

O/889/22

TRADE MARKS ACT 1994

**CONSOLIDATED PROCEEDINGS**

IN THE MATTER OF REGISTRATION NOS. 723438 & 225552  
IN THE NAME OF AIKON INTERNATIONAL LIMITED  
IN CLASS 25

AND APPLICATIONS FOR REVOCATION  
UNDER NOS. 503936 & 503937  
BY BEN ARNOLD

AND

IN THE MATTER OF REGISTRATION NO. 3423849  
IN THE NAME OF BEN ARNOLD  
IN CLASSES 25 & 26

AND AN APPLICATION FOR A DECLARATION OF INVALIDITY THERETO  
UNDER NO. 504369  
BY AIKON INTERNATIONAL LIMITED

## **Background and pleadings**

1. The following trade marks stand registered in the name of Aikon International Limited (“Aikon”):

UK registration no. 723438

**PALM**

Filing date: 4 November 1953

Publication date: 10 February 1954

Registration date: 4 November 1953

(“the 438 mark”)

UK registration no. 225552

**PALM**

Filing date: 31 August 1899

Publication date: 28 August 1901

Registration date: 31 August 1899

(“the 552 mark”)

2. Both marks are registered in respect of goods in class 25; the 438 mark for ‘*articles of knitted clothing and articles of clothing made from knitted piece goods, but not including bootees or slippers*’ and the 552 mark for ‘*stockings and socks*’.

3. On 17 June 2021, Ben Arnold (“BA”) sought total revocation of both registrations on the grounds of non-use under sections 46(1)(a) and 46(1)(b) of the Trade Marks Act 1994 (“the Act”).

4. Under section 46(1)(a), BA alleges non-use of the registrations in the five-year periods immediately following the dates on which the marks were registered, those being 4 November 1953 to 3 November 1958 for the 438 mark and 31 August 1899 to 30 August 1904 for the 552 mark. BA requests effective dates of revocation of 29 April 1959 and 1 September 1904, respectively.

5. Furthermore, revocation is sought under section 46(1)(b) as a result of alleged non-use of the registrations during the following five-year periods:

- 25 February 2006 to 24 February 2011, seeking an effective revocation date of 25 February 2011;
- 25 February 2011 to 24 February 2016, seeking an effective revocation date of 25 February 2016;
- 25 February 2016 to 24 February 2021, seeking an effective revocation date of 25 February 2021.

6. Aikon filed counterstatements defending its registered marks for all the goods for which they are registered. No claims are made to there being any proper reasons for non-use.

7. On 23 September 2021, the proceedings were consolidated pursuant to rule 62(1)(g) of the Trade Marks Rules 2008 (“the Rules”).

8. The following trade mark stands registered in the name of BA:

UK registration no. 3423849

**P A L M**

Filing date: 26 August 2019

Publication date: 20 September 2019

Registration date: 19 February 2021

(“the 849 mark”)

9. The 849 mark is registered for the following goods:

Class 25: Bathing caps; bathing costumes; bathing costumes for women; bathing drawers; bathing suit cover-ups; bathing suits; bathing suits for men;

bathing trunks; beach clothes; beach clothing; beach cover-ups; beach footwear; beach hats; beach robes; beach shoes; beach wraps; beachwear; bikinis; caftans; coverups; cover-ups; fitted swimming costumes with bra cups; sarongs; sun hats; surf wear; surfwear; swim briefs; swim caps; swim shorts; swim suits; swim trunks; swim wear for children; swim wear for gentlemen and ladies; swimming caps; swimming costumes; swimming suits; swimming trunks.

Class 26: Bags [zip fasteners for -]; belt buckles for clothing; belt clasp; blouse fasteners; buckles for clothing [clothing buckles]; button badges; buttons; fasteners (slide -) [zippers]; zip fasteners; zip fasteners for bags; zipper fasteners; zipper pulls; zippers; zippers for bags; zips.

10. On 23 November 2021, Aikon made an application to invalidate the 849 mark pursuant to section 47(2) of the Act. The application is based upon sections 5(2)(b) and 5(4)(a) of the Act and is directed against all the goods of the registration.

11. For the purposes of its claim under section 5(2)(b), Aikon relies upon its marks listed at paragraph 1 and all the goods for which they are registered. Aikon essentially contends that the competing trade marks are similar and that the parties' goods are identical or similar, giving rise to a likelihood of confusion. In its application for invalidation, Aikon made statements of use in relation to all the goods relied upon.

12. Under section 5(4)(a), Aikon claims that it has a protectable goodwill in relation to which it has used the sign **PALM** ("the word sign") throughout the UK since 2012 and the following figurative sign throughout the UK since 2016:



("the figurative sign")

13. Both signs are said to have been used in relation to *‘clothing, tights, underwear, vests, long sleeved tops, camisoles, knitted clothing, thermal clothing, knitted underwear, thermal underwear, socks’*. Aikon argues that the similarity between the signs and the 849 mark would give rise to misrepresentation and damage.

14. BA filed a counterstatement to the following effect:

“It is denied that [Aikon] has been trading in the United Kingdom since 2012 and that [Aikon] has goodwill as a result of the trading activity. [Aikon] is put to strict proof of use in these proceedings in order to rely on passing off.”

15. BA also indicated that it would require Aikon to provide proof of use of its registrations.

16. On 29 March 2022, the application for invalidation was consolidated with the revocation actions pursuant to rule 62(1)(g) of the Rules.

17. Aikon is professionally represented by Wilson Gunn and BA by Dynham. Only Aikon filed evidence in these proceedings. Neither party requested a hearing. Neither party filed written submissions in lieu of a hearing, though Aikon filed written submissions during the evidence rounds. This decision is taken following a careful perusal of the papers before me, keeping all submissions in mind.

18. 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 and, therefore, this decision continues to refer to the trade mark case law of the EU courts.

### **Evidence and submissions**

19. Aikon’s evidence is given in the witness statement of Edrrish Adam Patel, dated 22 November 2021, and accompanying exhibits AP1 to AP7. Edrrish Adam Patel is the Director of Ozzicozi Limited (“Ozzicozi”); they give evidence as to the commercial

relationship between Aikon and Ozzicozi, as well as the background and use of Aikon's registrations.

20. As noted above, Aikon also filed written submissions during the evidence rounds.

21. I have read all of the evidence and submissions and will return to them to the extent I consider necessary in the course of this decision.

### **My approach**

22. In the event that BA's applications for revocation against Aikon's registrations are successful, Aikon's marks will be revoked with effective dates preceding the filing date of the 849 mark. In these circumstances, Aikon's marks will not have been valid registrations at the filing date of the 849 mark. As a result, Aikon's application for invalidation based upon section 5(2)(b) of the Act will inevitably fail. Therefore, it is convenient to first deal with BA's applications for revocation before considering Aikon's application for invalidation.

### **BA's applications for revocation**

#### **The law**

23. Section 46 of the Act states:

"46. - (1) The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not been put to genuine use in the United Kingdom, by the proprietor or with his consent, in relation to the goods or services for which it is registered, and there are no proper reasons for non-use;

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

(c) [...]

(d) [...]

(2) For the purpose of subsection (1) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

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

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

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

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

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

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

24. 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.”

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

“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].”

26. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services protected by the mark” is not, therefore, genuine use.<sup>1</sup>

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<sup>1</sup> *Intermar Simanto Nahmias v Nike Innovate C.V.*, Case BL O/222/16

27. I am also guided by *Awareness Limited v Plymouth City Council*, Case BL O/236/13, in which 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.”

[...]

“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.”

28. Furthermore, in *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case 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 the marks

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

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

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

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

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

through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

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

30. In *Lactalis McLelland Limited v Arla Foods AMBA*, Case BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under section 46(2). He said:

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

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

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

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

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

31. The words ‘PALM’ and ‘Palm’ are visible within invoices,<sup>2</sup> purchase orders,<sup>3</sup> product brochures,<sup>4</sup> a guide for the Intimate Apparel Show,<sup>5</sup> an advert for the Pure Origin Show<sup>6</sup> and printouts from the palmunderwear.co.uk website<sup>7</sup> in a normal font. As Aikon’s marks are registered in word-only format, they can be used in any standard typeface. Moreover, the registration of word-only marks provides protection for the words themselves, irrespective of whether they are presented in upper, lower or title case.<sup>8</sup> As such, this is clearly use of the 438 and 552 marks as registered.

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<sup>2</sup> Exhibit AP1

<sup>3</sup> Exhibit AP2

<sup>4</sup> Exhibit AP4

<sup>5</sup> Exhibit AP5

<sup>6</sup> Exhibit AP6

<sup>7</sup> Exhibit AP7

<sup>8</sup> *Migros-Genossenschafts-Bund v EUIPO*, Case T-189/16

32. Furthermore, the following figurative marks can be seen in photographs of packaged products<sup>9</sup> and product brochures:<sup>10</sup>



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<sup>9</sup> Exhibit AP3

<sup>10</sup> Exhibit AP4



33. As word-only registrations, the distinctive character of the 438 and 552 marks lies in the word 'PALM'. As can be seen, the evidenced mark at a) above differs from the marks as registered in that it is presented in lower case and a slightly stylised, coloured font. It is my view that the evidenced mark differs to the registered marks in elements which do not alter their distinctive character. As noted above, the registration of word-only marks provides protection for the words themselves, irrespective of letter case. In addition, to my mind the particular font and colour used constitutes an expression of the registered word-only marks in normal and fair use.<sup>11</sup> Accordingly, I consider the evidenced mark at a) to be acceptable variant use of the 438 and 552 marks.

34. The evidenced marks at b), c) and d) above differ from the marks as registered in the use of colour and the slight stylisation of the word 'PALM'. Further, the evidenced marks contain additional elements, namely, the palm tree device, the word 'LEGWEAR' and the words 'BY MANCHESTER HOSIERY'. In my view, the particular fonts and colours used constitute expressions of the registered word-only marks in normal and fair use. Moreover, the case law above confirms that use of a mark encompasses its use as part of another mark taken as a whole or in conjunction with that other mark. Although these evidenced marks all contain additional elements, it is my view that the word 'PALM' continues to indicate economic origin (albeit, in respect of the evidenced mark at point d), as a secondary trade mark). As such, I consider the evidenced marks at b), c) and d) to be acceptable variant use of the 438 and 552 marks.

35. I now turn to the evidenced marks at e), f) and g) above. The differences between these marks and the marks as registered are the use of colour and additional elements, namely, the stylised palm tree device and the word 'UNDERWEAR'. In my view, the use of colour would constitute an expression of the registered marks in normal and fair use. Furthermore, the additional elements in the evidenced marks do not alter the distinctive character of the registered marks, nor do they prevent the word 'PALM' from being the indicator of economic origin. I do not, therefore, consider that the evidenced marks are not use of the registered marks merely because of the colours used or because the word 'PALM' is used in conjunction with additional matter.

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<sup>11</sup> *Dreamersclub Ltd v KTS Group Ltd*, Case BL O/091/19

However, in the evidenced marks, the word 'PALM' itself is altered due to the fact that the letters 'P' and 'A' are incomplete. Whilst it may be identified by the average consumer as the word 'PALM', to do so it is necessary to add back in the missing parts of the letters. Therefore, this does not show use of the word 'PALM' as such. As a consequence, I must consider whether this is acceptable variant use of the mark under section 6A(4)(a) of the Act. As previously outlined, the distinctive character of the 438 and 552 marks lies in the word 'PALM'. Although I do not consider that the colours used or the additional matter alter the distinctive character of the marks as registered, the heavy stylisation – with the effect that the average consumer will be required to add the missing parts of the incomplete letters back in themselves in order to identify the word 'PALM' – does, in my view, alter the marks' distinctive character. In light of this, I do not consider the evidenced marks at e), f) and g) to be acceptable variant use of the 438 and 552 marks.

### **Sufficient use**

36. Edrrish Adam Patel explains that Ozzicozi is owned by Aikon; they say it is the company responsible for trading and distributing 'PALM' products in the UK.<sup>12</sup> According to Edrrish Adam Patel, Ozzicozi was incorporated on 12 July 2016 and has been trading in the UK since that date; prior to that, they say, 'PALM' products were available via Aikon Europe Limited.<sup>13</sup> They say that 'PALM' has been used continuously in the UK from as early as 2012 under the control of Aikon.<sup>14</sup>

37. Edrrish Adam Patel states that Aikon manufactures a range of underwear, tights, stockings, vests, camisoles, socks, clothing and knitted garments, which are all sold under the trade mark 'PALM'.<sup>15</sup> They give the following sales figures for 'PALM' branded products in the UK:<sup>16</sup>

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<sup>12</sup> Witness statement of Edrrish Adam Patel, §§1-2

<sup>13</sup> Patel, §3

<sup>14</sup> Patel, §5

<sup>15</sup> Patel, §4

<sup>16</sup> Patel, §8

<b>Year</b>	<b>Approximate Sales (£)</b>
2017	117,771
2018	94,358
2019	125,167
Total	337,296

38. A selection of invoices – dated 7 September 2016, 3 October 2016, 3 October 2017, 14 December 2018, 29 August 2019, 18 November 2019, 26 February 2020 and 29 January 2021 – has also been provided.<sup>17</sup> The invoices were sent from Ozzicozi to customers in Solihull, Chessington, Faversham, Leicestershire, Cumbria and Bedford. The invoices, together with the product codes given by Edrrish Adam Patel,<sup>18</sup> demonstrate the sale of ladies’ clothing under the ‘PALM’ mark. Specifically, they show the sale of 909 camisoles, 1,018 sleeveless tops, 1,445 long-sleeved tops, 795 leggings, 552 long-sleeved turtle necks, 375 bodysuits and 1,000 tights in this period. Further, a selection of order details and purchase orders from Ozzicozi’s customers is in evidence.<sup>19</sup> In addition to the orders corresponding to the invoices, I note that orders were made by customers in Barnstaple and Weston-Super-Mare on 28 September 2016, 11 February 2020 and 19 August 2019. This evidence shows the sale of a further 70 camisoles, 130 sleeveless tops and 68 long-sleeved tops.

39. Edrrish Adam Patel provides a number of photographs of packaged products adorned with ‘PALM’ branding.<sup>20</sup> A range of ‘PALM’ marks – including those shown at points b), c), d) and e) of paragraph 32 above – can be seen on the packaging of ladies’ vests, long-sleeved tops, tank tops, tights, briefs, camisoles and leggings. I note that the photographs are undated. Moreover, Edrrish Adam Patel gives no narrative as to when the various packaging designs were in use.

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<sup>17</sup> Exhibit AP1

<sup>18</sup> Patel, §9

<sup>19</sup> Exhibit AP2

<sup>20</sup> Exhibit AP3

40. Product brochures are also in evidence.<sup>21</sup> The first is undated, though Edrrish Adam Patel says that it was distributed between 2012 and 2016.<sup>22</sup> A range of ladies' undergarments can be seen in the same, as can a limited number of undergarments for children. The marks shown at points a) and b) of paragraph 32 above are visible in the brochure. The second is a brochure from 2016/2017. Ladies' undergarments, such as long-sleeved tops, short-sleeved tops, sleeveless tops, camisoles, leggings, long-sleeved turtle necks, briefs and bodysuits, as well as tights, are displayed in the brochure. Whilst the brochure is heavily branded with marks that I do not consider to be acceptable variant use of the 438 and 552 marks (such as those shown at points e), f) and g) of paragraph 32 above), the word 'Palm' is also used in the brochure in normal font. Edrrish Adam Patel says that hard copies of the brochure were distributed to customers.<sup>23</sup> An undated version of the brochure is also in evidence, which is said to have been distributed by email.<sup>24</sup>

41. Edrrish Adam Patel states that 'PALM' had a stand at the AIS Intimate Apparel show.<sup>25</sup> An invoice from AIS (Associated Independent Stores Limited, based in Solihull) to Ozzicozi has been provided,<sup>26</sup> detailing a request for payment of £891 for attendance at the show. I note from the invoice that the show was scheduled for 17 to 19 February 2019. Pages from the show's brand directory are also exhibited,<sup>27</sup> within which 'PALM' is listed. Photographs of the 'PALM' stand have been provided.<sup>28</sup> Ladies' undergarments and socks can be seen in the same. However, the only use of 'PALM' is in a form (shown at point e) of paragraph 32 above), which I do not consider to be acceptable variant use of the of the 438 and 552 marks. Edrrish Adam Patel continues to explain that 'PALM' exhibited at the Pure Origin show, London.<sup>29</sup> From the cover page of the show guide in evidence,<sup>30</sup> I note that it was due to be held from 10 to 12

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<sup>21</sup> Exhibit AP4

<sup>22</sup> Patel, §12

<sup>23</sup> Patel, §12

<sup>24</sup> Ibid.

<sup>25</sup> Patel, §13

<sup>26</sup> Exhibit AP5

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Patel, §14

<sup>30</sup> Exhibit AP6

February 2019. A 'PALM' advert, said to be for the show,<sup>31</sup> has also been provided.<sup>32</sup> It gives the location of the 'PALM' stand.

42. Printouts from the 'PALM' website at palmunderwear.co.uk, obtained using the Wayback Machine, have been provided.<sup>33</sup> The first is from Manchester Hosiery (described as a division of Aikon Europe Ltd). The word 'Palm' appears in normal font and in the form shown at point b) of paragraph 32 above. The website says that underwear is manufactured and distributed under the mark. No date is visible, though the copyright notice is given as 2004-2012. The remaining printouts are from 'Palm Underwear' and refer to them offering base-layer underwear. The word 'PALM' appears in normal font. Whilst the printouts are undated, there are news updates from April 2016. Moreover, the website addresses<sup>34</sup> appear to support Edrrish Adam Patel's narrative evidence that the Wayback Machine captures reflect the position from 2016 to 2019.<sup>35</sup>

43. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.<sup>36</sup>

44. No details have been provided by Aikon (or Edrrish Adam Patel) to indicate the size of the relevant markets, or its share of those markets. Neither is there any evidence before me to that effect. It is my impression that the clothing industry in the UK is remarkably large, numbering in the many millions, if not billions, of pounds per annum. In that context, the turnover, amounting to £337,296 between 2017 and 2019, is small. However, as indicated in the case law cited above, use does not need to be quantitatively significant to be genuine. Moreover, the genuine use provisions do not exist in order to assess economic success or large-scale commercial use.<sup>37</sup>

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<sup>31</sup> Patel, §14

<sup>32</sup> Exhibit AP6

<sup>33</sup> Exhibit AP7

<sup>34</sup> Specifically, the sections which are "web.archive.org/web/2016...", "web.archive.org/web/2017...", "web.archive.org/web/2018..." and "web.archive.org/web/2019..."

<sup>35</sup> Patel, §15

<sup>36</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, Case T-415/09

<sup>37</sup> *MFE Marienfelde GmbH v OHIM*, Case T-334/01

45. The unchallenged turnover figures are supported by corroborating sample invoices from between 7 September 2016 and 29 January 2021. Whilst the invoices suggest a small number of units sold during this period, I bear in mind that they are not exhaustive, i.e. they are a selection of invoices not intended to demonstrate all sales carried out under the mark. Further, the invoices show the sale of ladies' clothing products under the 'PALM' mark to customers across the UK. Order details and purchase orders are also in evidence which are indicative of sales to additional customers in other locations in the UK during this period.

46. 'PALM' branded clothing is also visible in brochures. Although one is undated, Edrrish Adam Patel has given unchallenged narrative evidence that it was distributed between 2012 and 2016. Another brochure is clearly labelled 2016/2017. It is Edrrish Adam Patel's unchallenged narrative evidence that both hard-copy and digital forms of the brochure were distributed to consumers in the UK. However, there is no detail as to the circulation of the brochures.

47. Evidence concerning promotional activities conducted in respect of goods bearing the 'PALM' mark is extremely limited. The evidence suggests that the 'PALM' brand was represented at two trade shows in 2019. In respect of at least one of the shows, Ozzicozi incurred a fee for attendance. The 'PALM' mark was also displayed on a UK-facing website, which I have accepted to have been the case from 2016 to 2019. The website refers to underwear being manufactured in connection with the mark.

48. Taking the evidential picture as a whole into account, I do not discount that there has been some use of Aikon's registrations. Given Edrrish Adam Patel's unchallenged narrative evidence that Ozzicozi is owned by Aikon and is responsible for trading and distributing Aikon's 'PALM' branded products in the UK, I have no doubt that use of the 'PALM' mark by Ozzicozi was with Aikon's consent. Nevertheless, I must assess whether that use has been genuine, in accordance with the case law above, in respect of the goods for which the 438 mark and the 552 mark are registered, that being *'articles of knitted clothing and articles of clothing made from knitted piece goods, but not including bootees or slippers'* and *'stockings and socks'*, respectively.

49. Edrrish Adam Patel states that knitted garments, manufactured by Aikon, are sold under the 'PALM' brand. However, the approximate sales figures have not been broken down by reference to particular goods. As such, I am unable to determine what proportion of the same (if any) could be attributed to articles of knitted clothing. In addition, there is no documentary evidence to support Edrrish Adam Patel's assertion. It is not clear from the invoices or product codes that that any of the products sold were articles of knitted clothing. There is no explanation from Edrrish Adam Patel as to what any of these goods are made of or whether they are, indeed, articles of knitted clothing. The photographs of packaged products appear to show products made from cotton and wool, though none would be considered by the average consumer to be articles of knitted clothing. In any event, the photographs are undated and, therefore, cannot be relied upon as showing the position during the relevant periods. As noted above, the product brochures show that various items of ladies' undergarments were available under the 438 mark. However, it is my view that none of these goods fall within the scope of Aikon's specification. Most are clearly not articles of knitted clothing and are made from materials such as polyester, viscose, acrylic, elastane and modal fabric. While others are referred to as "fancy knit" style, and some contain wool, I do not consider that the average consumer would consider these undergarments to fall within the category of *'articles of knitted clothing and articles of clothing made from knitted piece goods, but not including bootees or slippers'*, or fairly describe them as such. There is also no unambiguous evidence of sales relating to these goods during the relevant periods. Although ladies' undergarments and socks can be seen in photographs from the Intimate Apparel Show, none appear to be articles of knitted clothing. In any event, these goods are presented under a form of the 'PALM' mark which I do not consider to be acceptable variant use of the 438 mark. There is also no evidence that articles of knitted clothing were available to purchase through the palmunderwear.co.uk website. In light of all the above, I am not satisfied that Aikon has demonstrated genuine use of the 438 mark for the goods for which it is registered.

50. I now turn to the 552 mark. Again, although Edrrish Adam Patel says that stockings and socks are manufactured by Aikon and sold under the 'PALM' brand, the approximate sales figures have not been broken down by reference to particular goods; therefore, I am unable to determine what proportion of the same (if any) could be attributed to stockings and socks. Moreover, to my mind there is no documentary

evidence to support Edrrish Adam Patel's assertion. For instance, none of the invoices shows the sale of stockings or socks and these goods do not appear within the product brochures or printouts of the website. Although socks can be seen in the photographs from the Intimate Apparel Show, there is no evidence that any such products were sold as a result of attendance at the show. Further, these products are presented under a form of the 'PALM' mark which I do not consider to be acceptable variant use of the 552 mark. I note that the invoices evidence the sale of leggings and tights. These products are also visible in the photographs of packaged products, as well as in the product brochures. However, the photographs of the packaged products are undated and, therefore, cannot be relied upon as showing the position during the relevant periods. Moreover, I do not consider that the average consumer would consider leggings and tights to fall within the category of '*stockings and socks*' (or vice versa), or fairly describe them as such. Taking all of the above into account, I am not satisfied that Aikon has demonstrated genuine use of the 552 mark for the goods for which it is registered.

## **Conclusion**

51. The applications against the 438 mark and the 552 mark under sections 46(1)(a) and 46(1)(b) have been successful. As a consequence, the marks are hereby revoked from the earliest dates requested, those being 29 April 1959 and 1 September 1904, respectively.

## **Aikon's application for invalidation**

### **Section 5(2)(b)**

52. As BA's applications for revocation against Aikon's registrations have been successful, Aikon's marks, having been revoked, were not valid registrations at the filing date of the 849 mark. As a result, they may not be relied upon to support Aikon's claim under section 5(2)(b) of the Act. Given that no other trade marks are relied upon, the application under this ground is dismissed.



## **Section 5(4)(a)**

### **The law**

53. Section 5(4)(a) has application in invalidation proceedings by virtue of section 47 of the Act, the relevant parts of which read as follows:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) [...]

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

54. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

55. Subsection (4A) of section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

56. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether "*a substantial number*" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

57. Halsbury's Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

"Establishing a likelihood of deception generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;

(c) the similarity of the mark, name etc used by the defendant to that of the claimant;

(d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

### **Relevant date**

58. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, Case BL O/410/11, Mr Daniel Alexander K.C., sitting as the Appointed Person, endorsed the Registrar’s assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

59. There has been no claim by BA that the 849 mark had been used prior to the earliest claimed use of Aikon's alleged earlier signs. Moreover, no such evidence has been adduced. Therefore, the relevant date for the assessment of Aikon's claim under section 5(4)(a) is the filing date of the 849 mark, that being 26 August 2019.

## **Goodwill**

60. The first hurdle for Aikon is to show that it had the necessary goodwill resulting from the trading activity relied on under the earlier signs at the relevant date. Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), in the following terms:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

61. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

62. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat), Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

63. Aikon claims that it has goodwill in relation to which it has used the word sign and the figurative sign throughout the UK since 2012 and 2016, respectively. It argues that it has used the signs in relation to *‘clothing, tights, underwear, vests, long sleeved tops, camisoles, knitted clothing, thermal clothing, knitted underwear, thermal underwear, socks’*.

64. For its part, BA denies that Aikon has been trading in the UK since 2012 and that it has any goodwill.

65. With regards to the word sign, I have already found, for the reasons outlined at paragraphs 49 and 50 above, that Aikon's evidence is insufficient to establish genuine use of 'PALM' (in word-only format) in respect of *‘articles of knitted clothing and articles of clothing made from knitted piece goods, but not including bootees or slippers’* and *‘stockings and socks’*. Whilst I acknowledge that the list of goods that Aikon seeks to

rely upon under this ground differ from that which were subject to a proof of use assessment, I do not consider that this puts Aikon in a better position under section 5(4)(a).

66. There is evidence that goods such as, for example, underwear, long-sleeved tops and camisoles had been sold to UK customers before the relevant date. Further, goods such as these can be seen in the product brochures from 2012 and 2016/2017. The evidence suggests that Aikon (or Ozzicozi, with its consent) sold products to customers in a number of locations in the UK. The evidence also suggests that the word sign has been used between 2016 and the relevant date. Therefore, the use shown has not been particularly long-standing but relatively widespread, geographically. Nevertheless, the invoices, order details and purchase orders suggest that a small number of goods have been sold. While the invoices are not exhaustive, the turnover figures are not indicative of a more significant number of products being sold. The global turnover figures are limited in the context of a substantial market. I note that the figures only cover three years, and that provided for 2019 is likely to include sales from after the relevant date (that being in August of that year). Moreover, they have not been broken down by reference to particular goods. Therefore, I am unable to determine what proportion of the figures could be attributed to each of the goods identified by Aikon. Given the amounts quoted, and in the absence of any further information or explanation from Aikon, the respective proportions would likely amount to extremely small sums for each good identified. The photographs of the packaged products do not assist Aikon; they are undated and, therefore, cannot be relied upon as showing the position as at the relevant date. To my mind, the printouts of the website do not help to establish the existence of goodwill in Aikon's business; goodwill arises as a result of trading activities and the printouts do not show that any goods have been sold through the website. In addition, no information has been provided as to how many internet users in the UK have visited the website, so I am unable to determine the extent to which consumers in the UK have been exposed to the sign. Based upon the evidence filed, I am not satisfied that Aikon has proven that it has a protectable goodwill in the word sign. As a result, the application for invalidation based upon this alleged earlier right fails.

67. In respect of the figurative sign, Edrrish Adam Patel says that 'PALM' has been used in various stylised and logo formats in the UK since 2016.<sup>38</sup> From the evidence, I note that the sign is visible in the photographs of packaged products (in various colourways); the 2016/2017 product brochure; the brand directory for, and photographs of, the Intimate Apparel Show; the advert for the Pure Origin Show; and the printouts of the website (in greyscale). However, in my view, it is not clear that any of the products which the invoices, order details and purchase orders show had been sold prior to the relevant date were offered for purchase in connection with the sign. In any event, they suggest the sale of a small number of goods and the turnover figures are not such to give the impression that a greater number of products have been sold. The global turnover figures are limited in the context of a substantial market. As I have already outlined, Aikon has provided no breakdown of these figures by reference to particular goods. Further, Edrrish Adam Patel gives no information as to what proportion of the figures relate to goods sold in connection with the sign. Accordingly, it is not possible to determine what proportion of figures relate to each good Aikon has identified, or which sign the turnover has been generated in connection with. Without further information, the global turnover figures, such as they are, suggest that extremely small sums are likely to have been generated in relation to each good. Furthermore, the evidence concerning activities conducted in promoting the sign and related expenditure is extremely limited. Ozzicozi was charged £891 for attendance at the Intimate Apparel Show. That is the extent of what the evidence shows. No further information in this regard has been provided. The photographs of the packaged products adorned with the sign are undated and, as such, cannot be relied upon as showing the position as at the relevant date. Whilst I accept that the sign is visible in the 2016/2017 brochure and was displayed on the website prior to the relevant date, neither the brochure nor the printouts of the website establish that any goods have been sold under the sign. To my mind, there is nothing in the evidence which unambiguously demonstrates that the sales documented in the invoices, order details and purchase orders were achieved in connection with the sign. Although the sign was displayed on the website, there is nothing which indicates that any trading activities have been conducted through the website, or as a result of internet users in the UK visiting it. I accept that Ozzicozi attended the Intimate Apparel Show and the Pure

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<sup>38</sup> Patel, §6



Origin Show, and that both of these events occurred prior to the relevant date. I also acknowledge that the 'PALM' stand at the Intimate Apparel Show was adorned with the sign. However, no details have been provided as to the number of attendees at these shows or how many of those attendees visited the 'PALM' stands. There is also no evidence of any trading activities resulting from the shows. On the balance of the evidence, I am not satisfied that Aikon has proven that it has a protectable goodwill in the figurative sign. As a result, the application for invalidation based upon this alleged earlier right fails.

## **Conclusion**

68. The application for invalidation under section 5(4)(a) of the Act is dismissed.

## **Overall outcomes**

69. BA's applications against the 438 mark and the 552 mark under sections 46(1)(a) and 46(1)(b) have been successful, resulting in the revocation of the registrations from 29 April 1959 and 1 September 1904, respectively.

70. Aikon's application for invalidation under sections 5(2)(b) and 5(4)(a) of the Act has failed. Subject to any appeal against my decision, the 849 mark will remain registered in the UK.

## **Costs**

71. BA has been successful and, as such, is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. I note that the statements and counterstatements filed by the parties were neither complex nor lengthy. Moreover, BA did not file any evidence, nor make any comments upon the evidence filed by Aikon nor file any written submissions. In the circumstances, I award BA the sum of £1,000 as a contribution towards the cost of the proceedings. This sum is calculated as follows:

Preparing statements and considering Aikon's counterstatements <sup>39</sup>	£400
Considering Aikon's statement and preparing a counterstatement <sup>40</sup>	£200
Official fees <sup>41</sup>	£400
<b>Total</b>	<b>£1,000</b>

72. I therefore order Aikon International Limited to pay Ben Arnold the sum of £1,000. This 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 (subject to any order made by the appellate tribunal).

**Dated this day 13<sup>th</sup> day of October 2022**

**James Hopkins**  
**For the Registrar**

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<sup>39</sup> In its applications for revocation under numbers 503936 and 503937.

<sup>40</sup> In Aikon's application for a declaration of invalidity under number 504369.

<sup>41</sup> Official fees associated with the filing of two Form TM26(N)s.