

**O/769/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO. 2488364  
IN THE NAME OF PARDEEP BAHANDA  
IN RESPECT OF THE TRADE MARK**

**HALE AND HEARTY / HALE & HEARTY (series of two)**

**IN CLASSES 29, 30, 31, 32, 35 & 43**

**AND**

**THE APPLICATION FOR PARTIAL REVOCATION THEREOF UNDER NO. 503860  
BY SMART GARDEN PRODUCTS LIMITED**

## **Background and pleadings**

1. Pardeep Bahanda (“the proprietor”) is the proprietor of trade mark registration no. 2488364 for the marks HALE AND HEARTY/HALE & HEARTY, registered as a series of two. The trade marks were filed on 23 May 2008 and were registered on 12 December 2008. The marks are registered for goods and services in classes 29, 30, 31, 32, 35 & 43.

2. On 18 May 2021, Smart Garden Products Limited (“the cancellation applicant”) filed an application seeking partial revocation of the trade mark registration effective from 18 May 2021, on the grounds of non-use based upon section 46(1)(b) of the Trade Marks Act 1994 (“the Act”). The goods for which revocation is sought are as follows:

Class 31: Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits, vegetables and herbs; seeds, natural plants and flowers; foodstuffs and beverages for animals, malt; products for animal litter; litter for animals; dried flowers and plants.

3. The proprietor filed a counterstatement denying that the mark has not been used during the period claimed in respect of the following goods:

Agricultural, horticultural and forestry products and grains not included in other classes; seeds, natural plants and flowers; foodstuffs ... for animals

4. The remaining goods for which revocation is sought were voluntarily surrendered by the proprietor within the counterstatement. The surrendered goods are as follows:

Live animals; fresh fruits, vegetables and herbs; ...beverages for animals, malt; products for animal litter; litter for animals; dried flowers and plants.

5. Only the proprietor filed evidence in these proceedings. The cancellation applicant filed written submissions during the evidence rounds and the proprietor filed written submissions in lieu of a hearing. These will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

6. The proprietor has appointed H&H Free From Ltd, its exclusive licensee, as its representative within these proceedings. The cancellation applicant is represented by Baron Warren Redfern.

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

### **Preliminary issues**

8. The proprietor filed its evidence in the form of a 'statement of use' form accessed from the IPO website, in addition to 14 exhibits, namely Exhibit 1 to Exhibit 14. The statement of use form used by the proprietor was created for use in opposition proceedings where proof of use is required, and as such the routine use of a statement of use form instead of a witness statement is not encouraged in revocation cases, on the basis that there may be multiple relevant periods to consider. However, in this instance the matter concerns a single relevant period. The information provided in the form relates to this single period, and the use of the form, which includes a statement of truth, has been deemed admissible for use in these proceedings. The statement of use is signed by Ana Caterina Konig, the Director of H&H Free From Ltd, the proprietor's recorded representative in these proceedings and the recorded exclusive licensee of the contested trade mark.

9. However, within its submissions, the cancellation applicant has stated that the statement of use filed in these proceedings should, to an extent, be struck out. This is initially put in the following terms:

2.1 The Statement of Use is made by Ana Konig, the director of H&H Free From Limited and the ex-director of Hale & Hearty Foods Limited. All the evidence which has been submitted relates to the activities of Hale & Hearty Foods Limited while it owned the Challenged Mark, and in that respect Ms Konig is a relevant witness. However, it is claimed that H&H Free From Limited is currently the exclusive licensee of the Challenged Mark. Such licence is recorded at the UK IPO but no copy is publicly available. No copy of the licence has been submitted in these proceedings either, and as such it has not been properly established that Ms Konig has the right to make any statement on behalf of the current Proprietor. Absent such proof Mr Konig's Statement of Use should be afforded zero probative value and/or should be struck out of these proceedings in as much as it pertains to any facts post 17.09.17.

10. I disagree with the cancellation applicant's submission above. I have no reason to doubt that Ms Konig made her statement with reference to the documents and knowledge she had at her disposal in her position as the director of the current recorded exclusive licensee of the proprietor, and ex director of the proprietor up until 2017. In addition, Ms Konig is the director of the recorded representative for the proprietor. The fact that the license itself has not been filed in evidence does not mean that I have reason to doubt that the details of the licence as recorded on the UK register are false, or to find that Ms Konig is unable to make the statement of use. Whilst I note no reply evidence was filed in response to this statement, the proprietor did respond in its final written submissions stating:

“Since then, yes, it is correct, that H&H Free From ltd is the Exclusive Licensee and from the proprietor Pardeep Bahanda. The IPO in addition has written confirmation from Mr Bahanda to respond directly and I am authorised to do so.”

11. There has been no request by the cancellation applicant to cross examine Ms Konig on this point and considering the circumstances I do not accept that the statement made by Ms Konig should be afforded no weight or be partially struck out in these proceedings on this basis. However, that being said, having considered the evidence as a whole I find this will make no difference to the outcome of these proceedings, on the basis that there is little evidence pertaining to use after 17 September 2017, the date from which the cancellation applicant suggests that the statement should be struck out. This is examined in more detail later in this decision.

12. At paragraph 2.6 of the cancellation applicant's submissions, Ms Konig's reference to sales figures are also challenged. The cancellation applicant states:

2.6 At Q6 of the Statement of Use annual turnover figures are given, but these are not explained. In particular no explanation is given as to whether they relate to golden linseed (organic) products or to the business of Hale & Hearty Foods Limited as a whole. Estimate sales for the Hale & Hearty Golden Linseed, 200g product are then provided of £12,000 for 2016-2017 and £8,000 for 2017-2018. As these figures are not supported by any documentary evidence they are of very low probative value. They are clearly not accurate figures, as Ms Konig states in the answer to Q8 that she no longer has access to the Hale & Hearty Foods Limited information from the operations and finance side as the company is dissolved and she lost the hard drive and other records. Therefore, these estimate sales figure have almost zero veracity. They are purely guesswork and cannot be used as the basis for demonstrating use of the Challenged Mark. (It is accepted that Exhibit 3 H&H – Exhibit 6 H&H show invoices from the same period, but as set out above they do not carry the Challenged Mark. As such, they do not support these alleged sales figures.)

13. I disagree with the cancellation applicant's initial statement that it is not clear whether the figures relate to the business as a whole or to the Golden Linseed products. Sales figures for the latter are clearly set out under the heading "Estimated sales for the mark in class 31 (product Hale & Hearty Golden Linseed, 200g)". I do agree however, that Ms Konig states at question 8 of her statement of use that she does not have access to the old hard drive and information from the operations and finance side of the business. In addition, I note the reference to the figures being "estimates" and I note also the lack of response to the cancellation applicant's suggestion that the figures are "guesswork". Whilst I have no reason to doubt that the figures and information provided have been given honestly with reference to the documents and information Ms Konig has at her disposal, which I note includes invoices, I do accept that whilst acknowledging Ms Konig's position as the ex-director of the proprietor of the mark during the period given, the figures given are unlikely to be completely accurate or exact. Whilst I do not consider this to be sufficient to strike out Ms Konig's statement, I will keep this in mind when considering the evidence as a whole.

## **Legislation**

14. Section 46 of the Act 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 is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

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

commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

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

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

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

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

15. Section 100 is also relevant, which reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

16. 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 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].”

17. Revocation is sought under section 46(1)(b) of the Act only in respect of the single time period of 18 May 2016 – 17 May 2021 (“the relevant period”). If successful, the effective date of the revocation will be 18 May 2021. It is for the proprietor to show that genuine use has been made during the relevant period.

### **Variant use**

18. The mark is shown in the evidence both as the word mark ‘Hale & Hearty’ as well as in a slightly stylised logo form. The majority of the use is of the stylised logo below:



19. Where there is use of mark ‘Hale & Hearty’ in word form, this is clearly use of the second word mark HALE & HEARTY as registered. In addition, the mark HALE & HEARTY can clearly be seen in the stylised mark above, and it is my view that the font and layout used falls within the scope of fair and notional use of the second word mark as registered. Whilst I note of the heart as a background to the ‘&’, it is my view that this does not prevent the wording itself from acting as an independent indicator of origin within the mark. I therefore find this to be an acceptable variant of the second word mark HALE & HEARTY.<sup>1</sup>

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<sup>1</sup> See *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12

20. I note both the use of the wording Hale & Hearty in addition to the stylised logo above vary to the first word mark by way of the word 'AND' being replaced with '&' across the two marks. 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 for an acceptable variant 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”.

15. It is my view that the word ‘AND’ within the mark is a non-distinctive element used to join two words to create what is overall a distinctive mark. The replacement of the word ‘AND’ with ‘&’ does not alter this element verbally or conceptually or prevent it from carrying out the same job of joining the two words together. The alteration is likely to go unnoticed by the consumer, and it does not, in my view, alter the distinctive character of the mark overall. I note that use of a registered mark in a different form that does not alter its distinctive character and corresponds to the form in which another mark is registered, may constitute use of both registrations.<sup>2</sup> I therefore consider the use of HALE & HEARTY and the stylised logo above to be acceptable use or acceptable variant use of both HALE & HEARTY and HALE AND HEARTY in this instance.

### **Use of the mark by the proprietor**

21. Before I consider the use of the marks, I will briefly address the concerns outlined by the cancellation applicant that the use shown in evidence may not be use by the proprietor. Within its written submissions, the cancellation applicant states as follows:

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<sup>2</sup> *Bernhard Rintisch v Klaus Eder* Case C-553/11

1.2 Paragraph 1 of the counterstatement is denied. UK Trade Mark No 2488364 (the “Challenged Mark”) has not been used between 18.05.16 and 17.05.21 (the “Relevant Period”) in respect of any of the goods in class 31 which are the subject of the current cancellation proceedings, as set out in greater detail below. It is noted that the Challenged Mark was owned by Hale & Hearty Foods prior to 17.09.17, so any use between 18.05.16 and 17.09.17 would have to be by that company or with its consent. It is also noted that paragraph 1 of the counterstatement states that after 17.09.17 the use was not by the current Proprietor Pardeep Bahanda, but by his licensee H&H Free From Limited. However, the licence started on 20.06.19, so if no use of the Challenged Mark was made by the Proprietor then there cannot have been any valid use between 17.09.17 and 20.06.19. Between 20.06.19 and 17.05.21 the use must be by H&H Free From Limited, as the exclusive licence holder.

22. As set out above, the case law including *Ansul* states that use of a mark may be either by the proprietor, or with the consent of the same. As identified by the cancellation applicant, the mark was owned by the party Hale & Hearty Foods Limited prior to 17 September 2017, which is recorded as the effective date of the assignment of the mark to the current proprietor. Use by this party prior to this date will be considered as use of the marks by the proprietor. I note the evidence, including the invoices issued during this time are issued by this party, and so there appears to be no doubt that use during this time was use by the proprietor.

23. I note that use after this time is said to have been made not by the proprietor of the marks, but by its (now) exclusive licensee. There is no doubt that use of a mark by an exclusive licensee is use with the consent of the proprietor. In addition, whilst I acknowledge the cancellation applicant’s submission that the license only began on 20 June 2019, it is my view that it may reasonably be inferred on the facts that use by this party prior to this time will have been use with the consent of the proprietor, considering that the proprietor later went on to provide this party with an exclusive license in respect of the same. However, in any case and as previously touched upon, I do not find the use after this date will have an impact on the decision I am to make, on the basis that the mark does not appear to have been used in respect of the challenged goods following the assignment of the marks to the current proprietor in September 2017. These facts are considered in additional detail below. I do not

therefore, find it necessary to consider the question of use with the consent of the proprietor in further detail within this decision.

## Use of the mark

24. Question 1 of the statement of use form completed by the proprietor states as follows:

**Q1. Please list the goods and/or services that your trade mark(s) has been used on.**

In class 31, the trademark HALE & HEARTY has been used for the category grains & seeds for HALE & HEARTY Golden Linseed (organic) during the period of use 18th May 2016 - 17th May 2021.

25. Images of the products, including an image of packaging for the Golden Flaxseed product are provided at Exhibit 1 and Exhibit 2. However, I note the images are described by the proprietor as, for example “Exhibit 1: Packaging file HALE & HEARTY Golden Linseed artwork”. Exhibit 1 shows this as below:



26. I also note that additional promotional material, including an advertisement at Exhibit 13 makes reference to Golden Linseed, whilst an image of Golden Flaxseed features in the images below the reference, as follows:



27. Invoices are provided between Exhibit 3 and Exhibit 6. These invoices are dated between 2 August 2016 and 10 January 2017. There are four invoices in total referencing sales of goods including 'linseed' to four different UK addresses during this period. Sales are shown to be made in cases of 6, and between 6 and 12 cases are shown on each invoice. A list of goods dated 1 April 2016 referencing Linseed is provided at Exhibit 7, with the price shown in Euros. It shows 360 boxes and 2160 units of Linseed being requested by the customer 'Hale & Hearty'. In its submissions, the proprietor indicates this is an order list from its German manufacturer. There is no mention on any of the invoices or on the order list of 'flaxseed'. It appears from the evidence that 'linseed' and 'flaxseed' is used interchangeably by the proprietor to refer to the same product.

28. Before I move any further, I note at this stage that other than linseed/flaxseed, the proprietor's evidence shows its range of goods primarily comprises breakfast cereals and baking mixes. There is also very limited evidence showing other goods such as agave syrup and crisps. However, there is nothing to indicate in the evidence that the proprietor offered goods falling within the categories below within the relevant period:

Class 31: Agricultural, horticultural and forestry [...] grains not included in other classes; forestry products not included in other classes; natural plants and flowers; Foodstuffs ... for animals

29. Whilst I note there is a possibility that linseed or flaxseed may be fed to animals, I have no evidence that this is the case here, and from the evidence provided it is my view the goods offered are clearly intended for human consumption.

30. The only goods that appear to have been offered under the mark during the relevant period which fall within those challenged are the flaxseeds/linseeds. It is my view these fall within the following categories:

Agricultural and horticultural products not included in other classes; Seeds.

31. I consider therefore, the sum of the evidence in relation to these goods. It is clear that there were sales of goods bearing the mark at the beginning of the relevant period, particularly within 2016 and at the beginning of 2017. Whilst an order sheet is provided dated 1 April 2016, sales are evidenced on the invoices only as early as 2 August 2016. It is not clear whether there were other sales of these goods between 1 April 2016 and the August invoice, as the turnover figures provided are non-specific. Within the statement of use provided by the proprietor, turnover figures for these goods are set out as follows:

**Q6. Please provide details of the number of sales achieved under the mark in the UK (or in the EU if the earlier mark is registered or protected at Community level) during the relevant period. These figures should, if possible, be provided on an annual basis and, if possible, be split in relation to each of the goods/services for which use of the mark is claimed; estimates should be provided if exact figures are not readily available.**

*Note: You may provide financial turnover figures to illustrate the level of sales under the mark, but if you do please also provide an indication of the typical unit price for the product or service.*

Annual Turnover in the relevant period was as follows: 2016 /2017 £1,100,000 2017 /2018 £755,000 Estimate sales for the mark in class 31 (product Hale & Hearty Golden Linseed, 200g) 2016/2017 £12,000 2017/2018 £ 8,000
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32. I remind myself that the figures above are estimates only.



33. General marketing expenditure is also provided by the opponent. It is stated this fell at circa £46,000 in 2016/2017 and also at circa £32,000 for the same period. It appears likely that one of these figures was intended to relate to 2017/2018. Either way, it appears the expenditure is in relation to the goods offered by the proprietor as a whole, rather than specifically in relation to the 'Golden Linseed' products exclusively, and I cannot allocate a particular amount to the promotion of the relevant goods.

34. A number of undated promotional images are provided in the evidence displaying the Golden Flaxseed packaging between Exhibit 9 and Exhibit 13. It is not clear how, where or when these materials were distributed. Exhibit 14 provides are several undated articles referencing the opponent, however, these do not make reference to the Golden Linseed goods specifically. It is not clear that this material was produced or distributed during the relevant time period. One article is dated 2012.

35. As previously referenced, at question eight of her statement of truth, Ms Konig describes the materials she has and has not had access to. She states as follows:

**Q8. Please provide any other information that you consider to be relevant.**

I have included a broad cross section of documents as exhibits that cover artwork, sales invoices, stock report, purchase orders and other examples of use. While I have access to full documents that were visual/ design records saved on a dropbox folder for graphic design and marketing purposes, I no longer have access to Hale & Hearty Foods Ltd old hard drive and information from the operations and finance side of the business as the company is dissolved and I lost the hard drive and other records in house moves some time ago.

I have restarted the business as H&H Free From Ltd and I am adding to and replicating the range across the categories, updated accordingly for the current status of the dynamic gluten free and free from natural food market.

36. I acknowledge that Ms Konig has had trouble collating the evidence required to show use of the mark. However, even taking this into account, whilst I accept there will have been some sales of 'Golden Flaxseed' as listed on the goods and as referred to by the proprietor and on the invoices as golden linseed or linseed, and that these sales will have taken place under the mark for a very short period between mid 2016 to the beginning of 2017, I note the (estimated) sales are minimal, totalling £20,000. The sales have all been made at the beginning of the relevant period, appear from the sum of the evidence to have lasted for a matter of months, and to have been followed by years of non-use. There appears to have been no effort to make further sales of

these goods for the remainder of the relevant period. I consider that the goods sold have a fairly low value, and from the invoices these appear to have a unit price of just under £7 when sold by the proprietor. However, this still equates to less than 3000 units sold in total over a short period of time only. I have not been provided with details of the size of the market for the goods, but I consider it must be at least reasonable. I do not have any evidence of promotional or marketing material displaying the goods from within the relevant period, or any other convincing material showing that a real effort has been made to create a market for the goods. Whilst I do not consider the use of the mark to be purely token, for the sole purpose of preserving rights in the mark, and whilst I keep in mind that there is no *de minimis* rule, I do not consider the use of the mark in relation to the goods to be genuine use for the purpose of creating and maintaining a share of the market for the goods in the UK.

37. I acknowledge Ms König's statement that she has reinstated the business, but there is no evidence that the use of the mark in relation to the goods has been resumed, or that the proprietor or its licensee has made any preparation to do so. In any case, as the application for revocation fell on the day directly following the expiry of the relevant period, the resumption of the use after the relevant period would not have assisted the proprietor in this instance.

38. The application for revocation under 46(1)(b) of the Act succeeds.

### **Final remarks**

39. The application for the partial revocation of the registration has succeeded. Subject to any successful appeal, the mark will be revoked as of 18 May 2021 in respect of all of the goods for which the application for revocation was filed, those being all goods in class 31 as follows:

Class 31: Agricultural, horticultural and forestry products and grains not included in other classes; live animals; fresh fruits, vegetables and herbs; seeds, natural plants and flowers; foodstuffs and beverages for animals, malt; products for animal litter; litter for animals; dried flowers and plants.

## **COSTS**

40. The cancellation applicant has been successful and is entitled to a contribution towards its costs. Whilst the cancellation applicant filed no evidence of its own, I consider it will have incurred costs for considering and commenting on the proprietor's evidence, and as such I have awarded an appropriate sum in respect of the same.

41. In the circumstances I award the cancellation applicant the sum of £750 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fees:	£200
Preparing the TM26N and considering the TM8N and counterstatement:	£200
Considering and commenting on the other sides evidence:	£350
<b>Total:</b>	<b>£750</b>

42. I therefore order Pardeep Bahanda to pay Smart Garden Products Limited the sum of £750. The above sum should be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 7<sup>th</sup> day of September 2022**

**Rosie Le Breton**

**For the Registrar**