

BL O/0698/26

APPEAL TO THE APPOINTED PERSON

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

**IN THE MATTER OF APPLICATION NOS. 3703840 & 3704050 IN THE NAME OF
PROMOSHIRT SM SA GMBH IN CLASSES 6, 9, 11, 18, 20, 21, 24, 25, 27 & 34**

AND

**IN THE MATTER OF OPPOSITIONS THERETO UNDER NOS. 434401 & 434576
BY SCHWEIZERISCHE EIDGENOSSENSCHAFT V.D. BUNDESAMT FÜR
RÜSTUNG ARMASUISSE EIDGENÖSSISCHES DEPARTEMENT FÜR
VERTEIDIGUNG, BEVÖLKERUNGSSCHUTZ UND SPORT**

AND

**IN THE MATTER OF INTERNATIONAL REGISTRATION DESIGNATING THE UK
NO. 1686195 IN THE NAME OF SCHWEIZERISCHE EIDGENOSSENSCHAFT V.D.
BUNDESAMT FÜR RÜSTUNG ARMASUISSE EIDGENÖSSISCHES
DEPARTEMENT FÜR VERTEIDIGUNG, BEVÖLKERUNGSSCHUTZ UND SPORT
IN CLASSES 3, 9, 18, 20, 21, 24 & 30**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 439706 BY
PROMOSHIRT SM SA GMBH**

DECISION

1. This is an appeal by Promoshirt SM S.A. GmbH (“Promoshirt”) against aspects of the decision (“the Decision”) of Hearing Officer Mr. James Hopkins (“the Hearing Officer”) in the above matters dated 15 December 2025.
2. The consolidated proceedings concern trade mark registrations and applications in the name of Promoshirt on the one part and a department of the Swiss Government (“the Confederation”) on the other, in each case in respect of marks which include the term SWISS MILITARY. The registrations and applications in issue are:
 - (a) Promoshirt’s UK Application No. 3703840, filed on 27 July 2017 in respect of the mark “SWISS MILITARY” (“Promoshirt’s First Application”);

- (b) Promoshirt's UK Application No. 3704050, also filed on 27 July 2017, in respect of the mark "SWISS MILITARY BY BTS" ("Promoshirt's Second Application");
- (c) The Confederation's UK Registration No. 801163988, filed on 12 April 2013, in respect of the mark "SWISS MILITARY" ("the '988 Registration");
- (d) The Confederation's UK Registration No. 913235973, filed on 8 August 2015 in respect of the mark "SWISS MILITARY" the '973 Registration");
- (e) The Confederation's International Registration No. 1686195, registered on 24 June 2022, in respect of the mark shown below ("the Confederation's IR"), protection of which in the UK was applied for on the same date.



3. Promoshirt's First and Second Applications were opposed by the Confederation, relying *inter alia* on the Confederation's '988 and '973 Registrations for the mark SWISS MILITARY as earlier rights for the purposes of s. 5(2) of the Trade Marks Act 1994 ("the Act"). In turn, Promoshirt opposed the protection in the UK of the Confederation's IR, relying *inter alia* on Promoshirt's First and Second Applications as earlier rights for the purposes of s. 5(2) of the Act¹. In consequence, Promoshirt's oppositions to the protection of the Confederation's IR depended to a significant extent on the outcome of the Confederation's oppositions to Promoshirt's applications.
4. The Hearing Officer reached his decision after an oral hearing by video conference, attended by Thomas St Quintin instructed by Abel & Imray LLP on behalf of Promoshirt and Jacqueline Reid instructed by Womble Bond Dickinson (UK) LLP on behalf of the Swiss Confederation. Each party had a degree of success, but Promoshirt was more successful overall, with the opposition against its Second Application dismissed in its entirety and that against the First Application

¹ Promoshirt also relies on a registration for the mark "SWISS MILITARY BY PSM" under UK Registration No. 917026203 but it is not relevant to any issue on this appeal.

succeeding to only a limited extent. The Confederation's IR obtained protection in the UK in respect of a subset of the specification applied for.

5. On the present appeal the parties requested a decision on the papers, in respect of which I have been assisted by written submissions on behalf of each party in respect of both the substantive appeal and Promoshirt's application to advance a new point on appeal, as addressed below.

SUMMARY OF THE APPEAL

6. Promoshirt's appeal concerns the Hearing Officer's decision allowing that part of the Confederation's opposition to Promoshirt's First Application in respect of "Glassware, porcelain and earthenware not included in other classes" in class 21 and the consequential effect on Promoshirt's own opposition in respect of the Confederation's IR for "Drinking bottles for sports (of plastic materials or of metal); drinking bottles for sporting activities, glassware, porcelain and earthenware, cups", also in class 21. No other aspects of the Decision are challenged by Promoshirt. Although the Confederation also opposed Promoshirt's First Application under ss. 2(3)(b) and 3(6) of the Act, those grounds were unsuccessful and the decision in respect thereof is not appealed by the Confederation.
7. In summary, Promoshirt contends by Ground 1 of its appeal that the Hearing Officer erred in holding that "glassware, porcelain and earthenware not included in other classes" are similar to a medium degree (or indeed at all) to "precious metals and their alloys and goods in precious metals or coated therewith not included in other classes" in class 14. No criticism is made of the Hearing Officer's summary of the relevant principles to be applied, but it is said that he erred in the application of those principles.
8. As a result, and this is Ground 2 of Promoshirt's appeal, Promoshirt contends that the Hearing Officer should have rejected the Confederation's opposition to Promoshirt's first application in respect of those goods in class 21 on the basis that the goods in issue were dissimilar. Promoshirt does not contend that the Hearing Officer fell into error in assessing the likelihood of confusion if he were right that the goods in issue were similar, and as a result Ground 2 is dependent on Promoshirt being successful under Ground 1.

9. Finally, as Ground 3 of its appeal, Promoshirt contends that the Hearing Officer should have allowed Promoshirt's opposition to the Confederation's IR in respect of the class 21 goods in issue, again, solely on the basis that had the hearing officer not erred as alleged under the first two grounds, Promoshirt's First Application would have survived to be a relevant earlier mark in respect of the Class 21 goods in issue. Again, there is no error of principle alleged in respect of this aspect of the Hearing Officer's decision beyond the consequences of the alleged error relied on under Ground 1.
10. Promoshirt's appeal as originally formulated necessarily depends on success under Ground 1. Although issues might potentially arise in respect of the consequences addressed under the second and third grounds of appeal, unless Promoshirt succeeds on its first ground, the appeal cannot leave the launch pad.

THE AMENDED GROUNDS OF APPEAL

11. Perhaps recognising this logical bottleneck, subsequent to filing its TM55 on 10 January 2026, Promoshirt filed (on 3 March 2026) "Supplementary Submissions" by which it sought permission to amend its grounds of appeal to rely on what it calls a "fall-back" specification in respect of the class 21 goods of its First Application. No such fall-back was advanced before the Hearing Officer, for which the only explanation given is that it was not considered necessary until the Hearing Officer's Decision was seen. Even then, it was not advanced as part of the original grounds of appeal and only introduced by way of amendment.
12. The fall-back specification proposed is to replace "glassware, porcelain and earthenware" with "glasses, glass bottles and crockery, all being tableware". If allowed, the goods in this fall-back specification would then be relied on by Promoshirt as being similar to "Drinking bottles for sports (of plastic materials or of metal); drinking bottles for sporting activities, glassware, porcelain and earthenware, cups" within the class 21 specification of the Confederation's IR. I would observe at this stage that (unsurprisingly) no argument as to the similarity or otherwise of these goods was addressed in the Decision and neither party to this appeal contends that submissions or evidence on this point were advanced before the Hearing Officer.

13. On receipt of Promoshirt's Supplementary Submissions I indicated by email from the Appointed Person Secretariat (dated 4 March 2026) that I had formed a preliminary view that I would to allow the amendment to the appeal grounds, permitting Promoshirt to seek to advance its fall-back position by way of its amendment. I requested the Confederation to indicate whether it opposed the amendment to the appeal grounds, and if so, to set out in writing its grounds for so doing and to indicate whether it consented to that application being determined on the papers. I also gave directions for the exchange of written submissions on the amendment to the appeal grounds (if opposed) and on the appeal, including on the proposed amended grounds of appeal.
14. By email dated 10 March 2026 the Confederation indicated that it did not oppose the proposed amendment to the appeal grounds and that it consented to the issue of permission to amend being determined on the papers.
15. The position was therefore that, in accordance with my preliminary indication, permission to amend would be allowed. However, the substantive issue of whether Promoshirt should be allowed to advance its proposed fall-back position falls to be determined as part of this appeal. Logically, it falls to be addressed first, and I do so below. I would observe at this stage, however, that I was somewhat surprised to receive written submissions from the Confederation by which, as well as making submissions both on the substantive issue of whether Promoshirt should be allowed to advance its new case and on the appeal more generally, it purported to resist Promoshirt's application to amend its grounds of appeal at all.
16. Insofar as the Confederation's submissions address the issue of permission to amend, I have ignored them in that they are contrary to the clear statement by the Confederation in its email of 10 March 2026 that it would not file any such opposition. However, insofar as such submissions go to the substantive issue of whether Promoshirt should be entitled to advance its fall-back position, I have taken them into account. In accordance with directions agreed between the parties, Promoshirt filed further submissions in response to the Confederation's submissions.

PERMISSION TO ADVANCE THE FALL-BACK POSITION

17. By its Supplementary Submissions Promoshirt acknowledges that its fall-back specification was not advanced before the Hearing Officer but submits that a

proposed narrowed specification can in principle be raised for first time on appeal and seeks permission to do so. Promoshirt relies on the decision of Daniel Alexander KC sitting as the Appointed Person in MULTISYS (BL O/468/11) as setting out the approach to be taken when considering whether to allow such a fall-back specification to be raised for the first time on appeal to the Appointed Person. Mr Alexander summarised the position as follows, at [25] to [29] of his decision:

25. *First, there are no fixed rules as to how the tribunal should deal with fall-back specifications advanced at a late stage of proceedings and, specifically, for the first time on appeal to the Appointed Person. Each case must turn on its facts, having regard to the overall objective of achieving justice between the parties and with due regard to the public interest.*
26. *Second, particularly where a broad specification is in issue in opposition proceedings, the proprietor should consider whether a narrower specification would be less susceptible to objection and should put any such alternative forward for consideration at the earliest opportunity in the opposition proceedings so that it can be considered in the first instance by the Registrar. It should do so with regard to Tribunal Practice Notice 1/2011. Applicants should not think that they will, in general, be able to get away with uncompromising defence of wide specifications until the last minute in the expectation that they will be allowed to narrow down to something permissible in the end.*
27. *Third, in some cases, it will be so obvious that a narrower specification is allowable that no sensible procedural objection could be taken to it being considered, even at a late stage. In some cases, of which m.d.e.m is an example, justice requires that such be done. In others, a narrower specification may give rise to more complex questions, including a need for evidence. In such cases, particularly where a fall-back position is presented for the first time at a late stage of proceedings, such as on a final appeal, the tribunal may be justified in refusing to consider it.*
28. *Fourth, in considering whether to admit it, the factors identified in the arguments for and against set out above are relevant and may have greater or lesser weight in any given case. Of particular weight is any prejudice likely to be suffered by one party or the other from considering or refusing to*

consider a fall-back position and any available alternative routes for the proprietor to obtain effective trade mark protection. The later a fall-back position is proposed and the less opportunity for considered objection given to an opponent, the more clearly must the fall-back position be allowable for there to be no risk of prejudice.

18. Promoshirt also referred to the decision of Philip Harris sitting as the Appointed Person in KOA (BL O/465/25) as authority for the proposition that that the Appointed Person could consider such a fall-back without remitting it to the Hearing Officer. That is of course correct, but in that case the fall-back had already been advanced at the first instance hearing, albeit that it was overlooked by the Hearing Officer, so KOA does not assist Promoshirt in respect of whether the new case should be allowed to be advanced on appeal for the first time.
19. Mr Alexander's analysis was derived from a characteristically thorough consideration of authorities in the specific context of appeals from the IPO to both the High Court and the Appointed Person and reflects the position as in 2011. To that analysis must be added the subsequent guidance given by the Court of Appeal as to the circumstances in which an appellant may be entitled to run new points on appeal in *Notting Hill Finance v Sheikh* [2019] EWCA Civ 1337; [2019] 4 W.L.R. 146, which is in my view equally applicable to appeals to the Appointed Person. At [21] to [28], Snowden LJ (as he then was) summarised the position as follows, considering the relevant authorities (footnote reference to *Jones* added):
 21. *There is no dispute that an appellate court has a general discretion whether to allow new points to be taken on appeal.*
 22. *In seeking to identify more specifically how the court should approach this exercise of discretion, HHJ Godsmark QC relied heavily on the extract from May LJ's judgment in Jones² to which I have referred above. This passage features prominently and is quoted verbatim in the relevant notes in the White Book to which the Judge was referred.*
 23. *Surprisingly, however, those notes do not refer to the most authoritative and frequently applied statement of the approach of an appellate court to the*

² *Jones v MBNA International Bank Ltd* [2000] EWCA Civ 314

question of whether to permit a new point to be taken on appeal. That statement appears in the judgment of Nourse LJ in Pittalis v Grant [1989] QB 605 at page 611,

"The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see Macdougall v. Knight (1889) 14 App. Cas . 194 and The Tasmania (1890) 15 App. Cas. 223 . It is perhaps best stated in Ex parte Firth, In re Cowburn (1882) 19 Ch.D. 419 , 429, per Sir George Jessel M.R.:

"the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

24. *The same principles were applied to interlocutory decisions in Rana v Ealing LBC [2018] EWCA Civ 2074 , where Underhill V-P stated,*

"Those observations were made in the context of an appeal from a decision following a trial, but the underlying principles are the same where the appeal is from an interlocutory decision, though of course such a decision is less likely to depend on disputed evidence."

25. *The principles were also recently restated by Haddon-Cave LJ in Singh v Dass [2019] EWCA Civ 360 at [15]-[18],*

"15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.

16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.

17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).

18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24 at [29])."

26. These authorities show that there is no general rule that a case needs to be "exceptional" before a new point will be allowed to be taken on appeal. Whilst an appellate court will always be cautious before allowing a new point to be taken, the decision whether it is just to permit the new point will depend upon an analysis of all the relevant factors. These will include, in particular, the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken.
27. At one end of the spectrum are cases such as *Jones* in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight. As *Peter Gibson LJ* said in *Jones* (at [38]), it is hard to see how it could be just to permit the new point to be taken on appeal in such circumstances; but as *May LJ* also observed (at [52]), there might nonetheless be exceptional cases in which the appeal court could properly exercise its discretion to do so.
28. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as

found by the judge in the lower court: see e.g. Preedy v Dunne [2016] EWCA Civ 805 at [43]-[46]. In such a case, it is far more likely that the appeal court will permit the point to be taken, provided that the other party has time to meet the new argument and has not suffered any irremediable prejudice in the meantime.

20. Perhaps unsurprisingly in light of the comment by Snowden LJ at [22]-[23] of *Notting Hill Finance*, the notes to the 2026 White Book concerning appeals on points not raised at trial³ address both *Notting Hill Finance* and the restatement of the principles at [15] - [18] of *Sing v Dass* quoted at [25] of that case.
21. This guidance aligns generally with the principles summarised by Mr Alexander in MULTISYS, in particular the need for the interests of justice and the public interest to be considered in the circumstances of each particular case. However, *Notting Hill Finance* gives greater emphasis than MULTISYS to the need for caution in allowing a new point to be advanced, albeit recognising that “exceptional” circumstances were not necessary for permission to be given.
22. In my view the touchstone in respect of applications to run new points on appeal in hearings before the Appointed Person will generally be whether running the new point will cause prejudice to the opposing party or will undermine the finality of proceedings, in particular by requiring the case to be remitted to the Hearing Officer avoid such prejudice.
23. In IPO hearings the position is generally that there has been no oral evidence and so the appellate tribunal will rarely be at the far end of the spectrum considered at [27] of *Notting Hill*, faced with evidence that has been the subject of cross-examination the course of which might have been altered had a point been taken below. However, where the point is not merely one of law and gives rise to factual issues that should have been addressed by evidence below, the fact that an opposing party would be deprived of the opportunity of adducing such evidence absent remission to the Hearing Officer is an important factor against allowing the further point to be considered. Similarly, if the new point is one which would have had an impact on the course of the hearing or outcome in respect of other points that also would militate

³ WB Volume 1 Note 52.21.1.1

against the appellant being allowed to take the new point, in particular if those further points themselves might require further evidence to be considered.

24. The key issue identified by the authorities is that of procedural fairness, combined with the public interest in the finality of legal proceedings. Those points, and all other relevant factors, must be considered with caution on the particular facts of each case.
25. With those principles in mind, I can turn to the substance of Promoshirt's application.
26. Promoshirt contends that its fall-back specification is on its face permissible on the POSTKANTOOR principles; it says that it is clear and precise and merely reduces the specification to a clearly defined subset of the original specification. Promoshirt also contends that consideration of the revised specification does not require any additional evidence, because it concerns goods that are not in a specialist field that I could assess based on my own experience.
27. Promoshirt submits that it will suffer considerable prejudice if its is not allowed to advance the fall-back specification, in essence because it would be deprived of the opportunity to advance a case on this appeal that is independent of the success of the first ground. This is correct, but such prejudice is likely to be present in all such applications, otherwise there would be no need to seek to run the new point on appeal.
28. In response, the Confederation makes a number of procedural points about the manner in which Promoshirt has sought to deploy its fall-back specification, in particular that Promoshirt has sought to circumvent the effect of s. 39 of the Act and prevented the IPO from considering the allowability of the proposed specification. The Confederation contends that the Promoshirt's fall-back extends the specification and suggests that the IPO should have been given the opportunity to consider the point.
29. I do not find these procedural points convincing. The issue of whether Promoshirt should be allowed to run the new point on appeal should be determined in the light of the substantive justice of the application, rather than any procedural foot-fault on the part of Promoshirt. Furthermore, if permission were given, I would be in as good a position to consider the allowability of the specification as the IPO, subject to the evidential issues discussed below.

30. The Confederation also criticises the lack of a good explanation for the late stage at which the fall-back is advanced, a criticism with some justification but not of critical importance in my view.
31. Most importantly in light of the relevant legal principles, the Confederation contends if the fall-back specification is allowed to be advanced on appeal, it will be deprived of the opportunity to address the effect of the fall-back in evidence, both in respect of the issue of whether the fall-back specification amounts to an extension of the original specification and the issue of whether the goods within the fall-back (if allowed) are similar to some or all of the class 21 goods of the Confederation's IR. On the latter point the Confederation points out that there is no evidence to support Promoshirt's contentions of similarity and it submits that some of the arguments are "absurd", such as the suggestion that drinking bottles for sports (of plastic materials or of metal) are "highly similar or identical" to glass bottles. The Confederation also contends that it would be put in a procedurally unfair position by being deprived of a first instance decision on the issues, and so a right of appeal in respect thereof.
32. In response to the Confederation's points, Promoshirt disputes the contention that Promoshirt has delayed unreasonably in deploying the fall-back position and addresses the Confederation's submission that it would have wished to adduce further evidence in respect of Promoshirt's opposition to the Confederation IR by reiterating its contention that the goods in issue are similar. It asserts that drinking bottles for sports "are clearly highly similar to glass bottles", disputing the Confederation's case that a suggestion of such similarity is "absurd". In support of its case, Promoshirt asserts that I should take judicial notice of various facts that it contends are notorious.
33. In my view, far from being an answer to the problem, Promoshirt's attempt to rely on the doctrine of judicial notice to resolve the evidential dispute reveals the procedural unfairness in depriving the Confederation of the opportunity to adduce evidence to try to make good its contentions. The reliance on judicial notice reveals that there is indeed an evidential dispute to be resolved. The fact that each side considers their position to reflect common sense (the Confederation by suggesting Promoshirt's position is "absurd" and Promoshirt by relying on what it contends to be notorious facts) reveals that evidence is appropriate to resolve it.

34. Furthermore, had Promoshirt identified its fall-back specification at first instance, it would have been open to the Confederation to consider whether there was any fall-back specification of its own that might be advanced to address Promoshirt's alternative case. Allowing the fall-back to be advanced on appeal in circumstances where the outcome of the opposition to Promoshirt's application has a direct but uncertain effect of the outcome Promoshirt's own opposition seems to me to be inherently unfair unless the Confederation were to be given an opportunity to respond properly to that case. In the words of the fourth point made by Daniel Alexander KC in MULTISYS "*Of particular weight is any prejudice likely to be suffered by one party or the other from considering or refusing to consider a fall-back position and any available alternative routes for the proprietor to obtain effective trade mark protection.*"
35. In all the circumstances I consider that, had Promoshirt advanced its fall back position before the Hearing Officer, it is likely that it would have led to further factual inquiry, and that allowing the point to advanced now would lead to significant prejudice to the Confederation by depriving it of the opportunity to adduce relevant evidence or indeed to consider a fall-back position of its own. Allowing Promoshirt to rely on its fall-back specification for the first time on appeal would either lead to considerable procedural unfairness to the Confederation or would undermine the finality of these proceedings by requiring the case to be remitted to the Hearing Officer. In consequence I refuse Promoshirt's application. It is not entitled to rely on its proposed fall-back specification in this appeal.

STANDARD OF APPEAL

36. Although the parties set out a range of different authorities in which the correct approach on appeal was discussed in the context of trade mark registry appeals and otherwise, the nature of that approach was not in dispute.
37. The principles are set out in the well-known case of *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch) at [24]-[25], and as summarised by the Supreme Court in *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. I have sought to apply those principles. Absent an error of law, it is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was plainly wrong in the conclusion he reached, in the sense of being outside of the bounds within which reasonable disagreement is possible. In the

case of a multifactorial assessment (such as the assessment of similarity between marks or goods and services, and the consequences of any such similarity) and in the absence of a distinct and material error in the approach of the Hearing Officer, the appellate tribunal should show real reluctance, though not the very highest degree of reluctance, to interfere.

THE HEARING OFFICER'S DECISION

38. In that there is no dispute that the Hearing Officer set out the correct legal principles, the most relevant passage in the Decision is paragraph 49, in which he considered the issue of whether “*glassware, porcelain and earthenware not included in other classes*” were similar to “*precious metals and their alloys and goods n precious metals or coated therewith not included in other classes*”. That paragraph provides:

“*Glassware, porcelain and earthenware not included in other classes*

49. The Swiss Confederation argues that these goods are similar to its *precious metals and their alloys and goods in precious metals or coated therewith not included in other classes* because they may be purchased for decorative purposes and are, therefore, in competition or complementary. It also contends that they are likely to be distributed through the same trade channels. Promoshirt’s goods include works of art made from the specified materials. Consequently, there is an overlap in nature, method of use and purpose, albeit that the respective goods are made from different materials. Whilst I still have Mr Purvis’ comments in *Unicorn Studios* firmly in mind, the aesthetic qualities of works of art clearly form a core purpose of those goods rather than an incidental or secondary one. In this connection, I agree that there is a degree of competition between the respective goods, since a consumer could reasonably choose, for example, a work of art made from silver over one made from porcelain, or vice versa. Insofar as works of art are concerned, the respective goods are likely to reach the market through the same trade channels and be offered by the same undertakings. I do not agree that they are complementary; they are not important or indispensable to one another. Overall, I find that there is a medium degree of similarity between the respective goods.”

39. First, I would observe that this is a single paragraph in a complex decision extending over 88 pages and almost 200 paragraphs, in which the Hearing Officer addresses numerous overlapping issues. In this particular paragraph he applies the same legal principles that he had applied elsewhere in the Decision, notably in the context of dismissing the Confederation’s opposition to Promoshirt’s application in respect of “mirrors, picture frames” in class 20, which he addressed at paragraphs 45 to 47 of the Decision, holding that such goods were not similar to “precious metals and their alloys and goods in precious metals or coated therewith not included in other classes.” The contention that the Hearing Officer fell into error in paragraph 49 but not in his earlier application of the same test suggests an internal inconsistency in his reasoning that is not complained of or evident in respect of any other aspect of his Decision.
40. By Ground 1, Promoshirt contends that the Hearing Officer misapplied the *Canon* guidance when assessing similarity of the goods in class 14 and 21 in paragraph 49. The bases of this contention are set out at paragraphs 12 to 18 of the Grounds of Appeal. Those paragraphs identify two supposed errors of principle.
41. First, by paragraph 15 of the Grounds of Appeal, Promoshirt argues that the hearing officer “failed to consider separately the various categories of goods in Class 21 for which the mark was applied, and in particular whether all of those goods would be similar to those in class 14”. By this it is argued that the Hearing Officer should have considered whether unspecified sub-categories of the terms “glassware, porcelain and earthenware” were similar or dissimilar to the class 14 goods in issue. However, as the Confederation points out, this approach is in accordance with the practice set out in TPN1/2012 and Promoshirt did not itself contend that the Hearing Officer should consider any sub-categories of goods as part of his comparison. In my view he did not fall into error.
42. Second, by paragraphs 16 to 18 of the Grounds of Appeal, Promoshirt contends that the Hearing officer failed to take into account the relevant *Canon* criteria when making his comparison, “*concentrating her [sic] comparison of the goods on the (possible) decorative purpose of the respective goods ... placing too much importance on any incidental decorative purpose ... and overlooking the need to take all factors into account when considering the similarity of goods*”.

43. I do not consider that Promoshirt's criticism is well founded. Quite apart from the fact that Promoshirt's own submission that the Hearing Officer *concentrated* his comparison on the common purpose of the goods implicitly recognises that he took other Canon factors into account as well, consideration of paragraph 49 of the Decision reveals that the Hearing Officer expressly took into account the trade channels through which the goods would be distributed, whether they were complementary or in competition, the nature, method of use and purpose of the goods. Further, the Hearing Officer's reference to the judgment of Iain Purvis KC in the *Unicorn Studios* case, which itself refers to the caution needed in applying the Canon factors at an appropriate level of generality (in the passage cited by the Hearing officer only 3 paragraphs earlier in the Decision) makes it inherently unlikely that the Hearing Officer failed to consider the full range of *Canon* factors, whether or not he mentioned them expressly.
44. Apart from those matters, Promoshirt does not identify any error of principle in the Hearing Officer's approach. It does not contend that he mischaracterised the law or disregarded evidence. Instead, it disagrees with his factual assessments or suggests he gave incorrect weight to the factors which he was entitled to consider.
45. As set out in paragraph 37 above, if I am to allow Promoshirt's appeal absent an error of principle I must be satisfied that the Hearing Officer was plainly wrong in the conclusion he reached, in the sense of being outside of the bounds within which reasonable disagreement is possible. I am not so satisfied. In my view it was open to the Hearing officer to find similarity on the basis that he did. Promoshirt has not discharged not that burden. I therefore refuse the appeal under Ground 1.
46. Having dismissed Promoshirt's Ground 1 of the appeal, Grounds 2 and 3 fall away as well and need not be considered further. In consequence, Promoshirt's appeal therefore fails in its entirety.

DISPOSITION

47. For the reasons given above the Appeal is dismissed and Promoshirt's application to rely on a fall back specification is refused.
48. In light of my decision on the Appeal and Promoshirt's application:

- (a) I maintain the award of costs made by the Hearing Officer, namely that the Swiss Confederation pay Promoshirt the sum of £2,950.
 - (b) In respect of the appeal costs, by analogy with the scale costs under TPN 1/2023, I award the Swiss Confederation the sum of £650 in respect of the costs of preparing for the Appeal and responding to Promoshirt's application, such sums to be set off against the costs awarded by the Hearing Officer.
49. I therefore direct that the Swiss Confederation shall pay to Promoshirt the sum of £2,300 within 21 days of the date of this decision.

Tom Moody-Stuart KC

The Appointed Person

3 August 2026