

O-449-16

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION No. 3069768

A DOG IS FOR LIFE NOT JUST FOR CHRISTMAS

IN THE NAME OF DOGS TRUST

DECISION

1. This appeal concerns an application dated 22 August 2014 made by the Appellant and Applicant, Dogs Trust (“the Trust”), to register A DOG IS FOR LIFE NOT JUST FOR CHRISTMAS (the “Mark”) for a range of goods and services in Classes 3, 14, 18, 20, 21, 25, 28, 31, 29, 41, 42 and 43 (listed in the annex to this decision). The Trust is a registered charity (Charity No 227523), which was originally called the National Canine Defence League (NCDL).
2. The Trust already has various registered marks incorporating some or all of the wording in the Mark. In 1997 the Trust became the registered proprietor of two UK trade marks for A DOG IS FOR LIFE (2041757 and 2107302 for charitable services in Classes 36 and 42 respectively). On 21 December 2001 the Trust obtained registration of A DOG IS FOR LIFE NOT JUST FOR CHRISTMAS for a range of goods and services in Classes 16, 36, 42, 44 and 45. So the issue in the present case is whether it is entitled to a registration for the same Mark for different goods and services.
3. An objection to the present application under s. 3(1)(b) of the 1994 Act was raised by the IPO by letter dated 15 September 2014, on the basis that the Mark was said to be devoid of distinctive character. In the course of the correspondence with the IPO summarised in paragraphs 3 to 13 of the Decision, the Trust filed evidence in the form of two Statutory Declarations of Ms Clarissa Baldwin dated 25 June 2001 and 31 October 2014 and a Witness Statement of Mr Adrian Jeremy Burder dated 26 March 2015. This evidence is summarised in §§15 to 83 of the decision under appeal. No substantive criticism was made of this summary.
4. Following a hearing on 6 July 2015, the Hearing Officer, Mr Edward Smith, refused the application for the Mark in its entirety, for the reasons given in his Decision dated 2 March 2016. In summary, he held that:

- (a) the Mark was prima facie objectionable under s. 3(1)(b) for all of the goods and services applied for (§§95 to 113); and
 - (b) the Mark had not acquired distinctive character for any of the goods and services applied for (§§114 to 130).
5. The Trust appeals against both of these findings in this appeal.

Standard of Review

6. The approach to an appeal from a decision of one of the IPO's Hearing Officers is well established. To succeed in an appeal the Applicant needs to identify an error of principle or misdirection of the law.
7. Appeals that concern alleged errors about the assessment of a concept as complex as distinctiveness are inevitably going to be evaluative and nuanced. In the absence of an error of principle the Court should be reluctant to interfere with decisions of this sort. See in this regard, Jacob LJ in *Phones4u Ltd v Phone4u.co.uk Internet Limited* [2007] RPC 5 at [28]:

“I remind myself of the position of the Court of Appeal concerning both questions of fact and value judgments. It will not interfere with findings of primary fact unless they are shown to be wrong (CPR 52.11(3)(a)). Nor will it interfere with a value judgment based on “the application of a not altogether precise legal standard to a combination of features of varying importance” unless there has been an error of principle per Lord Hoffmann in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 W.L.R. 2416 at p.2423.”

8. The Applicant referred me to the observations of Lord Neuberger PSC in *Re B (a child) (Care Order Proceedings)* [2013] UKSC 33 at paragraphs 93 and 94, which have been adopted in a number of recent decisions of the Appointed Person:

“[93] There is a danger in over-analysis, but I would add this. An appellate judge may conclude that the trial judge's conclusion on proportionality was (i) the only possible view, (ii) a view which she considers was right, (iii) a view on which she has doubts, but on balance considers was right, (iv) a view which she cannot say was right or wrong, (v) a view on which she has doubts, but on balance considers was wrong, (vi) a view which she considers was wrong, or (vii) a view which is unsupportable. The appeal must be dismissed if the appellate judge's view is in category (i) to (iv) and allowed if it is in category (vi) or (vii).

[94] As to category (iv), there will be a number of cases where an appellate court may think that there is no right answer, in the sense that reasonable judges could differ in their conclusions. As with many evaluative assessments, cases raising an issue on proportionality will include those where the answer is in a grey area, as well as those where the answer is in a black or a white area. An appellate court is much less likely to conclude that category (iv) applies in cases where the trial judge's decision was not based on his assessment of the witnesses' reliability or likely future conduct. So far as category (v) is concerned, the appellate judge should think very carefully about the benefit the trial judge had in seeing the witnesses and hearing the evidence, which are factors whose significance depends on the particular case. However, if, after such anxious consideration, an appellate judge adheres to her view that the trial judge's decision was wrong, then I think that she should allow the appeal."

9. The Applicant emphasised that I must allow the appeal if I consider that the first instance tribunal's view was "wrong" (Lord Neuberger's category (vi)). An appeal should also be allowed if the appellate judge has doubts, but on balance considers the first instance tribunal's view to be wrong (category (v)), subject to giving weight to any benefit that the first instance tribunal had in seeing any witnesses and hearing evidence. This will rarely be a factor in proceedings in the Intellectual Property Office. However, I consider that it is also relevant to take into account the experience of the first instance tribunal under this heading. This is supported by the observations of Walker LJ in *REEF Trade Mark* [2003] R.P.C. 5 at §§26-28 (emphasis added):

"26 How reluctant should an appellate court be to interfere with the trial judge's evaluation of, and conclusion on, the primary facts? As Hoffmann L.J. made clear in *Grayan* there is no single standard which is appropriate to every case. The most important variables include the nature of the evaluation required, **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.

27 It is worth noting that *Biogen* was a case very close to the top end of the scale. It involved very complex biotechnology which was the subject of a lot of expert evidence given at a lengthy trial before a very experienced judge of the Patents Court. In the circumstances Lord Hoffmann's memorable reference to Renan was not (if I may respectfully say so) out of place. There are far fewer nuances to be picked up from a bundle of statutory declarations which contain a good deal of irrelevant or tendentious material and on which there is no cross-examination.

28 In this case the hearing officer had to make what he himself referred to as a multi-factorial comparison, evaluating similarity of marks, similarity of goods and other factors in order to reach conclusions about likelihood of confusion and the outcome of a notional passing-off claim. **It is not suggested that he was not experienced in this field, and there is nothing in the Civil Procedure Rules to diminish the degree of respect which has traditionally been shown to a hearing officer's specialised experience.** (It is interesting to compare the observations made by Lord Radcliffe in *Edwards v Bairstow* [1956] A.C. 14 at pp.38–39, about the general commissioners, a tribunal with a specialised function but often little specialised training.) On the other hand the hearing officer did not hear any oral evidence. **In such circumstances an appellate court should in my view 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.”**

10. Note also the statement that an appellate court should also not “... *treat a judgment or written decision as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed.*” (Reef §29).

Section 3(1)(b): inherent distinctiveness

11. The relevant part of the decision dealing with the objection under s.3(1)(b) is at §§95-113 of the present case. The Hearing Officer first referred to the essential function of a trade mark as an indicator of origin by reference to Case C-329/02P ‘SAT.1’ *Satelliten Fernsehen GmbH v OHIM* at §97. He then went on to explain the test for distinctiveness under s.3(1)(b) by reference to §34 of Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (‘Postkantoor’) at §99. At §101 he emphasised the role of the Registrar in preventing the grant of undue monopolies. None of these principles was, rightly, challenged by the Applicant on this appeal.
12. At §102 the Hearing Officer reminded himself that he needed to examine all the goods and services applied for individually to check if they were free of objection.
13. He then went on to summarise the approach to the assessment of inherent distinctiveness in cases such as the present by reference to the decision of Geoffrey Hobbs QC sitting as the Appointed Person in “*Cycling Is ...*” *Trade Mark Applications* [2002] R.P.C. 37 which had been cited to him by the Applicant. The Hearing Officer referred in particular to §69 of that decision, but see also the following additional paragraphs (emphasis added):

“53 It thus appears to be legitimate, when assessing whether a sign is sufficiently distinctive to qualify for registration, to consider **whether it can indeed be**

presumed that independent use of the same sign by different suppliers of goods or services of the kind specified in the application for registration would be likely to cause the relevant class of persons or at least a significant proportion thereof, to believe that the goods or services on offer to them came from the same undertaking or economically-linked undertakings.

...

60 When assessing the capacity of the sign in question to identify the relevant goods or services as coming from a particular undertaking and thus to distinguish them from those of other undertakings, account should be taken of the inherent characteristics of the sign including the fact that it does or does not contain an element descriptive of the relevant goods or services: *Lloyd Schuhfabrik, paragraphs 22 and 23.*

...

67 The case for allowing registration rests upon the proposition that the signs are cryptic to a degree which makes it more likely than not that they would carry connotations of trade origin (**whatever other connotations they might also carry**) in the minds of the relevant class of persons or at least a significant proportion thereof.

68 The case for refusing registration rests upon the proposition that the signs are visually and linguistically meaningful in a way which is more likely than not to relate the goods and services to the activity of cycling **without also serving to identify trade origin** in the minds of the relevant class of persons.

69 **The difference between these two positions resides in the question whether the perceptions and recollections the signs would trigger in the mind of the average consumer of the specified goods and services would be origin specific or origin neutral.**

14. On this basis the tribunal must analyse whether the mark would be seen as being an origin specific sign or as origin neutral. Upon careful reading it can be seen that these two positions are not strict alternatives – note the reference in §68 to the fact that the sign must not “*also*” serve to identify trade origin. In other words, to refuse registration a sign must be *only* origin neutral. Care must therefore be taken not to treat this test as requiring a binary decision, which §69 of the case in isolation might be thought to suggest.
15. The Hearing Officer went on to apply his understanding of this test to the Mark in the present case in §§106-113 of the Decision. In §106 he recorded that the relevant consumer was a member of the general public, as the Applicant had conceded. He also recorded that the relevant consumer was “reasonably circumspect”. One element of the Applicant’s appeal suggested that he fell into error here because he

should have referred to the relevant consumer as being “reasonably well-informed and reasonably observant and circumspect”. I do not think there is anything in this – the Hearing Officer was using a convenient shorthand and there is no basis to suggest that he had mischaracterised the attributes of the relevant consumer in any material way.

16. In §108 the Hearing Officer referred to the labels “promotional” and “inspirational” and explained why he preferred not use them as they could be misleading. I think he was right to do so for the reasons he gave and on this appeal the Applicant agreed. The Hearing Officer also correctly recorded that “[a]s the case law rightly states, marks that are promotional or inspirational, even those that are unoriginal can function as trade marks and be registered accordingly.”
17. In §109 the Hearing Officer instead characterised the Mark as “*comprising a grammatically correct, narrative exhortation towards responsible dog ownership and responsible dog-giving*”. I will return to this finding below and the crucial issue of whether this is all it does. He recorded that “*the mark carries a punchy and effective narrative message; the tone is admonishing if not censorious*”.
18. He then considered the goods and services in §§110-111 in accordance with the guidance in the authorities, and concluded that all of them were capable of bearing a message such as the Mark in normal and fair use. However, as he pointed out at the end of §111, that does not mean that the mark would necessarily perform the essential function of a trade mark to guarantee the origin of such goods or services.
19. His findings on the main issue of inherent distinctiveness are recorded in §112 where he acknowledged that there is a degree of mental effort required to unpack the message, but that in his view this was not enough “*to convert the narrative into what would, in normal use and given a normal contextual understanding on the part of the relevant consumer in relation to the goods and services, result in a mark which conveys origin.*” He therefore held that that the perceptions and recollections amongst consumers would be ‘origin neutral’ in relation to all the goods and services, and that the prima facie objection of lack of distinctiveness would be upheld.

The Applicant’s Appeal on inherent distinctiveness

20. There are two main strands to the Applicant’s Appeal. The main attack on the decision of the Hearing Officer was that he failed to consider and apply the relevant case-law, and in particular *Audi AG v OHIM* (Case C-398/08 P). The Applicant also

contended that the Hearing Officer did not pay sufficient regard to the goods and services applied for.

21. As for the *Audi* point, the Applicant criticised the Hearing Officer for not referring to the case in his consideration of the relevant law, notwithstanding that it had been cited to the Hearing Officer during the course of the Applicant's written submissions.
22. I do not consider that the Hearing Officer's failure to refer to the case in the relevant part of the judgment is alone sufficient to allow me to conclude that he fell into error. Indeed, the Hearing Officer expressly referred to the *Audi* case earlier in his decision, and as being "well-known" when he recorded in §9 that the Applicant had argued before the examiner in the following terms:
 9. The applicant said, in reliance on the well-known *Audi AG v OHIM* (Case C-398/08 P) (*'Audi'*) case, that signs can send objective messages and still function as trade marks. Applying that guidance, the examiner ought to have considered the impact of the sign in relation to the specific goods and services. In that regard, and for example, goods such as bags or figurines are not linked in any way to responsible dog ownership. Specifically, the applicant cited goods of classes 3, 18, 20, 31, 41 and 43 as comprising goods or services in respect of which the sign would not be 'promotional' or 'inspirational' and, to make any kind of link with those goods would require, what was termed an 'additional mental step'. This additional mental step would mean that the consumer would not immediately perceive the sign as being devoid of distinctive character. Likewise, as regards certain services, such as 'research in the field of animal and pet welfare' or even 'boarding kennels', the applicant submitted, similarly, would not involve responsible dog ownership, *per se*.
23. For this reason I do not think it is possible to say that the Hearing Officer did not have the *Audi* case in mind when he made his decision. As Lord Hoffmann observed in the well-known passage from *Biogen v Medeva* [1997] RPC 1, the expressed findings of a judge "*are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la vérité est dans une nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation*". See also the quote from §29 of *Reef* above.
24. The more important question is not whether the Hearing Officer name-checked the *Audi* case in the relevant section of the judgment, but whether he complied with the guidance set out by the CJEU contained within it. To ascertain that it is necessary to examine in more detail what the *Audi* case decided.

The Decision in *Audi*

25. The CJEU's decision in *Audi* was an appeal from the General Court (not a reference). The General Court had upheld the Board of Appeal's decision to refuse registration of "Vorsprung durch Technik" (meaning *advance or advantage through technology*) in respect of all the goods and services applied for, except for vehicles and related goods in Class 12: an earlier registration was held to constitute proof of acquired distinctive character in respect of those goods.
26. In the operative part of the decision, the Court discussed the requirement for a trade mark to possess distinctive character and emphasised its essential function, namely that it must serve to identify the goods in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish those goods from those of other undertakings (§33). It noted that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the relevant public's perception of the mark (§34).
27. It explained that marks that are also used as advertising slogans were still registrable and that stricter criteria should not be applied to the registration of such marks (§§35-36). However it noted in §37 that whilst the criteria are the same:

"it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories."
28. Further it expressly acknowledged in §38 that it was legitimate to take into account the difficulties in establishing distinctiveness which may be associated with word marks consisting of advertising slogans because of their very nature, but that overall the same criterion must be applied. Thus it reminded readers in §39 that an advertising slogan cannot be required to display 'imaginativeness' or even 'conceptual tension which would create surprise and so make a striking impression' in order to have the minimal level of distinctiveness required (see *OHIM v Erpo Möbelwerk*, paragraphs 31 and 32; see also Case C-392/02 P *SAT.1 v OHIM*[2004] ECR I-8317, paragraph 41).
29. It then went on to find that the General Court had not applied these principles to the case at hand, and reversed the decision to refuse the mark. In particular, it emphasised that the mere fact that a mark is perceived by the relevant public as a

promotional formula, and that, because of its laudatory nature, it could in principle be used by other undertakings, is not sufficient, in itself, to support the conclusion that that mark is devoid of distinctive character (§44). It went on to explain in §45 (emphasis added):

45 On that point, it should be noted that the laudatory connotation of a word mark does not mean that it cannot be appropriate for the purposes of guaranteeing to consumers the origin of the goods or services which it covers. Thus, such a mark can be perceived by the relevant public **both as a promotional formula and as an indication of the commercial origin of goods or services**. It follows that, in so far as the public perceives the mark as an indication of that origin, **the fact that the mark is at the same time understood – perhaps even primarily understood – as a promotional formula has no bearing on its distinctive character**.

30. It also held in §47 that the fact that a statement can have a number of meanings, or constitute a play on words or be perceived as imaginative, surprising and unexpected and, in that way, be easily remembered, was not a necessary condition for establishing that an advertising slogan has distinctive character, but that the presence of those characteristics is likely to endow that mark with distinctive character.

31. In applying the law to the facts of the case before it, the Court explained at §57 (emphasis added):

“advertising slogans can express an objective message, even a simple one, and still be capable of indicating to the consumer the commercial origin of the goods or services in question. That can be the position, in particular, **where those marks are not merely an ordinary advertising message, but possess a certain originality or resonance, requiring at least some interpretation by the relevant public, or setting off a cognitive process in the minds of that public**”.

32. The Court held in §59 on the facts that the words ‘Vorsprung durch Technik’ suggest, at first glance, only a causal link and accordingly require a measure of interpretation on the part of the public. Furthermore, that slogan exhibits a certain originality and resonance which makes it easy to remember. It also referred to the longstanding use by Audi of the mark over a number of years (although the relevance of this to any objection under Article 7(1)(b) of Regulation No 40/94 is not immediately clear). In consequence it annulled the decision of the General Court to refuse the mark.

The Trust's criticisms of the Hearing Officer

33. The Trust submitted that the Hearing Officer had fallen into the same error as the General Court in the present case. In particular it pointed to his determination in §112 that the Mark was “origin neutral” as being expressly premised upon his analysis of the mark in §109 as a “*a grammatically correct, narrative exhortation towards responsible dog ownership and responsible dog-giving*” (whether or not that is a “promotional” or “inspirational” message or a “slogan”).
34. It submitted that the Hearing Officer failed to recognise that a mark can be perceived by the relevant public both as a formula containing an objective message and as an indication of the commercial origin of goods or services. It illustrated that alleged error by pointing to the Hearing Officer’s apparent requirement for the narrative to be “convert[ed]” into a mark conveying origin in §112. On the Trust’s analysis, it need not be “converted” from one to the other: it can be both.
35. Further the Trust submitted that the Mark in the present case exhibited considerable originality and resonance, and required a measure of interpretation. It suggested that:
- (a) “for life” typically refers to the life of the owner (e.g. guaranteed for life), whereas in the Mark it refers to the life of the dog;
 - (b) “for Christmas” normally refers to purpose, not duration (e.g. a gift for Christmas);
 - (c) the juxtaposition of the two parts of the Mark originally and cleverly contrasts the commitment to the dog for its entire life with the transience of Christmas gifts.
36. Overall it submitted that since, “*as a rule, the presence of [such] characteristics is likely to endow [a] mark with distinctive character*” (Audi at §47), the Mark is amply possessed of distinctive character in the present case: more so than the relatively banal term “advantage through technology”; and more than enough to have the minimal level of distinctiveness required under s. 3(1)(b) (cf Audi at §39).

Analysis

37. I confess that I have not found this an easy decision to reach and it has caused me what Lord Neuberger termed some “anxious consideration”. In particular I have been troubled by the fact that the assessment of distinctiveness is inevitably going

to be evaluative and nuanced and so an error of principle must be identified. Further I have given due weight to the standing and experience of the fact-finding tribunal.

38. However in the end I have come to the conclusion that the Hearing Officer did fall into error because it is not clear that he correctly applied the ruling of the CJEU in *Audi*.
39. In particular, I agree with the Trust that the Hearing Officer's use of the word "convert" in §112 is not on its face consistent with the guidance given by the CJEU in *Audi*. The CJEU emphasizes in a number of places that the relevant tribunal must have in mind that a mark can act both as an advertising slogan and as a trade mark at the same time. It is not a case of being one or the other, or it being necessary to convert from slogan to trade mark.
40. I accept that for a mark which would primarily be perceived as an advertising slogan, there must be a threshold which has to be overcome for it also to be capable of acting as a trade mark. Further it may be helpful in the analysis of such marks to consider the relative strength of each to assess the overall effect. However, given that the Hearing Officer did not refer to the *Audi* principles expressly, and only referred to §69 of *Cycling Is ...*, I cannot be sure that in referring to the requirement to "convert" the mark he was not erroneously of the view that the mark could only be either origin specific or origin neutral, when *Audi* (and, I should say, a proper reading of *Cycling Is ...*) makes it clear that a mark can fulfil both functions. I therefore consider that it is open to me to apply the *Audi* principles and reach my own conclusion based on the evidence before the Hearing Officer.
41. As to that, looking at it afresh, I differ from the Hearing Officer in his characterization of the Mark. In particular, I consider that his conclusion that the Mark comprises "a grammatically correct, narrative exhortation towards responsible dog ownership and responsible dog-giving" significantly understates the ingenious and creative nature of the phrase. It is correct that he also recorded that the Mark carries a punchy and effective narrative message, but this appears to ignore the clever and striking elements of the phrase emphasised by the Trust in the submissions I have recorded above. Thus, although the Hearing Officer found that there is a degree of mental effort required to unpack the message, I think he underestimated the true effect of the phrase on the average consumer.
42. As a result I consider that in accordance with §47 of *Audi*, given that I have concluded that the Mark would be perceived as imaginative, (to some extent)

surprising and unexpected and therefore easily remembered, this is likely to endow the Mark with distinctive character.

43. Further I consider that the Hearing Officer failed to give due weight to the evidence of the use of the Mark by others, both authorised and unauthorised, which I consider to be striking and consistent with the submission that the Mark exhibits considerable originality and resonance. The Hearing Officer referred to this evidence at §§82-83 of the Decision but did not return to it when making his assessment, in spite of the fact that he recorded that the authorised uses showed “*widespread recognition and respect of the mark and the applicant*”. The 13 examples included uses by TESCO, ‘A customer is for life, not just for Christmas’, Marks & Spencer, ‘A bag is for life, not just for Christmas’ and The Gloucestershire Historic Churches Trust, ‘A church is forever, not just for Christmas’. The 6 unauthorised uses included by Ann Summers, ‘A rabbit is for life, not just for Christmas’, and Mulberry, ‘A bag is for life, not just for Christmas’.
44. In my view the desire of others to use the Mark, whether authorised or unauthorised, provides strong support for the suggestion by the Trust that the Mark displays a considerable degree of originality.
45. Importantly, such use is clearly not the same sort of use as arose in the *Cycling Is ...* case cited by the Hearing Officer. Where other enterprises might wish to use a mark for descriptive purposes, it is likely that the average consumer would not perceive the mark in the applicant’s hands as denoting trade origin. However where, as here, others wish to use a mark because of (in the words of the Hearing Officer) “*the widespread recognition and respect of the mark and the applicant*” and its catchy and ingenious quality, this is prima facie evidence that the mark is recognisable and distinct and therefore capable of distinguishing the origin of goods and services.
46. As the old adage goes, imitation is the sincerest form of flattery, and I consider that such imitation supports the notion that the Mark is striking and does not amount to a mere origin-neutral narrative. Applying the criteria set out in §57 of *Audi*, I consider that the Mark is not merely an ordinary advertising message, but possesses a certain originality or resonance, requiring at least some interpretation by members of the relevant public, and setting off a cognitive process in the minds of such people.
47. For all these reasons I have come to the conclusion that I must allow the appeal and the Mark should return to the Office for further processing.

48. Although I was not addressed in detail in relation to the different goods and services sought to be covered by the registration by either the Trust or the Registrar, like the Hearing Officer I do not consider that there are sufficient differences between them to conclude that the objection should apply to some goods and services and not others. In particular, in the light of my findings above, I consider that even for the types of goods and services characterised by the Hearing Officer in §84 as concerning responsible dog ownership, e.g. education in the field of animal welfare and boarding kennels, the Mark is capable of being distinctive.

The Applicant's Appeal on acquired distinctiveness

49. In the light of my findings above I shall deal only very briefly with the Applicant's appeal against the finding of lack of acquired distinctiveness.

50. The Hearing Officer addressed the legal principles relating to acquired distinctiveness at §§114-115 and applied this to the evidence at §§116-130. In particular he examined each of the *Windsurfing* yardsticks and the evidence in relation to them.

51. As a result I do not consider that the Trust has identified any material error of law or principle in the Hearing Officer's findings. Indeed, I think the Hearing Officer was perfectly entitled to conclude that the Trust had failed to demonstrate any level of acquired distinctiveness in relation to the goods and services now sought to be registered, not least because there was so little evidence of any use of the Mark in relation to the relevant goods and services prior to the date of application. I decline to interfere with this part of the Hearing Officer's findings.

Costs

52. As is usual in appeals of this nature, I make no order as to costs.

Thomas Mitcheson QC
The Appointed Person
26 September 2016

The Applicant was represented by Guy Hollingworth.

The Registrar was represented by Nathan Abraham.

Annex

Goods and services for which application is made

Class 3

Shampoos for animals, dentifrices for animals.

Class 14

Key fobs.

Class 18

Bags, backpacks, luggage; collars, leads, dog harnesses, muzzles; dog coats; clothing for pets; umbrellas; key fobs; goods made of leather and imitations of leather.

Class 20

Baskets; pet beds; pillows, cushions and pet bedding.

Class 21

Cages and boxes for household pets; combs, brushes and toothbrushes for pets; mugs, cups, glasses, drinking vessels; glassware; tableware; pottery; containers for household use; bottle openers, corkscrews; coasters; feed bowls for animals; litter trays; figurines of glass, porcelain or terracotta.

Class 24

Textiles, bed covers, sofa throws.

Class 25

Clothing, footwear, headgear.

Class 28

Toys for animals; toys, games and playthings; Christmas tree decorations.

Class 31

Food for animals; animal litter; foodstuffs and additives for dogs; edible treats for dogs; dog biscuits and chews.

Class 39

Transportation of animals for animal welfare purposes.

Class 41

Education in the field of animal welfare, dog care and responsible dog ownership; organising competitions and other entertainments in relation to animal and pet welfare.

Class 42

Research in the field of animal and pet welfare.

Class 43

Boarding kennels; provision of long and short-term accommodation for animals; re-housing animals.