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TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 2531996 IN THE NAME OF HUSSEIN AYYUB

AND IN THE MATTER OF OPPOSITION NO. 100708 THERETO BY SHEZAN DERVICES (PRIVATE) LIMITED

AND IN THE MATTER OF TRADE MARK REGISTRATION NO. 2019696 IN THE NAME OF SHEZAN DERVICES (PRIVATE) LIMITED

AND IN THE MATTER OF APPLICATION FOR REVOCATION NO. 84535 THERETO BY HUSSEIN AYYUB




AND IN THE MATTER OF TRADE MARK REGISTRATION NO. 2029477 IN THE NAME OF SHEZAN DERVICES (PRIVATE) LIMITED

AND IN THE MATTER OF APPLICATION FOR REVOCATION NO. 84536 THERETO BY HUSSEIN AYYUB

DECISION

Introduction

1. This is an appeal from the decision of Mr. Martin Boyle, acting for the Registrar, dated 20 June 2014, (O-277-14), in which he:
 - (1) Partially allowed Opposition No. 200708;
 - (2) Partially revoked Registered Trade Mark No 2019696 with effect from 15 May 2004; and
 - (3) Revoked Registered Trade Mark No. 2029477 in its entirety.
2. The parties to the present appeal are, the Appellant, Shezan Services (Private) Limited ('SSP') and Mr. Hussein Ayyub, the Respondent. In paragraph 1 of the Decision the trade marks that the parties own were set out as follows:

Mr Ayyub's Application	SSP's Registrations
<p data-bbox="272 338 831 416">UK application 2531996 for a series of five marks, the first of which is:</p>  <p data-bbox="272 658 831 692">Registration is sought for:</p> <p data-bbox="272 728 831 2002">Class 29: Frozen meat, fish, poultry and game; frozen meat extracts; frozen meat and vegetable burgers; frozen food stuffs in the form of prepared meals or snacks; frozen prepared meals; frozen prepared cooked meals; frozen prepared curry; frozen curry; frozen prepared or cooked dishes based on vegetables, meat, fish, poultry or game; frozen prepared or cooked curry dishes based on vegetables, meat, fish, poultry or game; frozen kebabs; frozen burgers; frozen samosas; frozen spring rolls; frozen parathas; cooked meats; cooked sliced meat; chilled deserts; chilled ready meals; chilled foods consisting predominately of fish; chilled foods consisting predominately of game; chilled foods consisting predominately of meat; chilled foods consisting predominately of poultry; chilled kebabs; chilled cooked kebabs; chilled burgers; chilled cooked burgers; chilled samosas; chilled cooked samosas; chilled spring rolls; chilled cooked spring rolls; chilled parathas; chilled cooked parathas; chilled cooked meats; chilled sliced meat; chilled cooked sliced meat; chilled curry; chilled cooked curry; chilled chicken tikka; chilled cooked chicken tikka; cooked meat dishes; food products containing meat; meat products; cooked vegetable dishes; food products containing vegetables; prepared vegetable products; kebabs;</p>	<p data-bbox="831 338 1415 371">i) UK registration 2019696 for the mark:</p>  <p data-bbox="831 658 1415 692">The mark is registered for:</p> <p data-bbox="831 728 1415 909">Class 29: Jams, jellies, marmalades, conserves; jams and conserves adapted for slimming purposes; pickles, chutney (pickle); preserves; kasundi; processed fruits and vegetables.</p> <p data-bbox="831 949 1415 1055">The mark was filed on 28 April 1995 and it completed its registration process on 14 May 1999.</p> <p data-bbox="831 1095 1415 1128">ii) UK registration 2029477 for the mark:</p>  <p data-bbox="831 1451 1415 1485">The mark is registered for:</p> <p data-bbox="831 1525 1415 1592">Class 43: Restaurant, bar and snack bar services.</p> <p data-bbox="831 1632 1415 1738">The mark was filed on 7 August 1995 and it completed its registration process on 17 October 1997.</p>

<p>cooked kebabs; burgers; cooked burgers; samosas; cooked samosas; spring rolls; cooked spring rolls; parathas; cooked parathas; curry; cooked curry; chicken tikka; cooked chicken tikka.</p> <p>Class 30: Rice; spices; curry sauces; samosas; spring rolls; burgers in bread rolls; food stuffs in the form of prepared meals, snack foods or snacks; frozen prepared meals; pre-packed prepared meals; prepared cooked meals; prepared curry; prepared frozen meals; prepared meals; prepared or cooked dishes based on vegetables, meat, fish, poultry or game (included in class 30); frozen prepared rice; prepared or cooked curry dishes; snack dips; dips for snack foods; potato based snack foods; vegetable based snack foods; rice based snack foods; snack foods made from cereal; wheat based snack foods; snack foods based on vegetables, meat, fish, poultry or game; bread; bread products; pastry; chapattis; frozen desserts; chilled desserts; chilled ready meals; chilled foods consisting predominately of vegetables; chilled samosas chilled cooked samosas; chilled spring rolls; chilled cooked spring rolls; chilled parathas; chilled cooked parathas; chilled curry; chilled cooked curry; cooked samosas; cooked spring rolls; parathas cooked parathas; curry; cooked curry.</p> <p>Class 43: Services for providing food and drink; restaurant services; takeaway services; café services. The application was filed on 18 November 2009 and published in the trade marks journal on 9 April 2010.</p>	
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3. SSP opposed the registration of My Ayyub’s application under section 5(2)(b) of the Trade Marks Act 1994 (*‘the Act’*) on the basis of the two trade mark registrations set out above. Mr Ayyub denied the grounds of opposition and put SSP to proof of use of earlier trade marks under section 6A of the Act. In addition Mr Ayyub applied for revocation of the marks relied upon by SSP on the grounds of non-use. SSP denied

that the marks were liable to revocation on the basis that the marks had been put to genuine use.

4. Both parties filed evidence and the matter came on for a hearing on 3 April 2014 at which Mr Ayyub was represented by Graham Johnson of Appleyard Lees. SSP did not attend the hearing but instead relied upon the evidence and submission filed earlier in the proceedings.

The Hearing Officer's Decision

5. Having reviewed the evidence filed in the case, at paragraphs 4 to 15 of the Decision, the Hearing Officer went on to consider the question of proof of use/revocation.
6. The Hearing Officer first identified the relevant periods which he had to consider for the purposes of his assessment and then identified the applicable case law of the Court of Justice of the European Union ('*CJEU*') in relation to the genuine use of a trade mark. He did so by reference to the convenient summary set out by Arnold J in Stichting BDO and Others v. BDO Unibank, Inc and others [2013] EWHC 418 (Ch). Quite rightly in my view, there is no suggestion in the Grounds of Appeal that the Hearing Officer was wrong to adopt that summary as a statement of the current law in this area.
7. It is relevant to note at this stage that no defence was raised under section 46(1)(a) of the Act to the effect that there were proper reasons for any non-use during the relevant 5 year period and secondly, that no defence was raised under section 46(3) of the Act to the effect that genuine use of the trade mark had commenced or resumed after expiry of the relevant 5 year periods. That being the case, the registration can only be saved from revocation by showing that there had been genuine use of the trade mark prior to the cut-off points identified in paragraphs 18 and 19 of the Hearing Officer's Decision.
8. In the context of the Hearing Officer's assessment of the questions of use with respect to Trade Mark Registration No. 2019696 the Hearing Officer considered the applicable approach to "genuine use" in a form differing in elements which do not alter the distinctive character in the form in which it was registered as follows:

25. . . . Mr Johnson highlighted the nature of the mark used on these invoices i.e. it is not in the form of the registered mark. However, genuine use can be in a form "differing in elements which do not alter the distinctive character of the mark in the form in which it was registered" as per section 46(2) and section 6A(4)(a) of the Act. The Court of Appeal dealt with what I will describe as the use of a "variant mark" in *Bud/Budweiser Budbrau* [2003] RPC 25. Of relevance are the statements of Lord Walker of Gestingthorpe where he stated:

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“43. ...The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?”

44. The distinctive character of a trade mark (what makes it in some degree striking and memorable) is not likely to be analysed by the average consumer, but is nevertheless capable of analysis. The same is true of any striking and memorable line of poetry: Bare ruin'd choirs, where late the sweet birds sang' is effective whether or not the reader is familiar with Empson's commentary pointing out its rich associations (including early music, vault-like trees in winter, and the dissolution of the monasteries).

45. Because distinctive character is seldom analysed by the average consumer but is capable of analysis, I do not think that the issue of 'whose eyes? -registrar or ordinary consumer?' is a direct conflict. It is for the registrar, through the hearing officer's specialised experience and judgement, to analyse the 'visual, aural and conceptual' qualities of a mark and make a 'global appreciation' of its likely impact on the average consumer, who:

'Normally perceives a mark as a whole and does not proceed to analyse its various details.' The quotations are from para [26] of the judgement of the Court of Justice in Case C-342/97 *Lloyd Schuhfabrik Meyer GmbH v Klijsen Handel BV* [1999] E.C.R. I-3819; the passage is dealing with the likelihood of confusion (rather than use of a variant mark) but both sides accepted its relevance.”

Also of relevance are the comments of Sir Martin Nourse; he stated at paragraph 12:

“Mr Bloch accepted that, in relation to a particular mark, it is possible, as Mr Salthouse put it, for the words to speak louder than the device. However, he said that it does not necessarily follow that the entire distinctive character of the mark lies in the words alone. That too is correct. But there is yet another possibility. A mark may have recognisable elements other than the words themselves which are nevertheless not significant enough to be part of its distinctive character; or to put it the other way round, the words have dominance which

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reduces to insignificance the other recognisable elements....”

26) I also take note of the comments of Mr Arnold QC (sitting as the Appointed Person) in *NIRVANA Trade Mark* (O/262/06) and in *REMUS trade mark* (O/061/08). In these cases Mr Arnold (as he then was) undertook a thorough analysis of the relevant case law, including judgments of the CJEU and the GC, and he then put forward the following questions, the answers to which will assist in determining whether a variant form of use represents an acceptable variant (the text is from *NIRVANA* but it is also adopted in *REMUS*):

“33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the subquestions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all....”

9. With respect to the assessment of “genuine use” in the context of Trade Mark Registration No. 2029477 the Hearing Officer found as follows:

Registration 2029477

39) The mark and its services are:



Class 43: Restaurant, bar and snack bar services.

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40) The variant use question also arises with this registration. The evidence from the opponent shows the following mark used in relation to the restaurant:



41) As with the other registration, the distinctive character resides essentially in the word Shezan, but as observed already, the stylisation adds something. In this case, the cloud-like border also contributes to the mark's distinctive character. The way in which Shezan is presented in the used form has a different manner of stylisation. Furthermore the cloudlike element is missing. Therefore, despite the same word being used, the differences do alter the distinctive character of the mark. In reaching this finding I have taken into account the guidance given in Case C-252/12 -*Specsavers v Asda Stores Ltd* and Case C-12/12 *Colloseum Holding* [2012] ECR I-0000 neither of which alters my view. Consequently, the form of use may not be relied upon. In any event, the paucity of the opponent's evidence causes further difficulties. Mr Moore's evidence lacks detail and is, in any event, based upon hearsay. Mr Latif's evidence, whilst establishing the existence of a webpage for the restaurant and that it was established in 1969 provides no real detail of the actual use that has been made. Mr Piracha's evidence, despite the witness being the manager of the restaurant for 30 years, lacks detail. Whilst the evidence establishes that the restaurant exists, and that it won some awards in the 1970s, no details of the actual use is provided. Being the long-standing managing partner of the restaurant, Mr Piracha must have at his disposal a large body of evidence that could have been filed. I note that in *Catwalk* BL O/404/13 Mr Hobbs QC, sitting as the Appointed Person stated:

“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. As to which see paragraphs [17] to [19] and [24] to [30] of the Decision of Mr. [Daniel] Alexander QC sitting as the Appointed Person in

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PLYMOUTH LIFE CENTRE Trade Mark (BL O-236-13; 28 May 2013).”

42) The evidence must establish that the use of the mark is warranted in the economic sector concerned in terms of establishing or maintaining a market share. The restaurant business is clearly a huge market. There is no evidence whatsoever as to the turnover, the customer numbers, the advertising spend, the number of average covers. Whilst I am sure that the operation of a single restaurant has the capacity to meet the genuine use test, without evidence of the sort I have described I do not consider that SSP has established genuine use. The mark may not be relied upon in the opposition and it should also be revoked.

The appeal

10. SSP appealed to the Appointed Person under section 76 of the Trade Marks Act 1994. The Grounds of Appeal contend in substance that with respect to Trade Mark Registration No. 2029477:
 - (1) The Hearing Officer erred in principle in his approach to the application of the law on proof of use to the facts before him; and
 - (2) The Hearing Officer erred in principle in his approach to the application of the law on the issue of use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered; and
11. It is submitted that had the Hearing Officer not made the aforesaid errors of principle then the Hearing Officer could and would have found that (1) Registration No. 2029477 should not be revoked for restaurant services and that Revocation No. 84536 should partially fail; and (2) as a consequence Opposition No. 100708 should also be upheld in respect of the class 43 services of Application No. 2531996.
12. It was accepted by SSP on this appeal that “*there has been no use of the mark on ‘bar and snack bar’ services*”.
13. No Respondent’s Notice was filed. There was no cross-appeal.
14. A hearing was fixed for the appeal. Both parties filed a Skeleton of Argument and indicated that they would not be represented at the hearing and that they were content for the appeal to be decided in the papers.

Standard of review

15. The appeal is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong. See Reef Trade Mark [2003] RPC 5, and BUD Trade Mark [2003] RPC 25.

16. More recently in Fine & Country Ltd v Okotoks Ltd (formerly Spicerhaart Ltd) [2013] EWCA Civ 672; [2014] FSR 11 Lewison LJ said at paragraph [50]:

The Court of Appeal is not here to retry the case. Our function is to review the judgment and order of the trial judge to see if it is wrong. If the judge has applied the wrong legal test, then it is our duty to say so. But in many cases the appellant's complaint is not that the judge has misdirected himself in law, but that he has incorrectly applied the right test. In the case of many of the grounds of appeal this is the position here. Many of the points which the judge was called upon to decide were essentially value judgments, or what in the current jargon are called multi-factorial assessments. An appeal court must be especially cautious about interfering with a trial judge's decisions of this kind. . . .

17. This approach was reiterated by the Court of Appeal in Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115]. Moreover in paragraph [115] Lord Justice Lewison said:

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55;

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Bekoe v Broomes [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

18. It is necessary to bear these principles in mind on this appeal.

Decision

The proof of use issue

19. As set out above at paragraph 6, there is no suggestion in the Grounds of Appeal or the written submissions that the Hearing Officer did not correctly identify the relevant law with regards to “*genuine use*” by referring to the convenient summary set out by Arnold J in Stichting BDO and Others v. BDO Unibank, Inc and others [2013] EWHC 418 (Ch). SSP were in my view quite correct to adopt that position.
20. Instead, what is said is that (1) “*the Hearing Officer should not have considered the paucity of evidence but rather the findings of fact*”; and (2) the test for genuine use does not include a quantitative element and in those circumstances the Hearing Officer could and should have found that there was genuine use of the mark.
21. With regard to the question of evidence of use in paragraph 41 of his Decision the Hearing Officer quite correctly referred to paragraph [22] of the decision of Mr Geoffrey Hobbs QC sitting as the Appointed Person in CATWALK Trade Mark (BL-O-404-13).
22. In paragraphs 4 and 5 of his Decision in FURNITURELAND Trade Mark (BL-O-128-14) Mr Geoffrey Hobbs QC sitting as the Appointed Person identified the relevant approach as follows:
4. For the overall purpose of deciding whether there had been ‘genuine use’ of the trade mark, it was necessary for the Registrar to be satisfied that the evidence adduced by FV showed use of the nature and quality envisaged by the case law summarised at paragraphs [28] and [29] of the Judgment of the CJEU in Case C-149/11 *Leno Merken BV v. Hagelkruis Beheer BV* [2012] ECR I-0000; [2013] ETMR 16; in the following terms:
28. The Court has already - in the judgments in *Ansul* and *Sunrider v. OHIM* and the order in *La Mer Technology* - interpreted the concept of ‘genuine use’ in the context of the assessment of whether national trade marks had been put to genuine use, considering it to be an autonomous concept of European Union law which must be given a uniform interpretation.
29. It follows from that line of authority that there is ‘genuine use’ of a trade mark where the mark is used in

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accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether there is real commercial exploitation of the mark in the course of trade, particularly the usages regarded as warranted in the economic sector concerned as a means of maintaining or creating market share for the goods or services protected by the mark, the nature of those goods or services, the characteristics of the market and the scale and frequency of use of the mark (see *Ansul*, paragraph 43, *Sunrider v. OHIM*, paragraph 70, and the order in *La Mer Technology*, paragraph 27).

As confirmed by the CJEU in Case C-40/01 *Ansul BV v. Ajax Brandbeveiliging BV* [2003] ECR I-2439 at paragraph [37]:

Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns.

5. It was incumbent upon FV under Section 100 of the 1994 Act to adduce evidence which showed that the registration of its mark in relation to goods and services of the kind itemised in paragraph 2 above had been supported by use in commerce of corresponding breadth during the relevant 5 year period. In order to determine the extent (if any) to which the protection conferred by registration of the trade mark could legitimately be retained, the Registrar needed to form a view as to what the evidence did and just as importantly what it did not 'show' (per Section 100 of the Act) with regard to the actuality of use in relation to goods and services of the kind in issue. The evidence fell to be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addressed the actuality of use: see paragraphs [17] to [19] and [24] to [30] of the Decision of Mr. Daniel Alexander QC sitting as the Appointed Person in *PLYMOUTH LIFE CENTRE Trade Mark* BL O-236-13; [2013] RPC 34.

23. The evidence of use that was before the Hearing Officer came from three witnesses, Mr Moore a patent attorney at Jensen and Son; Mr Latif a trade mark attorney at Jensen and Son; and Mr Piracha the Managing Partner of Shezan Restaurant.

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24. The relevant evidence from Mr Moore is in the form of:

(1) A witness statement dated 3 July 2012 which stated:

I have been verbally informed by [SSP's] Pakistani trade mark attorney that Shezan Services (Private) Limited operate a restaurant in London under the Shezan trade mark. I do not currently have access to further details at this time.

(2) A witness statement dated May 2015 which stated:

I have been verbally informed by [SSP's] Pakistani trade mark attorney that Shezan Services (Private) Limited operate a restaurant in London under the Shezan trade mark. I do not currently have access to further details at this time but attached as Exhibit DM4 a copy of any email confirming this.

(3) Exhibit DM4 which contained an email dated 2 July 2012 from SSP's Pakistani trade mark attorneys indicating that they had been informed by SSP that it owned a restaurant "*being run by someone else, upon specific permission from [SSP]*" and that the restaurant is "*being run under the Trade Mark SHEZAN (in script form)*".

25. It seems to me that on the basis of this evidence, and in particular given there was no evidence to the dates upon which such use had taken place or as to the actual form in which the mark was said to have used, the Hearing Officer was entirely right to find as he did that Mr Moore's evidence lacked detail and was based upon hearsay. Both of those being factors that go to the weight of such evidence: see CITYBOND Trade Mark [2007] RPC 13 at paragraph [32].

26. The witness statement of Mr Latif contains 2 exhibits. Exhibit DL1 is a print out from the British History Online website for the Montpelier Square area. In that print out there is the following reference ". . . *The basement was fitted up as the Shezan Restaurant in 1969*". There is no other relevant reference in the exhibit.

27. Exhibit DL2 is a print out from the wayback machine for the website at www.shezan.co.uk. It appears the website was set up in 1998. There is a download of one page from the website on which the following mark appears:



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The Hearing Officer noted, and I agree with him, that it would seem, from the url, that the page carrying the mark in the exhibit dated from 1998.

28. In the circumstances, it seems to me to be entirely fair of the Hearing Officer to find that this evidence provided no detail of actual use. Indeed in my view the Hearing Officer could have gone further and found that such evidence only went, if at all, to the position in 1969 and 1998 being dates far outside the relevant period for which SSP had to establish genuine use of the trade marks.
29. Finally there is the evidence of Mr Piracha. Mr Piracha provided a 4 paragraph statement which has no exhibits. Mr Piracha states that he is “*the Managing Partner of Shezan Restaurant*” and that he has been the Managing Partner for 30 years. He goes on to state that the Shezan Restaurant has won several awards. I note that both of those awards are said to have been given in the 1970s a period not relevant to the determination that the Hearing Officer was required to make.
30. The totality of Mr Piracha’s specific evidence with regard to use of both Trade Mark Registration No. 2019696 and Trade Mark Registration No. 2029477 is contained in paragraph 4 as follows:

[The Shezan Restaurant] have been using the trade mark Shezan as our restaurant name since the 1970’s with the permission of Shezan Services (Private) Limited.

31. As set out in paragraph [21] of the decision of Mr Geoffrey Hobbs QC sitting as the Appointed Person in CATWALK Trade Mark (BL-O-404-13):

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.

32. In the present case the non-hearsay evidence before the Hearing Officer essentially amounted to a one sentence assertion with no supporting material. The one sentence had no specificity in particular as to the form in which it was said that the marks had been used; how the mark had been used; and/or over what period. There was no reference to the website, customer numbers, turnover or marketing. Moreover, that one sentence of evidence was given by a person who was in the ideal position to provide the Hearing Officer with relevant and specific evidence. He did not do so.
33. Given the very limited and vague evidence that was before him; and even more pertinently the lack or absence of evidence on the central issue before him it seems to me that the Hearing Officer was entitled to find that SSP had not discharged the burden that was upon it to establish genuine use of the mark.

The use of a mark differing in elements which do not alter the distinctive character of the mark in the form in which it was registered issue

34. Given the findings that I have made in relation to the first issue it is not necessary for me to consider the second. However, as the Hearing Officer considered the question of whether the use of:



constituted use of the mark as registered i.e.



I consider, bearing in mind the position taken by SSP on this appeal, that it would be appropriate to make clear that I consider that the Hearing Officer was also entitled to come to the view the mark in the form relied upon should not be regarded as use of the mark as registered.

35. The Hearing Officer correctly identified the relevant case law in paragraphs 25 to 26 of his Decision as set out above.

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36. Whilst he found that the distinctive character of the mark “*resides essentially in the word Shezan*” the Hearing Officer went on to find that both the stylisation of the word ‘Shezan’ and the cloud-like border also contributed to the distinctive character of the registered trade mark.
37. Whilst both the registered trade mark and the mark relied upon contain the word ‘Shezan’ it seems to me both are properly to be regarded as device marks. In the mark relied upon by SSP the stylisation of the word ‘Shezan’ is different from that in the registered trade mark (in particular the stylisation of the letter ‘z’ is very different) and the cloud-like border is entirely absent. In terms of the visual individualisation it seems to me that the Hearing Officer was entitled to find, as he did, that these differences, although perhaps not very great, were material and altered the distinctive character of the mark.
38. The Hearing Officer also expressly referred to the guidance in both Case C-252/12 Specsavers v. Asda Stores Ltd and Case C-12/12 Colloseum Holding in paragraph 41 of his Decision and stated that they did not alter his view. That seems to me to be correct. Both the cases referred to were concerned with a use of a mark that could properly be regarded as either use of the mark as registered as part of a composite mark or use in conjunction with another mark. In the present case, whilst the word ‘Shezan’ appears in both marks, it is not the word ‘Shezan’ that is registered as a trade mark it is device mark which is not used either in conjunction with or as a composite part of the mark relied upon to establish use.
39. In my view the Hearing Officer approached the question he had to decide in the correct way in the light of the authorities. Having done so, he reached a conclusion that was open to him and therefore his Decision cannot properly be overturned on appeal.

Conclusion

40. In the circumstances, it does not seem to me that SSP has identified any material error of principle in the Hearing Officer’s analysis or that the Hearing Officer was plainly wrong. In the result I have decided that the Hearing Officer was entitled to make the findings that he did.
41. In the result the appeal fails.

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42. Neither side has asked for any special order as to costs. Since the appeal has been dismissed, Mr. Hussein Ayyub is entitled to his costs. I order that Shezan Services (Private) Limited to pay a contribution towards Mr Ayyub's costs of £850 within 14 days of the date of this decision.

Emma Himsworth Q.C.

Appointed Person

2 June 2015

Shezan Services (Private) Limited was represented by Jensen & Son.

Mr. Hussein Ayyub was represented by Appleyard Lees.

The Registrar took no part in the Appeal.