

O/1126/24

**CONSOLIDATED PROCEEDINGS**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO. UK00002653326**

**IN THE NAME OF SEDNA LIGHTING LTD**

**FOR THE FOLLOWING TRADE MARKS:**

**omni**

**OMNI**

**(SERIES OF TWO)**

**IN CLASS 11**

**AND**

**AN APPLICATION FOR A DECLARATION**

**OF INVALIDITY UNDER NO. 506188**

**AND**

**AN APPLICATION TO REVOKE ON THE GROUNDS**

**OF NON-USE UNDER NO. 506189**

**BY ONE-LUX LIMITED**

## BACKGROUND AND PLEADINGS

1. Sedna Lighting Ltd (“the proprietor”) applied to register the series of trade mark shown on the front page of this decision (“the contested registration”) in the UK on 20 February 2013. The contested registration was accepted and entered onto the register on 24 May 2013 in respect of the following goods:

Class 11:           LED Lighting.

2. On 12 June 2023, One-Lux Limited (“the applicant”) applied to have the contested registration declared invalid under section 47 of the Trade Marks Act 1994 (“the Act”). The application for invalidity is based upon sections 3(1)(b), 3(1)(c) and 3(1)(d) of the Act. On that same date, the applicant also applied to have the contested registration revoked on the grounds of non-use under sections 46(1)(a) and 46(1)(b) of the Act.
3. In respect of the application for invalidity, the applicant argues that the contested registration, being the marks ‘omni’ and ‘OMNI’, consists of words that are used as an abbreviation of the word ‘omnidirectional’ which has the dictionary definition of goods which can be used to receive or transmit signals in all directions. As such, under the section 3(1)(b) ground, the applicant argues that the contested registration is not capable of being origin specific and so it devoid of distinctive character. Further, under the section 3(1)(c) ground, the applicant argues that in the context of the above meaning, the registration will be understood as lighting goods that are capable of emitting light in all directions. Therefore, the applicant claims that the contested registration is descriptive of characteristics of the goods at issue. Lastly, the applicant argues that, under section 3(1)(d), the words in the contested registration have become customary in the language of the trade for LED lighting goods which are capable of emitting light in all direction.
4. I turn now to the revocation application. The period during which the applicant alleges non-use under section 46(1)(a) is the five years after registration of the mark, being 25 May 2013 to 24 May 2018 (“the first relevant period”) with revocation sought from 25 May 2018. Under its section 46(1)(b) ground, the

applicant is alleging non-use of the mark for the period of 24 October 2016 to 23 October 2021 (“the second relevant period”) with revocation sought from 24 October 2021.

5. The proprietor filed counterstatements in response to both applications. In respect of the invalidity application, the proprietor denies that its registration is non-distinctive, entirely descriptive and that it has not become customary in the current language of the trade. As for its defence to the revocation, the proprietor denies that it has not genuinely used its registration for the registered goods during the relevant periods and that it would provide evidence to prove as such.
6. Upon the filing of the counterstatements, the Tribunal consolidated the proceedings under the power given to it under Rule 62(1)(g) of the Trade Mark Rules 2008. This was communicated to the parties by way of written correspondence dated 19 September 2023.
7. The applicant is represented by Swindell & Pearson Ltd and the proprietor is represented by Tennant IP Ltd. Both parties filed evidence in chief and, during this round, the applicant elected to also file written submissions. Given the nature of these consolidated proceedings, both parties were given the opportunity to file evidence in reply. While the applicant elected to file both evidence in reply and written submissions, the proprietor elected only to file written submissions in reply. No hearing was requested and neither party filed any written submissions in lieu of the same. This decision is made following careful consideration of the papers.
8. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

## PRELIMINARY ISSUES

### The proprietor's evidence

9. Before proceeding to the substance of my decision, I consider it necessary to discuss the proprietor's evidence. During the evidence rounds of these proceedings, the proprietor filed the second witness statement of Nathan Edwards dated 17 November 2023. This was accompanied by one exhibit, being NE4. In the submissions accompanying this statement, the proprietor made reference to the first witness statement of Mr Edwards dated 13 April 2023 and the exhibits attached thereto, being NE1 to NE3. This statement was filed under separate opposition proceedings between the parties under number 435652. For the avoidance of doubt, those opposition proceedings were not consolidated with the present invalidity/revocation actions.
10. In making a reference to the evidence filed under opposition number 435652, the proprietor requested that the first statement of Mr Edwards be considered in defence of the genuine use of the opponent's mark in the present proceedings. It is noted that, at that time, the Tribunal made no comment in response to this request and did not formally accept it into these proceedings. Having considered the papers, I note that any correspondence from the Tribunal wherein it referred to the evidence filed, it mentioned only the statement that was accompanied by Exhibit NE4, being Mr Edwards's second statement.<sup>1</sup> Clearly, this was an administrative error on the part of the Tribunal and I note that the applicant, in its evidence and submissions in reply, made specific mention of Mr Edwards's first statement and exhibits NE1 to NE3, therefore implying that it was under the impression that that statement was before the Tribunal in respect of the present proceedings.
11. Despite the Tribunal making no declaration that Mr Edwards's first statement was admitted into the present proceedings, I do not consider it controversial for me to make that declaration here. Therefore, bearing in mind the proprietor's request in

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<sup>1</sup> See the Tribunal's letters dated 5 December 2023 and 14 February 2024.

its submissions and the fact that the applicant has sought to discuss Mr Edwards's first statement, I hereby accept that Mr Edwards's witness statement dated 13 April 2023 and exhibits NE1 to NE3 are formally before the Tribunal in respect of the present proceedings.

The initial objection under section 3 of the applicant's 'OMNI-LED' mark

12. In its evidence, the applicant discussed its attempt to register the above mark under trade mark number 3714006 with the UK IPO. The applicant explains that, on 8 November 2021, that mark was objected to on the grounds of inherent registrability under section 3(1)(b) of the Act. It is set out that the explanation was that the 'OMNI-LED' mark is a sign which is devoid of distinctive character under section 3(1)(c) of the Act because it consists exclusively of a sign which may serve in trade to designate the kind of goods e.g. 'lighting and emergency light components'. I do not intend to repeat all of the reasons for this (as set out in the applicant's evidence) but note that the explanation is given that the reason for the objection was that the term 'Omni-LED' is defined as 'a new type of LED light bulb that combines all the benefits of an LED (low energy, long lasting, no heat) with the popular and nostalgic design of a traditional light bulb'. It is explained that the applicant overcame this objection by filing evidence that it acquired distinctive character due to its use of the mark. This is the mark presently opposed by the proprietor in proceedings 435652, being those discussed above.

13. While the applicant's position in this regard is noted, it has no impact upon my decision. Firstly, examination reports are not binding on Hearing Officers sitting before the Tribunal. Secondly, the assessment I must make here is based on a different mark (being one without the directly descriptive term 'LED') and is to be aimed at the filing date of the contested registration, being 20 February 2013, which is some eight years before the filing date of the applicant's OMNI-LED mark (being 25 October 2021). As a result, I will say no more about the applicant's position in respect of this point.

## **EVIDENCE**

14. The applicant's evidence came in the form of two witness statements from Ms Glynnis Murray dated 16 November 2023 and 19 January 2024. The first statement is that which was filed as evidence in chief whereas the latter is that which was filed in reply. Ms Murray is both a Director and the Managing Director of the applicant, having held these roles since 18 July 2008 and 1 October 2008, respectively. Ms Murray's first statement is accompanied by four exhibits, being GM1 to GM4 and her second is not accompanied by any. The purpose of Mr Murray's statement was to (i) demonstrate the objectionable nature of the contested registration under its section 3(1) application and (ii) to comment on the proprietor's evidence of use.

15. The proprietor's evidence came in the form of two witness statements from Mr Nathan Edwards dated 13 April 2023 and 17 November 2023. Both statements were filed during the evidence in chief rounds. Mr Edwards is the Director of the proprietor, a position he has held since 2012. He confirms in his statement that he is the founder of the proprietor and is involved in the day to day running of the business. As above, Mr Edwards's first statement is accompanied by three exhibits, being NE1 to NE3 and his second statement is accompanied by one, being NE4. The statements of Mr Edwards' have been adduced to demonstrate use of the contested registration.

16. I do not intend to summarise the parties' evidence (or submissions, for that matter) in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

## **MY APPROACH**

17. The assessments I must make in respect of the invalidity application are wholly distinct from the assessment I must make in the revocation application. Further, the success or failure of either application has no impact on the other. That being said, if the contested registration is deemed objectionable under section 3 of the Act then it may be possible for it to have acquired distinctive character as a result

of the use made of it. If so, the contested registration may overcome the objection. Therefore, the proprietor's use of the contested registration may have an impact on the invalidity application. Given that the revocation application is based solely on the proprietor's use, I consider this to be an appropriate place to start as, if necessary, I can refer back to my summary of the proprietor's evidence at the conclusion of my assessment of the invalidity application.

18. For the avoidance of doubt, if the revocation application is successful and the proprietor's registration is revoked, I will still be required to consider the invalidity application. This is because, if revoked, the contested registration will still be deemed a valid registration up until the effective revocation date. However, if the invalidity application succeeds, the contested registration will be declared invalid and deemed as if it has never been applied for.

## **DECISION**

### **Revocation application**

19. 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”.

20. 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.”

21. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“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 Merken 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].”

22. 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”<sup>2</sup> is not, therefore, genuine use.

23. I set out the relevant periods above when discussing the basis of the revocation action. For ease of reference, I remind myself that they are 25 May 2013 to 24 May 2018 (“the first relevant period”) and 24 October 2016 to 23 October 2021 (“the second relevant period”). While the relevant periods do overlap by approximately 19 months, they differ quite significantly.

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<sup>2</sup> *Jumpman*, Case BL O/222/16

## Evidence of use

24. The proprietor's evidence sets out that it manufactures and distributes LED lighting and luminaires for the global market. Further, the proprietor states that it has a special focus on commercial and industrial applications as well as bespoke signage, exhibition and OEM product lines. In respect of the latter point, it is noted that the evidence does not explain what 'OEM' refers to. That being said, it is my understanding that 'OEM' refers to a business operation wherein a company produces equipment for third party companies and those goods are sold under that third party's branding.

25. In respect of the 'OMNI' brand, the evidence confirms that this is the brand name for its range of LED lighting modules which are the interchangeable light sources used throughout products for commercial and industrial applications. The goods under this brand can also be used to retrofit or upgrade conventional lighting to LED lighting. Images of the OMNI products are shown in the evidence and I note that these goods clearly show the relevant branding.<sup>3</sup>

26. Of the proprietor's overall business, it states that the OMNI modules are used in 25% of all of its products. In terms of sales figures, it is estimated that sales of products using the OMNI brand is, since 2018, between £1 and £1.2 million. While noted, the opponent has provided no breakdown of this turnover figure whatsoever.<sup>4</sup> In support of the sales of OMNI products, the proprietor has provided a range of invoices from within the relevant periods.<sup>5</sup> The narrative evidence states that these show sales in the UK. However, as I will discuss below, this is not the case.

27. In considering the invoices and the narrative evidence describing them, I note that no breakdown has been provided. That being said, the invoices only cover 27 pages and I have been able to compile my own breakdown of the same. Having done so, I note the following:

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<sup>3</sup> NE1

<sup>4</sup> For example, no annual or jurisdictional breakdown has been provided.

<sup>5</sup> NE4

- a. There are a number of products that make no mention of the OMNI brand at all. Without specific mention of the relevant brand, I do not consider that the sales of these goods are of any assistance to the proprietor;
- b. Some goods, even where they are referred to as OMNI products, do not cover lighting products. Instead, these goods include casings or diffusers for OMNI products. As they are not lighting products, the goods are not within the categories of goods relied upon so are of no assistance to the present assessment;
- c. While the invoices show a range of products under the LED Apex branding (and I note the applicant's comments in respect of the same), the descriptions do make reference to the OMNI brand. I am satisfied that this use would be known to the purchaser on the basis that it is included in the description of the products; and
- d. Some invoices are addressed to locations in Qatar with shipping addresses in the United Arab Emirates. As the relevant market for this assessment is the UK, such evidence is of no assistance.

28. Where I am satisfied that the invoices cover OMNI lighting products to customers in the UK, the invoices show the sale of 600 products during the first relevant period and 19 products during the second. I reiterate that these figures are based on my own calculation of the invoices. On this point, I wish to set out that, in my view, the goods at issue here are somewhat technical in nature and given that I am not versed in the LED lighting industry, I consider that it would have been helpful for the proprietor to provide a more detailed explanation as to what goods are covered by the invoices. Having no such evidence, I have been left to conduct this assessment based on my own interpretation of the invoices and what they mean.

29. In respect of advertising, the evidence sets out that the proprietor has undertaken postal marketing campaigns by advertising its OMNI products. An example of one item of advertising is provided which refers to a 'SEDNA Retrofit Troffer Kit'.<sup>6</sup> While

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<sup>6</sup> NE2

seemingly a 'SEDNA' product, the advert does confirm that it contains a modular design that utilises an OMNI LED Light Engine.

30. Screenshots from the proprietor's website are provided.<sup>7</sup> I note that while some are undated, others show dates from within the second relevant period. Of the dated screenshots, I note that these were obtained from the internet archive facility, The Wayback Machine. Having considered these screenshots, I note that they all show use of the 'OMNI' branding. I also note that the undated screenshots make several references to an event called 'The Big 5' in Dubai.

### Assessment of the evidence

31. In attempting to make a determination as to whether there has been genuine use of the contested registration during either relevant period, I refer not only to section 100 of the Act (quoted above) but also to the case law that discusses the need for clarity and precision in proof of use claims. The first case is that of *Awareness Limited v Plymouth City Council*, Case BL O/236/13 ("*Plymouth Life*"), wherein Mr Daniel Alexander Q.C. as the Appointed Person stated that:

"22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having

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<sup>7</sup> NE3

regard to the interests of the proprietor, the opponent and, it should be said, the public.”

32. And further at paragraph 28:

“28. .... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted.”

33. In addition, I refer to the case of *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, wherein Mr Geoffrey Hobbs Q.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.”

34. I note that in its evidence in reply and submissions, the applicant has discussed its own issues with the proprietor’s evidence. While noted, my assessment of use is to be based on my own consideration of the evidence before me. Having said that, I can confirm that I have given due consideration to the issues raised by the applicant.

35. In considering the evidence as a whole, I am of the view that it consists of a number of issues. I remind myself that in assessing genuine use, I am required to take a holistic approach to the evidence. However, in the present case I consider it necessary to discuss these individual issues as, ultimately, they all impact upon my overall conclusion.

36. I will first deal with the advertising evidence. I note that the proprietor has not provided any evidence as to its advertising spend during the relevant periods. On this point, I will say that the failure to provide an advertising spend is not necessarily

fatal to the proprietor's case. However, the issue is, in my view, compounded by the fact that outside of providing one example of a postal advertising campaign, the proprietor has not provided any supporting evidence. Further, the evidence itself is undated and the narrative evidence offers no explanations as to when this one example was produced or distributed. In my view, it is reasonable to suggest that such supporting evidence could have, for example, included information as to how many UK addresses the postal campaign was sent to or its method of distribution (such as speculative leafleting). Therefore, it has not been possible for me to determine the reach of these materials across the UK during either of the relevant periods.

37. As for the proprietor's website evidence, I appreciate that some of the screenshots are from within the second relevant period. However, the issue with this evidence is similar to the issue described in the preceding paragraph. In short, there is nothing in the evidence (be that the screenshots themselves or the narrative evidence that introduces them) that can be said to point to how many UK visitors accessed the proprietor's website during the relevant periods. Further, there is nothing to suggest any volume of sales that stemmed from UK consumers accessing the website during this time. As a result, the website evidence is not of any particular assistance when it comes to determining an actual level of use.

38. Turning to the actual goods sold, I consider it necessary to first address the turnover figure provided. I remind myself that the evidence sets out that since 2018 the proprietor sold between £1 million and £1.2 million worth of 'OMNI' products. As there is no end date provided in respect of these figures, I consider it reasonable to conclude that it is accurate up to and including the date of the witness statement. As this was in April 2023, it can readily be taken that the turnover covers figures from 2018 to April 2023. The first relevant period ended in May 2018 and the second relevant period concluded in October 2021. This means that, at best, only five months of the turnover figures are applicable to the first relevant period. Further, in respect of the second relevant period, over a year and a half's worth of the turnover figure provided can be said to be from after its conclusion. As no breakdown as to annual figures has been provided, it is not possible to determine with any accuracy how this evidence relates to either relevant period. In addition, I

remind myself that the narrative evidence does not specify that the turnover figures relate to the UK and, further, it is clear in that the proprietor operates in the global market. This is supported by the fact that some post-2018 invoices provided cover sales to companies in Qatar (though the goods were ultimately shipped to the UAE) and the website evidence that discusses products being launched at an event in Dubai. Lastly, I note that while the invoices before me include 'OMNI' branded goods, some goods covered are those that are not at issue here. As set out above, some goods cover 'OMNI' branded LED casings and cages for LED lights. Such goods do not fall within the category of the goods in the contested registration's specification. Such an issue may possibly indicate that the turnover figure provided is not limited exclusively to lighting products.<sup>8</sup> I am of the view that these issues have left it impossible for me to be able to accurately attribute how much of the turnover relates to either relevant period, to the UK market or to the relevant goods.

39. While the above issues are the primary concerns I have with the turnover evidence, I wish to mention the fact that Mr Edwards claims, in his narrative evidence, that the proprietor also operates by selling OEM product lines. As I have discussed above, it is my understanding that OEM products are those that are manufactured by one company but sold under the branding of another. On this point, it could very well be the case that the sales of OMNI products cover those sold via the OEM product lines and, therefore, would not have been sold to users under the OMNI branding.

40. In light of what I have said above in respect of the turnover evidence it should come as no surprise that I consider that it contains a significant lack of specificity as to how it can be said to relate to the relevant periods, the relevant territory (being the UK) and the relevant goods. Again, the turnover seemingly relates to global use, the period up to and including the date of the witness statement (being approximately a year and a half after the latest relevant period) and likely covers other goods not included in the relevant specification. These issues have rendered it impossible for me to determine with any accuracy how relevant to my present assessment the turnover is. As a result, I consider that it would be a purely

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<sup>8</sup> On this point, I note that the narrative evidence of Mr Edwards simply sets out that this figure stems from the sale of 'OMNI products' at large and not the specific LED lighting goods.

speculative exercise if I were to attempt to attribute this turnover to either relevant period, to the relevant goods and to the relevant territory. In the circumstances, I do not consider this is an appropriate approach to take.

41. Taking all of the above into account and bearing in mind not only section 100 of the Act but the case law of *Plymouth Life* and *Dosenbach* (cited above), I consider the turnover evidence to be wholly and insufficiently solid. On this point, I consider it reasonable to suggest that the relevant turnover (insofar as it relates to the relevant periods, goods and territory) is something that would have been known to the proprietor (or should have been known to it, at least) and, should have been provided in evidence. Without anything to support the turnover evidence, I do not consider it to be of any assistance to the present assessment.

42. As a result of the above, the only sufficiently solid evidence I have before me in respect of actual sales during the relevant periods is that the proprietor shipped 600 LED lighting products to various addresses across the UK during the first relevant period and just 19 during the second relevant period. I will determine whether such use is to be deemed genuine for each of the relevant periods in turn.

#### The first relevant period

43. I note that the applicant has provided evidence as to the size of the LED lighting market in the UK. This is taken from statistical information obtained from the 'Lighting Industry Association'. I note that during the first relevant period, the evidence sets out that the total approximate sales in the relevant market, as a whole, stood at just over £1 billion. It is my understanding that LED lights are, for the most part, relatively inexpensive goods. This would imply a very significant amount of goods being sold in the market at large during the first relevant period. Plainly, the sale of 600 items by the opponent during this time is very low when compared to a market of this size. In addition, the supporting evidence is, for reasons discussed above, of very little assistance because it does not point to the breadth of any activities actually undertaken during the relevant period or across the relevant market and territory. All of this being said, I remind myself that as per the case law cited above, use need not be quantitatively significant in order for it to

be deemed genuine. Instead, use may be genuine if it can be said to be demonstrative of a genuine attempt to create or preserve a market share for the relevant goods. In my view, and despite my criticisms of the evidence before me, I consider that the sale of 600 products to UK customers during the first relevant period sits *just* above the threshold in order for it to be deemed genuine as it reflects an attempt by the proprietor to create a market share in its goods. As a result, the application for revocation fails in respect of the first relevant period. That being said, the nature of the evidence before me means that the same finding does not automatically apply to the second relevant period, which I will discuss further below.

#### The second relevant period

44. As above, the only sufficiently solid evidence of use I have for the second relevant period is the sale of 19 'OMNI' branded lighting goods. Clearly, this represents a vanishingly small level of sales. Despite what I have said above about use not needing to be quantitatively significant, I am of the view that this level of sales falls far short of a genuine attempt to create or preserve a market share for the relevant goods. On this point, I appreciate that turnover and sales figures are not the only forms of evidence that can prove genuine use. However, I remind myself that the supporting evidence of advertising and the proprietor's websites are not particularly compelling either. In my view, in order for the proprietor's evidence to overcome the vanishingly small level of sales, it would have needed to file satisfactory evidence in respect of its marketing efforts during the second relevant period or something else that could indicate a stable presence on the market. Plainly, it has not done so and I hereby find that the proprietor's evidence falls far short of proving that it has genuinely used its registration throughout the second relevant period.

45. As a result of the above, the contested registration is hereby revoked, with effect from 24 October 2021, for all of the goods in its specification.

46. I will proceed now to consider the application for invalidity.

#### Application for invalidity

47. Section 3 of the Act has application in invalidation proceedings pursuant to section 47 of the Act, which reads as follows:

“47. –

(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

[...]

(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) [...]

(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.”

## **Section 3(1) case law and legislation**

48. Section 3(1) of the Act provides as follows:

“3(1) The following shall not be registered –

(a) [...]

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

49. As above, the relevant date for determining whether the contested registration is objectionable under sections 3(1)(b), 3(1)(c) and 3(1)(d) is its deemed filing date, being 20 February 2013.

50. I bear in mind that the above grounds are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c) but still be objectionable under section 3(1)(b): *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P at [25].

51. The position under the above grounds must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect: *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04. I have no submissions or evidence from either party as to who the relevant public will be. The sole term in the contested registration is “LED lighting”. For the most part, LED lighting goods will be selected by the general public at large. I say this because the term can cover household items such as LED lightbulbs or lamps. In addition, LED lighting can include complex setups for use in large venues such as arenas and stadiums. As a result, the average consumer base will also consist of professional users. In my view, members of the general public will select the goods after giving consideration to factors such as fittings used (bayonet or screw, for example), longevity of the light, efficiency and brightness/colour. These factors will result in the members of the general public paying a medium degree of attention. As for the professional user, I consider that they will consider these same factors but may also give attention to compatibility with the overall rig and ease of control. These factors together with the fact that the goods will be important to the user’s business, are such that the professional user will pay an above medium (but not high) degree of attention.

### **Section 3(1)(d)**

52. I will first consider the application under section 3(1)(d) of the Act. Under this ground, the applicant claims that the marks in the contested registration, being ‘OMNI’ and ‘omni’, have become customary in the current language or in the bona fide and established practices of the trade in respect of the goods for which it is registered.

53. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM*, Case T-322/03, the General Court summarised the case law of the Court of Justice of the European Union under the equivalent of s.3(1)(d) of the Act, as follows:

“49. Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language

or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 31, and Case T-237/01 *Alcon v OHIM – Dr. Robert Winzer Pharma (BSS)* [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public's perception of the mark (*BSS*, paragraph 37).

50. With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (*BSS*, paragraph 38).

51. Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, *Merz & Krell*, paragraph 35, and *BSS*, paragraph 39).

52. Finally, signs or indications constituting a trade mark which have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, *Merz & Krell*, paragraph 37, and *BSS*, paragraph 40)."

54. In light of the case law above, the relevant question is whether, on the relevant date (20 February 2013), the registration had become customary in the current language or in the bona fide and established practices of the trade to designate the goods for which the marks are registered. That question must be based on the

perception of the average consumer of the goods in the UK, who I have identified at paragraph 51 above.

55. My assessment of the present ground relies on the evidence before me. Having considered the evidence in support of the present ground, it is noted that the applicant seeks to rely on the fact that its own mark 'OMNI-LED' was objected to in the first instance. I have set out above that this is not a relevant factor to the question as to whether the contested registration is objectionable. Even if such an argument did carry any weight, the relevant assessment here is based on the position in the trade as at the relevant date (being 20 February 2013), which, as above, is some eight years prior to the filing date of the applicant's own mark. Therefore, even if 'OMNI' had become customary in the trade by the filing date for the applicant's OMNI-LED mark (and I note there is no evidence of this), it does not assist the applicant. Given that this represents the entirety of the applicant's evidence in support of this ground, I can conclude with this ground at this point by simply setting out that there is nothing filed by the applicant that can support a claim that, by the relevant date, 'OMNI' became customary in the language or in the bona fide and established practices of the trade. As a result, I find that the applicant has failed to prove its claim and, therefore, the contested mark is not objectionable under section 3(1)(d) of the Act.

### **Section 3(1)(c)**

56. Section 3(1)(c) prevents the registration of marks which are descriptive of the goods, or a characteristic of them. The case law under section 3(1)(c) (corresponding to article 7(1)(c) of the EUTM Regulation, formerly article 7(1)(c) of the CTM Regulation) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

"91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks ( OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699 , paragraph 19; as regards Article 7 of Regulation No 40/94 , see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18, paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461, paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94. Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia, *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44, paragraph 45, and *Lego Juris v OHIM* (C-48/09 P), paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley*, paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign

could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie*, paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56)."

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods

or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].”

57. In considering the section 3(1)(d) ground above, I found that none of the evidence filed by the applicant was of any assistance to that ground. This is because it was aimed at demonstrating the UK IPO’s first instance objection to the applicant’s own mark rather than focus on the contested registration itself. For this same reason, the evidence filed is of no assistance here either. However, unlike the section 3(1)(d) ground, applications for invalidity under section 3(1)(c) may succeed without evidence.<sup>9</sup>

58. The applicant’s pleaded case under this ground is that the word in the marks of the contested registration (being varying presentations of the word ‘OMNI’)<sup>10</sup> is used as an abbreviation of the word ‘omnidirectional’ which is defined as ‘goods which can be used to receive or transmit signals in all directions’. As such, ‘OMNI’ is said to be descriptive of characteristics of LED lighting goods which are capable of emitting light in all directions.

59. In order for the pleaded claim to succeed, I would need to be satisfied that a significant proportion of consumers would, upon seeing the word ‘OMNI’, immediately think of the word ‘omnidirectional’. There is nothing in the evidence provided by the applicant to suggest what proportion of consumers in the UK (if any) would believe ‘OMNI’ was short for ‘omnidirectional’. Without any evidence in support of this point, my assessment must be based on what I perceive to be the inherent position. In short, I do not consider that consumers would readily think that ‘OMNI’ was short for ‘omnidirectional’. On this point, I consider it reasonable to suggest that consumers would be aware of a multitude of other words that begin with the prefix ‘omni’. While ‘omnidirectional’ may be one of these words, consumers are just as equally likely to call to mind words such as ‘omnipresent’, ‘omnipotent’, ‘omniscient’, ‘omnivore’ and ‘omnibus’. Alternatively, I consider it

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<sup>9</sup> On this point, I appreciate that evidence is often of assistance, especially in circumstances where the mark and goods at issue are technical in nature. However, I do not consider that to be the case here.

<sup>10</sup> For the sake of completeness and ease of reference, I will refer to the marks in the singular and the word at issue as, simply, ‘OMNI’.

more likely that as a result of the common use of the prefix 'omni' on words used in the English language, consumers may also believe 'OMNI' to be its own word, meaning 'all'.<sup>11</sup> Taking all of this into account, I am not prepared to find that a significant proportion of consumers would, upon seeing 'OMNI', immediately think of 'omnidirectional'. As such, and in light of how the applicant has pleaded its case,<sup>12</sup> my finding that the word 'OMNI' will not so obviously or directly be connected with 'omnidirectional' means that this ground must fail.

60. In addition to the above, it is noted that in its submissions, the applicant argued that 'OMNI' describes lighting goods that have multi-purpose uses in different settings. This argument was not put forward in pleadings and, as such, does not form part of the applicant's pleaded case under the present ground. Ordinarily, I would not consider it necessary to discuss this argument any further. However, even if it was appropriately pleaded, it would have been of no assistance. In short, there is nothing before me to suggest that the word 'OMNI' would be taken as meaning that the goods at issue are multi-purpose goods. Again, 'OMNI' is a prefix to many other words and, even understood on its own, 'OMNI' would not be readily understood as meaning 'multi-purpose'.

61. Taking all of the above into account, I find that the contested registration is not objectionable under section 3(1)(c) of the Act meaning that the application for invalidity reliant upon this ground fails in its entirety. I will now proceed to discuss the section 3(1)(b) ground.

### **Section 3(1)(b)**

62. The applicant's pleadings under this ground are, like the section 3(1)(c) ground above, reliant upon the fact that 'OMNI' is a word used as an abbreviation of the word 'omnidirectional'. Therefore, the applicant claims that it is not capable of being origin-specific and so is devoid of distinctive character. As above, I do not consider that the applicant has proven that a significant proportion of consumers would

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<sup>11</sup> I also appreciate that some consumers may attribute no meaning to the word whatsoever, instead believing it to be a made-up or foreign language word.

<sup>12</sup> Namely that 'OMNI' would be seen as short for 'omnidirectional'.

readily see 'OMNI' as an abbreviation of 'omnidirectional'. Instead, it will either be understood as a commonly used prefix to many words or a word that possesses its own meaning. Again, in light of how the applicant has pleaded its case, my finding that the word 'OMNI' will not so obviously or directly be connected with 'omnidirectional' means that this ground must fail.

63. As a result, I find that the contested mark is not objectionable under section 3(1)(b) of the Act meaning that the application for invalidity reliant upon this ground fails in its entirety.

## **CONCLUSION**

64. While the invalidation application based on section 3(1) has failed, the applicant has succeeded in respect of its revocation application under section 46(1)(a). As a result, the contested registration is not declared invalid but, instead, is hereby, subject to any successful appeal against my decision, revoked in respect of all goods for which it is registered with an effective revocation date of 24 October 2021.

## **COSTS**

65. In the ordinary course of proceedings, it is the successful party that is entitled to a costs award. On the fact of it, it may appear as though the applicant has succeeded in full because it has successfully revoked the contested registration. Despite this, I am of the view that both parties have enjoyed an equal degree of success on the basis that while the applicant has successfully revoked the contested registration, the proprietor has successfully defended the invalidity application against it. I consider that the appropriate course of action in respect of costs is for both parties to bear their own costs. As a result, I hereby make no order as to costs.

**Dated this 26<sup>th</sup> day of November 2024**

**A COOPER**  
**For the Registrar**