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TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3177248 IN THE NAME OF ANDREW POWELL

AND IN THE MATTER OF OPPOSITION NO. 407929 THERETO BY CORNING INCORPORATED

DECISION

Introduction

1. This is an appeal against the decision of Mrs Louise White, acting on behalf of the Registrar, dated 28 March 2018 (O-197-18). In her decision the Hearing Officer dismissed the opposition and ordered that Corning Incorporated (“*the Opponent*”) pay to Andrew Powell (“*the Applicant*”) the sum of £1500 as a contribution towards his costs.
2. On 28 July 2016 the Applicant applied to register the trade mark:

PYDREX

in the UK under No. 3177248 in respect of a wide range of goods and services in classes 9, 25, 35, 38, 41 and 42.

3. The application was examined and accepted and subsequently published for opposition purposes.
4. By a Notice of Opposition dated 21 November 2016 the Opponent opposed the application in its entirety on the basis of:
 - (1) Section 5(3) of the Trade Marks Act 1994 (“*the 1994 Act*”); and
 - (2) Section 5(4)(a) of the 1994 Act on the basis that the use of the mark PYDREX for the goods and services specified was liable to be prevented in the UK by way of a claim for passing off.
5. The earlier trade mark relied upon by the Opponent for the purposes of its Ground of Opposition under Section 5(3) was its earlier EUTM No 2906576 for the mark:

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PYREX

Registered in respect of:

Class 9

Glassware for scientific or industrial use; optical and ophthalmic glass, glass lenses, glass lens blanks; glass optical fiber in filament or cable form; glassware for laboratory use, beakers, slides, burets, tissue culture dishes, roller bottles, bottles, caps, crucibles, cylinders, dissolution vessels, desiccators, well plates, flasks, tubes, vessels, vials, pipets, petrie dishes; funnels, stirrers, jars, stopcocks, all being laboratory glassware; slides, and vacuum pumps for laboratory use.

Class 21

Glassware and containers for domestic use; non-electric vessels used for culinary purposes not of precious metal, baking dishes, serving dishes, casseroles, platters, pie plates, plates, cups, tumblers, roasting dishes and bowls.

The EUTM was filed on 22 October 2002 and entered on the register on 17 June 2004.

6. With respect to the claim under Section 5(4)(a) the earlier mark relied upon was again **PYREX**. Use was claimed for 1915 throughout the UK in relation to the same goods as specified in the EUTM relied on.
7. On or about the 19 January 2017 the Applicant filed a counterstatement denying all the claims made and putting the Opponent to proof of use of the EUTM.
8. Both sides filed evidence.
9. A hearing took place before the Hearing Officer. At that hearing Mr Chris McLeod of Elkington and Fife LLP appeared on behalf of the Opponent. The Applicant did not attend the hearing.

The Hearing Officer's Decision

10. The Hearing Officer first considered the Section 5(3) objection. Section 5(3) of the 1994 Act states as follows:

3) A trade mark which-

- (a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark

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(EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

11. As recorded in paragraph [3] of the Decision and as confirmed by Mr McLeod at the hearing before me the Opponent contends that the '*use of the later mark will dilute the distinctive character*' of the Opponent's earlier mark and '*that there is no unfair advantage aspect to [the opposition] (nor indeed any other strand over and above detriment to the distinctive character)*'. It is however to be noted that the Opponent did contend that '*there is no due cause for the adoption of the mark*'.
12. Having set out the relevant legal approach at paragraphs to be applied under Section 5(3) of the 1994 Act the Hearing Officer:
 - (1) Accepted that PYREX has a significant reputation and goodwill in respect of glassware, particularly that for domestic use as contained in Class 21 (paragraph [10] of the Decision);
 - (2) Accepted that at least in respect of domestic glassware PYREX was a household name (paragraph [10] of the Decision);
 - (3) Indicated that the decision would focus on the reputation and goodwill in respect of the goods in Class 21 as she considered that the goods in Class 9 would not materially improve the position (paragraph [10] of the Decision);
 - (4) Found that the respective marks were '*highly similar, visually and aurally*' (paragraph [20] of the Decision);
 - (5) Found that each of the signs would be perceived as invented words and had no concept in common (paragraph [20] of the Decision); and
 - (6) Found that PYREX is an invented word with a good deal of inherent distinctive character which has been enhanced as the result of the extensive use made of it (paragraph [21] of the Decision).
13. On the basis of these findings the Hearing Officer went on to find with respect to the Section 5(3) Ground of Opposition as follows:
 23. It is clear that the contested goods and services are far removed from those for which PYREX enjoys a reputation. It is noted that the respective trade marks are similar and that the reputation that PYREX enjoys is strong. However, even in bearing in mind the obvious high points of the opponent's case, it is considered highly unlikely that a link would be established.

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The goods and services are too disparate. Even if a link were established, it is difficult to see how it would have any consequence. In this regard, I bear in mind the following guidance:

[The Hearing Officer then set out extracts from the following cases at paragraph [23] to [26] of the Decision which for brevity are not reproduced here given that the quotations set out are uncontroversial:

Case C-197/07P *Aktieselskabet af 21. november 2001 v OHIM* paragraphs [22] to [23]

Case T-63/03 *Mäurer + Wirtz GmbH & Co KG v OHIM* paragraph [40]

Case C-383/12P *Environmental Manufacturing LLP v OHIM* paragraphs [34] to [43]

32Red Plc v WHG (International) Limited and others [2011] EWHC 665 (Ch) paragraph [133] Henderson J.]

27. It is difficult to see how a change of customer allegiance can occur (and so lead to detriment to distinctive character) when there is such a vast difference between the goods and services. There is also no evidence on the point. As such, bearing in mind the guidance outlined above, the opposition based upon Section 5(3) fails.

14. The Hearing Officer then turned to the issue under Section 5(4)(a) of the 1994 Act and having set out the relevant law:

- (1) Accepted that the Opponent's business had a significant protectable goodwill (paragraph [34] of the Decision);
- (2) Accepted that the signs in issue were highly similar (paragraph [34] of the Decision); and
- (3) Found that there was a huge gap in the respective fields of activity (paragraph [34] of the Decision).

15. The Hearing Officer went on as follows:

37. In *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA), Millet L.J. made the following findings about the lack of a requirement for the parties to operate in the a (sic) common field of activity, and about the additional burden of establishing misrepresentation and damage when they do not:

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“There is no requirement that the defendant should be carrying on a business which competes with that of the plaintiff or which would compete with any natural extension of the plaintiff’s business. The expression “common field of activity” was coined by Wynn-Parry J. in *McCulloch v. May* (1948) 65 R.P.C. 58, when he dismissed the plaintiff’s claim for want of this factor. This was contrary to numerous previous authorities (see, for example, *Eastman Photographic Materials Co. Ltd. V. John Griffiths Cycle Corporation Ltd.* (1898) 15 R.P.C. 105 (cameras and bicycles); *Walter v. Ashton* [1902] 2 Ch. 282 (The Times newspaper and bicycles) and is now discredited. In the *Advocaat* case Lord Diplock expressly recognised that an action for passing off would lie although “the plaintiff and the defendant were not competing traders in the same line of business”. In the *Lego* case Falconer J. acted on evidence that the public had been deceived into thinking that the plaintiffs, who were manufacturers of plastic toy construction kits, had diversified into the manufacture of plastic irrigation equipment for the domestic garden. What the plaintiff in an action for passing off must prove is not the existence of a common field of activity but likely confusion among the common customers of the parties.

38. The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration:

‘...whether there is any kind of association, or could be in the minds of the public any kind of association, between the field of activities of the plaintiff and the field of activities of the defendant’:

Annabel’s (Berkeley Square) Ltd. V. G. Schock (trading as Annabel’s Escort Agency) [1972] R.P.C. 838 at page 844 per Russell L.J.

39. In the *Lego* case Falconer J. likewise held that the proximity of the defendant’s field of activity to that of the plaintiff was a factor to be taken into account when deciding whether the defendant’s conduct would cause the necessary confusion.

40. Where the plaintiff’s business name is a household name the degree of overlap between the fields of activity of the parties’ respective businesses may often be a less important consideration in assessing whether there is likely to be

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confusion, but in my opinion it is always a relevant factor to be taken into account.

41. Where there is no or only a tenuous degree of overlap between the parties' respective fields of activity the burden of proving the likelihood of confusion and resulting damage is a heavy one. In *Stringfellow v. McCain Foods (G.B.) Ltd.* [1984] R.P.C. 501 Slade L.J. said (at page 535) that the further removed from one another the respective fields of activities, the less likely was it that any member of the public could reasonably be confused into thinking that the one business was connected with the other; and he added (at page 545) that

'even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than minimal loss is in my opinion a heavy one.'

42. In the same case Stephenson L.J. said at page 547:

'...in a case such as the present the burden of satisfying Lord Diplock's requirements in the *Advocaat* case, in particular the fourth and fifth requirements, is a heavy burden; how heavy I am not sure the judge fully appreciated. If he had, he might not have granted the respondents relief. When the alleged "passer off" seeks and gets no benefit from using another trader's name and trades in a field far removed from competing with him, there must, in my judgment, be clear and cogent proof of actual or possible confusion or connection, and of actual damage or real likelihood of damage to the respondents' property in their goodwill, which must, as Lord Fraser said in the *Advocaat* case, be substantial.'

43. Bearing in mind the aforesaid, though the fame of PYREX is fully acknowledged, it is in a discrete area, namely glassware. It is difficult to see how PYDREX used on the contested goods and services will be assumed to be the goods and services of PYREX, famous for glassware. It is considered that even this extensive goodwill cannot bridge this (significant) gap. There is considered to be no misrepresentation (and damage) here.

44. The opposition based upon Section 5(4)(a) also fails.

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16. The Hearing Officer then went on to find that the Opposition failed in its entirety and made an order as to costs on that basis.

The Appeal

17. On 25 April 2018 an appeal against the Hearing Officer's decision was filed on behalf of the Opponent pursuant to Section 76 of the 1994 Act.
18. The Grounds of Appeal contend in substance that the Hearing Officer's decision was flawed and contained material errors. In particular it is said:
- (1) The Hearing Officer should not have held that the Opponent's reputation was limited to '*glassware*' but should have found a reputation in relation to '*in essence cookware*';
 - (2) Having found a very high degree of similarity between the marks and found that extensive use of the mark had been demonstrated by the Opponent the Hearing Officer should have gone on to find that there was a material 'link' for the purposes of Section 5(3) of the 1994 Act;
 - (3) The Hearing Officer wrongly accepted or appears to have accepted the Applicant's evidence with regard to the Applicant's selection of the mark PYDREX;
 - (4) The Hearing Officer should have concluded that the only credible reason why the applicant adopted the mark PYDREX was to obtain the material benefit from using a mark so similar to that of the Opponent; and
 - (5) The Hearing Officer should not have found under either Section 5(3) of Section 5(4)(a) of the 1994 Act that the respective goods and services were '*too disparate*' submitting that the gap between the Opponent's goods and the goods and services specified in the application could easily be bridged such that the Opposition on both grounds should have been upheld.
19. On 22 May 2018 the Applicant filed a Respondent's Notice. Although headed a Respondent's Notice the document did not set out additional or alternative reasons as to why the decision below should be upheld but rather set out the Applicant's answer to the points made in the Grounds of Appeal.
20. After notification of the listing of the hearing of the Appeal pursuant to Section 76 of the 1994 Act the Applicant's representatives indicated that they would not be attending the hearing of the appeal. In lieu of attendance it was requested that the contents of the Respondent's Notice and the case law referred to in that document be taken into account which I have done.

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21. Mr Chris McLeod of Elkington and Fife LLP filed written submissions and appeared at the hearing of the appeal, as he did below, on behalf of the Opponent.

Standard of review

22. An appeal against decisions taken by the Registrar is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that she has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is 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. See Reef Trade Mark [2003] RPC 5; BUD Trade Mark [2003] RPC 25; and more recently the decision of Geoffrey Hobbs Q.C. sitting as the Appointed Person in ALTI Trade Mark (O-169-16) at paragraphs [19] to [20]; the decision of Daniel Alexander Q.C. sitting as the Appointed Person in Talk for Learning Trade Mark (O-017-17) referred to by Arnold J. in Apple Inc. v. Arcadia Trading Ltd [2017] EWHC 440 (Ch); and the judgment of Daniel Alexander Q.C. sitting as a Deputy Judge in the High Court in Abanka D.D. v. Abanca Corporación Bancaria S.A. [2017] EWHC 2428 (Ch).
23. Moreover where the decision below involves the making of a value judgment the decision maker on appeal must be especially cautious about interfering with that judgment on appeal: see most recently Lewison LJ in A P Racing Limited v. Alcon Components Limited [2018] EWCA Civ 1420 at paragraph [33].
24. It is necessary to bear these principles in mind on this appeal.

Decision

25. As a preliminary observation, as noted in paragraph 12(3) above, the Hearing Officer indicated at paragraph [10] of the Decision that her decision would focus on the reputation and goodwill in respect of the goods in Class 21 as she considered that the goods in Class 9 would not materially improve the position. I consider that the Hearing Officer was right to adopt this course in the circumstances of the present case not least because in respect of the Class 21 goods the relevant average consumer would be the same as for the contested services namely the general public.
26. The first point that is made on behalf of the Opponent is that the Hearing Officer should not have held that the Opponent's reputation was limited to 'glassware' but should have found a reputation in relation to '*in essence cookware*'.
27. The Hearing Officer did not summarise the evidence of use that had been filed on behalf of the Opponent in support of (1) the requirement to demonstrate use for the purposes of Section 6A of the 1994 Act; (2) to establish a reputation for the purposes of Section 5(3); and (3) to establish goodwill for the purposes of a claim for passing

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off pursuant to Section 5(4)(a). This was on the basis as she stated in paragraph [10] of her Decision that it was not necessary as she accepted *‘that PYREX has a significant reputation and goodwill in respect of glassware. Particularly that for domestic use as contained in Class 21’*.

28. The evidence of use relied upon by the Opponent in support of the Opposition was in the form of two witness statements one from Didier Le Tirant on behalf the exclusive licensee of the PYREX trade mark in relation to *‘cookware’* and the other in the form of a witness statement from Andrew Davies on behalf of the exclusive licensee for laboratory glassware. For the purposes of this Ground of Appeal I will refer only to the evidence of use directed to *‘cookware’*.
29. The witness statement of Didier Le Tirant states that she is the Group Chief Financial Officer of International Cookware SAS and a director of International Cookware Limited. The evidence goes on to state at paragraph 2 that *‘The relationship between the opponent and my company is that my company is the exclusive licensee of the PYREX trade mark in relation to cookware (the “cookware licence”). The cookware licence is current and has been in place since 1994’*. At paragraph 5 of the statement it is confirmed that the cookware licence is in respect of the Class 21 goods only. The licence is not exhibited to the witness statement nor is there any explanation in the witness statement as to which goods specified in Class 21 of the EUTM are encompassed the term *‘cookware’*.
30. The statement refers to the evidence being directed to goods in Class 21 but there is no breakdown in the body of the statement relating to the different goods identified in Class 21. There is no breakdown of turnover or the advertising figures or any explanation as to when the different goods within Class 21 were first put on the market under the mark.
31. There were, however, exhibits to the witness statement which provide further detail of the goods sold and supplied under the mark PYREX. For example DT1 contains a 2016 catalogue showing a wide range of different glassware but also metal bakeware and ovenware, ceramic bowls and ovenware, cast iron casseroles, aluminium and stainless steel pans; and DT3 contains examples of advertisements under the mark PYREX for a similar range of goods from 2008 to 2016.
32. In addition I also note:
 - (1) In Exhibit DLT4 is a print out of a page from the exclusive licensee’s website which under a heading *‘100 years of Pyrex’* states (emphasis added) *‘Born in 1915 into a family with a shared enthusiasm **for new glass applications**, PYREX has always anticipated family expectations and changes. Over the years PYREX has offered families new ideas to help prepare cook and serve at the table’*; and

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- (2) Attached to the submissions dated 18 July 2018 filed on behalf of the Opponent marked Exhibit CJM1 was an extract from the online Cambridge English Dictionary which for the entry for 'Pyrex' states as follows (emphasis added) '**a brand name for a type of glass** that does not break when it is heated, used for making containers for cooking'.
33. In considering the approach of the Hearing Officer it seems to me that, whilst this was not a point that was relied upon either by the Opponent or the Applicant on this appeal, she made a distinct procedural error in not making an express finding for the purposes of Section 6A of the 1994 Act. Had she done so it is likely that she would have summarised the evidence in the usual way and that her reasons for then accepting '*that PYREX has a significant reputation and goodwill in respect of glassware. Particularly that for domestic use as contained in Class 21*' would have been clearer.
34. Having said that I do not believe in the present case this is an operative error. That is because the Grounds of Opposition were Section 5(3) and Section 5(4)(a) on the basis of the law of passing off. Both those sections of the 1994 Act required the Opponent to establish something more than use – they required proof a reputation and goodwill. Such a finding necessarily includes a finding of use of the relevant goods or services.
35. Turning back to the real point in issue under this ground of appeal, in my view on the basis of the materials that were before her, as I have summarised above, it was open to the Hearing Officer to find that '*that PYREX has a significant reputation and goodwill in respect of glassware. Particularly that for domestic use as contained in Class 21*' and that '*in respect of at least domestic glassware . . . PYREX is a household name*'.
36. The next ground of appeal of appeal is put forward on the basis that having found a high degree of similarity between the marks and having found that the mark has a significant reputation the Hearing Officer should have gone on to find the necessary 'link' required under Section 5(3) of the 1994 Act.
37. The assessment of whether the public will make the required mental 'link' between the marks must take into account all relevant factors i.e. it is a multi-factorial assessment. Those factors were correctly set out by the Hearing Officer in paragraph [13] of the her Decision on the basis of the judgment of the CJEU in Case C-252/07 Intel Corporation Inc v. CPM United Kingdom Limited. The similarity of the marks and the strength of the reputation referred to by the Opponent are simply two of the factors.
38. In the present case in relation to the Intel factors the unchallenged findings of the Hearing Officer are:

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- (1) The degree of similarity between the conflicting marks: The marks are highly similar visually and aurally (paragraph [20] of the Decision);
 - (2) The strength of the earlier mark's reputation: The strength of the PYREX mark in relation to glassware was significant and strong (paragraphs [10], [21] and [23] of the Decision); and
 - (3) The degree of the earlier mark's distinctive character, whether inherent or acquired through use: The mark PYREX being an invented word has a good deal of inherent distinctive character which has been enhanced by the use made of it (paragraph [21] of the Decision).
39. What is said on appeal is that in the light of those findings the Hearing Officer should have gone on to have find a 'link'. However this ignores the fact that there is a further Intel factor that must be taken into account namely the nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public.
40. With regard to the degree of closeness of the goods and services in issue the Hearing Officer dealt with the issue briefly. Having set out the respective specifications she concluded that the contested goods and services were far removed from those for which PYREX had a reputation that is to say glassware. In other parts of her decision the Hearing Officer refers to the contested goods and services as being '*too disparate*' and there being a '*vast difference*' between them.
41. In relation to the pleaded position before the Hearing Officer as to the similarity or dissimilarity of the goods and services I note that: (1) the Notice of Opposition was silent on the issue; (2) the Applicant made it clear in its Counterstatement that its position regarding the goods and services the subject of the application to be dissimilar to those the subject of the earlier rights of the Opponent; (3) no evidence was served by the Opponent to suggest that the goods and services the subject of the application were anything other than dissimilar; and (4) unsurprisingly in such circumstances no evidence on this issue was put forward on behalf of the Applicant.
42. On this appeal the Opponent did not submit that the goods and or services were not dissimilar. It relied upon general assertions, without specifically identifying where it is that the Hearing Officer went wrong as a matter of principle, with regard to her findings as to the degree of closeness (or in this case the degree of disparity) between the goods and services in issue. In the circumstances, it seems to me on the basis of the specifications that were before her it was open to the Hearing Officer to make the findings that she did with regard to the degree of dissimilarity of the goods and services in issue from glassware.

43. However that is not the end of the matter. Having made the various findings with respect to the factors to be considered it was then necessary for the Hearing Officer to then go on to make a global assessment on the basis of those findings with a view to reaching a conclusion as to whether or not a 'link' had been established. In paragraph [23] of the Decision the Hearing Officer having referred to the findings that she had made with regard to the Intel factors concluded it was '*highly unlikely that a link would be established*'.
44. On this appeal the Opponent, in essence, relies on the exceptional degree of reputation of the PYREX mark (in particular the fact that the PYREX mark had been in use for 100 years) and the similarity of the marks in suit to call into question the Hearing Officer's assessment that a 'link' had not been established. However, as noted above, this argument is to ignore the question of the closeness or otherwise of the goods and services in issue as a factor in the global assessment of the 'link'. If taken to its logical conclusion the Opponent's position would result in a decision taker being required to find that a 'link' had been established where registration was sought in respect of any of the goods or services contained in the Nice international classification system in circumstances such as in the present case. This could result in a vast and illegitimate trade monopoly.
45. In the present case, there is no doubt that the Hearing Officer had in mind all the relevant Intel factors. Moreover there was no additional evidence before her on behalf of the Opponent to support the contention that a 'link' might be made between such goods and services. Examples of such evidence from other cases include evidence to show either within a particular industry or where the opponent itself has engaged in brand extension activities such that even where the goods and/or services are dissimilar that the average consumer might make the relevant 'link'. In the circumstances it seems to me that the Hearing Officer was entitled to reach the conclusion that she did.
46. Further in this connection I do not consider that general statements, that some of the specified services, for example educational services in Class 41, could cover educational services relating to glassware, are of assistance to the Opponent on the facts of this case i.e. in circumstances where (1) the marks are similar and not identical; (2) other than by way of a single example no specific submissions by reference to each of the services in the application have been made; and (3) there is no evidence on the issue. In the circumstances, I do not regard this submission as sufficient to displace the finding of the Hearing Officer that the goods and services are '*too disparate*' with a finding that the '*gap between the [Opponent's] goods and the goods and services of the application can easily be bridged*'.

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47. In any event, despite her finding that it was '*highly unlikely that a link would be established*' the Hearing Officer went on to find that even if a link were established it was difficult to see how it would have any consequence.
48. Again, the Opponent, in essence, relied on the exceptional degree of reputation of the PYREX mark, the fact that the PYREX mark had been in use for 100 years and the similarity of the marks in suit to call into question the Hearing Officer's assessment that it was difficult to see how a change of customer allegiance could occur.
49. As noted above, the sole consequence relied upon by the Opponent under its Section 5(3) Ground of Opposition was that the use of the contested mark would be detrimental to the distinctive character of the mark. As the Hearing Officer pointed out in paragraph [27] of her Decision there was **no** evidence before her from which it could reasonably have been inferred that the use of the contested mark would make any difference to the economic behaviour of the consumers or potential consumers of the Opponent's glassware. Consequently, in my view, the Hearing Officer was correct to conclude that even if there was a 'link' it was inoperative in the present case.
50. The Opponent also criticises the Hearing Officer's decision on the basis that:
 - (1) The Hearing Officer wrongly accepted or appears to have accepted the Applicant's evidence with regard to the Applicant's selection of the mark PYDREX;
 - (2) The Hearing Officer should have concluded that the only credible reason why the Applicant adopted the mark PYDREX was to obtain the material benefit from using a mark so similar to that of the Opponent.
51. These Grounds of Appeal can be dealt with quite shortly. First, the Hearing Officer did not make any explicit findings in her Decision with regard to the adoption of the mark PYDREX by the Applicant. In the light of her other findings it was not a matter that of necessity arose for consideration.
52. Second, it is difficult to see the relevance of this point given that firstly the Opponent made clear to the Hearing Officer and confirmed before me that '*there is no unfair advantage aspect to his opposition (nor indeed any strand over and above detriment to distinctive character)*'; and secondly no evidence in relation to this issue had at any stage been put forward on behalf of the Applicant.
53. Third, even if the question of the reason why the Applicant had adopted the mark was relevant to the decision that the Hearing Officer had to make the evidence given in the Witness Statement of Andrew Powell as to how he came up with the name PYDREX is clear. In paragraph 3 of his witness statement he states as follows:

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I came up with the name PYDREX to identify streaming services that I am currently offering inspired by gaming in my childhood. This name I have used and associated with my online profile and alias since about 6 or 7 years ago. Of which I now have many accounts and only aliases on the web in this name. The name was originally formed off a friend's name of which (sic) was Xydrox and my adaptation way Pydrex, unaware of the brand "PYREX" considering I would have only be (sic) 15/16 years of age and uninterested in glassware as "PYREX" is.

54. I understand that the Hearing Officer was invited at the hearing below, as I was at the hearing of the appeal, to disbelieve this evidence on the basis that the mark PYREX is so famous that the mark PYDREX could **only** have been selected by the Opponent in order to obtain a material benefit. That submission was made in circumstances where the evidence in paragraph 3 of Andrew Powell's statement had not been challenged by the Opponent either by way of evidence in reply or by any application for cross-examination. Even had the decision making process behind the choice of name been relevant to any of the issues that were before the Hearing Officer in the present case, given her other findings on the materials before her and the stated position of the Opponent that there was '*no unfair advantage aspect to the opposition*', it would not in my view have been appropriate for her to disbelieve the unchallenged evidence of Mr Powell. Moreover, I do not consider that the Applicant's social media activity relating to the present proceedings in any way detracts from the evidence given in his witness statement.
55. Finally, I turn to consider the position under Section 5(4)(a) of the 1994 Act. Quite correctly there was no suggestion on this appeal that the Hearing Officer had erred in the way in which she had set out the relevant legal principles to be applied. Instead, Grounds of Appeal were raised in respect of the decision under Section 5(4)(a) which essentially mirrored those under Section 5(3) of the 1994 Act.
56. For the reasons set out above, in my view the difference between glassware and the contested goods and services were such that it is highly unlikely that the Opponent's customers or potential customers would expect or assume that the Opponent is responsible in any way for the quality of the Applicant's goods or services. This is all the more the case in circumstances where there is **no** evidence at all to the contrary. Nor was there any evidence of damage or the likelihood of damage. In the premises it seems to me that it was open to the Hearing Officer to reject the Ground of Opposition under Section 5(4)(a) for the reasons that she gave.

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Conclusion

57. On the basis of my findings set out above it does not seem to me that there is any error of principle or material error in the Hearing Officer's decision. It was in my view open to the Hearing Officer to make the decision that she did. In the result the appeal fails.

58. Neither side has asked for a special order as to costs. I direct that the Opponent to pay to the Applicant the sum of £500 as a contribution to its costs of the unsuccessful appeal. That sum is to be paid within 14 days of this decision. It is payable in addition to the sum of £1500 awarded by the Hearing Officer in respect of the proceedings at first instance.

Emma Himsworth QC

2 July 2018