o/0057/23

TRADE MARKS ACT 1994
IN THE MATTER OF TRADE MARK APPLICATION NO. 3599197 BY BOND PAYMENTS LIMITED

AND OPPOSITION THERETO UNDER NO. 425712 BY TWIG RIGHTS LIMITED

DECISION

Introduction

1. This is an appeal against a Decision of James Hopkins, acting on behalf of the Registrar of Trade Marks, dated 9 May 2022 (O-394-22)("***the Decision***"). In the Decision the Hearing Officer rejected the opposition brought by Twig Rights Limited ("***the opponent***") to Trade Mark Application No. 3599197 in the name of Bond Payments Limited ("***the applicant***").

2. On 22 February 2021 the applicant applied to register the trade mark:

TWIG

under Trade Mark Application No. 3599197 with respect to a range of goods and services in classes 9, 16, 25, 35, 36, 39, 41, 42 and 45 ("***the application***").

3. On 22 July 2021 the opponent partially opposed the application under sections 5(1) and 5(2)(a) of the Trade Marks Act 1994 ("***the 1994 Act***"). The opposition was directed against goods and services in classes 9, 16 and 41 of the application.

4. In respect of both grounds the applicant relied upon its UK Trade Mark No. 2546911 registered for the trade mark:

TWIG

("***the earlier mark***"). The earlier mark was filed on 6 May 2010 and was registered on 29 October 2010. It was registered with respect to the following goods and services all of which, at the outset of the opposition, were relied upon for the purposes of the opposition:

> Class 9: Audio visual recordings; downloadable electronic publications; computer, electronic and video games; electronic instructional and teaching apparatus and instruments; pre-recorded CD-Roms and DVDs; computer software for educational purposes.

Class 16: Printed matter, magazines, books, posters, instructional and teaching material.

> Class 41: Education; entertainment; management of education services; production of educational programmes; provision of educational information; publication of educational material; information relating to entertainment or education, provided on-line from a computer database or the Internet; provision of online games and electronic publications.

5. Given the relevant dates the earlier mark is (1) an earlier mark for the purposes of section 6 of the 1994 Act; and (2) is subject to the proof of use requirements specified in section 6A of the 1994 Act.

6. In its Notice of Opposition, the opponent contended that the competing trade marks are identical and the parties' respective goods and services are identical or highly similar. Based upon these factors, the opponent submitted that there was a likelihood of confusion. The opponent also made a statement of use in relation to all the goods and services of the earlier mark.

7. The applicant filed a Counterstatement in which, whilst admitting that the competing marks were identical, denied the Grounds of Opposition and in particular that there was a likelihood of confusion. The applicant also indicated that it would require the opponent to provide proof of use of the earlier mark relied upon.

8. Only the opponent filed evidence.

9. A hearing took place before the Hearing Officer via video link on 30 March 2022. The opponent was represented by Mr David Moore of Jensen & Son and the applicant was represented by Mr Phillip Johnson instructed by Simons Muirhead Burton LLP. Both filed skeletons of argument in advance of the hearing.

The Hearing Officer's Decision

10. The Hearing Officer only considered the question of proof of use under section 6A of the 1994 Act.

11. Before turning to consider the question of proof of use the Hearing Officer made the following preliminary remarks (footnotes excluded):

> 13. At the hearing, Mr Moore took issue with the applicant's position in respect of the opponent's evidence; in his view, through Dr Johnson's skeleton arguments, the applicant was attempting to challenge the opponent's evidence without cross-examining its witnesses. Citing *EXTREME*, Mr Moore argued that, in the circumstances, it is not permissible to challenge the evidence unless it is self-evidently incredible. He added that the applicant has neither filed any evidence of its own nor forewarned the opponent in correspondence that any of the evidence was challenged. Therefore, Mr Moore contended that the evidence in this case must be considered unchallenged.

> 14. I acknowledge that the opponent's evidence in this case has not been tested by way of cross-examination and, to that extent, it can be considered unchallenged. I also accept the legal principles to which Mr Moore referred. Nevertheless, his objections to the applicant's criticisms of the opponent's evidence are, to my mind, misguided. Firstly, and as a general point, evidence does not always have to be accepted in the absence of cross-examination. Secondly, I do not understand the applicant to have been attempting to contest the veracity of any of the opponent's evidence or, for that matter, to have been inviting me to disbelieve its witnesses. This was confirmed by Dr (sic) Johnson at the hearing; he denied that the applicant was suggesting the opponent's evidence was untruthful. It is important to note that, even where a party's witnesses have not been cross-examined, it remains open to the other party to comment upon, or even criticise, the sufficiency of their evidence. In my view, that is what the applicant has done through Dr Johnson's skeleton arguments and submissions at the hearing. Even though the evidence has not been challenged by way of cross-examination, it is still necessary for me to determine the probative value of the evidence and whether it is sufficient to establish that the earlier mark has been put to genuine use in accordance with the statutory provisions and authorities outlined below. The mere fact that there has been no cross-examination of the opponent's witnesses does not mean that I must accept their evidence as being satisfactory for that purpose without a proper assessment.

12. With respect to the proof of use there is no suggestion on this appeal that the Hearing Officer did not identify the correct statutory provisions or the relevant case law as set out in paragraph [15] to [21] of the Decision.

13. Nor is it suggested that the Hearing Officer did not identify the evidence filed in support of the use relied upon by the opponent in support of the statement of use made in relation to all the goods and services of the earlier mark namely:

    (1) The witness statement of Mr David McGinty, Head of Marketing of Twig Education Limited (a 100% subsidiary of the opponent) a position that he had held since April 2019, dated 22 November 2021. Mr McGinty had held various roles at the company since October 2013. Mr McGinty produced 6 exhibits DM1 to DM6. See paragraph [9] and 10] of the Decision; and

    (2) The witness statement of Mr David Moore, a Chartered Trade Mark Attorney and Partner of the opponent's representatives, dated 22 November 2021. Mr Moore produced two exhibits DSM1 and DSM2 which introduced various newspaper articles and photographs into evidence. See paragraphs [9] and [11] of the Decision.

14. Further it is not suggested on this appeal that the concession set out in paragraph [22] of the Decision was not made at the hearing below:

> 22. At the hearing, Mr Moore conceded that the opponent's evidence does not establish that the earlier mark has been put to genuine use in respect of '*computer, electronic and video games; pre-recorded CD-Roms and DVDs*' in class 9 or '*management of education services; provision of online games […]*' in class 41. As such, the earlier mark may not be relied upon in relation to those goods and services.

15. The effect of that concession on the previously claimed use in respect of which evidence had been filed is shown by way of a mark-up below:

> Class 9: Audio visual recordings; downloadable electronic publications; ~~computer, electronic and video games~~; electronic instructional and teaching apparatus and instruments; ~~pre-recorded CD-Roms and DVDs~~; computer software for educational purposes.
>
> Class 16: Printed matter, magazines, books, posters, instructional and teaching material.
>
> Class 41: Education; entertainment; ~~management of education services~~; production of educational programmes; provision of educational information; publication of educational material; information relating to entertainment or education, provided on-line from a computer database or the Internet; ~~provision of online games~~ and electronic publications.

16. Having set out observations on certain aspects of the opponent's evidence the Hearing Officer went on to find as follows (footnotes excluded):

> 29. I remind myself that an assessment of genuine use is a global assessment, which involves looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself. Taking all of the above into account, the evidential picture suggests that there has been some use of the earlier mark (or at least variants thereof) and establishes that the opponent and the UK operational company have generated a turnover during the relevant period. Moreover, Mr McGinty has given unchallenged narrative evidence that the opponent and the UK operational company produce and provide educational content. The evidence suggests that this content is predominantly in digital video format. Further, the evidential picture also suggests that there has been some business interaction with both public and private entities. I also do not doubt that the opponent has had a

presence at the BETT show, received awards and has been referred to in articles.

30. Nevertheless, as indicated above, not every commercial use of a mark may automatically be deemed to constitute genuine use. Whilst I accept that the opponent and the UK operational company both generated a turnover during the relevant period, from the evidence I am unable to ascertain with any degree of certainty how this turnover was generated. Neither the opponent's nor the UK operational company's turnover figures have been broken down or attributed to particular goods or services. The evidence does not include invoices, order confirmations or commercial agreements, for example, that establish which specific goods or services the turnover has been generated in connection with. Overall, and without further information to contextualise the figures, I consider a turnover of just over £5m for a five-year period in the context of a number of potentially substantial markets to be modest. Although the evidence suggests that the opponent provides educational videos, there is a distinct lack of detail in this regard. For instance, there is no explanation or evidence indicating how many subscribers or customers the opponent had during the relevant period, or how many times the videos and/or support materials were accessed or downloaded. Whilst an article from Imperial College Business School via FE News, dated 16 August 2021, states that "Imperial has been working with Twig Education since 2014 when the two organisations began collaborating to create topical, high-quality digital science education products for primary level teachers and students around the world", there is no corroborating evidence of this collaboration, or any examples of the products they are said to have produced.

31. Furthermore, it is my view that insufficient evidence as to the use of the earlier mark during the relevant period has been provided. The company accounts do not establish that the turnover was generated in connection with the earlier mark. Although Mr McGinty says that products have been offered under various 'TWIG' marks, I note that the printouts from the opponent's website are all undated and were only obtained on 15 November 2021, i.e. after the relevant period. In addition, Mr Moore submitted that the opponent's CPD programme is used in 4,000 schools in the UK. The evidence upon which he sought to rely on for this argument is an article from Imperial College London. However, to my mind, this does not assist the opponent. Firstly, it predates the relevant period. Secondly, the CPD programme is offered under a materially different mark, namely, 'Reach Out CPD'. As for attendance at the BETT show, the majority of the photographs provided by Mr Moore are from January 2014 and January 2016, i.e. before the

relevant period. There are photographs from the BETT trade show in January 2017, which, I accept, falls within the relevant period. These show the slightly stylised word 'Twig' presented on the walls of the trade show pitch and above a screen. Adorned on the same is the phrase "[a]ward-winning films and digital content for K-10 STEM education". However, no further information has been provided. For example, there is no indication as to how many individuals attended the trade show or whether any business was generated as a result of the opponent's appearance at the same. Turning to the awards, the list provided by Mr McGinty is taken from the opponent's global website at www.twig-world.com; the printout was obtained on 15 November 2021, i.e. after the relevant period. I note that three of the awards, namely, the ELTons Award for Innovation, the Bett Awards and the Education Resources Awards appear to have been awarded during the relevant period (all 2017). However, the first two were attributed to products offered under a materially different mark, namely, 'Tigtag CLIL'. The third award was attributed to the 'Twig Education' "primary science news service". However, no further information has been provided. For example, neither Mr McGinty nor Mr Moore have put beyond doubt that this award relates to activities conducted during the relevant period; I am disinclined to take judicial notice of whether this particular award is given annually in respect of activities conducted in the year immediately preceding nominations.

32. Moreover, from the evidence I am unable to conclude with any degree of certainty that the opponent has attempted to create or maintain a commercial outlet for its goods and services in the UK. The evidential picture suggests that the opponent has a presence in the US. The company accounts clearly describe business activities in the US and, in particular, California. Areas of focus for future growth are said to include Asia, the Middle East and South America. Whilst the company accounts suggest that the reported turnover is recognised when a licence agreement has been executed and delivery has occurred, and that the UK operational company develops and delivers multimedia curriculum content as its principle (sic) activity, it is not clear what business has been conducted in the UK. For instance, invoices or order confirmations showing that the opponent has UK-based consumers, or that its turnover was generated in this territory, have not been provided. There is also no evidence of any partnerships with UK-based government entities. To my mind, the evidence does not establish that the opponent's products under the earlier mark have been used throughout the educational sector in the UK during the relevant period.

33. There are a number of other deficiencies in the opponent's evidence. For instance, the opponent has not provided any details of its market share or amounts invested in promotional activities. There is no evidence of any such activities having taken place. There is no evidence or information that would enable me to assess the scale and extent of the use of the earlier mark, or how geographically widespread any such use has been. Likewise, there is nothing before me from which I can ascertain whether such use is warranted in the economic sectors concerned to maintain or create a share in the market for the goods and services protected by the mark.

34. Although I do not doubt that there has been some commercial activity, and that this may have been conducted in connection with the earlier mark (or variants thereof), it is my view that the evidence provided is insufficiently solid or specific to meet the requisite standard of proof. Following a careful consideration of the evidence in its entirety, I am not satisfied that the opponent has demonstrated genuine use of its mark in the UK for any of the goods or services for which it is registered. The consequence of which is that the earlier mark may not be relied upon to support the opponent's claim and the opposition must inevitably fail.

The appeal

17. On the 6 June 2022 a Form TM55P Notice of Appeal together with a Statement of Grounds of Appeal was filed on behalf of the opponent. The Statement of Grounds of Appeal are in narrative form. However, in summary there appeared from the Statement of Grounds of Appeal to be two broad grounds of appeal namely:

    (1) That the Hearing Officer did not apply or did not properly apply the rule in Browne v. Dunne (1894) 6 R 67; and

    (2) That the Hearing Officer did not properly consider the evidence of use filed on behalf of the opponent and made errors in his assessment of such evidence.

18. No Respondent's Notice was filed.

19. Notification that the hearing of the appeal was listed to take place via video link on 14 November 2022 was sent to the parties on 7 October 2022.

20. On 10 November 2022 the opponent's representatives indicated that it '*refers to and repeats the statement of grounds of appeal and requests a decision on the papers*'. The applicant objected to this approach indicating that it was too late in the day for the appeal to be decided on the papers and that the hearing of the appeal should be maintained. In the light of the position of the applicant the hearing of the appeal was not vacated.

21. The hearing of the appeal took place via video link on 14 November 2022. At that hearing the Appellant was not represented electing to rely upon its Grounds of Appeal. Mr Phillip Johnson[1] instructed by Simons Muirhead Burton LLP appeared on behalf of the Respondent. Mr Johnson had filed a skeleton of argument in advance of the hearing.

The Standard of Review on Appeal

22. An appeal against decisions taken by the Registrar is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. See Reef Trade Mark [2003] RPC 5; and Actavis Group PTC v. ICOS Corporation [2019] UKSC 1671 at [78] to [81].

23. Moreover, where the decision below involves the making of a value judgment the decision maker on appeal must be especially cautious about interfering with that judgment on appeal: see most recently Actavis (above) at [80]:

> 80 What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge's conclusions of primary fact but with the correctness of the judge's evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible: *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 14-17 per Clarke LJ, a statement which the House of Lords approved in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

24. In Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115] Lewison LJ said:

> 114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only

[1] Mr Phillip Johnson is an Appointed Person. In accordance with the decision of Professor Ruth Annand in BUSINESS INSIDER TM (O-004-18) the issue of Mr Johnson appearing on behalf of the applicant on the appeal was canvassed with the representatives of the opponent who raised no objection.

> to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are*: Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360 ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325 ; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477 . . .
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> 115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

25. The general principles are not in dispute and I will bear the above principles firmly in mind in considering the issues before me.

Decision

26. Turning first to the Ground of Appeal based upon the failure to apply or to apply properly the rule in Browne v. Dunne, it was maintained on behalf of the opponent in paragraph 8 of the Grounds of Appeal that:

> The first error arises in the Hearing Officer's assessment of evidence in toto. The evidence was not challenged by the Applicant either by filing its own evidence or, alternatively, by cross-examination of the witnesses who were both available for cross-examination. Nor was any advance given that the evidence was to be challenged. The unavoidable effect of the Applicant's failure to cross-examine the Opponent's witnesses or provide advance notice that the evidence was to be challenged combined with the complete absence of evidence of is own is that it is not permitted to invite the tribunal of fact to disbelieve the witness's evidence on any matter unless the evidence of the Opponent on any matter is so incredible that the

matter upon which it is to be impeached is manifest (*Browne v. Dunne (1894) 6 R 67*).

27. The approach as applied to trade mark cases was summarised by Geoffrey Hobbs QC sitting as the Appointed Person in CLUB SAIL Trade Mark [2010] RPC 32 at [36] to [43]. Of particular relevance to the present appeal are the statements in paragraphs [38] and [39]:

> 38. Secondly, it is not obligatory to regard the written evidence of any particular witness as sufficient, in the absence of cross-examination, to establish the fact or matter (s)he was seeking to establish. That is brought out by the following observations of Mann J. in *Matsushita Electric Industrial Co. v Comptroller-General of Patents* [2008] EWHC 2071, [2008] R.P.C. 35 (Pat).
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> > 24. As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.
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> 39. Thirdly, when assessing the evidence in the witness statements it is appropriate to do so from the perspective identified by Lord Bingham of Cornhill in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22; [2003] 1 AC 32 (HL) at para.[13]:
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> > "… And I think it is salutary to bear in mind Lord Mansfield's aphorism in *Blatch v Archer* (1774) 1 Cowp 63 at 65, 98 ER 969 at 970 quoted with approval by the Supreme Court of Canada in *Snell v Farrell*:
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> > > 'It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted'"

28. In the present case it is clear from paragraph [14] of the Decision that the Hearing Officer was fully aware of the effect of the rule in Browne v. Dunne. It is also clear, from paragraph [14] of the Decision that the applicant was not suggesting that the opponent's evidence was *untruthful* such as to engage the rule in Browne v. Dunne but that the evidence even if truthful had not provided enough admissible and relevant evidence to demonstrate the relevant 'use'. That this was the position of the applicant was reconfirmed both in the skeleton of argument and the submissions made at the hearing in the context of the present appeal.

29. That is to say that the applicant was submitting no more than when the Hearing Officer considered the evidence in accordance with the guidance provided in paragraphs [38] and [39] of the Decision in CLUB SAIL Trade Mark that such evidence did not demonstrate 'use' to the required standard.

30. That this was the approach that the Hearing Officer took to the assessment of the evidence before him as confirmed in paragraphs [14] and [34] of the Decision. That the Hearing Officer took into account that the evidence was unchallenged is further confirmed in paragraph [29] of the Decision. In the circumstances I dismiss the first Ground of Appeal on the basis of the failure to apply the rule in Browne v. Dunne.

31. Turning to the second Ground of Appeal that the Hearing Officer did not properly assess the evidence of use that was before him, it does not seem to be suggested on this appeal that the Hearing Officer failed to correctly identify the principles identified in the case law in paragraphs [18] to [21] of the Decision; and further confirmed in paragraph [29] of the Decision.

32. What instead is submitted is that the Hearing Officer incorrectly applied the principles to the evidence that was before him. In summary what is averred is as set out in the last sentence of paragraph 17 of the Grounds of Appeal namely '*The evidence in this case goes far beyond what was available and constituted genuine use in the cases cited by the Hearing Officer*'.

33. The paragraphs that might be said to 'particularise' the second Ground of Appeal are set out in narrative form in paragraphs 9 to 17 of the Grounds of Appeal and are essentially directed to points that are said to arise in the context of paragraphs [30] to [32] of the Decision.

34. It is not always entirely clear as to the precise nature of the complaint is that addressed in those paragraphs of the Grounds of Appeal. To the extent that the complaint is made on the basis that the Hearing Officer disbelieved the evidence of Mr McGinty, as opposed to regarding the evidence of Mr McGinty as insufficient for the purpose of demonstrating 'use', for the reasons set out above under the first Ground of Appeal I reject those complaints. In this connection, it is of note that the Hearing Officer reiterated his approach to the assessment of the evidence of use in paragraph [34] of his Decision.

35. It seems to me that there can be no suggestion that the Hearing Officer did not consider the evidence that was before him. What is clear from the reasoning set out in paragraphs [30] to [32] of his Decision is that that the Hearing Officer accepted that there was some use of the earlier mark (or variants of the earlier mark) but for reasons that he explained the evidence, in so far as it was evidence from the relevant period, was not sufficient for him to conclude with any degree of certainty that the opponent had used the earlier mark in respect of the *specific* goods and services which were relied upon for the purposes of the opposition proceedings. As noted above the Hearing Officer reiterated his approach to the assessment of the evidence of use in paragraph [34] of his Decision.

36. In these circumstances it seems to me that if the points raised by the opponent were to be considered afresh by me then as stated by Geoffrey Hobbs QC sitting as the Appointed Person in NICO LONDON Trade Mark (O-338-20) at paragraph [36]:

> . . . the Decision would end up being re-taken by this Tribunal under the guise of reviewing it for error. However, it is necessary in order to maintain the required distance between the role of decision taker at first instance and the role of decision taker on appeal for this Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the Opponent relies are by force of what they reveal sufficient to establish that the Decision is vitiated by error.

37. I have reviewed the Decision in the light of the alternatives put forward by the applicant. Having done so I am satisfied that none of the points relied upon reveal any errors on the part of the Hearing Officer which taken either individually or together establish that the conclusion he reached is one that is vitiated by error. Rather it is one that it seems to me that it was open to the Hearing Officer to reach for the reasons that he gave.

38. I am further reinforced in that view because no complaint seems to have been raised on this appeal to the approach that the Hearing Officer took to the evidence as set out in paragraph [33] of the Decision.

39. At paragraph [38] in NICO LONDON Trade Mark (above) Geoffrey Hobbs QC stated as follows:

> In *Butler v Bankside Commercial* Ltd [2020] EWCA Civ 203 Lewison LJ (with whom David Richards and Asplin L.JJ agreed) repeated at paragraph [19] what Mummery LJ (with whom Rimer and Underhill L.JJ agreed) had said in *Neumans LLP v Andronikou* [2013] EWCA Civ 916 at paragraph [38] (in the context of paragraphs [36] to [40] under the heading "Lord Wilberforce and appeals from impeccable judgments"): "*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."

40. Adopting this approach, I dismiss the opponent's appeal against the Hearing Officer's decision that the opponent had not demonstrated genuine use of the mark such that it could not be relied upon to support the opponent's Grounds of Opposition.

Conclusion

41. To conclude, for the reasons set out above, it does not seem to me that there is any error of principle or material error in the Hearing Officer's decision. Moreover, it is not in my view appropriate to interfere with the evaluations of the evidence that the Hearing Officer made in reaching the decision that he did. In the result the appeal fails and is dismissed.

42. Since the appeal has been dismissed the applicant is entitled to a contribution towards its costs of the appeal. I will therefore make an order that the opponent pay to the applicant a contribution of £1,500 towards its costs of the appeal. This sum should be paid in addition to the costs of £850 below. I therefore order Twig Rights Limited to pay to Bond Payments Limited the sum of £2,350 by 4 pm on Wednesday 8 February 2023.

EMMA HIMSWORTH KC

Appointed Person

18 January 2023