

**O/281/19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATIONS NO. UK00002272671, UK0002272669A  
AND UK0002272669B**

**IN THE NAME OF THE BRADGATE PARK AND SWITHLAND WOOD CHARITY  
FOR TRADE MARKS IN CLASSES 9, 14, 16, 18, 20, 21, 26, 29, 31, 39, 41 AND 43**

**AND**

**CONSOLIDATED APPLICATIONS FOR REVOCATION**

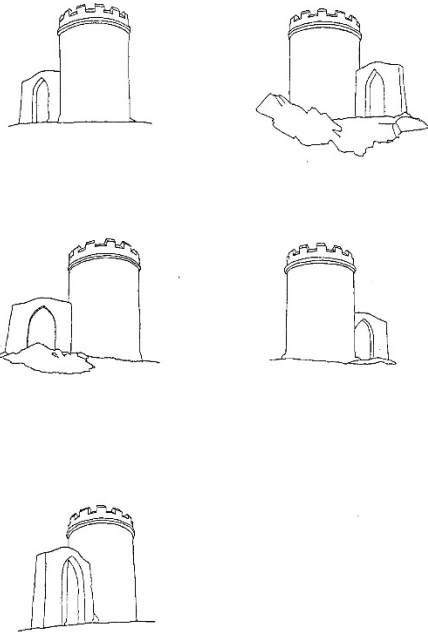
**UNDER NO. 502060, 502061 AND 502062**

**BY ANDREW ALAN FOSTER**

## BACKGROUND AND PLEADINGS

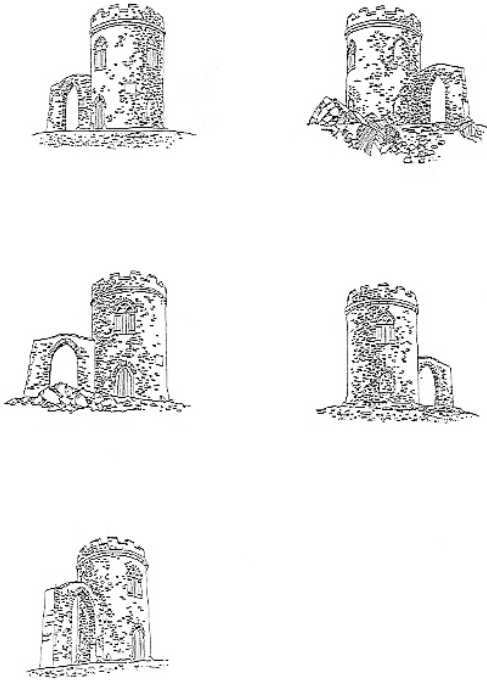
1. The following trade marks stand registered in the name of The Bradgate Park and Swithland Wood Charity (“the proprietor”):

a. UK registration no. 2272671  
 (“The First Registration”)



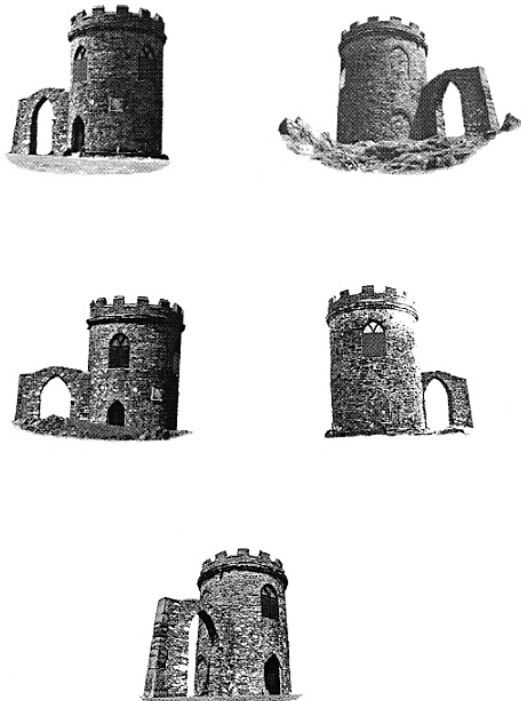
Filing date 15 June 2001; Publication date 8 January 2003; Registration date 23 May 2003

b. UK registration no. 2272669A  
 (“the Second Registration”)



Filing date 15 June 2001; Publication date 7 March 2003; Registration date 1 August 2003

c. UK registration no. 2272669B  
("the Third Registration")



Filing date 15 June 2001; Publication date 7 March 2003; Registration date 16 January 2004

(together “the Registered Marks”)

2. On 30 April 2018, Andrew Alan Foster (“the applicant”) sought revocation of the Registered Marks on the grounds of non-use. Under section 46(1)(a) of the Trade Marks Act 1994 (“the Act”), the applicant claims non-use in the five-year period following the date on which the Registered Marks were registered:

a. In respect of the First Registration, the period following the date on which the marks were registered is 24 May 2003 to 23 May 2008. The applicant requests an effective date of revocation of 24 May 2008.

b. In respect of the Second Registration, the period following the date on which the marks were registered is 2 August 2003 to 1 August 2008. The applicant requests an effective date of revocation of 2 August 2008.

c. In respect of the Third Registration, the period following the date on which the marks were registered is 17 January 2004 to 16 January 2009. The applicant requests an effective date of revocation of 17 January 2009.

3. Under section 46(1)(b) of the Act, the applicant claims non-use in respect of the Registered Marks for three separate periods: between 1 January 2011 and 31 December 2015, seeking an effective revocation date of 1 January 2016; between 21 February 2013 and 20 February 2018, seeking an effective revocation date of 21 February 2018; and between 30 April 2013 and 29 April 2018, seeking an effective revocation date of 30 April 2018.

4. The proprietor filed counterstatements defending its registrations for some of the goods and services for which the Registered Marks were registered. By letter dated 24 July 2018, the Tribunal notified the parties that the proceedings would be consolidated under rule 62(g) of the Trade Mark Rules 2008.

5. As the counterstatements filed by the proprietor only defended the application in respect of some of the goods and services for which the marks were registered, on 4

September 2018, the applicant wrote to the Tribunal to request partial revocation of the Registered Marks in respect of those goods and services for which the application was not defended. On 21 November 2018, the Tribunal issued a decision partially revoking the Registered Marks accordingly. The Registered Marks are now, therefore, registered for the following goods and services only:

Class 9 Refrigerator magnets.

Class 14 Jewellery, key rings, key fobs.

Class 16 Paper goods and card goods; postcards, notebooks, calendars, printed matter; photographs, prints, pictures, writing and drawing instruments, erasers, pencil sharpeners, instructional and teaching materials.

Class 18 Bags.

Class 20 Antlers.

Class 21 Household and kitchen utensils and containers, crockery, porcelain articles.

Class 26 Thimbles, badges for wear.

Class 29 Meat, poultry and game, products made from meat, poultry and/or game.

Class 31 Horticultural and forestry products.

Class 39 Tourism services, arranging and conducting guided tours, operation of visitor centres and of information points.

Class 41 Education and entertainment relating to history, natural history, geology, conservation, environment and country matters; provision of recreational facilities and information; visitor centre services.

Class 43 Restaurant, cafeteria and snack bar services, catering services.

6. The proprietor claims that in respect of these goods and services, the Registered Marks have been put to genuine commercial use within the five years preceding the application for revocation. No claim is made to there being any proper reasons for non-use.

7. The proprietor is represented by Howes Percival LLP and the applicant is represented by Spearing Waite LLP. The registered proprietor's evidence consists of the witness statement of Peter Tyldesley dated 15 October 2018. The applicant's evidence consists of the witness statements of Andrew Alan Foster dated 24 December 2018, Sarah King dated 23 December 2018 and John Anthony Buckby dated 24 December 2018. No hearing was requested and only the applicant filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

## **EVIDENCE**

### **The Proprietor's Evidence**

8. As noted above, the proprietor's evidence consists of the witness statement of Peter Tyldesley dated 15 October 2018, with 1 exhibit. Mr Tyldesley is the Director of the Bradgate Park and Swithland Wood Charity; a position he has held since 1 October 2012.

9. Mr Tyldesley has provided a photograph of a refrigerator magnet displaying the following mark in the top right hand corner<sup>1</sup>:



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<sup>1</sup> Exhibit PT1, page 1.

10. Mr Tyldesley has also provided a print out from the Bradgate Park Shop website, which is undated<sup>2</sup>. The page displays the following mark:



11. It also displays the following photograph which appears to be taken from a retail outlet and which shows pictures of 'Old John' displayed on the wall:



12. On the pages that follow, there are a selection of items available for purchase specifically, jewellery, lapel pins, calendars and postcards<sup>3</sup>:



*Queen of Bradgate - Lapel Pin Grey and Bronze*

£9.00

Limited Edition Lapel Pin Exclusive to Bradgate Park, the Queen of Bradgate collection is a tribute to Lady Jane Grey the 9-Day Queen. Inspired by 'Jane the Queen' signature from 10th - 19th July 1553.

Departments  
Lapel Pins · Queen of Bradgate Jewellery

[Add to basket](#) [Checkout](#)

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<sup>2</sup> Exhibit PT1, page 2

<sup>3</sup> Exhibit PT1, pages 3 and 4



### *Bradgate Calendar 2019*

£5.00

Bradgate Park through the seasons. This is a great gift to celebrate Bradgate Park and are also a great 'keep sake' for those who have fond memories of Bradgate Park park.

Departments  
General Product Sales

[Add to basket](#) [Checkout](#)



### *Set of 12 Images of Bradgate as Postcards*

£5.00

A set of 12 wonderful images of Bradgate Park. Taken by photographers from the Leicester Forest Photography Society. The images depict Scenes from Bradgate Park through the seasons.

Departments  
General Product Sales

[Add to basket](#) [Checkout](#)

[Back to top](#) [View basket](#)

Showing 5 of 5

13. Mr Tyldesley has provided the following (undated) photograph which he states shows use of the marks in relation to key fobs and key rings<sup>4</sup>:



<sup>4</sup> Exhibit PT1, page 5



14. The evidence shows a photograph of a 2019 calendar and postcards which display images of the Old John tower<sup>5</sup>:



15. The evidence also includes an undated photograph of a book entitled “The Story of Bradgate Park”<sup>6</sup>. The book displays the following mark:



16. A number of undated photographs of information leaflets also appear in Mr Tyldesley’s evidence. The first is entitled “Bradgate Park Venison”. A photograph of the cover is provided at page 6 of Exhibit PT1 and prints showing the inside of the leaflet are provided at pages 13 to 15 of Exhibit PT1. The cover displays the following variant, along with the variant shown in paragraph 10 above:



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<sup>5</sup> Exhibit PT1, page 1

<sup>6</sup> Exhibit PT1, page 6

17. The second information leaflet in Mr Tyldesley's evidence is entitled "Try Orienteering Here: BRADGATE ORIENTEERING CHALLENGE"<sup>7</sup>. This displays the same variant shown in paragraph 16 above.

18. A print out of an information leaflet entitled "Explore Bradgate: an education programme for learning and schools" also appears in Mr Tyldesley's evidence<sup>8</sup>. The words "Explore Bradgate" appear as a mark of origin on the cover of the leaflet alongside the variant shown in paragraph 10 above. The leaflet discusses guided activities and self-led visits. A note on the cover states "if you would like to arrange a visit, please note that charges apply."

19. The final leaflet in Mr Tyldesley's evidence is entitled "Walks & Activities 2018"<sup>9</sup>. It displays the variant shown in paragraph 16 above and lists the various activities that are available throughout the year (some of which are offered free of charge). It also notes that the visitor's centre is open all year round, with free admission.

20. Mr Tyldesley has provided two print outs of menus used at the park. The first is for the Conservatory Tea Room and the second is for the Deer Barn Tea Room<sup>10</sup>. Both note the prices of items offered for sale at the team rooms and both display the following variant:



21. Mr Tyldesley has provided an undated photograph of a notebook which displays the following mark on its cover<sup>11</sup>:

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<sup>7</sup> Exhibit PT1, page 6

<sup>8</sup> Exhibit PT1, pages 22 to 23

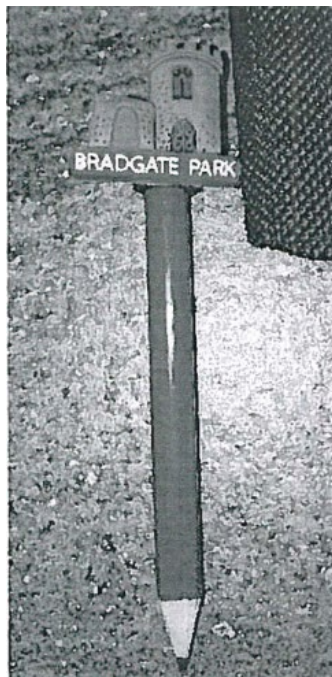
<sup>9</sup> Exhibit PT1, pages 28 to 35

<sup>10</sup> Exhibit PT1, pages 42 to 45

<sup>11</sup> Exhibit PT1, page 7



22. An undated photograph has been provided which shows a pencil with a figurine of 'Old John' attached to the top and the words "Bradgate Park" beneath it as follows<sup>12</sup>:



23. In addition to this, My Tyldesley has also provided undated photographs of a pencil sharpener and an eraser, which display the mark shown in paragraph 9 above<sup>13</sup>.

24. My Tyldesley has provided an undated photograph which displays three bags, the first of which is a canvas-style shopping bag and the second and third of which are tote bags<sup>14</sup>. All of the bags display the following mark:

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<sup>12</sup> Exhibit PT1, page 9

<sup>13</sup> Exhibit PT1, page 9

<sup>14</sup> Exhibit PT1, page 10



25. A print out from the opponent's website, which displays the mark shown in paragraph 10 above, explains that venison is available for purchase from the park. It also states "We have a limited supply of deer antlers (singles and full sets). Please contact us for availability and price."<sup>15</sup> The website print out is undated.

26. My Tyldesley has provided undated photographs showing drinking bottles, mugs, thimbles and a pin badge<sup>16</sup>: The pin badge and thimbles appear as follows:



27. The bottles display the following images:

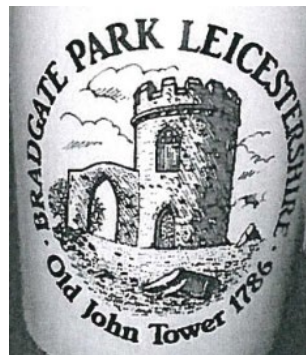
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<sup>15</sup> Exhibit PT1, page 18

<sup>16</sup> Exhibit PT1, pages 11 and 12



28. The mug displays the following image:



29. Mr Tyldesley has provided a copy of a label used for venison steak sold by the park<sup>17</sup>. This displays the mark shown in paragraph 10 above and is marked with a best before date of 19 September 2018.

30. A print out from the opponent's website, which is dated 10 May 2018, confirms that logs for firewood and charcoal for BBQs are available for sale<sup>18</sup>. The page displays the mark shown in paragraph 10 above. Prices for each product are listed and contact details are provided for orders to be placed. There is also a small section at the end of the page which notes that other bespoke wood products can also be supplied.

31. My Tyldesley has provided a print out from the opponent's website (which is undated), which notes that there are fact sheets with background information about the park available to download<sup>19</sup>. There are four links to fact sheets shown on the print out. Another print out provided is entitled "Education and Learning Activities for

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<sup>17</sup> Exhibit PT1, page 13

<sup>18</sup> Exhibit PT1, pages 19 to 21

<sup>19</sup> Exhibit PT1, page 8

Schools”<sup>20</sup>. Again, this page is undated. The page goes on to explain the different activities offered at the park. Mr Tyldesley has also provided a print out (again undated) which discusses the Visitor Centre which it states was opened in Summer 2016<sup>21</sup>. The print out states:

“There is no entry charge and the family friendly displays and information tell the stories of the Park, its origins, its history, its geology and the wildlife that live in and visit the Park. There are opportunities to have a close-up encounter with wildlife, hear from Lady Jane Grey about her story and learn how a nearby volcano created the Bradgate Park landscape. The displays include artefacts, as well as plenty of background to the heritage of the Park and the people that have played a part in the history of the Estate...”

32. All of these print outs display the mark as shown in paragraph 10 above, with the last print out also displaying the mark shown in paragraph 16 above. Mr Tyldesley has provided two photographs which appear to be from the signage and door to the visitor centre, tea rooms and meeting room facilities at the park<sup>22</sup>. These display the second mark shown in paragraph 24 above as well as well as the following mark:



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<sup>20</sup> Exhibit PT1, pages 24 to 27

<sup>21</sup> Exhibit PT1, pages 36 to 37

<sup>22</sup> Exhibit PT1, page 38

33. Mr Tyldesley has provided a print out from the opponent's website, again displaying the mark shown in paragraph 10 above, which notes that there are two tea rooms at the park<sup>23</sup>.

34. I also note that Mr Tyldesley has provided images of the inside of what appears to be a gift shop, presumably the gift shop at the park. The images are undated. At the top of each of these images appears the mark as shown in paragraph 10 above<sup>24</sup>. For example:



35. No explanation is provided about where these images were taken from. However, they appear to be taken from a website which allows the user to 'virtually' explore the gift shop. Directional arrows are visible. It appears to me that the variant shown in this image is visible only in the online virtual shop and not in the actual shop from which goods can be purchased.

36. Mr Tyldesley has provided a breakdown of the value of sales achieved by the opponent in respect of different goods<sup>25</sup>:

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<sup>23</sup> Exhibit PT1, pages 39 to 41

<sup>24</sup> Exhibit PT1, pages 46 and 47

<sup>25</sup> Witness statement of Peter Tyldesley, para. 6

Item	Period	Unit Sales	Value of Sales (£)
Refrigerator Magnets	1 April 2017 to 31 October 2017	271	565.00
Key Rings; Key Fobs	1 April 2017 to 31 October 2017	262	876.50
Paper goods and card goods; Printed Matter; Instructional and Teaching Materials	1 April 2017 to 31 October 2017	610	1,912.00
Notebooks	1 April 2017 to 31 October 2017	98	142.75
Postcards, Photographs, Prints, Pictures	1 April 2017 to 31 October 2017	119	234.12
Calendars	1 April 2017 to 31 October 2017	549	2,630.00
Writing and Drawing Instrument	1 April 2017 to 31 October 2017	202	363.00
Erasers	1 April 2017 to 31 October 2017	28	16.80
Pencil Sharpeners	1 April 2017 to 31 October 2017	17	17.00
Bags	1 April 2017 to 31 October 2017	70	238.00
Household and kitchen utensils and containers, Crockery, Porcelain Articles	1 April 2017 to 31 October 2017	35	162.00
Thimbles	1 April 2017 to 31 October 2017	1	2.00
Badges for wear	1 April 2017 to 31 October 2017	58	234.00
Meat; Poultry and Game; Products made from meat; Poultry and/or game	Financial Year 2017 – 2018	-	32,104.00
Horticultural and forestry products	Financial Year 2017 – 2018	-	6,184.00

37. Mr Tyldesley notes that although the mark has primarily been used at the park in Leicestershire, visitors to the park come from all over the country.

### **Applicant's Evidence**

38. As noted above, the applicant's evidence consists of the witness statement of Andrew Alan Foster dated 24 December 2018, with 2 exhibits, the witness statement of Sarah King dated 23 December 2018, with 3 exhibits and the witness statement of John Anthony Buckby dated 24 December 2018, with 8 exhibits.

### **Mr Foster's Evidence**

39. Mr Foster has been a sole trader providing landscaping services in Leicestershire under the trading name BRADGATE LANDSCAPING since around 2015. Mr Foster states that the business logo he has used since 2016 includes a representation of Old



John tower<sup>26</sup>. Mr Foster states that in 2018 he was contacted by the proprietor and notified of their trade mark registration and asked to pay a license fee to continue using his logo. The majority of Mr Foster's evidence relates to the correspondence between the parties regarding the dispute, and I do not propose to reproduce it here.

### Ms King's Evidence

40. Ms King is a sole trader artist who lives in Leicestershire. Ms King states that in 2015, she created a series of works of landmarks in the Leicestershire area, including a painting of Old John. In February 2016, Ms King states that she contacted the proprietor to enquire as to whether they would be interested in displaying and selling her painting. Ms King states that she received a response stating that they did not have enough space on the walls for her painting. Ms King states that she subsequently created a range of greetings cards using her art work, including one displaying the painting of Old John. Again, Ms King contacted the proprietor to enquire as to whether they would be interested in stocking her greetings cards, but no response was received.

41. When Ms King contacted the proprietor again in 2018, she received a response notifying her of the proprietor's registration and stating that she would need to either enter into a license with the proprietor for use of the mark or not offer items for sale which display the mark<sup>27</sup>. The majority of Ms King's evidence relates to the correspondence between the parties regarding the dispute, and I do not propose to reproduce it here.

### Mr Buckby's Evidence

42. Mr Buckby is a Partner at Gateley Plc, the applicant's solicitors. Mr Buckby states that 'Old John' is a famous Leicestershire landmark and provides examples of it being described as such in various materials<sup>28</sup>. He states that it is, therefore, unsurprising that many businesses in the area use images of Old John in their communications. Mr

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<sup>26</sup> Exhibit AAF1

<sup>27</sup> Exhibit SK1

<sup>28</sup> Exhibit JAB1

Buckby has provided various examples of businesses that use Old John as part of their logos<sup>29</sup>.

43. Mr Buckby states that the proprietor's goods are only distributed via the small shop at the park itself. He states that having visited the neighbouring village himself, he found various examples of images of Old John being used locally, such as use on bins and plant pots<sup>30</sup>. Mr Buckby states that images of Old John are used on local websites and in printed materials including on the websites of a local school, Parish Council and campsite<sup>31</sup>. He states that it has also been used by a local council on road signs in the area<sup>32</sup>.

44. Mr Buckby has provided a print out of the proprietor's Twitter post, dated 8 February 2018, in which it stated:

"A gentle reminder to all photographers. Our bye-laws for the Estate restrict commercial enterprise from photography business (including sales of images, plus Old John is a registered Trademark) We do have license options. Contact our Estate Office for details.<sup>33</sup>"

45. Mr Buckby has provided a further print out from the proprietor's Facebook page dated 10 February (although no year is visible) in which it stated:

"We wish to support local creative artists, including photographic enthusiasts, but where images are sold for commercial gain, including the use of images on products such as cards and mugs this represents an unauthorised commercial use of our intellectual property and an infringement of our trademarks.<sup>34</sup>"

46. A further post on Facebook which appears to be undated states:

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<sup>29</sup> Exhibit JAB2

<sup>30</sup> Exhibit JAB3

<sup>31</sup> Exhibit JAB4

<sup>32</sup> Exhibit JAB5

<sup>33</sup> Exhibit JAB6

<sup>34</sup> Exhibit JAB6

“To reiterate many of the comments on other social media and to messages. The Trust is not stopping people taking images. We love to see images, old and new and love that people want to share images on various platforms and formats and give them in gifts to friends. The taking an image is not an issue and where it is taken from makes no difference (so public land or within the Park). Selling that image is the concern, if it represents a breach of our registered trademark...<sup>35</sup>”

47. The applicant filed written submissions in lieu and, whilst I do not propose to summarise those submissions here, I have taken them into account in reaching my decision.

### **PRELIMINARY ISSUE**

48. I note that the IPO’s online database does not record any of the proprietor’s registrations as series of marks. However, all the marks were all applied for as series and were registered as such (albeit the Second Registration and Third Registration were applied for as a series of 10 and were registered as 2 series of 5). In his witness statement, Mr Buckby notes that the Second and Third Registrations were originally filed as one series and were subsequently divided into two registrations by the Registry. It seems clear to me from Mr Buckby’s comments that the applicant is aware that the proprietor’s marks are all members of series of registered marks notwithstanding the missing information from the online database. I will proceed on this basis.

### **DECISION**

49. Section 46 of the Act states:

“(1) The registration of a trade mark may be revoked on any of the following grounds –

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<sup>35</sup> Exhibit JAB6

(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 differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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) An application for revocation may be made by any person, and may be made to the registrar or to the court, except that –

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(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 existed at an earlier date, that date.”

50. 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.”

51. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He said:

“217. *The law with respect to genuine use* . In *Stichting BDO v BDO Unibank Inc* [2013] EWHC 418 (Ch), [2013] FSR 35 I set out at [51] a helpful summary by Anna Carboni sitting as the Appointed Person in *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] of the jurisprudence of the CJEU in Case C-40/01

*Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439 , Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I added references to Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237 ). I also referred at [52] to the judgment of the CJEU in Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16 on the question of the territorial extent of the use. Since then the CJEU has issued a reasoned Order in Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and that Order has been persuasively analysed by Professor Ruth Annand sitting as the Appointed Person in *SdS InvestCorp AG v Memory Opticians Ltd* (O/528/15).

...

219. I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetzky-Orden v Bundesvereinigung Kameradschaft 'Feldmarschall Radetzky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, 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] to [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].

(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].

(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].

(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 always the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

52. It is clear from the case law cited above that to be genuine use, the use made of the marks by the proprietor must be use which is “consistent with the essential function of a trade mark”. That is, to distinguish the goods and services of one undertaking from those of another. This is a question of fact. In deciding whether there has been use which is consistent with the essential function of a trade mark I must consider not whether the mark is capable of being used as a trade mark (the applicant has not sought to call into question the inherent registrability of the Registered Marks) but whether it has been used as such. It is also clear from the case law cited above that 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 or services protected by the mark” will not be genuine use. However, use by a non-profit making association can be genuine use. The fact that the proprietor is a charity does not prevent it from having made genuine use of the Registered Marks.

53. Given the proviso at section 46(3) of the Act, if the proprietor can establish genuine use in the most recent period (i.e. between 30 April 2013 and 29 April 2018), the registrations will not be revoked. I note that the sales figures provided by the proprietor only fall within this period in any event. I will, therefore, concentrate on that period for the purposes of my decision.

### **Form of the mark and genuine use**

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



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

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

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

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at

issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1)”. (emphasis added)

55. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was), sitting as the Appointed Person, summarised the test under section 46(2) of the Act as follows:

“33. ...The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all.”

56. Although this case was decided before the judgment of the CJEU in *Colloseum*, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.

57. The proprietor’s evidence does not show any examples of the Registered Marks in use as registered. However, there are a number of variants displayed throughout the proprietor’s evidence. I will consider the evidence available for each of the goods and services in the proprietor’s specifications in turn, the variant use applicable to each and whether the proprietor has demonstrated genuine use.

58. In making the assessment of genuine use I bear in mind that it is a global assessment, which includes looking at the evidential picture as a whole, not whether

each individual piece of evidence shows use by itself<sup>36</sup>. I also bear in mind the comments of Daniel Alexander Q.C. in *Awareness Limited v Plymouth City Council*, Case BL O/236/13, in which he stated:

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

### Refrigerator magnets

59. The evidence shows an example of a refrigerator magnet which displays the following variant:



60. The variant appears in the top right-hand corner of the magnet. The middle of the magnet is dominated by a landscape image. The position of the variant on the magnet and the fact that it is not the main decorative image suggests that this is being used

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

as a badge of origin rather than simply for decorative purposes. This variant consists of an image of 'Old John' tower. In determining whether this is an acceptable variant use of the Registered Marks, it is important to consider what gives the marks their distinctive character. The registration of trade mark consisting of a representation of a building does not give the proprietor exclusive rights to any representation of that building. Landmarks are buildings which consumers will recognise as such. It is only when a particular image(s) of a landmark is repeatedly presented in a consistent way that consumers will come to recognise the image(s) as a badge of origin. In my view, the distinctive character of the registered marks therefore lies in an image of the 'Old John' tower presented in a particular style (which is different for each of the Registered Marks). To qualify as acceptable variant use of the Registered Marks, the sign used by the proprietor must be the same as, or sufficiently similar to, the marks as registered to share their distinctive character. It is not sufficient for the proprietor to have used an image which is recognisable as the Old John tower. The marks used must also resemble the presentation of the tower in the marks as registered. The image in the variant shown above is heavily shaded. This cannot be said to be either a single line drawing as depicted in the marks covered by the First Registration or a use of the same textural design as depicted in the marks in the Second Registration. Clearly, this is not the same photographic style as depicted in the marks in the Third Registration. I consider that these differences alter the distinctive character of the marks as set out in *Nirvana*. I do not, therefore, consider this to be an acceptable variant use of any of the proprietor's marks. Consequently, this is not use upon which the proprietor may rely.

Jewellery, key rings, key fobs

61. I note that the proprietor's evidence consists of a web page which suggests jewellery is offered for sale under the following variant:



62. Clearly, this variant uses an image of 'Old John' tower in photographic form used in combination with additional matter (the image of the stag's head, the wording and decorative elements presented inside a circle). Whilst the image of 'Old John' tower in this variant does differ slightly to any of the images depicted in the marks in the Third Registration, these differences do not, in my view, alter the distinctive character as explained in *Nirvana*. Use in combination with additional matter is use upon which the proprietor may rely as explained in *Colloseum*. Whilst I recognise that there is a lot of additional detail added into this variant, the image of the tower is one of the three main elements (along with the Stag's head device and writing). Consequently, this is use of the marks in the Third Registration upon which the proprietor may rely. The presentational style of the 'Old John' tower in this variant is different to those depicted in the marks in the First Registration and the Second Registration and, consequently, I do not consider this to be an acceptable variant of the marks covered by those registrations.

63. Whilst the evidence does show jewellery being offered for sale on the proprietor's website, there is no evidence of any actual sales of jewellery being made. Figures for jewellery sales are not included in the table provided by the proprietor. Consequently, I consider the proprietor's evidence to be insufficient to demonstrate genuine use of the marks in the Third Registration in relation to jewellery.

64. The proprietor's evidence also includes the following image of three keyrings/key fobs:



65. The image is of poor quality and the image displayed on the first key ring/fob depicted is not clear. The second and third key rings/fobs both display images of 'Old John' tower, with one appearing to be a silhouette and the other being more detailed. They are both accompanied by wording (some of which is not legible). I note that the proprietor has demonstrated sales of key rings/fobs. However, I do not consider that the use demonstrated in the evidence will be viewed by the consumer as trade mark use. Key rings/fobs are commonly used as souvenirs and consumers will be accustomed to them being sold as such. This, of course, does not mean that it is not possible for a trade mark to be used on a key ring/fob. However, the mark is not featured on the back of the key ring/fob as a sign of origin or on a label, box or packaging, but as the main decorative feature. In my view, the use of an image of a local landmark as the main decorative feature on a keyring/fob in this way is likely to lead the consumer to conclude that it is used for purely decorative purposes and not as an indicator of trade origin. The proprietor has not used these variants as a badge of origin anywhere else in the evidence. In my view, this is not use which is consistent with the essential function of a trade mark and is not, therefore, genuine use.

Paper goods and card goods; postcards, notebooks, calendars, printed matter; photographs, prints, pictures, writing and drawing instruments, erasers, pencil sharpeners, instructional and teaching materials.

66. The proprietor's evidence includes examples of postcards, calendars and what appear to be pictures as follows:





### *Bradgate Calendar 2019*

£5.00

Bradgate Park through the seasons. This is a great gift to celebrate Bradgate Park and are also a great 'keep sake' for those who have fond memories of Bradgate Park park.

Departments  
General Product Sales

Add to basket

Checkout



### *Set of 12 Images of Bradgate as Postcards*

£5.00

A set of 12 wonderful images of Bradgate Park. Taken by photographers from the Leicester Forest Photography Society. The images depict Scenes from Bradgate Park through the seasons.

Departments  
General Product Sales

Add to basket

Checkout

Back to top

View basket

Showing 5 of 5

67. The image of 'Old John' tower which is displayed on the calendar and the postcards, in my view, is clearly not trade mark use for the reasons set out in paragraph 65 above. Photographs of landmarks (either in their original form or printed on to secondary goods), when they are clearly just photographs of landmarks, are likely to be viewed by the consumer as just an image being used for decorative purposes. The consumer is unlikely to view a photograph presented on goods commonly sold as souvenirs or mementos as indicative of trade origin. This is not use

upon which the proprietor may rely. However, the print out from the proprietor's website which shows calendars and postcards being sold under the variant shown in paragraph 61 above (which I have found to be an acceptable variant use of the marks in the Third Registration) combined with the sales figures provided by the proprietor are sufficient to demonstrate genuine use in relation to postcards and calendars for the marks in the Third Registration only. I do not consider that the proprietor has demonstrated genuine use of the marks in the First Registration or Second Registration in respect of these goods.

68. The second image in paragraph 66 above, which shows pictures hanging on a wall in a shop, is taken from the proprietor's website (which displays the same variant as in paragraph 61 above). It does not, in my view, assist the proprietor. There is no evidence that these goods are available for sale through the website and there is nothing in this image to suggest that the mark shown in variant 61 above is actually displayed on or near the pictures in the shop through which they are actually available for sale. Again, the image of 'Old John' in the picture itself is purely decorative and is not use which is consistent with the essential function of a trade mark. I do not consider that the proprietor has shown genuine use of any of the Registered Marks for pictures.

69. The proprietor has provided an image of a notebook which displays the following image on its cover:



70. Whilst I recognise that use in combination with additional matter is use upon which the proprietor may rely (as per *Colloseum*), I consider that the use in this variant has



altered the distinctive character of the Registered Marks for the same reasons as set out in paragraph 60 above.

71. In any event, I do not consider that the use shown in the image above is use which is consistent with the essential function of a trade mark for the reasons set out in paragraph 65 above. There are no examples of this variant being used as a trade mark elsewhere in the proprietor's evidence.

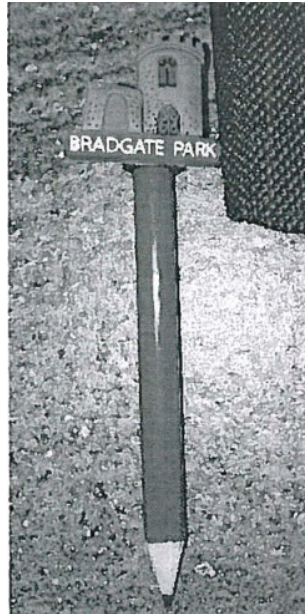
72. The book which appears in the proprietor's evidence displays the following variant:



73. Clearly, this image will not be acceptable variant use of the marks in the Third Registration as it does not share the same photographic style. The marks in the First Registration consists of a line drawing with much of the detail of 'Old John' tower taken away (such as brickwork, windows and doors). Its simplicity is part of its distinctive character. The addition of these details to the variant shown above, in my view, alters the distinctive character of the marks in the First Registration and is not, therefore, use upon which the proprietor may rely. The converse, in my view, is true of the marks in the Second Registration. The textural elements of the marks in the Second Registration is part of their distinctive character. These elements are absent from the variant shown above. In my view, this alters the mark's distinctive character. I do not, therefore, consider this to be acceptable variant use of any of the Registered Marks.

74. I note that the acceptable variant shown in paragraph 61 above also appears on the information leaflet for venison in Mr Tyldesley's evidence. However, this leaflet was distributed to promote the proprietor's venison sales. It was not being distributed to create or maintain a share in the market for the leaflets themselves. Consequently, I do not consider this to be genuine use in relation to printed matter.

75. The proprietor has provided the following undated photograph of a pencil:



76. Again, I consider that the representation of Old John tower shown here has too much detail to be an acceptable variant of the marks in the First Registration, does not display the same textural elements of the marks in the Second Registration and is not the same photographic style as the marks in the Third Registration. Consequently, I do not consider this to be an acceptable variant use of any of the Registered Marks. In any event, stationary is commonly sold as a souvenir and for the reasons set out in paragraph 65 above I consider that this use of an image of 'Old John' is purely decorative rather than indicative of trade origin. I do not, therefore, consider that this is use which is consistent with the essential function of a trade mark and is not, therefore, genuine use.

77. The proprietor's evidence shows that a very similar image is displayed on its pencil sharpeners and erasers as shown in paragraph 59 above. Whilst this variant appears as the main decorative element on these goods, there are examples of it being used as a trade mark elsewhere in the proprietor's evidence. Considering the evidence as a whole, I consider the use in the context of these goods will have a dual purpose; both decorative use and use as a badge of origin. However, I do not consider this to be an acceptable variant use of the Registered Marks. In any event, the evidence only shows sales of £16.80 for erasers and £17.00 for pencil sharpeners. I do not consider that this is sufficient to constitute genuine use.

## Bags

78. The proprietor's evidence includes a photograph of three bags which display the following image:



79. Whilst I recognise that this is the main decorative feature on the bags, as explained above the question of whether a sign is used as a trademark is not binary; it is possible for a sign to be both a badge of origin and decorative. There are other examples in the proprietor's evidence of this variant being used as a badge of origin. I am required to consider the proprietor's evidence as a whole. Bearing this mind, I am satisfied that this variant serves the dual purpose of being both decorative and a badge of origin. However, for the reasons set out in paragraph 73 above, I do not consider this to be an acceptable variant use of the Registered Marks.

## Antlers

80. Print outs from the proprietor's website show that antlers are offered for sale. The page displays the same variant as shown in paragraph 61 above, which I have already found to be an acceptable variant use of the marks in the Third Registration.

81. However, the proprietor has not provided any evidence of sales of these goods. "Antlers", whilst coming from an animal, will not fall within the terms "meat", "poultry and game", "products made from meat" or "poultry and/or game" as set out in the proprietor's table of sales figures. Similarly, I do not consider that they will fall within

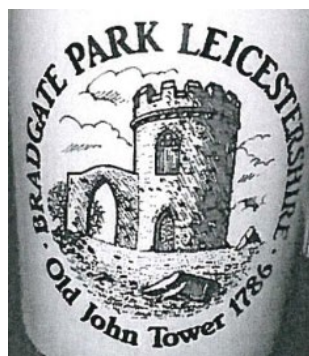
the term “horticultural and forestry products”. Horticulture relates to garden cultivation and forestry relates to managing and caring for forests. In the absence of any further submissions provided by the proprietor or any detailed breakdown, I cannot see that any sales listed in the table provided by the proprietor relate to antlers. Consequently, I do not consider the proprietor’s evidence to be sufficient to demonstrate genuine use of the marks in relation to antlers.

Household and kitchen utensils and containers, crockery, porcelain articles.

82. The only examples of goods shown in the proprietor’s evidence which may be considered to fall within these terms are the drinking bottles and mugs. The bottles display the following images:



83. The mug displays the following image:



84. The images displayed on the bottles have been used elsewhere in the proprietor’s evidence as trade marks (such as on the refrigerator magnet as shown in paragraph 59 above and on a book as shown in paragraph 72 above). Whilst I recognise that they appear as the main decorative element on the bottles, I consider that these also function as a badge of origin in this context. By contrast, the image displayed on the

mug does not appear elsewhere in the proprietor's evidence as a badge of origin and the use of the date in the image appears commemorative in nature. Taking this into account, along with its position as the dominant decorative element on a mug (which is commonly used as a souvenir item) I do not consider that this is use which is consistent with the essential function of a trade mark.

85. In any event, in my view, these images are all more detailed than the First Registered Mark and this addition of details alters the marks distinctive character as per *Nirvana*. They clearly do not display photographic images and are not, therefore, acceptable variants of the marks in the Third Registration. None of the images use the same textural patterns displayed in the marks in the Second Registration. In my view, these are not acceptable variants of any of the Registered Marks. I, therefore, do not consider that the opponent has shown genuine use in relation to "Household and kitchen utensils and containers, crockery, porcelain articles".

Thimbles, badges for wear.

86. The proprietor has provided the following undated images of a thimble and a pin badge:



87. The image of the thimble is too poor quality to determine whether it displays an acceptable variant of the Registered Marks. In any event, the sales figures provided for thimbles amounts to only £2.00 which, in my view, would not be sufficient to

demonstrate genuine use. The image of the 'Old John' displayed on the photograph of the pin badge shown above is also of poor quality and therefore difficult to identify the detail of the image, although it clearly is an image of 'Old John' tower. In any event, I consider that use of the 'Old John' tower in this way is purely decorative, rather than trade mark use. This is particularly the case given that the packaging, where you might expect to find a trade mark, is blank and does not display any of the Registered Marks. For the same reasons as set out in paragraph 65 above, this use will not be viewed as use which is consistent with the essential function of the trade mark and will not, therefore, be genuine use.

88. Images of pin badges are also visible on a print out of the proprietor's website, described as "lapel pins":



89. These are offered for sale under the mark shown in paragraph 61 above, which I have already concluded is acceptable variant use of the Third Registered Mark. This use in combination with the sales figures provided by the proprietor is, in my view, sufficient to demonstrate genuine use of the marks in the Third Registration for "badges for wear".

Meat, poultry and game, products made from meat, poultry and/or game.

90. The proprietor's evidence shows information leaflets about the sale of venison at the park and a print out of the proprietor's website which confirms that venison is available for sale. The proprietor has also provided a photograph of packaged venison steak (albeit the best before date for the meat is dated after the relevant period). Both

the website print out and the label attached to the venison packaging display the mark shown in paragraph 61 which I have already found to be an acceptable variant use of the marks in the Third Registration. This, combined with the sales figures provided by the proprietor, are sufficient to show genuine use of the marks in the Third Registration in relation to venison.

#### Horticultural and forestry products.

91. A print out from the proprietor's website has been provided which shows the proprietor offering charcoal and firewood for sale. The website displays the mark shown in paragraph 61 above, which I have already found to be an acceptable variant use of the marks in the Third Registration. The proprietor has also provided sales figures for forestry and horticultural products. I do not consider that firewood and charcoal will fall within the definition of horticultural products but will be covered by forestry products. At least part of these sales presumably, therefore, apply to charcoal and firewood. When taken as a whole, I consider that this evidence is sufficient to amount to genuine use of the marks in the Third Registration in relation to firewood and charcoal.

#### Tourism services, arranging and conducting guided tours, operation of visitor centres and of information points

92. Only one of the information leaflets provided by Mr Tyldesley (which relate to activities falling within these terms) is dated. It is dated 2018. In any event, none of the leaflets display an acceptable variant use of the Registered Marks.

93. There is evidence that the proprietor's visitor centre opened in July 2016. The evidence also confirms that admission to the visitor's centre is free. There would, consequently, be no corresponding sales figures for these services. The fact that the services are offered free of charge does not prevent this from being genuine use<sup>37</sup>. There is evidence of the visitor's centre services being promoted under the acceptable

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<sup>37</sup> *Antartica Srl v OHIM, The Nasdaq Stock Market, Inc*, Case C-320/07 P

variant shown in paragraph 61 above. Taking the evidence as a whole I am satisfied that the proprietor has used its mark in relation to visitor's centre/information services.

Education and entertainment relating to history, natural history, geology, conservation, environment and country matters; provision of recreational facilities and information; visitor centre services

94. There is no evidence of any sales in relation to these services. There are examples in the proprietor's evidence of such services being provided for free. However, as in paragraph 93 above, there is no evidence that the free services were offered during the relevant period under an acceptable variant of the Registered Marks (other than in relation to visitor centre services). I do not consider that the proprietor has shown genuine use of any of these services other than "visitor centre services".

Restaurant, cafeteria and snack bar services, catering services

95. The proprietor's evidence shows menus which display the following mark:



96. However, I have already found that this is not an acceptable variant use of any of the Registered Marks. The proprietor has also provided a print out from its website which confirms that tea room services are available at the park and the website displays the mark shown at paragraph 61 above, which I have found is an acceptable variant of the marks in the Third Registration. Unfortunately, the proprietor has provided no details about any sales of these services or their availability during the relevant period. In the absence of any such information, I do not consider the evidence to be sufficient to make a finding of genuine use.



## Fair Specification

97. I must now consider whether, or to what extent, the proprietor has shown use of the Registered Marks in relation to the goods and services for which they stand registered.

98. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

99. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme

Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

100. To summarise, I have found as follows:

a. The proprietor has shown genuine use of the marks in the Third Registration used in relation to postcards, calendars and badges for wear.

b. The proprietor has shown genuine use of the marks in the Third Registration in relation to "visitor's centres and of information points" and "visitor centre services". I note that the mark is also registered for tourism services more generally. However, in the absence of any evidence to show that the mark has been used more broadly than in relation to visitor's centres, I see no reason to allow the proprietor to retain this broader term, which would clearly cover many more services than just providing visitor centres.

c. The proprietor has shown genuine use of the marks in the Third Registration in relation to venison. However, this is not enough in my view for the proprietor to be entitled to retain the broad terms of “meat, poultry and game, products made from meat, poultry and/or game”.

d. The proprietor has shown no evidence of the Registered Marks in use in relation to horticultural products but has shown genuine use of the marks in the Third Registration in relation to charcoal and firewood. Whilst both of these would, in my view, fall within the meaning of the term “forestry products”, use in relation to these goods alone is insufficient to entitle the proprietor to retain the broad term “forestry products”.

e. In respect of the remaining goods and services in the specifications for the Registered Marks, the proprietor has failed to show genuine use.

101. Consequently, the proprietor has failed to show genuine use in respect of any of the goods and services for which the marks in the First Registration and the Second Registration are registered.

102. I consider a fair specification for the marks in the Third Registration to be:

Class 16 Postcards; calendars.

Class 26 Badges for wear.

Class 29 Venison and products made from venison.

Class 31 Charcoal, firewood.

Class 39 Operation of visitor centres and information points.

Class 41 Visitor centre services.

103. As explained above, although the proprietor has only shown use of the marks in the Third Registration in the most recent period, this is sufficient to prevent the mark being revoked pursuant to section 46(3) of the Act for those goods which the proprietor has shown genuine use.

## **CONCLUSION**

104. The marks in the First Registration are revoked for non-use in respect of all goods and services for which they are registered with an effective date of 24 May 2008.

105. The marks in the Second Registration are revoked for non-use in respect of all goods and services for which they are registered with an effective date of 2 August 2008.

106. The marks in the Third Registration will remain registered for the following goods only:

Class 16      Postcards; calendars.

Class 26      Badges for wear.

Class 29      Venison and products made from venison.

Class 31      Charcoal; firewood.

Class 39      Operation of visitor centres and information points.

Class 41      Visitor centre services.

107. The marks in the Third Registration are revoked for non-use in respect of all other goods and services for which the marks are registered with an effective date of 17 January 2009.

## **COSTS**

108. The applicant has enjoyed the greater degree of success and is entitled to a contribution towards costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,900** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the proprietor's statement (x3)	£400
Considering the proprietor's evidence and preparing evidence	£600
Preparing written submissions in lieu	£300
Official fee (x3)	£600
<b>Total</b>	<b>£1,900</b>

109. I therefore order The Bradgate Park and Swithland Wood Charity to pay Andrew Alan Foster the sum of £1,900. This sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

**Dated this 23<sup>rd</sup> day of May 2019**

**S WILSON**

**For the Registrar**