

TRADE MARKS ACT, 1996

Decision in Hearing

IN THE MATTER OF an application for the revocation of the registration of Trade Mark No. 150207 and in the matter of the registered Proprietor's opposition thereto.

151 PRODUCTS LIMITED

Applicant for Revocation

NEIL MOYNIHAN

Proprietor

The registered trade mark

1. Neil Moynihan (hereinafter "the Proprietor") of 13 Charlemont Heights, Rochestown, Cork, Ireland is the registered Proprietor of the trade mark ELBOW GREASE, which is registered under No. 150207 in respect of "*Cleaning, polishing, scouring and abrasive preparations, all included in Class 3 and none containing grease. Preparations included in Class 3 for use in degreasing; soaps; industrial cleaners none containing grease.*".
2. The application was filed with this office on 23 September, 1992. Publication of the registration of the mark appeared in the Journal on 6 April, 1994.

The application for revocation

3. On 10 September 2019, 151 Products Limited, of The Old School House, Bengal Street, Manchester, United Kingdom (hereinafter "the Applicant"), made an application for the revocation of the registration pursuant to the provisions of Section 51 of the Trade Marks Act, 1996 ("the Act") and Rule 41 of the Trade Marks Rules, 1996.
4. The Applicant grounds its application on the claim that within the period of five years following the date of publication of the registration the mark was not put to genuine use in the State, by or with the consent of the Proprietor, in relation to the goods for which it is registered, and there are no proper reasons for such non-use. The Applicant also grounds its application on a claim that use of the mark has been

suspended for an uninterrupted period of five years and there are no proper reasons for such non-use. Accordingly, the Applicant requests the Registration be removed in its entirety from the Register.

Notice of Opposition

5. On 16 July 2020 Mr. Neil Moynihan, proprietor of the trade mark at issue and sole shareholder and managing director of Cleanstyle Ltd, trading as Moynihan & Moynihan, filed a Statutory Declaration dated 29 June 2020. He states his Company has been authorised by him to use the trade mark ELBOW GREASE for various cleaning products, including those for which the mark is registered in Class 3.
6. Mr Moynihan says he has been selling cleaning products under the brand Elbow Grease in Ireland since 1986. He says the trade mark ELBOW GREASE was registered in 1992, originally by Cleanstyle Ltd; it was assigned to him in 2009; and that he or his Company have continuously sold products under the trade mark in Ireland since it was registered. He attaches at Exhibit 1 two photographs (claimed to have been taken in 2019) of ELBOW GREASE products.
7. Mr Moynihan explains that a UK-based company (Envirokem) keeps the formulation for ELBOW GREASE products and while Envirokem used to manufacture and supply products (including ELBOW GREASE products) to him, its role in recent years is to subcontract and liaise with other manufacturers to source, produce and supply ELBOW GREASE products. The current manufacturer of ELBOW GREASE is Assured Solutions Limited in England.
8. Mr Moynihan states ELBOW GREASE products have been one of his biggest sellers over the years and is intrinsic and essential to the success of his business. He attaches at Exhibit 2 a list purporting to show thousands of litres of ELBOW GREASE products marked as “goods out” (each entry with an unique reference number) between April 2014 and March 2019.
9. He attaches at Exhibit 3 what he states is a small sample of randomly selected invoices, payment confirmations and delivery confirmations (approximately 10 per annum) taken from the years 2015-2019. The sales invoices, all of which refer to ELBOW GREASE, show sales in counties Cavan, Meath, Westmeath, Laois,

Leitrim, Tipperary, Mayo, Wexford, Donegal, Offaly, Monaghan, Dublin, Limerick, Waterford, Kildare, Louth, Cork, Roscommon and Galway. The invoices are made out to numerous customers across diverse business areas including general retail, construction, education, manufacturing, engineering, animal feed, fisheries, local government, fitness and recreational, and individuals.

10. He says that in order to satisfy orders received in 2018 he ordered 10,000 litres of ELBOW GREASE and in 2019 he ordered 8,000 litres. He attaches at Exhibit 4 evidence, by way of invoices referencing ELBOW GREASE, to support this. He also attaches, at Exhibit 5, documentation relating to the transportation of the goods from the UK to his warehouse in Ireland. And at Exhibit 6 he attaches photographs of various products in storage in his warehouse, though the vast majority of the photographs do not contain any mention of ELBOW GREASE and all are undated.
11. Mr Moynihan outlines the sales network through which his Company's products are sold and attaches at Exhibit 7 samples of product specification sheets and product safety data sheets for third parties, and sales information used by his sales team, all of which mention ELBOW GREASE.
12. He also attaches (at Exhibit 8) emails between sales reps and head office support staff.
13. Mr Moynihan states the words "the Elbow Grease People" is prominently displayed on the labels of all his products. This, he explains, is because his ELBOW GREASE mark has been used so extensively, is so well known and of such significance to his business. He also states he has used "Dychem The Elbow Grease People" as a trading style or logo on various products he has supplied for over 34 years.

The law

14. The relevant provisions are in Section 51 of the Act, and are written in the following terms:

"(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 publication of the registration, the trade mark has not been put to genuine use in the State, by or with the consent of the proprietor, 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;

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

(3) The registration of a trade mark shall not be revoked on the ground mentioned in paragraph (a) or (b) of subsection (1) 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; but, for this purpose, any such commencement or resumption of use occurring after the expiry of the five year period and 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 Controller or the Court is satisfied that the grounds for revocation existed at an earlier date, that date.*

Relevant Period

15. In these proceedings, in light of the publication of the registration of the contested mark on 6 April 1994 and the application for its revocation having been made on 10 September 2019, the period in which the mark must have been put to genuine use is from 10 September 2014 to 9 September 2019, with the period between 10 June 2019 and 9 September 2019 being disregarded if use of the mark had been suspended and only resumed during that three-month period.

The Hearing

16. The Proprietor chose to rest its case on the evidence he filed, while the Applicant for revocation attended the Hearing on 6 July 2021. At the Hearing the Applicant was represented by Mr Simon Gray, Trade Mark Attorney of Tomkins and Co.

17. Mr Gray made a three-pronged attack on the mark: (i) that Mr Moynihan is not the proprietor of the mark he is using, and equally cannot consent to his company using a mark that he is not the proprietor of; (ii) the mark in the form used by Mr Moynihan is substantially different to the mark that is registered and is being used in such a way that it substantially alters the distinctive character of the mark; and (iii) the mark has not been used on all the goods as registered.

18. Mr Gary's first line of attack centred on the Proprietor's use of product labels (as submitted in evidence) that as well as showing the words ELBOW GREASE, also contain the terms "Dychem's Original" and "The Elbow Grease People", as reproduced below.



19. He argued this wording clearly states that the product is a DYCHEM product that is in no way associated with, produced or owned by Mr. Moynihan. He maintained the company Dychem is a UK registered company that trades in chemical and cleaning products, who has previously registered the trade mark DYCHEM THE ELBOW GREASE PEOPLE in the UK. He attached details of the registration in the UK of the company DYCHEM Limited. He also attaches an extract from the UK trade mark register showing the registration of "DYCHEM THE ELBOW GREASE PEOPLE" in March 1983.

20. He argued the declaration of Mr. Moynihan does not provide any indication of a relationship or ownership of the DYCHEM branded product and trade mark by Mr Moynihan and that Mr Moynihan failed to provide any proof of having acquired the rights in the Dychem trade mark or any authorisation from Dychem transferring ownership of their mark ELBOW GREASE. Furthermore, he noted that in his

declaration Mr Moynihan makes clear references to the fact that he or his company are selling DYCHEM products.

21. Mr Gray referred to Mr Moynihan's statement in the final paragraph of his Declaration that he has been using "Dychem The Elbow Grease People" as a trading style for over 34 years. However, Mr Gray argues this claim is not supported by actual proof of such use, nor is it the basis for his right to claim to be able to use the term DYCHEM. And, if the Proprietor is using this term for as long as is claimed, one would expect him to have registered it as a trade mark. Mr Gray argued Mr Moynihan is not using the term in the context envisaged under Section 51, but rather he is a distributor of Dychem products in Ireland.
22. Furthermore, Mr Gray argued that nothing submitted by Mr. Moynihan establishes why he uses the term DYCHEM, the name of an unrelated company in the UK, or why he uses another party's name on a product he claims to have produced through a UK manufacturer. If he were to have original products produced by a manufacturer, as he has claimed, then he would not have used the term DYCHEM - the name of another party to whom he has failed to establish any relationship or connection to.
23. Mr Gray contended the references to DYCHEM in the evidence filed by Mr. Moynihan makes it clear the products he is selling are DYCHEM owned products. Accordingly, Mr Gray argued Mr Moynihan is not the proprietor of the mark ELBOW GREASE, but is, at best, merely a distributor of the products of Dychem.
24. Mr Gray maintained that Mr Moynihan is not the proprietor of the actual ELBOW GREASE branded products sold in Ireland, and thus he is not using his trade mark as registered, which means one of the requirements to establish use under Section 51 has not been met. Therefore, Mr. Moynihan has failed to provide proof of genuine use of the mark in the state within the relevant period as the proprietor of the mark he is using.
25. In support of his arguments Mr Gray took me through the exhibits submitted by the Proprietor, highlighting the use of the word Dychem throughout.

26. Mr Gray also took issue with other aspects of the Proprietor's evidence, citing the lack of proof of the contractual or business relationship between the Proprietor and the entities contracted or subcontracted to manufacture and supply ELBOW GREASE products.
27. On this point I am satisfied that Mr Moynihan has clearly outlined his operation and identified the company he uses to produce goods to his specific formulae. To defend his registration in these proceedings there is no requirement for him to reveal the contractual or business arrangements he has with any of his suppliers, as they have absolutely no bearing on whether Mr Moynihan used the contested mark in the relevant period.
28. Mr Gray conceded the invoices submitted by the Proprietor do reference ELBOW GREASE but argued they cannot be taken on their own. He contends they must be viewed in the context of the materials submitted by Mr. Moynihan as a whole, which points to the sale of DYCHEM products. He argued if the sales were of Mr. Moynihan's own products then one would expect he would have exhibited samples of such products and labels applied to such products which uses the contested mark and not the DYCHEM brand.
29. I found Mr Gray's arguments on this point to be novel and extremely interesting, but not compelling for the reasons I outline below.
30. The company mentioned by Mr Gray as being producers of chemicals is DYCHEM Limited with an address in Hertfordshire. It was incorporated in the UK in October 1991, five years after the Proprietor's claimed first use of its then unregistered mark. The company that Mr Gray points to as having registered the mark "DYCHEM THE ELBOW GREASE PEOPLE" in the UK is Dychem International (UK) Limited of Bedfordshire. That UK trade mark registration was removed from the UK trade mark register in September 2004. There is nothing to suggest these two Dychem companies are one and the same as claimed by Mr Gray. He spoke about the lack of agreement between the Proprietor and the UK-based Dychem company(s) and of Mr Moynihan failing to provide any proof of having acquired the rights in the Dychem trade mark or any authorisation from Dychem transferring ownership of their mark ELBOW GREASE.

31. He seemed to suggest there was a requirement for Mr Moynihan to seek permission or enter into a formal agreement with the UK-based Dychem company(s) before seeking to use or register the contested mark. There is no basis for such claims. There is nothing to suggest, at the time the Proprietor sought registration for its mark, that there was someone else who had rights under that mark in Ireland. Whether there is one or two Dychem companies in the UK, neither is a party to the matters at hand and neither has, or appear ever to have had, any rights to the ELBOW GREASE trade mark in Ireland, or ever carried out business or became known in the State. Furthermore, the Proprietor's mark has been on the Register since 1994 and has never been the subject of invalidity proceedings based on unrightful ownership. So, I reject Mr Gray's insinuation regarding Mr Moynihan's acquisition and ownership of his mark.

32. I accept Mr Gray's argument that the inclusion of the word Dychem and the phrase "The Elbow Grease People", as depicted on the product labels submitted in evidence by the Proprietor, conveys the message that the goods are from Dychem, who are the elbow grease people. The Proprietor addressed this by stating it has used "Dychem The Elbow Grease People" as a trading style or logo for over 34 years. But curiously, he does not explain how he came to adopt that trading style or logo.

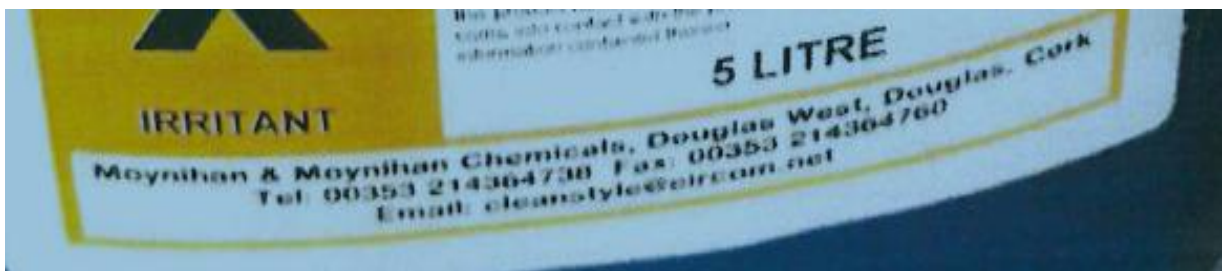
33. There is an alternative explanation whereby the Proprietor did originally source products from, or used a formula invented by, a UK company called Dychem. Having built a market and reputation for such products in Ireland, and with the original producers of the formula no longer in business¹, the Proprietor sourced his products elsewhere using the same trusted formulae. He decided to refer to Dychem as part of his trading style to inform his Irish customers that the products he was selling continued to be manufactured using the original Dychem's formula.

34. This alternative narrative is pure conjecture on my part. But whatever the explanation for the Proprietor's use of these elements on its labels, the applicant for

¹ The home page of the www.dychem.co.uk website clearly states that Dychem International (UK) Ltd (the owners of the expired UK trade mark DYCHEM THE ELBOW GREASE PEOPLE) went into liquidation in October 1992.

revocation has not been able to show that someone, other than the Proprietor, is associated with the products offered for sale in Ireland under the trade mark ELBOW GREASE. The evidence clearly shows the Proprietor has used the mark during the relevant period. Every one of the many invoices, orders and delivery dockets, which are made out to numerous customers across the State, refer to Elbow Grease. None reference Dychem or The Elbow Grease People.

35. There is nothing to identify what or who Dychem are or where they operate from. In contrast, each of the product labels submitted in evidence clearly identify the source of the goods as the Proprietor's company, as follows:



36. Furthermore, and importantly, the Proprietor's goods are not produced by a company called Dychem.

37. Mr Gray argued that the portion of the label containing the Proprietor's address and contact details merely identified the Proprietor as the distributor of the goods, not the origin. I disagree. There are numerous businesses that buy in finished products made to their exacting specifications and sell them under their own brand. For example, all supermarkets do it in respect of their own-branded goods. There is never anything to identify the producer of the goods, which will contain the supermarkets own trade mark, but the labelling may state the product was manufactured and packed especially for Dunnes Stores / Tesco. There is nothing unusual or wrong with this and it does not cast any doubt as to the legitimacy of the use by these stores of their respective Dunnes Stores and Tesco trade marks.

38. The important issue regarding such goods is that the Proprietor of the trade mark that appears on the goods is wholly responsible for the quality and safety of the goods, that the goods are fit for purpose and that, should things go wrong, it is the proprietor that is liable to be sued. There is nothing in the Proprietor's use of its mark

ELBOW GREASE to suggest that it does not take full responsibility for all these matters.

39. I am satisfied that, whatever additional materials are contained on the product labelling, the ELBOW GREASE mark identifies the Proprietor as the source of the goods. Consumers who have used ELBOW GREASE products know exactly whom to turn to in order to complain or transact repeat business – the Proprietor. In my opinion, irrespective of whether or not the consumer reads the product label as indicating some connection between an entity called Dychem and the trade mark ELBOW GREASE, the consumer will still go to the Proprietor if there are any issues with the goods.

Genuine Use

40. Mr Gray claimed the use of the mark by the Proprietor was not genuine. I have already found that the Proprietor did use its mark during the relevant period, but was such use “genuine”?

41. The Act does not define the term “genuine use” for the purposes of Section 51 but the concept has been considered by the Court of Justice of the European Union (CJEU) in *ANSUL*², wherein the Court stated that:

“... there is 'genuine use' of a trade mark where the mark is used in accordance with its essential function, which is to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services; genuine use does not include token use for the sole purpose of preserving the rights conferred by the mark. When assessing whether use of the trade mark is genuine, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, particularly whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark, the nature of those goods or services,

² *Ansul BV v. Ajax Brandbeveiliging BV* (Case No. C-40/01)

the characteristics of the market and the scale and frequency of use of the mark.”

42. There is ample other judgments emanating from the CJEU to assist me in answering this question. The CJEU has set out what is required in order to establish genuine use of a trade mark insofar as revocation proceedings are concerned. These include *Ansul*³, *La Mer*⁴, *Silberquelle*⁵ and *Sunrider*⁶ in which the following factors were identified as the criteria to be assessed by competent authorities:

- i. Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark. (*Ansul* at paragraph 35)
- ii. The use must be more than merely token; which means in this context that it must not serve solely to preserve the rights conferred by the registration. (*Ansul* at paragraph 36)
- iii. 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, without any possibility of confusion, to distinguish the goods or services from others which have another origin. (*Ansul* at paragraph 36; *Sunrider* at paragraph 70; *Silberquelle* at paragraph 17)
- iv. The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market. (*Ansul* at paragraphs 37-38; *Silberquelle* at paragraph 18)
- v. Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is not a *de minimis* rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating 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. (*Ansul* at paragraph 39; *La Mer* at paragraphs 18 and 24-25; *Sunrider* at paragraph 72)
- vi. All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of

³ *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439

⁴ *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159

⁵ *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759

⁶ *Sunrider v Office for Harmonisation in the Internal Market* (C-416/04 P) [2006] E.C.R. I-4237

the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide. (Ansul at paragraphs 38-39; La Mer at paragraphs 22-23; Sunrider at paragraphs 70-71)

43. It is clear from the foregoing that “genuine use” may be equated with actual use, provided that such use has been more than mere token use and that the use in question has brought the mark to the notice of the relevant class of consumers of the goods for which it is registered. It is not necessary for the purpose of proving genuine use of a mark to establish that the use in question has been continuous or extensive or that it has resulted in the mark becoming well-known to the relevant consumers. It is sufficient to show that the mark has been used as a trade mark for the goods within the relevant period and that it has, as a result, come to the notice of consumers of those goods.
44. Mr Gray argued the submissions and materials put forward by Mr Moynihan fails to demonstrate genuine use of the said Mark by way of commercial exploitation nor as a genuine attempt to create a market share for the goods and services sold under the mark. He maintained the actions of Mr. Moynihan is to sell the products of a third party only.
45. He directed me to Ansul⁷, wherein the Court reaffirmed the requirements for proving use of a mark as set down in Article 10(3) of the EU Trade Marks Directive, which was upheld in subsequent cases. Proof of genuine use must consist of indications concerning the nature, place, time and extent of use. He noted the Court in STRATEGI⁸ held these requirements to be cumulative, so that a party cannot claim to have established use in one or more categories but must establish proof of use in the five year period in all four categories in order to be held to have established genuine use of the mark.
46. Mr Gray took me through each category. As regards the nature of use of the contested mark, he relied on arguments already advanced in respect of the use of the word Dychem, which he claimed showed the Proprietor is using a third party's trade mark. He argued use of a mark must also be clear and precise so that the

⁷ C-40/01, Ansul BV v Ajax Brandbeveiliging BV (Minimax), (2003) RPC 40 CJEU

consumer knows the origin of the goods sold under a mark and there is no ambiguity. The fact that the mark claimed to be used by Mr. Moynihan is dominated by the distinctive DYCHEM element means that the consumer cannot know the origin of the goods sold under the mark.

47. I have already considered and rejected this line of argument.

48. As regards place of use, Mr Gray argued that while samples of invoices were exhibited with the declaration of Mr. Moynihan in which addresses in Ireland are references, when such documents are considered in the context of all materials submitted, there is no use of the said Mark by Mr. Moynihan as the proprietor of the said Mark. I reject this argument. The orders, invoices and delivery documents clearly identify the consumer and the place to which the goods bearing the contested mark were delivered.

49. Mr Gray argued there has been limited use within the relevant five year period. He pointed to what he regarded as a low number of customers who purchased the products, the absence of repeat purchases over the years and the fact that Mr. Moynihan appears not to engage in marketing and advertising – all clear indications that genuine use in relation to the goods claimed in Class 3 has not been proved. This, he claimed, shows the mark was used for the sole purpose of preserving the rights conferred by registration and hence it has to be regarded as token use.

50. Mr Gray argued that not only has the Proprietor not produced any proof of advertising but he has also failed to produce any evidence that the products marketed under the ELBOW GREASE mark can actually be purchased by the general public in retail stores, hardware stores, super markets or online. Therefore, use of the mark has not been in accordance with the definition of genuine use as laid down by the General Court of the European Union where in Case T-174/01⁹ that *"real use of the earlier mark on the marketplace, so as to draw the attention of potential consumers to the goods or services effectively offered under the mark"*.

⁸ Case T-92/09, STRATEGI, EU:T:2010;424

⁹ Jean M. Goulbourn v OHIM — Redcats SA, p. 41

51. Mr Gray is correct in that the Proprietor did not submit any evidence regarding marketing or advertising. But this does not equate to use of the mark being token in nature. It is accepted that token use is that which serves no other purpose other than preserving the rights conferred by the mark. Internal only use is considered token use. The Proprietor's goods may not be available for purchase by the general public in retail or hardware stores, or supermarkets or online, but that does not prove the use is token. It is clear from the evidence of use submitted that the Proprietor's goods are hazardous and are sold in large containers, and that the Proprietor's target customers are occupiers of large premises or are engaged in activities that require them to use industrial levels of cleaning products.
52. The Proprietor outlined his business model in his Statutory Declaration which referred to his network of sales reps that travel the country seeking new and supporting existing customers. This old-style model appears to be working for the Proprietor. Taking these factors into account, I find the absence of an online presence, while unusual, is not indicative of token use.
53. Proprietors whose marks are attacked for non-use are not required to submit evidence in respect of every transaction over the 5-year period. What they must submit is evidence to prove genuine use during the period in question. The absence of evidence of repeat customers demonstrates nothing of probative value. If anything, it shows the Proprietor did not rely on a small number of customers for repeat sales and demonstrated the widespread geographic extent of use of the mark. I am satisfied the Proprietor submitted ample evidence to allow me to conclude that genuine use of the mark was made during the relevant period.
54. Finally, as regards the extent of use Mr Gray again returned to his claim the Proprietor was not using his mark but one belonging to a third-party. I have already considered and rejected this line of argument.
55. I am satisfied the evidence of use submitted in support of maintaining the registration is sufficient to allow me to tick all the boxes identified by the Court. I am satisfied the use made of the mark is consistent with the essential function of a trade mark and that it has been used to guarantee the origin of the goods as being the

Proprietor. Accordingly, it has performed the essential function of a trade mark by serving to distinguish the Proprietor's goods from others which have a different origin.

56. The evidence shows the mark has been used throughout the State during the relevant period by the Proprietor and that its use has created and maintained a share in the market for most of the goods for which it is registered. The continuous level of sales clearly indicates that Irish consumers are aware of the mark ELBOW GREASE and the cleaning products upon which it is used. Therefore, I am satisfied the mark has been put to genuine use in the State and I reject the application for revocation on this ground.

57. I now turn to the second line of attack. Mr Gary noted that while Section 51(2) allows for use of a mark in a form that differs from the form in which it is registered, it only does so where such use does not substantially alter the distinctive character of the mark, as registered. He maintained the materials submitted in the Declaration of Mr Moynihan and accompanying exhibits shows use of the contested mark in a number of ways, namely DYCHEM ELBOW GREASE, DYCHEM'S ORIGINAL ELBOW GREASE and THE ELBOW GREASE PEOPLE.

58. Mr Gray submitted that the invented term DYCHEM is the dominant and distinctive element of the first two versions of the mark. As regards the term ELBOW GREASE he noted that in the context of the goods upon which it is claimed to have been used, the mark has limited distinctive character. According to Mr Gray the inclusion of a third party's trade mark (DYCHEM), in circumstances where it is the dominant distinctive element of the mark, alters the identity of the marks. He argued this substantially alters the distinctive character of the contested mark, and therefore such use does not come within the requirements of Section 51(2). Therefore, the Proprietor has failed to establish use of the contested mark as actually registered.

59. He maintained the third form of the mark as outlined in the materials submitted by Mr Moynihan (The Elbow Grease People) does not constitute use of the mark in a trade mark context. The use is at best promotional or advertising use of a phrase or slogan and so it is not use in a trade mark context as required under Section 51.

60. He maintained the manner in which the contested mark is used on the labels is not as a trade mark, as there is another dominant element which acts as the identifier for the goods in question, namely the DYCHEM brand. Furthermore, the term "The Elbow Grease People" does not act as a distinctive identifier of origin and therefore does not perform the function of a trade mark. Also, the manner in which it is used alters the distinctive character of the said Mark as registered and does not come within the provisions of Section 51(2).
61. He submitted that the manner of use of the mark is in forms which substantially alter the distinctive character of the mark and so cannot be relied upon as proof of use as required under Section 51.
62. I disagree. Firstly, whether or not the term ELBOW GREASE has limited distinctive character in respect of the goods for which it is registered is something I need not concern myself with as these proceedings solely concern an application for revocation grounded on specific provisions of Section 51 of the Act.
63. Secondly, the addition of taglines, slogans and laudatory claims alongside trade marks is common in the marketplace and cannot be taken to mean the form of the trade mark as registered has changed.
64. Thirdly, I am satisfied that I need do no more than conduct a simple comparison between the mark in the form it appears on the Register and the form in which it is used. In doing so I need not pay any attention to any additional materials that may appear on product labelling. The issue is whether or not the form in which the mark is used is the same form in which it is registered.
65. In this case the trade mark as registered is "ELBOW GREASE" in plain upper-case lettering. It appears in unaltered form on the product labelling, delivery dockets, invoices and product safety leaflets submitted in evidence, albeit at times using some lower-case letters, which I do not consider to be of determinative significance. Therefore, I am satisfied the mark as used is ELBOW GREASE and that it is used in a form that is identical to that in which it is registered. I am also satisfied that whatever distinctive character is present in the mark on the Register, it is retained in

the mark in the form in which it has been used. Accordingly, I reject the application for revocation on this ground.

66. Turning now to the final line of attack: that the Proprietor has not used the mark on the goods for which it is registered.

67. The mark is registered in respect of "*Cleaning, polishing, scouring and abrasive preparations, all included in Class 3 and none containing grease. Preparations included in Class 3 for use in degreasing; soaps; industrial cleaners none containing grease.*". Mr Gray argued the specification is rather broad and includes various cleaning products that have numerous applications in different contexts. He contended it is an established rule that when the trade mark has been registered in respect of goods for which it is not possible to make clear subdivisions within the relevant Class, the evidence of genuine use for those goods and services must cover all the goods covered by the Class in question, or at least by the literal meaning of the words used in the specification (T-383/18, *Sta*Ware EDV Berating GmbH v EUIPO*). The evidence submitted relates only to a single product used for removing stains from washable surfaces. This represent only one of the products covered by the wording of the specification and it could not be considered sufficient to grant Mr Moynihan exclusive rights over the mark ELBOW GREASE in relation to all the goods claimed in Class.

68. I am satisfied the Proprietor's use of the mark extends to the cleaning, polishing, scouring and abrasive preparations mentioned. Single abrasive preparations are, depending on their composition, capable of cleaning, polishing and scouring, so I am satisfied the very limited number of products offered under the contested mark can perform these functions.

69. However, the Proprietor has not adduced any evidence to suggest the mark having been used in relation to soaps. While soaps may be a subset of cleaning products, they are mentioned separately in the specification of goods. In order to defend the registration for soaps the Proprietor must provide evidence of use of the mark on this class of goods. He has failed to do so. Also, soaps are used for personal hygiene purposes and there is nothing to suggest the Proprietor traded in this segment of the

market. Therefore, I find the mark has not been used for soaps and I revoke the registration in respect of such goods.

70. In summary, I have decided to reject the application for revocation and to allow the registration to remain on the Register in respect of all goods, with the exception of “soaps”. I revoke the registration in respect of soaps from the date of application for revocation, namely, 10 September 2019.

Dermot Doyle

Acting for the Controller of Intellectual Property

31 August 2021