

**O/0178/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO. 908630832**

**IN THE NAME OF FUNLINE INTERNATIONAL**

**FOR THE TRADE MARK**

**JUNGLE JUICE**

**IN CLASSES 1 AND 3**

**AND**

**THE APPLICATION FOR REVOCATION THERETO**

**UNDER NO. 504488**

**BY LOCKERROOM MARKETING LTD**

## Background and pleadings

1. Funline International (“**the Proprietor**”) is the owner of UK trade mark number 908630832, for the plain text words “JUNGLE JUICE”. The trade mark is a comparable mark created on IP Completion Day,<sup>1</sup> at the end of the transition period of the UK’s withdrawal from the EU. It is based on an EU trade mark and retains the filing and registration dates of the EU trade mark, these being:

**Filing date:** 2 October 2009;

**Registration date:** 30 October 2011.

2. The contested mark is registered in respect of the following goods:

**Class 1:** Chemicals used in the manufacture of aphrodisiacs, chemical preparations for stimulating sexual activity, these products not being for medical and/or pharmaceutical purposes.

**Class 3:** Soaps, perfumery, essential oils, cosmetics, intimate gels, massage oils, air fragrances for aphrodisiac purposes.

3. On 10 January 2022, Lockerroom Marketing Ltd. (“**the Applicant**”) filed a Form TM26N, seeking revocation of the contested mark, in its entirety, on the grounds of non use based upon Section 46(1)(b) of the Trade Marks Act 1994 (“**the Act**”). The premise of the objection is that the contested mark had not been put to genuine use in the relevant territory in the five years between 6 January 2017 and 5 January 2022. Revocation is therefore sought as from 5 January 2022.

4. The Proprietor filed a counterstatement on 31 March 2022 denying the claim in respect of all of the goods under Class 1 of its registration; and perfumery, essential oils and air fragrances for aphrodisiac purposes under Class 3 of its registration. This means that the Proprietor does not defend the revocation in respect of the following goods:

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<sup>1</sup> 31 December 2020.

**Class 3:** Soaps, cosmetics, intimate gels, massage oils.

5. The Proprietor submits that:

- (i) it had sold goods under the mark “JUNGLE JUICE” in the EU and UK during the period of alleged non use;
- (ii) its goods produce a scent which can be used as a room fragrance; with these goods being covered under Class 3 of its registration;
- (iii) its goods can also be used as an inhalant;
- (iv) its goods are sold in liquid form, consisting of a chemical compound belonging to the group of alkyl nitrates. These chemicals are covered under Class 1 of the contested mark.

*Representation and papers filed*

6. Only the Proprietor filed evidence in these proceedings. This evidence comprises two witness statements of Ludovic Lemoues, owner and CEO of the Proprietor company, Funline International. In his evidence in chief, presented through his witness statement dated 22 June 2022, Mr Lemoues introduces nine exhibits, numbered LL1 to LL9. Mr Lemoues’ second witness statement dated 10 October 2022, presents the Proprietor’s evidence in reply through five exhibits, numbered LL10 to LL15. The evidence will be summarised to the extent that it is considered necessary. Only the Applicant filed written submissions, the first of which were filed during the evidence rounds, on 10 August 2022. The Applicant also filed submissions in lieu of a hearing. The submissions will not be summarised but will be referred to as and where appropriate during this decision.

7. In these proceedings, the Applicant is represented by Adamson Jones, the Proprietor by Pulse Global Services Ltd. Neither party requested a hearing and so this decision is taken following a careful review of the papers.

## Decision

8. 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.

9. The relevant parts of section 46 read:

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;

...

(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.

...

(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.

10. Paragraph 8 of Schedule 2A of the Act concerns the application of section 46 to comparable trade marks:

8. —(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or

(b) (the “five-year period”) has expired before IP completion day—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union.

(3) Where IP completion day falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM ; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union.

11. 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.”

12. In *Walton International Ltd & Anor v Verweij Fashion BV*,<sup>2</sup> Arnold J (as he was then) summarised the law relating to genuine use 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

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<sup>2</sup> [2018] EWHC 1608 (Ch) at paragraph 15 of the judgment.

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].”

### *The Proprietor's evidence*

13. Mr Lemoues' evidence covers three points, which I shall deal with separately.

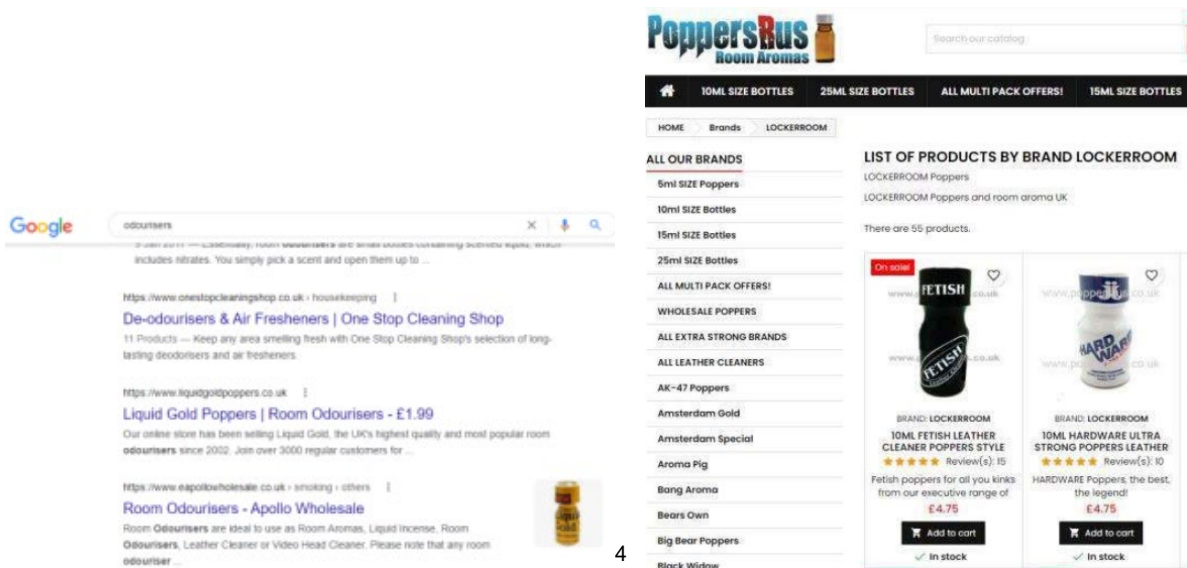
### *The history of and market for poppers*

14. Exhibit LL2 comprises an article from the website chemistryworld.com, dated 21 September 2021. The article describes the discovery of alkyl nitrates in the 19<sup>th</sup> Century and their use as a therapy for angina. It explains that by the 1960's the substance became used as a recreational drug and aphrodisiac, popular in the gay community. As recreational use expanded, the article explains that by the 1970's alkyl nitrates ceased to be sold in pharmacies and there remains a question over their legality for human consumption. Manufacturers of poppers are said to market their products as “cleaning agents”, “industrial solvents” or “room odourisers” and state that they are not intended for human consumption.” The UK Parliament debated the issue of poppers in 2016 in the passing of the Psychoactive Substances Act. The conclusion was that poppers should not fall within the scope of the definition of a psychoactive substance and therefore they are not banned in the UK. The heading of the article is reproduced below, I note the images of poppers and how the words “room odouriser” and “aroma” are visible:





15. Exhibit LL1 shows the top results of a Google search for the term “odourisers”. The websites raised in the search show several companies with UK website addresses offering at least two different brands of goods described as poppers. At Exhibit LL14, examples of the Applicant’s products for sale on two websites are shown and Mr Lemoues highlights that the goods are referred to as cleaning, or odourising products, when they are actually poppers. I note that on the packaging of the “Blue Boy” product, the words “LEATHER CLEANER” are just visible, as it is on the product descriptions from the “Poppers R us Room Aromas” website:



<sup>3</sup> Exhibit LL2, page 10.

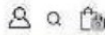
<sup>4</sup> Exhibit LL1, page 7.

<sup>5</sup> Exhibit LL14, page 62.



Buy Poppers online - Poppers Aromas - Shipping Worldwide

ALL POPPERS POPPERS PACK POPPERS NITRITES POPPERS ACCESSORIES NATURAL SEX BOOSTERS



**BLUE BOY**  
EXTREME FORMULA!

- | Pentyl Nitrite
- | 30ml Poppers
- | Lockerroom
- | Made in Canada

**DISCOVER**

Blue boy  
EXTREME FORMULA  
Content: 30 ml  
LOCKER ROOM  
SOFT FINISH  
MADE IN CANADA

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### *The Proprietor's business*

16. In his first witness statement, Mr Lemoues states that he is the owner and CEO of three companies, (i) Funline International; (ii) Chanvre CMD Limited (previously Funline International Limited); and (iii) Laboratoire Élysées Cosmétiques/Funline (previously Funline International SARL). Mr Lemoues explains that Chanvre CBD has a licence from Funline international and Laboratoire Élysées Cosmétiques/Funline is the exclusive distributor for the brands in Europe. In his second witness statement, Mr Lemoues provides evidence confirming the relationship between the three companies with (i) official Company records showing that he is director of the UK company Chnavre CBD Limited and French company Laboratoire Élysées Cosmétiques/Funline;<sup>7</sup> (ii) a copy of the licence agreement between the Proprietor and Funline International SARL (now Chanvre CBD Limited), which Mr Lemoues indicates was updated on 12 November 2019;<sup>8</sup> (iii) a copy of the licence agreement between Chanvre CBD and Laboratoire Élysées Cosmétiques/Funline,<sup>9</sup> and invoices showing royalty payments made by Laboratoire Élysées Cosmétiques/Funline to Chanvre CBD Limited.<sup>10</sup>

<sup>6</sup> Exhibit LL14, page 61.

<sup>7</sup> Exhibit LL12.

<sup>8</sup> Exhibit LL11.

<sup>9</sup> Exhibit LL13.

<sup>10</sup> Exhibit LL10.

*Use of the mark*

17. Mr Lemoues provides the following sales and turnover figures for the EU:

Year	Number of bottles
2017	70,414
2018	78,543
2019	74,049
2020	60, 500
2021 (9 months)	38.737

Year	Turnover
2017	€159,254.87
2018	€177,725.17
2019	€164,171.50
2020	€143,174.80
2021 (9 months)	€94, 909.86

18. Sales throughout the period of alleged non use are confirmed by a range of invoices in Exhibit LL3, with additional UK invoices provided in the Proprietor’s evidence in reply, at Exhibit LL15. The invoices show sales have been made in many EU countries including France, Ireland, Spain, Greece, Belgium, Bulgaria, Hungary, Poland, Italy, Sweden and Slovenia, with UK sales before and after the end of the transition period. Sales are indicated to be of “JUNGLE JUICE” or “JUNGLE JUICE PLATINUM”, with the goods sold mainly in boxes containing 18, 24, or 36 bottles, and being ordered as a single box, or up to 30 boxes in one order. The product labels are shown at Exhibit LL4 and confirmation of label orders are shown at Exhibit LL5, where it is shown that orders were made during the period of alleged non use for tens of thousands of labels:



19. An advertisement in a French tobacconist magazine, dated 2018 and a brochure prepared by the Proprietor for the Losange tobacconist Expo in 2017 and 2018 show the contested mark applied to the products, with invoices for the magazine advertisements and expo attendance confirming the payments made for these promotional activities:<sup>11</sup>



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### Assessment of genuine use

20. My task is now to consider whether the evidence filed, as I have summarised above is sufficient to show that the Proprietor (or another entity with his consent) had, during the relevant period and in the relevant territory, made genuine use of the contested mark.

21. The Proprietor did not defend the revocation in respect of Soaps, cosmetics, intimate gels, massage oils and the mark if therefore revoked in respect of these goods.

22. In its first submissions, the Applicant highlighted that the Proprietor's evidence in chief showed sales of goods were made by Laboratoire Élysées



<sup>11</sup> Exhibits LL8 and LL9.

<sup>12</sup> Exhibit LL6, page 114.

<sup>13</sup> Exhibit LL7, page 117.

Cosmétiques/Funline, rather than by the Proprietor. This being the case, the Applicant submitted that use by the Proprietor, or with its consent had not been shown. This led to the Proprietor filing further evidence concerning the relationship between the businesses in its evidence in reply, which I have summarised above. Though some of the Proprietor's evidence is in French and has no translation, I consider that the explanation provided by Mr Lemoues is corroborated by the company registration documents and evidence of payments and agreements between the parties, which collectively confirm the explanation of the relationship between the companies and that use has been made with the Proprietor's consent. The Applicant did not return to this point in its submissions in lieu of a hearing, indicating that the additional evidence filed by the Proprietor satisfied them on this point.

23. As to the use that had been made, the evidence shows that between 2017 and 2020, over 250,000 bottles of the Proprietor's product was sold, across 11 EU

member states. These products featured the mark in the form of  and . In my view, the stylised lettering does not alter the distinctive character of the registered mark. Additionally, I consider that the word "PLATINUM", featured on a range of the Proprietor's goods is low in distinctive character as it suggests a high quality product and so does not alter the distinctive character of the registered mark.<sup>14</sup> This being the case, I find that the forms of use shown by the Proprietor constitute acceptable variants of the registered mark.

24. While there are few examples of promotional activity in respect of the mark, this may be due to the nature of the goods and questions around the legality of retailing a substance which is described as a recreational drug. In any event, the Applicant does not contest that there has been use of "JUNGLE JUICE" at all; the Applicant's main argument is that genuine use has not been shown in respect of the goods under the registration.

25. In his first witness statement, Mr Lemoues makes the following statements:

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<sup>14</sup> T-146/15 Hyphen v EUIPO, EU:T:2016:469.

(i) “At the time of filing the trade mark application in the EU, it was not possible to apply the word “popper” to the packaging of the goods and therefore, although not illegal to sell, the goods had to be sold under the guise of room odourisers or leather shoe polish.”

(ii) “...in 2009 when my company applied for the trade mark JUNGLE JUICE, the Nice classification was not capable of properly identifying the goods. The classes or terms did not exactly fit the product. At the time of applying for the application, the best suited classes that would provide protection would be Class 1 and Class 3. Class 1 would cover the actual chemical, alkyl nitrite, that is sold in the bottle and Class 3 would cover use of the product as a fragrance or room odouriser.”

26. The Applicant responds to these points in its first submissions, making the following arguments:

(i) the relevant factor for classifying goods is the understanding of the relevant consumer, rather than how the goods are labelled.

(ii) uses of the goods as a recreational drug, for the treatment of angina and other medicinal uses show that the goods have pharmaceutical rather than olfactory properties. The Proprietor could have registered its trade mark in Class 5 of the Nice Classification and its failure to do so is not a proper reason for non use.

(iii) “the evidence does not support any finding that use of the relevant trade mark in relation to “poppers” is even capable of amounting to use in relation to any of the goods for which the Contested Registration is registered.”

27. Mr Lemoues’ provides the following responses and evidence in his second witness statement:

(i) a denial that the goods are sold under the guise of room odourisers and assertion that poppers can be used as a room odouriser, as shown on bottles in Exhibit LL2,<sup>15</sup> though I note that this image does not feature the Proprietor’s goods under the contested mark.

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<sup>15</sup> Image from Exhibit LL2 produced at my paragraph 14.

(ii) the statement that “poppers can and are used as room odourisers to create a mood, in the same way that incense can be used to create a mood.”

(iii) statements and examples of the Applicant’s goods and how these are described as leather cleaners, whilst not looking like typical examples of leather cleaners. Evidence that the Applicant’s trade marks are registered in respect of goods under Class 3, including goods for cleaning and room odourising.<sup>16</sup>

28. The Applicant makes further submissions on this in its submissions in lieu of a hearing:

(i) The Proprietor’s goods are not room odourisers as the Proprietor himself states that its poppers are sold “under the guise of room odourisers”. This is supported by Exhibit LL2 which describes how manufacturers refer to the products as goods other than poppers.<sup>17</sup>

(ii) The description “room odouriser” on the bottle cannot be relied upon as there is no evidence of how the goods could be used to odourise a room.

29. In *Altecnic Ltd’s Trade Mark Application*<sup>18</sup> the Court of Appeal decided that “the Registrar is entitled to treat the Class number in the application as relevant to the interpretation of the scope of the application, for example, in the case of an ambiguity in the list of the specification of goods.”

30. In *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited)*,<sup>19</sup> the late Mr Justice Carr considered whether it was appropriate to take the class(es) in which the trade mark was registered into account in revocation or invalidation proceedings when deciding whether a description covered the goods/services shown in the evidence. After considering the judgments of the High Court in the *Omega 1* [2010] EWHC 1211 (Ch) and *Omega 2* cases [2012] EWHC 3440 (Ch), the judge stated that in his (provisional) view, the class number should be taken into account where the meaning of the disputed term is not otherwise sufficiently clear and precise. In particular the judge stated that

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<sup>16</sup> Exhibit LL14.

<sup>17</sup> See my paragraph 18.

<sup>18</sup> [2002] RPC 34 (COA).

<sup>19</sup> [2018] EWHC 3608 (Ch).

where “the words chosen may be vague or could refer to goods or services in numerous classes [of the Nice classification system], the class may be used as an aid to interpret what the words mean with the overall objective of legal certainty of the specification of goods and services.”

31. Kerly’s Law of Trade Marks and Trade Names states the following in respect of revocation and the relevant goods or services:

“The use must be in relation to goods or services within the specification. Use on any other goods or services is irrelevant. If an issue arises as to whether particular goods or services do or do not fall within the specification, it may be necessary to construe what the words used in the specification actually mean. The general approach to construction has been described thus:

“When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all, a trade mark specification is concerned with use in trade.”<sup>20</sup>

The words in the specification must be construed as at the date of application for the mark in question.”<sup>21</sup>

32. In 2009, when the contested mark was filed, the 9<sup>th</sup> edition of the Nice Classification was in force. This means that at that time, the following class headings and explanatory note were applicable in Class 1 and Class 3:

#### **CLASS 1**

Chemicals used in industry, science and photography, as well as in agriculture, horticulture and forestry; unprocessed artificial resins, unprocessed plastics; manures; fire extinguishing compositions; tempering and soldering preparations; chemical substances for preserving foodstuffs; tanning substances; adhesives used in industry.

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<sup>20</sup> *British Sugar Pic v James Robertson & Sons Ltd* [1996] R.P.C. 281 at 288.

<sup>21</sup> Kerly’s Law of Trade Marks and Trade Names, 16<sup>th</sup> Edition, at 12-072.



### **Explanatory Note**

Class 1 includes mainly chemical products used in industry, science and agriculture, including those which go to the making of products belonging to other classes.

### **CLASS 3**

Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices.

### **Explanatory Note**

Class 3 includes mainly cleaning preparations and toilet preparations.

33. I remind myself that the list of goods in respect of which the Proprietor claims to have made genuine use of its mark are:

**Class 1:** Chemicals used in the manufacture of aphrodisiacs, chemical preparations for stimulating sexual activity, these products not being for medical and/or pharmaceutical purposes.

**Class 3:** Perfumery, essential oils, air fragrances for aphrodisiac purposes.

### *Class 1*

34. The description of the Proprietor's goods in Class 1 refers to chemicals used in manufacture, and chemical preparations. Within the scope of Class 1, as defined in the Nice class heading and explanatory note, the Proprietor's goods under its registered mark refer to raw materials and not end products. The class in which goods are recorded is important in confirming the scope of a registration. For example, alcohol within Class 1 would refer to alcohol for industrial purposes and would not be suitable for human consumption. Whereas alcohol in Class 33 would cover goods such as gin and wine, which is sold to the general public for consumption. What this means in the present case is that although chemicals used as aphrodisiacs is a term that could be used to describe the Proprietor's poppers,

within the scope of Class 1 these goods would refer to the raw material for manufacturing such goods. Such goods to be for use by the end consumer would fall within a different Nice class, likely Class 5.

35. The Proprietor's evidence shows no use in respect of chemicals that are used in the manufacture of aphrodisiacs, nor chemicals for stimulating sexual activity, as far as such good fall within Class 1. All of the evidence points to sales of a finished product that is packaged ready for sale to the general public.

36. With no evidence in respect of goods under Class 1, I find that genuine use has not been shown and the contested mark is revoked in respect of all goods under Class 1.

### *Class 3*

#### *Essential oils*

37. An essential oil is defined as "any of various volatile organic oils present in plants, usually containing terpenes and esters and having the odour or flavour of the plant from which they are extracted: used in flavouring and perfumery."<sup>22</sup> The Proprietor's evidence does not include any examples of goods sold under its mark that are described as essential oils, nor that would fit within the description of an oil from a plant. Indeed, the goods shown are stated to be formulated from a chemical. This being the case, I find that genuine use has not been shown in respect of essential oils and the registered mark is therefore revoked in respect of these goods.

#### *Perfumery and air fragrances for aphrodisiac purposes*

38. Due to the overlap in these goods, I will deal with them together. Having considered all of Mr Lemoues' evidence, there is no indication that the Proprietor's goods are used in respect of either perfumery or air fragrances. As the Applicant points out, the fact that the words "room odouriser" appears on the bottle does not mean that the goods are room odourisers. Indeed, there is no evidence or

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<sup>22</sup> Collins English Dictionary online.

information to show how the goods would odourise a room, or that consumers would purchase the goods for this purpose.

39. In Paragraph 5 of Mr Lemoues' first witness statement, he states "The goods sold under the brand JUNGLE JUICE are "poppers" which act as an aphrodisiac". Mr Lemoues therefore confirms the nature of the goods sold as being "poppers" and not perfumery, or air fragrances. Further, Mr Lemoues' evidence describes the nature of poppers as being a substance that was historically used in medicine and more recently is used as a legal high and for its aphrodisiac properties. So the goods are neither perfumery, nor air fragrances and, as the Applicant contends, the goods would appear to be of a nature that would fall within Class 5 of the Nice Classification where pharmaceuticals are classified. Mr Lemoues argues that poppers "can and are used as room odourisers to create a mood, in the same way that incense can be used to create a mood", however, no evidence is provided to support this.

40. Mr Lemoues states that when applying for the mark, it was not possible to apply the word "poppers" to the goods and he implies that it was not possible to classify the goods in Class 5. While it may be that it was not possible to apply the word "poppers" to the goods (though no evidence of this is provided), it is not apparent from the witness statements, or evidence, why the Proprietor's mark could not be registered within Class 5. The evidence suggests that it is a practice in the market for poppers to describe them as room fragrances, or shoe polish, however this does not alter the position from *British Sugar Pic* (cited above) that the relevant consideration is "how the product is, as a practical matter, regarded for the purposes of trade". The Proprietor has not shown genuine use of its mark either in respect of fragrances or air fragrances for aphrodisiac purposes. The registered mark is therefore revoked in respect of these goods.

## **Conclusion**

41. The Proprietor has not shown genuine use of its registered mark, during the period of alleged non use, in respect of any of the goods under its registration. No proper reasons for non use have been shown.

## **Outcome**

42. The application under section 46(1)(b) has been successful. Trade mark registration no. 908630832 is revoked in its entirety and the rights of the Proprietor in that regard are deemed to have ceased as from 6 January 2022.

## **Costs**

43. The Applicant has been successful in these proceedings and is entitled to a contribution towards its costs in line with the scale published in Tribunal Practice Notice 2/2016.

Official fee for revocation	£200
Preparing submissions	£200
Considering the other side's evidence	£600
Preparing submissions in lieu of a hearing	£400
TOTAL	£1,400

44. I order Funline International to pay Lockerroom Marketing Ltd. the sum of £1,400. This sum is to 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 20<sup>th</sup> day of February 2023**

**Charlotte Champion**  
**For the Registrar**