

BL O-404-19

TRADE MARKS ACT 1994

**TRADE MARK APPLICATION NO. 3249669
IN THE NAME OF PHARMASGP GMBH
TO REGISTER THE MARK**

DESEO

IN CLASS 5

**AND OPPOSITION THERETO
BY GLENWOOD GMBH PHARMAZEUTISCHE ERZEUGNISSE UNDER NO.
411522**

AND

**UK DESIGNATION OF INTERNATIONAL TRADE MARK REGISTRATION NO.
879815 FOR THE MARK**

DESEO

IN THE NAME OF GLENWOOD GMBH PHARMAZEUTISCHE ERZEUGNISSE

AND

**APPLICATION NO 501764 BY PHARMASGP GMBH
TO REVOKE THE TRADE MARK FOR NON-USE**

Background and pleadings

1) This dispute involves an opposition filed by Glenwood GmbH, Pharmazeutische Erzeugnisse (“Glenwood”) against a trade mark application in the name of PharmaSGP GmbH (“Pharma”) and an application by Pharma to revoke the earlier relied upon trade mark registration in the name of Glenwood.

2) On 11 August 2017, Pharma applied to register the word mark DESEO in the UK. It claimed a priority date of 20 June 2017 based on its Benelux trade mark registration no 1016338. It was accepted and published in the Trade Marks Journal on 3 November 2017 in respect of the following class 5 goods: “*Pharmaceuticals; medicinal healthcare preparations; baby food; dietary and nutritional supplements; pharmaceutical preparations for veterinary use*”.

3) Glenwood oppose the trade mark application based on Sections 3(6), 5(1), 5(2)(a) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). I summarise the various claims as follows:

- **Section 5(1) and 5(2)(a)** – these claims are based on the opponent’s earlier International Trade Mark which designates the UK, which it states is identical to the application, covering either identical or similar goods. Pertinent details of the earlier mark are as follows:

Mark¹: **DESEO**

IR No: 879815²

Owner: Glenwood

Goods: Class 5 - Pharmaceutical products

International registration date: 7 December 2005

Date of protection of the international registration: 1 October 2006

Priority date: 13 June 2005³

¹ The mark is in standard font and so it shall be referred to as DESEO throughout my decision.

² International trade mark registration designating the UK.

³ The priority date is claimed from German trade mark registration no. 305 34 226.6/05

- **Section 5(4)(a)** - Glenwood claims to have goodwill in respect of its business operating under the sign DESEO. It claims to have been selling pharmaceutical products under this sign since 2015 and has acquired a protectable goodwill. It claims that use of the trade mark applied for would be a misrepresentation to the public and result in damage to its goodwill.

- **Section 3(6)** - Glenwood states that in 2012 Pharma had purchased the IP rights relating to the mark DESEO in Germany. In May 2017, Glenwood contacted Pharma with a view to purchasing the IP rights in DESEO in further territories, including the UK, but the negotiations broke down. Pharma subsequently filed a trade mark application. Glenwood argues that it did so with full knowledge of its existing trade mark registration and use, which it claims to be an act of bad faith.

4) Pharma filed a counterstatement denying the claims made and requesting that, in respect of the sections 5(1) and 5(2)(a) claims, Glenwood provides proof of use of the earlier trade mark relied upon. Since the trade mark application the subject of the opposition was published on 3 November 2017 then the relevant proof of use period is 4 November 2012 to 3 November 2017 (I shall address this in greater detail later in this decision).

5) Pharma seeks revocation of Glenwood's earlier trade mark registration no 879815 listed above. The revocation is on the grounds of non-use based upon sections 46(1)(a) and (b) of the Act. The relevant periods are as follows:

Section of the Act	Relevant period	Claimed effective date
46(1)(a)	2 October 2006 – 1 October 2011	2 October 2011
46(1)(b)	17 August 2012 – 16 August 2017	17 August 2017

6) Glenwood filed a counterstatement denying the claims made and asserting that it has genuinely used its registration.

7) Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. A hearing took place via video-link on 26 April 2019. Both parties were professionally represented with Mr Curtis of HGF Limited appearing for Glenwood and Mr Traub of Pinsent Masons LLP for Pharma.

8) Since the revocation may have a direct bearing on the opposition, I shall proceed with Glenwood's claim that Pharma's registration has not been genuinely used. Further, given the interplay between the relevant revocation periods, and the proof of use periods, I shall deal with the "use" claims collectively.

EVIDENCE

Glenwood's evidence

9) Glenwood's evidence consists of two witness statements from Dr Gordon Guth who is its CEO, a position he has held since 2014.

10) Dr Guth states that to the best of his knowledge Glenwood began using the mark DESEO "before 2014 in the EU, at least in Germany"⁴, for pharmaceutical products aimed at increasing virility. The first use of the DESEO branded goods in the UK took place in 2015 via Amazon and eBay. Exhibit GG1 to the witness statement is an extract from the Amazon website which lists DESEO as being available for sale for £14.99 (a copy of which is duplicated below). Glenwood has not provided any print out from eBay.

⁴ Paragraph 5 to the witness statement

Shipping on this item:
AmazonGlobal Eligible



Que Se Sienta el Deseo
by Wally Martin, Wally Martin
MP3 Download
£0.59
Available for download now

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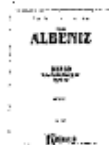
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11) Exhibit GG2 to the witness statement consists of 22 invoices dated between December 2015 and October 2016. They are all from a company called Evitaplus based in Germany and addressed to individuals throughout the UK. It is noted that none of the names on the invoices are the same and therefore there is no repeat custom. They are all for single purchases of DESEO costing €14.99 each. Therefore, the invoices show total sales amounting to €329.78.

12) Dr Guth states in his second witness statement that the 22 invoices do not correlate to sales from the advertisement placed on Amazon. He states that the invoices “may have been made via an alternative outlet, for example the Evitaplus website www.evitaplus.de which has previously included my company’s DESEO product.”⁵

13) The rest of Dr Guth’s evidence relates to Glenwood’s bad faith claims.

14) Dr Guth states that in 2012 Glenwood sold its German national trade mark registration for DESEO to Pharma. Then on 18 May 2017, Mr Markus Koske, the CEO of Pharma called him to ask “whether my company would be willing to sell its International Registration No 879815, which includes UK designation currently subject to the cancellation action, to PharmaSGP.”⁶ He claims that Mr Koske offered him €15,000, which was rejected. Dr Guth claims that Mr Koske assured him that since negotiations were not successful then it would adopt a different brand for its product outside of Germany.

15) Exhibit GG3 to the witness statement is a copy of an email exchange dated 7 to 24 May 2017 between Dr Guth and Mr Koske regarding the possible sale of the International Registration for the mark DESEO. Dr Guth highlights that Mr Koske confirms that Pharma is “very well aware of [Glenwood’s] trade mark” and offers to purchase it.

16) Dr Guth then refers to various disputes in Austria, France and Benelux which he claims “demonstrate the level of dishonest and underhandness attributable to Pharma”⁷.

17) Exhibit GG4 consists of various correspondence dated June to August 2017 between Hupe Gantenburg (Glenwood’s German representative) and Pharma. Hupe Gantenburg’s letter (the letter is undated but refers to and is in response to a letter

⁵ Paragraph 4 of Dr Guth’s second witness statement dated 24 January 2019

⁶ Paragraph 12 of the witness statement

⁷ Paragraph 17 of the witness statement

from Pharma dated 16 June 2017, so it is reasonable to date the letter shortly thereafter) to Pharma claims that Glenwood's DESEO mark has been used in France, Benelux, United Kingdom, Switzerland and Spain. Dr Guth states that after failing to negotiate a deal, Pharma initiated this "cancellation action and filed its own application for DESEO in an attempt to try and take this mark for itself and prevent my company from genuinely continuing to use this mark in the UK. Therefore, I consider that Pharma's trade mark application for DESEO has been filed in bad faith."⁸

Pharma's evidence

18) Pharma's evidence consists of two witness statements. The first statement is from Mr Markus Koske who is legal counsel for Pharma, a position he has held since June 2016.

19) Mr Koske's witness statement largely contains submissions and observations on Glenwood's evidence. I shall not summarise all these here, but I have read them and shall bear them in mind. Mr Koske is particularly critical of the evidence of use and he does not consider Glenwood's evidence to have sufficiently demonstrated use and considers that Pharma is merely exercising its statutory right to revoke the registrations for them to expand its DESEO brand beyond Germany.

20) Mr Koske confirms that he spoke to Dr Guth about the possibility of purchasing the International Registration for the mark DESEO. On 1 June 2017 Dr Guth emailed Mr Koske stating that he was willing to negotiate a possible sale of the international registration, but the negotiations were the subject to the execution of a non-disclosure agreement. The draft non-disclosure agreement included a clause which would have prevented the parties from challenging the validity of the other party's trade mark rights in DESEO and would have bound Pharma from filing trade mark applications for DESEO in the designated countries. Mr Koske states: "In other words, even before an agreement in principle regarding the purchase price could be reached, Glenwood GmbH demanded my Company forgo its right to challenge the

⁸ Paragraph 19 of the witness statement.

validity of the registration in light of its apparent non-use. This was unacceptable and it became apparent that the only reason for requesting the inclusion of a non-disclosure clause was that Glenwood GmbH not only did not use the trade mark to our knowledge, but that there was in fact no use.⁹ Mr Koske subsequently wrote to Dr Guth drawing negotiations to a close.

21) Mr Koske also denies that Pharma ever agreed to adopt a different brand outside of Germany.

22) Exhibit MK01 consists of a market study by Insight-Health which shows that the sales revenue of erectile dysfunction products in Germany totalled €91 million for the period August 2017 to July 2018.

23) Exhibit MK02 to the witness statement is a report from the website chemistanddruggist.co.uk headed "Community pharmacy news, analysis and CPD". It is dated 13 August 2018 which is after the relevant periods. The article states that for the first 12 weeks that "Viagra Connect" (a erectile dysfunction product) became available in the UK, it made sales in the region of £4.3m and estimates annual sales of this product to be in the region of £17m.

24) Exhibit MK03 to the witness statement is a report from the website coventrytelegraph.net headed "What is Viagra?". The article is dated 16 May 2018, which is after the relevant periods. The article states that up to one in five men, the equivalent of 4.3 million men across the UK, suffer from erectile dysfunction.

25) Pharma's second witness statement is from Mr Ben Hartley, who is an Intellectual Property Paralegal at Pinsent Masons LLP. Mr Hartley states that following instruction from Mr Traub, a Partner at Pinsent Masons LLP, he was asked to attend local pharmacies to enquire whether the brand DESEO is available in store and, if not, whether DESEO has to their knowledge, ever been available in the UK in the past. Of the four pharmacies Mr Hartley visited, none of them had ever sold DESEO, or even heard of the erectile dysfunction product. Mr Hartley also

⁹ Paragraph 8 of the witness statement

conducted several internet searches for DESEO (once again under instruction from Mr Traub). These were carried out on 21 November 2018, which is after the relevant period.

DECISION – REVOCATION FOR NON-USE AND PROOF OF USE

26) Pharma exercised its discretion to require Glenwood to show that it has genuinely used its earlier mark. As previously stated, the relevant period which evidence relating to the proof of use is 4 November 2012 to 3 November 2017.

27) During the hearing Mr Curtis rightly conceded that Glenwood has not submitted any evidence for the section 46(1)(a) period, namely 2 October 2006 to 1 October 2011. Under the provisions of section 46(3), should Glenwood show sufficient use for the section 46(1)(b) period then the earlier period becomes obsolete. Therefore, since there is a big overlap between the section 46(1)(b) revocation period (17 August 2012 to 16 August 2017) and the proof of use period (4 November 2012 to 3 November 2017), it is convenient to assess these periods where use is required collectively.

The law

28) The relevant law relating to revocation for non-use claims is section 46(1) of the Act, which states:

“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) An application for revocation may be made by any person, and may be made to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(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.”

29) The law in respect of proof of use is within section 6A of the Act, which states:

“Raising of relative grounds in opposition proceedings in case of non-use

6A. - (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), (b) 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 period of five years ending with the date of publication.

(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 period of five years ending with the date of publication of the application 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 differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(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.”

30) Section 100 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.”

The case-law

31) The case law relating to genuine use of trade marks for revocation and proof of use purposes was summarised by Arnold J. in *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) where he stated as follows:

“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 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 Marken 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].”

32) Mr Traub argued that Glenwood’s evidence “is no more than merely token”. In reply, Mr Curtis described sham use as being use of the mark intended to preserve the registration, rather than it being genuine. I accept that the use shown is non-sham commercial use insofar that it does not appear to me to be created to overcome challenges to use of the registration. However, this is not the end of the matter.

33) If any question arises in UK proceedings as to the use to which a UK registered trade mark has been put, it is for the proprietor to show what use has been made of the mark. Therefore, the application to revoke the registration for non-use places a burden of proof on the proprietor to prove the use which has been made of the mark during the relevant period. It is clear from the guidance that several factors must be considered when assessing whether genuine use of the mark has been demonstrated by the evidence filed. The responsibility is on the proprietor to provide sufficiently solid evidence to counter the application for revocation, a task which should be relatively easy to attain. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. 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.”

and further at paragraph 28:

“28. I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

34) I also note Mr Alexander’s comments in *Guccio Gucci SpA v Gerry Weber International AG* (0/424/14). He stated:

“The Registrar says that it is important that a party puts its best case up front - with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it - and file the best evidence first time round- or lose it”” [original emphasis].

35) During the hearing Mr Curtis stated that the evidence filed by Glenwood reflects all of its sales and advertising. He went on to emphasise that the Glenwood's position is strengthened by it, 1) advertising in the UK via Amazon¹⁰, and 2) the 22 sales invoices¹¹. In other words, the invoices issued are not attributable to Amazon. I shall deal with these in turn since Glenwood's evidence and submissions stressed that they are distinct areas of trade, but I do bear in mind that I must assess the evidence as a whole.

Amazon

36) The witness statement refers to the advertisement on Amazon as showing use of the mark "in relation to a pharmaceutical product"¹² It is not entirely clear what the goods being advertised on Amazon are. However, they are clearly some form of pharmaceutical product since the advertisement includes the various chemicals it includes. What is clear is that it is an advertisement showing use of the mark. Dr Guth has not stated whether the advertisement has resulted in sales and, if so, to what extent or where those sales occurred and how frequent they were.

Invoices

37) Glenwood submitted 22 invoices which are dated between December 2015 to October 2016. They are all from a German company to individuals in the UK. The total sales are for €329.78. It is not clear where the sales originated from, though it was stated that they were not from Amazon. Therefore, it is reasonable to conclude that they originate from outside of the UK, possibly the opponent's website, since the values are in Euros.

38) Whilst the invoices clearly evidence sales, it is noted that the invoices are to 22 different people and therefore there is no repeat custom. They are individual purchases for one product priced at €14.99. Since the invoices are in Euros it is

¹⁰ Exhibit GG1 to the witness statement of Dr Guth

¹¹ Exhibit GG2 to the witness statement of Dr Guth

¹² Paragraph 6 of Dr Guth's first witness statement

reasonable to infer that the goods were being offered for sale on a non-UK facing website or retail outlet. Further, whilst the sales did occur during the relevant period, they were made within 11 months and not across the relevant periods. I do accept Mr Curtis' argument that the sales were made to individuals throughout the UK, though the frequency of such sales is very low.

39) Pharma's representatives have filed evidence aimed at illustrating that the market is significant. Mr Traub also instructed a paralegal at his firm to visit local pharmacies to enquire as to whether they stock the erectile dysfunction product DESEO and carry out internet searches. Unfortunately for Mr Hartley, I do not consider this anecdotal evidence to be useful or indicative since it was after the relevant periods.

40) During the hearing Mr Curtis stated that should I be required to limit its specification to what I consider to be a fair specification, then he considers the following to be fair: "Pharmaceutical products to increase virility". Clearly this is a more specific market than the broad list of goods that Glenwood's specification covers. However, it does represent a better prospect of success for the opponent and I shall proceed on the basis that this is the relevant market. The consumer of these goods are men who have certain medical issues. Whilst Glenwood does argue that it is a specialised area, this does not necessarily assist me with assessing the size of the market.

41) Mr Traub referred to me to the CJEU decision of *Reber Holding GmbH & Co KG v OHIM*, Case C-141/13, 17 July 2014. The facts of this judgment were summarised by Ms Amanda Michaels (sitting as the Appointed Person) in *100% Capri* (BL O/357/14) as follows:

"19. Since then, and indeed since the hearing of the appeal, the CJEU has delivered its judgment in Case C-141/13, *Reber Holding GmbH & Co KG v OHIM*, 17 July 2014. In that case, an application for a CTM was opposed by the proprietor of a national mark which was put to proof of use of the mark. The evidence showed that the earlier mark had been used in relation to hand-made chocolates which had been sold only in one café in a small town in

Germany. Sales of some 40-60 kg of chocolates per annum were shown, but given the overall size of the German market for confectionery and the lack of geographical spread of sales, the CJEU upheld the General Court's finding that there had been no genuine use of the German mark. On the facts of the case, it might be thought that the CJEU had approved the application by the General Court of a stricter test of genuine use than in the earlier jurisprudence, and in particular *La Mer*, in which the CJEU had held that there was no 'quantitative threshold' to pass. However, in *Reber* the CJEU referred at [29] to that earlier jurisprudence, including *Ansul* and *La Mer*, and the need to consider all the circumstances of the case, and so it does not seem to me that the Court intended to diverge from its established approach to the assessment of genuine use."

42) Both parties are in agreement that the *Reber* case does not introduce a minimum level of use. They are also agreed that every case needs to be assessed on its own merits. Mr Traub states that the case reinforces the approach that any proprietor cannot just show "miniscule" use or references to use in the UK, and that there must be a consistent story of facts that build the picture that the mark has been genuinely used.

43) The *Reber* case has not changed the law *per se*. It does, however, provide an example of commercial use that was neither sham or token but was still not considered to be genuine. I must consider all the relevant factors as set out in the case law above, then reach a conclusion on whether the use made of the mark is aimed at maintaining or creating an outlet for the goods or a share in the relevant market.

44) Taking all of the above into account, I am left with assessing whether 22 separate sales totalling €329.78 combined with an offer for sale on Amazon is genuine use. Mr Curtis rightly stated that there is no *de minimus* level which Glenwood must demonstrate to overcome the non-use claim. He also rightly pointed out that there is no requirement for such use to be quantitatively significant. However, I must consider "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, the nature of the goods or services; the characteristics of the market concerned; the scale and frequency of use of the mark; whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; the evidence that the proprietor is able to provide; and the territorial extent of the use”.

45) During the hearing Mr Curtis was honest in his approach that the evidence accurately reflects Glenwood’s volume of sales, the geographical extent and the offering of goods for sale in the UK is sufficient to demonstrate use. I agree that the use is neither sham or token, but I simply do not consider it to be sufficient to create or maintain a marketplace. Whilst the sales are to different entities throughout the UK, the amount of sales (€329.78) is on a very small scale. There are no examples of advertising the products and there is no evidence that the products were placed for sale anywhere other than Amazon and on Glenwood’s website which is aimed at German consumers rather than the UK.

46) Taking all of the evidence, submissions and case law into account I find that Glenwood has failed to demonstrate that it has genuinely used its mark for both the revocation non-use and proof of use periods.

47) The consequences of Glenwood not providing sufficient genuine use of the mark are twofold:

- 1) International Trade mark registration no. 879815 designating the UK shall be revoked under section 46(1)(a) to take effect from 2 October 2011.
- 2) Glenwood may not rely upon the above-mentioned trade mark registration in respect of its section 5(1) and 5(2)(a) claims since it no longer qualifies as an earlier trade mark under section 6(1)(a).

DECISION 5(1) and 5(2)(a)

48) Since the basis for the sections 5(1) and 5(2)(a) claims has been revoked, the opponent no longer has an earlier mark to rely upon. However, for the sake of

completeness I shall briefly deal with the opposition claims. Sections 5(1) and 5(2)(a) state:

“5(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

5(2) A trade mark shall not be registered if because-

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the trade mark is protected...there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

49) If I had concluded that the use made of the mark by Glenwood was sufficient to demonstrate genuine use of the mark, I would have had to consider whether to limit the specification of goods that it may rely upon. The registration covers Class 5 Pharmaceutical products which is a broad term. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the

services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

50) As previously stated Mr Curtis suggested a fair specification to be "Pharmaceutical products to increase virility". I agree with this assessment and shall proceed on this basis. Therefore, the respective goods which I would have considered are:

Glenwood's earlier goods	Pharma's applied for goods
Pharmaceutical products to increase virility	Pharmaceuticals; medicinal healthcare preparations; baby food; dietary and nutritional supplements; pharmaceutical preparations for veterinary use

51) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court stated at paragraph 29 that:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

52) Applying the principle set out in *Meric*, I find Pharma's applied for *pharmaceuticals* to be sufficiently broad as to include, and therefore identical to Glenwood's earlier goods.

53) Glenwood's earlier goods are *pharmaceutical products to assist virility*. They are likely to have the same end user, be sold via the same trade channels as *medicinal healthcare preparations*. I have no evidence or submissions before on whether they would be in competition or complementary to one another. However, I find that they are similar to at least a high degree. For similar reasons I also find Pharma's applied for *dietary and nutritional supplements* to be similar to a medium degree.

54) I have no evidence before me or submissions as to whether Glenwood's goods could be used for animals. From the evidence provided the goods have been purchased by individuals rather than farmers or veterinary surgeons which suggests that they are not. On this basis, I find that Pharma's applied for *pharmaceutical preparations for veterinary use*. They are dissimilar. I see further distance between Pharma's applied for *baby food* and therefore, these too are dissimilar to Glenwood's earlier goods.

55) Since similarity between goods is a prerequisite for a finding of a likelihood of confusion, even if I had found genuine use of the mark I would have concluded that there was no likelihood of confusion with Pharma's applied for *pharmaceutical preparations for veterinary use; baby food*.

56) With regard to Pharma's applied for goods which I have found to be identical (pharmaceuticals), Glenwood's opposition under section 5(1) would have succeeded. Taking into account that the average consumer is likely to reasonably observant and circumspect who a likely to take at least an average degree of care and attention¹³ when purchasing the goods, which would follow a visual inspection of them, for goods which are highly similar degree (*medicinal healthcare preparations*) and similar to a medium degree (*dietary and nutritional supplements*), there is a likelihood of direct confusion and the opposition would have succeeded under section 5(2)(a).

57) To summarise my opposition conclusions, I would have found that it would have succeeded against Pharma's applied for Class 5 *Pharmaceuticals; medicinal healthcare preparations; dietary and nutritional supplements*. It would have failed in respect of *pharmaceutical preparations for veterinary use; baby food*.

DECISION – 5(4)(a)

The law

58) I shall now consider the position under section 5(4)(a), which states:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) [.....]

¹³ *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

The case-law

59) In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

60) It is settled law that for a successful finding under the tort of passing-off, three factors must be present: 1) goodwill, 2) misrepresentation and, 3) damage.

The relevant date

61) Pharma does not claim to be the senior user of the mark. Therefore, the relevant date for assessing whether there is passing off is the application filing date¹⁴, or as is the case here, the priority date, which is 20 June 2017.

¹⁴ *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11, Mr Daniel Alexander QC, sitting as the Appointed Person

62) Glenwood claims to have goodwill in respect of its business operating under the sign DESEO. It claims to have been selling pharmaceutical products under this sign since 2015 and to have acquired goodwill under the sign.

Goodwill

63) Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL):

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

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

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

65) However, a small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing off even though its reputation may be small. In *Stacey v 2020 Communications* [1991] FSR 49, Millett J. stated that:

“There is also evidence that Mr. Stacey has an established reputation, although it may be on a small scale, in the name, and that that reputation preceded that of the defendant. There is, therefore, a serious question to be tried, and I have to dispose of this motion on the basis of the balance of convenience.”

66) I have previously found that Glenwood has not demonstrated that it has genuinely used its mark for the relevant period 17 August 2012 to 16 August 2017. This was based on the sales being insufficient to create and maintain a share of the market. The last of these sales was in October 2015, which is around 20 months prior to the relevant date for passing off purposes (20 June 2017). I have already set out my reasons why Glenwood has not demonstrated genuine use. Whilst the test for goodwill differs to the test for proof of use differ, in this instance they produce the same result. I do not consider that Glenwood has shown that it has, at the relevant date, a protectable goodwill. The use made is nothing more than trivial. This view is further supported by the last sale being 20 months prior to the relevant date and that all of the sales being made are to different end users. None of these are repeat purchases. Taking all of these factors into account, Glenwood’s claim falls at the first hurdle insofar that it has not demonstrated it has goodwill.

DECISION – SECTION 3(6)

The law

67) Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

The case law

68) The law in relation to section 3(6) of the Act ("bad faith") was summarised by Arnold J. in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch), as follows:

"130. A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, "Bad faith in European trade mark law" [2011] IPQ 229.)

131. First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see Case C- 529/07 *Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132. Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and Case C-192/03 *Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133. Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral*

Property Pty Ltd (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134. Fourthly, bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined": see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135. Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136. Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137. Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138. Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, inter alia, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

69) Glenwood argues that, at the relevant date, Pharma knew that the mark DESEO was being used by it in relation to pharmaceutical products and that it was the registered proprietor.

70) It states that Pharma purchased the IP rights to the mark DESEO in Germany from Glenwood in 2012. Negotiations between the parties also took place in May

2017 in relation to the potential purchase of the UK designation along with designations in France, Benelux, Austria, Switzerland and Spain. However, negotiations broke down and the purchase did not proceed. Therefore, Glenwood argues that Pharma clearly knew about the PHARMA mark and registration.

71) It is common ground that the IP rights in Germany were acquired by Pharma in Germany. It is also agreed that there were negotiations relating to several other territories, including the UK. Pharma argues that the latest negotiations ceased because Glenwood sought a confidentiality agreement which included a “non-challenge clause” which effectively sought to prevent Glenwood from challenging the validity of the registrations. Glenwood states that since it did not agree to the price being offered by Pharma, then filing the trade mark application, in the knowledge of the existing use and registration, is behaviour which falls below acceptable commercial standards.

72) Pharma states that negotiations were not at an advanced stage, and even if they were, the fact that negotiations failed was not the basis for a bad faith claim. It goes on to state that an integral part of the trade mark system is to prevent parties from maintaining a monopoly over a particular trade mark, beyond the initial five-year registration period, without having used it. I agree. The reasons for the negotiations ending are not relevant in this circumstance. It seems to me that negotiations began, they concluded without a favourable outcome. Pharma subsequently carried out investigations on whether there was use of the registration and then proceeded to file a successful revocation action. I do not consider Pharma’s actions to be in bad faith and to conclude that they were would be counterintuitive to the trade mark system. Pharma clearly wanted to use DESEO in the UK and so it began negotiations to purchase the registration which could have been mutually beneficial. At this point, it is not required to withdraw any interest or waive its statutory right to challenge the registration when is a potentially legitimate claim to revocation. I do not see anything incorrect with this approach and I find that the application was not filed in bad faith.

73) I also reject Glenwood's claim that Pharma's intention was to prevent it "from genuinely continuing to use this mark in the UK"¹⁵ since there is no evidence of significant UK use or any evidence that Glenwood intended to expand into the UK market.

OVERALL CONCLUSION

74) International Trade mark registration no. 879815 designating the UK shall be revoked under section 46(1)(a) to take effect from 2 October 2011.

75) Opposition no. 411522 is dismissed and, therefore, trade mark application no. 3249669 shall proceed to registration.

COSTS

76) Pharma have been successful in its revocation action and in defending its application against Glenwood's opposition. Therefore, it is entitled to a contribution towards its costs. In the circumstances I award Pharma the sum of £1900 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Task	Cost
Official fee	£200
Preparing a statement of case for the revocation, considering the other side's counterstatement and preparing a counterstatement in the opposition	£400
Preparing evidence and considering and commenting on the other side's evidence	£700
Preparing for and attending a hearing	£600
TOTAL	£1900

77) I therefore order Glenwood GmbH, Pharmazeutische Erzeugnisse to pay PharmaSGP GmbH the sum of £1900. The above sum should be paid within

¹⁵ Paragraph 19 of Dr Guth's witness statement

fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this day of 15 July 2019

Mark King

For the Registrar,

The Comptroller-General