

O-740-22

**TRADE MARKS ACT 1994
IN THE MATTER OF REGISTRATION No. 3120465
STANDING IN THE NAME OF
BLACK ISLE BREWING CO. LIMITED
AND
IN THE MATTER OF A REQUEST FOR A DECLARATION
OF INVALIDITY THERETO UNDER No.504168
BY ATOM SUPPLIES LIMITED**

BACKGROUND

1) The following trade mark is registered in the name of Black Isle Brewing Co. Limited (hereinafter BIB):

Mark	Number	Filing & registration date	Class	Specification
BLACK ISLE	3120465	31.07.15 06.11.15	32	Beers; lager, ale and porter; mineral and aerated waters, and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
			33	Alcoholic beverages (except beers); spirits and liqueurs, but in so far as whisky and whisky based liqueurs are concerned, only Scotch whisky and Scotch whisky based liqueurs produced in Scotland.

2) By an application dated 15 September 2021 Atom Supplies Limited (hereinafter ASL) applied for a declaration of invalidity in respect of this registration.

3) The ground of invalidity is, in summary that BIB has not used the mark in suit upon the goods for which it is registered within the five year period following the date of completion of the registration process and there are no proper reasons for non-use. ASL asks for a revocation date of 7 November 2020.

4) On 2 December 2021 BIB provided a counterstatement to the invalidity action. It states that the mark has been used upon “beers; lager; ales and porters” in Class 32 during the five years since the mark was registered. BIB also states:

“As for the goods in Class33, Black Isle has always had a genuine intention to produce and sell its own whisky and other spirits. It is for this reason that Black Isle chose to protect the BLACK ISLE mark in Class 33. However, there are proper reasons for non-use. Black Isle wanted to produce the Class 33 goods itself as opposed to applying its mark to third party goods. Consequently, it decided to build its own distillery. This in itself takes considerable time, for example, Scotch whisky must

be matured for a period of at least three years. This restriction would allow Black Isle only two years to plan and build the distillery and subsequently sell the goods that are produced. This is not a feasible timescale.

Black Isle's intention to produce the goods covered in Class 33 has been for a number of years and it has taken a number of practical steps since 2011 to execute this goal. The ongoing COVID-19 pandemic has halted these plans for a further two years and had put Black Isle under great financial strain, which has meant this project has to be put to one side to focus on ensuring the business stays afloat. In the light of the above, it would be inequitable to cancel the registration which is the subject of this cancellation."

5) BIB was professionally represented whilst ASL used their in-house Counsel. Only BIB filed evidence. Both sides ask for an award of costs. Neither side wished to be heard on the issue but both sides provided written submissions which I shall refer to as and when necessary.

DECISION

6) 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 upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

7) The invalidity is brought under Section 46 (1) which states:

"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;

(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 (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 in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

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

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

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

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

8) Section 100 states:

“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.”

9) In determining whether the mark in suit has been used I take into account the views expressed in *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) where 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 Bundervsvereinigung 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 Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the

characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

10) I also take into account the comments in *Awareness Limited v Plymouth City Council*, Case BL O/236/13, where 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.”

11) I also note that in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL 0/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“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.”

12) In the instant case BIB filed a witness statement and exhibits dated 8 February 2022 by David John Gladwin an employee of BIB. He states that BIB has been producing beers, ales and porters since 1998 and has built up a considerable reputation for organic beers in the UK. He accepts that BIB has not used its mark upon the following goods in Class 32: Mineral and aerated waters, fruit drinks and fruit juices; syrups and other preparations for making beverages.

13) Mr Gladwin lists the beers, ales, lagers and porters offered by his company under the house mark BLACK ISLE and with sub-marks such as “21 pale; Blonde; Goldfinch; Porter; Red Kite; Spider Monkey; Hibernator and Scotch Ale”. He provides the following exhibits which clearly show that the mark has been used on beers, porters and ales in the period November 2015 – March 2021.

- DG2: shows that the Internet Archive site Wayback Machine has been archived every year from 2001 to date.
- DG3 & 5: Copies of the BIB website dated from 2015-2021 shows various beers, lagers, ales and porters offered for sale under a variety of sub-brands but all with the mark BLACK ISLE upon them.

- DG6: A selection of invoices showing sales of various beers, lagers, ales and porters during the period 2015-2021 to retailers such as Tesco and Sainsbury's amongst others. Whilst the amounts on these invoices are not huge, they are only a selection and indicate that the mark in suit has been used on the goods claimed.
- DB7: shows an extensive list of businesses which BIB has supplied its beers, lagers, ales & porters to.
- DB8: This shows sales of beer averaging over £1.6million each year in the period 2015-2021.

14) BIB has also provided evidence of its sales and marketing activities. I also note that in its submissions ASL stated:

“12. the applicant is of the same view that the Proprietor has sufficiently discharged its evidential burden in showing the trade mark has been put to genuine use in the UK in respect of a small portion of the Class 32 goods, namely: beers; lager; ale and porter.”

15) BIB has easily cleared the hurdle of proof of use in respect of its beers, ales, lagers and porter. I now turn to the issue of the goods on which the mark in suit has not been used and for which it is claimed there are proper reasons for non-use. When considering the issue of proper reasons for non-use I take into account that these reasons must have been operative during the relevant period (*Cernivet Trade Mark* [2002] RPC 30 (AP)) and that the reasons must be outside the control of the proprietor as was set out in *Armin Häupl v Lidl Stiftung & Co. KG*, Case C-246/05, where the Court of Justice of the European Union held that:

“52. In particular, as correctly stated by the Advocate General in [79] of his Opinion, it does not suffice that “bureaucratic obstacles”, such as those pleaded in the main proceedings, are beyond the control the trade mark proprietor, since those obstacles must, moreover, have a direct relationship with the mark, so much so that its use depends on the successful completion of the administrative action concerned.

53. It must be pointed out, however, that the obstacle concerned need not necessarily make the use of the trade mark impossible in order to be regarded as having a sufficiently direct relationship with the trade mark, since that may also be the case where it makes its use unreasonable. If an obstacle is such as to jeopardise seriously the appropriate use of the mark, its proprietor cannot reasonably be required to use it nonetheless. Thus, for example, the proprietor of a trade mark cannot reasonably be required to sell its goods in the sales outlets of its competitors. In such cases, it does not appear reasonable to require the proprietor of a trade mark to change its corporate strategy in order to make the use of that mark nonetheless possible.

54. It follows that only obstacles having a sufficiently direct relationship with a trade mark making its use impossible or unreasonable, and which arise independently of the will of the proprietor of that mark, may be described as “proper reasons for non-use” of that mark. It must be assessed on a case-by-case basis whether a change in the strategy of the undertaking to circumvent the obstacle under consideration would make the use of that mark unreasonable. It is the task of the national court or tribunal, before which the dispute in the main proceedings is brought and which alone is in a position to establish the relevant facts, to apply that assessment in the context of the present action.

55. Having regard to the foregoing considerations, the answer to the second Proper question referred for a preliminary ruling must be that Art.12(1) of the Directive must be interpreted as meaning that obstacles having a direct relationship with a trade mark which make its use impossible or unreasonable and which are independent of the will of the proprietor of that mark constitute “proper reasons for non-use” of the mark. It is for the national court or tribunal to assess the facts in the main proceedings in the light of that guidance.”

16) I also take into account the case of *Naazeen Investments Ltd v OHIM*, Case T-250/13, where the General Court held that difficulties in manufacturing a product was not outside the proprietor’s control and therefore did not constitute a proper reason for non-use. The court stated that:

“66. According to the case-law, ‘proper reasons’ refers to circumstances unconnected with the trade mark proprietor rather than to circumstances associated with his commercial difficulties (see, to that effect, judgment of 9 July 2003 in *Laboratorios RTB v OHIM — Giorgio Beverly Hills (GIORGIO AIRE)*, T-156/01, ECR, EU:T:2003:198, paragraph 41). The problems associated with the manufacture of the products of an undertaking form part of the commercial difficulties encountered by that undertaking.

67. In the present case, the marketing of the goods in question was stopped because those goods were defective. Given that it was for Gondwana to supervise and control the manufacture of the goods in question even though they were being manufactured by a third party, the interruption to the marketing of those goods cannot be regarded as independent of the will of Gondwana.

68. Furthermore, the applicant is wrong in claiming that it had no choice but to stop using the mark at issue or to put consumers’ health in danger. As OHIM has observed, further products could have been manufactured and placed on the market within a reasonable period. Therefore, the applicant cannot claim that the change in strategy of the proprietor of the mark at issue made use of that mark unreasonable. The additional economic investments necessary for the manufacture of further products form, as OHIM states, part of the risks that an undertaking must face.

69. Accordingly, the applicant cannot claim that the Board of Appeal was wrong to take the view that the difficulty encountered by Gondwana concerning the manufacture of the goods in question did not constitute a proper reason for non-use of the mark at issue (paragraph 36 of the contested decision).”

17) The judgment of the General Court was upheld on further appeal to the CJEU: see Case C-252/15 P. Whilst in *Viridis Pharmaceuticals v EUIPO*, Case C-668/17P, the CJEU upheld a decision of the EUIPO to revoke the EU trade mark BOSWELAN, which was registered for pharmaceuticals, for non-use. The proprietor had argued that the required clinical trials amounted to genuine use of the mark or, alternatively, a proper reason for non-use. The first argument was rejected on the ground that the use was internal and therefore not visible to the public. As regards the second argument, whilst the CJEU did not rule out the possibility that the requirement to conduct clinical trials before marketing the goods could be a proper reason for non-use, it upheld the decision to reject that argument

in this case. This was because the proprietor had applied to register the mark long before clinical trials started, had not invested substantially in the trials, or taken steps to speed up the regulatory approval process. This meant that the delay in putting the trade mark into use was not solely attributable to factors independent of the will of the proprietor.

18) I will first consider the goods in class 33. BIB contend that it has always been its intention to distil its own spirits, rather than putting its mark upon goods produced by others, so called white-labelling. BIB points out that it does not have a distillery and that building one from the ground up takes a considerable amount of time and planning. It explains that by law “scotch” whisky must be matured in the barrel for a period of at least three years, thereby providing a narrow window of opportunity for the distillery to be built. BIB states the obvious in that planning permission, finding an architect and building contractor and getting the distilling equipment installed all take considerable time. BIB states that it carried out a number of steps:

- 2011: it got a quote for the provision of the production and bottling plant required. It also trialled its product by white labelling. Although no details of how many bottles were produced or sold was provided.
- 2012: Discussions held with potential consultants who had experience of the distilling process.
- 2017: BIB engaged with a consultant, Allen Associates.
- 2018: Allen Associates commissioned a feasibility study to assist with defining the project. During this year BIB opened a hotel and began work on a bar which opened in 2019. The distilling project was therefore suspended as these projects took all of BIB’s available financial resources.
- 2019: An architect was employed to assist in the plans for the distillery.

- 2020: Plans for the distillery layout were produced. Discussions about the project continued but were interrupted by the Covid-19 pandemic and have been on hold for the past two years due to the financial constraints of the lock-downs etc.

19) Mr Gladwin states “My company also has had a bona fide intention to produce non-alcoholic beer, falling under the term “other non-alcoholic drinks” in Class 32. For the same reasons as above, the production of such goods has been put on hold. However, we have now made significant investment into the production of such goods”. At exhibit DG 22 he provides an invoice dated 7 December 2021 for £66,000 in relation to a dealcoholisation system costing just over £183,000. I note that this invoice is dated almost three months after the invalidity action began (15/09/21).

20) ASL provided a detailed critique of the evidence of BIB in its submissions. I do not propose to set this out as it chimes with my own views on the matter. BIB applied for its mark on 31 July 2015 over three years after receiving a quote for the distilling equipment. It would appear that apart from discussions with consultants no other activity occurred regarding the provision of the distillery. For instance, no quotes were obtained regarding the building to house the distillery. No approach was made to the local authority to seek planning permission. It is claimed that a trial was carried out to ascertain the market for a whisky from BIB, years prior to obtaining registration of its mark on 6 November 2015. Despite the claims by BIB that it did not want to simply attach its mark to goods produced by others this is precisely what it did in 2011. Interestingly, BIB is silent on the amount of bottles of whisky that were white-labelled, where or to whom they were sold or even what revenue this exercise garnered. Nor did it provide any details of whether the trial was a success or how and to whom it was promoted or advertised. Subsequent to its mark being registered BIB appears to have done nothing to begin the process of being able to use its mark for almost two years. Quite why discussions were held with consultants and then a firm of architects for almost three years prior to a basic layout plan being produced is not explained. One would have thought that this stage could have been concluded in far less time. Having obtained the plans BIB did not seek planning approval, nor did it go out to tender to find out how much the building work would cost and how long it would take to build. It did not renew its, by now nine year old, quote for distilling equipment. Given that the witness statement was written in February 2022 one would have expected something more to have happened in order to begin the process of building the distillery, but no details of

any work are provided, only a quote for a dealcoholisation plant. BIB has sought to explain its inability to use its mark on the Covid pandemic. But this really only affected matters for periods from March 2020. There have been lockdowns but also periods between when the provision of a distillery could have been addressed, even if only in part. BIB also points to the financial problems affecting all industry but particularly the leisure and hospitality industry, a major customer for BIB, during the pandemic. I acknowledge that this might have affected the ability to build the distillery. But I note that BIB made a conscious decision to divert resources in 2018 and 2019 to a hotel and bar instead of financing the distillery. It is true that Scotch whisky must mature for at least three years before it can be sold, but BIB has not produced a single drop of whisky during the five years since its mark was registered. Had it begun the work on the distillery buildings or plant, I might have accepted that they were indeed attempting to use their mark, but the absence of any such activity means that any distillery is still many years away from provided as they have not even sought planning permission for the operation. I also take into account that throughout the five years the mark has been registered, BIB could have availed itself of other distilleries and simply white-labelled a whisky produced to their specification. BIB's refusal to go down this route is of their own choosing, similar to its decision to fund other projects prior to building its own distillery.

21) Considering the matter in the light of all of the above BIB has failed to show that there were proper reasons for not using the mark during the period concerned on the goods in Class 33 for which it is registered. The delays, mostly due to their instance on building their own distillery and funding other projects instead of their own distillery, were entirely within BIB's ability to overcome by simply white-labelling or not diverting funds to other projects.

22) I now turn to the issue of non-use of the mark in suit on the following goods in Class 32: "mineral and aerated waters, and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages". No reasons why, other than the covid pandemic and shortage of funds have been advanced to explain why the mark in suit has not been used on these goods. Whilst BIB has filed an invoice showing that it has purchased a dealcoholisation plant, this invoice is dated almost three months after the invalidity action began in September 2021. The complete absence of any submissions or evidence of BIB gearing up to use its mark on these goods, no indication of whether advertising has been carried out, suppliers and customers approached, labels designed etc

all lead me to the opinion that there has been no activity at all on such goods prior to the invalidity action landing on the doorstep. Again, it was within BIB's control to invest in such plant earlier or to have such goods produced by others and white-labelled. BIB chose to do neither.

23) The invalidity request under section 46(1) succeeds in respect of the following goods:

- In Class 32: mineral and aerated waters, and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.
- In Class 33: Alcoholic beverages (except beers); spirits and liqueurs, but in so far as whisky and whisky based liqueurs are concerned, only Scotch whisky and Scotch whisky based liqueurs produced in Scotland.

24) The invalidity request under section 46(1) fails in respect of the following goods:

- In Class 32: Beers; lager, ale and porter

CONCLUSION

25) The invalidity action under section 46(1) has been partly successful. The mark in suit will remain on the register only for the goods in class 32 shown at paragraph 24 above, the goods shown in paragraph 23 above will be removed with effect from 6 November 2015.

COSTS

26) As ASL has been mostly successful it is entitled to a contribution to its costs. However, as ASL has represented itself it was sent a costs proforma which it failed to complete and return to the Registry. I therefore decline to award ASL any costs.

Dated this 30th day of August 2022

G W Salthouse
For the Registrar
the Comptroller-General