sales of the bean curd products, this was not on any great scale, and it was not clear whether the Mark as registered had been applied to the products, or whether they had been sold by reference to the Mark as registered. The Proprietor failed to produce a breakdown of sales, or (despite several attempts) a single legible example of packaging showing use of the Mark in the UK. I have considered carefully whether the fact that the Mark as registered was shown on the website and in the catalogues proves that the bean curd products which were sold by Chadha were sold under or by reference to the Mark as registered, and I conclude that it does not go that far. Whilst it raises the possibility that it did so, that is not good enough to prove use of the Mark, as required. I have also considered whether, when taken in the round, the evidence proves that genuine use was made of the Mark. Having weighed up all of the evidence, I have come to the view that the Proprietor has

not proved satisfactorily that it made genuine use of the Mark as registered upon any of the goods in its specification.

34. I therefore dismiss the appeal. The Mark will be cancelled with effect from 30 June 2012.
35. The Applicant provided me with some additional submissions as to its costs in relation to the Proprietor's unsuccessful application to adduce the fresh evidence on the appeal. Bearing that in mind, I will order the Proprietor to pay the Applicant the sum of £1850 towards its costs of the appeal. This sum shall be paid, together with the £1000 costs awarded by the Hearing Officer, by 5 pm on 19th April 2017.

Amanda Michaels
The Appointed Person
5 April 2017

MR. PHILIP HARRIS (of Lane IP Ltd) appeared for the Appellant.

MS. CLAIRE HUTCHINSON (of HGF Ltd) appeared for the Respondent.