BL O/0905/23

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER TRADE MARK APPLICATION No.3656650
for VANTAGE INFRASTRUCTURE (device)
IN THE NAME OF HASTINGS FUND MANAGEMENT (UK) LIMITED

-and-

IN THE MATTER OF OPPOSITION NUMBER 430055
BY VANTAGE AIRPORT GROUP LIMITED

-and-

IN THE MATTER OF AN APPEAL AGAINST THE DECISION
OF CHARLOTTE CHAMPION DATED 20 MARCH 2023

DECISION

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1. This is an appeal from a decision of Ms Charlotte Champion, the Hearing Officer for the Registrar, dated 20 March 2023 (O/0287/23), by Vantage Airport Group Limited ("the Opponent"), after the Hearing Officer rejected its opposition to a trade mark application made by Hastings Fund Management (UK) Limited ("the Applicant").

Background

2. The Application was filed on 17 June 2021, and claimed a priority date of 2 March 2018 from EUTM No. 17868109. It was for a device mark:

for the following services in classes 36 and 37:

Class 36: investment services; investing in debt and equity infrastructure projects, infrastructure assets, infrastructure business, infrastructure security and loans all for institutional clients; property and real estate management; and

Class 37: construction, repair, refurbishment, maintenance and demolition of buildings and civil engineering structures and infrastructure (including roads, rail, bridges and utility supplies); civil engineering construction services; building services; on site project management services relating to the construction services; construction management services for the building, construction and engineering industries.

3. The Opposition was filed on the basis of s 5(4)(a) of the 1994 Act, and relied upon goodwill said to have arisen through use of the signs 'VANTAGE', 'VANTAGE AIRPORT GROUP' and:

The signs were said to have been used throughout the United Kingdom since 2010 for

a) investment services in relation to infrastructure, namely airports, and investment in infrastructure, namely airports, and

b) management of infrastructure, namely airports.

4. In its counter-statement the Applicant denied the existence of any such goodwill. The Opponent filed evidence seeking to prove goodwill, in the form of a witness statement from Mr Sami Teittinen, its Chief Financial Officer. The Applicant filed submissions commenting on that evidence, and in particular setting out reasons why it said that the evidence did not prove use of the earlier signs as claimed. It also filed a witness statement from its solicitor, Mr Paul Kavanagh, dealing with (in essence) the sale of the Opponent's interest in Liverpool John Lennon Airport. The Opponent filed evidence in

reply from its trade mark attorney, Ms Macchi, exhibiting some additional documents, including some print outs of web pages.

5. Neither side sought a hearing, and the Hearing Officer decided the matter on the papers, which included additional written submissions from both parties.

6. The Opponent's case was that it had used the earlier signs in relation to its ownership and/or management of Liverpool John Lennon Airport until 2014, that its UK airport management business was not permanently closed, and it claimed to have residual goodwill from that use. After 2014, it claimed to have used the signs in the UK in relation to investment services related to airport infrastructure and investment in infrastructure.

7. The Applicant submitted that any activities under the earlier signs in connection with Liverpool John Lennon Airport which may have generated goodwill in the UK dated only from 2013, and ceased to be owned by the Opponent when it sold its interest in the airport in 2014. Even if the Opponent did then own goodwill in the UK, there was no residual goodwill by the relevant date. It also submitted that the evidence of use in relation to investment services did not show goodwill in the UK, relying on *Starbucks (HK) Limited and another v British Sky Broadcasting Group PLC and others* [2015] UKSC 31. Moreover, it said that the Opponent had not shown the provision of investment services to customers at all, as opposed to activities seeking funding for the Opponent's own projects.

8. The Hearing Officer dismissed the opposition, finding that at the relevant date the Opponent did not have the goodwill necessary to rely upon sub-section 5(4)(a). The Opponent appeals.

Standard of appeal

9. It was common ground that this appeal is by way of review, it is not a rehearing. The relevant principles were not in dispute. An appeal against decisions taken by the Registrar is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for the appellate tribunal to be satisfied that there was a distinct and material error of principle in the decision in

question or that the Hearing Officer was wrong. See *Reef Trade Mark* [2003] RPC 5; and *Actavis Group PTC v. ICOS Corporation* [2019] UKSC 1671 at [78] to [81].

10. The principles have been summarised in numerous cases. For instance, the Respondent referred me to the Court of Appeal's decision in *Volpi v* Volpi [2022] EWCA Civ 464 at [2]. The principles have also been stated in a number of recent trade mark appeals, such as by Sir Anthony Mann in *Stitch Editing Limited v. TikTok Information Technologies Ltd* [2023] EWHC 1167 (Ch) at paragraphs [6] to [8]:

> "6. The correct approach to appeals such as this has recently been confirmed in the decision of Richards J in *Instagram LLC v Meta 404 Ltd* [2023] EWHC 436 (Ch). In that case (which was another trade marks appeal case) the judge followed the guidance to be applied in appeals generally and set out in *Volpi v Volpi* [2022] EWCA Civ 464.
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> > "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
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> > ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> > iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
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> > iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
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> > v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

7. So far as the decision below is evaluative, an appellate court should also approach the appeal with caution:

"76. So, on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion". (*Re Sprintroom Ltd* [2019] EWCA Civ 932)

8. And last, as Richards J observed in Instagram, proper respect should be paid to the decision of an expert tribunal in the field in question:

"26. Finally, it is relevant to observe that this is an appeal from a tribunal with particular expertise. As Lady Hale observed in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at paragraph 30, the court should approach the appeal on the basis that it is probable that an expert tribunal, charged with applying the law in their specialist field, has probably got it right.""

11. I have kept these principles in mind when considering the present appeal.

Merits of the appeal

12. The grounds of appeal were helpfully summarised at paragraph 5 of the Grounds, and the central point was the one set out at (a) below, to which all the other grounds contributed. It said that the Hearing Officer misdirected herself because she:

(a) failed to find actionable goodwill at the relevant date;

(b) wrongly assessed/applied the Applicant's submissions as to actual use of the earlier signs at the relevant date;

(c) impermissibly rejected the Opponent's unchallenged evidence in particular that of Mr Teittinen;

(d) paid no appropriate attention to residual goodwill; and

(e) misdirected herself in her analysis of an "investment service."

13. Both the Grounds of Appeal and the Opponent's skeleton argument stated that the primary complaint was that the Hearing Officer had limited her analysis of the Opponent's claim to goodwill to consideration of whether it had goodwill stemming from its ownership of UK airports. I do not understand that complaint, as it is clear that the Hearing Officer also considered whether the Opponent had goodwill stemming from the claimed investment services. See point (e) in the list above, which I discuss below.

(a) failing to find actionable goodwill at the relevant date

14. The complaint that the Hearing Officer had failed to find the goodwill necessary to support the sub-section 5(4)(a) objection was phrased in general terms and encompassed each of the further grounds below. One specific point made by the Opponent in its skeleton argument, however, was to suggest that the Hearing Officer had misapplied *Starbucks v BSB* (supra).

15. At paragraph 16 of the decision, the Hearing Officer had simply said with reference to *Starbucks*:

> "The requisite goodwill must be based on the presence of customers in the UK. Customers situated elsewhere do not contribute to the required goodwill in the UK."

No criticism was made of this summary. I should add that the Hearing Officer dealt with *Starbucks* in more detail later in the Decision. First, at [34], she said:

> "Though the evidence concerning attendance at industry events, awards and the Opponent's website shows use of the Vantage signs, none of that evidence shows use in or targeted to the UK market and UK customers. I will consider this further below."

She went on:

> "37. Briefly stated, the services claimed under the Vantage signs are investment in airport infrastructure and management of airport infrastructure. Mr Teittinen describes his company's services as involving the submission of bids to develop airports, which includes structuring of infrastructure transactions (including

financing thereof), direct investment and airport management services in connection with the airport infrastructure.

38. Almost all of Mr Teittinen's evidence refers to services the Opponent has provided, events it has attended, and awards that it has received outside the UK. In *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31, Lord Neuberger (with whom the rest of Supreme Court agreed) stated (at paragraph 47 of the judgment) that:

> "I consider that we should reaffirm that the law is that a claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question. And, where the claimant's business is abroad, people who are in the jurisdiction, but who are not customers of the claimant in the jurisdiction, will not do, even if they are customers of the claimant when they go abroad."

39. And later said, at paragraph 52:

> "As to what amounts to a sufficient business to amount to goodwill, it seems clear that mere reputation is not enough, as the cases cited in paras 21-26 and 32-36 above establish. The claimant must show that it has a significant goodwill, in the form of customers, in the jurisdiction, but it is not necessary that the claimant actually has an establishment or office in this country. In order to establish goodwill, the claimant must have customers within the jurisdiction, as opposed to people in the jurisdiction who happen to be customers elsewhere. Thus, where the claimant's business is carried on abroad, it is not enough for a claimant to show that there are people in this jurisdiction who happen to be its customers when they are abroad. However, it could be enough if the claimant could show that there were people in this jurisdiction who, by booking with, or purchasing from, an entity in this country, obtained the right to receive the claimant's service abroad. And, in such a case, the entity need not be a part or branch of the claimant: it can be someone acting for or on behalf of the claimant."

40. While the evidence shows that the Opponent has been involved in very large contracts, for example with major airports in New York, and that it has received awards for its running of a Cypriot airport, these factors are not relevant in showing goodwill within the UK. Mr Teittinen has sought to show that UK businesses will

be aware of the Opponent's business because they have attended the same industry events. Even if attendance has led to an awareness of the Opponent's business (which is not confirmed in the evidence), *Starbucks* confirmed that "reputation is not enough".

…

46. Generating the significant sums of turnover claimed in the UK implies that the Opponent had a substantial operation in the UK, however, there is no evidence to show this. Evidence of the existence of a website with unsubstantiated claims that it is accessed by people in the UK, and evidence that representatives from the UK sector attended the same industry events as the Opponent is not sufficient in my view to show that the Opponent had customers in the UK."

16. In my view, there is no error in the Hearing Officer's application of *Starbucks* in these parts of her Decision, subject to the points about her treatment of the evidence which I discuss below.

(b) wrongly assessed the Applicant's submissions as to relevant date

17. The Opponent complained that at [6(v)] the Hearing Officer had repeated, and then "apparently" applied, a submission by the Applicant that the earlier signs needed to be in use in the UK at the relevant date. It is not clear to me that the Hearing Officer did approach the matter on the basis that use needed to be ongoing as at the relevant date, and I was not taken to any specific part of the Decision to that effect. On the contrary, at [17]-[18] the Hearing Officer appears to me to have set out the correct test of whether there was sufficient goodwill to found a passing off action as at the relevant date. I do not consider that she misdirected herself in this regard. There is no force in this criticism, and I reject this Ground of Appeal.

(c) rejected the Opponent's unchallenged evidence

18. The Opponent complained that the Hearing Officer treated Mr Teittinen's evidence as incredible, although it had not been challenged as inadmissible or untruthful, and there had been no request to cross-examine him. It said that she exceeded her remit to

evaluate the evidential material before her and wrongly treated his evidence as incredible.

19. The Hearing Officer made several comments about the lack of documents supporting the matters set out in Mr Teittinen's witness statement:

> "27. The figures indicate very substantial turnover by the Opponent from its services in the UK, though the Opponent has provided little supporting evidence to show where its turnover has been generated. Up to 2014, it appears likely that the revenues would have been come, at least in part, through the Opponent's ownership of the UK airports, however, there are no invoices, or accounts showing this. After the sale of the Opponent's interests in its UK Airports when the Opponent stated its desire to focus "growth in North America and other markets" there is no evidence of where the very high levels turnover were generated in the UK. Though Mr Teittinen states that fundraising processes have taken place, raising the astounding sum of $1.1 billion from investors in the UK, no accounts, brochures, statements from investors, or any other documentation is provided to verify or support the Opponent's operations in the UK after 2014.
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> 28. In *Awareness Limited v Plymouth City Council,* Case BL O/236/13, Mr Daniel Alexander K.C. as the Appointed Person stated that:
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> > "22. The burden lies on the registered proprietor to prove use ... However, 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 (which in many cases will be the Hearing Officer in the first instance) 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."

29. The lack of evidence supporting the Opponent's generation of investment in the UK and generation of UK turnover (which reached its highest levels after the Opponent's decision to focus on markets outside the UK) casts doubts over the claims made by the Opponent. I shall make further comment on this later in my decision."

One such further comment was at [32] Decision:

"32. Mr Teittinen describes the Opponent's online activity, with its website receiving around 15,000 visitors annually between 2015 and 2017, with between 10% and 15% of these stated to be UK based visitors. No evidence is provided to confirm the number of UK visitors, but even if 15% are from the UK, the Opponent has provided no information about the activity of those visitors when accessing its website, and there is no evidence that the visitors became customers of the Opponent. In terms of the Opponent's social media presence, the Opponent's Twitter handle @VantageAirportG is stated to have over 800 followers. The Opponent provides no evidence confirming the location of its followers, and no examples of the 1,300 tweets it claims to have made."

20. The Hearing Officer then went on to say that the Opponent's evidence lacked clarity especially on the identity of its customers and the scope of its services. She said:

"42. With regards to the services of management of airport infrastructure, that the Opponent had investments in three UK airports is not in dispute. What the evidence does not make clear is what services were provided and who the customers were. Where a company manages an airport, one might expect to see the name of the company in and around the airport itself; the staff that work at the airport may be employed by the management company; or the directives set by the management company might be produced on documents under the company's name. No such evidence has been provided. Though the Government publication at Exhibit MM04 states that Vantage Airport Group have "invested heavily to create an excellent passenger experience and one of the UK's most efficient regional airports", there is no wider evidence of these claims, or third party verification of them. With regards to the management of airport infrastructure, it is not clear who would have been aware of the Opponent's involvement in UK airports, or the nature and extent of their services.

43. As well as the evidence being limited in respect of the ownership of the UK airports, the evidence suggests that the connection to the Vantage signs was short lived. The 2013 press release reproduced earlier suggests that leadership under the Vantage name (albeit Vantage Airports UK) only commenced in 2013, one year prior to the Opponent selling its share to the Peel Group:

> "Vantage Airports UK is the new name for the partnership between Vantage Airport Group and The Peel Group which jointly own Liverpool John Lennon airport. The new branding aligns the Company more closely with majority shareholder Vantage Airport Group"

44. The desire to align the company owning the airport more closely with the Opponent who at the time was the majority shareholder, suggests that prior to 2013, it was not generally known that Liverpool Airport was owned, or run by the Opponent, or under the Vantage signs.

45. There are also questions about whether the recipients of the Opponent's investment support saw the Opponent as providing "investment services". The Applicant points out that businesses often make investments in stock or assets from a third party, for their own business purposes, but those kinds of investments are not the kind of investment service that can generate goodwill. Similarly, the Applicant submits that businesses seeking funding for their own projects are not providing an investment service and so these activities described by the Opponent in relation to its activity in the UK would not generate goodwill. These points asserted by the Applicant raise an additional point of doubt as to whether goodwill was accrued from the ownership of the UK airports and I find that the Opponent's evidence and submissions – even in reply – do not provide clarity on the identity of its customers or the detail of its services."

21. The Opponent submitted on the appeal that the Hearing Officer had (in effect) gone much further than Mr Alexander had indicated was appropriate in *Plymouth City Council*. It said that the Decision showed that she had disbelieved Mr Teittinen, and she had expressed her criticism of him in terms which suggested that his evidence was

untrue. She should have been considering what was the appropriate weight to give to his evidence rather than doubting its credibility.

22. The Applicant submitted that there was no room to criticise the Hearing Officer for her views on the (lack of) probative value of the Opponent's evidence, and especially the evidence of Mr Teittinen. It pointed out that it had responded to his witness statement by putting in detailed submissions dated 7 September 2022, which sought to identify "several substantial inconsistencies and errors in the Witness Statement which cast doubt on … the accuracy of the assertions in the Witness Statement." The submissions went on to identify elements of the witness statement which the Applicant said were unclear, and/or had no probative value, and to suggest that it did not show how the earlier signs were said to have been used after 2014 or in relation to what (if any) services. It pointed to the lack of supportive documentation for various assertions. The Applicant said that this was all in line with the requirements of TPN 5/2007 as to how evidence should be challenged and especially how to challenge evidence short of seeking cross-examination. The TPN does suggest that written submissions may be a satisfactory way to dispute the other side's factual evidence. The Applicant went on to point out that the Opponent's evidence in reply failed to grapple with the specific points it had made in its submissions. It concluded that the Hearing Officer had been entitled to find that points asserted by Mr Teittinen were not proved, given the lack of supporting documentation, and the failure to respond to the Applicant's criticisms of the evidence.

23. I agree with the Applicant that the evidence filed in reply did virtually nothing to improve the Opponent's case. For example, Mr Teittinen had said that the Opponent's website provided information on the management and investment services it offered, but did not provide examples of the relevant pages. The Applicant pointed this out. Ms Macchi then produced some copies of webpages, but these too failed to provide any description of those services, nor did the pages show that any such services were being offered to UK customers. The only document of value was the DoT report which I mention below, and the Hearing Officer found that to be of limited help. That being so, and in light of the detailed challenges to the evidence in chief which had been made by the Applicant, it seems to me that the Hearing Officer was entitled to treat Mr Teittinen's evidence with a good deal of circumspection. The Applicant had done all that was necessary pursuant to TPN 5/2007 to raise concerns about the probative value of the

evidence, short of calling for cross-examination, yet the Opponent had failed to produce documentary evidence, which the Hearing Officer plainly thought ought to have been available to it, to substantiate its claim to use of the earlier signs in the UK, most particularly for the period after it ceased to be involved in Liverpool John Lennon Airport in 2014.

24. I am not persuaded that the Hearing Officer fell into error in her analysis of the evidence, or wrongly treated Mr Teittinen's witness statement as untruthful. She made no such finding. However, she was plainly concerned by the lack of documentary evidence to support his narrative, and found the lack of clarity as to the Opponent's activities inconclusive. To take one example, the Opponent criticised the Hearing Officer for describing the figures given by Mr Teittinen as "astounding" in [27] Decision. However, I do not read that paragraph as indicating that she thought he was lying about the figure. Instead, in my view, the last sentence of [27] makes it plain that the Hearing Officer was concerned that even having raised such a huge sum there was no documentation "to support the Opponent's operations in the UK after 2014." As she went on to say in [29], this lack of supporting evidence cast doubt over his narrative, and in [45] she said that the deficiencies in the evidence led to a lack of clarity as to the identity of the Opponent's customers or the detail of its services. She dealt with the point further in [46] (see above).

25. The Opponent also complained of her comment at [32] about the number of UK visitors to the Opponent's website and the lack of evidence that the visitors became customers of the Opponent. Whilst the Opponent said that she should not have expressed doubt about the per centage figure given by Mr Teittinen, she found the evidence about website visitors insufficiently detailed to help prove that the Opponent had UK customers, regardless of the numbers concerned.

26. The Opponent also criticised the Hearing Officer for her approach to one of the exhibits to Ms Macchi's witness statement, which consisted of a DoT report on UK International Air Services dating from 2012. The vital element of that report was quoted by the Hearing Officer at [42] Decision (see above). The Opponent submitted that such a report should not need further verification. That may be so, but it does not seem to me that the contents of the report could have allayed the Hearing Officer's concern

expressed in the last sentence of [42], that the Opponent had failed to provide clarity about who would have been aware of the Opponent's involvement in Liverpool Airport. Moreover, as made plain in [43]-[44], the Hearing Officer was concerned that the Opponent may not have used the earlier signs in relation to the airport before 2013. Certainly a document exhibited by Ms Macchi showed that the name used up to 2012 was Vancouver Airport Group, which was then changed to the Vantage name. The Applicant contended that this shows the earlier sign was not used in 2010, when the Opponent invested in the Liverpool Airport, although at some point it started providing airport management services there through its affiliate, Vantage Airports UK. As the Opponent gave up its role at the airport in April 2014, its use of the earlier sign there was, as she found at [43], short-lived. No complaint was made about that finding in the Grounds of Appeal. Moreover, as she explained, it was not clear to the Hearing Officer that the Opponent became known as running the airport under the Vantage name. The airport appears to have operated throughout under the same John Lennon branding.

27. In the circumstances, I do not accept that the Hearing Officer erred in her approach to the Opponent's evidence, and I reject this Ground of Appeal.

(d) residual goodwill

28. The Opponent submitted that the Hearing Officer had failed to find that it had acquired goodwill in the UK through its activities prior to 2014, and that she had not given proper or sufficient reasons for finding that it did not have residual goodwill at the relevant date. In so far as the claim to have goodwill in investment services is concerned, I do not consider that the Hearing Officer misdirected herself in her finding that no such goodwill had been proved either before or after 2014, for the reasons given under (c) above and (e) below. No point will have arisen on residual goodwill.

29. As for the claim to goodwill arising out of the Opponent's management of infrastructure, namely airports, again, the Hearing Officer gave a variety of reasons supporting her view that no such goodwill had been proved, especially in [41]-[44] Decision. I am not persuaded that there was any error in those paragraphs, so that again the point on residual goodwill would not have arisen. But, had it done so, she found at [50] that goodwill based upon only about one year's trading under the earlier signs would have dissipated after a gap of 4 years. She does not appear to have thought that

the evidence about use of the earlier signs in relation to investment services (which she had in any event rejected as non-probative) would have maintained the goodwill for the management services, but the Opponent's submissions below did not make that point. It is right that she did not set out detailed reasoning as to why she thought any goodwill would have dissipated, but the Opponent's criticism that she ignored its claim to residual goodwill is not made out.

30. I reject this Ground of Appeal too.

(e) Analysis of an "investment service."

31. The type of "investment services" relied upon by the Opponent were certainly unusual. The Applicant had said in its submissions:

> "15. Mr Teittinen refers throughout his witness statement to 'investment services in airport infrastructure'. His terminology should be treated with caution. The kind of service that is required to generate goodwill is a service by a provider to a customer. This is apparent from the fact that goodwill requires customers (per *Starbucks v BSkyB*). Mr Teittinen appears to use the word 'service' in rather a looser sense. The Applicant suggests that Mr Teittinen uses the term 'investment services' for activities that are not actually a service at all, but relate to investment more generally. Business will often invest in an asset or seek investment from a third party for their own business purposes. Those kinds of 'investment' are not the kinds of investment services that can form the basis of goodwill.
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> 16. Paragraph 12 of Mr Teittinen's witness statement is an example of his eliding of the concept of 'investment services' and investment in a more general sense. In that paragraph he says, 'My company did not cease its investment services in relation to airport infrastructure in the UK after 2014'. However, the remainder of the paragraph refers to the Opponent seeking investment in relation to its own projects. All kinds of business seek investment to fund their own projects and business needs. By seeking, or even obtaining, such investment, businesses are not offering investment services. One does not become an investment service provider by getting a loan from the bank. Nor does making an investment in one's own project or asset constitute an investment service that can generate goodwill - there is no customer.

17. Mr Teittinen's explanation in paragraph 5 of his Witness Statement supports the Applicant's position in this regard. In paragraph 5 Mr Teittinen states:

> A key element of my company's business are (sic) the investment and financing of projects relating to airport infrastructure. Such services consist of my company evaluating different investment opportunities across the world and, either independently or in conjunction with others, submitting proposals to governments and/or private entities to become the developer of airport infrastructure.

According to Mr Teittinen, the Opponent 'evaluates investment opportunities' and makes proposals to 'become the developer of airport infrastructure'. This suggests that its offering is *airport development services* – it is not evaluating investment opportunities as a service to customers, it is doing it for its own benefit."

32. The terminology adopted by the Applicant in paragraphs 15 and 16 of its submissions was reflected by the Hearing Officer at [45] Decision, where she said:

> "45. There are also questions about whether the recipients of the Opponent's investment support saw the Opponent as providing "investment services". The Applicant points out that businesses often make investments in stock or assets from a third party, for their own business purposes, but those kinds of investments are not the kind of investment service that can generate goodwill. Similarly, the Applicant submits that businesses seeking funding for their own projects are not providing an investment service and so these activities described by the Opponent in relation to its activity in the UK would not generate goodwill. These points asserted by the Applicant raise an additional point of doubt as to whether goodwill was accrued from the ownership of the UK airports and I find that the Opponent's evidence and submissions – even in reply – do not provide clarity on the identity of its customers or the detail of its services."

33. The Opponent criticised that paragraph of the Decision, saying that the first two sentences of the paragraph are unsupported by the evidence or the law and that it was

extraordinary to suggest that these types of investment services could not generate goodwill.

34. From 2014 onwards the Opponent had no airport under its management in the UK, but all of its projects were based abroad, its investment activities related to airport projects outside the UK and were supported by various events and activities also outside the UK. At [25], the Hearing Officer noted Mr Teittinen's evidence that the Opponent had run three fundraising processes in the UK between 2010-2019, raising significant sums for its global (but non-UK) airport projects, and that representatives from the UK had attended global conferences outside the UK at which the Opponent's services had been advertised. She went on at [27] to note the lack of documentation to support his statement, and at [29] said that she considered that the lack of such documentary evidence "casts doubt over the claims made by the Opponent."

35. I accept that it would be wrong to suggest that any particular type of investment service could not generate goodwill, but I am satisfied that the Hearing Officer's comment to that effect in [45] was either simply her repetition of the Applicant's submissions to that effect or, if she did want to make such a point, was an example of her reasoning being badly expressed rather than wrong, as it appears that the Hearing Officer accepted the Applicant's contention that the activities which the Opponent had shown it had carried out after 2014 amounted to no more than seeking funding for its own projects. Alternatively, her complaint about a lack of clarity in the Opponent's evidence, such as at [47] and [50] Decision, shows why she thought that the Opponent had not proved that any such services had generated goodwill.

36. Having carefully considered Mr Teittinen's evidence and the parties' submissions below and on the appeal, I am not persuaded that the Hearing Officer erred in her analysis of the evidence of the nature of the Opponent's investment activities. In my view, it was open to her to find that the evidence failed to make clear exactly what kind of services the Opponent was providing to customers in the UK relating to the airport infrastructure and management services being carried on abroad after 2014.

37. At the hearing of the appeal, I asked counsel for the Opponent to explain to me what kind of services were said to have been provided by it, whether investment services

offered to a third party, or fundraising for the Opponent's own business. She replied that this was an "open question" and said, on instructions, that "investment services in relation to infrastructure" amounted to inviting investors to invest, or "luring in" investors, whilst "investment in infrastructure" was the deployment of such funds. Whilst Mr Teittinen explained that once the investment had been made, the Opponent would perform airport management functions for the airport in which the investment was made, it seems to me that his evidence as to the kind of services offered by the Opponent was quite ambiguous and did indeed leave open the important question of what sort of services they were.

38. In my judgment, the Hearing Officer was entitled to conclude that inviting investors to invest does not amount to providing "investment services" in the normal sense, such as advising clients on investment opportunities and/or investing money for them, but were activities by which the Opponent invited third parties to invest in its own airport projects, that is to say, fund-raising for the Opponent's business activities abroad – luring investors in, as counsel put it. Although the Opponent may have sought funding from people from the UK, it is hard to see how that would have built up goodwill in terms of an attractive force to bring in custom for "investment services in relation to infrastructure" with "customers" in the UK, and the evidence did not establish this.

39. The Hearing Officer did not find that the evidence showed that the Opponent had built up goodwill in the UK in the alternative category of "investment in infrastructure, namely airports" by virtue of its involvement in the UK airports prior to 2014. See again [41]-[44] Decision and my comments at paragraph 26 above.

40. In all the circumstances, in my judgment it was open to the Hearing Officer to find that goodwill had not been proved in the UK for the "investment services in relation to infrastructure, namely airports, and investment in infrastructure, namely airports" upon which the s 5(4)(a) objection in part relied.

Conclusions

41. I conclude that the decision under appeal is not one that no reasonable judge could have reached. The appeal is dismissed. I will order the Opponent to make a contribution to

the Applicant's costs of the appeal in the sum of £1500. That sum shall be paid together with the costs awarded by the Hearing Officer by 5pm on 12 October 2023.

Amanda Michaels
The Appointed Person
21 September 2023

Ms Denise McFarland (instructed by **Keltie LLP**) appeared for the Opponent/Appellant

Dr Jamie Muir Wood (instructed by **Dechert LLP**) appeared for the Applicant/Respondent