

O-1093-22

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 503572

BY NAÏVE COFFEE LTD

**TO REVOKE FOR NON-USE THE REGISTRATION OF
TRADE MARK No. 912773594:**

NAÏVE

OWNED BY LAURYNAS BARTKEVICIUS

Background and pleadings

1. Laurynas Bartkevicius (“**the Proprietor**”) owns UK trade mark registration No. 912773594 (“**the Contested Mark**”), as detailed here:

NAÏVE

(word mark)

Filing date: 8 April 2014

Registration date: 4 September 2014

Registered in respect of various non-alcoholic drinks products in Class 32, as follows:

Lemonades; Syrups for lemonade; Syrups for lemonade; Syrups for lemonade; Shandy; Bitter lemon; Carbonated non-alcoholic drinks; Ginger ale; Low-calorie soft drinks; Tonic water [non-medicated beverages]; Fruit flavored soft drinks; Root beer; Aloe vera juices; Pineapple juice beverages; Orange juice; Fruit-based beverages; Aerated juices; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit extracts; Beverages consisting principally of fruit juices; Vegetable drinks; Vegetable juices [beverages]; Must; Fruit nectars, non-alcoholic; Tomato juice [beverage]; Iced fruit beverages; Fruit drinks; Smoothies; Fruit-flavoured beverages; Fruit juice for use as a beverages; Fruit juice beverages; Grape juice; Grape juice beverages; Flavoured waters; Sparkling water; Table waters; Lithia water; Waters [beverages]; Soda water; Seltzer water; Still water; Mineral water [beverages]; Mineral water (Non-medicated -); Bottled drinking water; Bottled water; Aloe vera drinks, non-alcoholic; Orange barley water; Aperitifs, non-alcoholic; Lemon barley water; Energy drinks; Energy drinks [not for medical purposes]; Energy drinks containing caffeine; Non-alcoholic honey-based beverages; Non-alcoholic malt free beverages [other than for medical use]; Sorbets in the nature of beverages; Isotonic drinks; Isotonic beverages [not for medical purposes]; Whey beverages; Cocktails, non-alcoholic; Part frozen slush drinks; Sports drinks; Alcohol free wine; Guarana drinks; Sarsaparilla [non-alcoholic beverage]; Cider, non-alcoholic; Sherbets [beverages]; Hops (Extracts of -) for making beer; Hop extracts for use in the preparation of beverages; Lemon squash; Extracts for making beverages; Essences for making beverages; Concentrates for use in the preparation of soft drinks; Orange squash; Cordials; Pastilles for effervescing beverages; Powders for effervescing beverages; Aerated water (Preparations for making -); Liqueurs (Preparations for making -); Mineral water (Preparations for making -); Syrups for making non-alcoholic beverages; Orgeat; Malt syrup for beverages; Syrups for beverages; Malt wort; Syrups for making fruit-

flavored drinks; Squashes [non-alcoholic beverages]; Grape must, unfermented; Lime juice cordial.

2. The Contested Mark is a comparable UK trade mark created following the end of the transition period of the UK's withdrawal from the EU. It is based on an EU Trade Mark and retains the filing and registration dates of the EU Trade Mark.¹
3. On 8 April 2021 Naïve Coffee Ltd ("**the Applicant**") applied to revoke the Contested Mark, relying on the provisions of **section 46(1)(a)** of the Trade Marks Act 1994 ("**the Act**"). The premise of the objection is that, without proper reason, the Contested Mark has not been put to genuine use in the relevant territory (including the UK) in the five years from the date it became registered, i.e. between 5 September 2014 – 4 September 2019 ("**the Relevant Period**"). The Applicant claims that the Contested Mark should therefore be revoked in its entirety as from 5 September 2019.²
4. The Proprietor filed a Form TM8(N) notice of defence in respect of the following of the registered goods, which the Proprietor says have been sold under the Contested Mark:

Carbonated non-alcoholic drinks; Low-calorie soft drinks; Fruit flavored soft drinks; Aloe vera juices; Orange juice; Fruit-based beverages; Aerated juices; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit extracts; Beverages consisting principally of fruit juices; Vegetable drinks; Vegetable juices [beverages]; Fruit nectars, non-alcoholic; Iced fruit beverages; Fruit drinks; Smoothies; Fruit-flavoured beverages; Fruit juice for use as a beverages; Fruit juice beverages; Flavoured waters; Sparkling water; Table waters; Waters [beverages]; Soda water; Seltzer water; Still water; Mineral water [beverages]; Mineral water (Non-medicated -); Bottled drinking water; Bottled water; Aloe vera drinks, non-alcoholic; Non alcoholic malt free beverages [other than for medical use]; Orange squash; Cordials; Aerated water (Preparations for making -); Mineral water (preparations for making -)

5. At the date of the application for revocation (8 April 2021), the Contested Mark stood registered in the name of Lotus Orient Ltd, and its legal representative was recorded in the UKIPO register as Trade Mark Wizards. However, the defence form that was filed

1 Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

2 The statutory form TM26(N) that the Applicant filed on 8 April 2021 indicates that it notified the proprietor on 30 March 2021 that the application for revocation would be made.

named Mr Bartkevicius both as the Proprietor and as the recorded representative.³ The Registry therefore wrote to Mr Bartkevicius on 21 June 2021 seeking clarification.

6. In response, the Proprietor filed a Form TM33 on 1 July 2021, notifying the Registry of a change of representative and updating the address for service. On 2 November 2021 (following a retrospective extension to the original deadline) the Proprietor filed evidence in defence of the Contested Mark, which included his witness statement that he acquired the Contested Mark in August 2020.⁴ The Registry updated the register accordingly. On 31 December 2021, Mr Bartkevicius filed a signed confirmation statement that as the assignee and new registered owner of the Contested Mark, he stood by his counterstatement and confirmed that he was aware of and accepted liability for costs if the Applicant succeeds in these revocation proceedings.

Papers filed and representation

7. Both parties filed evidence during the evidence rounds, which I outline later in this decision. The Applicant is professionally represented in these proceedings by Briffa; the Proprietor acts without attorney representation. Neither side requested a hearing and nor did they file written submissions in lieu of an oral hearing. I have read all of the papers filed and shall refer to points of evidence or submission to the extent I consider warranted.

DECISION

8. The relevant parts of section 46 of the Act provide as follows:

“46 (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;

.....

³ In the responses to Question 3 and 5.

⁴ Witness Statement of Laurynas Bartkevicius, dated 1 November 2021, at paragraph 2.

(2) For the purposes of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and 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 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.

.....

(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 of the Act is also relevant and provides that where a question arises about the use of a trade mark “.. it is for the proprietor to show what use has been made of it.” It is therefore plain that the burden of proof falls on the Proprietor to show that the Contested Mark has been used (or that there were proper reasons for any non-use, had that been made as an alternative pleading).

10. Since the Contested Mark is a comparable mark, paragraph 8 of Part 1 of Schedule 2A of the Act is also relevant. It provides that where the five-year period referred to in section 46(1)(a) expired before IP Completion Day, the references in section 46 to use of a trade mark are to be treated as references to the corresponding EUTM, and the references to the United Kingdom include the European Union.⁵ In the present case, the five-year period under section 46(1)(a) (the Relevant Period) expired before IP Completion Day (31 December 2020). As a consequence, use in the EU, prior to IP Completion Day may be taken into account for the purposes of illustrating genuine use.

Case law principles

11. In *Walton International Ltd & Anor v Verweij Fashion BV*,⁶ Arnold J. (as he then was) considered the case law relating to genuine use and concluded 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;
- (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;
- (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;
- (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: Internal use by the proprietor does not suffice: Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter:
- (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:

5 IP Completion Day marked the ending of the 11-month period from 31 January 2020 during which the UK continued to be subject to EU rules – the period known in the Withdrawal Agreement between the UK and the EU as the 'transition period'.

6 [2018] EWHC 1608 (Ch) at paragraph 15 of the judgment.

- (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:
- (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:
- (8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use

Registered Proprietor's Evidence

12. **The Proprietor's evidence in chief:** Witness Statement of Laurynas Bartkevicius, dated 1 November 2021, with Exhibits JS1 - JS5.⁷ Mr Bartkevicius gives evidence as the owner of the Contested Mark, based on his "personal knowledge" or "the records of companies involved in trading the products under [the Contested Mark]".
13. The Proprietor states that he acquired the trade mark in August 2020, but the trade mark "has been used in selling various beverages since 2017". He identifies the following four drinks in the product range between **2017-2019**:
- naïve aloe vera (the first aloe vera-based drink produced using special "floating uncrushed pieces" technology in Europe
 - naïve aloe vera drink with basil seeds
 - naïve orange drink with uncrushed orange cells
 - naïve pomegranate drink with chia seeds

⁷ (This evidence was refiled on 28 January 2022 in a version that included page numbering.)

14. For the period **2019 – 2021** the product range appears to have comprised (only) water sold in 330 ml cans (sparkling and still).
15. The Proprietor states that “drinks have been sold in the following countries: Lithuania, Latvia, Estonia, Germany, Sweden, Finland, the Netherlands, Greece, UK.” He states that turnover in the relevant period was as follows:
- 2017-2019: over 400,000 units of naïve orange, basil, pomegranate, aloe vera in EU, including UK, totalling over £150,000 sales.
 - 2019 – 2021: over 900,000 x 330 ml cans of sparkling and still naïve water, achieving sales of over £100,000.
16. The witness refers to **Exhibit JS1** as showing “product descriptions and real pictures with labels.” This exhibit appears to a corporate document, describing the development of the range of Naïve drinks, promoting aspects such as their being vegan, sugar free and high in various vitamins and minerals. The promotional material includes images of the bottled drinks and indicates a sales price of between £1.50 - £2.50, dependent on the particular drink and promotion, and with a retailers’ margin of 35-50%. However, it is not explicitly stated what the exhibit is exactly, and it is not stated who may have had sight of the material or when, so it is of very limited value as evidence of use of genuine use.



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17. Page 11 of the exhibit shows various drinks for sale on a shelf in a LIDL store somewhere. (Evidence from the Applicant refers to it being a LIDL in Lithuania, which based on the signage, appears likely.)



18. Zooming in on the image, amongst the drinks on that shelf appear to be some NAÏVE canned drinks. However, while these images indicate that various drinks under the Naïve brand have been produced in reality and offered for sale, the exhibit reveals nothing of when, where or in what numbers the goods were sold.

19. **Exhibit JS2** is said to show that products have been produced during the Relevant Period. Exhibit JS2 shows six invoices. Four of the invoices are from a seller (UAB Vimedus) based in Vilnius, Lithuania, addressed to Lotus Orient Ltd in the UK (the former proprietor of the Contested Mark). Relevant details of those four invoices are:
- Invoice No.1909-03 – dated 6 September 2019, in respect of 50,000 cans of still water (NAÏVE) and over 8400 cans of sparkling water (NAÏVE), valued at over 10,000 Euros;
 - Invoice No.1909-04 – dated 8 September 2019, in respect of precisely the same numbers of canned water (NAÏVE) and precisely the same value;
 - Invoice No.1909-05 – dated 6 September 2019, in respect of slightly fewer cans of still water and a slightly greater number of cans of sparkling water (NAÏVE), but totalling precisely the same value;
 - Invoice No. 2104-04 – dated 14 April 2021, in respect of equal numbers of cans of still and sparkling water (NAÏVE) (nearly 26,000 of each), at a value of over 9k Euros. The invoice date is outside of the Relevant Period and after the date on which the Applicant filed its application for revocation of the Contested Mark.
20. The other two invoices are from a seller (McCarter a.s.) based in Bratislava, Slovakia, though again addressed to Lotus Orient Ltd in the UK. Relevant details of those two invoices are:
- Invoice No. 5021801832 – dated 16 August 2018, in respect of 4 pallets (5184 items) of Lotus NAÏVE Orange drink (500ml), at a value of 1500 Euros.
 - Invoice No. 5021801819 – dated 17 August 2018, in respect of nearly 15,000 Lotus NAÏVE Aloe Vera drinks (500ml), nearly 14,000 Lotus NAÏVE basil seeds and aloe vera drinks (500ml) and nearly 9,000 Lotus NAÏVE orange drink (500ml), at a value of over 13,000 Euros.
21. The witness states that **Exhibit JS3** is said to be evidence of product shipments to different countries during the Relevant Period. The exhibit spans pages 25 – 37 and shows photocopies of various shipping notices and receipts. Not every delivery note shows the goods as branded “NAÏVE”, but most do. Details are as follows:
- From McCarter a.s. (in Bratislava, Slovakia), delivering to an address in Vilnius, and where the customer is identified as Lotus Orient Ltd at an address in the UK. The delivery note is dated 26 September 2018 and is in respect of Lotus NAÏVE Chia & Pomegranate drinks.

- The next document is dated 17 August 2018 and refers to shipment from Lotus Orient Ltd to an address in Slovakia. However, the document is not in English and does not identify the goods involved so is of no real evidential value.
- The next document (page 27) is dated 16 August 2018 and involves McCarter a.s. and Lotus Orient Ltd but its content is too indistinct to be evidentially useful.
- Page 28 shows a purchase order dated 14 January 2019 addressed to Lotus Orient Ltd in the UK (where the contact person is identified as “LAURYNAS”) and where the goods are 216 trays of 6 x 500ml of NAÏVE orange drink destined for Bickery Food Group B.V. in the Netherlands.
- The next “arrival notice” is dated 5 November 2019 from UAB “Vimedus” (in Lithuania) to Lotus Ltd in UK (FAO of “Laurynas Zakevicius” [sic]) in respect of 78 pallets of NAÏVE spring water (still and sparkling). The date is outside of the Relevant Period but before the revocation application date.
- Page 30 is a copy of a bill of lading bearing a date of 17 October 2019, where the shipper is identified as UAB “Vimedus” (in Lithuania) and the consignee is Lotus Ltd in UK. The document is in respect of 78 pallets of NAÏVE spring water (still and sparkling). It is possible that it relates to the same shipment as the document on page 29.
- Page 31 is a copy of a delivery note dated 19 November 2019 from Naïve Waters Ltd (where the seller contact is given as Laurynas Bartkevicius). The delivery is to an address in England. The goods are over 3000 cases of NAÏVE still and sparkling water (over 73,000 units). The date is outside of the Relevant Period but before the revocation application date.
- Page 32 shows a further delivery note nearly identical to the one above.
- Page 33 is a document again nearly identical to the two above but is dated 15 November 2019.
- Page 34 shows a delivery note similar to the above, but dated 13 September 2019 and in respect of just under 59,000 cans of NAÏVE waters. The order is shown to have been placed on 7 August 2019 (within the Relevant Period).
- Page 35 is a delivery / loading note, but its details correspond to the details of the document at page 31 (including the specific handwritten references to “26 damaged cases, 3016 good cases or 3042 cases total”). I therefore consider those two documents to refer to the same order.
- Likewise, the details of the document at page 36 appear to correspond to the details of the document at page 33 and appear to relate to the same order.

- Page 37 shows an arrival notice dated 23 April 2020 from UAB Vimedus (Lithuania), delivered to Laurynas Zakevicius (sic) in the UK. The delivery is of 52 pallets of NAÏVE still and sparkling water. The date is outside of the Relevant Period and after the revocation application date.

22. The witness describes **Exhibit JS4** as sales invoices of the products “for given periods of time”.

- It shows a total of 11 invoices:
- Page 39 – to The Bickery Food Group BV in The Netherlands – dated 13 November 2018 – for NAÏVE aloe vera drinks – valued at over 2100 Euros.
- Page 40 – a buyer in Lithuania – dated 5 December 2018 – for NAÏVE aloe vera and pomegranate drinks – total value of around 240 Euros.
- Page 41 – an invoice dated 1 May 2019, where the buyer is a cash and carry in UK, buying nearly 1300 units of NAÏVE aloe vera, orange and pomegranate drinks, totaling nearly £1200. This invoice is duplicated on page 42.
- Page 43 - an invoice dated 28 July 2021, where the buyer’s address is in England, buying nearly 26,000 units of NAÏVE water, totaling over £1300. However, the date of this invoice is outside of the Relevant Period and after the revocation application date and must therefore be disregarded in my assessment of genuine use.
- Page 44 is an invoice dated 13 September 2019 for delivery within England of nearly 60,000 cans of NAÏVE water, totalling over £13,000.
- Page 45 is an invoice dated 13 September 2019 for delivery within England of over 73,000 cans of NAÏVE water, totalling over £16,000. The delivery address is the same as that in several of the other exhibited documents. The date is outside of the Relevant Period but before the revocation application date. This document corresponds to the delivery information at page 36.
- Page 46 is an invoice dated 19 November 2019 for delivery within England (same address again) of over 73,000 cans of NAÏVE water, totalling over £16,000. This date too is outside of the Relevant Period but before the revocation application date. Page 47 is nearly identical (same date, goods amount and delivery information), but has a slightly different invoice number and slightly different signature.
- Page 48 is an invoice dated 11 September 2019 for delivery within England (same address again) of nearly 118,000 cans of NAÏVE water, totalling almost

£26,500. This date is outside of the Relevant Period but before the revocation application date.

- The final invoice exhibited on page 59 shows a delivery date of 20 May 2021, which outside of the Relevant Period and after the revocation application date and must therefore be disregarded in my assessment of genuine use.

23. The witness describes **Exhibit JS5** as “marketing material” “to show that products have been advertised during relevant periods.” The material exhibited includes more photographs of Naïve-branded drinks being offered for sale, including these examples:



24. The photo on the left is of NAÏVE cans of water, offered for sale in pounds sterling, place unknown; the drinks on the right look like the basil seed drink, and, according to the signage, are offered for sale at Thames cash and carry. However, these photographs are not good evidence of genuine use since there is no way of discerning when they were offered or for how long. It is also not clear whether or not the photos date from after the Relevant Period or after the revocation application date.

25. Exhibit JS5 includes a photograph of NAÏVE featuring as a brand in a sample box:



26. However, this is not good evidence of genuine use since there is no way of discerning when the goods were offered, to whom, where etc. The photo makes no clear connection to the Relevant Period or territory, or even goods. Exhibit JS5 also includes a photograph of NAÏVE featuring as a brand on a water bottle, along with Nestlé and Premier Foods:



However, this is not evidence of genuine use since no context is given for the water bottle, or any detail of how it may have been used to promote the registered goods (where, when etc.).

27. **The Applicant's evidence and submissions:** The Applicant filed a Witness Statement of Mustafa Kondo, dated 11 March 2022, with Exhibits MK1 to MK4. Mr Kondo is the sole director of the Applicant. His statement includes a number of submissions in response to the Proprietor's evidence. I note the following points:

- Although the Proprietor states that the drinks sold under the contested mark include aloe vera, orange, pomegranate and water, he does not specify whether the goods sold extend beyond this limited list and/or include any of the remaining goods that are currently registered under the Contested Mark.

- The invoices show purchases by the Proprietor from third parties not based in the UK, where the currency is Euros and which do not show proof of use in the UK.
- The invoices to buyers in Lithuania and the Netherlands do not constitute proof of use in the UK. The shipper is Naïve Waters Ltd, a company that is not the Proprietor and which was dissolved on 17 August 2021, as confirmed in an extract from the Companies House register at **Exhibit MK1**.
- **Exhibit MK2** shows Lotus Orient Ltd was dissolved on 17 November 2020.
- **Exhibit MK3** shows extracts from the Proprietor's business website and social media accounts. Mr Kondož states that the Proprietor's business website www.naivedrinks.co.uk is no longer active and his business social media accounts have not been updated for many years. For instance, the relevant Facebook page has not been updated since 2017 and the link provided by the Proprietor's business Facebook page also appears to be inactive. Proprietor's business Twitter page was created on 26 October 2018 and the last post was the next day (27 October 2018) and includes only two tweets in total.
- **Exhibit MK4** shows images, from March 2022, of the Proprietor's drinks – still and sparkling water, orange, pomegranate with chia seeds, and aloe vera with basil seeds – offered for sale on the Proprietor's business Amazon page and on the websites of Drink Supermarket or Office Stationery, but that in each case the goods are marked as no longer in stock.

28. Mr Kondož appears to accept (at paragraph 16 of his witness statement) that the Proprietor has provided evidence of genuine use within the UK during the relevant period in respect of sparkling water and spring water.

29. **The Proprietor's evidence in reply:** Second Witness Statement of Laurynas Bartkevicius, dated 4 August 2022, with Exhibits LB1 to LB5. The Proprietor filed evidence in reply to the statement by Mr Kondož and I note the following points.

30. Mr Bartkevicius refers to the NAÏVE brand positioning in relation to zero plastics, so the trade mark "*can not cover any of the remaining goods which are currently registered in the market in order not to dilute the NAÏVE trade mark / brand messaging.*" On this point, Exhibit LB1 appears to be a corporate document or slide pack, emphasising the benefits of cans over plastic and glass. The implication of this may be that the Proprietor is focusing its efforts to the canned goods, which on the face of the evidence, are simply

the still and sparkling water.⁸ Indeed, Mr Bartkevicius refers to other goods having been discontinued. I shall nonetheless consider the evidence of use in the round, including in respect of the aloe vera and other drinks, which appear to have been sold in plastic bottles.

31. Mr Bartkevicius's statement suggests that the Contested Mark is not being used in respect of any of the registered goods other than still and sparkling water and that the reason for this is to avoid dilution of the NAÏVE trade mark / brand messaging and its environmental credentials. As I will explain later in this decision, this is not a reason on which the Proprietor can rely in defence of the revocation action against the Contested Mark.
32. He acknowledges that Naïve Waters Ltd was a company that was dissolved on 17 August 2021, but states that before and up to that date, it traded in goods under the Contested Mark and reiterates that the Proprietor is still the owner of the trade mark and can license its use through partnerships or any other vehicle to distribute goods.
33. In response to the shortcomings in social media presence highlighted by the Applicant's evidence, Mr Bartkevicius refers to directing his limited resources to other marketing and sales channels. He also states that the goods are produced in Ukraine and he is seeking other supply solutions.⁹
34. As to the allegation that the Proprietor has not shown use in the UK, he refers to evidence of invoices and deliveries to the UK. (I shall return to the issue of territory shortly in this decision.) At Exhibit LB2 he presents various invoices relating to the UK. It seems to me that most of those are duplicates of invoices or shipping information filed earlier, or else they were invoices from June – August 2021 and thus not relevant. The exhibit included at least one more UK invoice for Naïve waters, dated 16 September 2019 delivered to an address in the UK. This date is outside of the Relevant Period but before the revocation application date.

Assessment of genuine use

35. My task is now to consider whether the evidence filed, as I have summarised, and in part commented on above, is sufficient to show that the Proprietor has, during the

⁸ Notwithstanding the reference in the slide show / corporate plan at Exhibit q1 2020 cucumber and garden mint, pomegranate; passion fruit; yuzu and mandarin

⁹ I note that page 42, Exhibit LB5 shows Ukrainian water analysis reports

relevant period and in the relevant territory, made genuine use of the Contested Mark, in respect of the registered goods at issue. I approach this task in light of the principles summarised by Arnold J in *Walton*.

36. A first point to note is that the Proprietor has filed a defence only in respect of *some* of the registered goods – those listed at paragraph 4 of this decision, and repeated below. Since no defence has been offered in respect of the other goods specified in the full registration (as set out in paragraph 2 of this decision) then those goods are revoked for uncontested non-use.
37. A second point to note is that the Relevant Period is 5 September 2014 – 4 September 2019, being the five-year period following registration of the Contested Mark. However, the provision in section 46(3) of the Act means that even where the evidence of genuine use is insufficient in respect of the Relevant Period, the registration of the Contested Mark shall nonetheless not be revoked to the extent that there is evidence of genuine use in the period between 5 September 2019 and 8 April 2021, which is the date on which the Applicant applied to revoke the Contested Mark. The proviso to that alternative period of use is that any use shown that took place in the period of three months before the revocation application date shall be disregarded, unless preparations for the use began before the Proprietor became aware that the application might be made. I note that the Form TM26(N) (i.e. the application for revocation form) states that the Proprietor was informed on 30 March 2021 of the Applicant's intention to seek revocation.
38. A third point to clarify is the relevant territory in which the use must be shown. The Applicant's witness objected that the evidence relating to Lithuania and The Netherlands do not show genuine use in the UK. However, as noted at paragraph 10 above, the Contested Mark is a comparable UK mark, based on an EUTM, and the whole of the Relevant Period fell before IP Completion Day (31 December 2020) i.e. the end of the transition period following the UK's departure from the European Union. As a consequence, use in the EU, prior to IP Completion Day may be taken into account for the purposes of illustrating genuine use. As for use subsequent to IP Completion Day, only use in the UK could be relevant for the purposes of the section 46(3) proviso.
39. In view of the limited extent of the Proprietor's defence of the Contested Mark, the only goods at issue are:

Carbonated non-alcoholic drinks; Low-calorie soft drinks; Fruit flavored soft drinks; Aloe vera juices; Orange juice; Fruit-based beverages; Aerated juices; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit extracts; Beverages consisting principally of fruit juices; Vegetable drinks; Vegetable juices [beverages]; Fruit nectars, non-alcoholic; Iced fruit beverages; Fruit drinks; Smoothies; Fruit-flavoured beverages; Fruit juice for use as a beverages; Fruit juice beverages; Flavoured waters; Sparkling water; Table waters; Waters [beverages]; Soda water; Seltzer water; Still water; Mineral water [beverages]; Mineral water (Non-medicated -); Bottled drinking water; Bottled water; Aloe vera drinks, non-alcoholic; Non alcoholic malt free beverages [other than for medical use]; Orange squash; Cordials; Aerated water (Preparations for making -); Mineral water (preparations for making -)

40. The only goods that feature in the evidence as having been sold in the EU or UK are:
- i. Naïve Orange drink (where the bottle shown on the Amazon website, in the Applicant's Exhibit MK4, refers to the drink containing "crunchy bits and juicy pieces");
 - ii. Naïve pomegranate drink with chia seeds
 - iii. Naïve basil seeds and aloe vera drink
 - iv. Naïve still spring water (cans)
 - v. Naïve sparkling water (cans)
41. Before I consider the evidence relating to the cans of spring water, I will consider first the evidence in respect of the three fruit/plant-based drinks above, which involves the following:
- a. the witness statement averment by the Proprietor that from 2017 – 2019 over 400,000 units were sold in the EU, including the UK and that sales totalled over £150,000. The Proprietor also identifies nine EU countries (including the UK during the Relevant Period) in which Naïve drinks have been sold. The statement is lacking in detail of how those sales were distributed – so it is not clear as to exactly what numbers of what drinks were sold in which countries in what months. The period of sales may be from January 2017 to December 2019 i.e. essentially 3 years, or may be from December 2017 to January 2019 i.e. much closer to the equivalent of a year of sales. Taking the premise of equal numbers sold in each of the nine EU countries mentioned in the witness statement, that would work out as approximately 44,444 drinks sold in each of those countries in that period.

- b. As corroboration that the drinks existed and were shipped and sold within the EU, the invoices at Exhibit JS2 show Naïve fruit drinks being sold to Lotus Orient Ltd (the Proprietor's predecessor in title) in the UK in August 2018 (during the Relevant Period) and in amounts totalling over 14,500 Euros. It appears that Mr Bartkevicius has an association with Lotus Orient Ltd and with Naïve Waters Ltd, but his witness statement is not explicit about those connections. Nonetheless, it is his name shown as the contact person in invoices to those companies, and it does not appear to be contested that Mr Bartkevicius owns the Contested Mark and, in line with his submission in his second witness statement, it is enough that the Proprietor has consented to use by another as a vehicle to distribute goods.
 - c. Exhibit JS3 includes a delivery note to Lotus Orient Ltd in the UK within the Relevant Period (for Pomegranate and Chia seed drinks). It also shows a purchase order from January 2019 (within the Relevant Period) for 216 trays of the Naive Orange drinks, to an address in The Netherlands.
 - d. Exhibit JS4 shows another invoice from within the Relevant Period to an address in The Netherlands for over 2100 Euros of Naïve aloe vera drinks; an invoice for aloe vera and pomegranate drinks to Lithuania valued at 240 Euros, again within the Relevant Period; and another invoice from within the Relevant Period shows a UK cash and carry buying nearly 1300 units of NAÏVE aloe vera, orange and pomegranate drinks, totaling nearly £1200.
 - e. There is also the evidence filed by the Applicant, where the Naïve fruit/plant-based drinks are shown as having been offered for sale on Amazon.co.uk and on Drink Supermarket (offered for sale in pounds sterling). However, not only are those websites shown to be no longer selling those drinks, but the Proprietor has provided no evidence of the extent to which there may have been sales through those outlets during the Relevant Period or subsequently.
 - f. There is also the photograph of the basil seed bottled drinks offered for sale at Thames cash and carry, though, as I noted earlier, it is unclear from when that photograph dates.
42. The evidence gives no information about how the goods have been promoted and marketed. The picture of the Proprietor's business dealings is not clear and the delivery and shipping evidence is not wholly illuminating. The scale of use is also modest, and tiny in terms of the EU soft drinks market.

43. In *Plymouth Life Centre*,¹⁰ Daniel Alexander QC (as he then was), sitting as the Appointed Person, observed that although the burden lies on the registered proprietor to prove use, there is no particular way in which use must be established. He continued: *“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.”*

44. The evidence marshalled by the Proprietor undoubtedly has considerable shortcomings as I have alluded to. However, it seems to me that taken in the round, it may be considered sufficient to establish that there has been actual use of the Contested Mark in relation to the fruit/plant-based drinks (orange, aloe vera and pomegranate) and that the use took place in various countries in the EU, including the UK, during the Relevant Period. There is no quantitative threshold for sales, determined a priori and in the abstract. The soft drinks market is enormous, but the particular varieties of fruit- and plant-based goods under the Naïve mark are somewhat out of the ordinary, and from the witness statement of the Proprietor, achieved over £150,000 of sales during the time that they were offered. I am satisfied that this is not tokenistic use, nor even minimal use, but that the Contested Mark has been used on the goods in a manner consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods to the consumer or end user by enabling the consumer to distinguish the goods from others which have another origin. While the evidence could have been much richer and clearer in detail, it is, in my view (just) sufficient to find that there has been use by way of real commercial exploitation of the mark on the market for the relevant goods, even if, since the Relevant Period, the plastic-bottled goods have been discontinued.

45. I turn next to consider the evidence in relation to the Naïve canned water. The Proprietor’s witness statement evidence is that between 2019 – 2021 there were sales of over 900,000 cans worth over £100,000. The description of the timescale is again unhelpfully vague, since it is only sales up to (at most) the date on which application for

revocation was filed (8 April 2021) that are relevant for genuine use. Some of the evidence is from after that date – such as the invoice for over 50,000 cans (over 9,000 Euros) dated 14 April 2021. On the other hand, there is some evidence in relation to Naïve canned water during the Relevant Period – but most of the evidence relating to the water goods is from after the Relevant Period. I shall still take into account that evidence up to the date of application for revocation, since there is no reason to doubt that the preparations in relation to the use of the Contested Mark in respect of the canned waters began before the Proprietor became aware that the application for revocation might be made.

46. Three invoices are shown in Exhibit JS2 from September 2019 to the former proprietor (Lotus Orient Ltd) in the UK in respect of over 30,000 Euros of Naïve water, and 78 pallets were delivered to the same on 5 November 2019. Delivery notes in evidence show some to the UK dated September 2019 (where the order was placed in the Relevant Period) and deliveries on 15 and 19 November 2019 from Naïve Waters Ltd (where the seller contact is the Proprietor). The delivery notes show fairly sizable amounts of the NAÏVE still and sparkling water goods – repeatedly tens of thousands of units. There is also the further sales invoice evidence in Exhibit JS4, dating from September 2019, which total around 250,000 units and over £55,000. Coupled with this evidence is the Applicant’s evidence that indicates that the Naïve waters have previously been offered for sale on three separate websites in the UK (in pounds sterling), though the dates are not known and the goods are no longer available.
47. I again fully acknowledge the weaknesses in the evidence, but again it is, in my view (just) sufficient to find that there has been use by way of real commercial exploitation of the mark on the market for the relevant goods. Use does not have to be continuous,¹¹ nor does the use have to indicate an especially successful business. In my view the volumes of goods passing through the hands of the Proprietor and his related companies appear to be more than tokenistic and indicate real commercial exploitation of the Contested Mark.
48. Where the submitted evidence for proof of use of trade mark is sufficient only for part of the goods listed, the contested mark is deemed registered for only those goods. 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.”

49. In my view, the evidence is sufficient to permit the continued registration of the following defended specified terms:

Aloe vera juices; Fruit juice beverages (Non-alcoholic -); Sparkling water; Still water

50. I should also add that I find no proper reason that would justify non-use of the Contested Mark in respect of other goods. Firstly, it is necessary to claim proper reasons for non-use, and no such claim was made in the Proprietor’s counterstatement. And secondly, the business decision referred to in the Proprietor’s evidence, regarding avoiding plastic, is not one that could constitute a proper reason in the context of the section 46(1)(a). Case law has emphasised that only obstacles that have 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 the mark,¹² may be described as “proper reasons” for non-use.¹³ Brand positioning on plastics is a normal business decision which does not represent an impediment arising independently of the will of the Proprietor.

Outcome

51. The application under section 46(1)(a) of the Act has been partially successful. Trade mark registration No. 912773594 is revoked in part and the rights of the Proprietor in that regard are deemed to have ceased as from 5 September 2019. The registration shall be reduced to cover only the following goods: *Aloe vera juices; Fruit juice beverages (Non-alcoholic -); Sparkling water; Still water*

Costs

52. The Applicant has been successful in revoking many of the particular terms specified. On the other hand, the Proprietor has successfully defended a good deal of the substance of his registration. In my view, it is fair to award a partial contribution to the Applicant’s costs of filing the application for revocation, based on the published scale of costs (Tribunal Practice Notice 2/2016), and taking a broad-brush approach:

Official filing fee:	£200
Preparing the application and considering the Proprietor’s case:	£250
Total:	£450

¹² In line with Article 19(1) of the TRIPS Agreement, being the Agreement on the Trade-Related Aspects of Intellectual Property.
¹³ See, for instance, the CJEU in *Haupt v Lidl* Case C-246/05 [2007] ETMR 61

53. I order Laurynas Bartkevicius to pay Naïve Coffee Ltd the sum of £450 which, in the absence of an appeal, should be paid within twenty-one days of the expiry of the appeal period.

Dated this 12th day of December 2022

Matthew Williams

For the Registrar, the Comptroller-General