

BL O/1046/22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3680558

BY

MOOEYS FRANCHISE LTD

TO REGISTER THE FOLLOWING SERIES OF TWO TRADE MARKS:

Moo Skin

MooSkin

AND

OPPOSITION NO. 427914 THERETO

BY

MOOGOO HONG KONG LIMITED

Background and pleadings

1. On 11 August 2021, Mooeys Franchise Ltd (the “Applicant”) applied to register the series of two word only trade marks, **Moo Skin** and **MooSkin**. The contested application was accepted, and published for opposition purposes in the Trade Marks Journal on 17 September 2021. Registration of the marks is sought in respect of the following goods:

Class 3 *Cosmetics; Organic cosmetics; Beauty care cosmetics; Skincare cosmetics.*

2. On 23 December 2021, MooGoo Hong Kong Limited (the “Opponent”) filed a notice of opposition, opposing the application under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), on the basis of its earlier United Kingdom Trade Mark (UKTM):

UKTM No. 911714912

MooGoo

Filing date: 5 April 2013

Registration date: 2 August 2013

3. For the purposes of its opposition, the Opponent relied upon all of the goods for which the earlier mark is registered, namely:

Class 3 *Age spot reducing creams; Anti-wrinkle cream; Babies' creams [non-medicated]; Face creams; Nappy cream [non-medicated]; Non-medicated creams; Non-medicated skin creams; Skin care creams, other than for medical use; Skin cream; Skin creams; Sun protecting creams [cosmetics]; Baths (Cosmetic preparations for -); Cosmetics in the form of creams; Cosmetics for use on the skin; Facial creams [cosmetic]; Skin creams [cosmetic]; Anti-aging creams; Aromatherapy creams; Aromatherapy lotions; Aromatic oils; Baby care products (non-medicated-); Baby lotion; Body moisturisers; Body milks; Body cream; Cleansing creams; Cleansing milks for skin care; Conditioners for*

treating the hair; Conditioners for use on the hair; Conditioning creams; Deodorants; Day creams; Creams (non-medicated-) for the body; Creams (non-medicated-) for the eyes; Creams (soap-) for use in washing; Creams for wrinkles; Creams for firming the skin; Eye cream; Face cream (non-medicated-); Face creams; Facial cleansing milk; Facial cream; Facial moisturisers [cosmetic]; Facial washes; Hair care lotions; Hair conditioner; Hair cream; Hand cream; Hand soaps; Hair shampoo; Moisturizing milk; Moisturiser; Moisturising skin creams [cosmetic]; Moisturising skin lotions [cosmetic]; Milks [cosmetics]; Non-medicated creams; Non-medicated hair shampoos; Non-medicated scalp treatment cream; Non-medicated skin creams; Non-medicated soaps; Scalp treatments (non-medicated-); Shampoo; Skin balms (non-medicated-); Skin cream; Skin creams [non-medicated]; Skin care oils [non-medicated]; Soap; Lip balm; Lip balm [non-medicated].

Class 5 *Medicinal creams for skin care; Pharmaceutical preparations for skin care; Skin care creams for medical use; Skin care lotions [medicated]; Pharmaceutical preparations for Skin care; Scalp treatments [medicated]; Analgesic balm; Balms for medical purposes; Medicated balms; Foot balms [medicated]; Medicated lip balm; Medicated baby powders; Medicated foot powder; Medicated talcum powder; Babies' creams [medicated]; Nappy cream [medicated]; Body creams [medicated]; Face cream [medicated]; Antiseptic cleansers; Serums.*

4. The opposition is aimed against all of the goods in the contested application. The statement of grounds was worded in the following terms:

“The new application in [sic] for Mooskin and all our products are named Moogoo Skin Care. This is very similar and may lead to confusion among consumers”.

5. On 17 January 2022, the Applicant filed its counterstatement. The Applicant stated that it did not believe the earlier mark had been genuinely used, and put the Opponent to proof of use.

6. The Applicant admitted that the contested goods may be similar to the goods in Class 3 of the earlier mark, however, it denied that they are either similar, identical or complementary to the goods in Class 5 of the earlier mark.

7. The Applicant submitted that the earlier mark possesses, "... at best, a low distinctive character in relation to the goods and services of the earlier mark". The Applicant argued that the low distinctive character of the earlier mark is evident not only from the number of "MOO-formative" trade marks in Class 3 on the Register, but also from the common usage of MOO-formative trade marks in the marketplace. The Applicant claimed that the prevalence of such trade marks would be evidenced later in the proceedings. The Applicant argued that the supposed co-existence and common usage of MOO-formative trade marks demonstrates that neither confusion nor association with the contested mark does or would occur.

8. Both parties provided submissions and evidence, with the Opponent including evidence for the purpose of establishing proof of use. The evidence and submissions shall be summarised to the extent that it is considered necessary at the appropriate time.

9. No Hearing was requested.

10. The Applicant is professional represented by Inbrandgible Limited. The Opponent is unrepresented.

Proof of use

11. The relevant statutory provisions are as follows:

Section 6A:

"(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), (b) 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) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(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.”

12. Further, Section 100 of the Act states that:

“100. 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.

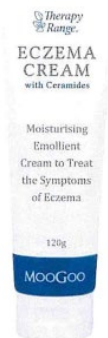
13. Considering the above, it is incumbent on the Opponent to establish proof of use of its earlier mark UKTM No. 911714912 in the 5-year period ending on the date of application of the contested mark, i.e., between 12 August 2016 and 11 August 2021.

Opponent evidence/submissions

14. On 5 April 2022, the Opponent filed evidence containing the witness statement of Mr Paul Marzella, Chief Financial Officer of MooGoo Hong Kong Limited. The witness statement stated that the Opponent company had been using the earlier mark since April 2013, initially exclusively online before expanding to a wholesale model out of its Slough-based UK office in 2015. According to the witness statement, the turnover for last 4 years had been 2017/2018 - £1,051,354; 2018/2019 - £1,201,103; 2019/2020 - £1,333,424; and 2020/2021 - £1,490,057. The witness statement did not particularise whether the turnover was in relation to the specific earlier mark or the Opponent company in general.

15. The witness statement referred to exhibit MG1, which consisted of press articles discussing the launch of the Opponent's products into Lloyds Pharmacies in 2019, and Holland & Barret in 2020. The witness statement also referred to exhibit MG2, which consisted of extracts from the online retail websites of moogooskincare.co.uk and hollandandbarrett.com.

- Exhibit MG1 consisted of two press articles:
 - MooGoo strengthens UK presence with Lloyds retail deal, appearing in 'Cosmetic Business', dated 22 October 2019. The article refers to MooGoo products becoming available in "95 Lloyds stores across the UK from tomorrow" (i.e., 23 October 2019).
 - Skincare brand lands 550-store UK retail deal, appearing in 'Retail & Leisure International', dated 15 July 2020. The article explains that the Australian brand's "range of specialist skincare products are now being sold in hundreds of Holland & Barrett stores in the UK and Ireland".
- Exhibit MG2 consisted of extracts from two websites: moogooskincare.co.uk and hollandandbarrett.com. The websites shows that certain MooGoo skin care products are available to purchase in GBP:



Eczema Cream with Ceramides 120g
(<https://moogooskincare.co.uk/skin-problems/eczema-cream-with-ceramides-120g>)
£17.90



MooGoo Skin Milk Udder Cream 200g
(28)
£12.50
£6.25/100 g



Applicant evidence/submissions

16. On 1 June 2022, the Applicant filed submissions in reply to the Opponent's evidence, as well as evidence in support of its application. The Applicant referred to the evidence taken from moogooskincare.co.uk, appearing in the witness statement of Mr Paul Marzella. The Applicant submitted that moogooskincare.co.uk is owned by MooGoo EU Limited (registration number 1872947), which is a separate legal entity from the named Opponent MooGoo Hong Kong Limited (registration number 08064875). The Applicant claimed that no explanation had been provided to indicate a relationship between the companies, and argued that any goodwill attributed to one cannot be extended to the other without explanation as to the relationship. I consider it apposite to clarify at this juncture that the original TM7 and notice of opposition listed the Opponent company as being MooGoo Hong Kong Limited.

17. The Applicant argued that the proof of use evidence provided by the Opponent is insufficient to indicate that the earlier mark was well-known to the relevant UK public at the relevant date. The Applicant stipulated that a breakdown of sales had not been provided, nor had any information pertaining to advertising expenditure. The Applicant argued that the claims made in the press releases (MG1) had not been backed up with actual figures, and that considering both exhibits are dated 5 April 2022 they are not within the relevant date.

18. The Applicant submitted that the relevant consumer is a member of the general public, with a medium level of attention, who selects the goods primarily by visual means. The Applicant argued that although the marks share the same first three letters

MOO they differ as to their remaining letters/elements, and it is therefore unlikely that the consumer would mistake one mark for the other. The Applicant also submitted that the marks would be pronounced differently. As for the conceptual comparison, the Applicant first identified the meaning of each mark's shared element, submitting that 'MOO' will be perceived as the sound a cow makes. The Applicant then submitted that the element 'Goo' in the earlier mark is a thick, sticky, unpleasant substance, whilst the element 'Skin' in the contested mark refers to the outer layer of an animal's body. According to the Applicant, the resulting concept of the earlier mark is that of a milky goeey substance, whilst the concept of the contested mark is that of a milky substance to be applied to skin. The Applicant argued that the marks are therefore conceptually different.

19. The Applicant's evidence included the witness statement of Ms Amy Lewis, director of Mooeys Franchise Ltd. The information contained therein pertained predominantly to the origin of the company and the decision for the name of the trade mark. Ms Lewis also referred to eight other trade marks which the company owns that contain the word Moo. Ms Lewis claimed that she had not received any complaints of confusion with the earlier mark MooGoo. Exhibits numbering AL1 – AL14 accompanied the witness statement, which evidences some of the above statements.

DECISION

20. 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.

21. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)*

[2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

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

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

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

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

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

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

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or

services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

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

22. In *Awareness Limited v Plymouth City Council, PLYMOUTH LIFE CENTRE*, BL O/236/13, Mr Daniel Alexander K.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”.

23. In *CATWALK Trade Mark*, BL O/404/13, Mr Geoffrey Hobbs K.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"

Form of use

24. The Opponent's evidence includes internet extracts of where the earlier mark has been used on skin care products (MG2). Whenever the word MooGoo appears on a product, it has been superimposed onto a coloured background, with the colour of the background changing between blue, grey, yellow, orange and green. 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 (CJEU) found that:

“32. ... 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.

...

35. Nevertheless, ... 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)”.

25. It is clear from *Colloseum* that ‘use’ of a trade mark can be indicated if the sign has been used either independently or in conjunction with another trade mark. It is certainly apparent that the term MooGoo is being used in conjunction with an additional colour element, however, it is not necessarily the case that the use of a coloured background would constitute another trade mark. Even if the use of colour were to be viewed as an additional trade mark, I nevertheless do not consider it deniable that the earlier mark MooGoo itself clearly appears in “conjunction” with it, and is therefore an acceptable demonstration of use.

26. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold K.C. (as he then was) as the Appointed Person summarised the test of use in a differing form from the trade mark as registered:

"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 sub-questions, (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."

27. The different colours that appear on the products act as a background upon which the words appear. The colours do not, in my opinion, constitute additional elements which are distinctive in their own right. It is arguable that they in fact are merely decorative additions. In any case, I do not consider the use of a coloured background to alter the distinctive character of the earlier mark MooGoo. The term MooGoo itself has not been altered, affected, manipulated, or interfered with by the presence of the additional colour element. In addition, the term MooGoo appears without a coloured background in the articles (MG1), which therefore constitutes at least one example of evidence of use of the mark as registered. I therefore find the evidence to include examples which can be considered for assessing whether genuine use has been proven.

Genuine use

28. The assessment of genuine use is multifactorial. In the first instance, the earlier mark must be shown to have been used by either the proprietor or an authorised third party. The evidence submitted by the Opponent includes exhibit MG2, which it claims demonstrates that its MooGoo products are available to purchase on the websites hollandandbarrett.com and moogooskin.com. The products are indicated as being available to buy in the UK by their price being displayed in pounds sterling, and in the case of the moogooskin website, the presence of the UK element in the domain of its URL. I consider such evidence to reflect use by both the Opponent and the third party selling the products (Holland & Barrett).¹

29. The relevant statutory provision Section 6A, 1A identifies that the relevant period for proving genuine use is the period of 5 years ending with the date of the contested application for registration, or the date of the priority claimed for that application. The relevant period for the earlier mark UKTM No. 911714912 has been established as being 12 August 2016 - 11 August 2021. It is noted that neither the exhibit MG2 nor

¹ I note the Applicant's comments regarding the ownership of moogooskin.co.uk. I shall assume MooGoo EU Limited to be an authorised third party.

its accompanying witness statement contain reference to a date when the website extracts were taken. However, it is also noted that the press articles in MG1 identified dates when the products (presumably the type of which were identified in MG2) would be available to purchase in stores, with them being made available in Lloyds Pharmacy in 2019 and Holland & Barrett in 2020. Whilst no evidence has been provided to show that products were available to buy in Lloyds Pharmacy stores, exhibit MG2 did indicate product availability in Holland & Barrett which, although undated, will subsequently be assumed to have been taken some time in 2020.

30. Although the dates of use are assumed rather than expressly indicated, I nevertheless consider the instances of use to be ‘actual use’² that is ‘consistent with the essential function of a trade mark’,³ i.e., use has the intent to identify the origin of the goods. Despite the limited amount of evidence before me, I do not find any cause to doubt that the instances where MooGoo appears on products or in articles are examples of the earlier mark functioning as an indicator of trade origin.

31. The fact that the evidence is extremely limited is an issue that must be mentioned. The evidence consists of a total of 10 pages of information, which has been collated from a mere four sources (Cosmetic Business; Retail & Leisure International; moogooskincare.co.uk; hollandandbarrett.com). It is incumbent on the Opponent’s evidence to show use of the earlier mark that is more than merely token⁴, i.e., more than serving solely to preserve rights. It is also incumbent on the evidence to show that the use has been 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.⁵ In my opinion, the small amount of evidence provided should not be classified as merely token or preservative use, as I do not believe it represents sporadic or tokenistic use with the aim of merely maintaining a (false) position in the market. Instead, it is my opinion that the small amount of evidence should be recognised for what it is – the apparent extent of use of the earlier mark. Based on the information before me, which is all that I can take into consideration, it seems to me that the reason

² *Ansul* paragraph 35.

³ *Ibid* paragraph 36.

⁴ *Ibid* paragraph 36.

⁵ *Reber* paragraph 29.

the evidence is so limited is because it is a true reflection of all that was available to the Opponent.

32. I am aware that use need not always be quantitatively significant for it to be deemed genuine, and that even minimal use of a mark may qualify as genuine use if it is deemed justified in the economic sector of the relevant goods.⁶ That having been said, I find it impossible to accept that the use of the earlier mark can be considered genuine use when no information has been provided that pertains to certain essential criteria, such as marketing/advertising expenditure, market share, intensity or geographical extent of use. Perhaps most importantly of all, no information has been provided in relation to sales. I acknowledge that the Opponent has included turnover figures, which do not appear an insubstantial amount of money. However, this information has not been supported by a single sales invoice. Other than merely making the statement of turnover no information has been provided pertaining to a single order, any proof of sale, or any evidence of custom. It cannot be assumed, therefore, that any sales have actually occurred. In addition, the turnover referred to has not been specifically attributed to the earlier mark, and it could instead relate to the entire operation of MooGoo Hong Kong Limited. Further, without information relating to the market share, it is not possible to decide how significant the turnover figures actually are.

33. Whilst it is clear that there is no *de minimis* rule on what is or is not considered quantifiable use,⁷ it is nevertheless still incumbent on the Opponent to provide some measure of use that is justifiable in the economic sector concerned. Considering the quite enormous size of the skin care sector in which the registered goods exist, I cannot conclude that the minimal and uncorrelated evidence before me constitutes genuine use.

34. As previously mentioned, I am restricted to assessing the case for genuine use by analysing the evidence presented before me. The burden of furnishing me with sufficient proof lies with the proprietor of the earlier mark (see *Plymouth* BL O/236/13). The comments of Mr Daniel Alexander QC, acting as the Appointed Person in BL O/424/14 *Guccio Gucci SPA v Gerry Weber International AG*, should also be noted:

⁶ *Ansul* paragraph 39.

⁷ *Leno Marken* paragraph 55; and *Ansul* paragraph 39

“The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round – or lose it”.”

35. Although the *Guccio* proceedings related to revocation proceedings, the principle is nevertheless the same for proof of use in opposition actions, whereby it is essentially incumbent on the Opponent to provide the Registrar with its best case at the earliest opportunity.

36. The evidence submitted has not satisfied me or proven to me that on the balance of probabilities the earlier mark has been put to genuine use. As identified in *CATWALK*, as well as Section 100 of the Trade Marks Act 1994, I must evaluate the evidence to identify what it does and also what it does not show. It does show that the mark has been used on certain skin care products (but certainly not the entire specification for which the earlier mark is registered, in which case any argument in favour of genuine use is restricted to a limited number of skin care products), and that it is available to buy in the UK within the relevant 5-year period. The evidence does not show the market share, the marketing/advertising expenditure, the geographical scope, any trade recognition, or any proof of sales.

Conclusion

37. The Opponent has failed to establish genuine use of its earlier mark within the relevant period. The opposition falls at the first hurdle and is dismissed accordingly. Subject to appeal, the Application will proceed to registration

Costs

38. As the opposition has failed, the Applicant has been successful and is entitled to a contribution towards its costs. I bear in mind that the relevant scale is contained in

Tribunal Practice Notice 2/2016. In the circumstances I award the Applicant the sum of £750 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering a notice of opposition and

filing a counterstatement	£200
---------------------------	------

Preparing evidence	£550
--------------------	------

Total	£750
-------	------

39. I therefore order MooGoo Hong Kong Limited to pay Mooeys Franchise Ltd the sum of £750. 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 29th day of November 2022

Dafydd Collins

For the Registrar