BL O/0725/25

IN THE MATTER OF THE UK TRADE MARKS ACT 1994

-and-

IN THE MATTER OF UNITED KINGDOM TRADE MARK REGISTRATIONS Nos. 911011831, 913628664, 913621057, 909270877

FOR THE MARKS:

LACD and LACD (stylised)

IN THE NAME OF WOLFGANG RIMBECK

-and-

APPLICATIONS TO REVOKE THE SAID MARKS UNDER ACTIONS CA000505296, CA000505297, CA000505298, CA000505299

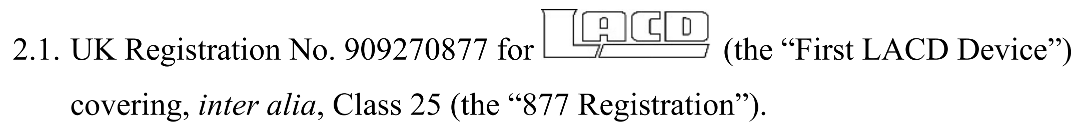
BY LACED EUROPE LTD

DECISION OF THE APPOINTED PERSON IAIN PURVIS KC

Background and the Hearing Officer's Decision

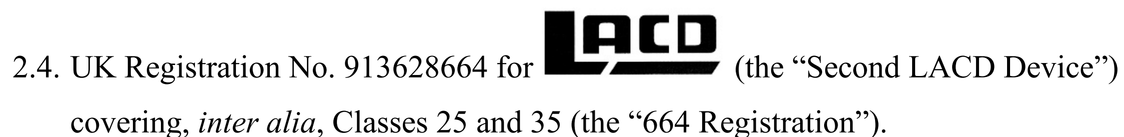
1. This is the appeal of Wolfgang Rimbeck ("the Appellant") against the decision of Clare Boucher, for the Registrar (the "Hearing Officer"), dated 24 January 2025 (O/0067/25, the "Decision") by which she partially upheld the Revocation Actions brought by Laced Europe Limited (the "Respondent").

2. I have adapted the summary of the background to the Hearing Officer's Decision and the Decision itself from the Skeleton Argument of the Appellant. The Appellant is the owner of the following United Kingdom trade mark registrations (together, the 'Registrations'):

    2.1. UK Registration No. 909270877 for  (the "First LACD Device") covering, *inter alia*, Class 25 (the "877 Registration").

    2.2. UK Registration No. 911011831 for LACD (the "LACD Mark") covering, *inter alia*, Class 25 (the "831 Registration").

    2.3. UK Registration No. 913621057 for the LACD Mark covering, *inter alia*, Classes 25 and 35 (the "057 Registration").

    2.4. UK Registration No. 913628664 for  (the "Second LACD Device") covering, *inter alia*, Classes 25 and 35 (the "664 Registration").

3. On 23 August 2022 the Respondent filed the Revocation Actions against each of the Registrations. The Revocation Actions sought partial revocation of the Registrations, insofar as the goods and services in Classes 25 and 35. The specifications under attack were reproduced at Annex A to the Decision (the "Challenged Goods and Services").

4. The Revocation Actions were filed on the basis of Sections 46(1)(a) and 46(1)(b) of the UK Trade Marks Act 1994 (the "**Act**").

5. On 21 December 2022 the Appellant filed Notices of Defence and Counterstatements in response to the Revocation Actions, claiming that the Registrations had been put to genuine use for the relevant goods and services.

6. The Appellant filed evidence to demonstrate genuine use of the Registrations for the Challenged Goods and Services in the form of a witness statement from Mr Wolfgang Rimbeck ("Mr Rimbeck"), the CEO of the Appellant, dated 30 August 2023 ("Rimbeck 1") with eight supporting exhibits.

7. The Respondent filed evidence in the form of a witness statement from Ms Louisa Victoria Dixon ("Ms Dixon"), a partner in the law firm representing the Respondent, dated 15 May 2023 ("Dixon 1") with one supporting exhibit.

8. The Respondent also filed written submissions dated 17 May 2023, criticising the Appellant's evidence of use.

9. The Appellant filed evidence in reply in the form of a second witness statement from Mr Rimbeck dated 19 July 2023 ("Rimbeck 2") and three supporting exhibits. The Appellant did not file any written submissions.

10. The Appellant later sought permission to amend Rimbeck 1 and Exhibits WR1, WR2, and WR4. The Respondent contested this request. On 1 November 2023, following a case management conference held on 26 October 2023, the Hearing Officer gave the Appellant permission to rely on Rimbeck 1 and Exhibit WR4 in their amended form. However, permission to rely on the amended Exhibits WR1 and WR2 was refused.

11. The Decision was taken following a hearing attended by both parties on 26 March 2024.

12. At the start of the hearing, the Appellant conceded that use had not been shown for some of the Challenged Goods and Services and proposed what was said to be a fair specification for the remainder (the "Proposed Specification"). The Proposed Specification is shown at [14] of the Decision.

13. The Appellant also conceded that the relevant period during which use must be assessed is 23 August 2017 to 22 August 2022 and that the effective dates of any revocation would be as follows (at [17] of the Decision):

    13.1. For the 877 Registration: 22 January 2016.

    13.2. For the 831 Registration: 5 December 2017.

    13.3. For the 057 Registration and the 664 Registration: 10 June 2022.

14. The Hearing Officer set out the law on genuine use (at [15] to [16] and [18] of the Decision and the law on fair specifications (at [71] to [72] of the Decision. Her account of the law is not contested in this Appeal and I see no need to consider it further here save where it is relevant to an argument raised before me.

15. She concluded that the First LACD Device and the Second LACD Device were acceptable variants of the LACD Mark (at [70] of the Decision. As a result, all these marks were considered together and I will simply refer to them as the "LACD Marks".

16. The Hearing Officer went on to conclude that the LACD Marks had been put to genuine use for certain goods and services and not others. In a nutshell, the Appellant was found to have proved genuine use in respect of what might be called more specialised mountaineering and climbing equipment – climbing shoes and gloves, spikes and gaiters. The Appellant failed to show use across the broader categories of outerclothing, weatherproof trousers, hats etc.

17. The categories for which use was shown and which were therefore allowed to be maintained were (as set out at [79] to [82] of the Decision):

    17.1. For the 877 Registration and the 831 Registration:

    Class 25: *Climbing shoes; gloves for mountaineering and climbing.*

    17.2. For the 057 Registration:

    Class 25: *Snow spikes for shoes; shoe covers for use when wearing shoes, namely Gaiters.*

    17.3. For the 664 Registration:

    Class 25: *Climbing shoes; gloves for mountaineering and climbing; Gaiters; Snow spikes for shoes.*

18. The Marks were found not been put to genuine use for the following goods and services (together the "Refused Goods and Services"):

    18.1. For the 877 Registration and the 831 Registration:

    Class 25: *Casual outerclothing for women and men, in particular for climbing and hiking*; *rain jackets; weatherproof clothing for mountain climbing; weatherproof trousers and jackets; headgear, in particular hats and caps.*

    18.2. The 057 Registration:

    Class 25: *Non-slipping devices for footwear.*

    Class 35: *Retailing and wholesaling in relation to sporting articles for mountaineering, hiking, Including on the Internet; Business consultancy and advisory services; Arranging*

and conducting of advertising events; Marketing services; Publication of publicity texts; Updating of advertising material; Distribution of products for advertising purposes; Arranging and organising of advertising; Advertising advice; Consultancy relating to business organisation; Dissemination of advertisements; Public relations services; Professional business consultancy with regard to retail distribution systems; Providing information relating to all the aforesaid goods through advertising in brochures; Exhibition and presentation of goods for advertising purposes; Collection of various goods (except the transport thereof) for others, to facilitate the display and purchase of the aforesaid goods for customers.

18.3. For the 664 Registration:

Class 25: *Casual outerclothing for women, and men, in particular for climbing, and hiking; Rain jackets; Weatherproof clothing for mountain climbing; Weatherproof trousers and jackets; Headgear, in particular caps (headwear); Non-slipping devices for footwear.*

Class 35: *Retailing and wholesaling in relation to sporting articles for mountaineering, hiking, Including on the Internet; Business consultancy and advisory services; Arranging and conducting of advertising events; Marketing services; Publication of publicity texts; Updating of advertising material; Distribution of products for advertising purposes; Arranging and organising of advertising; Advertising advice; Consultancy relating to business organisation; Dissemination of advertisements; Public relations services; Professional business consultancy with regard to retail distribution systems; Providing information relating to all the aforesaid goods through advertising in brochures; Exhibition and presentation of goods for advertising purposes; Collection of various goods (except the transport thereof) for others, to facilitate the display and purchase of the aforesaid goods for customers.*

19. Accordingly, the Hearing Officer revoked the Registrations for the Refused Goods and Services as well as those for which the Appellant had already conceded non-use, the revocations taking effect from the dates set out above, but allowed them to continue in force for the class 25 goods set out in my paragraph 17 above.

20. Grounds of Appeal were filed by the Appellant on 21 February 2025.

The Grounds of Appeal

21. I will make some initial remarks about the Grounds of Appeal attached to the TM55.

22. Firstly I will deal with the history of the document. As filed, the Grounds (signed by Potter Clarkson LLP, Attorneys for the Appellant) sought to restore all the goods and services including all those for which non-use had in fact been conceded before the Hearing Officer. They also included the (incorrect) statement that the amended version of Mr Rimbeck's first Witness Statement had been 'accepted' following the CMC and included a reference to the amended Exhibits WR1 and WR2 which amendments had (as explained above) been refused by the Heairng Officer. These errors do not seem to have been picked up by either the Appellant's or the Respondent's representatives when the Grounds were filed. I assume the errors were identified (perhaps by Counsel) when the Appeal was being prepared for hearing before me because on 25 July 2025 the Appellant sent an email to the Appointed Person and the Respondent containing an 'amended' Grounds of Appeal which removed the errors. This made it clear that the Appeal was only maintained in respect of the Refused Goods and Services.

23. Rather strangely, the reason given for the filing the amended Grounds was not that they were intended to correct these errors in the original but rather as follows (quoting from the email):

…Following a review of the Grounds of Appeal, our client wishes to submit an amended version of the Statement of Grounds, with the intention of narrowing and refining the scope of the appeal, to streamline the issues for determination and reduce the complexity of the proceedings.

Please find attached both a redline version showing the amendments and a clean version for ease of reference to ensure transparency…

24. This was not an accurate explanation of the reasons for the amendment. Furthermore, it turned out that the redline version and the 'clean' version did not match in a number of respects, a point complained of by Mr Hollingworth on behalf of the Respondent.

25. More notably, the amendments did not only correct the errors, they added a sub-paragraph to paragraph 8 which was obviously intended to be an extra point of substance. Paragraph 8 set out some 'comments' of the Hearing Officer which were said to be 'specifically contested'. There were four of these in the original Grounds of Appeal, marked with Roman numerals. The amended Grounds added a number V as follows:

"I find that the marks have not been genuinely used for any of the services" (Paragraph 60)

26. Whilst no formal application to amend the Grounds was ever made by the Appellant, the Respondent indicated that it would not object to amendments which were genuinely limiting the issues or making corrections of errors. However, it did oppose points of substance. It seems to me that this additional sub-paragraph 8(V) was intended to shore up a problem with the Notice of Appeal which is that it does not specifically address the class 35 findings, so it was a point of substance. I will come back to it later in this Decision.

27. Secondly, I will consider the substance of the Grounds of Appeal. It was set out on a 'continuation sheet' to the TM55 and runs to 29 paragraphs. Following an introduction, it claims in paragraph 5 to identify *'distinct and material errors of principle'* in the Decision, which are said to be *'briefly set out below'*. The remaining paragraphs are divided by 4 headings.

28. The first is called *'evidence of use'*. This section (as amended) states generally that the Hearing Officer was *'incorrect in its conclusion that the Appellant has not satisfactorily demonstrated use of the mark LACD in the United Kingdom and the EU in respect of the Refused Goods and Services and therefore* [sic] *erred in its assessment of the evidence submitted by the Appellant'*. Paragraph 8 then contains four (or, now, five) statements made by the Hearing Officer which are said to be *'specifically contested'*. In general these are conclusory statements about the evidence or the conclusions which the Hearing Officer was prepared to draw from it. Apart from that, this section contains little more than generalised assertions to the effect (as stated in paragraph 10) that *'the goods are being sold to groups and consumers in large amounts'* and that the Hearing Officer should have found that evidence of the totality of such sales by invoices, images, brochure extracts etc. was sufficient to establish genuine use.

29. The second is called *'evidenced volume of products bearing the LACD Marks'*. This makes generalised statements about the number and value of Contested Goods said to have been shown to be sold under the Marks. It asserts (in paragraph 17) that *'the evidence proves that the Appellant was using or creating the minimum threshold of products for a finding of genuine use to have been passed'*. It does not identify any alleged error by the Hearing Officer save the unpromising one that her *'interpretation of the evidence, particularly the volume of goods sold, has not been correctly evaluated'*.

30. The third is called *'brochures'*. This recognises that an assessment of genuine use is *'a global assessment'* and makes various references to legal truisms such as that *'it is possible for an accumulation of evidence to show use, even if individual items of evidence would on their own be insufficient proof'* and that *'use of the mark must be more than token, although that use need not always be quantitatively significant for it to be deemed genuine.'* It then asserts that the evidence was *'sufficient to dispel possible doubts as to its genuineness'* and that it *'has not been given due consideration by the Hearing Officer'*. Finally it makes a general reference to the *'brochures'* which (together with some other matters) are said to *'show the advertisement and of the goods in the public domain, aimed at the average consumer.'*

31. The fourth and final section is called *'Use of the mark on Clothing'*. This seeks to identify certain items of clothing by reference to pages in the brochures in the evidence, stating that they *'clearly show use of the 877 mark'* and then link them to certain pages in the exhibited invoices. With the exception of a beanie hat, these are all T-shirts. The section goes on to submit that the *'evidential picture as a whole'* shows that the use was *'sufficient to prove genuine use of the marks.'* Finally it refers to the exhibited invoices as all containing the LACD logo.

32. In Greybox O/106/20 I said as follows on the subject of Grounds of Appeal:

'Most Opposition proceedings, including this one, involve evaluative, multi-factorial decisions, in which the Hearing Officer applies a generalized legal test by weighing up the evidence and coming to a nuanced overall impression. It is well-established that a wide latitude is given to Hearing Officers in relation to such decisions and no appeal islikely to succeed unless the appellant demonstrates a distinct and material error of principle. This may involve an actual mistake of law, or it may involve an error in the way

the legal test has been applied – for example taking into account irrelevant evidence, or failing to consider relevant evidence. When compiling Grounds of Appeal, it is important for Appellants to have this in mind. The Grounds should identify errors of principle which would provide a proper foundation for the Appointed Person to overturn the Decision.'

33. In this case, the Notice of Appeal failed in its basic role, namely to identify the actual errors of principle on which the Appellant relies. Whether these are legal errors or factual errors which are said to be so material as to undermine the decision under appeal, they must be specifically identified so that they can be understood by the Appellate tribunal and by the opposing party. A prolix and repetitive account of the strength of the Appellant's case together with allegations that the Hearing Officer should have taken a different view as to the weight of the evidence is of no use for this purpose. Nor does it assist to preface such an account with a general assertion that the Decision *'is based on distinct and material errors of principle'* when one is still in the dark at the end of the account as to what those distinct and material errors might be.

34. On the afternoon of 28 July 2025 (a little late) the Appellant served its skeleton argument. Considered in isolation, the skeleton argument is generally a credit to Ms Knott (who drafted the document and who presented the Appellant's case before me). It correctly focusses on the Judgment and seeks to identify errors of principle. To this end it sets out four 'Grounds' of Appeal and under each head specifies the alleged errors of the Hearing Officer on which it relies. However, the problem is that a skeleton argument does not stand in isolation, and should not be identifying 'Grounds' for the first time. It should be expressing and expanding on the Grounds already set out in the Notice of Appeal. Here, neither the 'Grounds' mentioned in the skeleton argument nor the errors specified by reference to those Grounds are (in my opinion) identifiable in the Grounds of Appeal.

35. I think this should all be self-evident, but I should perhaps expand on my guidance in Greybox as follows. It is not permissible to argue on Appeal that a Hearing Officer made an error of law or principle sufficient to undermine the Decision unless that error has been identified in the Grounds of Appeal. No such arguments can be permitted because it would be manifestly unfair on the Respondent who has prepared for the Hearing (or perhaps decided they do not need to attend the Hearing) on the basis of the case set out in the Grounds. If the Appellant decides in the course of preparing the Appeal that it needs to be argued on the basis of errors of law or principle not identified in the Grounds of

Appeal, then the right course is to apply to amend the Grounds. There is no guarantee that such an application will succeed, but obviously the earlier it is made the better.

The arguments advanced on the Appeal

36. I begin with what Ms Knott calls 'Ground 1'. This states

'despite accepting the evidence of high volumes of sales of trousers and tops by the Appellant, the Hearing Officer refused to infer that the LACD Marks had been applied to the same and that, as, amounted to genuine use of the Registrations.'

This takes us to one of the primary difficulties with which the Hearing Officer was presented by the form of the evidence. Mr Rimbeck's very brief and unhelpful witness statements had not dealt at all with the key question of whether or how the LACD Marks had been applied to the goods. He had however exhibited some brochures which had depicted the goods. Going (in my view) beyond the call of duty, the Hearing Officer had taken it upon herself closely to examine the brochures to see whether any labels could be seen on the garments bearing the LACD Marks and if so which. This had extended even to blowing up the images to make the area around a label more visible. As a result, she had managed to identify an LACD label on a couple of the shirts. The argument of Ms Knott was essentially that the Hearing Officer had been unfairly literal in her approach, having done this exercise. Rather than conclude (as she did) that label-type use had only been proved in relation to those few items on which she had managed to find a label with a Mark on it, Ms Knott contended that she should have <u>inferred</u> that these labels were representative of a general policy with regard to all the items of clothing visible in the brochures. She argued that there was no reason to believe for example that a 'long sleeved T' would have been labelled any differently from a 'short sleeved T' of the same type.

37. The overriding problem with this argument of course is that it amounts to an attack on the precise way in which the Hearing Officer chose to evaluate the evidence in circumstances which required inference and speculation. This is not fertile ground for an appeal in any case, but particularly not in the present case. To my mind, given the way the evidence was presented, no complaint could have been made if the Hearing Officer had refused to do such a 'deep dive' into the evidence at all. Having done so however, she was perfectly entitled to draw only limited conclusions from what she found. This was not, as was suggested, an *'over-forensic approach'*. The burden of proof in use cases is on the

proprietor and it is not the role of the tribunal to fill in obvious gaps in the evidence. Here, as I have said, Mr Rimbeck had not even gone to the trouble of explaining in either of his witness statements how if at all the Marks were applied to the goods (for instance by a consistent policy of labelling, supply in branded packaging etc.).

38. The Hearing Officer quoted para 107 of Arnold LJ's summary in easyGroup Ltd v Nuclei Ltd [2023] EWCA Civ 1247 including (with emphasis added):

'The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned…

It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use.

She also quoted Awareness Ltd v Plymouth CC [2013] RPC 24:

19. For the tribunal to determine in relation to what goods or services there has been genuine use of the mark during the relevant period, it should be provided with clear, precise, detailed and well-supported evidence as to the nature of that use during the period in question from a person properly qualified to know. …

22. … it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal … comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public

39. So far as I can see, the Hearing Officer's approach to the evidence was precisely in accordance with these statements of principle. There is no merit in a complaint that she should have drawn further 'inferences' from the very limited evidence she had only been able to find by hunting through the exhibits herself. I therefore would not have accepted the suggestion that the Hearing Officer had made an error of principle here.

40. In any event, there is a more fundamental problem with 'Ground 1', which is that this alleged error of principle is not identified in the Grounds of Appeal. There is no reference to a failure by the Hearing Officer to draw a sufficiently broad inference of fact from observing labels on a couple of particular items of clothing out of a large range of different items depicted in the brochures. When asked about this in the hearing before me Ms Knott could do no more than point to some of the general points in the Grounds of Appeal about the *'evidential picture as a whole'*, *'it is possible for an accumulation of evidence to show use'* and that the Hearing Officer's interpretation of the evidence *'has not been properly evaluated.'* The fact that the Notice of Appeal contains general language which would 'cover' the specific points now being made does not justify them. As I have indicated, it is an abuse of process to raise specific alleged errors of principle for the first time in a skeleton argument under cover of an entirely general set of Grounds of Appeal, because it is inherently unfair on the Respondent, who will have had to draft his or her skeleton argument without knowledge of what the actual point of the Appeal is. The right course would have been to apply to amend the Grounds. The irony of the present case is that the Grounds were in fact sought to be amended (at the 11th hour), but no attempt was made to identify the points which were intended to be run at the hearing.

41. There were two other points run by Ms Knott under cover of her 'Ground 1' but they both suffered (inter alia) from the same problem.

42. First she alleged in her Skeleton Argument and in opening the Appeal that the Hearing Officer had *'incorrectly disregarded the table at Exhibit WR3 which lists the following styles of trousers and t-shirts under the brand LACD ('Marke'):*[1]

    1.1. T-shirts: 'Van', 'Miracle', 'Wetterstein', 'Half-dome', 'Bellavista', 'Stella', and 'Peak'.

[1] [**Tab 7/202-203**].

1.2. Trousers: 'Gravity'.'

It was said that the Hearing Officer wrongly disregarded this table on Exhibit WR3 on the basis that it was undated and that "*Mr Rimbeck does not say what period it covers*" (at [22] to [23] of the Decision. This was said to be an incorrect understanding of the evidence. I will not go into the detail of this allegation because it was immediately accepted at the hearing by Ms Knott (having heard Mr Hollingworth) that she had misunderstood the Exhibit and that the table therefore could not be treated as evidencing the date on which those items had been sold under the brand. However, this was again a specific point which (if it was going to be run) would have had to be identified as a material error of fact by the Hearing Officer in the Grounds of Appeal.

43. Second it was said that the Hearing Officer failed to take into account the fact that another T-shirt called 'Bellavista' shown in the brochure bore the LACD Mark on the front – a close look at the picture revealed the mark at the bottom right of the image on the chest of the shirt. Again, this was not a point made in the Grounds of Appeal.

44. I turn to what Ms Knott called 'Ground 2'. This was a specific argument in relation to the Hearing Officer's findings in relation to the category *'Headgear, in particular hats and caps'* which was dealt with separately between paragraphs 41 and 42 of her Decision. The Hearing Officer had (consistently with her careful and conscientious approach to the evidence generally) gone to the trouble of counting up the sales of all items of headgear by extracting these from the invoices which had been exhibited, and setting them out in a table of her own at Annex C of her Decision. Having done all that, she found that the total number of sales over the 5 year period were 41 beanie hats and 17 caps. She concluded as follows (citing Arnold LJ in Easygroup):

'I consider that the level of sales shown in the evidence are tiny in comparison to the likely size of the EU or UK market. Arnold LJ explained that the GC has held on numerous occasions that "the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use". I have already commented on the shortcomings of the brochure evidence. The proprietor has filed no advertising or other marketing material, or dated screenshots showing the relevant goods being offered for sale. While I acknowledge that there is no de minimis level of sales, I remind myself that

the mere fact of commercial use of a mark may not automatically mean that genuine use has been shown. I consider that the registered proprietor has not shown that it has made genuine use of the earlier marks for Headgear.'

45. The complaint made about this in the Skeleton Argument was that even though it was accepted that the sales of the specific category of Headgear were very small indeed, the Hearing Officer had erred by applying a *de minimis* rule to this category. First of all, I should say that this is clearly not the case on the face of the Decision. The Hearing Officer has specifically reminded herself that there is no such rule when it comes to sales figures. She has rejected this category on the basis that the proprietor had not provided enough evidence (giving the examples of advertising, dated screen shots of the products being offered for sale) to dispel the perfectly reasonable doubts that such a tiny number of sales in the context of a vast market amounted to anything other than token use. This approach accords with the law as expressed in Easygroup. Secondly, this point was not a Ground of Appeal. The Grounds said nothing about the Hearing Officer's findings on Headgear, or why those specific findings were wrong, save only in paragraph 8(IV), where it was said that the Appellant *'specifically contested'* the finding in one sentence of paragraph 41, namely '*While the applicant filed information on the market for apparel, there is nothing specific to headgear.'* But this was not the point taken in the Skeleton Argument – it was not suggested that there had been any market evidence specific to headgear.

46. Turning to 'Ground 3', this was an attack on the finding of the Hearing Officer in paragraph [60] of her Decision in relation to the class 35 registration for *'retail services'* etc. Here (having set out Mr Rimbeck's evidence on the point in paragraph 7 of his First Witness Statement, the Hearing Officer concluded as follows:

'There is no evidence that the registered proprietor's company offers retail or wholesale services, in the sense of bringing together for the benefit of others of a variety of goods enabling customers conveniently to purchase those goods. Selling one's own goods is not the same thing as offering retail services: see Tony Van Gulck v Wasabi Frog Ltd, Case BL O/391/14 at [9]. Nor do I see from the evidence before me that the registered proprietor's company is trading in advertising, business consultancy, public relations or any of the services that Mr St Quintin submitted constituted a fair specification in Class

35. There are no turnover figures, invoices, or promotional materials covering these services. I find that the marks have not been genuinely used for any of the services.'

47. Ms Knott attacked this finding on the basis that it had failed to take into account Mr Rimbeck's evidence of '*(1) selling goods wholesale to these partners* [here some evidence from an exhibit was relied on showing a large difference between the price at which Mr Rimbeck's company sold snow spikes to a business partner and the retail price of the same product] *(2) providing advice, (3) assisting with advertising subsidies, and (4) providing training'.*

48. This argument had no merit. The Hearing Officer obviously had taken this evidence into account, because it was part of the evidence quoted in the previous paragraph. It was dismissed because this form of use was not *'in trade'.* This was (as I understand it) shorthand for saying that the Proprietor was not in the business of trading in advice or training services, or the provision of wholesale services. Any such *'service'* was simply part of the ordinary business of selling its own goods to business partners and did not justify a registration for the service itself. I cannot see any basis for going behind that finding.

49. Once again, however, this argument is not open to the Appellant because it is not detectable on the face of the Grounds of Appeal. The Grounds said nothing about the findings in relation to class 35 services at all. It will be recalled that the proposed amended Grounds included an extra paragraph 8(V) *'specifically contesting'* the following statement by the Hearing Officer:

    "I find that the marks have not been genuinely used for any of the services" (Paragraph 60)

    As I have said, this appears to be an attempt to shore up the Grounds by making a specific reference to the findings on services. However it is nowhere near good enough to amount to an actual Ground of Appeal since it fails to identify any error in the findings in relation to class 35. I would therefore have refused the application to amend (assuming it was being made). Even if I had allowed it, the amendment would not have provided any basis for the arguments actually advanced at this Hearing as to the error the Hearing Officer is supposed to have made.

50. Finally we come to 'Ground 4'. This concerned the category *'non-slipping devices for footwear'.* The Hearing Officer revoked the Marks in this category, on the basis that the only non-slipping devices for which use had been shown were specialist snow-spikes and that there was a separate category for these (for which the Marks were not revoked) namely *'snow spikes for shoes'.* She had dealt with the evidence in relation to sales of snow spikes in paragraphs [53] to [56] of her Decision, and the conclusions which should be drawn in terms of the permissible specification of goods in paragraph [76]:

'The goods shown in the evidence have a particular purpose and contain metal spikes joined by chains. Mr St Quintin [Counsel for the Proprietor who appeared below] *did draw my attention to the Snow Spikes Light as "less rugged, perhaps more for general use rather than more expedition use". However, as I explain in paragraph 55 above, it is not clear how, or even if, the mark was used in conjunction with the goods. Consequently, I focus on the Snow Spikes shown in paragraph 53 above. In my view, the average consumer would see them as a specialist item that constitutes an identifiable subcategory. I find that a fair specification is Snow spikes for shoes.'*

The reason the Hearing Officer considered that it was not clear how or if the mark was used in conjunction with the Snow Spikes Light was that the picture in the brochure (reproduced in paragraph [55]) did not show the LACD marks at all (unlike the pictures of the Snow Spikes Easy 1 and 2).

51. Ms Knott contended that the Hearing Officer was wrong to dismiss the Snow Spikes Light for two reasons. First that they were included in long lists of products in invoices which had the LACD mark in the heading. The Hearing Officer plainly did have that point in mind since she had analysed the invoices in detail and had remarked that they carried the LACD mark (see eg paragraph [30]). Second that *'Likewise, she wrongly refused to infer that the LACD Marks had been applied to the goods in question, despite her earlier findings that the LACD Marks had been applied to snow spikes Easy I and snow spikes Easy II (at [53] of the Decision'.* I cannot see any basis for her to have made any such inference. The photograph of the Snow Spikes Light shows a completely different product from the Snow Spikes Easy, which come with a specially branded bag (these are metallic products which clearly need to be carried safely) and branded loops. The bag and the loops are the only places which carry branding. There is no bag for the (apparently rubberised) Snow Spikes Light, nor do they have the loops. I should also say

that even if the Appellant had been correct in these assertions, I do not accept that this would necessarily justify the wider specification for *'non-slipping devices for footwear'*. All we really know on the evidence about Snow Spikes Light is that they are a lighter and less metallic form of snow spikes. I do not see how this undermines the Hearing Officer's evaluation that snow spikes are a specialised product which would be understood by the average consumer as a distinct sub-category of non-slip device and therefore did not justify a registration for all non-slipping devices for footwear.

52. So there seems to me to be no merit in 'Ground 4' anyway. But of course, like all the other 'Grounds' argued before me it was not foreshadowed in the actual Grounds of Appeal. These do not say anything about the snow spike debate, let alone make the point about Snow Spikes Light which was advanced before me.

Conclusion

53. In conclusion, I have rejected all the arguments made before me by the Appellant. I did not consider that any of them had any real merit anyway, but more fundamentally none of them had been raised in the Grounds of Appeal. In relation to the Grounds, I would note that no application to amend was made. Ms Knott, having taken instructions, was prepared to offer that Mr Hollingworth and the Respondent team should be given time (presumably by way of an adjournment) to consider the new points and respond separately to them if so advised. I do not find this at all satisfactory. The appropriate course would have been to make a formal application to amend, which would have required a draft set of Grounds together with proposed directions. It might be said that such an application would have faced obvious difficulties given the extreme lateness, the obvious prejudice to the Applicant, and the lack of any reasonable excuse for not raising these points earlier.

Costs

54. I invited submissions on costs. Mr Hollingworth contended that the way in which the Appeal had been conducted by the Appellant was 'egregious' and that it justified an 'off-the-scale' award, though he did not go so far as to ask for his clients' actual costs to be assessed. As will be apparent from the substantive part of this Decision, I have much sympathy with his complaints about the way in which the Grounds of Appeal were drafted, re-drafted, and were inconsistent with the skeleton argument. However, I also

note that no complaint was raised by the Respondent about the inadequacy of the Grounds when they were served. I recognise that the administrative errors in serving the re-drafted Grounds caused some inconvenience and wasted time, and that the receipt of a skeleton argument raising points not apparent from the Grounds must certainly have resulted in extra time being needed to prepare this Appeal. However, overall I see no justification for going beyond the practice of following the guidelines in Annex 1 of Tribunal Practice Note 1/2023. I will reflect the conduct of the Appellant and the inconvenience suffered by the Respondent in making an award towards the top end of the usual scale.

55. I will therefore order the Appellant to pay £2000 towards the Respondent's costs.

IAIN PURVIS KC

THE APPOINTED PERSON

31 JULY 2025