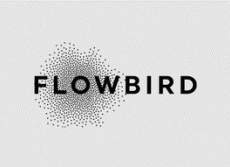
BLO/258/22

TRADE MARKS ACT 1994

IN THE MATTER OF UK DESIGNATION OF IR APPLICATION NO. 1478123
IN THE NAME OF FLOWBIRD FOR



AND IN THE MATTER OF OPPOSITION NO. 418791
BY APCOA PARKING HOLDINGS GMBH

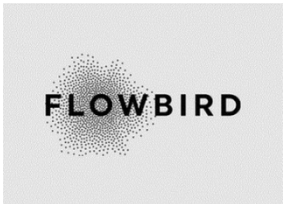
AND IN THE MATTER OF APPEAL TO THE APPOINTED PERSON
FROM THE DECISION OF MS BETHANY WHEELER-FOWLER
DATED 16 JULY 2021

DECISION

1. This is an appeal from a decision of Ms Bethany Wheeler-Fowler, on behalf of the Registrar, BL O/537/21, by which she rejected the opposition of Apcoa Parking Holdings GmbH ("the Opponent") to a trade mark application filed by Flowbird ("the Applicant"). The Opponent appeals.

Background

2. The Applicant applied for the disputed mark ("the Flowbird mark") on 25 October 2018 by way of an International Registration designating the UK, claiming priority from a French application dated 27 April 2018, with a specification for goods and services in Classes 9, 35, 36, 37, 38, 39 and 42. The specification is set out in full in the decision under appeal and I need not insert it here. The mark is as follows:



3. In December 2019 the Opponent lodged an opposition based on s.5(2)(b) of the Act, relying upon two earlier marks:

(1) EU Trade Mark No. 17883605 for the mark FLOW ("the earlier Word Mark") in respect of various goods and services in Classes 9, 35, 36, 37, 38 39, 42 and 45; and

(2) EU Trade Mark No.17770124 for the device mark set out below ("the earlier Device Mark"), which is registered in respect of the same specification of goods and services:

Neither of the earlier marks was subject to proof of use. The full specifications are again set out sufficiently in the decision below.

4. No evidence was filed. Both parties filed written submissions. There was no hearing, and the Hearing Officer decided the opposition on the papers. Similarly, neither party sought to address me at an appeal hearing, but instead I was provided with helpful sequential written submissions.

5. The Hearing Officer's findings were, in summary:

(1) most of the numerous goods or services are identical or similar to some degree;

(2) comparing the Flowbird mark to the earlier Word Mark, they are visually and aurally similar to a medium degree and conceptually similar to a low degree;

(3) as to the distinctiveness of the earlier Word Mark, FLOW was "somewhat suggestive and allusive of easing how such objects are moved/dealt with" for goods and services relating to the management of movement, and for them the distinctive character was low (or low to medium). For the remainder, the distinctive character was medium;

(4) there was no likelihood of direct or indirect confusion;

(5) the Flowbird mark is less similar visually and aurally to the earlier Device Mark;

(6) the earlier Device Mark had a higher degree of distinctive character than the Word Mark, which did not arise from the common element Flow;

(7) there was again no likelihood of confusion.

Grounds of appeal

6. The Opponent appeals some but not all of the Hearing Officer's findings, submitting that she was wrong not to find a likelihood of indirect confusion. The Grounds of Appeal complained that the Hearing Officer had erred in a number of ways, in brief:

(1) as to the conceptual comparison of the marks;

(2) as to her finding that FLOW was suggestive or allusive of certain goods/services;

(3) in finding no likelihood of indirect confusion;

(4) in finding that two groups of services had only a low degree of similarity to the Opponent's services; and

(5) in finding no likelihood of confusion between the Flowbird Mark and the earlier Device Mark.

Standard of the appeal

7. It was common ground that this appeal is by way of review of the Hearing Officer's decision. Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference in this sort of appeal. Before that is warranted, it would be necessary for me 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. The relevant principles were set out in *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17 by Daniel Alexander QC sitting as the Appointed Person at [14]-[52], and his conclusions were approved by Arnold J in *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), [2017] FSR 40. Mr Alexander QC said in particular that:

> "… 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)."

8. Subsequently, the Supreme Court in *Actavis Group PTC v. ICOS Corporation* [2019] UKSC 1671, [2019] RPC 9 dealt with the role of the appellate court at [78] to [81]. Lord Hodge said:

"78. … Where inferences from findings of primary fact involve an evaluation of numerous factors, the appropriateness of an intervention by an appellate court will depend on variables including the nature of the evaluation, the standing and experience of the fact-finding judge or tribunal, and the extent to which the judge or tribunal had to assess oral evidence*: South Cone Inc v Bessant , In re Reef Trade Mark* [2002] EWCA Civ 763; [2003] RPC 5, paras 25-28 per Robert Walker LJ.

…

80. What is a question of principle in this context? An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. What is the nature of such an evaluative error? In this case we are not concerned with any challenge to the trial judge's conclusions of primary fact but with the correctness of the judge's evaluation of the facts which he has found, in which he weighs a number of different factors against each other. This evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible. …

81. Thus, in the absence of a legal error by the trial judge, which might be asking the wrong question, failing to take account of relevant matters, or taking into account irrelevant matters, the Court of Appeal would be justified in differing from a trial judge's assessment of obviousness if the appellate court were to reach the view that the judge's conclusion was outside the bounds within which

reasonable disagreement is possible. It must be satisfied that the trial judge was wrong …"

9. I note the additional guidance from Mr Iain Purvis QC sitting as the Appointed Person in *Rochester* BL O/049/17 at [33]:

"… the reluctance of the Appointed Person to interfere with a decision of a Hearing Officer on likelihood of confusion is quite high for at least the following reasons:

(i) The decision involves the consideration of a large number of factors, whose relative weight is not laid down by law but is a matter of judgment for the tribunal on the particular facts of each case

(ii) The legal test 'likely to cause confusion amongst the average consumer' is inherently imprecise, not least because the average consumer is not a real person.

(iii) The Hearing Officer is an experienced and well-trained tribunal, who deals with far more cases on a day-to-day basis than the Appellate tribunal.

(iv) The legal test involves a prediction as to how the public might react to the presence of two trade marks in ordinary use in trade. Any wise person who has practised in this field will have come to recognize that it is often very difficult to make such a prediction with confidence. … Any sensible Appellate tribunal will therefore apply a healthy degree of self-doubt to its own opinion on the result of the legal test in any particular case."

10. I have kept these principles in mind on this appeal.

Merits of the appeal

Ground 1: the conceptual comparison

11. The Opponent complained of the analysis at paragraph 105 of the decision. The Hearing Officer said:

"The word 'flow' is typically understood to refer to the steady movement of something. In both marks, 'flow' will evoke a message surrounding this concept. However, in the contested mark, the addition of 'bird' to this element alters the conceptual hook as it also will be seen to reference to the flying animal. Whilst

the average consumer may view ‘flowbird’ as a word without an obvious meaning, they may also still recognise the ‘flow’ and ‘bird’ elements as words with concepts earlier mentioned. Bearing this in mind, I consider the marks have a low degree of conceptual similarity.”

12. The Opponent argued that the Hearing Officer was right to recognise that the average consumer "will" break the mark down into the two elements FLOW and BIRD, which meant that the meaning of the word FLOW would be conveyed by both marks. It argued that the word BIRD did not qualify the word FLOW and the two did not form a unit which was different to the sum of its parts. It said that the Hearing Officer should have found the marks to be similar at least to a medium degree.

13. The Opponent has not, in my view, identified an error in the assessment of conceptual similarity. This Ground of Appeal is no more than an invitation to me to substitute a different view for that of the Hearing Officer without any proper grounds to do so. The fact that the Hearing Officer considered that a consumer may (not “will”) identify both words in the Flowbird mark does not, in my judgment, show that the addition of BIRD did not “qualify” the word FLOW. The Hearing Officer was obliged to consider the Flowbird mark as a whole and I am satisfied that she was entitled to find that adding the word BIRD “altered the conceptual hook.”

14. I do not accept that there is any flaw in the logic she employed in reaching her conclusion as to the level of conceptual similarity. The Hearing Officer considered that the meaning of the word FLOW would be seen in both marks, so she found that they had some degree of conceptual similarity. The reason why she said it was only a *low* degree of conceptual similarity was because of the addition of the word BIRD, which brought in a different concept and which when added to FLOW creates a word without an obvious meaning. That was a finding which, in my view, the Hearing Officer was perfectly entitled to make. I reject the first Ground of Appeal.

Ground 2: inherent distinctive character

15. The Opponent said that the Hearing Officer had erred in her assessment of the level of inherent distinctiveness of the earlier Word Mark (the validity of which was not in issue). At paragraph 108 she said:

> "The opponent submits that the earlier mark is distinctive to an average degree. The applicant contends that the word "*FLOW"* is of weak distinctiveness and a "*fairly common English word that can be defined in a number of ways in particular in relation to the "flow of traffic".* In respect of the goods and services associated with managing the movement of something (such as vehicles, parking and payment), the earlier mark, "*FLOW*"", is somewhat suggestive and allusive of easing how such objects are moved/dealt with. For the goods and services where the suggestive message applies, the distinctive character is low (or low to medium) but for the remainder, the distinctive character is pitched at medium."

16. The Grounds of Appeal pleaded that this was wrong because the word FLOW does not convey a sufficiently direct and specific message regarding a characteristic of the goods/services. It should have been found to have a medium degree of distinctiveness across the board. The Opponent sought to rely upon the findings of another Hearing Officer in an opposition which it had brought against an application to register the mark FREEFLOW. In that decision, BL O/548/21, which was handed down a few days after the decision in issue here, the Hearing Officer held "I do not consider that 'FLOW' will have any allusive or descriptive qualities. I find that this also applies to those goods and services that do not relate to car parking. From a trade mark perspective, despite not being allusive or descriptive, it is not particularly remarkable. Therefore, I find that the applicant's first mark enjoys a medium degree of distinctive character" and "I do not consider that the use of 'FLOW' in the parties' marks is allusive or descriptive of any of the goods and services at issue." His decision was appealed, and Mr Thomas Mitcheson QC, the Appointed Person, held in BL O/857/21: "it does not appear to me that the word FLOW has sufficient allusiveness to any of the characteristics of the goods and services themselves to justify a dilution in distinctiveness which would allow the conclusion that the Hearing Officer was wrong."

17. The Opponent concentrated in its submissions on this point upon the long-established principle that, in assessing descriptiveness, the question is whether the nature of the mark is such that it enables the public "immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics." That is, in my view, a different question from whether a mark is

allusive. Here there was no challenge to the validity of the earlier Word Mark based on alleged descriptiveness, and the HOO made no finding of descriptiveness.

18. The question before me is whether there is an error in the Hearing Officer's analysis of the inherent distinctiveness of the earlier Word Mark. It does not seem to me that the Opponent has identified any error of principle in the decision. That being so, the criticism is of her "evaluative process" which is something upon which different judges can legitimately differ. I should not interfere with this part of the decision unless I am satisfied that the Hearing Officer's conclusion is outside the bounds within which reasonable disagreement is possible.

19. The fact that another Hearing Officer came to a different conclusion as to the allusiveness of the word FLOW a few days *after* she reached her decision does not, in my view, show that this Hearing Officer erred in this respect. Whilst in the *Freeflow* appeal, Mr Mitcheson QC did not find that the Hearing Officer there was wrong, he was of course considering whether there was an error in that decision. He did not think he could say that the Hearing Officer must have been in error. The same applies to this point in this appeal. It is unfortunate that there was not consistency between the Hearing Officers' views on this point, but such differences may arose when different judges can legitimately differ in their evaluation of the impact of a mark. It does not seem to me sufficient to show that in the case before me, the Hearing Officer must have erred.

20. In relation to Ground 3 of the appeal, the Opponent relied upon a decision of the Opposition Division of the EUIPO, No. 3102608, dated 19 March 2021. This decided an opposition brought by the Opponent against Flowbird's EUTM application and the same marks were (*inter alia*) in issue. The decision, and the fact that it was under appeal, was drawn to the Hearing Officer's attention but she did not refer to the substance of the decision. It was not, of course, binding upon her. The appeal to the EUIPO Board of Appeal No R 748/2021-2 was decided on 3 March 2022 (after the parties had provided me with their submission on this appeal). I note that the Board of Appeal approved the Opposition Division's view that the earlier Word mark had

below-average inherent distinctiveness for some goods/services, saying at paragraph 81:

> "For part of the relevant goods and services, namely those that are traffic- and/or transport-related, the degree of distinctiveness of this element could be slightly below-average since it might allude to the fact that the relevant goods and services target in some way a process or convey information about a continuous stream of traffic (e.g. 'traffic management services' in Class 39)."

Those findings (repeated at paragraph 89) appear to me to be in substance the same as the Hearing Officer's decision on the inherent distinctiveness of the earlier Word Mark, and this reinforces my conclusions at paragraph 18 above that this is a point upon which different tribunals may reasonably disagree.

21. In its written submissions on the appeal, the Opponent added two further points in relation to paragraph 108 of the decision. First, it complained that the Hearing Officer had not properly identified the goods and services affected by this finding of allusiveness. It also complained that she had not taken account of the level of distinctiveness of the earlier Word Mark when assessing the likelihood of confusion. Neither of these points was raised in the Grounds of Appeal, and the Opponent cannot rely upon them now.

22. I therefore reject Ground 2 of the appeal. I would add that even had I allowed the appeal on this point, it is hard to see how that would have had an impact on the decision as a whole, given that the Hearing Officer found no likelihood of confusion for any goods/services, even ones as to which the earlier Word Mark had a medium level of inherent distinctiveness.

Ground 3: no likelihood of indirect confusion

23. The Hearing Officer's analysis of this point is found at paragraph 115 of the decision below:

> "I now turn to consider whether there is a likelihood of indirect confusion. Whilst the contested mark fully incorporates the earlier mark, when the average consumer views the contested composite mark, I do not consider this shared element ("*FLOW*") has a distinctive significance independently of the whole.

> Instead, when the "*FLOW"* element is combined with "*BIRD"* in the way in which it is in the applied for mark, I consider that the combination will be read together and as a unit, albeit one which has no known meaning as a whole (other than possibly evoking a concept of a type of bird). The addition of "*BIRD"* to the word "*FLOW*" is a fairly unique combination and I do not consider it likely that the average consumer would think it is a natural brand extension or indication of a shared economic connection between the two parties/marks. Rather, even where the mark is used on identical goods and services, such as the provision of car parks, it is my view that the average consumer would think the parties merely share the "*FLOW"* element due to coincidence. For these reasons, I neither find a likelihood of indirect confusion. For the avoidance of doubt, I would still reach this finding even if "*FLOW*" is regarded as an independent element."

24. The Opponent's first point in the Grounds of Appeal was that the Hearing Officer had contradicted herself in this passage. It said that her point that the Flowbird mark has no known meaning as a whole was inconsistent with her finding at paragraph 105, where she had said that "the average consumer may … recognise the 'flow' and 'bird' elements as words with concepts earlier mentioned." I do not consider those two statements to be inconsistent, especially putting that phrase in context. At paragraph 105 she had said

> "Whilst the average consumer may view 'flowbird' as a word without an obvious meaning, they may also still recognise the 'flow' and 'bird' elements as words with concepts earlier mentioned."

25. I reject the submission that there is an error in the Hearing Officer's conclusion that FLOWBIRD forms a unit simply because that unit had no known meaning. She may not have said so in terms, but in my judgment the Hearing Officer plainly considered that the consumer would see FLOWBIRD as an invented word. It does not seem to me that she can be criticised for reaching that conclusion simply because she had, quite rightly, held at paragraph 105 that the consumer may recognise the two words which go to form that new unit.

26. The Opponent asserted in the Grounds of Appeal that the Hearing Officer was wrong to exclude indirect confusion because of her finding that the Flowbird mark consisted of a neologism. In its submissions, it expanded that point to say that the Hearing Officer erred because FLOW should have been given some independent distinctive significance, however, that was put on the basis that the combination of FLOW and BIRD did not form a unit with a new meaning. The Hearing Officer had found that it did form a new unit, as I have said, and the fact that she thought it would be seen as an invented word with no meaning does not seem to me to help the Opponent on this point. Whether or not the neologism had a meaning, the fact that it would be seen as a unit would have an impact upon the consumer's view of the inclusion of the word FLOW as part of that new unit.

27. In my view, paragraph 115 is consistent with the Hearing Officer's findings as to conceptual similarity, and the Opponent has not shown that her analysis of the likelihood of indirect confusion was wrong.

28. In its submissions, the Opponent again raises the point about the impact on the assessment of the likelihood of indirect confusion of the distinctiveness of the earlier Word Mark. Again, this was not raised in the Grounds of Appeal.

29. The Opponent said that the Hearing Officer erred in finding that the uniqueness of the combination of FLOW and BIRD would prevent indirect confusion occurring. It submitted in general terms that she reached a decision that no reasonable tribunal could have reached. More specifically, it said that she failed to give any explanation as to why she concluded that FLOWBIRD would not be liable to be seen as a sub-brand or brand extension, but would be put down to 'coincidence.' I cannot accept these points. It seems to me that the Hearing Officer did explain why she thought that the mark would not be seen as a sub-brand or extension, and that was because adding BIRD to FLOW was a 'fairly unique combination.' Her analysis appears to me to be consistent with the views expressed by Mr Purvis QC in paragraph 17 of *L A Sugar*, in that the addition of BIRD to FLOW is not simply adding a non-distinctive element to the earlier mark.

30. The Opponent sought to rely upon the EUIPO decision I have mentioned above, in which a likelihood of indirect confusion was found. That finding was upheld in the appeal I have mentioned above, where the Board of Appeal said at paragraph 96 "The public might also perceive the mark applied for as a sub-brand and/or a variation of the earlier mark designating a new line of goods and services." No specific reason was given for that finding, so far as I can see, although the Opposition Division had held that the use of sub-brands was common in relation to some of the goods and services. There was no evidence to that effect in this case, nor did the Hearing Officer make any findings about the ubiquity of sub-brands in relation to particular goods or services. It was not suggested to me that she had been invited to do so. In the circumstances, whilst again it is unfortunate that different tribunals disagree on the same issue, it does not seem to me that this shows that the Hearing Officer must have erred in coming to a different conclusion to that of the EUIPO instances.

31. The Opponent's contention that the Hearing Officer reached a decision that no reasonable tribunal could have reached, and its submissions as to why a consumer would, in its view, assume an economic connection between people using FLOW and FLOWBIRD in relation to identical goods or services do not identify any error on the part of the Hearing Officer. It is in substance inviting me to substitute my view (or its view) for that of the Hearing Officer. As I consider that the Hearing Officer was entitled to come the conclusion she reached in paragraph 115, I reject the Opponent's attempt to overturn the decision in this way.

Ground 4: comparison of the goods/services

32. The Opponent accepted in its submission that this Ground falls away if I reject the Grounds discussed above. I do not, therefore, need to deal with this Ground.

Ground 5: opposition based upon the earlier Device Mark

33. The Opponent relied upon all of the matters raised in relation to the earlier Word Mark. For the reasons give above, it does not seem to me that those points should succeed in respect of the Device mark where they failed for the Word mark.

34. Separately, the Opponent submitted that the Hearing Officer erred in concluding that the presence of the F device element of the earlier Device mark meant that it was visually and aurally similar to a low degree to the Flowbird mark. She should, it argued, have found them to be similar to a medium degree.

35. The Hearing Officer said at paragraph 116(c):

> "The overall impression of the earlier mark lies in the word "*FLOW*" and a green square with rounded corners encasing three horizontal white lines, of which is likely viewed as resembling the shadow of an "*F"*. Comparing this to the contested mark, there is a reduced degree of visual and aural similarity (to a low degree). Though, the marks still have a low degree of conceptual similarity."

36. First, the Opponent said that the Hearing Officer erred in that analysis because the F element of the device would not be pronounced by the average consumer, so it had no aural impact. I agree that the Hearing Officer did not explain how the device would have an impact upon the pronunciation of the earlier mark, and I do not understand how or why she reached this view. I consider that this is an error in her analysis. For what it is worth, it does not seem to me that the device reduces the level of aural similarity below the medium level of the earlier Word mark.

37. Next the Opponent submitted that the impact of the stylised F was not such as to reduce the visual similarity of the marks. Again, the Hearing Officer did not set out why she thought that was the case. On the other hand, it seems to me that if one is not to ignore the device element of the earlier mark, one must accept that its stylised F device, which is wholly different to the device element of the Flowbird mark, has some impact on the level of visual similarity of the marks. This might well reduce the visual similarity to a low level.

38. Whether the aural and visual similarity of the earlier Device mark to the mark applied for is low or medium overall, it does not seem to me that the Hearing Officer should have concluded that there was a likelihood of confusion, direct or indirect, between these marks, given the greater differences between them than between the earlier Word mark and the Flowbird mark.

39. In the circumstances, I reject the appeal based upon the earlier Device mark.

40. 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 £400, to be paid together with the costs of £1000 awarded below by 5 pm on Friday 8 April 2022.

Amanda Michaels
The Appointed Person
24 March 2022

Written submissions were filed by **Laytons LLP** on behalf of the Opponent/Appellant, and by **Swindell & Peirson Ltd** on behalf of the Applicant/Respondent