

O/571/22

TRADE MARKS ACT 1994

**IN THE MATTER OF INTERNATIONAL
REGISTRATION NO. 1215909
DESIGNATING THE UNITED KINGDOM
IN THE NAME OF "PHILICON 97" AD:**

PHILICON

AS A TRADE MARK IN CLASSES 29,30,32

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 60000245 BY
BOYER SA**

BACKGROUND AND PLEADINGS

1. On 17 April 2014, “PHILICON 97” AD (“the holder”) applied to register the International Registration shown on the cover page of this decision (“the IR”). With effect from 4 November 2014, the holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol to the Madrid Agreement. The priority date for the IR is 21 March 2014. The holder seeks protection for the following goods:

Class 29: *Vegetables, preserved; vegetables, dried; tomato puree; tomato juice for cooking; fruit, preserved.*

Class 30: *Ketchup; tomato sauce.*

Class 32: *Fruit juice and fruit beverages; syrups for beverages.*

2. The request was published for opposition purposes on 6 March 2015 and, on 7 May 2015, it was opposed by Boyer SA (“the opponent”).¹ The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition was directed at all of the goods in the IR’s specification. The opponent relies on the following mark:



Registration no. EUTM 3309499²

Registration date 7 August 2003; date entered into the register 22 June 2005.

¹ The opposition was stayed following a request received by the applicant on 13 July 2015 to stay the opposition pending the outcome of proceedings against the earlier right which was subject to revocation on the grounds of non-use before the Paris Court of First Instance. Following appeal proceedings the opposition remained suspended. On 14 April 2022, the Tribunal notified the parties that the opposition would continue following the conclusion of proceedings at the French Supreme Court.

² Although the UK has left the EU and the EUTM relied upon by the opponent enjoys protection in the UK as a comparable trade mark, the EUTM remains the relevant right in these proceedings. That is because the application was filed before the end of the Implementation Period and, under the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, I am obliged to decide the opposition on the basis of the law as it stood at the date of application.

Trade Mark type: three dimensional mark.

Relying on some goods, namely:

Class 31: Fresh vegetables and fruits.

("the opponent's mark")

3. The opponent submits that as a result of the identity and similarity between the goods and the similarities between the marks, there exists a likelihood of confusion on the part of the public including a likelihood of association. The holder filed a counterstatement denying that there is a likelihood of confusion.

4. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 No. 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Marks Rules 2008 ("TMR") but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

"(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit".

5. The effect of the above is that parties are required to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast track oppositions. No leave was sought in respect of these proceedings.

6. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise, written arguments will be taken. A hearing was not requested and was not considered necessary. Only the holder filed written submissions in lieu of a hearing. The holder is represented by Marks and Clerk LLP; the opponent is represented by Eric Junca IP Attorney. This decision is taken following a careful reading of all the papers.

7. 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 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.

EVIDENCE

8. As set out above, only the opponent has filed evidence in these proceedings. The opponent's evidence in chief came in the form of the statement of case dated 4 May 2015 which was accompanied by 3 exhibits.

9. While I do not intend to summarise the evidence and submissions at this stage, I have considered them in detail and will, where necessary, refer to them below.

DECISION

Proof of use

10. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

11. Given its filing date, the opponent's mark qualifies as an earlier trade mark under the above provisions. As the matter is using the fast track procedure and the earlier mark is older than five years from the priority date of the IR, the opponent's mark is subject to proof of use pursuant to section 6A of the Act.

12. The relevant statutory provisions are as follows:

“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.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier 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 (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) - (5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

13. Section 100 of the Act is also relevant, which reads:

“100. 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.”

14. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use 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].”

15. Pursuant to Section 6A of the Act, the relevant period for assessing whether there has been genuine use of the opponent’s mark is the 5-year period ending with the priority date of the IR i.e. 22 March 2009 to 21 March 2014.

16. As the earlier mark is a European Union Trade Mark (EUTM), the opponent must show use in the EU. In *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, the Court of Justice of the European Union (“CJEU”) noted that:

“It should, however, be observed that ... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use .”

17. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the

economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark” is, therefore, not genuine use.³

18. I am also guided by *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.”

19. I also note Mr Alexander Q.C.’s comments in *Guccio Gucci SpA v Gerry Weber International AG*, Case BL O/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]

20. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

³ *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

Form of the Mark

21. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA

were in combination weakly distinctive, and the word MOOD alone was less distinctive still”.

22. The opponent’s mark as registered is shown in an attachment to the opponent’s statement of case. Whilst it shows the mark, it is not considered as proof of use as the evidence is a registration certificate of the mark. I note that the exhibits show evidence dated outside of the relevant date, for reasons that will become obvious later in the decision, I will consider whether they are acceptable variants. I note that the opponent has used the mark in the following ways:



(Example 1)



(Example 2)



(Example 3)

23. The opponent's mark, as seen in paragraph 2 of this decision, comprises a three dimensional mark. The mark consists of the word 'PHILIBON' presented in capitalised orange letters surrounded by blue edging on a hexagonal prism. The word 'PHILIBON' is spread over three sides and has a background setting of two tropical palm tree beaches which are positioned on either side of a sea. Directly above the text 'PHILIBON'; in smaller text are the words 'Le délice des Quatre Saisons' which are presented in blue. Underneath "PHILIBON" sits the words 'MARQUE DÉPOSÉE' which are presented in blue and capitalised. Below that, there are the words 'Claude Boyer' in a stylised yellow typeface. On the top of each side of the hexagonal prism are two semi-circular shapes presented in blue with five white stars decorating the top of each semi-circle.

24. The distinctive character of the mark is dominated by the word 'PHILIBON' and the shape of the mark. The beach background, described above in paragraph 23, will have at least some distinctive character in relation to fresh fruit and vegetables. The text 'Claude Boyer' is substantially smaller than 'PHILIBON' and so will contribute little to the distinctive character of the mark. However, the words 'MARQUE DÉPOSÉE' and 'Le délice des Quatre Saisons' will be seen by the average consumers as unfamiliar words of a foreign language that they cannot understand and, therefore, will be negligible elements. The negligible elements will not contribute to the distinctive character of the mark.

25. Example 1 shown above in paragraph 22 has the shape of a cuboid. I am unable to determine whether the smaller elements e.g. the smaller text, are present in the example due to the poor quality of the image provided. However, I am able to identify the word 'PHILIBON' present on the background setting of two tropical palm beaches which are positioned on either side of a sea; an element that contributes to the distinctive character of the opponent's mark is present in this example. However, the example differs from the registered mark in that the shape is not a hexagonal prism but a cuboid. It is my view that this change alters the distinctive character of the opponent's mark. As per *Lactalis McLelland Limited*, this is not an acceptable variant of the opponent's mark.

26. Example 2 shown above in paragraph 22, appears to have the shape of a hexagonal prism. The example consists of the word 'PHILIBON' presented in

capitalised orange letters presented on a background and surrounded by blue edging. Surrounding the word 'PHILIBON' is the image of a world that appears in blue, this is presented on the background setting of two tropical palm tree beaches which are positioned on either side of a sea. Due to the size of the image, I am unable to determine whether the smaller elements are present on the packaging. It appears that some text is present above the image of the world and within the orange semi-circular border, however, I am unable to identify the text due to its sizing. It does not appear that there are any stars on the semi-circles positioned at the top of each side of the hexagonal prism. The mark differs from the registered mark in that the word 'PHILIBON' does not span three sides, the word 'PHILIBON' is placed on a white background and is surrounded by a blue image of the world. I also note that there is an orange semi-circular border containing text that I cannot identify underneath the world image and there is an absence of stars at the top of the two semi-circles present on each side of the pentagonal prism. The dominant elements of the opponent's registered mark and the beach background are clearly present in the examples. As a result, it is my view that the differences do not alter the distinctive character of the opponent's mark. As per *Lactalis McLelland Limited*, this is an acceptable variant of the opponent's mark.

27. Example 3 shown above, consists of the word 'PHILIBON' encapsulated by a white background within a blue border. This is surrounded by an image of the world which appears in blue. Above the world is the text "DEPUIS 1997" and to the bottom of the world is the text "Le goût de l'origine" in white contained within an orange semi-circular label with two devices on the end. The example differs from the registered mark in that the 3D shape of the mark, beach background and text "Claude Boyer" discussed in paragraph 24 are absent. It is my view that these differences alter the distinctive character of the opponent's mark. As per *Lactalis McLelland Limited*, this is not an acceptable variant of the opponent's mark.

Genuine use

28. I note that in its defence and counterstatement, the holder stated that it did not consider the evidence to show use of the mark in relation to the goods relied upon. An assessment of genuine use is a global assessment, which includes looking at the

evidential picture as a whole, not whether each individual piece of evidence shows use by itself.⁴

29. The opponent has provided evidence of an invoice, turnover figures and photos at a market and retail store. I note the following in regard to the evidence:

- a) An invoice for the sale of packaging from the opponent to a customer in France.⁵ The invoice is dated 31 March 2015.
- b) A photo the opponent states was taken at a wholesale market in Paris, it shows melons that are boxed in an acceptable variant of the mark.⁶ I note that this photo is dated 17 April 2015.
- c) A photo the opponent states was taken at the 'Grand Frais' retail store.⁷ The photo shows a selection of fruits for sale, however, as a result of the goods being displayed in an unacceptable variant of the mark, it is of no assistance to the opponent. I note that this photo is dated 5 August 2014.
- d) Annual turnover figure of €30.000.000 in 2014 in relation to the 'PHILIBON' brand.

30. I note that the majority of the evidence discussed above is after the relevant period. While that may be the case, I will assess the evidence insofar as it is able to shed light on the position during the relevant period. Within the statement of case, the opponent provides turnover figures in relation to the earlier mark. The figures state that the annual turnover of the 'PHILIBON' brand in 2014 was €30.000.000. On the face of it, this figure is quantitatively significant. However, I bear in mind that this turnover is for 2014 as a whole and any figures after 21 March 2014 fall outside of the relevant period. While I have no way of determining the exact level of use from within the relevant period, I am of the view that, even when reduced accordingly it could be said that the figures represent a respectable level of use across the EU for a 3 month period. Whilst this may be the case, the evidence is not clear as to what mark this use is attributable to, particularly given that the evidence show use with unacceptable variants of the mark at issue. The assessment of genuine use at hand requires an assessment of use attributable to the mark at issue, being the 3D mark. As the turnover

⁴ *New York SHK Jeans GmbH & Co KG v OHIM*, T-415/09

⁵ Exhibit 1 of the opponent's statement of case

⁶ Exhibit 2 of the opponent's statement of case

⁷ Exhibit 3 of the opponent's statement of case

figures are not broken down, to develop a better understanding of business operations I will need to cross reference the figures with the opponent's other evidence. I note that the specification only pertains to "fresh fruit and vegetables" and the figures provided could be said to cover fruit and vegetables at large. Further, I note that in question 7 the opponent was asked what the mark was used for, the opponent responded by stating it was used for fruit and vegetables and made reference to Exhibit 3 which shows a selection of fruit and vegetables, such as plums and melons. While I accept that the turnover figures relate to this broad range of goods, I echo what I have said above in that it is not clear whether its use was under the mark as registered (or an acceptable variant of the same) or not

31. I note that there is also a reference in the statement of case to indicate that the goods were sold in the European market – specifically France, Germany, the United Kingdom and the Netherlands. I am, therefore, able to consider that the aforementioned geographic spread applies in relation to the market of sales (which was made in the proprietor's statement of case and is verified by a statement of truth) as evidence in this case.

32. The invoice evidence demonstrates that the opponent sold packaging to a company in France. I note that this invoice has been provided in French and no translation has been given. Despite this, I am of the view that some of the content of the untranslated invoice is self-evident and does not necessarily require translation. For example, the sales figures and addresses are identifiable. In cross referencing the opponent's invoice with the opponent's statement of case, it is clear that this invoice pertains to an order for packaging. However, it is unclear from the invoice whether the packaging does or does not bear the opponent's mark or whether the packaging is in relation to an acceptable variant. Even if the packaging is in relation to an acceptable variant, I note that the evidence is dated after the relevant date and it does not clearly point to the fact that the packaging ordered (if it was the mark as registered or an acceptable variant of the same) was used before the relevant period expired. I will bear in mind the issues highlighted above in my overall assessment.

33. While I have no evidence from either party as to the size of the EU market for the goods concerned, I believe the market to be substantial, numbering in billions of euros per annum. Further, I have considered that the market for fresh fruit and

vegetables sold across the EU is likely to be extremely competitive with a vast number of producers competing with one another. The evidence states that €30.000.000 over an annual period was the turnover for 'PHILIBON' sales to France, the United Kingdom, Germany and the Netherlands. As discussed in paragraph 30, I bear in mind that the annual turnover of €30.000.000 is in relation to 2014 as a whole and any figures after March 2014 will fall outside of the relevant period. . However, I am of the view that, even when reduced accordingly the figures represent a respectable level of use across the EU for a 3 month period. Despite this, from the evidence provided I have no way of determining the exact level of use from within the relevant period. Further, the evidence has demonstrated the sale of packaging to a customer based in France. Whilst this may be the case, it is unclear from the invoice whether the packaging does or does not bear the opponent's mark or whether the packaging is in relation to an acceptable variant. I also note that there is nothing to solidly point to the fact that the packaging was used before the relevant period expired. The evidence also demonstrates the sale of melons bearing an acceptable variant of the opponent's mark in exhibit 2; this represents part of the opponent's specification for fresh fruit and vegetables. Despite this, I note that the evidence is dated outside of the relevant period and there is no way to identify the proportion of the figures that relate to the sale of melons during the relevant period. Further, I note that there is no evidence that has been provided in relation to any advertising or promotional activities that have been undertaken by the opponent.

34. Bearing in mind the above, I note that the assessment that I must make is in respect of the mark as registered. From the evidence presented I am unable to determine the level of sales that are attributed to the products that are sold under the mark. I note the case of *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that the burden lies on the registered proprietor to prove use and if it is likely that evidence would exist and little or none is provided, a tribunal would be justified in rejecting the evidence as insufficiently solid. The difficulty for the opponent is that it has filed a small amount of evidence, most of which is outside of the relevant period. Given all of the criticisms of the evidence that I have discussed above, I am not able to infer what level of sales figures can be attributed to the mark as registered (or an acceptable variant of the same) and from within the relevant period. Therefore, on the basis of the evidence

before me, I am unable to find that genuine use has been demonstrated in relation to the goods upon which the opponent relies.

CONCLUSION

35. The opponent has failed to establish genuine use of the specification of its registration within the relevant period. Where the proof of use provisions apply, an opponent cannot rely on its mark unless those provisions are satisfied. Consequently, as the opponent has not provided use of its mark, it cannot rely on it for the purposes of this opposition and the opposition fails. Subject to appeal, the opposition is dismissed and the application will proceed to registration.

COSTS

36. The holder has been successful and is entitled to a contribution towards its costs. The award of costs in fast track proceedings is based upon the scale published in Tribunal Practice Notice 2/2015. In the circumstances, I award the holder the sum of £500 as a contribution towards the costs of proceedings. The sum is calculated as follows:

Considering the notice of opposition and filing a counterstatement:	£200
Preparing written submissions in lieu:	£300
Total	£500

37. I, therefore, order Boyer SA to pay “PHILICON 97” AD the sum of £500. The sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 5th day of July 2022

A Klass
For the registrar