

O-253-18

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO 3,170,531 IN THE NAME OF
AXIS BANK LIMITED

AND IN THE MATTER OF AN APPEAL FROM THE DECISIONS OF OLIVER MORRIS
DATED 4 OCTOBER 2017 (O/477/17)

DECISION

Introduction

1. This is an appeal from the decision of Oliver Morris, for the Registrar, dated 4 October 2017 in which he upheld the opposition of Albingia Sa under sections 5(2)(b) of the Trade Marks Act 1994 to Axis Bank Limited's application number 3,170,531. Albingia relied upon its earlier international mark No 1,056,950 designating the EU. Axis Bank appeals the decision.
2. The application in suit (No 3,170,531) is for the following device mark:



3. The mark was applied for in relation to the following services in Class 36:
Financial services; banking services; financial and banking services provided via the Internet; monetary affairs; financial management; real estate affairs; capital investment; venture capital investment; investment of capital and funds; asset management investment; management of investment; acquisition for financial investment; administration of capital investments, fund investments and other financial investments; financial investment services; fund investment services; administration of funds and investments; hedge fund services; capital investments; capital fund management; financial analysis; financial consultancy; financial management; fund investments; financial investment fund services; international fund investment; financial fund management; mutual funds; mutual fund establishment; mutual fund investment; mutual fund management; stock exchange quotations; brokerage; stocks and bonds brokerage; surety services; corporate funds management; information, advisory and consultancy services relating to all the aforesaid; information, advisory, and consultancy services relating to all the aforesaid provided on-line from a computer database or the Internet.

4. The opposition is based on the following international mark designating the EU (No 1,056,950):



5. The international mark is protected in relation to the following services in class 36:
Insurance, consulting and information concerning insurance including risk analysis; financial affairs; banking, monetary affairs, real estate affairs.

Standard of appeal

6. The principles applicable on appeal from the registrar were considered in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 by Daniel Alexander QC sitting as the Appointed Person. These principles have now been approved and applied by the High Court; see for instance: *Royal Mint Ltd v The Commonwealth Mint and Philatelic Bureau Ltd* [2017] EWHC 417 (Ch) at paragraph 18 and *Apple Inc v Arcadia Trading Ltd* [2017] EWHC 440 (Ch) at paragraph 11.

7. Mr Alexander summarised the position at paragraph 52 of his Decision (I made a few minor updates to this summary in *Grill'O Express* (O/140/17), paragraph 6, which I have incorporated in square brackets):

52. Drawing these threads together, so far as relevant for the present case, the principles can therefore be summarized as follows.

- (i) Appeals to the Appointed Person are limited to a review of the decision of Registrar (CPR [52.21]). The Appointed Person will overturn a decision of the Registrar if, but only if, it is wrong ([...][CPR 52.21]).
- (ii) The approach required depends on the nature of decision in question (*REEF*). There is spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision. At one end of the spectrum are decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum are multi-factorial decisions often dependent on inferences and an analysis of documentary material (*REEF, DuPont*).
- (iii) In the case of conclusions on primary facts it is only in a rare case, such as where that conclusion was one for which there was no evidence in support, which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that the Appointed Person should interfere with it (*Re: B and others*).
- (iv) In the case of a multifactorial assessment or evaluation, the Appointed Person should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (*REEF, BUD, Fine & Country and others*).
- (v) Situations where the Registrar's decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong (c) where the view expressed by the Registrar is one about which the Appointed Person is doubtful but, on balance,

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concludes was wrong. It is not necessary for the degree of error to be “clearly” or “plainly” wrong to warrant appellate interference but mere doubt about the decision will not suffice. However, in the case of a doubtful decision, if and only if, after anxious consideration, the Appointed Person adheres to his or her view that the Registrar's decision was wrong, should the appeal be allowed (*Re: B*).

- (vi) The Appointed Person should not treat a decision as containing an error of principle simply because of a belief that the decision could have been better expressed. Appellate courts should not rush to find misdirections warranting reversal simply because they might have reached a different conclusion on the facts or expressed themselves differently. Moreover, in evaluating the evidence the Appointed Person is entitled to assume, absent good reason to the contrary, that the Registrar has taken all of the evidence into account. (*REEF, Henderson and others*).

Bearing in mind the repeated reminders that different points are likely to be particularly relevant in other cases, this is not intended to be a summary of universal application for other cases where particular aspects of the approach may require different emphasis.

8. In addition, it is worth highlighting the comments made by Sir John Dyson, on behalf of the Supreme Court, in *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49, [2011] 2 All E.R. 65 at paragraph 46:

In the light of the clear and impeccable self-direction set out only a few paragraphs earlier..., and having regard to the need for restraint to which we have referred, the court should surely have been very slow to reach the conclusion that it did. It should only have interpreted these paragraphs in the way that it did if there was no doubt that this is what they meant. It is often easy enough to find some ambiguity or obscurity in a judgment or determination, particularly in a field as difficult and complex as immigration, where the facts may be difficult to unravel and the law difficult to apply. If, as occurred in this case, a tribunal articulates a self-direction and does so correctly, the reviewing court should be slow to find that it has failed to apply the direction in accordance with its terms. All the more so where the effect of the failure to apply the direction is that the tribunal will be found to have done precisely the opposite of what it said it was going to do...

9. Similarly, the comments of Jacob LJ, in a VAT case, *Revenue & Customs v Proctor & Gamble UK* [2009] EWCA Civ 407 are worth reiterating, see paragraph 19:

It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that "the judgment must enable the appellate court to understand why the judge reached his decision" (per Lord Phillips MR in *English v Emery* [2002] EWCA Civ 605, [2002] 1 WLR 2409 at 19) and that the decision "must contain .. a summary of the Tribunal's basic factual conclusion and statement of the reasons which have led them to reach the conclusion which they do on those basic facts" (per Thomas Bingham MR in *Meek v Birmingham City Council* [1987] IRLR 250). It is quite clear how this Tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told "why they have won or lost."

10. In the same case, Toulson LJ elucidated further at paragraph 60:

Where a Tribunal has taken into account all relevant factors, and has not been influenced by impermissible factors, a court will only exceptionally entertain a challenge based on the Tribunal's evaluation of those factors for the reasons given by Baroness Hale in *AH*. The challenger would have to show that the decision was perverse, and in this case there is simply no foundation for such a challenge. The Tribunal was not obliged to accord a separate grading for each factor. It was entitled, as it did, to look at the matter in the round.

11. I will apply these principles.

Grounds of appeal

12. Mr Riordan presented a long skeleton argument, which at 102 paragraphs had more than twice as many paragraphs as the Hearing Officer's Decision. He put forward seven heads of argument in his skeleton: (a) the Hearing Officer failed to appreciate the earlier mark as a whole; (b) the Hearing Officer failed to adopt the perspective of the correct average consumer; (c) the Hearing Officer construed the specification of the earlier mark incorrectly; (d) the Hearing Officer incorrectly analysed confusion by reference to a component; (e) the Hearing Officer failed to assess confusion from the correct perspective; (f) the Hearing Officer rejected evidence of absence of confusion; and (g) the Hearing Officer failed to consider the notional fair use of the Axis mark in context.
13. Mr Riordan did not pursue grounds (f) and (g) at the Hearing as he accepted they could not be pursued without some evidence in support. In relation to the other five grounds (a) to (e), Mr Longstaff's submissions were, in essence, that Mr Riordan's appeal was an attempt to re-litigate the opposition by finding some fault of the Hearing Officer through a microscopic and overly academic analysis.

The Hearing Officer consideration of the earlier mark

14. The Appellant argued that the Hearing Officer, when comparing the two marks, considered only the device element (the stylised letter "A" as he called it) and did not take account of the word "albingia" or the French phrase "vous assurer avec talent". Essentially, the same argument was made twice in that the Appellant suggested the device-only comparison was made when the similarity of the marks was considered (ground (a)) and when the assessment of confusion was undertaken (ground (d)).

Assessment of similarity of goods

15. It was accepted by the Appellant that the correct principles were set out by the Hearing Officer (at paragraph 31), but Mr Riordan submitted that he failed to apply these principles, a failure which he said was demonstrated in the second half of paragraph 34 of the Decision:

In my view, there is a clear point of similarity and a clear point of difference, for what are very obvious reasons (the presence of a highly similar stylised component/the absence of the word albingia). The additional absence of the French strapline does little to further distance the marks. Furthermore, the differences in the exact geometric configuration of the stylised A and the applicant's mark, whilst accepting that there are differences, do not in my view stand out significantly. Weighing all of this, I conclude that there is a medium degree of visual similarity between the marks. That I have found some visual similarity on the basis explained does not mean that I have ignored the whole mark comparison. It is simply the case that the similarity that exists between the applicant's mark and the component of the opponent's mark will clearly strike the eye, particularly bearing in mind my assessment of the overall impression of the mark.

16. Notwithstanding, his explicit reference to the absence of the word "albingia" and the French strapline in the first half of this extract, Mr Riordan submitted the Hearing Officer did not weigh these elements in his ultimate visual comparison because in his final sentence he simply referred to the stylised "A" component (in the phrase "similarity that exists between the applicant's mark and the component of the opponent's mark will clearly strike the eye").

17. This argument is a clear attempt by the Appellant to identify the sort of “ambiguity or obscurity” referred to Sir John Dyson in *MA(Somalia)* as the basis of an appeal. There is nothing in the Hearing Officer’s reasoning which suggests he did not consider all three elements in his comparison. Indeed, his reasoning explicitly indicates he did consider all the different elements. Accordingly, this ground of appeal is rejected.

Confusion analysis

18. The Appellant’s argument that the Hearing Officer considered only the stylised A component in his assessment of confusion is based on an extract of paragraph 47 of the Decision:

...Whilst recognising the whole mark comparison that is to be made, I nevertheless conclude that the average consumer will notice what I consider to be a remarkable degree of similarity between the applicant’s mark and the stylised A component of the opponent’s mark. I say “remarkable degree of similarity” because, although there are differences, they are such that they could easily be lost through imperfect recollection. The common component plays a roughly equal role in the overall impression of the opponent’s mark and has a normal level of distinctiveness. I agree with Mr Longstaff that the average consumer will see this as some form of corporate visual logo sending a message of trade origin. If the average consumer were then to encounter the applied for mark, that recognition will still exist and an assumption of same stable services reached. I come to this view whether or not the applicant’s mark, in abstract, would be perceived as a letter A.

19. Mr Riordan relied on the Hearing Officer’s comment that there was a “remarkable degree of similarity” between the applicant’s mark and the stylised A and his later reference to the “common component” to submit that the Hearing Officer did not undertake an overall comparison.
20. It is useful to address the second point first. It is true, as Mr Riordan states, that there was not a “common component” as the stylised A is not the same in each mark. However, this phrase in the context of the whole paragraph does not suggest that the Hearing Officer was treating the two stylised “As” as identical; rather, he was using a shorthand to explain his reasoning. In other words, this is another example of the Appellant identifying a very minor “ambiguity or obscurity” and suggesting that it unpicks the Hearing Officer’s reasoning.
21. The first limb of Mr Riordan’s argument is similar to that discussed above. The Hearing Officer expressly stated that he had to make a “whole mark comparison” and he refers later to the “overall impression”. As the stylised A in the Appellant’s mark was all that could be compared with the Respondent’s mark, it is hardly surprising that this formed the majority of the Hearing Officer’s reasoning. Nevertheless, as he clearly states, the Hearing Officer performed the global assessment he is required to undertake. This ground of appeal therefore fails.
22. Mr Riordan also criticised the Hearing Officer’s application of the decision of Iain Purvis QC, sitting as the Appointed Person, in *LA Sugar v By Back Beats* (O/375/10). While this was dealt with later in his skeleton and during submissions, it makes sense to deal with it here. The relevant part of the *LA Sugar* decision is at paragraphs 16 and 17:

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16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINT” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).

23. The Appellant submitted that the instant case does not fall within any of the categories (a) to (c). In *Radar* (O/215/17) at paragraph 32, the Hearing Officer held that these three categories were not exhaustive. This finding was mentioned without adverse comment on appeal to the Appointed Person: *Radar* (O/640/17) at paragraph 12. The Hearing Officer’s finding in *Radar* is clearly right. The central question in cases of indirect confusion is whether the average consumer believes there is an economic link between the two marks. The three cases from *LA Sugar* are just examples where such a link will be perceived. Neither as a matter of fact nor as a matter of law would it be right to restrict consumers to perceiving an economic link only in those three cases.

24. Accordingly, I reject Mr Riordan’s submission that the Hearing Officer erred because he did not explain his “*sui generis*” category of indirect confusion adequately. To hold otherwise would be effectively turning the three classes in *LA Sugar* into a rule of law, rather than an explanation of the factual circumstances which might lead to an economic link being perceived. In his decision (Paragraph 47), the Hearing Officer concluded that the average consumer would consider the services provided under the marks to be from the “same stable”. Accordingly, his finding of indirect confusion was one he was entitled to make. This ground of appeal therefore fails.

Average consumer

25. The Appellant also submitted that the Hearing Officer failed to adopt the perspective of the correct average consumer (ground (c)). Under this ground, Mr Riordan has two lines of argument: first, that the Hearing Officer applied cases relating to survey evidence in inappropriate circumstances; secondly, that the Hearing Officer identified

two different classes of average consumer but did not carry this finding through to the rest of his Decision. I will address each in turn.

The single meaning / survey cases

26. In *Interflora v Marks & Spencer* [2013] EWHC 1291 (Ch), [2013] FSR 33 at [194 to 224], Arnold J analysed the case law and concluded that it is possible for the average consumer to have different responses to the trade marks in question. In other words, there is no single meaning rule. A similar analysis was undertaken by Kitchin LJ when the case reached the Court of Appeal [2014] EWCA Civ 1403, [2015] FSR 10 at [107 to 130]. Furthermore, in *Comic Enterprises v Twentieth Century Fox Film Corp* [2016] EWCA Civ 41, [2016] FSR 30, Kitchin LJ summarised the principles at paragraph 34:
- i) the average consumer is a hypothetical person or, as he has been called, a legal construct; he is a person who has been created to strike the right balance between the various competing interests including, on the one hand, the need to protect consumers and, on the other hand, the promotion of free trade in an openly competitive market, and also to provide a standard, defined in EU law, which national courts may then apply;
 - ii) the average consumer is not a statistical test; the national court must exercise its own judgment in accordance with the principle of proportionality and the principles explained by the Court of Justice to determine the perceptions of the average consumer in any given case in the light of all the circumstances; the test provides the court with a perspective from which to assess the particular question it has to decide;
 - iii) in a case involving ordinary goods and services, the court may be able to put itself in the position of the average consumer without requiring evidence from consumers, still less expert evidence or a consumer survey. In such a case, the judge can make up his or her own mind about the particular issue he or she has to decide in the absence of evidence and using his or her own common sense and experience of the world. A judge may nevertheless decide that it is necessary to have recourse to an expert's opinion or a survey for the purpose of assisting the court to come to a conclusion as to whether there is a likelihood of deception;
 - iv) the issue of a trade mark's distinctiveness is intimately tied to the scope of the protection to which it is entitled. So, in assessing an allegation of infringement under Article 5(1)(b) of the Directive arising from the use of a similar sign, the court must take into account the distinctiveness of the trade mark, and there will be a greater likelihood of confusion where the trade mark has a highly distinctive character either per se or as a result of the use which has been made of it. It follows that the court must necessarily have regard to the impact of the accused sign on the proportion of consumers to whom the trade mark is particularly distinctive;
 - v) if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement.
27. A slightly different summary of the principles was put forward by Floyd LJ in the earlier case of *J.W. Spear & Sons v Zynga Inc* [2015] EWCA Civ 290, [2015] FSR 19 at paragraph 37. It was this summary which was set out by the Hearing Officer (Decision, paragraph 37).
28. The Hearing Officer referred to *Zynga* as part of his assessment of the similarity of the signs and the Appellant's first criticism is that applying this case is inappropriate as it related to confusion and not similarity. The Hearing Officer expressly acknowledged that *Zynga* relates to confusion but he found that it could be applied, by analogy, to aural comparison (see Decision, paragraph 37). As both the similarity of mark and the likelihood of confusion are undertaken through the eyes of the average consumer this appears entirely reasonable.

29. The Appellant's second criticism was that the *Zynga* and the related case law related to survey evidence. Accordingly, referring to a "percentage of consumers" (Decision, paragraph 37) is inappropriate as in the instant case there is no evidence to which a percentage can relate.
30. In the extract from *Comic Enterprises*, at paragraph 34(iii), Kitchin LJ repeated the widely accepted principle that in relation to some goods and services it is entirely appropriate for the court to put itself in the position of the average consumer to determine whether there is an infringement without any expert evidence or consumer surveys being led.
31. As *Interflora* makes clear, the average consumer can have a range of reactions to a trade mark and evidence can be led as to what these reactions might be. It must be right, therefore, that the Hearing Officer can use his or her "own common sense and experience of the world" (*Comic Enterprises*, paragraph 34(iii)) to determine that some consumers will have one reaction and some will have another. It cannot be necessary to have a survey or expert evidence for such a finding.
32. I am not suggesting that a Hearing Officer should, without evidence, attribute very precise percentages identifying how many consumers might have a particular reaction. However, suggesting a "substantial" or "significant" proportion (or a "quarter" or "half" or similar) of consumers have a reaction is a sensible way for a Hearing Officer to address the matter. This is essentially what the Hearing Officer did (Decision, paragraph 37) and so he cannot be criticised on this basis.
33. The third criticism was that the Hearing Officer addressed a binary question – whether the marks were similar or not – by considering a proportion of the public. The Court of Appeal has held that the relevant public can have different reactions; therefore, it must be the case that where a sufficient number of consumers consider the mark to be similar the court must go on to consider whether there is a likelihood of confusion. There was, therefore, a binary answer provided by the Hearing Officer.

Multiple consumers identified by Hearing Officer

34. Mr Riordan's second line of argument was that the Hearing Officer identified two classes of average consumer yet undertook the analysis only in respect of one such class of consumer. The relevant passages of the decision are paragraphs 27 and 28:

27. Given that the services are identical, this means that the same average consumer(s) is/are applicable to both parties. The average consumer for the majority of the services could, in my view, be a member of the public or a business. For some of the services, such as corporate/investment fund management and certain of the investment services, the business user is more applicable. There is no dispute that the degree of care and attention used by either average consumer is likely to be higher than the norm. This is understandable because the services all involve, generally speaking, people's money/finances, so the choice of where to put it/invest it etc, is important.

28. Mr Longstaff put the degree of care and attention at quite high, borrowing a finding from the decision of the EUIPO as referred to earlier. Mr Riordan submitted that the degree of care

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and attention was higher than the norm, but, further, that some of the services in question were very specialised, purchased by sophisticated and institutional investors, with the result that such average consumers would exercise a “particularly high degree of care”. I accept Mr Riordan’s general point that some of the services will be selected with a greater degree of care than the others, albeit, they will all be selected with a degree of care higher than the norm. However, putting that at a “particularly high degree” may be overstating things, I would just say that for some of the investment/corporate fund management services, a high degree of care and consideration is likely to be in play.

35. As can be seen, the Hearing Officer did identify two classes of consumer: a member of the public and a business user. Importantly, he went on to suggest that for both consumers the care and attention is likely to be “higher than the norm”. He also indicated that in respect of investment/corporate fund management services a high degree of care and consideration would be used.
36. Mr Riordan submits that as two consumers were identified (general public and businesses) then two assessments should have been undertaken as to similarity and subsequently likelihood of confusion (and the two consumers should not be mixed up between stages). He complained that, rather than do this, the Hearing Officer applied “the lowest common denominator” when he made the assessment.
37. The basic law in this area is well-known. The assessment of whether the relevant services are similar or not must be conducted through the eyes of the average consumer. Where there is more than one class of consumer there may need to be more than one assessment. This has been found by the courts on multiple occasions, such as in *Hearst v AVELA* [2014] EWHC 439(Ch), [2014] FSR 36 (where there were three classes: licensees, retailers and end users) and *Schütz v Delta* [2011] EWHC 1712(Ch) (where there were bottle fillers and end users). The position is nicely summarised in Kerly (16th Ed) at paragraph 3-011:

There may be more than one relevant class of people [who use the service] and the task of the court is to identify the typical consumer representative of each class. It is enough if one relevant class of consumer is confused.
38. As Kerly makes clear, if there are two classes of consumer for a service then all that is required is that the more credulous average consumer is confused (even if the more circumspect is not). Further, if one service has average consumer X and Y and a second service has average consumer Y and Z then it is perfectly acceptable to assess similarity (and then confusion) in relation to consumer Y only provided that consumer Y is confused in both cases. Accordingly, in such cases applying the “lowest common dominator” (in one sense) is entirely acceptable and cannot be criticised.
39. If the Hearing Officer had found that the average consumer for one or more of the services was businesses only, but he then went on to make the comparison of marks through the eyes of the general public, this would clearly have been an error. Although, in some cases it may be that there is a finding of fact that the perception and attention paid by the business user and general public would be the same and so, by reason of that finding, it would make no difference to the outcome whether the business user or general public’s perception were used.

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40. In paragraph 47 of his Decision, the Hearing Officer undertook his overall assessment of the likelihood of confusion. He found that there would be indirect confusion; that is, the average consumers would realise that the marks are different but would believe the similarities between the marks mean that the services come from the same stable.
41. Critically, Mr Riordan submits that when the Hearing Officer made this assessment he did not consider the services individually (but clumped all the services together) and he referred to “the average consumer” (one class) when he had found that the different services have different average consumers (in particular, corporate/investment fund management had business consumers only). Accordingly, he submits that in so grouping the services together the Hearing Officer made a material error.
42. The Court of Justice has held in relation to absolute grounds (C-239/05 *BVBA Management* [2007] ECR I-1455, paragraph 38; C-282/09 *P-CFCMCEE* [2010] ECR I-2395, paragraph 37 and 38) and more recently in relation to relative grounds (C-597/12 *Isdin* (2013) EU:C:2013:672, paragraph 25 and 26) that reasons for refusal must be provided in relation to each and every good or service, but where the same ground of refusal (or reason) applies to a group of goods and services the reasoning given may be general covering all such grouped goods or services. Accordingly, when considering the likelihood of confusion, general reasoning can be used for appropriate groupings.
43. In paragraphs 14 to 22 of his Decision, the Hearing Officer found each of the services to be identical or similar to a very high degree; he found there to be a medium degree of visual similarity between the marks (Decision, paragraph 34); he found there to be no aural similarity between the marks (Decision, paragraph 37); and, finally, he found that a sufficiently significant percentage of the relevant public would perceive a medium degree of conceptual similarity (Decision, paragraph 38). He went on to find the similarity between the marks to be “easily sufficient” to go on and consider the likelihood of confusion (Decision, paragraph 40).
44. It might have been better for the Hearing Officer to have undertaken the likelihood of confusion assessment (Decision, paragraph 47) by reference to each group of services (ie those used in his assessments in paragraphs 14 to 22), but considering the services were all found to be identical or very highly similar it is difficult to see how he could have come to a different conclusion in respect of one service over another even through the eyes of a business consumer. Accordingly, this ground of appeal is also rejected.

Comparison of services

45. The Appellant’s final complaint related to the application of the “inclusiveness” principle (ground (c)). The Hearing Officer referred to *T-133/05 Meric* [2006] ECR II-2739 which is authority for the proposition that when comparing goods (or services) the general includes the particular and the particular is included in the general. For instance, “dairy products” is identical to “milk” and “milk” is identical to “dairy products”.
46. The Respondent’s specification uses the class headings for Class 36. Mr Riordan originally appeared to allege that the Hearing Officer had impermissibly considered the

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Respondent's specification to include all the services within class 36. This argument is completely without basis. In paragraph 12 of his Decision, the Hearing Officer accepted both sides were only relying on the "literal" meaning of the words and he proceeded on that basis.

47. Mr Riordan's second submission was that *Merix* has been modified by C-307/10 *CIPA* EU:C:2012:361 (*IP TRANSLATOR*) which held at paragraph 49 that:

services for which the protection of the trade mark is sought to be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, on that basis alone, to determine the extent of the protection sought.

48. Arnold J has recently made a reference to the Court of Justice in *Sky Plc & Ors v Skykick UK Ltd & Anor* [2018] EWHC 155 (Ch) asking, amongst other things, whether a trade mark can be declared invalid on the grounds it lacks clarity or precision. The validity of the mark is not in issue in these proceedings and it should not be brought in by the back door (see by analogy C-196/11 *Formula One* (2012) EU:C:2012:314 where a mark could not be held to lack distinctiveness). Accordingly, Mr Riordan could not (and did not) say that any part of the specification could be disregarded.

49. In any event, while it is right that the general term used in *Merix* must be clear and precise according to *IP TRANSLATOR*, this does not change the basic principle that, for example, "dairy products" includes "milk". I will now turn to the criticisms in the construction of particular phrases in the specification.

50. Mr Riordan's first particular criticism was that "stock exchange quotations; brokerage; stocks and bonds brokerage" are not part of "banking" or "financial affairs". The term "financial affairs" is very broad, but in my view, it would cover things which would be called broadly "financial services" and a classic example of this is dealing in stocks and shares. Therefore, the Hearing Officer was entitled to consider these services to be identical. Accordingly, I do not need to consider "banking" separately.

51. Mr Riordan's second particular criticism was similar in that he said, "investment and asset management services" were not covered by "financial affairs". For the same reasons as outlined in the preceding paragraph, the Hearing Officer was entitled to consider these services to be identical.

52. Mr Riordan's third particular criticism related to "online information services" being held to fall within the ambit of the Hearing Officer's other findings (Decision, paragraph 22). However, this submission was selective in its reading of the specification in that the services were claimed "relating to all the aforesaid" when provided on-line. It is a claim as to the mode of delivery and not a separate claim for "information services". Accordingly, this criticism is also without merit.

53. I therefore reject this ground of appeal as well.

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Conclusion

54. Accordingly, I dismiss the appeal in its entirety and uphold the Hearing Officer's decision. I award the Respondent £1,000 as a contribution towards its costs to be paid within 21 days of the date of the order.

PHILLIP JOHNSON
Appointed Person
23 April 2018

For the Appellant: Jaani Riordan instructed by Bristows LLP

For the Respondent: Benjamin Longstaff instructed by Barker Brettell LLP