

**O/0413/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3734995**

**IN THE NAME OF SMARTHOME MADE SIMPLE LTD**

**TO REGISTER THE FOLLOWING TRADE  
MARK:**



**Smarthomes Made Simple**

**IN CLASS 9**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 433521**

**BY DAVID BELL**

## **Background and pleadings**

1. On 20 December 2021, Smarthome Made Simple Ltd ('the applicant') applied to register the trade mark as shown on the front page of this decision. It was accepted and published on 18 March 2022 in respect of the following goods:

Class 9: Home automation software; Home automation devices; Home automation systems; Home theatre projectors; Smart home software; Home cinema systems; Home theatre systems; Audio speakers for home; Electronic security systems for home network.

2. On 16 May 2022, David Bell ("the opponent") filed a notice of opposition against the application. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is directed against all the applied for goods.

3. The opponent relies upon the following trade mark:

Earlier Mark	Registration no.	Registration date	Services relied upon
<b>Smart Home Simplified</b>	UK00003116074	9 October 2015	35: Retail services connected with the sale of home telecommunication apparatus.

4. By virtue of its earlier filing date of 2 July 2015, the opponent's trade mark constitutes an earlier mark, in accordance with section 6 of the Act. As it had been registered for more than five years at the filing date of the application, it is subject to the proof of use requirements specified within section 6A of the Act.

5. In its notice of opposition, the opponent contends that, "the new applicant is selling the exact same products/ technology and in the same market/sector. Their application is extremely similar and can easily cause confusion."

6. The applicant filed a counterstatement denying the claims made and putting the opponent to proof of use in respect of its earlier mark.

7. The opponent is represented by Kanaval Consultancy Limited whereas the applicant is represented by Walker Morris LLP. Both parties filed evidence in these proceedings. Neither party requested a hearing however both parties did file written submissions in lieu. I now make this decision after careful consideration of the papers before me.

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 on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

### **Evidence**

9. The opponent's evidence consists of the witness statement of David Bell, the registered owner of the earlier trade mark and is dated 5 October 2022. The witness statement is accompanied by twelve exhibits and the primary purpose of the evidence is to demonstrate that the earlier mark has been genuinely used in the UK during the relevant period.

10. The applicant's evidence comprises the witness statement of Oliver Lises dated 5 December 2022 together with six exhibits. Mr. Lises confirms that he is a joint managing director of the applicant. The evidence appears to demonstrate the nature of the applicant's business and outlines the definition of the term "smart home".

11. Whilst the evidence will not be summarised here, I have taken it all into consideration in reaching my decision and will refer to it below, as and where necessary.

## DECISION

### Proof of use

12. The applicant has requested proof of use in these proceedings in respect of the opponent's earlier mark. I will begin by assessing whether and to what extent the evidence supports the opponent's statement that it has made genuine use of the mark in relation to the services relied upon. In accordance with section 6A(1A) of the Act, the relevant period for this purpose is the five years ending on the filing date of the contested application: **21 December 2016 to 20 December 2021**.

13. The relevant statutory provisions are set out in Section 6A of the Act, which states:

“(1) This section applies where -

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

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

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

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

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

(5)- (5A) [Repealed]

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

14. 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.”

15. Consequently, the onus is upon the opponent to prove that genuine use of the registered trade marks was made within the relevant territory in the relevant period, and in respect of the goods and services as registered.

### **Relevant case law**

16. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The Court of Justice of the European Union (“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].”

17. Use does not need to be quantitatively significant in order to be genuine, however, proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is not genuine use.<sup>1</sup>

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<sup>1</sup> *Nike Innovate CV v Intermar Simanto (Jumpman)* O/222/16 Daniel Alexander QC sitting as the Appointed Person on appeal.

18. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

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.”

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

“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.”

20. In other words, a number of factors must be considered when assessing whether genuine use of the mark has been demonstrated from the evidence filed. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.<sup>2</sup>

### **Form of the mark**

21. In their submissions, the applicant draws attention to the fact that much of the evidence provided shows the sign “Vesternet” as the dominant and distinctive element with the opponent’s mark “Smart Home Simplified” being used as a descriptive term stating:

“What the exhibits show, is that the opponent sells products, which are not branded with the earlier trade mark. If anything, the exhibits prove that the earlier trade mark is purely descriptive and pales into insignificance next to the much larger, dominant and distinctive element, VESTERNET. The use of the earlier trade mark, at best is only to describe what the VESTERNET website sells.”

22. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article

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<sup>2</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, GC Case T-415/09

15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)." (emphasis added).

23. Upon reviewing the evidence, I note that the earlier mark is displayed on goods packaging, social media pages, promotional flyers and an invoice however, every

example shows the mark being used in conjunction with the sign “Vesternet”. While I do not intend to show all uses, I provide the following examples for illustrative purposes:



24. I also note that the opponent’s social media pages such as Facebook, Instagram and Twitter are named “Vesternet”. Further, the retailing of goods are sold via the opponent’s website [www.vesternet.com](http://www.vesternet.com). Two customer reviews have been provided in Exhibit 9. Although the full reviews are not shown, I note that the second reviewer states that they have ordered goods from “Vesternet”.

25. Whilst I note the opponent’s assertions that their mark is visible on their website, social media pages, goods packaging and invoices, from the examples shown above, it is clear that the opponent’s mark is being used in conjunction with another mark. However, the relevant assessment here is that for such use to be considered acceptable, the opponent’s mark must continue to be perceived as indicative of the origin of the services at issue.

26. Though I accept that the above case law sets out that use of a mark encompasses both its independent use and its use in conjunction with another mark, from the evidence filed I am of the view that “Smart Home Simplified” will not be perceived as indicative of the origin of the services for which it is registered. Rather,

I consider that consumers will perceive the sign “Vesternet” as the primary indication of the origin of the services and “Smart Home Simplified” will merely be viewed as a tagline or marketing slogan. As a result, I do not consider that it is acceptable use of the mark as registered and, therefore, its use is not in line with the requirements in *Colloseum* and will not be seen as in keeping with essential function of a trade mark which is to guarantee the identity of the origin of the services for which it is registered.

27. In the alternative, I go on to consider if the use shown is use of an ‘acceptable variant’. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

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

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

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

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one

of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

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

28. In every example exhibited, the word “Vesternet” appears to be the dominant element when used in conjunction with the mark “Smart Home Simplified” as it is displayed in a noticeably larger font whereas the mark “Smart Home Simplified” appears much smaller and below the “Vesternet” wording. Further, the word itself appears to have no standard English dictionary definition rendering this element more distinctive. I am therefore of the view that the relevant public will not perceive “Smart Home Simplified” as an indication of the origin of the services in question. Consequently, I do not consider the use of “Smart Home Simplified” to be consistent with the essential function of a trade mark.

29. In light of my findings above, I find the opponent has not shown that it has made genuine use of the earlier mark and so the section 5(2)(b) ground must fail.

## **Consideration of the evidence of use**

30. If I am wrong to find as I have above and the opponent's mark can be said to have been used as registered (or an acceptable variant of the same), I will proceed to consider the issue of sufficient use.

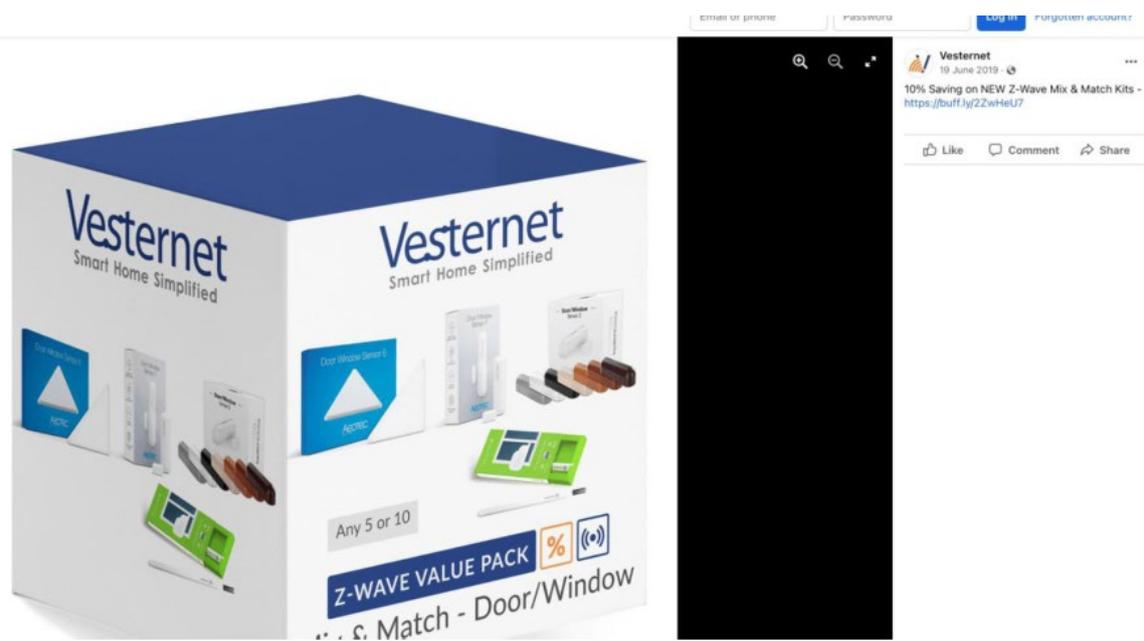
31. The opponent's evidence consists of the witness statement of David Bell, the registered owner of the earlier trade mark and is dated 5 October 2022. The witness statement is accompanied by twelve exhibits.

32. Exhibit 1 displays three examples from the UKIPO website of other registered trade marks which include the term "Smart Home". I note that these trade marks are not related to these proceedings.

33. Exhibits 2-5 include screen printouts from the opponent's websites [www.vesternet.com](http://www.vesternet.com) and [www.instagram.com/vesternetuk](http://www.instagram.com/vesternetuk). The images show goods such as cameras, intercoms, thermostats and sensors. The opponent's mark can be seen displayed next to several of these images however, all these exhibits are undated.

34. Exhibits 6 and 7 show screen printouts from the opponent's website and Facebook, Twitter and YouTube pages. Whilst the opponent's mark is visible on these webpages, these examples are either undated or dated before the start of the relevant period. There is nothing in these exhibits which directly ties the opponent's mark to the services for which it is registered.

35. Exhibit 8 displays images of goods packaging for items such as "Z-wave" switches and controllers. Exhibit 8 is the only exhibit dated within the relevant period. It includes images from the opponent's Facebook page displaying the items "Z-Wave kits" as shown below:



36. The opponent states that these goods are sold on the opponent’s website and Facebook and Instagram pages. Whilst these examples show the opponent’s mark displayed on goods packaging, these examples appear to be of a promotional nature therefore I do not consider that this indicates that the earlier mark has been used in relation to retail services connected with the sale of home telecommunication apparatus. The mere existence of copies of screen shots in isolation, are of little value

evidentially without any supporting information such as an indication as to how many customers viewed the website, over what period, the volume of custom generated as a result or the extent that the relevant consumer had been exposed to the mark by visiting the website. These details have not been provided.

37. Exhibit 9 shows images of two customer reviews. The exhibit is undated, and the opponent's mark is not included in either of these reviews. Further, no information regarding the date or the location of these purchases has been included.

38. Exhibits 10 and 11 include a Facebook advert and a promotional flyer each displaying the opponent's mark. Both exhibits are undated.

39. Exhibit 12 is an invoice for a single item described as "Hubitat Elevation Model C-7 Hub SKU: HUBITAT-UK." No further information has been provided by the opponent relating to this item and it is therefore unclear if it constitutes as home telecommunication apparatus. I also note that the invoice is dated 4 October 2022, after the relevant period.

40. From my assessment, I note that the opponent's evidence of use has its deficiencies. Mr Bell has not provided evidence pertaining to turnover figures; however, I note that he claims that an average of £20,000 per year is spent on advertising, equating to a total of approximately £150,000 since he began using his earlier mark<sup>3</sup>.

41. Several of the exhibits filed are either undated or clearly dated outside of the relevant period of 21 December 2016 to 20 December 2021. Exhibits which do contain the earlier mark clearly show that the mark is being used on goods such as thermostats, switches and sensors<sup>4</sup>, not the services in which the opponent relies.

42. I have carefully considered the evidence provided by the opponent and whether this meets the requirements for genuine use as per *Walton*, set out earlier in this

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<sup>3</sup> Paragraph 29 of the Witness Statement of David Bell

<sup>4</sup> See Exhibits 3, 4 and 8

decision. I am also mindful of the guidance from the *Dosenbach-Ochsner* and *Awareness* appeal cases emphasising the need to consider what the evidence fails to “show” and what might reasonably have been conclusively shown. In my analysis above, I have highlighted numerous shortcomings in the evidence.

43. As previously outlined, no turnover or market share figures have been provided. The only evidence of sales provided was a single invoice which is dated outside of the relevant period. Documentation in the relevant period such as Facebook posts is not evidence of the provision of the services for which the earlier mark is registered under class 35. After considering the evidence and relevant caselaw, I am not satisfied that the opponent has demonstrated genuine use of its marks in the UK for any of the services for which it is registered. The consequence of which is that the earlier marks may not be relied upon to support the opponent’s claim and the opposition must inevitably fail.

## **CONCLUSION**

44. The opposition under section 5(2)(b) has failed in its entirety. Subject to any successful appeal, the contested mark will proceed to registration in the UK for all the specified services.

## **COSTS**

45. The applicant has been successful in this case and is therefore entitled to a contribution towards its costs. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice (‘TPN’) 2 of 2016. Although I did not consider it necessary to assess the applicant’s evidence given the circumstances of this case, it is still entitled to an award of costs of the same. As such, using the TPN as a guide, I award costs to the applicant on the following basis:

Preparing a statement and considering the other side’s statement:	£200
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Preparing evidence and considering the other side's evidence:	£500
Filing submissions:	£300
<b>Total:</b>	<b>£1000</b>

46. I therefore order David Bell to pay the sum of £1000 to Smarhome Made Simple Ltd. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 4<sup>th</sup> day of May 2023**

**Catrin Williams**  
**For the Registrar**