

O/134/19

TRADE MARKS ACT 1994

APPLICATION NO 502058 BY SEBASTIAN MCDIARMID  
TO REVOKE TRADE MARK  
REGISTRATION NO 2643929

**ELYSIAN**

OWNED BY  
ELYSIAN LONDON LIMITED

## Backgrounds and Pleadings

1. ELYSIAN LONDON LIMITED (the Proprietor) is the registered proprietor of trade mark registration number UK 2643929 consisting of the word only trade mark ELYSIAN. The trade mark was filed on the 28 November 2012 and completed its registration on the 22 March 2013. It is registered in respect of the following goods in Class 25:

Class 25: Men's clothing, footwear and headgear.

2. SEBASTIAN MCDIARMID (the Applicant) seeks revocation of the trade mark registration in respect of all the Proprietor's goods in Class 25 on the grounds of non-use, based upon section 46(1)(a) and (b) of the Trade Marks Act 1994 ("the Act"). He submits in his application that:

*"Elysian London has not used their Elysian trademark on clothing, headgear or footwear"*

3. The Proprietor filed a counterstatement denying the claim. It opposes the application for revocation on the grounds that *"since becoming the owner of the trademark I have been using the trademark and intend to use it in the future" [sic]*

4. Revocation is sought under Section 46(1)(a) that there was no genuine use of the mark in the first five years following the date of completion of the registration period, namely from 23 March 2013 to 22 March 2018. Revocation is therefore sought from 23 March 2018. Revocation is also sought under section 46(1)(b) that there was no genuine use made of the mark between 4 April 2013 and 3 April 2018 or 13 April 2013 and 12 April 2018 and that revocation is sought from 4 April 2018 and 13 April 2018.

5. Neither party is represented. Only the Proprietor filed evidence in these proceedings by way of witness statements and exhibits, which I have summarised below to the extent that they are considered relevant. Neither party requested a

hearing although both filed written submissions in lieu of a hearing. The decision is taken therefore following a careful perusal of the papers.

### **Preliminary issues**

6. Mr Pociecha, who is the Proprietor's controlling mind, filed the counterstatement in which he outlines various matters which he wishes the registrar to take as evidence to establish use after he/the Proprietor became the owner of the trade mark registration. Rule 64(1) of the Trade Marks Rules 2008 sets out the provisions as to what constitutes evidence in proceedings and the form they must take which would normally be by way of a witness statement, affidavit or statutory declaration. If filing a witness statement this must include a statement of truth and be signed and dated by the maker of that statement.

7. Although Rule 64 sets out the format which the evidence should take, in the case of *Soundunit Limited v Korval Inc.*, BL/0468/12, Mr Daniel Alexander Q.C., sitting as the Appointed Person, acknowledged that "before the High Court a pleading verified by a statement of truth may be admitted as evidence (see CPR Rule 32)."

8. On this basis, whilst Mr Pociecha has not formally filed a witness statement in the correct format, I am able to consider the contents of his counterstatement as evidence as it has been signed by him personally and the attestation box includes a declaration of truth.

9. The parties were advised on the 5<sup>th</sup> October 2018 that the evidence stage of the proceedings was closed, no evidence having been filed by the Applicant. In the same letter they were asked whether they wished to be heard or to file written submissions in lieu of a hearing. Written submissions had to be filed by the 19<sup>th</sup> October 2018.

10. Neither party asked to be heard. Both parties filed written submissions in lieu of a hearing.

11. On the 4th December 2018 Mr Pociеча acting on behalf of the Proprietor emailed the Registry submitting further material. There was no formal application filed nor was the material in the correct evidential format. There followed a succession of emails between Mr Pociеча and the Registry which did not take the matter further. The Registrar appointed a case management conference(CMC) to resolve matters. That CMC was held on the 11<sup>th</sup> February 2019 by way of telephone conference with the parties.

12. At the CMC, Mr Pociеча confirmed he no longer pursued a request to file further evidence, he had only purported to do so as “the case had been going on for a while and he was worried he was going to lose it”. The hearing officer acknowledged Mr Pociеча’s decision in writing by way of letter dated 11<sup>th</sup> February 2019, also confirming that had he pursued his application, the reasons given for wishing to file evidence out of time were insufficient for the Registrar to exercise its discretion under Rule 38(8) of the Trade Mark Rules 2008 as amended.

13. As the evidence rounds are now closed the matter can proceed on the basis of the papers submitted up to and including the 19<sup>th</sup> October 2018. Any material filed after this date has been disregarded for the purposes of this decision.

### **The Proprietor’s evidence**

14. The Proprietor’s evidence consists of a number of formal witness statements to include the counterstatement submitted by Mr Pociеча which I have already determined I can accept as evidence. These are summarised as follows:

## Charlie Pociecha's Evidence

15. Mr Pociecha's evidence is included in the TM8N and counterstatement filed on 2 May 2018. He does not set out his relationship with the company (the Proprietor) nor in what capacity he acts on their behalf. Throughout, he refers to himself as the owner of the mark, but this is not supported by the details entered on the register.

16. In summary he states that he became owner of the mark from the 27 March 2018 and was not responsible for use of the mark prior to this date as it "was nothing to do with him or his company". He continues that as he "never registered the trademark" he could not be accountable for the "uninterrupted use" due to "the period of negotiation and ownership change". He explains that his non-use of the mark was as a result of someone else (Hawthorn International Ltd) owning it and he was unable to use it on clothing. He refers to a sales invoice for the purchase of the trademark but it is not produced within the paperwork I have seen, although a copy of the assignment details as recorded on the Trade Mark Registry is shown.

17. Mr Pociecha continues that his use can be evidenced by the fact he has "built a website, started social media accounts and created the company on Companies House." He does not produce any supporting documentation to corroborate this however. He refers to obtaining quotes and sample products, but again, no copies are produced. Mr Pociecha includes two undated "photo examples" of the samples obtained with the trademark used on it. The photographs however are of such poor quality that I am unable to clearly see what the photographs depict and neither show the ELYSIAN mark.

18. Mr Pociecha states that he has "given clothing items with the trademark to friends and family to promote the brand" and that they have been "spreading the social links and through word of mouth" but gives no further explanation as to how this has been achieved. He explains that the reason that no products were offered for sale on the "elysianlondon.co.uk website" was because he was "perfecting the samples, products,

systems and returns processes etc as it could not sell and products until the buying process and everything else is 100% accurate, safe and reliable [sic].” He states that he had only purchased the mark for a month and was unable to “start a full stock update” but he envisaged he would be able to do so in June or July. Any delay and “the longer coming soon period” was caused by the ongoing negotiations between himself and the previous owner of the mark. He further states that a “huge interest” has been generated by “all the social media accounts”, however nothing has been filed to demonstrate this.

19. He states that his “Instagram use is the most active” but does not produce any evidence in support. This statement is contradicted later, where he submits that “the social media page has not even been live for a year.” He submits that he has “all emails and documents saved including the application form and invoice for the trademark” and “emails receipts images evidence which can be provided” and that he can prove use by “profile promotions/paid ads, so strategies and shout outs.” He states that he has provided “evidence of trademark use which I did and I can again” but again I have seen nothing within the papers to support this.

20. He concludes that ELYSIAN is being used in the community and will continue to do so in the future and that these proceedings are now “holding up my product orders with my manufacture and this is also causing me great inconvenience to my daily life.”

21. The remainder of his counterstatement is mainly critical of the Applicant and what he perceives as the alleged illegal conduct regarding the contested mark. Even if alleged misconduct had been pleaded, this would be irrelevant in relation to whether the Proprietor has used its mark during the relevant periods. The Applicant’s alleged conduct will therefore play no part in my decision in relation to whether the Proprietor has established genuine use of the mark.

Witness statement of Robert Williams dated 28 June 2018

22. Mr Williams states that he is the Director of Hawthorn International Limited a position he has held since March 2014. He states that the mark ELYSIAN was first used in the United Kingdom in 2013 by ELYSIAN LONDON LTD, but gives no further explanation or produces any documents to support this statement.

23. He continues that the mark was first used for men's clothing, footwear and headgear in March 2013 and was last used in May 2014. Again, no further supporting evidence or examples are provided as to how the mark was used during this period.

24. At paragraph 5 and paragraph 6 of his statement he has entered N/A for annual sales figures for the goods and amounts spent on promoting the goods. He provides no details as to the extent of the geographical use of the mark within the UK and again has marked this section as N/A. He continues that Elysian London Ltd was a previous company of his and that the company used the trademark to protect its intellectual property whilst developing the clothing brand which was called "Elysian London". Again, he says he/they were building the Elysian brand from the date of registration (namely the 22 March 2013) until he/they started trading under the new company name on the 1<sup>st</sup> May 2014. No further evidence is produced in support of this statement.

25. He continues that Elysian London Ltd remained a separate company until its dissolution in August 2017 and that the trademark ELYSIAN was then transferred to Hawthorn International Ltd. Again, no further explanation is given how the mark was used during this time.

26. Mr Williams admits that Hawthorn International Ltd did not use the trademark ELYSIAN after 1<sup>st</sup> May 2014 when he/they stopped developing the brand. He states that the trademark was offered for sale to Mr Charlie Pocięcha who was "in the process of establishing Elysian London as a clothing brand himself." Exhibit "Elysian TM1"

produces an email dated 8<sup>th</sup> February 2018 between Mr Williams and Charlie Pociеча. Mr Williams describes this email as giving authorisation to “Charlie” to use the trademark whilst the transfer documentation was being processed. The email makes reference to buying a trademark and the process taking “a couple of weeks” but provides no details as to the price, terms of use or whether it is to be used under a licence agreement. Specifically, there is no reference to “Elysian” or “Elysian London Limited” within this email.

27. Mr Williams concludes that he is aware that “Charlie” has continued to build “his brand using the ELYSIAN trademark” but gives no further clarification.

#### Harry Pociеча’s statement dated 1 July 2018

28. Mr Harry Pociеча refers to himself as a student and a customer of “Elysian London” since 22 February 2018. He submits that the mark Elysian was first used in 2013 by Hawthorn International Ltd and that it has been used in West Yorkshire. He states his brother gave him a sample to wear and promote. He has entered N/A for details regarding annual sales and amounts spent on promoting the goods.

29. Exhibit EL2 is described as a white Elysian T-shirt. The photograph produced shows an individual wearing a t-shirt with the word ELYSIAN printed on the front together with an image of a feather.

#### Isabel Beaumont’s statement dated 20 June 2018

30. Ms Beaumont describes herself as a student and has been a customer of Elysian London since 27<sup>th</sup> January 2018. She states the mark ELYSIAN was first used in 2012 by HAWTHORN INTERNATIONAL LTD. She states that Rob Williams (being the founder of Hawthorn International) authorised use of the mark from the 27<sup>th</sup> January 2018 following “agreed payment and transfer of trademark” but gives no further explanation. Again, her statement is silent regarding sales figures or amounts spent on promotion giving the explanation that this is because the business has only recently



been established. She states that the mark has been used in Yorkshire but does not elaborate any further. She exhibits at EL1 a picture described as an “Elysian t-shirt in grey”. This photograph produced is undated and shows a t-shirt on a hanger with the mark ELYSIAN together with an image of a feather. I am unable to clearly identify the colour of the t-shirt other than it is pale in colour. She concludes “Sebastian McDiarmid has used this trademark illegally without permission from the trademark owner.”

#### Luke Dyson’s undated statement

31. Mr Dyson describes himself as a student and states that he has been a customer of Elysian London since 6 March 2018. He states that the mark was first used by Rob Williams (Hawthorne International Ltd) in 2013 but gives no further explanation. At paragraph 3 he states that the marks have been used on “clothing, t-shirts, jumpers, hoodies, with plans for more” but gives no examples or further details. He continues that the mark is used in Yorkshire, UK. He concludes by explaining that the Elysian mark was purchased by Charlie Pociecha and that Elysian Clothing has illegally used the mark without permission. He exhibits at EL3 a copy of a photograph described as a “white Elysian logo t-shirt purchased and worn by myself to promote and show off.” The photograph is undated and shows a t-shirt with the ELYSIAN mark presented on the front together with a feather device. There are however no details regarding the price paid for the t-shirt or where it was purchased from.

#### **Decision**

32. Section 46(1) of the Act states that:

“The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the

goods or services for which it is registered, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) that, in consequence of acts or inactivity of the proprietor, it has become the common name in the trade for a product or service for which it is registered;

(d) that in consequence of the use made of it by the proprietor or with his consent in relation to the goods or services for which it is registered, it is liable to mislead the public, particularly as to the nature, quality or geographical origin of those goods or services.

(2) For the purpose of subsection (1) use of a trade mark includes 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 use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made: Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be

disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) An application for revocation may be made by any person, and may be made to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

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

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

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

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

33. 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.”

34. Given the proviso to section 46(3) of the Act, if the Proprietor can establish genuine use in the most recent period ie between 13 April 2013 and 12 April 2018 the registrations will not be revoked. I will consider all the periods within my deliberations and not just the first five years from the date of registration, as the current Proprietor argues that any period prior to the transfer of ownership to him should not be taken into account.

35. What constitutes genuine use has been subject to a number of judgments. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He said:

“217. *The law with respect to genuine use.* In *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch), [2013] FSR 35 I set out at [51] a helpful summary by Anna Carboni sitting as the Appointed Person in *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] of the jurisprudence of the CJEU in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439 , Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I added references to Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237). I also referred at [52] to the judgment of the CJEU in Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16 on the question of the territorial extent of the use. Since then the CJEU has issued a reasoned Order in 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 that Order has been persuasively analysed by Professor Ruth Annand sitting as the Appointed Person in *SdS InvestCorp AG v Memory Opticians Ltd* (O/528/15).

218. An important preliminary point to which Prof Annand draws attention in her decision is that, whereas the English versions of Articles 10(1) and 12(1) of the Directive and Articles 15(1) and 51(1)(a) of the Regulation use the word “genuine”, other language versions use words which convey a somewhat different connotation: for example, “ernsthaft” (German), “efectivo” (Spanish), “sérieux” (French), “effettivo” (Italian), “normaal” (Dutch) and “sério/séria” (Portuguese). As the Court of Justice noted in *Ansul* at [35], there is a similar difference in language in what is now recital (9) of the Directive.

219. I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetzky-Orden v Bundesvereinigung Kameradschaft 'Feldmarschall Radetzky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, 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]; *Centrotherm* at [71]; *Leno* 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]; *Centrotherm* at [71]; *Leno* at [29].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56].

(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]; *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].”

36. 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.”

37. I also note Mr Alexander’s comments in *Guccio Gucci SpA v Gerry Weber International AG* (O/424/14). He stated:

“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”” [original emphasis].

38. If any question arises in UK proceedings as to the use to which a UK registered trade mark has been put, it is for the Proprietor to show what use has been made of the mark. Therefore, an application to revoke for non-use places the burden of proof on the Proprietor to prove the use which has been made of the mark. Equally, if the Proprietor is not able to show genuine use, the responsibility rests on him to show that there were proper reasons for the non-use.

39. It is clear from the guidance that a number of factors must be considered when assessing whether genuine use of the mark has been demonstrated by the evidence



filed. The responsibility is on the Proprietor to provide sufficiently solid evidence to counter the application, a task which should be relatively easy to attain.<sup>1</sup> In this case there are a number of deficiencies in the evidence provided. Neither Mr Pociecha nor Mr Williams has filed evidence of any sales figures or invoices during the five years following the date of registration or thereafter. In fact, Mr Williams accepts that no use of the mark was made by him or his company after 1<sup>st</sup> May 2014 and Mr Pociecha concedes that the mark was “nothing to do with him or his company” prior to its purchase on the 27 March 2018.

40. I must therefore assess the evidence that has been filed and determine whether it is sufficient to establish use of the mark. I accept that according to the caselaw there is no quantitative threshold in this assessment and that sometimes even minimal use is sufficient in order for it to be deemed genuine.<sup>2</sup> However, in *Memory Opticians Ltd's Application*, BL O/528/15, Professor Ruth Annand, as the Appointed Person, upheld the Hearing Officer's decision to revoke the protection of the mark STRADA on the grounds that it had not been put to genuine use within the requisite 5-year period. In this case there had in fact been sales of goods bearing the mark, but these were very low in volume (circa 40 pairs of spectacles per year) and were localised to 3 branches. This level of use was held to be insufficient to create or maintain a market under the mark. Consequently, it was not genuine use. In the case before me, the Proprietor has not demonstrated any sales of clothing throughout the relevant period. None of the witness statements have produced any sales figures, invoices or receipts.

41. Within the evidence there is only one reference to the “purchase” of a t-shirt which was referred to by Mr Dyson, however he did not provide any information as to the date of purchase or whether it was within the relevant periods. There is no copy of the invoice, details as to the price paid or payment transaction details. More telling is that Mr Pociecha makes no reference to the sale of any items of clothing in his counterstatement; he states that he gave t-shirts to family and friends. Even if I accept

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<sup>1</sup> *Awareness Limited v Plymouth City Council*, Case BL O/236/13

<sup>2</sup> *Naazneen Investments Ltd v OHIM*, Case T-250/13

that this transaction was within the relevant period and the t-shirt referred to was in fact purchased by Mr Dyson, this alone is insufficient to persuade me that there has been sufficient use made of the mark to create or preserve a market share in those goods, especially when considering the nature of the goods and the particular market namely the clothing industry. I would anticipate that the scale and frequency of use of the mark for clothing to be higher. I also note that the Proprietor's witnesses make no reference to head gear or footwear, limiting their evidence to clothing, in particular t-shirts.

42. The main thrust of Mr Pociеча's evidence is that he was only able to demonstrate use of the mark from the date he/his company purchased it namely March 2018. From this date he was creating a market for the goods, through social media and ensuring that the buying and selling processes were "100% accurate, safe and reliable" before launching the product. According to the caselaw it is not necessarily the case that goods that don't exist yet are unable to qualify for genuine use, but this is dependent on the nature of the goods and products in question. Preparations for use can in certain circumstances be sufficient to establish genuine use.

43. In *Healey Sports Cars Switzerland Limited v Jensen Cars Limited*, [2014] EWHC 24 (Pat) Mr Henry Carr Q.C. sitting as a Deputy Judge of the High Court stated that:

"26. I agree with the Hearing Officer that the question of whether goods are "about to be marketed" is to be decided in the context of the economic sector concerned, and that some goods will take longer to develop than others. I also agree that the press release and website, which were published a few days before expiry of the five year period and enabled no more than initial interest in a future development to be registered, did not show that the goods were about to be marketed."

44. In the case before me the Proprietor has not filed sufficient evidence that supports the view that the products were about to be marketed or that it was making preparations for use. I see nothing about the nature of t-shirts or clothing products that would require an unusually long lead time between marketing and availability for sale of such products. I cannot see any evidence that the Proprietor was genuinely marketing the products with a view to taking firm orders for them. The Proprietor's preparations to use the mark, as outlined by Mr Pociеча, were "profile promotions, paid ads, so strategies and shout outs" and spreading the word via family and friends, however there is no tangible evidence before me which would amount to preparatory use. No evidence has been filed of a marketing campaign or planned launch, nor any evidence of the results of website searches undertaken by potential customers, social media screen shots or details of the number of followers attained. There is no specificity to the Proprietor's evidence at all. Saying you have evidence is not the same as producing it. Whilst I do not disbelieve what the Proprietor says I can only assess the matter on what the evidence shows and what has been presented to me.

45. It is therefore difficult to evaluate the significance of what has been produced and assess whether it shows that the Proprietor has actually commercially exploited the Elysian mark during the relevant periods or at all. The vagueness of the witnesses' statements might have been compensated for by the production of documents for example invoices, orders, accounts, turnover figures, advertising expenditure figures, social media campaigns but none were presented by any of the witnesses. It is clear that where goods take a considerable time to develop and are bespoke goods which are created once a contract or purchase has been made then a broader interpretation of "about to be marketed" can be taken. Here, however, the products are not of a nature that would require a considerable lead time in their development stage and there is no evidence produced of the design and development of the brand. The deficiencies in the Proprietors' evidence are such that they fail to persuade me that the Proprietor has made preparations for use of its mark.

46. Other than the comments made by Mr Pociеча that he was waiting until everything was 100% accurate, little evidence has been produced as to any reasons

for non-use, setting out why the product has not been presented to market for example because they are not quite ready or are in the development stage. The nature of the products before me are straightforward items of clothing. Nothing has been produced to demonstrate that the launch of the products was imminent. There is no evidence submitted of preparations for use that one would expect, namely promotional marketing material, product designs, brand research, media coverage or development of the brand image.

47. In his submissions the Applicant has criticised the Proprietor's witnesses. He questions their independence and whether they are genuine customers. He infers that the witnesses are Mr Pociecha's friends and family and therefore little weight should be attached to their evidence. It is clear to me that Mr Harri Pociecha, Ms Beaumont and Mr Dyson would not have been privy to certain information included in their statements in their capacity as independent customers. Mr Harri Pociecha makes reference to his "brother" giving him a sample t-shirt to wear and promote. On this basis, I accept the submissions and attach little weight to the contents of these statements specifically due to the lack of detail and the lack of supporting documentation. The Proprietor has not in my view identified any independent customers or potential customers who have been shown the ELYSIAN mark. Use by family and friends is not sufficient to be considered as genuine use without other corroborating, independent use.

48. Mr Williams' statement is of no probative value in order to establish use of the mark between the 23 March 2013 and 22 March 2018. In fact, Mr Williams accepts that no use was made of the mark by him in either his capacity as owner/director of Elysian London Ltd or Hawthorn International Ltd after 1<sup>st</sup> May 2014. No evidence has been provided either by him of use prior to May 2014 other than stating he was "building the Elysian brand". No explanation has been given or any evidence has been provided to establish what he did to build the brand or genuine reasons for being unable to do so. No accounts, sales figures, orders, invoices have been provided during this time.

49. According to Mr Pociecha the application is an attempt to frustrate and disrupt the Proprietor's business and put it to cost so that its entitlement can be revoked with the sole purpose of stealing the mark. The Proprietor has not appreciated that it is its responsibility to prove genuine use, instead the focus seems to be towards the Applicant's perceived illegal use of the mark. Under section 46(1) anyone can make an application for revocation and not necessarily an individual with a vested interest. The Applicant is as entitled as anyone to make the application and by adopting the course that it has the Proprietor has run the risk that the tribunal would reject its evidence as insufficiently solid. I find that very little has been filed to establish any genuine use of the mark whether in preparation or at all. What has been filed is so minimal that it is wholly insufficient to overcome the burden of establishing genuine use.

50. The main function of a trade mark is that it enables consumers to distinguish the goods and services of one undertaking from another. If a mark is not being used its function is redundant. It also prevents other traders, who are in a position to commercialise goods and services, using the same or similar marks thereby harming commerce and innovation. This public interest point was explained by Justice Jacob (as he then was) in *La Mer* [2002] E.T.M.R. 34 (paragraph 19):

“There is an obvious strong public interest in unused trade marks not being retained on the registers of national trade mark offices. They simply clog up the register and constitute a pointless hazard or obstacle for later traders who are trying actually to trade with the same or similar marks. They are abandoned vessels in the shipping lanes of trade.”

51. I find the Proprietor's evidence and submissions confusing and contradictory throughout. I must determine the case on what is before me. There is a distinct lack of evidence that I am able to categorically refer to that persuades me that the mark has been used during the relevant periods namely between 23 March 2013 and 22 March 2018; 4 April 2013 and 3 April 2018; 12 April 2013 and 13 April 2018. Even if I conclude that some use of the mark has been demonstrated from 27<sup>th</sup> March 2018 (the date Mr Pociecha states he/his company bought the mark) it is of such a minimal

amount for the nature of the goods in question that I am unable to find in the Proprietor's favour. In my view the Proprietor has failed to discharge the burden placed on it to provide evidence of genuine use in respect of any of the goods in class 25 for which the trade mark is registered or satisfied me regarding genuine reasons for its non-use.

52. This view would not have differed even if I had taken into account the additional material filed by Mr Pociecha on the 4<sup>th</sup> December 2018. This material consisted of emails between Mr Pociecha and Rob Williams dated the 2<sup>nd</sup> February 2018 and an email and response to Firelabel dated the 1<sup>st</sup> May 2018. These emails demonstrate nothing more than an initial enquiry regarding the supply, cost, quality and minimum order requirement for samples. They are not by themselves sufficient to establish genuine use or even preparations for use, being dated so close to the end of the relevant period with no further indication that the goods were about to be placed on the market.

### **Outcome**

53. The application for revocation on the grounds of non-use therefore succeeds under section 46(1)(a) and (b). Consequently, the trade mark is revoked for all the goods in class 25 with effect from 23 March 2013.

### **Costs**

54. The Applicant being successful is entitled to a contribution towards his costs. Mr McDiarmid was invited to complete a pro forma regarding the hours spent on a range of given activities and the costs incurred during these proceedings. I take note of the completed form and disallow the time claimed for filing a Notice of Opposition and Notice of Defence as none were filed by the Applicant. I also take note that the Proprietor filed a TM8(N) form of some 8 pages in length and grant 2 hours consideration time for this. The remaining time is granted in full. I therefore find that the Applicant is entitled to the following costs at the rate of £19 per hour:

Preparing a Notice of Cancellation	£19
Considering TM8 form filed by Proprietor	£38
Considering and commenting on Proprietor's evidence and submissions	£114
Official fee	£200
<b>Total</b>	<b>£371</b>

55. I order ELYSIAN LONDON LIMITED to pay the sum of £371 to SEBASTIAN MCDIARMID. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated 11 March 2019

Leisa Davies

For the Registrar