

O-229-16

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3025795 BY AGNESE RIKMANE
& MARK JAMES DAVIES TO REGISTER THE FOLLOWING TRADE MARK IN
CLASS 12:

V W DERRINGTON

AND OPPOSITION THERETO (NO 401412) BY VOLKSWAGEN AG

DECISION

INTRODUCTION

1. This is an appeal from the decision of Mr Oliver Morris acting for the Registrar dated 15 December 2014 whereby he rejected the opposition to the registration of the trade mark V W DERRINGTON applied for on 10 October 2013 by Agnese Rikmane & Mark James (“the applicants”) in respect of the following goods:
Class 12: Automobile steering wheels; Automobile wheels; Fuel lines for vehicles; Motor cars for racing; Racing motor cars; Rearview mirrors [of automobiles].
2. Volkswagen AG (“the opponent”) opposed registration of the mark under sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). As to section 5(2)(b), the opponent relied on a number of prior registrations for the mark **VW** in letters (or in the form of their well-known Volkswagen logo, for a wide range of automotive products. The opponent contended that, for each of the prior registrations, the mark applied for contained the trade mark VW, was similar to the opponent’s earlier trade mark and was sought to be registered for identical goods. The opponent contended that there was a high likelihood of confusion in the minds of the public. As to section

5(4)(a), the opponent relied on its significant goodwill in the mark VW and alleged that there would be passing off were the mark applied for to be used.

THE APPEAL

3. The opponent contends that the Hearing Officer made a number of errors in his decision and that it should be reversed. In particular, the opponent contends that the Hearing Officer wrongly evaluated the mark applied for and the manner in which it would be understood by a significant number of members of the public. That error of approach is said to have affected his determination of the opposition both under section 5(2)(b) and under section 5(4)(a) of the Act.
4. Only the opponent was represented at the hearing of this appeal and helpful written and oral submissions were made on the opponent's behalf. The applicant submitted a letter shortly before the hearing urging me to uphold the decision of the Hearing Officer which, it was said was "balanced, detailed and clearly structured" and sought an order for costs.

Applicable principles

5. The correct approach to appeals of this kind, which I adopt here, was summarized by Floyd J (as he then was) in *Galileo International Technology LLC v European Union* [\[2011\] ETMR 22](#) as follows:

"11.Such appeals are not by way of a rehearing but are a review. The principles were set out by Robert Walker LJ in *Bessant and others v South Cone Inc* [\[2003\] RPC 5](#), at paragraphs 17 to 30. Robert Walker LJ said at [28]:

"The appellate court should in my view show real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle."

12. At paragraph 29, Robert Walker LJ said this: "The appellate court should not treat a judgment or a written decision as containing an of error principle simply because of its belief that the judgment or decision could have been better expressed."

13. In that case the High Court judge had reversed the decision of a Hearing Officer. The Court of Appeal held that he had been wrong to do so. Robert Walker LJ in dismissing the appeal said this:

"I consider that the Hearing Officer did not err in principle, nor was he clearly wrong."

14. I conclude that, unless I am satisfied that the Hearing Officer made an error of principle, I should be reluctant to interfere. I should interfere if I

consider that his decision is clearly wrong, for example if I consider that he has drawn inferences which cannot properly be drawn, or has otherwise reached an unreasonable conclusion. I should not interfere if his decision is one which he was properly entitled to reach on the material before him.” (see Henry Carr QC in *Healey Sports Cars Switzerland Ltd v Jensen Cars Ltd* [2014] EWHC 24 (Pat)).

6. The opponent accepted at the hearing that if the case failed on section 5(2)(b) it would not succeed on section 5(4)(a) grounds. However, it is convenient to deal first with the Hearing Officer’s decision in the context of the errors he is said to have made in evaluating the case under section 5 of the Act, since the Hearing Officer dealt with matters in that order.

SECTION 5(4)(a)

7. The opponent criticises the Hearing Officer’s decision under this head on two main grounds, with which I deal in turn.

(i) Opponent’s goodwill

8. First, the opponent contends that the Hearing Officer did not place sufficient weight upon the strength of the applicant’s goodwill. This is not borne out by the decision.
9. To the contrary, the Hearing Officer found that the letters VW were strongly associated with the opponent’s goodwill. The Hearing Officer found, unsurprisingly, that the opponent enjoyed a strong goodwill in its VW marks in the following terms:

“20. The opponent’s business is large and well-established. It clearly has an extremely strong goodwill in relation to the sale of motor vehicles (primarily cars and vans). The signs VOLKSWAGON [sic] and the VW logo are strongly distinctive of the opponent in this regard. In terms of the letters VW per se, the opponent does not appear to use the letters other than in the form of its logo. However, the logo is composed of those letters and this, taken together with the fact that those letters represent the initial letters of Volkswagon [sic], means that members of the public will associate the letters with the opponent’s goodwill. This is exemplified by the evidence showing that VW per se is used by others to identify the opponent and its cars. I consider the letters VW to be strongly associated with the opponent’s goodwill.

21. In addition to the motor vehicles themselves, the opponent’s strong goodwill will have extended to the parts for those vehicles. There is evidence of strong sales and there is an emphasis on the acquisition of genuine parts as opposed to those of third parties.”

10. The Hearing Officer was not persuaded that the issue of the opponent's goodwill should be evaluated at any date earlier than the filing date in the light of the legal principles summarised in the *MULTISYS* case because the evidence did not show that the applicant was entitled to goodwill at any earlier date. On this issue, which is of both relevance to the section 5(4) case and to an issue I refer to below on how the mark would be perceived, the Hearing Officer said this at para. [9]:

“The applicant's evidence

9. This is given by Mr Mark Davies, one of the joint applicants of the subject trade mark. Mr Davies is a director of V W Derrington Ltd (“Derrington”). It is explained that Derrington manufactures aftermarket motor vehicle components for passenger and racing cars, mainly catering for the historic market. He states that the name V W Derrington has been synonymous within specialist and high performance road and race car markets “since 1919 continuously until the present day”. Mr Davies refers to a number of documents in his exhibit as follows:

i. An advertisement from 1923 for exhaust pipes. The supplier is identified as V.W. DERRINGTON.

ii. An advertisement from 1930 for sports exhaust sets. The supplier is identified as V.W. DERRINGTON.

iii. An advertisement from 1932 for “gadgets” including steering wheels, exhaust systems and radiator guards. The supplier is identified as DERRINGTON. The letters V.W. or V W are not used.

iv. An advertisement from 1933 for exhaust systems, steering wheels, screens and cycles wings. The supplier is identified as V.W. DERRINGTON

v. An advertisement from 1936 for screens, cylinder heads, brake lever extensions, gear controls, exhaust systems, filler caps and “fishtails”. The supplier is identified as V.W.DERRINGTON, although at the top of the page DERRINGTON is also used alone.

vi. An advertisement from 1939 for a cylinder head, luggage carriers and exhaust systems. The supplier is identified as V.W. DERRINGTON, although the letters V.W. are in smaller print than DERRINGTON.

10. All of the above advertisements were obtained from The Aeroplane Directory of the Aviation and Allied Industries 1937. The exhibited documents continue:

vii. A transcription of a 1952 advertisement published in The Motor Sport Magazine. The supplier is identified as V.W. DERRINGTON. The advertisement refers to cylinder heads for use in certain car brands of the time.

viii. A “period photograph” of a shop from around 1952. The shop name is V.W. DERRINGTON LTD. There may be car parts in the window, but it is difficult to tell. ix. An article from Autosport dated March 1953. The article is about the Morris 8 CAR. The article states “The most comprehensive “tune-up” kit for Minors at present on the market is that offered by V.W. Derrington Ltd of Kingston-upon-Thames”. There is also a photograph with the caption “V.W. Derrington checks the ignition setting...”.

x. A “period photograph” from around 1953 of a works bus. I can just about make out the word DERRINGTON, but not the letters V W.

xi. Copies of patent documents for a 1955 steering wheel patent in the name of Victor William Derrington. xii. A photograph of a sales van from around 1954. I can make out the word DERRINGTON (on the door) but not the letter V W

xiii. The front page of a catalogue for wooden steering wheels. The supplier is V.W. DERRINGTON LTD. It is stated that the catalogue was widely distributed between 1959 and 1963.

xiv. An article in the magazine Car and Car Conversions (“CCC”) from 1966 The article is headed “D is for DERRINGTON”. The full name (V.W. DERRINGTON LTD”) and address (in Kingston-upon-Thames) is also given. The thrust of the article is about tuning up vehicles and that V.W. Derrington Ltd was one of the first to offer this.

xv. An article from Car magazine dated May 1967. It is headed “Kingston’s Georgian Soup Kitchen” and is about Victor William Derrington and the firm he ran. There is much historical information in that Mr Derrington raced cars and that his shop provides the means to soup up cars for sporting purposes.

xvi. An advertisement from CCC dated September 1975. The supplier is V.W. DERRINGTON LTD and various goods are offered for cars but with an apparent sporting/competition theme.

xvii. A letter dated 5 January 1984 to a potential customer about a combined inlet/exhaust manifold system for the “100e”. It is on the headed paper of V.W. DERRINGTON LTD (V.W. is smaller than DERRINGTON, LTD is smaller again).

xviii. A photograph of a manifold from the 1960s, which has V.W. DERRINGTON LTD embossed on the product. This is said to be illustrative of how the brand is used on goods and that steering wheels, for example, are marked in a similar way.

11. Mr Davies states that the name has never been registered in the UK or EU, but the extensive use of the name DERRINGTON, including its separate initials V W can be seen in the above documents and Derrington is “relying on the earlier and continuous use of the name in having common law right to continue to use and to fortify the right to use and protect the mark..”. He states that V W Derrington is a globally recognised brand with a long reputation in the UK and internationally and existed before the opponent was founded in

1937. They are associated with road and racing cars and parts for cars, racing cars, historic sports and racing cars and motor car related activities”. Their use has never been taken as a reference to Volkswagon, VW or Volkswagon AG [sic].

11. At para. [17], the Hearing Officer said:

“17...However, notwithstanding what has been filed, and in line with the opponent’s submissions, I do not consider the applicants’ position to be improved by the evidence they have filed, for the following reasons:

i) The applicants for the trade mark are two individuals, one of whom has identified himself as a director of Derrington. The applicants would need to establish that they owned any goodwill Derrington built up. There is no evidence of any form of assignment of goodwill from Derrington to the applicants. Neither is there any explanation as to why the applicants have filed the mark in the name of the applicants. It is, therefore, not clear that the applicants should be able to benefit from the claimed use of Derrington.

ii) Even without the problem at i) above, it is not established that Derrington has a current goodwill. The advertisements are historical, the most recent provided in evidence being from the mid-70s. The only more recent document is a letter from the mid-80s, around 30 years before the relevant date. There is no evidence as to what trade Derrington has operated since then. The statement by Mr Davies that the business has continued is a simple assertion, with no objective evidence from which to make any form of assessment.

iii) Further, even in the period when advertisements were issued, no other objective evidence is provided, such as turnover, sales information, customer numbers etc. This makes it difficult to assess the strength of any goodwill in the years gone by. Whilst it is probable that some goodwill existed, how strong it was is not clear from the evidence.

iv) Finally, given that there is no current goodwill, the applicants would need to establish some form of residual goodwill. This is difficult in circumstances when the evidence is lacking in terms of being able to assess its initial strength. The evidence does not establish that the applicants’ new mark will even call to mind the old business of Derrington, let alone that any new business would be regarded as the old...”

12. The Hearing Officer not only evaluated the goodwill in the opponent’s favour but rejected the submission that an earlier date should be taken.

(ii) Comparison of the marks and misrepresentation

13. Second, the opponent contends that the Hearing Officer failed to perform a proper comparison of the marks in assessing the case under section 5(4). Again, I am not persuaded by that argument.

14. In considering the issue of misrepresentation, the Hearing Officer made a detailed evaluation of how the respective marks would be perceived. Having reviewed the evidence, he said:

“24. It is the notional use of the mark V W DERRINGTON for the following goods that must be considered: Class 12: Automobile steering wheels; Automobile wheels; Fuel lines for vehicles; Motor cars for racing; Racing motor cars; Rearview mirrors [of automobiles]

25. In relation, firstly, to motor cars for racing and racing motor cars, I observe that the opponent’s evidence does not specifically focus upon cars for racing. However, a car for racing can be extremely similar to an ordinary road car. It may have some adaptations such as extra safety features but they are still cars. Furthermore, even if the public perceived a difference, they would not be surprised to learn that a major car manufacturer is moving into cars for racing. Such an assumption will, of course, only be made if the mark is indicative of the necessary connection. In this case, much depends on how the mark V W DERRINGTON will be seen. Even though the applicant’s evidence does not establish a senior or concurrent goodwill, it at least demonstrates that DERRINGTON is the surname of the founder of Derrington and that V W are/were his initials. Although DERRINGTON is not a common surname, it still sounds like one and, therefore, the whole mark V W DERRINGTON has the potential to be seen as a full name. The goodwill of the opponent must also be factored in when assessing how the mark will be regarded. The opponent’s evidence shows that it uses sub-brands (polo, golf etc), a point I bear in mind in assessing how the applied for mark is likely to be perceived. The opponent also submits that the fact that it uses a network of authorised dealers is a relevant factor as V W DERRINGTON could be seen as such an undertaking. Having considered all of this, and notwithstanding the opponent’s goodwill in the letters VW per se, I still consider that the mark will be perceived as a reference to a person with the initials V W and the surname Derrington. The separation of the letters V and W assists in this. For the goods at issue, the mark will not be mistaken as a VW sub-brand or a VW dealer. It should also be borne in mind that cars are purchased with a good deal of care, so it is not as though the goods will be chosen in a casual manner with only a fleeting reference to the marks. I do not consider that a substantial number of persons will be deceived into believing that the goods of the applicant are the responsibility of the opponent or are economically linked in some way.

26. In relation to steering wheels, fuel lines and rear view mirrors, I consider the same finding to apply. Whilst the opponent’s goodwill extends to parts such as these, the applied for mark will be perceived in the same way as described above. Even though these goods are purchased with less care than a vehicle, a reasonable degree of care will still be deployed. I do not consider

that a substantial number of persons will be deceived into believing that the goods of the applicant are the responsibility of the opponent or are economically linked in some way.”

Discussion

15. In my judgment, the Hearing Officer was right to say that goods of the kind in question are normally selected with considerable care. Equally, I consider that the Hearing Officer was right to conclude that the mark, taken as a whole, would not naturally be seen as a composite comprising two components “V W”, and “DERRINGTON”.
16. Although, there are some people who might consider that V W DERRINGTON was indicative of “VW at Derrington” or indicative of a composite trade mark effectively reading it as “Derrington’s VW dealership” in a manner not uncommon with certain kinds of car dealerships (recall the Berkeley Square landmark Jack Barclay Bentley) including the opponent’s, in my judgment the Hearing Officer was right in his conclusion that there would not be a substantial number of persons who would consider that and who would be deceived into believing that the goods of the applicant were connected in a relevant way with the opponent.
17. In any event, I do not consider that the Hearing Officer took into account the wrong factors and, in this context, the weight he gave them was a matter for his judgment which he exercised in a sensible way. I do not think he can be said to be clearly wrong. I return to this issue below in the context of the section 5(2)(b) arguments.
18. In this connection, it is said by the opponent that the Hearing Officer should have assessed the level of visual and aural similarity as at least moderate or high. I am not persuaded by this, essentially for the reasons given by the Hearing Officer who took into account that the marks needed to be compared as a whole and that on that basis the similarity was not high.
19. It is also said by the opponent that the Hearing Officer should not have held that the mark would be perceived as a name with the initials V W. For the reasons given above, I consider that the Hearing Officer had ample basis for his conclusion that the

mark would be perceived as a whole, with the letters being treated as initials of the name. That is how the mark is presented, even with the absence of dots after the letters V and W. It is how it would reasonably be understood. I also consider that, in reaching his conclusion, the Hearing Officer took sufficient account of the importance of the early part of the marks and of the fact that there is some use of marks which combine the name of the automotive manufacturer with a family or place name.

20. That is not to say that the mark V W DERRINGTON is not capable of being used in a manner which would be misleading. While the evidence and submissions do not suggest that normal and fair use would lead to passing off, for the reasons given by the Hearing Officer, if the mark were to be used in an unfair way for example by making it appear that the initials VW were separate or more prominent than the word “DERRINGTON” by using different sizes, colours or fonts for each, the opponent may have ground for objecting to such use. Doubtless the applicants will be astute to ensure that they do not in practice do so. That, however, is a different question from whether the mark, as it is in its composite form, may properly be registered and used by the applicant.

21. I therefore reject the criticisms of the Hearing Officer’s findings under section 5(4)(a).

SECTION 5(2)(b)

22. The Hearing Officer then considered the objection under 5(2)(b). He set out the law, in a manner not criticised on this appeal, in para. [19] of his decision as follows:

“...The following principles are gleaned from the judgments of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-GoldwynMayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C- 425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to

make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.”

Distinctiveness and the nature of the average consumer

23. The opponent contends that, while the principles of law were correctly stated in the decision, they were not correctly applied. I am unable to accept that argument.

24. The Hearing Officer considered the facts and held, in para. [32] of the decision, that on the basis of the extensive use the mark VW was “strongly distinctive” of the opponent’s goods. He then outlined the characteristics of the average consumer for the relevant goods and the circumstances of selection in para. [34], in the following terms:

“34. As stated in relation to the section 5(4)(a) assessment, a good deal of care will go into the selection of a motor vehicle, this is so whether the average

consumer is a member of the public or a business. Slightly less (but still at least a reasonable degree) care will go into the selection of parts. The marks will be encountered visually, through websites, brochures etc. But I do not discount the aural impact either as this is a field in which discussions with salespersons often take place.”

25. Next, in an important part of his decision, the Hearing Officer compared the marks (as he had under section 5(4)) and, in particular, considered how the mark V W DERRINGTON would be perceived. He said:

“Comparison of marks

35. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

36. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks. The competing marks are: VW against V W DERRINGTON.

37. In terms of the overall impression of the marks, in the opponent’s mark VW represents a conjunction of two letters, with neither dominating the other. As for V W DERRINGTON, and as already stated, the blend of meaning and significance will be of a full name (initials and surname) which I consider to mean that DERRINGTON will have greater relative weight in the overall impression of the applicant’s mark. The letters V W clearly play a role in the mark, so cannot be ignored from the comparison.

38. From a visual and aural perspective, there is a degree of similarity as the marks contain/consist of the letters VW/V W. However, there is a major difference in terms of the addition of the word DERRINGTON. I consider that any similarity between the marks to be of only a low degree.

39. Conceptually, there is a difference in concept as the applicant’s mark will be seen as a name and the opponent’s mark will not.”

26. It is said by the opponent that the Hearing Officer should not have approached the matter in this way and that it was wrong to focus on the manner in which the mark would be perceived in the way that he did.
27. However, in making the relevant comparison, it was, in my view, almost inevitable that he would approach matters along the lines he followed. Although there was no positive evidence that V W DERRINGTON would be perceived as a name with initials, it was intended to be so perceived and the opponent filed no direct evidence to suggest that it would be perceived in any other way. The opponent instead pointed to the evidence concerning the other names of dealers which involved “VW” together with another term, and other composite use of similar kinds, but I am not persuaded that this would have been sufficient for the Hearing Officer to have properly concluded that the mark actually applied for would be seen in that way by the average consumer for the goods in question. Moreover, the mark V W DERRINGTON is an old one (see the record of the facts concerning its historical use above) and no evidence has emerged from the period during which it was used of that happening.
28. Finally on this point, at the hearing, the opponent rightly accepted that the Hearing Officer was entitled to consider whether *prima facie* the mark taken as a whole would be perceived as a name. The Hearing Officer’s decision was sensitive to this general issue of how the mark would be perceived and I am satisfied that there was a proper basis for the Hearing Officer’s findings.
29. At the hearing, there was also some discussion as to whether the Hearing Officer had taken sufficient account not just of the likelihood of confusion but of the risk of confusion in applying section 5(2)(b) of the Act. Having set out the test, he applied it in reaching his conclusions as follows:

“Likelihood of confusion

40. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

41. The goods are identical, but the degree of similarity between the marks is low. I have held that the applied for mark will be seen as a name, so the marks

are conceptually different. Even when the enhanced reputation of the earlier mark is borne in mind, this does not in my view change how the applied for mark will be perceived. The goods are highly considered purchases in the case of cars, but even for parts they are still purchased with a reasonable degree of care. I consider, as per 20 my assessment under section 5(4)(a), that the average consumer will not be confused. This is so even when indirect confusion is considered. The use of V W in the applied for mark V W DERRINGTON will not indicate that the goods come from the same (or related) stable as the opponent's VW mark, but instead as the use of those letters a part of a name. There is no likelihood of confusion."

30. In my judgment, the reference to "likelihood of confusion" in that section was no more than a shorthand for the statutory test and that the Hearing Officer was there evaluating whether there was any real risk of confusion. Although he might have expressed himself differently here, I do not detect any error in substantive approach.

31. I am therefore satisfied that the Hearing Officer took into sufficient account the right factors, including the similarity of the marks, the identity of the goods, the distinctive nature of the opponent's marks (and the correspondingly greater likelihood of confusion where there are such marks) and the manner in which the applicant's mark would be perceived by the average consumer for the goods in question.

32. I therefore reject this head of appeal.

OVERALL CONCLUSION

33. This appeal must be dismissed.

COSTS

34. The applicant did not attend the appeal but sent a short letter of submissions. In those circumstances, costs, which would have included considering the grounds of appeal, would have been nominal. I will therefore make a modest award of £50 of costs for this appeal, which should be added to the costs of £350 awarded by the Hearing Officer (i.e. £400 in total).

DANIEL ALEXANDER QC

Appointed Person

9 May 2016

Representation:

W P Thompson for the opponent/appellant.