

**BL O-118-19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF:**

**PHILIPS, CLAUDEL AND COMPANY LIMITED'S APPLICATIONS  
(Nos. 501401 and 501402)**

**TO REVOKE ON THE GROUNDS OF NON-USE**

**TWO TRADE MARK REGISTRATIONS  
(Nos. 562073 & 562074)**

**OF THE MARK:**

**CULPEPER**

**OWNED BY CULPEPER LTD**

## **Background and pleadings**

1. These proceedings concern two trade mark registrations both of which consist of the word mark **CULPEPER**. They are longstanding registrations, both having been filed on 8 August 1935. One of the marks, no. 562074, is registered in respect of class 3 goods, the other for goods in class 5. I will, for the most part, refer to the marks collectively, unless it is necessary to differentiate between the registrations. The goods covered by the registrations are:

**Class 3:** Perfumes, perfumed soap, tooth powder, toilet preparations for the hair, non-medicated mouthwash, non-medicated lotions for toilet use, bath powder for toilet use, oils for toilet use, face powders, face cream, rouge for toilet use, eyelash darkening preparations.

**Class 5:** Medicated herbal preparations for humans.

2. The registrations are owned by Culpeper Ltd (“the proprietor”). It took ownership of the registrations from their previous owner, Napiers Herbal Healthcare Limited (“Napiers”). When recording the change of ownership, the effective date of assignment was given as 5 February 2016.

3. Philips, Claudel and Company Limited (“the applicant”) is the applicant for revocation. The applicant relies on section 46(1)(b) of the Trade Marks Act 1994 (“the Act”), claiming non-use in the five-year period: 15 August 2011 to 14 August 2016 (“the relevant period”). The applicant claims 15 August 2016 as the date from which revocation should take effect. In the respective statements of case, the applicant states:

“I found through my investigation that the company who owned the trademark ceased all trading activity at the end of March 2011. All the companies premises and warehouses were closed and vacated by the end of June 2011 and no further trading has been conducted since that date.”

4. The proprietor filed counterstatements defending its registrations. It states (as I have already explained) that it acquired the registrations on 5 February 2016 but between then and 14 August 2016 (the end of the relevant period) it:

“set about creating a market in the United Kingdom for [perfumes, perfumed soap, toilet preparations for hair, non-medicated lotions for toilet use, bath powder for toilet use, oils for toilet use and face cream and medicated herbal preparations for humans]. This required formulation and testing before any goods could be sold. Although the present owner had not sold any such goods by 14 August 2016, presentations had been made to Harrods, who agreed to stock owners goods subject to completion of testing”

5. The applicant additionally states that during the relevant period there was genuine use by the previous owner, “inter alia by sale on Amazon and E-bay websites”.

6. Both sides filed evidence. A hearing took place before me on 13 December 2018 at which Mr Michael Deans, of M.J.P Deans, represented the proprietor, and at which Mr John Philips, a director of the applicant company, represented the applicant.

7. Shortly before the hearing, the proprietor sought leave to amend its defence by alternatively relying on the existence of proper reasons for non-use. The claimed proper reasons for non-use are based, essentially, on the required formulation and testing of products before they could be sold (as per paragraph 4 above) and, further, that Napier’s insolvency and winding up also hampered its ability to use the mark. I come back to this issue later.

### **Legislation and leading case-law relating to revocation**

8. The pertinent legislation is contained in section 46 of the Act, the relevant parts of which read:

“(1) The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c).....

(d).....

(2) For the purpose of subsection (1) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made: Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) .....

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from –

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existed at an earlier date, that date.”

9. Section 100 is also relevant; it 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.”

10. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) (28 June 2018), Arnold J. summarised the case-law on genuine use:

“114. The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), 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 Bundesvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I9223, 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], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, 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] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases 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]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(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]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]- [51].

(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] and [22]. 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]; Reber at [29].

(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]; Leno at [29]-[30], [56]; Centrotherm at [72]-[76]; Reber at [29], [32]-[34].

(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] and [76]-[77]; 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].”

## **The evidence**

11. It is common ground that the CULPEPER brand has something of a heritage. Indeed, it appears that both parties wished to exploit that heritage and any associated cachet as part of their own businesses. The evidence touches on this, but whilst I may refer to some of the evidence for context, I will focus, in the main, on the claimed use during the relevant period.

12. The proprietor's witness is Mr Martin Gill. His primary evidence consists of a witness statement together with four exhibits. In relation to the registrations at issue, he explains that the proprietor acquired them from the Treasury Solicitors as Crown nominee. When they were acquired, they were at that time recorded on the register as being in the name of Napiers, who he says subsequently changed its name to Culpeper UK Ltd. He adds that the predecessor in title went into administration on 23 February 2011, that the administrators then "ran the existing business down" and that the company was dissolved on 15 May 2012.

13. In terms of genuine use, Mr Gill breaks this down between sales of goods stemming from the predecessor company, and what he says is the use made by the current proprietor. I will similarly break matters down.

14. Exhibit MEG3 consists of a list of stock provided to Mr Gill by Anthony Batty & Co, who dealt with the administration and liquidation of the predecessor company. It is said to be a list of remaining stock of Culpeper goods sold by the administrator to Van Essen Hotels 1 Ltd ("Van Essen") for use as hotel amenity products on 1 March 2011. The list includes items such as shampoo, shower gel, soap etc. The total number of goods is in the region of 35k. The hotel group itself went into administration on 20 April 2011, with the administrator of that company then selling off individual hotels, with winding-up commencing on 17 October 2012. Mr Gill makes two subsequent observations in relation to this: first, he states that the stock sold to Van Essen could not all have been used up by 15 August 2011 (the start of the relevant period), second, that the administrators for Van Essen will also have sold its remaining stock on, although he has been unable to identify to whom.



15. Mr Gill also explains that the last Culpeper store (in Oxford) was closed at the end of March 2011 and any remaining stock removed to a warehouse. Although he states that this would have included over a hundred different lines, including medicinal and aromatherapy products, he has been unable to identify to whom the non-hotel amenity products were sold.

16. Mr Gill states that there must have been significant amounts of unused stock of genuine Culpeper goods because small parcels of such stock have been sold “by variously named parties over the intervening years on Amazon and eBay..”. He refers to Exhibit MEG4 which contains 3 prints:

- A print from amazon.co.uk advertising for sale “A SET OF 4 PURE ESSENTIAL OILS – CULPEPPER- NUTMEG – CEDERWOOD ATLAS – 14ML”. The product has four reviews against it (not provided). The seller is a business called MustBeBonkers. The goods cost £3.99 with free UK delivery. This print is not dated. The pictures of the goods are unclear, the wording upon them cannot be ascertained.
- A print from google.co.uk for the search Culpeper oils 2015. The results page contains what appears to be a link to the above amazon page from which it is noted that the date first available for this product was 18 June 2015. There are other references to CULPEPER on this results page. Two relate to the town of Culpeper in the US. The others appear to refer to Culpeper goods, but without seeing the underpinning websites, there is little to take from this.
- A print consisting of the following image, albeit the print has no information at all as to its origin:



As can be seen, the word CULPEPER appears in the crest at the top of the label and the words CULPEPER LTD on the side.

17. Mr Gill does not give an explanation as to the origin of the above picture. He nevertheless concludes this part of his evidence by stating that the goods are still being sold on websites to this day.

18. Mr Gill then proceeds to explain what use the proprietor has undertaken since it acquired the registrations on 5 February 2016. There are no exhibits to support this aspect of his evidence. I set out below a summary chronology from the statements made by Mr Gill (together with some further statements he made) and note his explanation that the proprietor was having to start the business afresh as there was no existing business and product range in place:

- Within weeks, the proprietor initiated an action plan to “create and bring to market a range of products celebrating the unique history of the CULPEPER brand”.

- It recruited Anne McIntyre, a medical herbalist, to help direct product development, and Quig Wang, a professor in the field of luxury marketing, to help with the marketing side of things.
- Contracts were agreed (when is not clear) with cosmetic product developers. This typically involves an initial 8 weeks prototyping, followed by 15 weeks of challenge testing and stability/compatibility testing with a further 8 weeks of piloting and trials.
- A meeting was held on 29 June 2016 with Nick Fleming, a senior buyer for Harrods, with a view to having an initial launch in their store.
- A meeting was held on 4 July 2016 with Juliet Shepherd, Manager of the luxury cosmetics department of Harrods, who apparently liked the raison d'être of the brand and that the goods would be 100% English.
- In light of comments made in the above meetings (the specific comments and what was discussed is not really detailed), the proprietor, independent of the product formulation, decided to create a more elegant form of packaging and which included designs based on 17<sup>th</sup> Century Culpeper bottles.
- The above was, apparently, well received at further meetings (the dates of which are not given) with Harrods, Harvey Nicholls and Fortnum & Mason. As a result, the proprietor now has been offered space within Harrods to launch its Culpeper range commencing October 2018.
- Mr Gill states that two years is a typical lead time to get products to market in this field.
- The intended parallel sales into the retail and wholesale market had to wait until the Harrods launch.
- Harrods, if they feature a new line, ask for a period of exclusivity of between one and six months. This appears a general observation as opposed to what was agreed with the proprietor.

- The proprietor has been involved in technical discussions with a grower, with the intention to exploit the medicinal properties derived from Blue Cats Tail. The dates of this, or the nature of such development, is not set out.

19. The applicant's witness is Mr Philips (who also represented the applicant at the hearing before me). He gives some evidence about the history of Culpeper and his decision to try to resurrect the brand. He discovered the subject registrations and contacted the representatives of the then proprietor, Napiers, to see if he could acquire the registrations. He was apparently told that if Napier was interested in selling the marks they would get back to Mr Philips. No one called back. All of this was during 2013.

20. Irrespective of the above, Mr Philips still decided to start a business based upon Culpeper's heritage. He established the applicant company in January 2014 and made a trade mark registration in March that year. He subsequently started to develop products etc. He states that during this time, and also in 2015, he regularly conducted Internet searches for Culpeper and never found any goods for sale. He provides an example at Exhibit JDP7 which he refers to following a statement that he conducted a search in December 2015. However, as pointed out by Mr Deans at the hearing, this could not have been the search result then because the print provided contains a copyright notice which ends in 2018.

21. Mr Philips states that he was advised to file the word mark CULPEPER in 2016, which led to letters being received from the proprietor's representative and ultimately the subject dispute. In relation to the evidence filed by the proprietor, I note the following from Mr Philip's evidence:

- That the product shown at Exhibit MEG4 is unlikely to be a genuine CULPEPER product because it carries a different design to the ones used when the business went into administration (and the several years preceding). The design, said to be in use, is provided at Exhibit JDP2, which depicts a simpler label without a crest.

- The date of availability on Amazon is questioned because Mr Philips conducted searches which did not find the product and, in any event, the date is input by the seller not by amazon and does not provide evidence that it was offered for sale on the date concerned.
- The seller MustBeBonkers specialises in party supplies (information to this extent is provided Exhibit JDP4).

22. It is also noteworthy that Mr Philips provided a copy of the administrator's report (covering the period 23 February 2011 to 22 August 2011) relating to the proprietor's predecessor in title. The report was prepared by Anthony Batty & Co, the same firm who provided Mr Gill with a stock list of the goods sold to Van Essen as hotel amenity products. From this I note that:

- The administrators traded the business through three stores in order to maximise realisation of stock held in the shops and warehouse. The sales were successful with the majority of stock sold by 23 March 2011, on which date the stores in Bath and York closed.
- All residual stock was then moved to the Oxford store which itself closed on 31 March 2011.
- A sale of the business was initially agreed with Van Essen, but they then fell into administration.
- A sale was then agreed, and completed, with Mongoose Developments Limited ("Mongoose"), a company controlled by a spouse of one of the directors of the predecessor company and Van Essen.
- The sale completed on 12 May 2011 for the sum of £65k (plus VAT) broken down as £50k for the goodwill of the business, £5k for the residual stock (following the sales at the three stores) and £10k for machinery etc.

- Additionally, £21k worth of stock was sold to Van Essen for the purpose of hotel amenity products, although, it is noted that the stock was not paid for and the administrator claims reserved title to such stocks.

23. Mr Philips also provides evidence about Mongoose in the form of its abbreviated accounts for year ending 30 June 2013 and in which it is stated that the company no longer trades with a view to future profits and that the director no longer deems its assets to be recoverable at their original written down value – the assets are to be written off to recoverable amounts. Also provided is an extract from Companies House showing that the company was wound up in April 2015. Mr Philips states that this shows that Mongoose never traded although there is insufficient evidence in the accounts to show that this is the case; of course, there is no evidence showing that they did trade.

24. Mr Gill gave evidence in reply. He questions the reliability of Mr Philip's internet searches given that he (Mr Gill) is aware of products being sold on Amazon and eBay. He states that he does not know how to produce archive web prints, so provides instead a print from what I assume is around the time he completed his witness statement (September 2018) showing 8 Culpeper products on eBay.

25. Mr Gill also picks up on a comment he made in his original witness statement about reference to Culpeper being made in tourist blogs despite the closure of the stores, which Mr Philips highlighted was not something supported in evidence. To support the point, Mr Gill provides a print (taken at some point in 2018) from LondonTown.com detailing a Culpeper store in Covent Garden. The extract is essentially from a directory of London shops focusing on health and beauty. It gives the address of the shop in Covent Garden. There is also an emboldened statement that the store is closed for business. It lists the types of goods sold and indicates that it is a popular store for tourists to visit. Mr Gill also highlights that in some photographs within this exhibit both the more recent label and the older versions are shown.

### **Genuine use in the relevant period**

26. I begin by observing that I fully agree with Mr Deans' submissions that the proprietor is fully entitled to rely on any use that has been made by its predecessor in title. It is to this evidence I turn first. Before doing so, it is worth reminding myself that the relevant period is: 15 August 2011 to 14 August 2016.

27. The predecessor in title entered administration on 23 February 2011. The administrator continued to trade the business up until 31 March 2011. Thus, its actual trading activities ceased four and a half months prior to the start of the relevant period. I did not understand Mr Deans to be concerned on this point because it is secondary use on which he relied. To the extent that there is secondary use, this stems from the sale of stock by the administrators. There appear to be two distinct sales. First, hotel amenity stock was sold to Van Essen (although it is reported by the administrators that payment was not actually received) on 1 March 2011 (five and a half months before the start of the relevant period) to the value of £21k. Van Essen then went into administration in April 2011, with the administrator (according to Mr Gill) then selling off individual hotels, with winding-up subsequently commencing on 17 October 2012. Second, the sale of any residual stock which, from the content of the administrator's report, was sold to Mongoose, for £5k on 21 May 2011 (just under three months before the relevant date).

28. Mr Gill says it is unlikely that all of the hotel amenity stock would have been used up by 15 August 2011, with the consequence that the CULPEPER goods would have still been provided to guests during the relevant period. However, this is just speculation – no evidence is given about the size of the business, how many rooms (or even how many hotels) it had. No evidence is given about how quickly hotels get through amenity products they provide. The evidence does not show what happened to any of the hotel amenity stock during the relevant period. There is no evidence to suggest that it continued to be in use in the hotels. There is no evidence that Van Essen's administrators sold any surplus (if there was any) to anyone.

29. There are also question marks about the residual stock that was left following the sales at the three stores. The stock was sold to Mongoose. There is no evidence to

show what they did with it. There is no evidence that it sold the stock on when it subsequently had its own financial difficulties.

30. Where the above leaves me is that, at the very best, a small amount of surplus stock may have found its way to the secondary market. The only actual evidence is the disputed sale on amazon.co.uk with the information that the goods were placed on sale in June 2015. I noted earlier that there were four reviews, presumably from sales of this item, but when those sales took place cannot be known. The highpoint is, therefore, that a few sales may have taken place, just under 4 years into the relevant period, over 4 years after the predecessor in title had ceased its trading activity.

31. Reference was made at the hearing to residual goodwill. This has no relevance to the question of genuine use. I come to the clear view that the secondary use does not assist the proprietor. This is due to the extremely low levels of use in what is a reasonably large field, coupled with the fact that the use is not warranted for the purpose of maintaining or creating a market share. I make the latter point because any sales were simply an unrelated (to the proprietor or its predecessor) trader selling on a very small amount of surplus stock of a defunct business. The proprietor (at that point in time) was not making genuine use, nor was there such (genuine) use with its consent.

32. Given the above findings, it is unnecessary to say anything further about the witnesses' contrasting successes at finding Culpeper goods on Internet searches, or whether the labels used signifies whether the goods were genuine or not.

33. I now turn to the proprietor's own activities following its acquisition of the registrations from the Treasury Solicitor. It is accepted by the proprietor that no sales of any goods have been made. Whilst it is clear from Mr Gill's testimony that the proprietor started to prepare for trade during the relevant period, there is little external use that can even potentially be relied upon. The closest one gets are the meetings with Harrods in June and July 2016 (the subsequent meetings with Harrods and others are not dated). However, the nature of these meetings lacks any real detail. From the gist of what Mr Gill states, I view these as nothing more than a pitch for retail space within Harrods to sell its product. It is not clear exactly what products were being



considered. Further, if this was simply aimed at getting retail space, Harrods can not even be considered as a potential wholesale client. In the case-law I cited earlier, Arnold J highlighted that genuine use can include use in relation to goods “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].”. The circumstances here fall a long way short of that. The proprietor’s own activities do not constitute genuine use.

### **The alternative defence - proper reasons for non-sue**

34. At the hearing (and foreshadowed before it) Mr Deans sought leave to introduce a claim (by way of counterstatement amendment) for the existence of proper reasons for non-use. After discussing the matter at the hearing, I allowed the amendment. I did so because a number of the points relied upon in terms of proper reasons for non-use had in fact been foreshadowed in the original counterstatement and the evidence. Further, if there were proper reasons for non-use, it would be inappropriate for the proprietor to lose its registration on an effective technicality, due to a poorly drafted original counterstatement. I did, though, allow the applicant time to provide any further submissions in writing on this point. The applicant did not avail itself of that opportunity.

35. In the judgment of the CJEU in *Haupt v Lidl Stiftung & Co KG* it was stated:

“It follows that only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as ‘proper reasons for non-use’ of that mark.”

36. The CJEU reaffirmed its position in *Il Ponte Finanziaria SpA v OHIM* Case C-243/06P [2008] ETMR 13 when it stated:

“The concept of “proper reasons”... refers essentially to circumstances unconnected with the proprietor of a trade mark which prevent him from using the mark...”

37. There are two main points relied upon.

38. First, it was submitted by Mr Deans that the very fact that the predecessor in title was placed into administration and was consequently going through the insolvency and winding-up process impacted upon its capacity to trade. This is clearly true, but is not something which should constitute a proper reason for non-use, otherwise the business failings of a company, which are often not out of its control, would be immunized from the requirement to show genuine use. In any event, the genuine use period is five years long so even if the business could not trade for part of it, the sale of a registration to another party, means that any subsequent use could be relied upon.

39. The above leads into the second point. The registrations were sold on to the proprietor but it had only a short period of time to make genuine use. Mr Deans argued that the necessary formulation and testing of goods constituted a proper reason for non-use. I reject this submission (and reason) also. Whilst I accept that a proprietor wishing to bring new products to market may well need more time to do so than the proprietor had, it was of the proprietor's own choosing to purchase a mark that was close to being vulnerable to revocation – in such circumstances, the proprietor ought to have got its product to market more quickly. There is nothing in the development of the products which has been outside of its control or has presented particular difficulties.

40. The claim to there being proper reasons for non-use is rejected.

### **Conclusion**

41. Registrations 562073 & 562074 are revoked in their entirety with effect from 15 August 2016.

### **Costs**

42. Following the hearing, the applicant was contacted asking it to complete a costs pro-forma if it wished to claim costs. This included the following information:

“.....I enclose herewith a costs proforma that the cancellation applicant must complete if it wishes to claim costs in this matter. A further period of fourteen days from the date of this letter, that is on or before **14th February 2019**, is therefore allowed for its completion and return, following which the hearing officer will issue his decision. I should point out that if the proforma is not completed and returned, no costs, other than official fees arising from the action (excluding extensions of time), will be awarded.

43. No response was received from the applicant. As such, I make no award of costs.

**Dated 1 March 2019**

**Oliver Morris**

**For the Registrar,**

**The Comptroller-General**