

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 4040817 NODSE IN CLASS 3

IN THE NAME OF JBX ENTERPRISES LIMITED

AND OPPOSITION THERETO No. OP000448946

BY NAOS

DECISION

1. This is an appeal against a failed opposition to registration of the mark NODSE in Class 3 in the name of JBX Enterprises Limited (“the Applicant”).
2. The basis for the opposition by the Opponent, NAOS, was its prior registration, UK Mark 666559 for the following:

Nodé

registered for these goods in Class 3:

Class 3: Bleaching preparations and other substances for laundry use; cleaning, polishing, grease removing and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions.

3. Given the age of the Opponent’s registration, it was required to demonstrate proof of use.
4. The Opponent appeals the decision of the Hearing Officer, Judi Pike, dated 24 February 2026, wherein she held that although the Opponent had demonstrated proof of use of its mark for shampoo in the relevant period, this did not amount to use of any of the goods within the specification set out above.

5. Allied to this was a related point under s.5(4)(a) of the Act which turned on the same point.
6. Emma Pallister of Mathys & Squire appeared for the Opponent/Appellant in the hearing before me held on 23rd July 2026. The Applicant was not represented and took no part in the appeal. I am grateful to Ms. Pallister for her succinct but helpful submissions.

Standard of Appeal

7. This is now well established. 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. I summarised the approach in SOCIAL WORK NEWS (O/0050/24) at [13]:

To paraphrase, an appeal should only be allowed where the decision of the lower court was “wrong”. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge’s conclusion was “outside the bounds within which reasonable disagreement is possible”. In the case of a multifactorial assessment and in the absence of a distinct error of principle, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere.

8. I have sought to apply those principles. It is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was wrong in the conclusions she reached.

Approach to Genuine Use

9. The Hearing Officer cited the summary of the law provided by Arnold LJ in *easyGroup Ltd v Nuclei Ltd* [2023] EWCA Civ 1247 at §§105-106. There was no suggestion before me that this was not the right approach:

105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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 Bunderversammlung 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 Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v*

Centrotherm Clean Solutions GmbH & Co KG [EU:C:2013:592], 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], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

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: *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]; *Ferrari* at [32].
 - (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]; *Gözze* at [37], [40]; *Ferrari* at [32].
 - (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]; *Ferrari* at [33].

- (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].

- 10. As for how to interpret the words used in a specification, Jacob J explained in *British Sugar Plc v James Robertson & Sons Ltd* [1996] R.P.C. 281 at 288:

“When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all, a trade mark specification is concerned with use in trade.”

- 11. Arnold LJ had to decide how to interpret the term “telecommunications services” in *Sky Plc v Skykick UK Ltd* [2020] EWHC 990 (Ch) at 88. He summarised the applicable principles of interpretation in the following four propositions:

- (1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.
- (2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.
- (3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.
- (4) A term which cannot be interpreted is to be disregarded.

- 12. Before me Ms. Pallister emphasised that the tribunal should adopt a fair reading of the specification and that it was important that a proprietor who had used a mark in good faith should not be stripped of all protection. In particular, she cited the following passage from the judgment of Mr Justice Henry Carr in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch):

18. On the matter of the interpretation of terms, in *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2002] EWCA Civ 1828, at paragraph 31 it was stated:

In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under s.10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use."

19. It follows from the above judgements that in order to determine a fair specification, the tribunal must bear in mind the circumstances of the trade and the meaning of terms from the perspective of the public or notional consumer.
20. It also follows from *Reckitt Benckiser* that the principle should not be applied so strictly that the proprietor is stripped of all protection for registered goods which are not necessarily identical to those for which use has been demonstrated, provided the respective goods are "not in essence different".

13. I bear all these principles in mind.

The Decision of the Hearing Officer

14. The Hearing Officer found that there had been use of the Opponent's mark as a secondary mark under the "house brand" Bioderma in respect of shampoo, exemplified as follows:



15. Nevertheless, she found that this did not amount to use of any of the goods for which the mark was registered. In particular, she rejected the written arguments of the Opponent that this amounted to use in relation to cosmetics, hair lotions or cleaning preparations. I will deal with these in turn

Cosmetics

16. The Hearing Officer relied on the similar facts of the well-known *La Mer Technology, Inc v OHIM*, Case T-418/03 in the General Court. In particular, she highlighted §114 of that decision:

114. The Board of Appeal was therefore right to take the view, in paragraph 33 of the contested decision, that ‘soaps, perfumery, essential oils, hair lotions, dentifrices, toiletries’ under the Community trade mark and ‘cosmetics of a marine product base’ under the earlier mark are very similar.”

17. Having quoted from *La Mer* she concluded:

20. The General Court found that there was similarity but it did not find identity between cosmetics (of a marine product base) and other personal hygiene goods, including toiletries which I consider covers shampoo. Shampoo may have cosmetic properties, such as making the hair look nicer because it's clean, but that does not make it a cosmetic, according to the natural and usual meaning of that term in relation to goods, which I consider is understood as pertaining to bodily decoration (such as make-up) and skincare. I find that cosmetics does not cover shampoo.
18. Plainly it is desirable for the Registry and the Courts to adopt a consistent approach to the identity/similarity of goods. However, I consider the starting point should be the language of the prior specification and the question of how these goods would, as a practical matter, be regarded for the purposes of trade. Prior classifications by the Registry or the Courts can then be used as a sense-check to test the preliminary conclusion.
19. In the present case the expressed reasoning of the Hearing Officer in relation to cosmetics is brief. It can be seen, however, from her observations in the second sentence of §20 cited above that she considered shampoo to be similar to but not covered by the term "cosmetics" because of their different purposes. Based on the decision in *La Mer* it would also be difficult to describe her finding as "wrong" in the sense of something that no reasonable tribunal could reach.
20. The Opponent submitted to me that the facts of the QUEEN KHADI case O/0376/25 were more similar to the present than those of *La Mer*. This, it was said, showed that the Hearing Officer had fallen into error.
21. First, Ms. Pallister submitted that the goods under comparison in *La Mer* were not on all fours with the present Opposition, as they did not include 'shampoo' or the term 'cosmetics' in a broad sense. The goods being compared were 'toiletries' and 'cosmetics (of a marine product base)'.
22. That is strictly correct, but the General Court used the example of soap as being used primarily for hygienic purposes but also for making the skin more beautiful. Nevertheless, it was not identical to a cosmetic of a marine product base. Nor, based on the same approach, could shampoo be. So I do not consider that the facts of *La Mer* were so different so as to be able to exclude it as a cross-check.
23. QUEEN KHADI was a decision in the Registry dated 24 April 2025 and decided by Hearing Officer L Fayter. In that case the opponent had demonstrated sales of goods including shampoo, and the question was whether these amounted to the use of cosmetics. The Hearing Officer held that they did, finding at §§44-45:

44. I bear in mind that neither party has provided any submissions in relation to fair specification. However, clearly, the evidence shows that the opponent sells hair colour (including henna), shampoo, conditioner, hair oil, body oil and face masks.
45. The First, Second and Third Earlier Marks have protection of the term “cosmetics” in class 3. I find that “cosmetics” are types of preparations which are applied to the user’s skin (face and body), hair and nails, to beautify them, or to improve their appearance. This is therefore an extremely broad term which would cover a very wide range of goods, (from make-up to hair care to skin care). Therefore, even accepting that the opponent’s above goods falls within the broad definition of cosmetics, the opponent has only shown use of its mark in relation to limited sub-categories of such goods. In my view, the average consumer would view this as use of the marks in relation to “colouring matters for the hair”, “hair shampoo”, “hair conditioner”, “hair oil”, “face masks” and “body oil”, rather than use in relation to “cosmetics” at large. Therefore the term “cosmetics” needs to be narrowed down to reflect the opponent’s aforementioned goods only (which I consider to be appropriate sub-categories).
24. So the Opponent was right that the Hearing Officer in that case appears to have reached an opposite conclusion to that of the General Court in *La Mer*. However, the point does not appear to have been argued in QUEEN KHADI (whereas it plainly was the subject of dispute in *La Mer*). Further, the Hearing Officer did not appear to have had the benefit of the guidance in *Skykick* in relation to the construction of wide terms.
25. The Opponent also sought to rely on the UK Cosmetics Regulation (EC) No. 1223/2009 (UKCR) which includes shampoos in its regulated products. This was not before the Hearing Officer and its ambit – to regulate the safety of materials to be applied to the body – does not mean that goods sold under it occupy the same trade channels. Moreover, Ms. Pallister fairly accepted that the contents of the Regulation would be unlikely to be known to the average consumer.
26. Ms. Pallister also pointed out that a search for ‘hair cosmetics’ on the UKIPO goods search tool shows that this is an accepted class 3 term. It was said that this meant that ‘cosmetics’ encompasses products to be applied to hair. It may well be that it is possible to identify the existence of certain hair cosmetics. But that does not make shampoo one of them.
27. Standing back, and in agreement with the observations of the Hearing Officer, my impression is that shampoo is not regarded in the course of the trade as a subset of cosmetics. It is clearly closely related, but I think the average consumer would

expect to find make-up and the like under the sign “cosmetics” in the average high street pharmacy, with shampoo in a different aisle. As both the Hearing Officer and the General Court pointed out, although cosmetic products can be used for cleaning purposes, and shampoos can contribute to beautification, the primary purpose of each is different, and would be regarded as such in the course of trade and by the average consumer.

28. Drawing this together, I refuse to interfere with the finding of the Hearing Officer in relation to cosmetics. The QUEEN KHADI decision is in conflict with LA MER, but I do not consider that it demonstrates that LA MER (and therefore the Hearing Officer) is wrong. This is simply one of those close-call evaluations that different tribunals may determine differently – which is not sufficient reason for an appellate tribunal to interfere. Moreover, neither prior decision could be determinative: the primary issue is whether use of the relevant goods has been demonstrated in this case. The Hearing Officer’s decision was that they had not and I cannot say that this was wrong. On this basis there is no reason for me to interfere with the Hearing Officer’s evaluative decision.

Hair Lotion

29. The Hearing Officer’s reasoning in relation to hair lotion was as follows:
 18. The specification does include hair lotions, but in my view these are not the same as shampoo. Shampoo is for cleaning the hair, whereas hair lotions are for protecting the hair, such as against the effect of repeated use of heated appliances such as hairdryers and straighteners, or applying as an aid to setting the hair in a particular style. Hair lotions do not clean the hair. The opponent has not suggested that hair lotions covers the goods which it has sold; instead, the opponent has submitted that it should be able to rely upon “cosmetics, namely hair care preparations”. This suggests that it views hair care preparations as a sub-set of cosmetics and that its goods are not hair lotions. In any event, I find that shampoos are not hair lotions which have a different purpose and are not covered by the term hair lotions in the opponent’s specification.
30. Once again as part of its appeal the Opponent sought to rely on Registry precedent in support of its submission that the Hearing Officer was wrong. It cited the case of O/0427/25 Kairos, a decision of Hearing Officer Suzanne Hitchings dated 15 May 2025. In that case the Hearing Officer found at §25 that products including shampoo were *Meric* identical to the broad term “hair lotions”.
31. Again, I do not think this is a good enough reason to reverse the finding of the Hearing Officer in the present case. I find no reason to interfere with her reasoning.

Indeed, I agree that hair lotions are not the same as shampoo – their purposes are different for the reasons she gave.

Cleaning Preparations

32. The Hearing Officer dealt with the final issue as follows:

21. Finally, although the opponent has made no submissions that cleaning preparations in the earlier specification covers the goods in relation to which it has used the earlier mark, for completeness I will consider whether cleaning preparations covers shampoo. I consider, the natural and usual meaning of 'cleaning preparations' has to be seen in the context of the other goods with which they are listed: polishing, grease removing and abrasive preparations.⁷ These are not goods for personal use. In *Aveda Corporation v Dabur India Limited*, [2013] EWHC 589 (Ch), Arnold J (as he then was) agreed at paragraph 60 with the registrar's hearing officer that 'cleaning, polishing, scouring and abrasive preparations' were not for use on the body and that the natural meaning of the unqualified term is that of household or industrial preparations, particularly since all four adjectives appear in the same term. At paragraph 61, the judge also found that cleaning, polishing, scouring and abrasive preparations were not similar to the opponent's "skin care products, namely ... cleansing lotions" and/or "body cleansing lotions". The judge considered that these were the closest of the opponent's goods to the applicant's cleaning, polishing, scouring and abrasive preparations. I note that the opponent in that case also had cover for shampoo, but that was clearly not considered to be as close, even to 'cleaning preparations'. It follows that, if further away from closer goods which were found to be dissimilar, then shampoo also must be dissimilar. I find, in any case, that the present opponent's use of the earlier mark in relation to shampoo is not covered by any of its specification terms, including cleaning, polishing, grease removing and abrasive preparations.

33. Before me Ms. Pallister submitted that because the specification did not expressly refer to household cleaning preparations, then the cleaning properties of Node shampoo would be included within this.

34. I can deal with this very briefly. I think the Hearing Officer was plainly right to hold that shampoo is not a cleaning preparation for the reasons she gave. I have no hesitation in dismissing this last limb of the s.5(2) appeal.

s.5(4)

35. The s.5(4) decision followed on from the Hearing Officer's refusal to find use of the goods under s.5(2). She explained it as follows:

27. The evidence shows that the opponent, at the relevant date, had a level of goodwill in its business associated with the sign Nodé in relation to shampoo. However, the opponent's pleaded goodwill is in relation to the same goods as it relies upon for its section 5(2)(b) ground. It has not relied upon use of its sign in relation to shampoo or any broader terms which cover shampoo.
36. I accept that if I had found use of the goods by the Opponent under s.5(2) then it would also have been necessary to remit the case under s.5(4). But the Opponent went further and suggested that it could win on s.5(4) even if it had lost under s.5(2). The Opponent submitted that the pleading point taken against it under s.5(4) was too harsh even in the light of the s.5(2) determination. In particular, Ms. Pallister suggested that the Hearing Officer ought to have considered that goodwill attaches to the business as opposed to the individual goods.
37. That may be, but it is still necessary to demonstrate use of the mark in relation to the pleaded goods, and by definition in relation to that the Hearing Officer had already found against the Opponent under s.5(2). Having done so I consider that the Hearing Officer was therefore correct to dismiss the s.5(4) ground also.
38. The appeal is dismissed.

Costs

39. The Applicant played no part in the appeal. As below I therefore make no order as to costs.

Thomas Mitcheson KC
The Appointed Person
11 August 2026