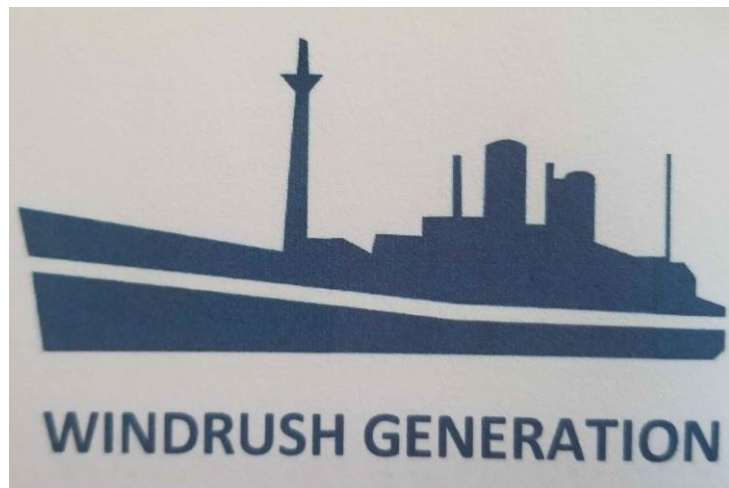


O/0141/26

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO. 3619267
IN THE NAME OF WINDRUSH FOUNDATION FOR THE MARK**



IN CLASS 41

AND

**THE APPLICATION FOR A DECLARATION OF INVALIDITY THERETO
UNDER NO. 507047 BY WINDRUSH GENERATION LEGACY ASSOCIATION**

Background and pleadings

1. On 31 March 2021, Windrush Foundation (“the registered proprietor”) applied for the trade mark shown on the cover page of this decision (application 3619267), for a lengthy list of services in class 41.
2. The trade mark was registered on 3 September 2021. On 26 February 2024, an application for a declaration of invalidity was filed by Windrush Generation Legacy Association (“the applicant”) under sections 47(1)/3(1)(a), (b) and (d) and section 3(6) of the Trade Marks Act 1994 (“the Act”).
3. The specific claims made are:
 - Section 3(1)(a): “The trade mark is not at all distinctive in character. The trade mark is purely descriptive and merely describes a group of people. The trade mark does not therefore enable the registrar, any other competent authority or the public to determine the clear and precise subject matter of the protection afforded to the proprietor. Given the purely descriptive nature of the mark and the lack of distinctive character of the mark, it is submitted that the mark is not indicative of the goods or services that it provides. The mark is not therefore capable of distinguishing the goods or services that it provides as distinctive from another undertaking.”
 - Section 3(1)(b): “The trade mark is purely descriptive of a group of people; that group of people being the group to which the proprietor of the mark provides its services and to which a number of other organisations provide services. The mark is therefore devoid of any distinctive character. The Windrush Generation denotes the people who emigrated from the Caribbean to Britain between the arrival of the HMT Empire Windrush on 22 June 1948 and the Immigration Act 1971. The term appears in a multitude of public settings including the book ‘Voices of the Windrush Generation’ by David Matthews (ISBN 9781788701341) Oct 2018”.

- Section 3(1)(d): “The trade mark simply describes a group of people. The group of people described by the trade mark is ‘the windrush generation’. The Windrush Generation denotes the people who emigrated from the Caribbean to Britain between the arrival of the HMT Empire Windrush on 22 June 1948 and the Immigration Act 1971. The term windrush generation has become customary in the current language and is generally understood as describing this particular group of people. The term is used to describe this same group of people in books, television, advertisements, radio and other forms or media.”
- Section 3(6): “Windrush Foundation (“the applicant”) applied to register the trade marks 377000 WINDRUSH MONUMENT in the UK on 25 March 2022, 750361 WINDRUSH MEMORIAL, 3750384 WINDRUSH75 on 2 February 2022 and 3726492 WINDRUSH and 3726488 WINDRUSH DAY on 28 November 2021. The applicant registered UK00003619267 WINDRUSH GENERATION on 31 March 2021.

It is submitted that all of the above applications have been filed without an intention to use the marks in respect of the services claimed and are filed as a mechanism to prevent use of the terms by third parties.

It is submitted that the applicant’s mark is so general that in the context of the broad range of related marks registered by the applicant as listed above, there is no reasonable commercial rationale nor commercial logic to the particular mark in question.

The opponent cites the applicant’s recent case no. O-0051-24 in which 4 of the above marks were determined to be registered in bad faith.”

4. The registered proprietor filed a defence and counterstatement, denying the grounds by stating “Windrush Foundation opposes the application to cancel: UK00003619267”. The counterstatement included the following statements (in summary):

- sections 3(1)(a) and (b): the mark is distinctive because it highlights and publicises the contributions of members of the Windrush Generation who arrived on the ship *Empire Windrush* at Tilbury Docks on 22 June 1948. It is distinctive because it represents a unique group of West Indians, many of whom served the RAF in the second world war and returned to Britain to help rebuild the country after the war. Ex-RAF serviceman Sam King coined the term ‘Windrush Generation’ decades before ‘Voices of the Windrush Generation’ was published by David Matthew in 2020. The term ‘Windrush Generation’ refers only to those West Indians who arrived on 22 June 1948 on the *Empire Windrush*;
- section 3(1)(d): the registered mark has become more known because of the work of its owner who has continued to show close connections with the West Indians who travelled on the *Empire Windrush*;
- section 3(6): the application was not made in bad faith because the registered proprietor has delivered goods and services since 1995, being the first organisation to have done so, mainly with the support of community volunteers. The registered proprietor has been organising “Windrush events” since 1995 and has used the mark in community projects. The registered proprietor continues to challenge the falsehood that calls a group of people ‘Windrush Generation’, even though they did not travel on the *Empire Windrush* ship. The registered proprietor claims that the UK Government did this in 2018 by declaring that the ‘Windrush Generation’ were people who arrived in the UK from the Caribbean between 1948 and 1971. It claims that the opponent and David Matthews are amongst the projects which, after 2018, emerged using the UK Government’s view of what the term meant, capitalising on the registered proprietor’s work which began in 1995.

5. The applicant is represented by Mike Harry and the registered proprietor represents itself. Both parties filed evidence accompanied by written submissions. Neither party asked to be heard and neither filed written submissions in lieu of a hearing. I make this decision after a careful reading of all the papers and I will refer to them where relevant and necessary.

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Sections 47(1)/3(1)(a), (b) and (d) of the Act

7. Section 47(1) of the Act states:

“The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

[...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

[...]

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made.

Provided that this shall not affect transactions past and closed.”

8. Sections 3(1)(a), (b) and (d) state:

“3.— (1) The following shall not be registered –

(a) signs which do not satisfy the requirements of section 1(1),

(b) trade marks which are devoid of any distinctive character,

(c) [...]

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

9. The relevant date for determining the above grounds of invalidation is the date on which the contested mark was filed, 31 March 2021; except in relation to the proviso in section 47(1), the effect of which is that the registration shall be saved if it is shown that the mark had acquired distinctive character by the date of the application for invalidation; i.e. by 26 February 2024.¹

10. In its pleadings, the applicant refers to five other trade mark applications which the registered proprietor made: 3770090 WINDRUSH MONUMENT on 25 March 2022, 3750361 WINDRUSH MEMORIAL and 3750384 WINDRUSH75 on 2 February 2022, and 3726492 WINDRUSH and 3726488 WINDRUSH DAY on 28 November 2021. The applicant claims:

¹ See, to that effect, paragraph 179 of *The London Taxi Corporation v Frazier-Nash Research Limited and anor* [2016] EWHC 52 (Ch); and paragraph 29 of *Harley Doctor Limited v Samedaydoctor (London) Limited*, Case BL O/577/15

“It is submitted that all of the above applications have been filed without an intention to use the marks in respect of the services claimed and are filed as a mechanism to prevent use of the terms by third parties.”

11. The applicant cites decision number BL O/0051/24 (“the earlier decision”) in which four of the marks were determined to have been registered in bad faith. Firstly, there was no bad faith claim made against WINDRUSH75 in the opposition proceedings with which the earlier decision was concerned, brought by The Department for Levelling Up, Housing and Communities. Secondly, the previous proceedings with which the earlier decision was concerned were brought by a different third party and the section 3(6) pleadings were largely different to the present case, concerning different marks. I am also not bound by the earlier decision.

12. The registered proprietor refers to the fact that the contested mark met the Intellectual Property Office’s requirements for registration. That is not a determinative or even an influential factor in the issues I must decide in these proceedings. This is because the provisions of section 47 of the Act are there to enable third parties to object to marks after registration. There would be no point to the legislation if all it took to defeat an application for a declaration of invalidity on absolute grounds was the mere fact that the original trade mark application was accepted *ex officio* or *ex parte*. The applicant was not involved in the decision to accept the mark. To deny it recourse to section 47 would be contrary to its right to a fair and impartial trial. In determining these *inter partes* proceedings on behalf of the registrar, I am required to act in a quasi-judicial role, approaching the matter with a clean slate.²

Section 3(1)(a)

13. In its written submissions, the applicant submits that the boat device in the mark is not identified as the *Empire Windrush*, it is generic and could apply to any boat.³ It

² See *Swiss Research Labs Limited v Bauer Holdings Limited*, case BL O/1020/22, Mr Iain Purvis KC, sitting as the Appointed Person, at paragraphs 10 to 12

³ Filed 8 July 2024

submits that the words “Windrush Generation” are in common usage and refer to a group of people who arrived not only on the *Empire Windrush* but on a multitude of ships over a period ranging from 1948 to 1973 (referring to its evidence). The applicant submits that, for this reason, the mark is generic and simply descriptive of a group of people who arrived on a number of boats.

14. Section 3(1) of the Act prohibits the registration of marks which do not satisfy the requirements of section 1(1), which states:

“(1)1 In this Act “trade mark” means any sign which is capable—

(a) of being represented in the register in a manner which enables the registrar and other competent authorities and the public to determine the clear and precise subject matter of the protection afforded to the proprietor, and

(b) of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals, colours, sounds or the shape of goods or their packaging.”

15. Mr Geoffrey Hobbs QC, sitting as the Appointed Person in *AD2000 Trade Mark*, said that section 3(1)(a) permits registration provided that the mark is ‘capable’ to the limited extent of “not being incapable” of distinguishing.⁴ Consequently, if I am satisfied that the mark complies with sections 3(1)(b) or (d) of the Act, the ‘incapable of distinguishing’ objection under section 3(1)(a) is bound to fail. Alternatively, if either of the grounds under section 3(1)(b) or (d) succeed, the outcome under section 3(1)(a) becomes moot. In any event, this ground of opposition fails for the reasons given by Arnold J (as he then was) in *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418(Ch):

⁴ [1997] RPC 168

"44. ... As I discussed in *JW Spear & Sons Ltd v Zynga Inc* [2012] EWHC 3345 (Ch) at [10]–[27], the case law of the Court of Justice of the European Union establishes that, in order to comply with art.4, the subject matter of an application or registration must satisfy three conditions. First, it must be a sign. Secondly, that sign must be capable of being represented graphically. Thirdly, the sign must be capable of distinguishing the goods or services of one undertaking from those of other undertakings.

45. The CJEU explained the third condition in Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* [2004] ECR I-1619 as follows:

"80. As a preliminary point, it is appropriate to observe, first, that the purpose of Article 2 of the Directive is to define the types of signs of which a trade mark may consist (Case C-273/00 *Sieckmann* [2002] ECR I-11737, paragraph 43), irrespective of the goods or services for which protection might be sought (see to that effect *Sieckmann*, paragraphs 43 to 55, *Libertel*, paragraphs 22 to 42, and Case C-283/01 *Shield Mark* [2003] ECR I-0000, paragraphs 34 to 41). It provides that a trade mark may consist inter alia of 'words' and 'letters', provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

81. In view of that provision, there is no reason to find that a word like 'Postkantoor' is not, in respect of certain goods or services, capable of fulfilling the essential function of a trade mark, which is to guarantee the identity of the origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin (see, in particular, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 28, *Merz & Krell*, paragraph 22, and *Libertel*, paragraph 62). Accordingly, an interpretation of Article 2 of the Directive appears not to be useful for the purposes of deciding the present case."

46. The Court went on to say that the question whether POSTKANTOOR (Dutch for POST OFFICE) was precluded from registration in respect of particular goods and services (i.e. those provided by a post office) because it was devoid of distinctive character and/or descriptive in relation to those particular goods and services fell to be assessed under Article 3(1)(b) and (c) of the Directive (Article 7(1)(b) and (c) of the Regulation).

47. It follows that "the goods or services" referred to in Article 4 are not the particular goods or services listed in the specification, as counsel for the defendants argued. Rather, the question under Article 4 is whether the sign is capable of distinguishing any goods or services."

16. The mark is not incapable of distinguishing any goods or services. **The section 3(1)(a) ground fails.**

Evidence

17. The applicant has filed a witness statement and exhibits from Deborah Klass, its CEO.⁵ Ms Klass disagrees with the narrow interpretation of the registered proprietor as to what 'Windrush Generation' means. She states that 'Windrush Generation' has evolved to describe the generation of people who arrived in the UK on the first ship in 1948, the *Empire Windrush*, to re-build the UK's infrastructure and economy after World War 2; and also those who arrived on other ships after the *Empire Windrush* over a certain period, for the same purpose. To support her view, Ms Klass exhibits the following:

- Exhibit DK02: an image of the front cover of a book called "Home Coming, Voices of the Windrush Generation", by Colin Grant. There is no information about when this book was published;
- Exhibit DK03: a screenshot from the website of the London Borough of Haringey, which is headed with "Windrush Generation 1945-1960", followed

⁵ Witness statement dated 8 July 2024

by a brief explanation about the docking of the *Empire Windrush* with 492 Caribbean migrants being the symbolic start of the Windrush Generation. The text says:

“The Windrush Generation denotes the people who emigrated from the Caribbean to Britain between the arrival of the HMT Empire Windrush on 22 June 1948 and the Immigration Act 1971, including the passengers on the first ship.”

There is no dating for the screenshot;

- Exhibit DK04: this is a screenshot from the UK Parliament’s website, specifically the House of Lords Library, about the Windrush scandal and compensation scheme. The article was published on 15 February 2024, after the date on which the contested trade mark was filed. The article says “The Windrush generation refers to individuals who migrated to the UK from Commonwealth countries between 1948 and 1973.”;
- Exhibit DK05 comprises an undated screenshot from the website windrush-monument.levellingsup.gov.uk called “Celebrating the Windrush Generation”. It says that “Thousands of men, women and children moved from the Caribbean to the UK in the 1940s, 50s, 60s and 70s. These individuals are known as the Windrush Generation – named after one of the ships that sailed from the Caribbean to England in 1948, the MV Empire Windrush.”;
- Exhibit DK06 comprises an undated screenshot from the website hackney.gov.uk, entitled “Windrush generation and support undocumented migrants”. The page states that the “Windrush generation refers to people who, between 1948 and 1971, were invited by successive governments to relocate to Britain from their homes in Commonwealth countries in the Caribbean to address labour shortages.”;
- Exhibit DK07 comprises an undated screenshot from the website of Bristol Museum, carrying a similar description of the term ‘Windrush Generation’;
- Exhibit DK08 comprises a screenshot from the news website CNN, showing the start of an article dated 22 June 2020 and the title “Who are the Windrush generation? A British scandal explained.” The page says:

“London (CNN) – On Monday, Britain celebrates Windrush Day, honoring a generation of Caribbean immigrants who moved to the UK in the late 1940s at the invitation of the government.”

- Exhibit DK09 comprises a screenshot from the website The Conversation (UK edition), which Ms Klass states is an independent news outlet:

The Windrush generation: how a resilient Caribbean community made a lasting contribution to British society

Published: June 2, 2023 4.53pm BST



The Windrush arrives at Tilbury docks on 22 June 1948. Contraband Collection / Alamy

This article is dated after the filing date of the contested registration;

- Exhibit DK10 comprises a screenshot from the Newsround website about the Windrush Generation and the celebration of Windrush Day on 22 June. The article and video carry the date of 28 September 2023, after the date on which the contested trade mark was filed;
- Exhibit DK11 is a screenshot from the website of the London Borough of Hammersmith and Fulham, showing an article called “The Windrush Generation”, which was originally published in 2020 and gives the sort of detail provided in the other exhibits, saying that:

“It is accepted generally that the arrival of the 500 plus Caribbean’s (sic) (men, women and children) in 1948 aboard the big ship Windrush

was a landmark in time and core to the formation of cosmopolitan Britain that we all know today.”

18. The registered proprietor’s evidence comes from Arthur Torrington, who is its co-founder and who has been a director since the registered proprietor, a charity, was founded in 1996. The charity’s work is based on an idea by Sam King, an ex-RAF World War 2 serviceman. It is common ground between the parties that the *Empire Windrush* arrived at Tilbury docks on 22 June 2048 with migrants from the Caribbean, who had been invited by the UK government to fill labour shortages. It is also common ground between the parties that the term ‘Windrush Generation’ refers to the people who arrived in the UK onboard the *Empire Windrush* on 22 June 1948; and the counterstatement refers to the ‘Windrush Generation’. I will confine my review of the registered proprietor’s evidence to those parts which are in dispute and to the genesis of the term ‘Windrush Generation’. Although I refer only to evidence which is relevant to the issues I have to decide, I confirm that I have read all of the evidence. Mr Torrington makes the following points in his witness statement and exhibits:⁶

- Windrush is the name of a Gloucestershire village and river but, after the 1940s became associated with a ship “and a generation of people who arrived from the West Indies at Tilbury docks on 22 June 1948.”;
- Sam King advertised in the *Weekly Gleaner* in 1967 asking for those who were on the *Empire Windrush* to contact him. Mr Torrington states that Mr King “intended to bring together fellow members of the Windrush Generation.”;
- “In 2018, ‘Windrush Generation’ became an almost everyday term among the British media, British Government, Local Government, and community officials.”; “2018: The BRITISH Media adopts the term ‘WINDRUSH GENERATION’ when sharing information about the SCANDAL”; “2018: The BRITISH GOVERNMENT apologies (sic), also adopts the term, which

⁶ 11 October 2024

is used in all their schemes and projects that address the injustices inflicted on the 'WINDRUSH GENERATION';⁷

- in 1998, the 50th anniversary included an event held at Lambeth Town Hall for which a booklet was produced. Mr Leroy Gittens, an ex-serviceman, is quoted as saying “I am not of the *Windrush* generation. I am an ex-serviceman.” Mr Torrington states that this remark “is evidence of how members of the public understood the term ‘Windrush Generation’”;⁸
- in 2013, to mark the 65th anniversary of the arrival of the *Empire Windrush*, the then deputy Prime Minister, Nick Clegg, released a statement in which he referred to this being “a chance for all of us to pay tribute to the strength and resilience of the Windrush generation and the lives they built in Britain, often in incredibly tough circumstances.”;⁹
- chapter 7 of Professor Stuart Hall’s book, ‘Familiar Strangers’, published in 2017, was called ‘Caribbean Migration: The Windrush Generation’;
- the UK government of 2018, after the ‘Windrush Scandal’, redefined the ‘Windrush Generation’ as Caribbean migrants who settled in the UK between 1948 and 1973. In reply to a Freedom of Information request made by Mr Torrington in 2024, the Home Office said that the Government’s definition of “Windrush generation” was first used publicly by the Government on 16 April 2018, when the Home Secretary announced a new team to help Commonwealth citizens confirm their status in the UK.

Section 3(1)(b)

19. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and section 3(1)(b) of the Act) were conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

⁷ Exhibit 18

⁸ Exhibit 21

⁹ Exhibit 25

“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case

C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37).”

20. It can be seen from the registered proprietor’s evidence that it considers that the true, historical meaning of ‘Windrush Generation’ is that it refers to the group of Caribbean settlers who travelled to the UK in 1948 on board the *Empire Windrush*. Mr Torrington maintains that it was the UK Government which altered this meaning in 2018 by publishing material and referring to Windrush Generation as meaning settlers from the Caribbean who came to the UK between 1948 and the early 1970s. In his view, this is the interpretation favoured by the applicant (and others). It is clear from the registered proprietor’s pleadings, evidence and written submissions that the divergence in public perception as to the meaning of ‘Windrush Generation’ is a source of dismay to the registered proprietor.

21. However, it is equally clear from the registered proprietor’s evidence that the words ‘Windrush Generation’ describe a group of people at a point in history, even if it disagrees with the applicant about the composition of that group of people, in a historical context. For some of the services applied for, such as education and cultural activities, the words will be seen as describing the content of such services: services about the Windrush Generation. Even if Mr King was the first to coin the expression, by 31 March 2021 it was descriptive of a group of people associated with a historical event or period of time. For services about and related to that subject matter, the words were also descriptive by 31 March 2021, regardless of who had coined them. I am reminded of the registrar’s refusal under section 3(1)(b) of the trade mark application for ‘BREXIT’, which was a term coined to denote a specific historic event. Mr James Mellor QC, sitting as the Appointed Person (as he then was), considered the appeal against the registrar’s refusal for a range of goods in class 32.¹⁰ Mr Mellor stated:

“42. ...The term BREXIT is imaginative and very memorable. It is also distinctive in the sense that the term is very well-known in that it denotes the event and/or the process of the UK leaving the EU. In my view, to the extent that the term can be characterised as distinctive, it is not the distinctiveness

¹⁰ BL O/262/18.

required for registration as a trade mark. In my view, absent the public being educated through use to perceive the term as a trade mark (i.e. as conveying a trade origin message) the term would not convey that message to the average consumer when used in relation to beer, it would simply signify the event or the process and in that sense, it would be seen as commemorative of the event or the process.”

22. By 31 March 2021, ‘Windrush Generation’ had a descriptive meaning and it does not matter which interpretation is correct: what is crucial is whether the descriptive meaning (of whichever interpretation) is what the average UK consumer would perceive. The essential function of trade marks is that they signal to the consumer that the goods or services come from a single trader responsible for their quality as opposed to the goods or services of other traders. If words describe the goods or services, or a characteristic thereof (such as subject matter), they cannot fulfil this function, unless the average consumer has been educated to believe that the primary, descriptive, meaning has been replaced by a secondary, trade source meaning.¹¹

23. Of course, the contested mark consists of more than the words WINDRUSH GENERATION. It also contains the silhouette of a ship. In *Canary Wharf Group plc v The Comptroller General of Patents, Designs and Trade Marks* [2015] EWHC 1588 (Ch), Mr Iain Purvis QC, sitting as a Deputy Judge of the High Court, set out the correct approach to assessing whether a trade mark is descriptive of the subject matter of the goods/services. He stated that:

“39. The general approach to be taken by a tribunal dealing with a 'subject matter' or 'theme' objection under s3(1)(c) or s3(1)(b) was recently considered by Geoffrey Hobbs QC sitting as the Appointed Person in NMSI Trading Ltd's Trade Mark Application (Flying Scotsman) [2012] RPC 7 by reference to a number of authorities including the General Court in Danjaq v OHIM (Dr No) [2009] ECR II-2097, Mr Richard Arnold QC (as he then was) sitting as the Appointed Person

¹¹ That subject matter can be a characteristic of goods or services was confirmed by Mr Richard Arnold QC (as he then was), sitting as the Appointed Person in *Linkin Park LLC's Application*, Case BL O/035/05 [2006] E.T.M.R. 74, paragraph 44

in Linkin Park [2006] ETMR 74, the First Board of Appeal of OHIM in Ferrero OHG v FIFA [2008] ETMR 76 and Mr Allan James in Diana Princess of Wales Trade Mark [2001] ETMR 25.

40. Following, in general terms, the approach of Mr Hobbs as set out in particular in paragraph 18 of Flying Scotsman, I believe that at least three matters need to be considered where a 'subject matter' or 'theme' objection arises under s3(1)(c) or (b):

(a) The nature of the goods or services for which the application is made. Are they in principle apt to provide or convey information about (or imagery relating to) the subject matter of the sign?

(b) The nature of the sign. Is it something which it is reasonable to believe would be recognised by the relevant class of persons (that is to say average consumers of the goods or services in question) as indicating a particular subject matter or theme?

(c) Is the subject matter or theme of a kind which (in the context of the goods or services in question) the average consumer would consider was controlled by a single economic undertaking, as opposed to something which was free to be used and exploited by anyone. See for example Psytech International v OHIM [2011] ETMR 46 at [34]-[43] and the concept of 'official merchandise' recognised in Arsenal Football Club v Reed [2003] RPC 9 (CJEU) and [2003] RPC 39 at [50]-[69] (Court of Appeal)."

24. At least some of the services, such as education and cultural services, could provide or convey information about those who arrived on the ship associated with the Windrush Generation (the *Empire Windrush*). It is reasonable to believe, particularly given the publicity around the Windrush Generation arising from the Windrush scandal in 2018, that average UK consumers for the services would recognise the mark as indicating the subject matter of the Windrush Generation and those who arrived on the ship (or on ships thereafter) associated with the Windrush Generation. The Windrush Generation arrived in the UK on a ship called *Empire Windrush*, the name of which inspired the coining of the descriptive term Windrush Generation. The mark contains both the descriptive words and the device of a ship, the combination of which does not signal that the services are controlled by a single

undertaking, or trader. The average consumer will, instead, see the combination as denoting the subject matter of the services; e.g. educational services about the Windrush Generation of people, who arrived on a ship. For example, a poster or leaflet showing the mark in relation to an exhibition, a course or a talk will simply inform the average consumer as to the subject matter without also creating the immediate impression that it is a trade mark denoting services which are controlled by a single economic undertaking. The mark has a meaning, just as BREXIT has a meaning, but it is not a distinctive meaning in a trade mark sense, which would be to indicate the services of one trader instead of any other trader. This means that the mark, as a whole, is devoid of any distinctive character.

25. In reaching this conclusion, I have borne in mind *NMSI Trading Ltd's Trade Mark Application (Flying Scotsman)* Case BL O/313/1, [2012] RPC 7. In that case, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, considered an appeal against the registrar's refusal of the following mark, under sections 3(1)(b) and (c), in classes 9, 16 and 28:¹²



26. Mr Hobbs found that the mark “was by a slender margin acceptable under Section 3(1)(b) of the Act in accordance with the second of the two approaches to assessment I have summarised above.” The two approaches were set out as follows:

“26. The case for refusal of registration can be summarised as follows: the verbal elements qualify the pictorial element and vice versa; in that way the pictorial element is effectively identified as an artistic representation of the Flying Scotsman locomotive; as a result the pictorial element magnifies the

¹² The goods covered, *inter alia*, audio and visual recordings, printed matter, posters, toys and model trains.

effect of the words; the average consumer's perceptions of the sign as a whole are thus liable to be permeated by the message of the words and would accordingly be origin neutral in relation to goods of the kind I am required to envisage for the purpose of deciding whether registration was correctly refused.

27. The case for allowing registration can be summarised as follows: the sign operates by attaching the made-up name for a locomotive to an image which represents the locomotive emblematically; the image is emblematic to a degree which shows that the sign is not being used simply and solely as an indication of content or character in relation to the goods concerned; moreover it personalises the sign in a manner which is apt to result in it being seen as a 'fingerprint' of the involvement of a particular economic undertaking; the average consumer's perceptions of the sign as a whole would accordingly be origin specific even in relation to goods of the kind I am required to envisage."

27. I do not think that the present case is on all fours with *Flying Scotsman*, despite both marks consisting of words denoting subject matter and a stylised device pertaining to the words. Earlier in the decision, at paragraph 18, Mr Hobbs said that "content and character can serve to contextualise a sign as an indication of involvement by a particular person or organisation in the marketing of 'official' goods or services". The *Flying Scotsman* is a famous train which can be visited. The context of the present contested mark is a period in history, or an historical event. The difference between this case and *Flying Scotsman* is that the meaning of the mark in *Flying Scotsman* designates the one, specific train and the device is 'emblematic', or contains enough artistry or creativity, to be distinctive of a single trader. The combination, in relation to a single train, was by a slender margin enough to contextualise the mark as an indication of involvement by a particular person or organisation in the marketing of 'official' *Flying Scotsman* goods. However, in the present case, the subject matter is not of a kind which the average consumer would consider was controlled by a single trader: the words do not denote a 'thing', but denote a period of history which, on the registered proprietor's own argument, has a cultural significance intimately tied to, and inseparable from, the

ship. That is enough of a distinction between the two cases, when the *Flying Scotsman* mark was acceptable by only a slender margin, for me to find that the cases are not directly comparable.

28. My next task is to decide whether the contested mark is devoid of any distinctive character for all of the services of the contested mark or for only some of them. In approaching this task, I will follow *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau*, in which the CJEU stated that if the same ground of refusal is appropriate for a category or group of goods or services, the same reasoning may be applied to all of the goods or services in that category or group.¹³

29. In my view, the mark is not devoid of any distinctive character across the board. It is acceptable for services for which the words WINDRUSH GENERATION are not descriptive, and for which the mark as a whole is distinctive (i.e. not devoid of any distinctive character). The services for which the mark is objectionable under section 3(1)(b) are all those which are concerned with education, entertainment, conferences and cultural activities, which could all relate to the subject matter or be themed around the Windrush Generation. I also include some sporting activities because there is evidence about sporting events to commemorate the Windrush Generation, such as cricket, a very popular sport in the West Indies; but I have not extended this to professional sporting services.¹⁴ Services which are defined as for a particular industry or profession not related to the subject matter, such as *audio production*, or which are specified as relating to a different subject, such as *adult education services relating to accounting*, and *adult education services relating to pharmacy*, are not subject to an objection under section 3(1)(b).

30. The application for invalidation succeeds under section 3(1)(b) for the following services:

Arranging and conducting fairs for academic purposes; Arranging and conducting of concerts; Arranging and conducting of conferences; Arranging and conducting of conferences and congresses; Arranging and conducting of conferences, congresses

¹³ [2007] ECR I-1455, Case C-239/05

¹⁴ Exhibit 34 to Mr Torrington's witness statement

and symposiums; Arranging and conducting of cultural activities; Arranging and conducting of day school courses for adults; Arranging and conducting of displays for educational purposes; Arranging and conducting of educational courses; Arranging and conducting of educational events; Arranging and conducting of educational events for charitable purposes; Arranging and conducting of educational seminars; Arranging and conducting of lectures; Arranging and conducting of lectures for educational purposes; Arranging and conducting of lectures for training purposes; Arranging and conducting of music concerts; Arranging and conducting of seminars; Arranging and conducting of seminars and workshops; Arranging and conducting of sports competitions; Arranging and conducting of sports events; Arranging and conducting of sports events for charitable purposes; Arranging and conducting of training seminars; Arranging and conducting of tutorials; Arranging and conducting of workshops and seminars; Arranging and conducting of workshops and seminars in self-awareness; Arranging and conducting of workshops [training]; Arranging, conducting and organisation of workshops; Arranging, conducting and organization of seminars; Arranging conferences; Arranging for students to participate in educational courses; Arranging for students to participate in recreational activities; Arranging of an annual educational conference; Arranging of award ceremonies; Arranging of award ceremonies to recognise achievement; Arranging of award ceremonies to recognise bravery; Arranging of competitions for cultural purposes; Arranging of competitions for education or entertainment; Arranging of competitions for entertainment purposes; Arranging of cultural events; Arranging of demonstrations for cultural purposes; Arranging of demonstrations for educational purposes; Arranging of educational events; Arranging of entertainment shows; Arranging of exhibitions for cultural purposes; Arranging of festivals for entertainment purposes; Arranging of festivals for training purposes; Academic mentoring of school age children; Academies [education]; Academy services (Education -); Administration [organisation] of cultural activities; Adult education services; Advanced training; Adventure training for children; Advisory services relating to education; Advisory services relating to entertainment; Animated musical entertainment services; Archive library services; Arrangement of conferences for educational purposes; Arrangement of conferences for recreational purposes; Arrangement of conventions for educational purposes; Arrangement of seminars for educational purposes; Arrangement of seminars for recreational purposes;

Arrangement of training courses in teaching institutes; Arranging and conducting award ceremonies; Arranging and conducting conferences; Arranging and conducting conferences and seminars; Arranging and conducting education fairs; Arranging and conducting educational conferences; Academic mentoring of school age children; Academies [education]; Academy education services; Academy services (Education -); Administration [organisation] of amusement services; Administration [organisation] of competitions; Administration [organisation] of contests; Administration [organisation] of cultural activities; Administration [organisation] of entertainment services; Administration [organisation] of gameshows; Administration [organisation] of gaming services; Adult education services; Adult training; Adult tuition; Advanced training; Advisory services relating to education; Advisory services relating to entertainment; Advisory services relating to the organisation of sporting events; Advisory services relating to training; fairs and museums; Amusement services; Amusements; Analysing educational test scores and data for others; Animated musical entertainment services; Aquatic recreation areas (Operation of -); Archive library services; Arrangement of conferences for educational purposes; Arrangement of conferences for recreational purposes; Arrangement of conventions for educational purposes; Arrangement of conventions for recreational purposes; Arrangement of seminars for educational purposes; Arrangement of seminars for recreational purposes; Arrangement of sports competitions; Arrangement of training courses in teaching institutes; Arranging and conducting athletic competitions; Arranging and conducting award ceremonies; Arranging and conducting competitions; Arranging and conducting conferences; Arranging and conducting conferences and seminars; Arranging and conducting educational conferences; Arranging and conducting fairs for academic purposes; Arranging and conducting of balls; Arranging and conducting of beauty contests; Arranging and conducting of classes; Arranging and conducting of colloquiums; Arranging and conducting of competitions [education or entertainment]; Arranging and conducting of concerts; Arranging and conducting of conferences; Arranging and conducting of conferences and congresses; Arranging and conducting of conferences, congresses and symposiums; Arranging and conducting of congresses; Arranging and conducting of conventions; Arranging and conducting of cultural activities; Arranging and conducting of day school courses for adults; Arranging and conducting of displays for educational purposes; Arranging and

conducting of displays for training purposes; Arranging and conducting of educational courses; Arranging and conducting of educational discussion groups, not on-line; Arranging and conducting of educational events; Arranging and conducting of educational events for charitable purposes; Arranging and conducting of educational seminars; Arranging and conducting of entertainment activities; Arranging and conducting of entertainment events; Arranging and conducting of entertainment events for charitable fundraising purposes; Arranging and conducting of entertainment events for charitable purposes; Arranging and conducting of games; Arranging and conducting of in-person educational forums; Arranging and conducting of lectures; Arranging and conducting of lectures for educational purposes; Arranging and conducting of lectures for training purposes; Arranging and conducting of live entertainment events; Arranging and conducting of live entertainment events for charitable purposes; Arranging and conducting of meetings in the field of education; Arranging and conducting of meetings in the field of entertainment; Arranging and conducting of music concerts; Arranging and conducting of seminars; Arranging and conducting of seminars and workshops; Arranging and conducting of sports competitions; Arranging and conducting of sports events; Arranging and conducting of sports events for charitable purposes; Arranging and conducting of symposia; Arranging and conducting of symposiums; Arranging and conducting of training courses; Arranging and conducting of training seminars; Arranging and conducting of training workshops; Arranging and conducting of tutorials; Arranging and conducting of workshops; Arranging and conducting of workshops and seminars; Arranging and conducting of workshops and seminars in self-awareness; Arranging and conducting of workshops [training]; Arranging and conducting seminars; Arranging and conducting workshops; Arranging and presenting of live performances; Arranging, conducting and organisation of concerts; Arranging, conducting and organisation of conferences; Arranging, conducting and organisation of congresses; Arranging, conducting and organisation of seminars; Arranging, conducting and organisation of symposiums; Arranging, conducting and organisation of workshops; Arranging, conducting and organization of seminars; Arranging conferences; Arranging contests; Arranging for students to participate in educational activities; Arranging for students to participate in educational courses; Arranging for students to participate in recreational activities; Arranging for ticket reservations for shows and other entertainment events; Arranging group recreational

activities; Arranging of an annual educational conference; Arranging of athletics competitions; Arranging of award ceremonies; Arranging of award ceremonies to recognise achievement; Arranging of award ceremonies to recognise bravery; Arranging of beauty contests; Arranging of classes; Arranging of competitions for cultural purposes; Arranging of competitions for education or entertainment; Arranging of competitions for educational purposes; Arranging of competitions for entertainment purposes; Arranging of competitions for training purposes; Arranging of competitions via the Internet; Arranging of concerts; Arranging of conferences; Arranging of conferences relating to cultural activities; Arranging of conferences relating to education; Arranging of conferences relating to entertainment; Arranging of conferences relating to training; Arranging of contests; Arranging of conventions for cultural purposes; Arranging of conventions for educational purposes; Arranging of conventions for entertainment purposes; Arranging of conventions for training purposes; Arranging of courses of instruction; Arranging of courses of instruction for tourists; Arranging of cultural events; Arranging of demonstrations for cultural purposes; Arranging of demonstrations for educational purposes; Arranging of demonstrations for entertainment purposes; Arranging of demonstrations for training purposes; Arranging of displays for cultural purposes; Arranging of displays for educational purposes; Arranging of displays for entertainment purposes; Arranging of displays for training purposes; Arranging of educational conferences; Arranging of educational events; Arranging of entertainment shows; Arranging of exhibitions for cultural or educational purposes; Arranging of exhibitions for cultural purposes; Arranging of exhibitions for educational purposes; Arranging of exhibitions for entertainment purposes; Arranging of exhibitions for training purposes; Arranging of festivals for cultural purposes; Arranging of festivals for educational purposes; Arranging of festivals for entertainment purposes; Arranging of festivals for training purposes; Arranging of games; Arranging of guided educational tours; Arranging of lectures; Arranging of music performances; Arranging of music shows; Arranging of musical entertainment; Arranging of musical events; Arranging of pageants; Arranging of presentations for cultural purposes; Arranging of presentations for educational purposes; Arranging of presentations for entertainment purposes; Arranging of presentations for training purposes; Arranging of quizzes; Arranging of seminars; Arranging of seminars relating to cultural activities; Arranging of seminars relating to education; Arranging of seminars relating to entertainment; Arranging of

seminars relating to training; Arranging of soccer games; Arranging of sporting events; Arranging of sports competitions; Arranging of training courses; Arranging of visual and musical entertainment; Arranging of visual entertainment; Arranging of workshops; Arranging of workshops and seminars; Arranging professional workshop and training courses; Arranging teaching programmes; Arranging the provision of recreation facilities; Arranging of tours for training purposes; Art exhibition services; Art exhibitions; Art gallery services; Art gallery services provided on-line via a telecommunications link; Artistic direction of performing artists; Artistic management of musical shows; Artistic management of performing artists; Artistic management of theatre shows; Audio entertainment services.

31. The application for invalidation fails under section 3(1)(b) for the following services:

Audio production; Audio production services; Audio recording and production; Audio recording and production services; Academic examination services; Accreditation [certifying] of educational achievement; Accreditation of educational services; Adult education services relating to intellectual property; Adult education services relating to management; Advisory services relating to publishing; Animation production services; Academic examination services; Accreditation [certifying] of educational achievement; Accreditation of educational services; Accreditation of professional competency; Administration of lotteries for others; Administration [organisation] of poker games; Adult education services relating to accounting; Adult education services relating to auditing; Adult education services relating to banking; Adult education services relating to commerce; Adult education services relating to environmental issues; Adult education services relating to finance; Adult education services relating to intellectual property; Adult education services relating to law; Adult education services relating to management; Adult education services relating to medicine; Adult education services relating to pharmacy; Advanced driving instruction for drivers of motor cars; Adventure playground services; Advice relating to medical training; Advisory services relating to publishing; Amusement and theme parks; zoos; Amusement arcade gaming machine rental services; Amusement arcade machine rental services; Amusement arcade services; Amusement arcade services (Providing -); Amusement arcades; Amusement centers; Amusement centre

services; Amusement centres; Amusement park and theme park services; Amusement park services; Amusement park services with a theme of films; Amusement park services with a theme of radio productions; Amusement park services with a theme of television productions; Amusement parks; Analyzing educational tests scores and data for others; Animal dressage; Animal exhibitions; Animal exhibitions and training of animals; Animal exhibitions (Arranging of -); Animal exhibitions (Conducting of -); Animal shows; Animal training; Animation production services; Arcade game services; Arrangement of professional golf tournaments; Arranging and conducting education fairs; Arranging and conducting of American football training programs; Arranging and conducting of commercial, trade and business conferences; Arranging and conducting of education courses relating to the travel industry; Arranging and conducting of seminars in the field of oncology; Arranging and conducting of soccer training programs; Arranging and conducting of youth American football training programs; Arranging and conducting of youth soccer training programs; Arranging and conducting of wine tasting events for educational purposes; Arranging and conducting of wine tasting events for entertainment purposes; Arranging competitions and tournaments relating to car racing; Arranging competitions and tournaments relating to driving; Arranging of air displays; Arranging of air shows; Arranging of an annual conference relating to logistics; Arranging of an annual conference relating to procurement; Arranging of an annual conference relating to telecommunications; Arranging of conferences relating to advertising; Arranging of conferences relating to business; Arranging of conferences relating to commerce; Arranging of conferences relating to trade; Arranging of conventions for business purposes; Arranging of conventions for trade purposes; Arranging of seminars relating to advertising; Arranging of seminars relating to business; Arranging of seminars relating to commerce; Arranging of seminars relating to trade; Arranging technical instruction courses; Artistic management of entertainment venues; Artistic management of music venues; Artistic management of theatres; Audio and video editing services; Audio and video production, and photography; Audio and video recording services; Audio, film, video and television recording services; Audio production; Audio production services; Audio recording and production; Audio recording and production services.

Acquired distinctiveness

32. The proviso to section 47(1) of the Act states:

“Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section [section 3], it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

33. The relevant date for the present assessment is therefore the date on which the application for invalidation was filed: 26 February 2024.

34. It is clear from the CJEU in *Oberbank AG & Banco Santander SA and Another v Deutscher Sparkassen- und Giroverband eV* (Joined cases C-217 and 218/13), that the burden of establishing acquired distinctiveness rests on the registered proprietor.

35. The registered proprietor’s evidence concentrates on the history of the term ‘Windrush Generation’ and its own aims. It says next to nothing about any use of the contested mark. Where it is mentioned in the evidence, it is confined to the following:

- page 4 of Exhibit 18, which Mr Torrigton describes as being from the registered proprietor’s website. I note that the website details were updated on 20 February 2024, four days prior to the relevant date. The page looks like this:

19 October 2018: 7th International Biennial Steelpan, Calypso & Mas Conference, The Tabernacle
21 June 2019: WINDRUSH DAY event: EVENT HELD AT THE BROADWAY THEATRE, LEWISHAM
MARCH 2020: WENDY WILLIAMS' - 'WINDRUSH LESSONS LEARNED REVIEW' published.
22 JUNE 2020: WINDRUSH DAY: COMMEMORATION EVENT VIA ZOOM
2020: WINDRUSH'72: COMMEMORATION of the 25th ANNIVERSARY of WINDRUSH FOUNDATION.
2021: 22 JUNE: WINDRUSH'73: WINDRUSH DAY COMMEMORATIVE EVENT VIA ZOOM
2022: 22 JUNE: WINDRUSH'74: WINDRUSH DAY COMMEMORATIVE EVENT VIA ZOOM
2022: WINDRUSH FOUNDATION AWARDED FUNDING NATIONAL LOTTERY TO COMMEMORATE WINDRUSH'75 IN 2023
2023: CELEBRATING WINDRUSH PIONEERS Project funded by National Heritage Lottery Fund.
WINDRUSH FOUNDATION Directors in 2024: Verona Feurtado, Dione McDonald, and Arthur Torrington CBE

FOUR WWII ex-RAF SERVICEMEN



FROM LEFT: DONALD CLARKE, GEORGE MASON, SAM KING, ALLAN WILMOT
PIONEERING MEMBERS OF THE WINDRUSH GENERATION

UPDATED: 20 FEBRUARY 2024

FOR MORE INFORMATION, PLEASE VISIT www.windrushfoundation.com



4

- Exhibit 38 which Mr Torrington adduces to support his statement that the contested mark is inserted on educational publications and products. The exhibit comprises the following:

WINDRUSH FOUNDATION
THE ORGANISATION THAT STARTED IT ALL
PRESENTS

WINDRUSH 75

A GOLDEN OPPORTUNITY

TO DOWNLOAD | FREE

7 WINDRUSH EDUCATION RESOURCES:

These Windrush Education Resources feature genuine and original stories and experiences of the Windrush Generation who helped to lay the foundations of our community.

- Mr Windrush (Book)
- Man of the People (Book)
- John Richards (Book)
- Windrush 75 Pioneers & Champions (Book)
- Tallawah: Windrush Generation Poetry (Book)
- Windrush Top of class: Stories (Book)
- John Richards (Video)

WWW.WINDRUSHFOUNDATION.COM | INFO@WINDRUSHFOUNDATION.COM

www.windrushfoundation.com

36. The ship device is just about discernible at the top right and bottom left of the image. I assume that the wording underneath the ship device is WINDRUSH GENERATION because Mr Torrington states that the mark appears on the registered proprietor's resources. It is too small to see.

37. Although the registered proprietor bears the burden of proof, the applicant has also filed an exhibit which it states is an image of some literature produced by the registered proprietor. Exhibit DK1 comprises an image of a booklet called “KS2 Lesson Plans for Studying the Empire Windrush and Caribbean Migration”. Ms Klass states that Mr Torrington sent her the booklet in November 2022 and that he had advised a member of the applicant’s staff that the publication was one which he commonly handed out to schools and other organisations for educational purposes. The top of the image looks like this:



Resources – Lesson 4

THE WINDRUSH GENERATION

38. The CJEU provided guidance in *Windsurfing Chiemsee* as to the correct approach with regards to the assessment of the acquisition of distinctive character through use.¹⁵ The guidance is as follows:

“51. In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.

52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify

¹⁵ Joined cases C-108 & C-109/97

goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages.”

39. The registered proprietor has provided none of this information. What it has provided goes nowhere near to establishing that its mark, which is *prima facie* or inherently devoid of any distinctive character, had acquired distinctiveness in a trade mark sense by 26 February 2024. In fact, looking at the images above, it is the words Windrush Foundation which provides the trade origin message, which I note from the registered proprietor’s submissions that it has registered as a trade mark under number 3574193, in class 41:



40. Since the contested mark had not acquired distinctive character in relation to the services for which I found it was inherently devoid of any distinctive character, **the invalidation succeeds against the services listed above in paragraph 30 under section 3(1)(b) of the Act and fails for the services listed above in paragraph 31.**

Section 3(1)(d)

41. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM*, Case T-322/03, the General Court (“GC”) summarised the case law of the CJEU under the equivalent of s.3(1)(d) of the Act, as follows:

“49. Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current

language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 31, and Case T-237/01 *Alcon v OHIM – Dr. Robert Winzer Pharma* (BSS) [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public's perception of the mark (BSS, paragraph 37).

50. With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (BSS, paragraph 38).

51. Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, *Merz & Krell*, paragraph 35, and BSS, paragraph 39).

52. Finally, signs or indications constituting a trade mark which have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, *Merz & Krell*, paragraph 37, and BSS, paragraph 40).”

42. The enquiry under section 3(1)(d) is whether the mark was customary in the current language or was customary in the bona fide and established practice of the trade in the UK (i.e. where the trade means the contested goods and services) at the

date of application for the contested mark. Proving this requires the filing of evidence of fact supporting the claim that it was customary for other traders to use the mark as a whole at the relevant date, but not in a trade mark sense.¹⁶ There is a relatively high evidential bar: in *Affinity Leasing Limited v Total Motion Limited*, Mr Daniel Alexander QC, sitting as the Appointed Person reviewed the authorities and concluded that the overall message was that section 3(1)(d) “requires specific evidence that it is specifically customary.”¹⁷

43. I need to make the assessment taking into account the expectations of relevant average consumers to decide whether, at the date of the application the mark, had become “customary in the current language or in the bona fide and established practices of the trade”. Although where intermediaries influence decisions to purchase goods or services their views should also be taken into account, in the present case the average consumer for the contested services is largely the general public, and it is their views which are likely to be of decisive importance.¹⁸

44. In *Stash Ltd v Samurai Sportswear Ltd*, Professor Annand, sitting as the Appointed Person, stated that it was sufficient if a mark offended either limb of s.3(1)(d).¹⁹ That is to say, that (at the relevant date) the mark had become customary (a) “in the current language”, or b) “in the bona fide and established practices of the trade”. The words ‘of the trade’ should not be construed as applying to both limbs. Basing herself on the Oxford English Reference Dictionary, 1995, Professor Annand took “customary” (in the language) to mean “usual; in accordance with custom”.

45. The applicant has not provided any use by other traders or third parties of the contested mark (as a whole). It must be shown that the contested mark consists exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade. It is, therefore, not enough to show use only of the words. **The applicant has not made out the section 3(1)(d) ground, which therefore fails.**

¹⁶ *Nude Brands Ltd v Stella McCartney Ltd*, [2009] EWHC 2154 Ch

¹⁷ Case BL O/522/20, at [22]

¹⁸ CJEU, Case C-371/02 *Björnekulla Fruktindustrier AB v Procordia Food AB*, paragraphs 24 and 25

¹⁹ BL O/281/04

Section 47(1)/Section 3(6) of the Act

46. Section 3(6) states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

47. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin considered the question of what amounts to bad faith. He said that the categories of bad faith and the circumstances which may constitute bad faith are not closed, and stated:

“152. In seeking to identify the relevant principles, it is necessary to have in mind two fundamental aspects of trade mark law to which I have already referred: first, it is concerned with the use of marks in trade to denote the origin of goods and services. Secondly, the aim of the trade mark regime is to contribute to a system of undistorted competition in which businesses are able to attract and retain customers by the quality of their goods and services, and for that purpose are able to have registered signs which enable consumers to distinguish the goods and services of one undertaking from those of another. Such a system must also provide an incentive and protection for the investment by a brand owner in the quality and other beneficial aspects of its goods and services, and so allow it to develop a goodwill in its business relating to their sale and supply.

153. Against this background, the essence of the objection that an application to register a mark was made in bad faith may be understood: it is that the motive or intention of the applicant was to engage in conduct that departed from accepted principles of ethical behaviour or honest commercial practices having regard to the purposes of the trade mark system which I have described. Whether the conduct was undertaken with that motive or intention and did indeed depart from such ethical behaviour or honest commercial practices must be assessed having regard to all the objective circumstances

of the case: see, for example, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 (“*Koton*”), paras 46 and 47 [...].”

48. Later in the judgment, Lord Kitchin summarised the general principles applicable to bad faith at [240], as follows:

“(i) [...]

(ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).

(iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation [...], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 ([*Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 (“*Malaysia Dairy*”), para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 (“*Sky CJEU*”), para 73).

(iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the [...] law of trade marks, namely the establishment and functioning of [...] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45; [*Koton Mağazacılık Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 (“*Koton*”), para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case (*[Hasbro Inc v EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 (“*Hasbro*”)], paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; *[AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the

application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to the goods or services in relation to which it is sought to register the mark, or that the applicant has a *bona fide* intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of

establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87).”

49. *Skykick* also sets out at paragraph 86 that a statement on the application form that the mark is in use, or there is a *bona fide* intention to use it may, if untrue, provide evidence supporting a bad faith case, but is not sufficient by itself to justify the refusal or cancellation of the registration.

50. An allegation of bad faith is a serious one which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch).²⁰ It is necessary to ascertain what the registered proprietor knew at the relevant date (31 March 2021). Evidence about subsequent events may be relevant if it casts light backwards on the position at the relevant date.²¹

51. As a reminder, the applicant’s pleaded case under this ground is:

“Windrush Foundation (“the applicant”) applied to register the trade marks 377000 WINDRUSH MONUMENT in the UK on 25 March 2022, 750361 WINDRUSH MEMORIAL, 3750384 WINDRUSH75 on 2 February 2022 and 3726492 WINDRUSH and 3726488 WINDRUSH DAY on 28 November 2021. The applicant registered UK00003619267 WINDRUSH GENERATION on 31 March 2021.

It is submitted that all of the above applications have been filed without an intention to use the marks in respect of the services claimed and are filed as a mechanism to prevent use of the terms by third parties.

²⁰ *Ibid*

²¹ *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16)

It is submitted that the applicant's mark is so general that in the context of the broad range of related marks registered by the applicant as listed above, there is no reasonable commercial rationale nor commercial logic to the particular mark in question.

The opponent cites the applicant's recent case no. O-0051-24 in which 4 of the above marks were determined to be registered in bad faith."

52. In its written submissions filed with its evidence, the applicant submits that the contested mark was filed "not for commercial purposes, but as a deliberate scheme designed to disrupt the ability of the applicant and all other potential third parties from making use of the generic term 'Windrush Generation'." It goes on to refer to the other marks applied for by the registered proprietor (the subject of the earlier decision), calls this a "pattern of behaviour" and submits that the registrations were "for the purpose of seeking to prevent 'the wrong message' being spread about the words 'Windrush' & 'Windrush Generation'. The applicant points to the following in the counterstatement as evidence of bad faith:

"In efforts to preserve the integrity of Sam King's legacy, Windrush Foundation, which he co-founded with Arthur Torrington, continues to challenge the falsehood that calls a group of people 'Windrush Generation' who did not travel of the ship Empire Windrush, and who arrived in the UK on other ships after June 1948."

53. The applicant submits that the above statement shows that the filing of the contested mark "was not for genuine commercial purposes or for any future use of the mark, but instead as a mechanism to prevent others from ascribing a meaning to the generic phrase 'Windrush Generation' that differed from the proprietor's own interpretation of the phrase." It submits that the mark was filed as a blocking mechanism, referring to *Copernicus-Trademarks v EUIPO (LUCO)* Case T-82/14.²²

54. It would have been preferable if these submissions, filed with the applicant's evidence, had been included in the applicant's pleadings in its application for

²² General Court

invalidation. The applicant fleshes out its case in these submissions. Taking the sections of the pleadings in reverse order, firstly, as set out earlier, the outcome of the earlier decision is not determinative of the present case, which is a different mark, with a different ‘opponent’, different pleadings and different evidence. Secondly, the penultimate part of the pleadings consists of the following:

“It is submitted that the applicant’s mark is so general that in the context of the broad range of related marks registered by the applicant as listed above, there is no reasonable commercial rationale nor commercial logic to the particular mark in question.”

55. This pleading does not say specifically what the problem is. I do not know what the applicant means by the applicant’s mark being “so general in the context of the broad range of related marks” (those in the earlier decision). General in what way? In my view, this pleading is insufficiently clear and I do not think it would be right for me to guess at what the applicant might mean. This is all the more so when it is an allegation of bad faith, which is serious and should be explained clearly. Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said in *Demon Ale Trade Mark* [2000] R.P.C. 345, at 357:

“Considerations of justice, fairness, efficiency and economy combine to make it necessary for the pleadings of the parties in Registry proceedings to provide a focussed statement of the grounds upon which they intend to maintain that the tribunal should or should not do what it has been asked to do.”

56. In *Simpson Performance Products, Inc v Andreas Freundlib*, Mr Phillip Johnson, sitting as the Appointed Person, said:²³

“37. Any allegation of bad faith must be fully and properly pleaded as it is akin to an allegation of dishonesty: *Jaguar Land Rover Ltd v Bombardier Recreational Products Inc* [2016] EWHC 3266 (Ch), [50]. While Hearing Officers often adopt a degree of liberality when it comes to the particularity of

²³ Case BL O/0197/23

pleading before the registrar, this should not apply where dishonesty, or bad faith, is alleged. As *Jaguar* makes clear it needs to be very clear to the trade mark proprietor (or applicant) exactly how its probity is being attacked. So any Statement of Case alleging bad faith should be properly set out so that every fact supporting bad faith is clear.”

57. Finally, the first part of the pleadings comprises the following:

“It is submitted that all of the above applications have been filed without an intention to use the marks in respect of the services claimed and are filed as a mechanism to prevent use of the terms by third parties.”

58. Although, as noted above, the applicant used its written submissions to flesh out its case, I do not consider that the registered proprietor has been unduly prejudiced by this situation. The intention to use and blocking claim was pleaded, albeit briefly, as set out above. The submissions went to this pleading and were filed with the applicant’s evidence-in-chief, which the registered proprietor answered with its own evidence and written submissions. It knew by that point the full basis for this part of the section 3(6) case and was able to answer it. Therefore, I will restrict my assessment of the section 3(6) ground to this pleading.

59. In his evidence, Mr Torrington states that the registered proprietor’s Articles of Association were updated in 2021 (the year of application), showing more details of its services and products. He states that “Windrush services” include holding events and activities that educate the public about the lives and contributions (to Britain) of the Windrush Generation who arrived at Tilbury Docks on 22 June 1948.”²⁴ Mr Torrington goes on to state that the opponent in the earlier decision “prevented our ownership of terminologies that we had created...The Owner [the registered proprietor] was trying to steer The Windrush Generation Legacy Association away from falsely giving their users the impression that they were members of the

²⁴ Paragraph 26

Windrush Generation like those of June 1948. They wrongly conflate ‘Windrush’ and ‘Generation’.”²⁵

60. Section 3(6) involves shifting evidential burdens. The initial burden is on the applicant to prove, in evidence, a case which rebuts the presumption that the contested mark was filed in good faith. It is important to have in mind the pleading made and whether the evidence supports that pleading. The only evidence about intention to use and blocking which Ms Klass provides is her account of the contact made between her and Mr Torrington in November 2022 (after the relevant date). The rest of her evidence goes to the meaning of Windrush Generation to support the applicant’s 3(1)(b) and (d) grounds.

61. Ms Klass states that Mr Torrington had visited the applicant’s premises in November 2022 in order to speak to her. Ms Klass was not on the premises at the time of the visit, but he handed to a member of staff a book which he said he commonly handed out to schools and other organisations for educational purposes. He asked that the book be handed to Ms Klass. This is the book referred to above at paragraph 37: ‘KS2 Lesson Plans for studying the Empire Windrush and Caribbean migration.’ A few days later, Ms Klass and Mr Torrington spoke on the telephone. She states that Mr Torrington said that he liked the work of the applicant but that it was not ‘Windrush’ work. He said that, for this reason, the applicant should not have Windrush in its name because the applicant did not understand the meaning of ‘Windrush’. Ms Klass states:

“10. Mr Torrington went on to say that his organisation was the only organisation that should be using the term ‘Windrush’ because his organisation had fought to preserve the meaning of the term and that the term ‘Windrush Generation’ having been coined by Sam King who was one of the founders of the organisation, only his organisation were entitled to use the term.

²⁵ Paragraph 58

11. Mr Torrington advised me that his organisation had previously challenged other organisations in this regard. Mr Torrington said therefore that WGLA [the applicant] should change its name because it was led into thinking that what it is doing is Windrush work.”

62. The applicant’s evidence in relation to the bad faith ground is brief but sufficient for the purpose of mounting a *prima facie* case to support the applicant’s pleadings. Mr Torrington has given plenty of evidence about the reasons for filing the registered proprietor’s mark. Section 3(6) is a ‘public interest’ ground (rather than a private dispute between two parties) and, if I am wrong that the applicant has met its evidential burden, I consider that, because of the public interest, I cannot ignore what Mr Torrington says about the reasons for filing the mark.

63. It is clear from his evidence that Mr Torrington/the registered proprietor was very concerned about what he/it saw as an erroneous interpretation of the Windrush Generation. Mr Torrington cares deeply about the public understanding what he states is the correct interpretation; i.e. that the term applies only to the cohort of people who arrived in the UK on the *Empire Windrush* on 22 June 1948. In his eyes, the way to educate the public and remove the erroneous interpretation from the public eye was to register the contested trade mark to control the use of the words. This can be seen from what Mr Torrington says in the counterstatement, at paragraph 61 of his witness statement, and in the registered proprietor’s written submissions:

“In efforts to preserve the integrity of Sam King’s legacy, Windrush Foundation, which he co-founded with Arthur Torrington, continues to challenge the falsehood that calls a group of people ‘Windrush Generation’ who did not travel of the ship Empire Windrush, and who arrived in the UK on other ships after June 1948.”²⁶

“This Witness Statement shows that UK00003619267 was not registered in bad faith, but to preserve and conserve the integrity of Sam King’s legacy.”

²⁶ Counterstatement

“It is unreasonable for the Applicant to filed [sic] for the cancellation of the Owner’s mark which signifies historical correctness.”²⁷

64. A trade mark registration is a trade monopoly. It is a negative right which can be used to prevent parties with similar marks or signs from using those marks or signs in the course of trade. There is nothing, therefore, inherently wrong with applying for a trade mark in order to secure a trade monopoly. However, it is wrong to apply for a trade mark to obtain a monopoly for purposes other than indicating the essential function of indicating the trade origin of goods or services. All of Mr Torrington’s evidence is about what he sees as the ‘pure’ meaning of Windrush Generation and, in particular, Sam King’s legacy. He disapproves of the applicant’s use of the term because it does not accord with his and the registered proprietor’s definition and, according to Ms Klass’ unchallenged version of their conversation, he told her that his organisation was the only organisation which should be using ‘Windrush’ and ‘Windrush Generation.’ Although this conversation took place after the relevant date, it sheds light upon Mr Torrington’s/the registered proprietor’s belief at the relevant date because, by then, he already disapproved of the shift in use of ‘Windrush Generation’ which had begun in 2018.

65. Although Mr Torrington’s/the registered proprietor’s belief that it was only the registered proprietor which was entitled to use ‘Windrush Generation’ was, at the relevant date, in their eyes morally justified, I must also consider this ground objectively. The combined effect of what Ms Klass says Mr Torrington said to her and what he himself said, as set out above at paragraph 63, is that the trade mark was filed to prevent others from using Windrush Generation because it was not being used ‘properly’. The registered proprietor, aggrieved by the continued broadening of the meaning of the term since 2018, decided to create a monopoly in order to police the historical interpretation of the term. That is not the purpose of a trade mark. Creating such a monopoly was not a monopoly for the purposes of distinguishing the goods and services of the proprietor from those of others in trade; instead, it was to control the meaning of a historical term.

²⁷ Written submissions

66. I am in no way suggesting that the registered proprietor behaved in a malicious or sinister way by applying for a trade mark to conserve its own definition of the historical term. However, as per *Skykick*, “the concept of bad faith must also be understood in the context of trade mark law, which involves the use of marks in the course of trade.” I have to decide whether the registered proprietor’s belief, which led to the filing of the contested mark, was conduct which departed from accepted principles of ethical behaviour or honest commercial practices in the context of trade mark law. I have already explained that the essential function, or purpose, of a trade mark is to distinguish one trader’s goods and services from those of other traders. This is to enable the consumer to make a choice about where they buy goods and services from so that they can either repeat or avoid a subsequent purchase. The purpose of a trade mark registration is not to control or police interpretation of historical terms or accuracy. This brings me back to paragraph 240(v) of *Skykick*:

“(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).”

67. I do not see how the trade mark, given Ms Klass’ and Mr Torrington’s evidence, can be said to have been filed with the aim of engaging fairly in competition. The registered proprietor obtained an exclusive right for purposes other than those falling within the functions of a trade mark. At the relevant date, the registered proprietor knew that WINDRUSH GENERATION was a descriptive term for a group of people tied to a period in history. Whether the registered proprietor recognised it or not on the relevant date, the evidence shows that the filing of the application departed from accepted standards of honest commercial practices and therefore amounts to a form of commercial dishonesty because it was filed to block use of the descriptive phrase by others who may have used it in ways in which the registered proprietor

disapproved. I do not think it makes a difference that the mark comprises a device of a ship as well as the descriptive words Windrush Generation. This is because, having regard to the way in which Mr Torrington has set out the registered proprietor's case, the intention of the registered proprietor was to block others' use of the phrase by applying for the subject mark as a whole. This means that the application was filed in bad faith for all the services in the specification. It was not filed for the essential function of a trade mark, to engage fairly in competition. The section 3(6) ground succeeds.

68. I have assessed the ground on the basis of the following pleading:

“It is submitted that all of the above applications have been filed without an intention to use the marks in respect of the services claimed and are filed as a mechanism to prevent use of the terms by third parties.”

69. A 'blocking' trade mark application (of the kind envisaged in paragraph 240(v) of *Skykick*) could also, by its nature, mean that there is no intention to use the mark in respect of the services claimed (because the sole intention was to block others' trade, rather than to engage in trade). However, the wording of the pleading could also mean that there is, aside from the 'blocking' claim, a separate claim that the registered proprietor did not intend to use the mark in relation to all the services in the specification. If that is what was meant, it should have been pleaded properly. Ms Klass said nothing about the length, or breadth, of the specification in her evidence and the applicant said nothing about it in its submissions. I do not, therefore, propose to deal with a possible, separate, claim to intention to use for the reasons explained at paragraphs 55 and 56, in relation to clarity of pleadings.

Overall outcome

70. The application for invalidation partially succeeds under section 3(1)(b) and succeeds in full under section 3(6). Under section 47(6) of the Act, the registration is deemed never to have been made.

Costs

71. The applicant is entitled to costs based upon the scale published in Tribunal Practice Notice 1/2023. I award costs as follows:

Fee for filing the Form TM26(I)	£200
Preparing the application and considering the counterstatement	£300
Preparing evidence and considering the registered proprietor's evidence	£800
Total	£1300

72. I order Windrush Foundation to pay to Windrush Generation Legacy Association the sum of **£1300**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 20th day of February 2026

**Judi Pike
For the Registrar,
the Comptroller-General**