BL O/0448/26

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO. UK00003973316
IN THE NAME OF LEGUME TECHNOLOGY LIMITED
AND OPPOSITION THERETO NO. 445936
BY DSM AUSTRIA GMBG

DECISION

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1. This is an appeal by the Opponent/Appellant, DSM Austria GmbH (the Appellant) against a decision of Hearing Officer Ms. Teresa Pinto (the Hearing Officer) dated 15 December 2025 by which she dismissed the opposition.

2. The mark applied for by the Applicant/Respondent, Legume Technology Limited (the Respondent) is MYCOFIX under application UK00003973316 in respect of the following goods:

   Class 1: Chemical and microbial substances, materials and preparations for use in agriculture, aquaculture, horticulture and forestry; chemical and microbial preparations for the treatment of seeds; chemical and microbial preparations for use in coating seeds [other than fungicides, herbicides, insecticides, parasiticides]; seed coatings [inoculants]; inoculants [other than for medical or veterinary use]; microbial inoculants, other than for medical use; inoculants for seeds; substances for treating seeds, not included in other classes; prepared soils for the cultivation of seeds; prepared soils including inoculants for the cultivation of seeds.

   Class 31: Agricultural and aquacultural crops, horticulture and forestry products; seeds; seeds coated with an inoculant.

   The relevant priority date is 30 October 2023.

3. The opposition is founded upon two earlier trade mark registrations, each in respect of the mark MYCOFIX and each with priority date 20 November 1989; UK00001427670 in class 31 and UK00001427669 in class 5. Each has been registered for more than 5 years at the filing date of the Respondent's application. The Appellant relied on relative grounds under ss. 5(1), 5(2)(a) and 5(3) of the Trade Marks Act 1994 ("the Act") relying on the following goods for which its earlier marks were registered:

   Class 31 (UK00001427670): Agricultural, horticultural and forestry products; foodstuffs for animals; malt for animals; additives to foodstuffs for animals; mineral additives to foodstuffs for animals; all included in Class 31.

   Class 5 (UK00001427669): veterinary preparations and substances; products having a fungistatic and fodder toxin inactivating effect; disinfectants

4. The Respondent put the Appellant to proof of use of each the earlier trade marks relied upon pursuant to s. 6A of the Act, with the relevant period being the five years ending with the filing date of the application, 31 October 2018 to 30 October 2023.

5. Neither party requested a hearing in the opposition and the decision was taken by the Hearing Officer based upon the papers.

6. Before me the Appellant was represented by Ian Silcock instructed by Ip21 Limited IP. The Respondent was represented by Chris Aldridge of Mohun Aldridge Sykes Limited.

STANDARD OF APPEAL

7. This was not in dispute. The principles are set out in the well-known cases of *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch), *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. The Appellant in particular relied upon the principles recited by Joanna Smith J. in *Axogen* at [24]-[25].

8. I have sought to apply those principles. Absent an error of law, it is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was plainly wrong in the conclusion she reached, in the sense of being outside of the bounds within which reasonable disagreement is possible. In the case of a multifactorial assessment (such as the assessment of use, of similarity between marks or goods and services, and the consequences of any such similarity)

then in the absence of a distinct and material error in the approach of the Hearing Officer, the appellate tribunal should show real reluctance, though not the very highest degree of reluctance, to interfere.

THE HEARING OFFICER'S DECISION

9. The Hearing Officer's findings can be summarised as follows:

(a) On proof of use, the Hearing Officer carefully considered the limited evidence of use before her and concluded that the Appellant had not satisfactorily demonstrated genuine use of either of the earlier trade mark registrations in respect of the goods relied on classes 31 and 5. She held in particular that the use was 'token', and insufficient, in the economic sector concerned, for the purposes of maintaining or creating a market share for the goods covered by the earlier marks. In consequence, opposition failed.

(b) For the sake of completeness, and in case she was wrong on the issue of proof of use, the Hearing Officer went on to consider the position if genuine use had been established in respect of the goods in evidence, in respect of which she considered a fair specification would have been:

> **Class 5:** Products having a fungistatic and fodder toxin inactivating effect, namely mycotoxin deactivator in the form of animal feed.

(c) Addressing the relative grounds relied upon against that specification ("the Limited Specification") the Hearing Officer held:

(i) That the goods of the Limited Specification were dissimilar to those for which the application had been filed. In consequence, the grounds of opposition under ss. 5(1) and 5(2)(a) of the Act were dismissed.

(ii) That the Appellant had not established that its registration in class 5 (UK00001427669) was a mark with a reputation in respect of the goods for which it was registered (whether the Limited Specification or at all) in that the Appellant has not shown that the mark was known by a significant part of the public concerned by the products covered by that mark. In consequence, she also dismissed the opposition under s. 5(3) of the Act.

10. Insofar as further detail of the Hearing Officer's reasoning is relevant to the present Appeal, it is set out below. Otherwise, little purpose would be served in setting out the Hearing Officer's reasoning than to lengthen this judgment. In this regard I am mindful of the guidance given by Lewison LJ in *Unik Bond S.A v Catbalgan Holdings* [2025] EWCA Civ 1594 at [59] and [60].

APPLICATION TO ADDUCE FURTHER EVIDENCE ON APPEAL

11. In response to the Hearing Officer's findings on proof of use and reputation the Appellant applied to adduce further evidence on appeal. Although framed as "Ground 2" in the Appellant's TM55 rather than an application as such, the Appellant clearly stated in that document that it requested leave "to submit and have accepted additional evidence in the appeal proceedings". The additional evidence in question was a statement from Sarah Vermont, an employee of a related company to the Appellant who had since 2016 been employed by Biomin UK Limited, the UK distributor of the Appellant's products. The statement, along with 10 exhibits, sought to remedy the defects of the three previous statements adduced on behalf of the Appellant in the course of the opposition.

12. The principles governing admission of further evidence on appeal from trade mark registry proceedings are well established. Mr Silcock relied on the summary given by Henry Carr J in *Consolidated Developments Ltd v Cooper (TIN PAN ALLEY Trade Mark)* [2018] EHWC 1727; [2019] F.S.R. 2 at [33], which emphasises the importance of the three criteria set down by Denning LJ in *Ladd v Marshall* [1954] 1 W.L.R. 1489, while acknowledging that they are not a straightjacket to the exercise of the relevant discretion. The *Ladd v Marshall* criteria (adjusted to the context of registry hearings) can be summarised as follows:

    (a) The applicant must show that the evidence could not have been obtained with reasonable diligence for use at the earlier hearing;

    (b) The evidence must be such that, if allowed in, it would probably have an important influence on the outcome of the hearing, though it need not be decisive; and

    (c) The evidence must be credible, though it need not be incontrovertible.

13. The Appellant's application turns on the first of these factors. Dealing (for completeness) with the other two criteria in reverse order, the additional evidence is credible on its face and it is fair to say that, if admitted, it would almost certainly establish genuine use for the purposes of s. 6A of the Act, though Mr Silcock did not contend that it would prove use beyond the putative Limited Specification identified by the Hearing Officer ("*Products having a fungistatic and fodder toxin inactivating effect, namely mycotoxin deactivator in the form of animal feed*" in Class 5). The Appellant further contended that the evidence would, if admitted, establish that its earlier marks had a reputation for the purposes of s. 5(3) in respect of the Limited Specification.

14. Turning to the first of the *Ladd v Marshall* criteria, no witness statement was served in support of the application. The only "evidence" which purported to show that the additional evidence could not with reasonable diligence have been obtained and adduced before the Hearing Officer was contained in paragraph 16 of the Appellant's TM55, which is set out in full below:

> "Whilst every effort was made to submit all evidence in a timely manner in the opposition proceedings, it has come to light that the responsible paralegal within the Opponent's group of companies did not have knowledge of, or access to, all necessary evidence. The Appellant company moved offices around the time of the gathering of evidence and information, and access to what was needed was restricted. Furthermore, the group of companies has undergone a number of changes including changes in ownership. Whilst efforts are made to retain and archive information, such changes can lead to the loss of information. The Opponent has spent extensive time locating key personnel previously involved with the trade mark and in locating and accessing systems that contained the required information."

15. Quite apart from the absence of the formalities required of a witness statement, this paragraph comes nowhere near establishing that the additional evidence could not with reasonable diligence have been deployed previously. The statement that "every effort" was made to submit all evidence in a timely manner is no more than a bare assertion and does not appear to me to be credible on its face. The purported explanation does not address why evidence was given by the Appellant's legal adviser rather than by a representative of the Appellant itself. It does not (as Mr Silcock fairly accepted) explain why it was left to a paralegal employed by the

Appellant to gather the materials on which the evidence was based and it does not explain why Ms Vermont (who holds herself out as having person knowledge of the relevant facts) was apparently not even involved in the preparation of the previous evidence, let alone why she did not give evidence herself. Mr Silcock suggested that it might be inferred that Ms Vermont was not available at an earlier stage from the fact that her help was not sought, but such an inference is inconsistent with Ms Vermont's evidence that she had been employed with the relevant group company since 2016.

16. The hypothetical suggestion that company information might be lost during changes in ownership and moving offices is revealed to be unfounded by the fact that further evidence has now been prepared and is now sought to be adduced. Further, and perhaps most importantly, no explanation is given for why the steps to obtain Ms Vermont's statement were only taken after the Hearing Officer's decision rather than in response to the criticisms of the Appellant's evidence of use made by the Respondent in its written submissions dated 17 September 2024. The Respondent's criticisms prompted the Appellant's reply evidence served on 18 November 2024, and yet no explanation is given for why Ms Vermont was not involved it its preparation.

17. In consequence I have no hesitation in refusing the Appellant's application for permission to adduce and rely on the statement of Ms Vermont.

GROUNDS OF APPEAL

18. Apart from the application to adduce further evidence ("Ground 2") and its request for costs if the appeal is successful (Ground 6) which are not in facts grounds of appeal, the Appellant relied on the following grounds in its TM55 dated 26 January 2026:

    (a) **Proof of Use (Ground 1)**: Although the Hearing Officer correctly summarised the law, the Appellant contends that she erred in the application of those principles and that her conclusion that the Appellant had not discharged the burden of proving use was "plainly wrong".

    (b) **The Marks (Ground 3)**: The Appellant contends that the Hearing Officer failed to take into account the high distinctive character of its marks and the fact that the marks in issue were identical.

(c) **The Average Consumer (Ground 4):** The Appellant contends that the Hearing Officer failed to assess "the relevant characteristics and likely approach" of the average consumer, and that had she done so she would have held that the goods in issue were similar.

(d) **Section 5(3) reputation (Ground 5)**: If the further evidence were admitted, the Appellant contended that the use shown was sufficient to establish a reputation for the Appellant's mark in respect of the goods in question, and that the opposition be remitted to the registry for consideration of the s. 5(3) opposition. The Appellant very sensibly did not contend that the Hearing Officer had fallen into error in dismissing the s. 5(3) opposition on the limited evidence of use before her.

19. In his helpful and clear skeleton argument Mr Silcock stated that he would address Grounds 3 and 4 in a composite submission that the Hearing Officer had erred in holding that there was no similarity between the goods in her notional "fair specification" in class 5 and those goods for which the mark in issue has been applied. He contended that had she held that there were even a low level of similarity, she should have borne in mind the highly distinctive character of the mark MYCOFIX and the fact that the marks in issue are identical and "considered the likelihood of confusion even if there was almost no similarity at all" between the respective goods, with the consequence that the opposition under s. 5(2) of the Act should have been allowed.

20. Although I was concerned that this submission does not correspond directly to any of the Grounds in the TM55 and in particular does not map onto either Ground 3 or Ground 4, I was persuaded by Mr Silcock that the argument was available to him in that it was encompassed within the possible arguments to be advanced under those two Grounds in combination. Mr Aldridge did not contend the case advanced by Mr Silcock in his skeleton was not open to him, and consequence I allowed Mr Silcock to proceed on the basis in his skeleton without need for amendment of the TM55.

21. In light of my conclusion on the application to adduce further evidence, the appeal in respect of s. 5(3) falls away. The remaining grounds are cumulative, in that the Appellant's contentions under (b) and (c) above can only succeed if the Appellant is successful in its challenge on proof of use. I therefore address that first below.

Proof of Use

22. It is common ground that he Hearing Officer had the correct principles in mind when she considered the evidence of use. At paragraph 14 of her decision the Hearing Officer cited the summary of the correct approach given by Arnold LJ in *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247 under [106] (set out below with references removed) and she considered further authorities from the General Court which shed light on the issue of whether low levels of use were "token".

> "106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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.
>
> (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.
>
> (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.
>
> (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. Internal use by the proprietor does not suffice. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter. But use by a non-profit making association can constitute genuine use.
>
> (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.

(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.

(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.

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use."

23. The Appellant contends that the although the Hearing Officer recited the correct approach, she nevertheless fell into error in by conflating the central issue of whether the use shown was "genuine" with the subsidiary issue of whether the use was insubstantial in light of the scale of use shown and market share represented by that use. Mr Silcock submitted that in focussing on the scale of use shown the Hearing Officer did not properly consider the issue of whether the use was of the right kind, and so genuine. As he rightly emphasised (and as stated by Arnold LJ at his point (7) above) there is no *de minimis* rule. Even minimal use may be genuine if it is "justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services".

24. Mr Silcock did not dispute that scale of use was a relevant factor that could be taken into account when assessing use was genuine. However, he contended that when considering (as mandated by (6) above) whether use was "warranted in the economic sector concerned to maintain or create a share in the market" care needed to be taken to ensure that the assessment made was whether the use was of the kind that could or was intended to create or maintain such a share (and so "genuine" as opposed to "token") and not whether the use was of sufficient scale to demonstrate such a market share. Because there is no *de minimis* rule, the assessment was qualitative, and although quantitative factors might be relevant to that qualitative assessment, it must not stand proxy for it.

25. Mr Silcock drew support for this submission from the specific circumstances of appeal in *easyGroup v Nuclei*. Counsel for the appellant in that case contended that the trial judge had wrongly applied a *de minimis* test, relying in particular on the following statement of the law (made at [256] of the trial judgment) as being incorrect: "It is well established that the existence of some retail sales of a product is not itself sufficient to demonstrate genuine use of a trade mark.". Arnold LJ addressed that submission at [124] of his judgment:

"Counsel for easyGroup particularly criticised what the judge said at [256]. I accept that the opening sentence of that paragraph is not well drafted, but that is an understandable slip in a long judgment. I am not persuaded that this demonstrates that the judge was applying the wrong test. It seems to me that when she said that "some retail sales of a product is not itself sufficient to demonstrate genuine use" she meant "not necessarily sufficient": she had cited the summary of principles including sub-paragraph (8) in [254], and she went on at [258] to reiterate, by reference to sub-paragraph (7), that "even minimal use can be sufficient". Similarly, I do not agree with the judge's summary of the Reber case in [256(i)], since what the CJEU held was merely that the GCEU had not erred in law when it concluded that relatively small sales of chocolate from a single shop did not amount to genuine use, but I do not think that this demonstrates that the judge applied the wrong test either."

26. As Mr Silcock pointed out, the reframing by Arnold LJ of the first sentence of [256] as "It is well established that the existence of some retail sales of a product is <u>not necessarily sufficient</u> to demonstrate genuine use of a trade mark." (emphasis added) both reveals the original statement as erroneous (albeit as a result of a drafting slip)

and provides support for his contention that even a low level of retail sales would be sufficient unless the nature of the use were not "genuine" for some reason.

27. In my view Mr Silcock is correct in his legal analysis. The assessment before the Hearing Officer, to be made taking into account all the relevant circumstances including the commercial scale of any use, was whether the use shown was "genuine", at whatever scale. Use that is not genuine would include use that is token (to preserve the registration) or sham. With that approach in mind, I have considered the Hearing Officer's analysis, bearing in mind the approach to be taken on appeal and in particular the fact that it is not enough that a different tribunal might have reached a different conclusion; what is needed is an error.

28. It is true that the Hearing Officer gave significant weight to the level of sales shown by the Appellant's evidence, but she was entitled to do so. She analysed the evidence of use with care over four pages of her decision. She gave particular thought to the very limited scale of use shown, which she held amounted to just under 900 bags of 25 kg product over the period, with a value of some £51,635. She recorded that Respondent criticised the Appellant's evidence as being indicative of nominal or token (as opposed to genuine) use, comparing the total sales in evidence with the total feed additive market of US$840 million in 2023. In its reply evidence the Appellant did not dispute this estimate of the market size and further did not either state that the sales in evidence were only examples of its use or (as would have been very easy for it to do) give figures for its total sales.

29. In considering the nature of the evidence of use adduced by the Appellant the Hearing Officer recorded that she bore in mind the comments of Daniel Alexander QC as the Appointed Person in *Awareness Limited v Plymouth City Council*, Case BL O/236/13 (at [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."

30. Having carefully considered Mr Silcock's criticisms of the Hearing Officer's reasoning, and his contention that she wrongly applied a quantitative rather than a qualitative approach in assessing whether genuine use had been proved, I have come to the conclusion that they are not justified. Although the Hearing Officer did give significant weight to the commercial context of the sales in evidence, it is in my view clear that she did so as part of her assessment of whether the nature of the use was genuine, as opposed to token, as she was entirely entitled to do under the *easyGroup v Nuclei* principles. This is shown (for example) by the following passage from paragraph 28 of her judgment:

"Bearing in mind that no information about turnover and promotional spend has been forthcoming, the total amount of transactions seems in my view 'token', and insufficient, in the economic sector concerned, for the purposes of maintaining or creating a market share for the goods covered by the earlier mark."

31. Although I agree with Mr Silcock that it would have been wrong for the Hearing Officer to have held that there was no genuine use on the basis that the levels of sales in evidence were insufficient for the Appellant to have maintained or created a market share, and indeed that to do so would have been to make the mistake discussed by Arnold LJ in [124] of *easyGroup v Nuclei*, that is not what the Hearing Officer did. She rather held that the nature of the use was "token", i.e. serving solely to preserve the rights conferred by the registration, and in reaching that conclusion she relied in particular on the very low level of sales. The Hearing Officer's use of the words "insufficient, in the economic sector concerned, for the purposes of maintaining or creating a market share for the goods covered by the earlier mark" reflects the words of Arnold LJ in the seventh of the points he made under paragraph [106] of *easyGroup v Nuclei.*

32. In consequence, despite the cogency of Mr Silcock's legal analysis and the eloquence of his submissions, Ground 1 of the appeal fails.

Similarity of Goods

33. In light of my decision on Ground 1 the appeal under the combination of Grounds 3 and 4 necessarily fails. However, for the sake of completeness I would record that had the issue of similarity between the Hearing Officer's "fair specification" and the goods for which the mark applied for needed to be determined, I was not persuaded that the Hearing Officer had fallen into error to any material extent. In consequence the Appellant's failure to prove genuine use of its earlier marks did not, in the end, materially effect the outcome of opposition under s. 5(2) of the Act.

COSTS

34. As the appeal is dismissed the costs award below is maintained and the respondent is entitled to an award of its costs.

35. I direct that the Appellant shall pay to the Respondent the following sums within 21 days of the date of this decision;

    (a) The £1,200 previously ordered to be paid by the Hearing Officer.

    (b) In respect of the appeal costs, by analogy with the scale costs under TPN 1/2023, the sum of £1,500 in respect of the preparing for and attending the Appeal.

Tom Moody-Stuart KC
The Appointed Person
26th May 2026