BL O/0350/26

IN THE MATTER OF THE TRADE MARKS ACT 1994

AND IN THE MATTER OF APPLICATION NO. 3996128 FOR THE FOLLOWING TRADE MARK IN CLASS 11 IN THE NAME OF SHENZHEN TCL NEW TECHNOLOGY CO., LTD:

BreezeIN

AND IN THE MATTER OF OPPOSITION NO. 446889 BY SEELEY INTERNATIONAL PTY LTD

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF BEVERLEY HEDLEY DATED 3 FEBRUARY 2026

DECISION

Introduction

1. This is an appeal by Seeley International Pty Ltd (the "**Opponent/Appellant**") from the decision of the Hearing Officer, Ms Beverley Hedley, dated 3 February 2026 with number O/0092/26 (the "**Decision**"). The Decision addresses an opposition by the Opponent to Shenzhen TCL New Technology Co., Ltd's (the "**Applicant/Respondent**") application for trade mark number 3996128 depicted below in class 11 (the "**Application**").

BreezeIN

Background

2. The Application was filed on 27 December 2023 and published for opposition purposes on 12 January 2024.

3. On 15 April 2024, the Opponent opposed the Application for all goods under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (the "**Act**"), relying on its earlier trade mark depicted below with number 3565920 (the "**Earlier Mark**"):

Trade Mark No	Trade Mark	Filing Date	Registration Date	Classes
3565920	(Series of 2 marks)  	9 December 2020	16 April 2021	7, 9 and 11

4. As the Earlier Mark had not been registered for five years or more at the filing date of the Application, it was not subject to the proof of use conditions in accordance with section 6A of the Act.

5. Neither party requested a hearing, with the Opponent and Applicant relying on their written submissions dated 9 August 2024 and 15 October 2024 respectively. The Hearing Officer therefore made a decision based upon the papers before her.

6. The Hearing Officer held that the opposition had failed on all grounds and the Application should be allowed for all goods. She ordered that the Applicant pay the Opponent the sum of £650 by way of contribution to the Opponent's costs.

7. On 2 March 2026, the Opponent filed a Notice of Appeal to the Appointed Person against the Decision under section 76 of the Act. The Applicant did not file a Respondent's Notice. The parties again declined a hearing and relied on written submissions in lieu.

Grounds of Appeal

8. The Opponent advances the following grounds of appeal:

   a. Ground 1: "The [Hearing Officer] erred in her assessment of whether the Earlier Marks or each of them enjoyed enhanced distinctiveness".

   b. Ground 2: "The [Hearing Officer] erred in her assessment of whether there is a likelihood of confusion for the purposes of section 5(2)(b)"[1].

   c. Ground 3: "The [Hearing Officer] erred in her assessment of whether a link exists between the relevant marks for the purposes of section 5(3)".

   d. Ground 4: "The [Hearing Officer] erred in her assessment of whether there is passing off for the purposes of section 5(4)(a)."

9. Under each ground it gives specific reasons in support, which I address below.

[1] This is directed to the finding of indirect confusion only.

Standard of Review

10. The principles to be applied to an appeal are well established. They were summarised by Joanna Smith J in *Axogen Corp v. AVIV Scientific Ltd* [2022] EWHC 95 (Ch) at [24]. Further guidance has also been given by the Supreme Court in in *Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc* [2025] UKSC 25 at [93] to [95] as follows:

> "94. It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions. While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including, in the intellectual property context, Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:
>
> (i) The trial is not a dress rehearsal. It is the first and last night of the show.
>
> (ii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court.
>
> (iii) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> 95. In Lifestyle Equities CV v Amazon UK Services Ltd [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those constraints in a trade mark context. After citing from the Fage case this court in a joint judgment said, at paras 49- 50:
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> '49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in re Sprintroom Ltd [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

> 50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.'"

11. I also note that disagreements about the precise 'weight' to be given to a factor has been consistently rejected as a proper ground of appeal from the Hearing Officer (see Ian Purvis KC, sitting as the Appointed Person in BL-0-106-20 GREYBOX).

12. Further, the Court of Appeal in *Unik Bond SA v. Catbalogan Holdings Sarl* [2025] EWCA Civ 1594 has given the following guidance to the way appellate courts should approach the writing of judgments:

> "59. In *Re Portsmouth City Football Club Ltd (in liquidation)* [2013] EWCA Civ 916, [2013] Bus LR 1152 Mummery LJ (with whom Rimer and Underhill LJJ agreed) posed the question at [36]:
>
> > "What sensible purpose could be served by this court repeating in its judgments detailed discussions of every point raised in the grounds of appeal and the skeleton arguments when they have already been dealt with correctly and in detail in the judgment under appeal? No purpose at all, in my view."
>
> 60. He continued at [38]:
>
> > "The proper administration of justice does not require this court to create work for itself, for other judges, for practitioners and for the public by producing yet another long and complicated judgment only to repeat what has already been fully explained in a sound judgment under appeal. If the judgment in the court below is correct, this court can legitimately adopt and affirm it without any obligation to say the same things over again in different words. The losing party will be told exactly why the appeal was dismissed: there was nothing wrong with the decision appealed or the reasons for it."

13. I have kept the above principles in mind when considering this appeal.

Discussion

Ground 1 (enhanced distinctiveness)

14. The Hearing Officer addressed the distinctive character of the Earlier Mark at paragraphs 33 and 34 of the Decision.

15. She directed herself to *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV,* Case C-342/97, which requires the Hearing Officer to make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered when determining distinctive character.

16. She then concluded that the Earlier Mark has a "below-medium degree of distinctiveness", reasoning: a) on the one hand, that 'breeze' and 'air' are concepts which have little distinctiveness in relation to the relevant earlier goods (for example, "[a]pparatus for heating, cooling, ventilating and air conditioning"); but b) on the other hand, that the misspelling of BREEZ, the stylisation of AIR and the combination of the two words elevates the distinctiveness.

17. The Hearing Officer then addressed the enhanced distinctiveness of the Earlier Mark at paragraphs 35 to 47 of the Decision.

18. Here, she considered the witness statement from Mr Seeley[2] dated 8 August 2024 adduced by the Opponent ("**Seeley 1**"), concluding that Mr Seeley's evidence was not sufficient to show enhanced distinctiveness and reasoning as follows (see [47] of the Decision):

> "Having reviewed all of Mr Seeley's evidence, I find that it is not sufficient to show that the earlier mark enjoyed enhanced distinctiveness at the relevant date in the UK. Whilst the evidence shows that the opponent's products have won some awards in the UK, the most recent of these was four years prior to the filing date of the contested mark and it is not clear whether the relevant average consumer was aware of these awards at that date. Furthermore, I agree with the applicant that the annual UK sales figures appear to me to be modest (bearing in mind that the unit price of the goods sold by the opponent is unlikely to be inexpensive). There is also a complete absence of any expenditure figures relating to UK advertising/promotional spend such that I cannot tell how much has been spent on any such advertising/promotion in the UK. Finally, there is very limited promotional material before me showing exposure of the mark in the UK aside from use on the opponent's own websites and a single post on www.coolingpost.com just over one month before the relevant date."

19. In its Grounds of Appeal, the Opponent does not assert that the Hearing Officer misdirected herself, misapplied the law or that there has been a significant error of principle. Rather, it asserts that the Hearing Officer erred in her assessment and should have found at least a medium to high degree of distinctiveness. In support of the Opponent's submission, it advances four reasons, which I address below:

Reason 1

20. The Opponent submits that "the [Hearing Officer] treats awards, sales, UK trading since 2007, distributor appointment, websites, case studies and certifications in isolation, not cumulatively" ([7a] of the Grounds of Appeal). The Opponent subsequently expands upon this, saying that "[h]ad the [Hearing Officer] conducted a holistic, sector-sensitive assessment, and weighed the evidence properly, she would have found at least a medium to high degree of distinctiveness".

21. While the Hearing Officer does consider each piece of evidence (UK trading since 2007, distributor appointment, websites, case studies and certifications) separately in paragraphs 35 to 46 of her Decision, I find that she did consider the evidence cumulatively and holistically at paragraph 47 (set out above). In particular, she refers to "all of Mr Seeley's evidence" and then specifically calls out the weight to be given to certain factors including awards, the annual sales, the advertising/promotional spend and the websites. As to a "sector-sensitive assessment", I address this in relation to the Opponent's second reason below.

22. I accept that this balancing of the issues is expressed in a relatively compressed form. However, Hearing Officers are entitled to do so. In this regard (while directed to the

[2] The founder and Chairman of the Opponent.

similarity of goods) Arnold LJ explanation in his judgment in Extreme Networks Ltd v Extreme E Ltd [2024] EWCA Civ 1386 at [31] is instructive:

> "31. It is common for hearing officers when assessing the similarity of goods or services to express their reasoning in highly compressed form. There are a number of reasons for this: first, their extensive experience in the field; secondly, comparison of goods or services is a routine exercise for them to have to undertake when writing decisions; thirdly, it is frequently necessary for them to have to undertake multiple comparisons in each decision; and fourthly, it is often the case that no evidence has been adduced by either party (leaving the hearing officer to rely upon their own knowledge and experience as a consumer) and that the parties have addressed the issue quite briefly in their submissions. In such circumstances the principles summarised by Lord Hamblen in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22, [2022] 1 WLR 3784 at [72] apply mutatis mutandis to the hearing officer's evaluation:
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> > 'It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
> >
> > > (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently: see AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
> >
> > > (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account: see MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
> >
> > > (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out: see R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope of Craighead.'"

23. I also note that the Opponent appears to contradict its submission in its fourth reason (below), where it explains that the Hearing Officer "placed too much weight of [sic] the ad-spend gap", suggesting the evidence was assessed holistically with weight applied to different factors.

Reason 2

24. The Opponent further reasons that "[t]he [Hearing Officer] found UK sales 'modest' (§47) without any benchmark for the specialist market (size, nature and characteristics of the

relevant UK market) or engagement with evidence of long-standing UK presence (2007-2023) and sectoral awards (§38-46)." It goes on to say that "[t]he [Hearing Officer's] conclusion rests on an unstated and high threshold with the niche market context ignored" ([7b] of the Grounds of Appeal).

25. Mr Seeley addressed the sales of products under the Earlier Mark at paragraphs 25 and 26 of his witness statement, explaining that turnover increased from £13,751 in 2007 to £218,000 in 2023. He also noted the following:

    a. The goods were for residential, commercial and industrial markets (Seeley 1, [5]);

    b. The presence of UK facing websites using the Earlier Mark since 2006 (Seeley 1, Exhibit FFS2);

    c. There were CE conformity certificates in 2013, 205, 2016, 2018 and 2019 (Seeley 1, Exhibit FFS7).

    d. The Opponent had won UK industry awards in 2018 and 2019 (Seeley 1, [17]);

    e. The Opponent had appointed a UK national distributor on 15 October 2023 (Seeley 1, Exhibit FFS3); and

    f. The Opponent had cited UK specific case studies (Seeley 1, Exhibit FFS5);

26. In its written submissions, the Opponent (merely) characterised the evidence as follows (my emphasis):

    a. "[T]he sales figures shown in the United Kingdom at paragraph 26 of Mr Seeley's Witness Statement clearly demonstrate the high volume of sales of BREEZAIR branded products" (see [23] of its written submissions dated 9 August 2024);

    b. The above evidence "giv[es] rise, at minimum, to a significant commercial and industrial dimension to the UK market" (see [25] of its written submissions dated 20 April 2026).

27. In turn, in its written submissions dated 15 October 2024, the Applicant stated that: "The turnover figures in paragraph 26 of the Witness Statement of Frederic Frank Seeley show negligible sales in the United Kingdom. The Opponent's air coolers retail for around £80 to £750 per unit and are fairly expensive products. The turnover figures, therefore, imply sales of very few units per year in the context of an air-cooling market worth several billion pounds" (see [2]).

28. In her Decision, the Hearing Officer considered the above evidence and submissions and explained that she "agrees with the applicant that the annual UK sales figures appear to me to be modest (bearing in mind that the unit price of the goods sold by the opponent is unlikely to be inexpensive)" ([47] of the Decision).

29. Having considered the evidence, there is very little (or no) details of the volume of sales or the size, nature and characteristics of the relevant UK market, nor is there any evidence about the market share held by the Opponent or the proportion of the relevant section of the public which identified the goods under the Earlier Mark as originating from a particular undertakings.

30. In these circumstances, I do not accept that any criticism can be made of the Hearing Officer. Absent the above evidence, she had to rely on the information available to her, which taken to its logical conclusion meant, for example, that the Opponent sold between ~290 (£218,000 / £750) and 2,725 (£218,000 / £80) units in the United Kingdom in 2023[3].

31. To this the Opponent submits that "[a]gainst a specialise [sic] business to business trade for commercial and industrial evaporate cooling equipment, the same figures [as above] may represent meaningful commercial penetration" (see [29] of its written submissions dated 20 April 2026). However, the evidence was that the goods were for residential, commercial and industrial markets (see paragraph 25.a above)[4], not business to business trade.

Reason 3

32. In turn the Opponent reasons that "[t]he [Hearing Officer] improperly discounted the Appellant's awards. The [Hearing Officer] stated it is 'not clear' whether the average consumer would have known of 'some' awards (§47). The [Hearing Officer] clearly failed to recognise awards as objective indicators of market standing in a specialist trade."

33. Mr Seeley explained that, in the UK, products sold under the Earlier Mark won the "Energy Reduction Product for 2018" (London Energy Management Awards 2018) and "Energy Efficient Product of the Year 2019" (Energy Awards 2019), as well as being shortlisted for an award in 2016 ([38] of Seeley 1). This was reiterated in the Opponent's written submissions to the Hearing Officer (see [21]) and summarised at paragraph 38 of the Decision.

34. Having considered this evidence and submissions, the Hearing Officer concluded that "[w]hilst the evidence shows that the opponent's products have won some awards in the UK, the most recent of these was four years prior to the filing date of the contested mark and it is not clear whether the relevant average consumer was aware of these awards at that date" ([47] of the Decision).

35. To the degree to which the Opponent's characterisation that the awards were "discounted" is a submission that the Hearing Officer regarded the awards as being unworthy or lacking credibility, I do not accept this. Rather, I understand from the text quoted in the paragraph above that the Hearing Officer considered the weight to be given to the awards, concluding that they were of limited value when assessing enhanced distinctiveness.

36. If the Opponent's submission is that the Hearing Officer gave the incorrect weight to the awards because it is "not clear" whether the average consumer would have known of "some" awards, I note the following:

    a. The date on which enhanced distinctiveness is to be assessed is the date of filing of the Application, namely 27 December 2023 (see by analogy *Levi Strauss & Co v Casucci SpA* [2006] E.T.M.R. 71 CJEU or *Lifestyle Equities CV v Royal County of*

[3] The Opponent submits in its written submissions dated 20 April 2026 that "the [Hearing Officer] was required … to make *some* findings as to the character of the relevant market against which the evidence was to be measured." To the degree to which the Opponent's submission is that, absent any evidence, the Hearing Officer should have guessed what the market was, it would have been inappropriate for her to have done so.

[4] Something the Opponent acknowledges at paragraph 24 of its written submissions dated 20 April 2026.

Berkshire Polo Club Ltd [2023] EWHC 1839 (Ch) [208]). In this respect, the Hearing Officer was correct to consider the relevance of awards in 2018/2019 in 2023;

b. The relevance of the awards needs to be assessed through the prism of the average consumer, which the Opponent submitted ([9] of its written submission) and the Hearing Officer agreed ([26] of the Decision) would be medium (average) to high, depending on the goods. In this respect, the Hearing Officer was entitled to consider whether the average consumer would have known of said awards in 2023; and

c. As set out at paragraph 29 above, the Hearing Officer had to make this assessment in the vacuum of certain evidence.

37. In this context, I find that the Hearing Officer was entitled to give the awards this weight.

Reason 4

38. Finally the Opponent submits that the "[Hearing Officer] placed too much weight of the ad-spend gap (§47)", explaining that "[t]he absence of promotional spend figures is treated as dispositive, notwithstanding other direct indicators such as consistent sales, distributor appointment in the UK media, UK facing websites, UK case studies and CE certifications …"

39. I do not accept that the Hearing Officer treated the absence of promotional spend as being dispositive. Rather, she states that she has considered "all of Mr Seeley's evidence" (see [47] of Decision), which included UK sales ([45 and 47] of the Decision), UK distributors ([37] and [41] of the Decision), UK facing websites ([40] of the Decision), UK case studies ([43] of the Decision), CE certifications ([46] of the Decision) and promotional spending ([47] of the Decision). She then weighed those factors, explaining that the apparent low UK sales, and lack of promotional spending weighed against a finding of enhanced distinctiveness.

40. As to the level of weight applied, the Hearing Officer explains that the lack of evidence on promotional spend is a factor, along with the modest annual sales figures and the limited promotional material.

41. To this the Opponent submits that whether advertising spend is "a meaningful indicator of market penetration depends on the market in question" (see [35] of its written submissions dated 20 April 2026). However, again, the Hearing Officer had no (or very little) evidence on the market before her, for which she cannot be criticised.

42. In this context, I do not find that the Hearing Officer applied undue weight.

Conclusion

43. Taken together, the Hearing Officer did not misdirect herself or misapply the law nor can her evaluation be characterised as a significant error of principle or plainly wrong in the manner required by *Lifestyle Equities*. This ground of appeal therefore fails.

<u>Ground 2 (likelihood of confusion)</u>

44. The Hearing Officer addressed section 5(2) of the Act at paragraphs 12 to 58 of the Decision. Having found that there was no likelihood of direct confusion, the Hearing Officer held that

there was also no likelihood of indirect confusion, concluding as follows (see [56] and [57] of the Decision):

> "The similarity between the marks at issue stems from the common letters 'BREEZ'. It is that common element which gives rise to a medium degree of visual and aural similarity between the marks. However, the 'Breez' element of the earlier mark has a low degree of distinctiveness and, although the commonality of that element in both marks gives rise to a good degree of conceptual similarity between them, it is a concept with little, if any, distinctiveness. Bearing in mind the principle in *Whyte and Mackay*, this therefore points away from the consumer putting the similarities that exist between the opponent's mark and the applicant's mark down to the goods coming from the same/linked undertaking(s). Furthermore, a change of the respective words in the marks from 'Breezair' to 'BreezeIn' does not strike me as a logical brand extension or the kind of change which one would expect to see in a sub-brand. This is because, firstly, the former contains a misspelling of 'Breeze' which is not present in the later mark which does not seem consistent with a logical brand extension or sub-brand. Secondly, even allowing for the 'Breez' and 'Breeze' parts of the marks being imperfectly recalled as being the same, the applicant's mark results in a unitary concept of a gentle wind entering in to somewhere whereas the earlier mark contains two separate concepts of a breeze and the concept of air; this also does not seem consistent with a natural brand extension or sub-brand.
>
> I therefore do not consider that the average consumer is likely to believe that the differences between the marks merely reflects a variation in the nature of the products or stems from marketing considerations denoting goods from the same/linked trader(s) as per the guidance in *L'Oréal*. Rather, I find that the average consumer is likely to put the common use of the letters 'BREEZ', and the resultant shared concept of a gentle wind (which has little, if any, distinctiveness) down to mere coincidence and nothing more. I make this finding in respect of all of the goods at issue even where there is identity between them. There is no likelihood of indirect confusion."

45. Again, the Opponent does not assert that the Hearing Officer misdirected herself or that there has been a significant error of principle. Rather, in support of this ground of appeal, the Opponent broadly advances four reasons which I address below:

Reason 1

46. The Opponent submits that Hearing Officer's assessment was affected by her error in finding that the Earlier Mark had a below-medium distinctiveness ([10(a)] of the Grounds of Appeal). I have already addressed this point at paragraphs 14 to 43 above and so it falls away.

Reason 2

47. The Opponent further submits that the Hearing Officer adopted a piecemeal rather than global assessment ([10] and [10(b)] of the Grounds of Appeal). It then assets that the Hearing Officer's "distinctiveness findings did not merely weigh against confusion in the global assessment; they operated as an effective veto upon it" ([47] of the written

submissions dated 20 April 2026) and that the Hearing Officer, in making the assessment, failed to apply the principle of imperfect recollection ([10](e) of the Grounds of Appeal).

48. In assessing likelihood of confusion, the Hearing Officer directed herself to a number of cases, from which she derived certain principles, including that it must be appreciated globally, taking account of the relevant factors ([13(a)] of the Decision).

49. Having considered a comparison of the goods ([14] to [24] of the Decision), the average consumer and the purchasing process ([25] and [26] of the Decision), a comparison of the marks ([27] to [32] of the Decision) and the distinctive character of the Earlier Mark ([33] to [47] of the Decision), the Hearing Officer then directed herself to "feed all of [her] earlier findings into the global assessment ..." when assessing *direct* confusion (see [48] of the Decision).

50. She then weighed a number of factors, calling out the identity/high similarity of the goods, the medium visual/oral similarity of the marks and the high degree of conceptual similarity, as well as the below-medium distinctiveness when reaching her conclusions ([48] to [52] of the Decision). This is consistent with a global assessment. Indeed, the Opponent appears to accept this, as this aspect of the Hearing Officer's Decision is not appealed.

51. In this context, the Opponent's submission appears to be that, having applied a global assessment in the context of *direct* confusion, the Hearing Officer disregarded it when considering *indirect* confusion. I do not accept that this is a fair reading of the Hearing Officer's Decision. Considered holistically, she conducted a global assessment and her subsequent reasoning in relation to indirect confusion cannot be divorced from this.

52. In this context, it is constructive to consider James Mellor QC's (as he then was) decision in *Cheeky Italian v Sutaria* O/219/16 [16]:

> "16.2. Second, if (as here) the differences between the marks are such that there is no likelihood of direct confusion, one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion. This is what Mr Purvis was pointing out in those paragraphs in LA Sugar."

53. It is for this reason that I am also unable to find that the Hearing Officer treated distinctiveness as an effective veto when considering indirect confusion or that the Hearing Officer incorrectly applied the principle of imperfect recollection. The Hearing Officer having applied addressed these points in the context of direct confusion, which is not under appeal, it is not available to me to reopen them in relation to indirect confusion.

Reason 3

54. The Opponent then submits that the Hearing Officer erred in finding that the Earlier Mark had two separate concepts of "breeze" and "air" whereas the Application had one concept of "gentle wind entering into somewhere" and dismissed the significance of the conceptual similarity of BREEZ(E) ([10(c)] and [10(e)] of the Grounds of Appeal). This is developed in the Opponent's written submissions dated 20 April 2020, in which the Opponent says that the Hearing Officer misapplied the principle of imperfect recollection.

55. With regard to the former, in its written submissions the Opponent stated: "Conceptually, the marks are similar to the extent that they are both evocative of the English word 'BREEZE'

meaning a *'gentle wind'*. The terms 'IN' and 'AIR' contained in the Application Mark and the Earlier Mark simply define how that 'gentle wind' would be delivered."

56. While I agree that BREEZ(E) is a reference to a gentle wind, AIR and IN are not analogous concepts, nor are they both indicative of the method of delivery. Rather, AIR denotes an invisible gaseous substance, whereas IN expresses arrival. Therefore, only IN expresses the method of delivery. In this context the Hearing Officer was entitled to find that the Earlier Mark embodies two separate concepts, whereas the Application did not.

57. As to the conceptual similarity of BREEZ(E), in *Whyte and Mackay Ltd v Origin Wine UK Ltd* [2015] F.S.R. 33 [44], Arnold J (as he then was) stated that: "...what can be said with certainty is that, if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion." This was elaborated upon in *Nicoventures Holdings Limited v The London Vape Company Limited* [2017] EWHC 3393 [27], with Birss J (as he then was) stating that: "... If the only similarity between two marks arises from common elements which have low distinctiveness (alone and as a combination) then that tends to weigh against a finding of likelihood of confusion. Such a situation does not preclude a finding of likelihood of confusion but it is a relevant factor and in an appropriate case it may be decisive."

58. In this respect, where the Hearing Officer had found that the Earlier Mark had a below-medium degree of distinctiveness, she was correct to consider the implications of this when assessing likelihood of confusion as part of a global assessment. In particular, the inference drawn from *Whyte and Mackay* and *Nicoventures* is that this below-medium distinctiveness militates against the good degree of conceptual similarity of the Earlier Mark and Application (as well as the medium degree of visual and oral similarity), although it is not decisive.

59. With regard to imperfect recollection, my comments in relation at paragraph 53 are repeated.

Reason 4

60. Finally, the Opponent submits that the Hearing Officer did not provide adequate reasons as to why there was no likelihood of economic linkage ([10(c)] and [10(d)] of the Grounds of Appeal).

61. When addressing indirect confusion, the Hearing Officer referred to *LA Sugar Ltd v By Back Beat Inc* BL O/375/10, *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, *Cheeky Italian Ltd v Sutaria* O/219/16 and *Duebros Limited v Heirler Cenovis GmbH* BL O/547/17.

62. In so doing, she called out three (non-exhaustive) examples of indirect confusion, namely: a) where the common element is so strikingly distinctive that the average consumer would assume no-one else but the brand owner would be using the mark; b) where the later mark simply adds a non-distinctive element to the earlier mark, suggesting a sub-brand or brand extension; and c) where the earlier mark comprises a number of elements and a change of one element is consistent with a brand extension.

63. Turning to the Application, she then addressed these examples of indirect confusion, noting that the common element (BREEZ) was not strikingly distinctive (for the same reasons as the Earlier Mark had below-medium distinctiveness) and that the change from BREEZAIR to BREEZEIN (with a change from BREEZ to BREEZE) was not a logical brand extension (the latter example of a number of elements, not being applicable).

64. While caution should be exercised to referring to non-exhaustive examples when assessing indirect confusion, I do not accept that the Hearing Officer can be criticised for not providing reasons. This is especially where the extent of the Opponent's submissions before the Hearing Officer on indirect confusion were as follows (see [25] of its written submissions):

> "A likelihood of confusion does not simply need to be direct confusion but can also be indirect confusion. Even if actual confusion was not found, indirect confusion is unavoidable given the high similarity of the Application Mark and the Opponent's Earlier Mark together with the identity/high similarity of goods covered by the Subject Application."

65. Notably, in its written submissions to the Hearing Officer, the Opponent did not cite any authorities in support of its position, did not elaborate on why likelihood of indirect confusion may be found where direct confusion was not, and did not provide any examples.

66. In this respect, I note the comments of James Mellor QC (as he then was) in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion".

Conclusion

67. Again, taken together, the Hearing Officer did not misdirect herself or misapply the law nor can her evaluation be characterised as a significant error of principle or plainly wrong in the manner required by *Lifestyle Equities*. This ground of appeal therefore fails.

Ground 3

68. The Hearing Officer addressed section 5(3) of the Act at paragraphs 59 to 64 of her Decision. When assessing the reputation of the Earlier Mark, she directed herself to *General Motors Corporation v Yplon SA*, C-375/97 and the guidance therein as to what is required to establish reputation, including the market share, the intensity, geographical extent and duration of use and the size of the investment in made.

69. Having done so, she concluded as follows (see [63] of the Decision):

> "Bearing in mind my earlier comments [regarding the distinctiveness of the Earlier Mark], although there have clearly been sales in the UK prior to the relevant date in relation to evaporative air coolers and the opponent has received some awards in the UK prior to the relevant date, there is insufficient evidence to satisfy me that the scale of UK use has been such as to acquire the necessary reputation. In reaching this conclusion, I have borne in mind, in particular, the apparently modest sales figures, the lack of any substantial UK advertising/promotion or details about

promotional spend and the limited promotional material before me showing exposure of the mark in the UK…" (My emphasis.)

70. The Opponent does not say that the Hearing Officer misdirected herself, misapplied the law or that there has been a significant error of principle. Rather, it asserts that the Hearing Officer erred in her assessment of the Opponent's evidence ([12] of the Grounds of Appeal)[5]. It also submits that the Hearing Officer's finding of goodwill (as to which, see below) is incongruous with the finding of no reputation ([13] of the Grounds of Appeal) and that the Hearing Officer erred in assessing whether there was a "link" ([14] of the Grounds of Appeal).

71. For the same reasons that I have found that the Hearing Officer was entitled to come to the conclusions she did on enhanced distinctiveness (and, in particular, that her assessment of the evidence before her was not plainly wrong), I do not agree with the Opponent that she erred in the subsequent application of that evidence to an assessment of reputation. This is especially where:

    a. There was no evidence before the Hearing Officer of some of the factors specifically called out by *General Motors* relevant to establishing reputation, namely market share, intensity, geographical extent or the size of investment made; and

    b. In its written submissions, the Opponent did not call out any specific evidence in support of reputation, rather relying on generic references to the "Opponent's reputation … [being] vast" and "the Witness Statement of Mr Seeley .. unequivocally demonstrate[ing] the Opponent's extensive use of the Earlier Mark …" (see [34] to [38]).

72. As to the alleged incongruity between the Hearing Officer's finding of a moderate level of goodwill but no reputation, goodwill and reputation are different. The former is an asset and the latter is a (potential) aspect of a trade mark, with them being applicable to different bodies of law, namely passing off and trade mark infringement/validity. While the evidence required to substantiate them may be applicable to both, they enjoy different tests, with goodwill typically enjoying a (significantly) lower threshold. In this context, there is no incongruity, nor can any criticism be made of the Hearing Officer for not explaining the distinction.

73. As to a "link", as the Earlier Mark does not have a reputation, the opposition (and appeal) on section 5(3) falls away. Further the lack of reputation would be a factor when making a global assessment of the link, along with the degree of similarity between the respective marks and between the goods/services (see *Intel Corporation, Inc. v CPM United Kingdom Limited,* 252/07, EU:C:2008:655, [2009] ETMR 13).

74. I therefore do not need to address the Hearing Officer's findings in relation to a link. I do, however, make the following observation. The Hearing Officer held that "without a qualifying reputation in the UK, there can be no link made in the consumer's mind …" (see

[5] I understand this to be a reference to the criticism advanced by the Opponent in relation to enhanced distinctiveness in support of ground 1 of the appeal, something which appears to be confirmed by the Opponent's written submissions dated 20 April 2026 at [61].

[61] and [63] of the Decision). Where a global assessment is required, I caution against such an emphatic conclusion. Rather, reputation is but one factor to be considered.

Conclusion

75. Again, taken together, the Hearing Officer did not misdirect herself or misapply the law nor can her evaluation be characterised as a significant error of principle or plainly wrong in the manner required by *Lifestyle Equities*. This ground of appeal therefore fails.

Ground 4

76. The Hearing Officer addressed section 5(4)(a) of the Act at paragraphs 65 to 79 of the Decision. In so doing, she directed herself to, inter alia, the following authorities:

    a. The classical trinity in *Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL, as explained by HHJ Clarke in *Discount Outlet v Feel Good UK* [2017] EWHC 1400;

    b. The definition of goodwill as articulated in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 and the evidence required to substantiate it as set out in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC); and

    c. The test for misrepresentation and damage as set out by Morritt LJ in *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, namely:

> "There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc. [1990] R.P.C. 341 at page 407* the question on the issue of deception or confusion is 'is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]'.

77. Having done so, she concluded as follows at paragraph 74 and 77 of the Decision (my emphasis):

> "… I accept that the opponent had the requisite level of goodwill (which I pitch at around a moderate level) in the UK at the relevant date in a business selling evaporative air coolers and that the following sign was distinctive of that goodwill …
>
> "… [but that] I find that those familiar with the opponent's business will not assume that the goods provided under the applicant's mark are the responsibility of the opponent. Misrepresentation is not made out…" (my emphasis).

78. The Opponent does not assert that the Hearing Officer relied on the incorrect authorities, but submits that she subsequently applied the test for misrepresentation incorrectly (see the text underlined above).

79. I agree with the Opponent. The test should be directed to the relevant members of the public, not those familiar with the Opponent's business. Further, the test is whether a substantial number of the relevant members of the public will be misled into purchasing

the Applicant's product in the belief that it is the Opponent's product, not whether there is an assumption that the Applicant's products are the responsibility of the Opponent (whatever this may mean).

80. It therefore falls on me to apply the test correctly. Here, the Opponent submits that the Hearing Officer's finding on misrepresentation was materially impaired by her assessment of the distinctiveness of the Earlier Mark and the following factors weigh in favour of misrepresentation: a medium visual similarity, medium aural similarity, good conceptual similarity, similar/identical goods, the same market and moderate goodwill in the UK ([16] and [17] of the Grounds of the Appeal).

81. I note that there is a danger of seeking to apply the tests associated with trade marks in relation to passing off. They are two distinct bodies of law and likelihood of confusion is not the same as misrepresentation. Nonetheless, the factors identified by the Opponent can be helpful when assessing misrepresentation, albeit not binding.

82. With regard to the BREEZAIR sign (which is taken to be the same in form as the Earlier Mark[6]) the Hearing Officer has held that this is allusive of the functions of the products in question, as is the BREEZEIN sign (which is also taken to be the same in form as the Application). A member of the public is, therefore, likely to give less weight to the conceptual similarity of the respective signs or the identity/similarity of the goods. In circumstances where there is only a moderate amount of goodwill and medium visual and oral similarity, I do not therefore consider that a substantial number of the relevant members of the public will be misled into purchasing the Applicant's products in the belief that they are or are associated with the Opponent's products.

83. Therefore, while I accept that the Hearing Officer was wrong in her application of the law, I agree with the conclusion she reached nonetheless. This ground of appeal therefore fails.

Decision

84. The appeal fails for the reasons given above. The Application should proceed to grant.

Costs

85. For the costs below, the Hearing Officer ordered the Opponent to pay the Applicant £650 by way of contribution to its costs.

86. Since the Opponent has failed in its appeal, I order the Opponent to pay to the Applicant the sum of £650 by way of contribution to its costs of the Appeal.

87. Accordingly, I order that the Opponent must pay to the Applicant the total sum of £1,300 within 21 days of this decision.

Antony Craggs
Appointed Person
27 April 2026

Representation

Applicant/Respondent: Unidentified, Trademarkit LLP

[6] See [78] of the Decision.

Opponent/Appellant: Abigail Wise, Lewis Silkin LLP