BL O/0111/26

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF AN APPLICATION TO PROTECTION INTERNATIONLA TRADE MARK REGISTRATION NO. WO0000001665812 IN THE UNITED KINGDOM IN THE NAME OF BYD COMPANY LIMITED

AND IN THE MATTER OF OPPOSITION NO. 436547 BY MOVING LIFE LIMITED

DECISION

Introduction

1. This is an appeal against the decision of Al Skelton, acting on behalf of the Registrar, dated 28 August 2025 (O-0797-25)("***the Decision***").

2. On 7 April 2022, BYD COMPANY LIMITED ("***the applicant***") requested protection in the United Kingdom ("***UK***") of the international trade mark 'Atto'. The mark had a priority date of 9 December 2021.

3. The applicant's mark was published for opposition purposes on 1 July 2022 with respect to the following goods:

> Class 12: Cars; motor coaches; trucks; motor buses; automobile bodies; automobile chassis; motors, electric, for land vehicles; motorcycles; brake pads for automobiles; forklift trucks.

4. On 29 September 2022, Moving Life Ltd ("***the opponent***") filed a notice of opposition based on section 5(4)(a) of the Trade Marks Act 1994 ("***the 1994 Act***"). For these purposes the opponent relied upon the sign ATTO which it claimed had been used throughout the UK since early 2016 in respect of goods which were identified in the Form TM7 as '*vehicles; motorised vehicles; scooters; personal mobility vehicles; parts and accessories for vehicles and personal mobility vehicles; bags, covers, chargers, and batteries for vehicles and personal mobility vehicles*'.

5. The applicant filed a counterstatement in which it denied the grounds of opposition.

6. Both sides filed evidence and skeletons of argument. At the hearing before the Hearing Officer on 5 September 2024 Ms Becky Knott instructed by JA Kemp LLP represented the opponent; and Ms Kendal Watkinson instructed by Haseltine Lake Kempner LLP represented the applicant.

The Hearing Officer's Decision

7. So far as it relevant to the appeal there is no dispute that the Hearing Officer correctly identified the relevant law applicable to the assessment of conflict that they were required to make pursuant to section 5(4)(a) of the 1994 Act. I therefore do not set out the relevant legal tests that were set out in the Decision but refer to the relevant findings that were made by the Hearing Officer.

8. First, the Hearing Officer held at paragraph [14] that the relevant date for the purposes of the assessment that they had to make was 7 April 2022 being the date protection was requested in the UK. The Hearing Officer noted that there was no claim to use of the sign prior to that date.

9. Second at paragraph [6] and footnote 2 and at paragraph [44] the Hearing Officer stated that because of the evidence filed the goods for which it was necessary for goodwill to be established had been limited by the opponent to '*mobility scooters*'. The Hearing Officer having reviewed the evidence filed on behalf of the opponent concluded that the term '*mobility scooters*' was too broad and that the protectable goodwill at the relevant date was '*portable mobility scooters*' (paragraph [45]).

10. Third, having reviewed the arguments of the parties before them with regard to misrepresentation the Hearing Officer concluded as follows (emphasis as in the original, footnote excluded):

> 72. The threshold for misrepresentation is a simple one, 'is it, on a balance of probabilities, likely that, if the applicant is not restrained, a substantial number of members of the public will be misled into purchasing the applicant's goods in the belief that they are the opponent's goods?' One factor in this assessment will always be whether or not the relevant public makes any kind of association between the competing goods. Having considered the relevant tests and all of the evidence and submissions made by both parties, the opponent has not overcome the heavy burden of showing the kind of association between the parties' respective fields of activity that would lead to a connection being made between them that could or would give rise to a misrepresentation. This is despite the fact that the applicant's mark and the opponent's earlier sign are identical.
>
> **73. The opposition fails under section 5(4)(a) of the Act.**

The appeal

11. In a TM55P filed on 25 September 2024 the opponent appealed the Decision. It did so on the basis of five grounds of appeal which were conveniently summarised in Ms Knott's skeleton argument filed on behalf of the opponent. It was said that the Hearing Officer had erred:

(1) By failing to take into account and assess the opponent's claim to goodwill for goods other than mobility scooters.

(2) By assessing the opposition at the filing date as opposed to the priority date.

(3) In law and/or principle by finding that the opponent's goodwill was limited to portable mobility scooters.

(4) In law and/or principle when assessing the question of misrepresentation.

(5) In law and/or principle by incorrectly applying the higher threshold against the finding of misrepresentation.

12. No Respondent's Notice was filed.

13. At the hearing of the appeal which took place by video link the parties were represented as below by Ms Becky Knott instructed by JA Kemp LLP on behalf of the opponent; and Ms Kendal Watkinson instructed by Haseltine Lake Kempner LLP on behalf of the applicant. Both counsel filed skeletons of argument.

Standard of review

14. There was no dispute as to the approach to be taken to the appeal. Reliance was placed on the summary by Joanna Smith J in Axogen Corp v. AVIV Scientific Ltd [2022] EWHC 95 (Ch) at [24]. That approach was encapsulated by the opponent as requiring an appellant to *'show that there was an error of principle or misdirection of the law, or that the Decision was one that no reasonable hearing officer could have come to*' in order to succeed on appeal.

15. 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].

16. I have also kept in mind the guidance to the way appellate courts should approach the writing of judgments as was recently set out by the Court of Appeal in Unik Bond SA v. Catbalogan Holdings Sarl [2025] EWCA Civ 1594 as follows:

> 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."

17. I have kept these principles in mind when considering this appeal.

Decision

Ground 1

18. The first ground of appeal is concerned with the scope of the goodwill relied upon by the opponent. As noted by the Hearing Officer the opponent did not rely on the entirety of the goods identified in the TM7. In the Decision the Hearing Officer referred to the goods being limited in the opponent's evidence dated 1 August 2023 (paragraph [6] and footnote 2).

19. It is clear from the opponent's evidence given by Mr David dated 1 August 2023 and the skeleton of argument before the Hearing Officer that the opponent, whilst stream lining its claim to goodwill, maintained its claim to a goodwill for '*mobility scooters*' and '*accessories for mobility scooters, namely batteries, chargers, bags, pet carriers, arm rests, cushions and cases*' ("***the Accessories***").

20. It is also clear from the summary of the evidence that Hearing Officer was aware that the evidence was directed not just to mobility scooters but also to the Accessories as they are expressly referred to paragraphs [16] to [18], [22] and [36] of the Decision. However, in paragraph [44] the Hearing Officer having referred to the position of *the applicant* who took the position that any '*goodwill would be limited to the motor scooters market . . .* ' went on to state that '*Following a limitation to its initial pleadings, the opponent claims goodwill in the ATTO sign for mobility scooters only.*' (emphasis added). The Hearing Officer then went on to find that on the evidence the protectable goodwill in the ATTO sign was limited to 'portable mobility scooters' (paragraph [45] of the Decision).

21. The Hearing Officer made no express findings on the basis of the evidence with regard to whether or not there was a protectable goodwill with respect to the Accessories. This was an error. Whether this was a material error is dealt with further below.

Ground 2

22. This ground is directed to the error made by the Hearing Officer in identifying the date for the request for protection in the UK (7 April 2022) rather than the priority date (9 December 2021) as the relevant date for the assessment that had to be made for the purposes of section 5(4)(a) of the 1994 Act.

23. On this appeal the applicant accepted that this was an error and that the correct date for the assessment was the priority date. However, what is maintained by the applicant is that this is not a material error. It seems to me that there is force in this position. Whilst there was an error in the identification of the relevant date, I cannot see that in this case the error had any impact on the assessment under section 5(4)(a) of the 1994 Act. I am reinforced in that view on the basis that the opponent was not able to identify any such impact. I should add that the opponent nonetheless maintained that this error was one which undermined the cogency of the Hearing Officer's other findings however I am unable to accept that proposition. If it was otherwise open to the Hearing Officer to make the findings that they did this error was not one which could be relied upon to impugn such findings.

Ground 3

24. This ground of appeal is directed to the finding that goodwill was limited to 'portable mobility scooters' as opposed to 'mobility scooters'. In support of this position the opponent sought to rely upon arguments based on the Nice Classification system. However, this case is concerned with section 5(4)(a) of the 1994 Act and a claim by the opponent that it was entitled to object to the contested mark by reason of the law of passing off. Points of the type raised before me based on technical trade mark specification arguments even by way of analogy do not seem to me to be of assistance.

25. The assessment of the relevant goodwill for the purposes of a section 5(4)(a) objection requires a multi-factorial assessment of the evidence. It is a 'real world' assessment that required the Hearing Officer to assess the evidence filed by the opponent in support of the claim to a protectable goodwill.

26. The Hearing Officer reviewed the evidence filed by the opponent in paragraphs [16] to [40] of the Decision. It is not suggested that the Hearing Officer erred in the description of the evidence in those paragraphs.

27. Instead that it is maintained that the Hearing Officer should not have limited 'mobility scooters' to 'portable mobility scooters' because (1) it was not a term that consumers would apply to the opponent's business; and (2) the applicant had in its skeleton of argument below maintained that if the Hearing Officer was, contrary to the applicant's primary position, to find that there was a protectable goodwill, it should be limited to 'mobility scooters'.

28. As to (1) I was not taken to or shown any material that would suggest that consumers would not apply the term portable to the products supplied by the opponent. As to (2) it was a matter for the Hearing Officer to determine on the basis of the materials before them what the appropriate scope of the opponent's goodwill was. In the present case what either of the parties submitted was the appropriate scope of the goodwill was something that the Hearing Officer could take into account but was not something that they were bound to accept.

29. In circumstances where the assessment of goodwill is a multifactorial assessment, I have reviewed the findings made by the Hearing Officer in the light of the criticisms made by the opponent. Having done so I can see no error in the assessment made by the Hearing Officer that would vitiate the finding that the goodwill was limited to 'portable mobility scooters'.

30. I am reinforced in my view that it was open to the Hearing Officer to take the approach that they did by the evidence given by the main witness for the opponent, Rafy David the chief executive officer of the opponent. In paragraph 2 of their witness statement it was stated as follows (emphasis added):

> [The opponent] is a **portable** mobility solution company dedicated to developing and manufacturing products for those with limited mobility. [The opponent] specialises in products that transport with ease which allow customers to travel and engage in more active lifestyle, namely mobility scooters (the "ATTO Scooters") . . . The ATTO Scooters stand out in the market as being less bulky, more easily manoeuvrable, and more compact than other products of a similar nature.

31. In the premises, I reject the third ground of appeal.

Ground 4

32. Ground 4 is directed to the finding of misrepresentation. It is said that the Hearing Officer applied the wrong test to the assessment on the basis that they considered the issue from the perspective of members of the general public and not from the perspective of the opponent's actual or potential customers.

33. It was accepted before me that the Hearing Officer had correctly identified the relevant legal principles and the case law which identified that the relevant perspective was that of the opponent's actual or potential customers (see in particular paragraphs [46] and [47] of the Decision). I note that in paragraph [46] the Hearing Officer refers to the actual or potential customers as the 'relevant public'.

34. What is said is that the Hearing Officer erred in paragraph [72] of the Decision by referring to '*members of the public*' when reaching their conclusion in that paragraph. That does not seem to me to be an entirely fair characterisation of paragraph [72] for two reasons. First the reference to 'members of the public' was part of a quotation

from the judgment in Neutrogena Corporation v. Golden Limited [1996] RPC 473 which the Hearing Officer had cited in paragraph [46] of the Decision and with respect to which no complaint is raised on this appeal. Second given that the Hearing Officer goes on in the same paragraph to make their findings by reference to the '*relevant public*' and that together with paragraph [46] of the Decision seem to me to point to the Hearing Officer understanding the relevant perspective from which the assessment under section 5(4)(a) of the 1994 Act had to be made.

35. I do not accept the other paragraphs in the Decision relied upon by the opponent in support of their contention that the Hearing Officer was not approaching the question from the correct perspective. All those paragraphs were concerned with different issues relied upon by the parties with respect to whether the goods in issue did or did not occupy the same field of activity including by reference to submissions as to the 'education' of the public.

36. I am reinforced in my view that this ground of appeal is not a fair criticism of the Hearing Officer given that (1) in the skeleton or argument filed on behalf of the opponent below referred to both 'actual and potential customers' and 'a substantial number of members of the public' as being deceived; and (2) at no stage was it explained how 'the actual and potential customers' of the opponent's goods were different to 'members of the public' and how the assessment of misrepresentation would be different.

37. In the circumstances, the fourth ground of appeal is dismissed.

Ground 5

38. By Ground 5 the opponent submits that the Hearing Officer should not have applied the law, as set out in Harrods Limited v. Harrodian School Limited [1996] RPC 697 (CA) which was quoted in paragraph [71] in the present case. What is said is that the Hearing Officer should not have found that the parties' respective fields of activity had no overlap or only a tenuous degree of overlap between them such that the opponent had a heavy burden of proving a misrepresentation.

39. The first point to note in this connection is that the Hearing Officer referred to the Harrods case (above) at the invitation of the opponent as support for the proposition that there was no requirement for a common field of activity to establish conflict (see paragraph [71] of the Decision). Nor was there any suggestion that the Hearing Officer had not correctly identified the relevant principles.

40. What is said is that the Hearing Officer was wrong to apply the 'heavy burden' to proving likelihood of confusion and damage in the present case as they had not found that there was no overlap or only a tenuous overlap between the goods in issue but had at paragraph [65] of the Decision found that there *may* be an overlap but '*only at a very high level*'.

41. However, this was an introductory paragraph to the section of the Decision on misrepresentation and is immediately followed by a paragraph (also numbered [65]) in which the Hearing Officer sets out the two points relied upon by the opponent on this issue. The first point being that there was an overlap in the field of activity being 'transport'; and the second being the position that the absence of a common field of activity was not fatal to a finding of conflict under section 5(4)(a) of the 1994 Act.

42. Over the following paragraphs [66] to [70] the Hearing Officer considered the evidence before them with regard to overlap in activity before reaching the conclusions that they did in paragraph [72] of the Decision. In those paragraphs the Hearing Officer made clear findings with respect to the overlap or lack of overlap between the goods they had identified as being in issue. I have reviewed these paragraphs in the light of the criticism of the conclusion reached made by the opponent, and it seems to me that the findings that were made by the Hearing Officer were ones that it was open to them to make for the reasons that they gave.

43. In the premises, the fifth ground of appeal is dismissed.

Consideration of the impact of Ground 2 on the findings of no misrepresentation

44. In so far as the Accessories are concerned, I note that no relevant submissions relating to misrepresentation were contained in the skeleton of argument filed before the Hearing Officer on behalf of the opponent. On this appeal it was rightly accepted that all the Accessories were limited to accessories for 'motor scooters'. It was valiantly submitted on behalf of the opponent that 'motors, electric for land vehicles' and 'brake pads for automobiles' would give rise to a conflict with 'batteries for mobility scooters' and 'chargers for mobility scooters'. However, even if it could be said that there was a protectable goodwill with respect to 'batteries for mobility scooters' or indeed 'batteries for portable mobility scooters' and 'chargers for mobility scooters' or 'chargers for portable mobility scooters' I do not see how and nor was it explained how the position could be any different or indeed better than the position in relation to the finding of no conflict with respect to 'portable mobility scooters' and 'Cars, motor coaches; trucks; motor buses'. Against that background it does not seem to me that the failure of the Hearing Officer to expressly deal with the issue of goodwill and/or misrepresentation with respect to the Accessories can be regarded as a material error.

Conclusion

45. On the basis of my findings above it does not seem to me that the opponent has identified any material error in the Decision. Moreover, it is not in my view appropriate to interfere with the evaluations that the Hearing Officer made in reaching the conclusion that they did. In the result appeal fails and is dismissed.

46. As the appeal has been dismissed the applicant is entitled to a contribution towards the costs of the appeal. The applicant did not file a Respondent's Notice. Against the background of this appeal, it seems to me in the exercise of my discretion that the

opponent should pay to the applicant a contribution of £1,300 to the applicant's costs of the appeal.

47. The Hearing Officer order the opponent to pay to the applicant a contribution of £2,200 with respect to its costs at first instance. In those circumstances I order that Moving Life Ltd to pay BYD COMPANY LIMITED the total sum of £3,500 on or before 4 March 2026.

EMMA HIMSWORTH KC

Appointed Person

11 February 2025