

o/929/22

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. UK00003405720 BY  
ZAMIR HUSSAIN**

**AND OPPOSITION THERETO UNDER NO. 417955 BY JATINDER SINGH WASU**

**AND IN THE MATTER OF REGISTRATION NO. UK00003306679 IN THE NAME  
OF JATINDER SINGH WASU**

**AND IN THE MATTER OF AN APPLICATION FOR A DECLARATION OF  
INVALIDATION THERETO UNDER NO. 503011 BY ZAMIR HUSSAIN**

**AND IN THE MATTER OF REGISTRATION NO. UK00003013345 IN THE NAME  
OF JATINDER SINGH WASU**

**AND IN THE MATTER OF AN APPLICATION FOR REVOCATION THERETO  
UNDER NO. 503180 BY ZAMIR HUSSAIN**

**AND IN THE MATTER OF REGISTRATION NO. UK00002190267 IN THE NAME  
OF JATINDER SINGH WASU**

**AND THE MATTER OF AN APPLICATION FOR REVOCATION THERETO  
UNDER NO. 503181 BY ZAMIR HUSSAIN**

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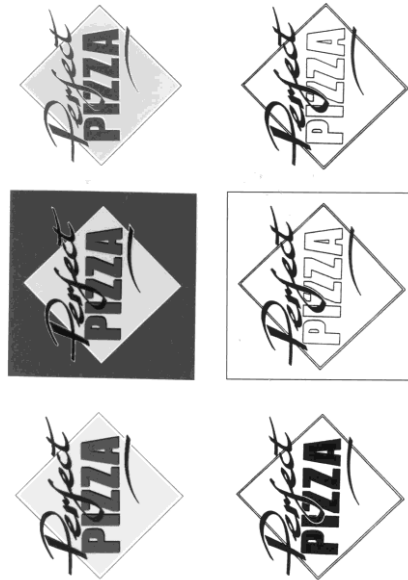
**DECISION**

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**Introduction**

1. This is a Decision on two appeals against the decision of Ms S Wilson, acting on behalf of the Registrar, dated 9 December 2021 (O-891-21). In her Decision the Hearing Officer:
  - (1) Upheld Opposition No 417955 to Trade Mark Application No. UK00003405720 and accordingly refused the application.
  - (2) Upheld the application for invalidity No 50311 of Trade Mark Registration No. UK00003306679 in its entirety.
  - (3) Upheld the application for revocation No 503180 against Trade Mark Registration No. UK00003013345 in its entirety with an effective date of 2 April 2017.
  - (4) Upheld the application for revocation No 503181 against Trade Mark Registration No. UK00002190267 in its entirety with an effective date of 2 April 2017.

- (5) Ordered Mr Jatinder Singh Wasu to pay to Mr Zamir Hussain £1,046 by way of costs.
2. On 10 June 2019, Zamir Hussain (“*Mr Hussain*”) applied to register the following trade mark under UK Trade Mark Application No. UK00003405720 (“*the 720 Mark*”):



3. The mark was applied for with respect to the following goods and services:

Class 30: Preparations made from cereals; Bread; Cakes; Pizza; Preparations made from cereals; Puddings; Sandwiches; Sauces; Pasta; Pies.

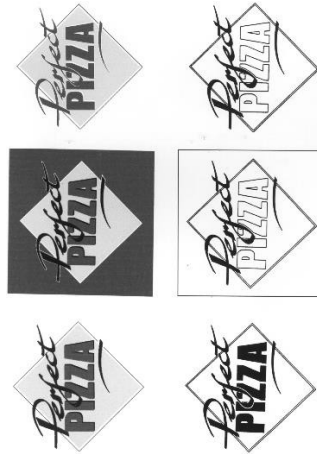
Class 39 Transport and delivery of food and drink; Transport and delivery of goods.

Class 43 Bar services; Catering for the provision of food and drink; Take away food services; Restaurant services; Preparation of food and drink.

4. On 4 October 2019, Jatinder Singh Wasu (“*Mr Wasu*”) opposed the 720 Mark on the basis of section 5(1), 5(2)(b), 5(3), 5(4)(a) and 3(6) of the Trade Marks Act 1994 (“*the 1994 Act*”).
5. For the purposes of the section 5(1) objection Mr Wasu relied upon:
- (1) UK Trade Mark Registration No. 3306679 (series of 3) (“*the 679 Mark*”) which was filed on 26 April 2018 and registered on 31 August 2018 for:



- (2) UK Trade Mark Registration No. 2182923 (“*the 923 Mark*”) which was filed on 25 November 1998 and registered on 30 June 2000 for:



The 923 Mark was cancelled with effect from 1 August 2016 following successful revocation proceedings brought by Mr Hussain (“*the earlier revocation proceedings*”) and therefore in these proceedings could not form a basis for a section 5(1) ground of opposition.

6. For the purposes of the section 5(2)(b) objection Mr Wasu relied upon:

- (1) UK Trade Mark Registration No. 2190267 (“*the 267 Mark*”) filed on 26 February 1999 and registered on 30 January 2004 for the word mark:

**PERFECT PIZZA**

- (2) UK Trade Mark Registration No. 2605544 (series of 3) (“*the 544 Mark*”) filed on 23 November 2011 and registered on 6 July 2012 for:



- (3) UK Trade Mark Registration No. 2605551 (“*the 551 Mark*”) filed on 23 December 2011 and registered on 6 July 2012 for the word mark:

**THE PERFECT PIZZA COMPANY**

- (4) UK Trade Mark Registration No. 3013345 (“*the 345 Mark*”) filed on 10 July 2013 and registered on 21 February 2014 for the word mark:

**PERFECT PIZZA MAKE IT PERFECT**

7. For the purposes of the section 5(3) objection Mr Wasu relied upon the 267 Mark and the 544 Mark. Mr Wasu relied upon some of the good and services for which those marks were registered namely:
- (1) With respect to the 267 Mark: Catering services for the provision of food and drink; restaurant services; take away food services and preparation of food and drink in class 42; and
  - (2) With respect to the 544 Mark: Services for providing food and drink; catering services for the provision of food and drink; restaurant services; pizza restaurant services; café services; take away services; take-away food services; preparation of food and drink in class 43.
8. Mr Wasu claimed that the use of the applied for mark would, without due cause, take advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.
9. For the purposes of the section 5(4)(a) objection Mr Wasu relied upon:
- (1) The sign:



which he claimed to have used throughout the UK since 1998 '*the Perfect Pizza diamond logo*'.

- (3) The sign: PERFECT PIZZA which he claimed to have used throughout the UK since 1998.
- (4) The sign:



which he claimed to have used throughout the UK since 2012 '*The Perfect Pizza Company Sign*'.

10. Mr Wasu claimed to have used all the signs in relation to food and beverage; transport and delivery of food and beverages; take-away food services; restaurant services; preparation of food and drink; catering services for the provision of food and drink.
11. Under section 3(6) Mr Wasu claimed that the 720 Mark had been applied for in bad faith because Mr Hussain was '*a previous franchisee of [Mr Wasu's] predecessor in title, who should have stopped use of the opposed mark once he stopped being a franchisee but failed to do so. He is also aware of [Mr Wasu's] earlier rights*'.
12. Mr Hussain filed a counterstatement denying the claims made and putting Mr Wasu to proof of use of the 267 Mark and 679 Mark.
13. On 3 February 2020, Mr Hussain applied to invalidate the 679 Mark relying on sections 5(4)(a), 3(3)(a) and 3(6) of the 1994 Act.
14. For the purposes of the section 5(4)(a) ground of invalidity Mr Hussain relied upon the following signs:



15. Mr Hussain claimed to have been using these signs throughout the UK since 13 February 2003 in relation to coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; edible ices; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice etc in class 30, transport; packaging and storage of goods; travel arrangement etc in class 39 and services for providing food and drink; temporary accommodation etc in class 43.
16. Under section 3(6) of the 1994 Act Mr Hussain averred that (1) Mr Wasu was aware that there were ongoing revocation proceedings on the grounds of non-use between the parties at the time of filing the application; and (2) that Mr Wasu was aware of Mr Hussain's rights to the applied for mark. Consequently, it was said the application was made in bad faith.
17. On 20 May 2020, Mr Hussain applied to revoke the 345 Mark and 267 Mark on the grounds of non-use pursuant to section 46(1)(b) of the 1994 Act. Mr Hussain relied upon non-use in respect of the 345 and 267 Marks for the following periods:
  - (1) 2 April 2012 to 1 April 2017, claiming an effective date of revocation of 2 April 2017;
  - (2) 23 December 2013 to 22 December 2018, claiming an effective date of revocation of 23 December 2018; and
  - (3) 6 July 2014 to 5 July 2019, claiming an effective date of revocation of 6 July 2019.
18. Mr Wasu filed counterstatements denying the claims made.
19. Both sides filed evidence and submissions in support of their respective positions. No application for cross-examination was made.

20. A hearing took place by video link at which Mr Hussain represented himself (assisted by Mr Abbas) and Mr Wasu was represented by Mr Graham Johnson of Appleyard Lees IP LLP. Both parties filed skeletons of argument.

### **The Hearing Officer's Decision and the Appeals**

21. In her Decision the Hearing Officer:

- (1) Upheld Opposition No 417955 to Trade Mark Application No. UK00003405720 on the basis of section 5(4)(a) on the basis of the Perfect Pizza diamond logo; and section 3(6) of the 1994 Act and accordingly refused the application (paragraphs [144] to [166] of the Decision). This is the subject of an appeal by Mr Hussain.

Mr Wasu has also filed a Respondent's Notice with respect to this appeal in which it is averred that the opposition should also have been upheld under sections 5(2)(b) and section 5(3) of the 1994 Act on the basis of conflict with the earlier marks being the 267 Mark, the 544 Mark and the 551 Mark (paragraphs [100] to [143] of the Decision). In this connection it is to be noted that the Hearing Officer made no determination in the opposition on the basis of the 267 Mark having found that it was liable to be revoked on the basis of non-use.

- (2) Upheld the application for invalidity No 503011 of Trade Mark Registration No. UK00003306679 in its entirety on the basis of section 3(6) of the 1994 Act (paragraphs [61] to [97] of the Decision). The decision on this application for invalidity is not the subject of an appeal.
- (3) Upheld the application for revocation No 503180 against Trade Mark Registration No. UK00003013345 in its entirety with an effective date of 2 April 2017 (paragraphs [32] to [60] of the Decision). The decision on this application for revocation is not the subject of an appeal.
- (4) Upheld the application for revocation No 503181 on the basis of non-use against Trade Mark Registration No. UK00002190267 in its entirety with an effective date of 2 April 2017 (paragraphs [32] to [60] of the Decision). This is the subject of appeal by Mr Wasu.

22. I shall refer to the particular findings of the Hearing Officer as necessary in my Decision below.

### **Appeal against the decision in Opposition No 417944 to Trade Mark Application No. UK00003405720**

23. On 6 January 2022 Mr Hussain filed a TM55P Notice of Appeal against the finding that Trade Mark Application No. UK00003405720 on the basis of section 5(4)(a) and

section 3(6) of the 1994 Act. The Grounds of Appeal relied upon are in summary as follows:

- (1) That the Hearing Officer wrongly assessed the issue of the relationship between the parties and in particular wrongly put weight on a franchise agreement relating to the use of the relevant marks and to which Mr Hussain was not a party. It was further averred that contractual matters were not matters that it was appropriate for the Hearing Officer to determine. Had the Hearing Officer not put the weight she did on the franchise agreement she would not have upheld the section 3(6) objection.
- (2) That the Hearing Officer made an error in the relation to the relevant date for the purposes of the assessment that was to be under section 5(4)(a) of the 1994 Act.
- (3) That the Hearing Officer made an error in principle in assessing the evidence relied upon by Mr Wasu in support of his claim to a protectable goodwill with respect to the Perfect Pizza diamond logo under section 5(4)(a) of the 1994 Act.

24. On 1 February 2022 Mr Wasu's representative served at Respondent's Notice in which it was maintained that:

- (1) The Hearing Officer correctly upheld the opposition for the reasons that she gave.
- (2) The Hearing Officer should also have upheld the Opposition under section 5(4)(a) on the basis of two further signs relied upon for that purpose; and section 3(6) on the basis of Mr Hussain was either bound by or had knowledge of a franchise agreement relating to the use of the signs in issue.
- (3) The Hearing Officer should have considered the issue of whether there was a conflict with the application and the 267 mark under section 5(2)(b) and section 5(3) and upheld the same the 267 mark not being liable to be revoked on the basis of non-use for the reasons set out in the appeal against that part of the decision.
- (4) The Hearing Officer should not have dismissed the Opposition under section 5(2)(b) and section 5(3) grounds on the basis of no conflict with either the 720 Mark or the 544 Mark on the basis that there was an '*error in principle in the assessment and comparison of the marks in suit*'.

Appeal against the decision in the application for revocation No 503181 on the basis of non-use against Trade Mark Registration No. UK00002190267

25. On 6 January 2022 Mr Wasu's representative filed a TM55P Notice of Appeal against the finding that the 267 Mark should be revoked in its entirety on the basis of non-use.

26. The Grounds of Appeal are in summary that had the Hearing Officer correctly applied the established case law to the evidence that were before her she could and should have concluded that the criteria set out in Walton International Ltd v. Anor v. Verweji Fashion BV [2018] EWHC 1608 (Ch) were satisfied. In particular it is said the Hearing Officer erred by failing to take into account use of the word mark PERFECT PIZZA alone or within other marks for example THE PERFECT PIZZA COMPANY. Had the Hearing Officer not erred then the 267 Mark for the mark PERFECT PIZZA would not have been revoked.
27. No Respondent's Notice was filed.

#### Hearing of the Appeal

28. A hearing of the appeals took place by video link at which as below Mr Hussain represented himself (assisted by Mr Abbas) and Mr Wasu was represented by Mr Graham Johnson of Appleyard Lees IP LLP. Both parties filed skeletons of argument.

#### The Standard of Review on Appeal

29. 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 he or 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; and Actavis Group PTC v. ICOS Corporation [2019] UKSC 1671 at [78] to [81].
30. 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 *Actavis* (above) at [80]:

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:  
*Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 14-17 per Clarke LJ, a statement which the House of Lords

approved in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325, para 46 per Lord Mance.

31. In Page UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115] Lewison LJ said:

114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23 [2007] 1 WLR 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58 [2013] 1 WLR 2477 . . .

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

32. This approach was recently reconfirmed by the Court of Appeal in Assetco plc v. Grant Thornton UK LLP (2020) [2020] EWCA Civ 1151 at [156].
33. The general principles are not in dispute and I will bear the above principles firmly in mind in considering the issues before me.

## **Decision**

Appeal against the decision in Opposition No 417944 to Trade Mark Application No. UK00003405720

*The Appeal – preliminary – the franchise agreement*

34. It is necessary on this appeal to start by considering the franchise agreement which forms a central part of the Decision, the Appeal and the Respondent's Notice.
35. The Hearing Officer began her findings in relation to the franchise agreement as follows (footnotes excluded):

### **THE RELATIONSHIP BETWEEN THE PARTIES**

28. A franchise agreement has been provided which is dated 13 February 2003.<sup>1</sup> The parties to the agreement are Perfect Pizza Limited and Zaheer Hussain. The agreement grants Zaheer Hussain the right to operate a franchise business using the mark PERFECT PIZZA and associated marks (although the agreement does not state what these are). It goes on to state:

“14.1 The Franchisee shall use the Trade Name and the Trade Marks only in connection with the operation of the Said Business and only in the form and manner approved by the Franchisor from time to time.

14.2 The Franchisee shall not use the Trade Marks in any way which may prejudice their distinctiveness or their reputation or the Goodwill including not using the Trade Names the Trade Marks or the Future Trade Marks (as defined in clause 14.5) in a generic manner.

[...]

14.4 In no circumstances shall the Franchisee apply for registration as proprietor of the Trade Name or the Trade Marks or any or part of them or any mark which would conflict with the Trade Name or the Trade Marks or use or apply for any mark which is identical with or similar to the Trade Marks or the Trade Name so as to amount to infringement or passing off nor shall the Franchisee take any action which may be detrimental to the reputation of the Trade Marks or put any registrations or applications to register at risk.

[...]

18.1 On the termination of this Agreement the Franchisee will immediately discontinue the use of the Trade Name the Trade Marks the Future Trade Marks

signs cards notices and other display or advertising matter indicative of the Franchisor or of any association with the Franchisor or of the Said Business or Approved Products of the Franchisor and will make or cause to be made such changes in signs cards notices and other display or advertising matter buildings and structures as the Franchisor shall direct so as effectively to distinguish the PERFECT PIZZA OUTLET from its former public “get up” and marketing image”

29. At the hearing, Mr Hussain noted that he is not a named party to the franchise agreement; he stated that Zaheer Hussain is, in fact, his brother. Mr Johnson has provided a copy of a witness statement given by Mr Hussain in previous proceedings before the Registry. In this statement, Mr Hussain states:

“We have been one of the Franchisee of Perfect Pizza, since, 13th February 2003. The company, Aspire Cuisine Limited by Perfect Pizza Limited entered into a franchise Agreement with Zaheer Hussain as the franchisee. The Agreement granted the franchisee an inclusive licence to use the Perfect Pizza Cancellation Trademark No. UK00002182923 with inclusive right to distribute and sale [sic] the goods and services under Perfect Pizza and Trademark, at 283 Barking Road London E13 8EQ. Due to financial reasons the agreement came to an end in around 2008/9.

Since then, we have been selling, serving and trading with our customers at our store as well as through our online website, under the business name of “Perfect Pizza” and with the Cancellation Trademark No. UK00002182923. In addition to this, the store has been trading under the name “Perfect Pizza” for around 10 years before we took over the store, at the same address of 283 Barking Road, London, E13 8EQ.”<sup>2</sup> (my emphasis)

30. It seems to me that, whilst Mr Hussain is not a named party in the franchise agreement, he considered himself bound by its terms. At the hearing, it was accepted that Mr Hussain was involved in the franchise business being operated under that agreement. Further, it is clear from his witness statement, referred to above, that he viewed himself as being involved in the running of the business under the franchise agreement. I will return to the relevance of this below

36. In this connection I note that the franchise agreement also contained a recital that stated (emphasis added):

The Franchisee desires to obtain the benefits of the Franchisor's knowledge skill and experience and **the right to operate a business under the Trade Name** in accordance with the System at the premises hereinafter describe (a "PERFECT PIZZA OUTLET").

From the evidence it would seem that the premises for which the franchise was granted was located at 283 Barking Road, London E13 8EQ ("*the Premises*").

37. Further, in this connection I would note that in the TM8 and Counterstatement it was explicitly stated that it was the Applicant for the 720 Mark namely Mr Hussain who had been trading under and by reference to the 720 Mark at the Premises for the claimed period of time including the period when the franchise agreement was in force. In his witness statement Mr Hussain also identified himself as a franchisee.
38. The complaint raised on this appeal by Mr Hussain and in particular with respect to paragraph [30] appears to be that (1) he was not a party to the franchise agreement and therefore not bound by the terms of the franchise agreement such that the franchise agreement was not relevant to the issues to be decided for the purposes of the Opposition; and (2) that the UKIPO was not the appropriate forum for any dispute with regard to the franchise agreement to be determined and that the Hearing Officer should therefore not have considered and made findings with respect to the franchise agreement.
39. What does not appear to be disputed by Mr Hussain is that the use of the 720 Mark between 2003 and 2008/9 (and upon which he seems to rely in the context of the Opposition) was use made pursuant to the franchise agreement. Nor is it in dispute that Mr Hussain was aware at all material times of the existence of the franchise agreement or that he viewed himself as being involved in the operation of the business when it was being conducted under the franchise agreement as well as subsequently at the Premises. Indeed, Mr Hussain self-identified as a franchisee in his evidence.
40. It seems to me that Mr Hussain is correct, as the Hearing Officer found, that he was not a party to the franchise agreement. It also seems to me that it follows that *prima facie* Mr Hussain cannot be sued for breach of the franchise agreement. Which is not to say that either:
  - (1) the existence and terms of the franchise agreement do not affect the question of whether the use of the 720 Mark, upon which Mr Hussain seeks to rely, was use pursuant to that agreement and therefore subject to the terms of the franchise agreement; or
  - (2) that the use of the 720 Mark at the Premises could not be restrained by way of claim for breach of contract claim if the use at the Premises was the subject to the franchise agreement and continued after the end of that agreement.

In fact, as noted above and below it is accepted by Mr Hussain that the use of the 720 Mark at the Premises between 2003 and 2008/9 was pursuant to the franchise agreement.

41. In addition, although Mr Hussain at the hearing of the appeal seeks to resile from the position, it would appear from the statements in the TM8 and in the evidence filed, as the Hearing Officer noted, that Mr Hussain considered himself to be a franchisee and that the business at the Premises was being run under the terms of the franchise agreement. Therefore, it does not seem to me, that there is a material error in paragraph [30] of the Hearing Officer's decision.
42. In so far as further references are made to the franchise agreement on points raised on this appeal, I shall deal with them as they arise below.
43. With regard to the second point Mr Hussain is incorrect. It is not uncommon for Hearing Officers in the UKIPO to have to decide contractual matters (including disputes as to the terms and effect of contracts) in the UKIPO in so far as they have a bearing on issues that arise for decision in the context of opposition or invalidity proceedings. That that is the position was stated by the Hearing Officer in paragraph [164] of her Decision.

*The Appeal – section 5(4)(a) of the 1994 Act*

44. The Opposition under section 5(4)(a) of the Act succeeded in respect of only one of the signs relied upon namely the Perfect Pizza Diamond logo.
45. The 720 Mark was filed on 10 June 2019 and therefore *prima facie* the relevant date for the assessment of the section 5(4)(a) of the 1994 Act is that date. However, Mr Hussain maintained that he had made use of the mark the subject of the 720 Mark prior to that date. Although not explicitly referred to in the Hearing Officer's Decision it would seem from the TM8 and Counterstatement that the relevant date for the assessment was said by Mr Hussain to be 13 February 2003 (the date of the franchise agreement) or alternatively a claim to use of the 720 Mark for around 25 years.
46. As the Hearing Officer correctly held at paragraph [70] of her Decision:

70. Whether there has been passing off must be judged at a particular point (or points) in time. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, sitting as the Appointed Person, considered the relevant date for the purposes of s.5(4)(a) of the Act and stated as follows:

“43. In *SWORDERS* TM O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

47. Adopting this guidance, the Hearing Officer therefore dealt with the claim by Mr Hussain to use from before the application date as follows:

147. The prima facie relevant date is the date of the application for the 720 Mark i.e. 10 June 2019. However, I note that Mr Hussain has made reference to his use of the 720 Mark prior to the application for registration. I have already set out above that Mr Hussain’s use from 2003 onwards would have related to use under the franchise agreement, which was use with the consent of Mr Wasu or his predecessors in title. I have seen no evidence of use of the mark prior to that date. Any use made after the termination of the franchise agreement was use that could have been prevented by Mr Wasu as a breach of the agreement. As a result, Mr Hussain is not able to rely upon this use for establishing an earlier relevant date and I need only consider the position at the prima facie relevant date.

48. As noted above Mr Hussain maintains on this appeal that he was not a party to the franchise agreement. That is undoubtedly correct. However, what does not seem to be disputed by him on this appeal is that with respect to the use at the Premises (1) the Hearing Officer was wrong to find that there was no evidence of use prior to 2003; (2) the use of the 720 Mark upon which he relied was from 2003 until 2008/2009 use under the franchise agreement; (3) after the end of the franchise agreement the use of the 720 Mark continued in the same way at the premises the subject of the franchise agreement. In respect to all such use Mr Hussain’s statement either referred to such use being by him as the applicant for the 720 Mark or in terms of ‘we’ being Mr Hussain and unspecified others.
49. In those circumstances, it was open to the Hearing Officer to find for the reasons that she did that Mr Hussain was not able to rely upon any use of the 720 Mark prior to 2009.
50. The question then is what is the position after the end of franchise agreement? As correctly pointed out by Mr Hussain he was not a party to the franchise agreement. The contracting parties were Mr Zaheer Hussain and Perfect Pizza Limited a

predecessor in title of Mr Wasu. It seems to me that the failure to remove the signage and other indicia from the Premises at the end of the franchise agreement could undoubtedly have been the subject of a claim for breach of contract brought against Mr Zaheer Hussain and the ongoing use of the signage and other indicia at the Premises could have been restrained. It seems to me that the Hearing Officer was entirely correct to find as she did that the ongoing use of the signage and other indicia at the Premises could have been restrained by Mr Wasu (or his predecessors).

51. What Mr Hussain now appears to maintain for the first time on this appeal is that the continued use of the signage and indicia at the Premises *by him* could not amount to a breach of the franchise agreement *by him*.
52. Assuming in Mr Hussain's favour, that the use of the Premises after the end of the franchise agreement was by him and not by or with his brother, which does not seem to be the case given the facts and matters referred to above which point to the contrary, *prima facie* it would seem that no claim could have been brought against *Mr Hussain* (the applicant) to prevent the use of the 720 Mark at the Premises by way of a claim for breach of the franchise agreement.
53. In those circumstances it seems to me that, on the basis of the assumption in Mr Hussain's favour (which I do not accept), it could be said that the relevant date is 2008/2009 for determining the section 5(4)(a) ground of objection and not the date of filing of the application on the basis that was the first use *by him* of the 720 Mark.
54. However, even if the date for the assessment could be said to be 2008/2009 it does not result in a material error on the part of the Hearing Officer. This is because as SWORDERS TM make clear if an earlier date is relied upon it is first necessary to consider the position at the earlier date and if the claim is made out to then to go on and consider the position at the filing date to see if the position has changed. In the present case it is clear on the basis of the facts as the Hearing Officer found them that as of 2008/2009 Mr Wasu could have restrained the use of the 720 Mark by Mr Hussain under the law of passing off (as to which see further below) so ultimately the question of conflict still revolves around a determination as of the filing date.
55. In the context of the section 5(4)(a) objection Mr Hussain also maintained that the Hearing Officer erred in her assessment of the evidence in support of the claim to goodwill with respect to the Perfect Pizza Diamond logo. The criticisms on appeal were in made in fairly general terms and seemed to be largely based on issues relating to whether the franchise agreement was binding on Mr Hussain (which seem to be relevant only to the claim to priority) and issues relating to the effect of the appointment of administrators on Mr Wasu's claim to title in the relevant goodwill.
56. In paragraph of the Decision the Hearing Officer found as follows (footnotes excluded and emphasis by way of underlining added):

148. I have summarised Mr Wasu's evidence of use from 2011 onwards above. I also note the following:

a. Mr Wasu gives evidence that the website for the business has been in operation for “20+ years” and has generated sales during that time of over £25,000,000;

b. The franchise agreement which is dated 13 February 2003, relates to the use of the sign PERFECT PIZZA;

c. Mr Wasu gives evidence that the sign has been used at various stores across the UK including Chiswick, Guildford, Leamore, Portsmouth and Southsea, Rowley Regis and Stevenage.

d. Mr Hussain accepts that his use of the 923 Mark (which is now cancelled) was covered by the franchise agreement;

e. There does not seem to be any real dispute as to chain of title. In this regard, in his witness statements, Mr Hussain states:

“We have been one of the Franchisee of Perfect Pizza, since 13th February 2003. The Company, Aspire Cuisine Limited by Perfect Pizza Limited entered into franchise Agreement with Zaheer Hussain as the franchisee. [...]”

And:

“On 02-07-2011, Mr Wasu incorporated a company namely Aspire Cuisine Ltd. (Mr Wasu was the director), after that, Aspire Cuisine Ltd. Bought the business Perfect Pizza Ltd. On Same day dated 01 Aug 2011, he changed the company name to “The Perfect Pizza Company Ltd” and for this new venture; he also changes the trading name [...]

Following, on 30-01 2015, bad administration of his company. Mr Wasu willingly declared that he is incompetent to continue (Franchise) The Perfect Pizza Business. So he voluntarily handed over the company to the administrator; consequently, upon the appointment of the administrators Mr Wasu bought all Intellectual Property Rights along with Revoked Mark UK2182923 for a nominal under value of one pound (£1). [...]”

149. It seems to me that Mr Hussain accepts that intellectual property rights (which would include the goodwill in the business) were transferred from The Perfect Pizza Company Ltd to Mr Wasu in 2015.

150. There does not seem to be any real dispute between the parties that Mr Wasu's business had goodwill at the relevant date. It is the business itself which generates goodwill, not a particular sign. Consequently, the fact that there was a rebrand in 2011/2012 does not impact upon the question of whether *the business* has goodwill. The real dispute appears to relate to whether the signs relied upon were distinctive of that goodwill at the relevant date. In any event, for the avoidance of doubt, I am satisfied that Mr Wasu had a reasonable (and protectable) degree of goodwill at the relevant date in relation to pizza take away services and pizzas. The website had been operating for over 20 years and had generated £25million in sales during that time. Whilst this does not amount to a particularly extensive sum per annum in the context of the market and I have no information about the distribution of these sales over the 20 year period, it represents a reasonable turnover over. There is clearly evidence of Mr Wasu's business trading from various premises prior to the relevant date. Further, any goodwill generated by Mr Hussain's business under the franchise agreement would have accrued to Mr Wasu (or his predecessors in title). As noted above, it does not seem to me that there is any real dispute that Mr Wasu owned any such goodwill, as the chain of title has not been disputed.

151. The real question (and the point of dispute between the parties) is whether the signs relied upon were distinctive of Mr Wasu's goodwill at the relevant date. **Mr Wasu claims to have started using the PERFECT PIZZA logo as early as 1998. This does not appear to be disputed by Mr Hussain.** Indeed, Mr Hussain accepts that his own business has been using the diamond logo device since 2003. As I have set out above, there was clearly a re-brand in 2011/2012 to THE PERFECT PIZZA COMPANY and any continued use by Mr Wasu after that time was on a very small scale. **Certainly, up until the re-brand, it seems to me that the PERFECT PIZZA diamond logo was distinctive of Mr Wasu's goodwill.** Although the evidence is limited, there are examples of use on the website prior to that date and on advertising materials. I note that there was a period of 7 years between the re-brand and the relevant date. However, there was some continued use of the sign on the Fordhouses store (albeit not enough to establish genuine use) and the inclusion of the words PERFECT PIZZA in the new logo (THE PERFECT PIZZA COMPANY) is likely to have kept the connection alive in the minds of the consumer. That is not to say that use of the new logo would be acceptable use of the old logo or that they are close enough to result in a likelihood of confusion; I have already found that not to be the case above. However, it is clear that Mr Wasu was attempting to educate customers that a rebrand was taking place and that the same business was continuing to operate under a new mark. This,

combined with the continued use of the words PERFECT PIZZA (albeit as part of a different mark) would have assisted in keeping the PERFECT PIZZA logo in the mind of customers. **Taking this into account, as well as the longevity of the business and use of the sign prior to that re-brand, I am satisfied that it is likely that the PERFECT PIZZA diamond logo remained distinctive of Mr Wasu's goodwill at the relevant date [being the application date].**

57. In the light of the very general complaints raised by Mr Hussain with regard to the findings that the Hearing Officer reached above and having (1) regard to the fact that the appeal is a review and not a re-hearing; (2) the evidence as summarised by the Hearing Officer in her Decision and further noted in paragraphs [148] and [149] of her Decision; (3) the admissions made by Mr Hussain with regard to title in his evidence; and (4) reviewed the evidence that was before the Hearing Officer and in particular in respect of the evidence filed by Mr Wasu in support of his claim to be the owner of the relevant goodwill it seems to me that the conclusions in paragraph [151] are ones that it was open to the Hearing Officer to make on the basis of the materials before her.
58. It is therefore my view that whether considering the position as of a date in 2008/2009 or, as the Hearing Officer did, only the filing date of the 720 Mark, Mr Wasu has made out his objection pursuant to section 5(4)(a) of the 1994 Act on the basis of the Perfect Pizza Diamond logo.
59. I therefore dismiss the appeal under section 5(4)(a) of the 1994 Act.
60. With regard to the other signs relied upon by Mr Wasu in support of his ground of opposition under section 5(4)(a) of the 1994 Act given my finding on this appeal in respect of this grounds there is no reason to consider them further.

*The appeal section 3(6) of the 1994 Act*

61. The Application was filed on 10 June 2019 and therefore that is the relevant date for the assessment that the Hearing Officer was require to make for the purposes of the Opposition under section 3(6) of the 1994 Act.
62. There is no dispute that the Hearing Officer identified the relevant legal test under section 3(6) of the 1994 Act.
63. The Hearing Officer upheld the objection under section 3(6) on the following basis:

160. As noted above, I am satisfied that Mr Hussain was bound by the franchise agreement. I am also satisfied that Mr Wasu had rights in the PERFECT PIZZA diamond logo at the relevant date. Mr Hussain accepts that the diamond logo was covered by the terms of the franchise agreement. The franchise

agreement confirms that, if terminated, the franchisee must cease use of the marks that were the subject of that agreement.

161. It seems to me that continued use of a trade mark covered by a franchise agreement under which Mr Hussain was operating and by which he considered himself bound, followed by a subsequent application to register a highly similar trade mark (albeit one that repeats the same/similar device six times) after he claims that agreement had come to an end, creates a prima facie case of bad faith.

162. In his Form TM8, Mr Hussain refers to his own allegations of bad faith against Mr Wasu. However, this cannot amount to a defence under this ground of opposition.

163. Mr Hussain also states:

“In Regards Franchise Agreement and using the applied Trade Mark No. UK00003405720 it is totally contractual matter, therefore it not the forum to discussion. Following, as usual to bad administration of the company director “The Perfect Pizza Company Ltd”. Mr Wasu willingly declared that he is incompetent to run the Business (Franchise Company), as a result Mr Wasu voluntarily handed over the company to the administrator.

Above and beyond, it is also should be resolve in the civil court because the civil court has jurisdiction or authority to deal with that sort of issues or cases, even though, (Mr Wasu) sent me Legal Notice as well, and I already reply back accordingly for this notice, anyhow I applied as per UK IPO law after the cancellation of the earlier mark, (see cancellation No. CA000501937) Therefore, applicant made an application for registration of mark UK0000305720 lawfully in good faith.”

164. For the avoidance of doubt, it is not uncommon for this Tribunal to have to deal with contractual disputes as part of deciding grounds of opposition/invalidation. Consequently, I see no merit in the arguments regarding jurisdiction raised by Mr Hussain. I recognise that the timing of the application in dispute was after the decision given by the previous hearing officer in relation to the previous revocation proceedings between the parties. However, Mr Hussain has provided no explanation as to why he applied to register a trade mark with the identical stylisation/presentation as that which he knew he had been permitted to use only by virtue of the franchise agreement and had been required to cease using once that agreement came to an end. I recognise that there does not

appear to have been any action on Mr Wasu's part to prevent Mr Hussain from using the logo during the intervening period following the end of the franchise agreement, but I do not consider that sufficient to overcome the prima facie case as discussed above.

165. It seems to me, in the absence of any plausible explanation provided by Mr Hussain, that he sought to benefit from any local awareness/familiarity with that sign that had resulted from his trading under the franchise agreement. Mr Hussain, himself, may have considered this to be acceptable conduct given that Mr Wasu had re-branded his business. However, I must judge the position by the standard of honest commercial practices. The very fact that Mr Hussain chose a highly similar mark (using the identical presentation of the words PERFECT PIZZA) to that used by Mr Wasu, suggests to me that he believed (rightly or wrongly) that there was some benefit to be gained from continuing to use this mark. However, as he had been using the mark only by virtue of the franchise agreement, he was not entitled to continue using it. On balance, I am not satisfied that the explanations given by Mr Hussain are sufficient to rebut the prima facie bad faith case established by Mr Wasu.

64. It is maintained on behalf of Mr Hussain that as he was not a party to the franchise agreement it could not form the basis of an allegation of bad faith and that the Hearing Officer was wrong to uphold the objection under section 3(6) on that basis.
65. Mr Wasu maintains firstly that Mr Hussain *by his own admission* identified himself as a franchisee and was therefore bound or considered himself to be bound by the franchise agreement; alternatively, that whether or not Mr Hussain was bound by the franchise agreement he was at all material times had knowledge of the franchise agreement and was aware of the trading activity and goodwill of Mr Wasu. That it is said along with the other facts and matters referred to by the Hearing Officer were sufficient to support a finding of bad faith.
66. It seems to me that whilst the Hearing Officer's findings did not always reflect or properly reflect the position that Mr Hussain was not a party to the franchise agreement it nonetheless seems to me that the Hearing Officer's findings in her Decision support the position maintained by Mr Wasu that the application was filed in bad faith whether or not Mr Hussain was in fact a party to and thereby bound by the franchise agreement. Such support can be found in particular from the findings that as of the filing date:
  - (1) Mr Wasu had a protectable right with respect to the Perfect Pizza diamond logo;
  - (2) Mr Hussain's knowledge of the franchise agreement and its terms;

- (3) Mr Hussain's acknowledgement before the Hearing Officer that he considered himself to be bound by the franchise agreement;
  - (4) The acceptance by Mr Hussain that the Perfect Pizza diamond logo was covered by the franchise agreement;
  - (5) The fact that the franchise agreement provided that at the end of the franchise period the use of the mark should have ceased at the Premises and therefore any use after the end of that agreement could have been restrained by way of a claim for breach of contract; and
  - (6) The absence of any explanation or plausible explanation as to why Mr Hussain applied to register a trade mark with the identical stylisation/presentation as to that which he knew had been first used at the Premises with permission under the franchise agreement and which should have ceased at the end of that agreement.
67. Moreover, these findings are further supported by the position as noted by the Hearing Officer that Mr Hussain has by his own admission identified himself as a franchisee (see the TM8 and in Mr Hussain's evidence), Mr Hussain's admitted involvement with the business conducted at all material times under the mark at the Premises, and the fact that Mr Hussain sought to rely upon use of the mark made with consent during the term of the franchise agreement in support of his own position in the Opposition.
68. In the circumstances it does not seem to me that it is correct to maintain as Mr Hussain now seems to that the franchise agreement cannot form any part of a decision under section 3(6) of the 1994 Act as against an application by him. Put simply he cannot have it both ways. That is all the more the case given that this position has been adopted for the first time on appeal.
69. In the circumstances it seems to me that the objection under section 3(6) of the 1994 Act should be upheld.

*The Respondent's Notice – additional matters*

70. With respect to the failure of the Hearing Officer to consider the 127 Mark this of course followed from her finding that the 127 Mark should be revoked and could therefore not be relied upon as an earlier mark for the purposes of the Opposition. The question of whether this was the course that it was open to the Hearing Officer to take is the subject of an appeal by Mr Wasu which is dealt with below.
71. Finally, with regard to the issue raised in the Respondent's Notice that the Hearing Officer should not have dismissed the Opposition under section 5(2)(b) and section 5(3) grounds on the basis of no conflict with either the 720 Mark or the 544 Mark, I can deal with this matter shortly.

72. First, the only point made in the Grounds of Appeal on this point was that there was an ‘*error in principle in the assessment and comparison of the marks in suit*’. No further explanation was given as to why the Hearing Officer was wrong in the Grounds of Appeal. This is unsatisfactory c.f. for the reasons identified by Iain Purvis QC sitting as the Appointed Person in GREYBOX TM (0-106-20) at paragraph [9].
73. Second no further details of the source of complaint on this issue or what it is said that the Hearing Officer should have found in her assessment of the comparison of the marks in suit were identified in either the Skeleton of Argument or at the hearing before me when it became apparent that this issue was rather by way of a fall back.
74. The Hearing Officer set out her assessment of the comparison of the relevant marks in paragraphs [118] to [128] of her Decision. She did so carefully. There is no suggestion that the approach that she took to the assessment that she was required to make was wrong in law. It seems to me that were this issue to be considered afresh by me then as stated by Geoffrey Hobbs QC sitting as the Appointed Person in NICO LONDON TM (O-338-20) at paragraph [36]:

. . . the Decision would end up being re-taken by this Tribunal under the guise of reviewing it for error. However, it is necessary in order to maintain the required distance between the role of decision taker at first instance and the role of decision taker on appeal for this Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the [Proprietor] relies are by force of what they reveal sufficient to establish that the Decision is vitiated by error.

75. I have reviewed the findings with respect to the comparison of the marks of which complaint is made and I am satisfied that the conclusion the Hearing Officer reached on this and on the likelihood of confusion were ones that she was entitled to reach for the reasons that she gave.

Appeal against the decision in the application for revocation No 503181 on the basis of non-use against Trade Mark Registration No. UK00002190267

76. There is no suggestion on the appeal against the revocation of the 267 Mark , in my view rightly, that the Hearing Officer erred in her identification of the relevant legal principles. The Hearing Officer correctly referred to:
- (1) The summary of the law on genuine use in the judgment of Anrold J. (as he then was) in Walton International Ltd v. Anor v. Verweji Fashion BV [2018] EWHC 1608 (Ch) (at paragraph [34]).
  - (2) The law concerning the use on one mark with, or as part of another mark in Case C-12/12 Colloseum Holdings AG v. Levi Strauss & Co. (at paragraph [37]).

- (3) The law relating to the test under section 46(2) of the 1994 Act (XXX) in Nirvana Trade Mark a decision of Mr Richard Arnold QC sitting as the Appointed Person (as he then was) (O-262/06) (at paragraph [38]).
77. The two broad bases for appeal were (1) the failure by the Hearing Officer to take into account the use of the mark PERFECT PIZZA within The Perfect Pizza Company logo or the words The Perfect Pizza Company; and (2) the omission of evidence from her consideration of use both of PERFECT PIZZA as an independent mark and within The Perfect Pizza Company logo.
78. The Hearing Officer set out her finding at paragraph [42] of her Decision as follows:
42. Registration of the word only mark PERFECT PIZZA (as is the case for the 267 Mark) will cover use in any standard typeface or font. . . The words PERFECT PIZZA are also clearly visible within [The Perfect Pizza Company logo]. However, I need to consider whether the addition of the words THE and COMPANY to the beginning and end of the marks mean that the words PERFECT PIZZA no longer have an independent distinctive role within the mark. I accept that the words THE and COMPANY are non-distinctive additions. However, I consider that the words PERFECT PIZZA are also non-distinctive. The addition of the words THE and COMPANY change the meaning of the mark from one which refers to a business to one which describes the goods. Consequently, I do not consider that the [The Perfect Pizza Company logo is] acceptable use of the mark as per *Colloseum* and *Nirvana*.
79. On this appeal it is said that the Hearing Officer was correct to find that (1) the word only mark PERFECT PIZZA will cover use in any standard typeface or font; (2) the words PERFECT PIZZA are clearly visible within The Perfect Pizza Company logo; and (3) the words THE and COMPANY are non-distinctive additions to the mark PERFECT PIZZA. I agree.
80. However, what is also said on this appeal is that the Hearing Officer erred by finding ‘*that the words PERFECT PIZZA are also non-distinctive*’. I agree. This it seems to me is an error. It is clear from the judgment of the CJEU in Case C-196/11P Formula One Licensing BV v. EUIPO that unless a mark is a subject of an invalidity attack a registered trade mark cannot be said to lack distinctive character i.e. the mark has sufficient distinctiveness to meet the requirements for registrability. That is not to say that such a registration does not have anything other than low inherent distinctive character.
81. In these circumstances it is my view that by reason of this error the Hearing Officer approached the question that she had to consider in accordance with the Colloseum and Nirvana from the wrong perspective.

82. It seems to me that applying the approach identified in Colloiseum and Nirvana as set out by the Hearing Officer in paragraphs [37] and [38] of her Decision on the basis that the distinctive character of the registered trade mark is the combination of the words PERFECT PIZZA; and then applying the findings of the Hearing Officer that the words THE and COMPANY are non-distinctive additions and that the words PERFECT PIZZA are clearly visible within The Perfect Pizza Company logo leads to the conclusion that the words PERFECT PIZZA will still be perceived as indicative of origin and that the distinctive character, such as it is, is not altered.
83. In these circumstances it seems to me that the evidence of use filed in the form of the Perfect Pizza Company logo and indeed the use of the words The Perfect Pizza Company could and should have been taken into account by the Hearing Officer for the purposes of determining whether there was evidence of use of the 267 Mark.
84. I have reviewed the Hearing Officer's findings with regard to the evidence as summarised in paragraphs [47] to [58], [148] and [150] to [151] of her Decision and take the view that these findings are themselves sufficient for Mr Wasu to have established use of the 267 Mark over the relevant periods of time. My view that this is the case has been further confirmed by my own review of the evidence of use filed on behalf of Mr Wasu which, whilst not perfect, is in my view sufficient to establish use of the 267 Mark.
85. Further, it also seems to me that the Hearing Officer did not give any or any sufficient weight to the use of the mark PERFECT PIZZA as a wholly independent mark. In particular it seems to me that the Hearing Officer did not give any or any sufficient weight to the use of the domain name perfectpizza.co.uk and the advertising of the website at that domain name as shown in Mr Wasu's exhibits for example on the side of the boxes containing pizzas during the relevant periods. Nor did the Hearing Officer refer to uses of the mark Perfect Pizza on the website itself as contained in the evidence. This is somewhat surprising given her finding in paragraph [150] of her Decision that '*The website had been operating for over 20 years and had generated £25million in sales during that time*'. In the circumstances it seems to me that this would have been additional basis for overturning the Hearing Officer's Decision in relation to the revocation of the 267 Mark.
86. Given the finding I have made on this appeal with respect to the 267 Mark it would have formed an additional basis for a claim for invalidity with respect to the 720 Mark. However, this was not a ground that was considered by the Hearing Officer and it therefore seems to me that it is not open for me to determine, for the first time on appeal, whether or not there is a conflict between the 267 Mark and the 720 Mark.
87. For the reasons set out above I have upheld the Hearing Officer's Decision with respect to the Opposition to the 720 Mark. Consideration of an additional ground on the basis of the 267 Mark therefore makes no difference to the ultimate outcome of the Opposition.

88. At the hearing of the appeal the parties both indicated that they did not wish the proceedings to be sent back to the Registrar but that I should decide the matter unless such was necessary for the determination of the Opposition i.e., that the Opposition on the other grounds had otherwise been dismissed on appeal. In those circumstances I will uphold the appeal against the order for revocation of the 267 Mark. However, I will not refer the question of whether the opposition against the 720 Mark could be upheld on the additional basis of the 267 Mark under section 5(2)(b) or 5(3) of the 1994 Act back to the Registrar for further determination.

### **Conclusion**

89. For the reasons set out above I have reached the conclusion that:

- (1) Mr Hussain's appeal should be dismissed; and
- (2) Mr Wasu's appeal should be allowed.

90. It is therefore necessary for me to revisit the cost order made by the Hearing Officer at first instance and consider the appropriate costs order on this appeal.

91. In paragraph [171] of her Decision the Hearing Officer set out her approach on costs as follows:

At the hearing, Mr Johnson submitted that costs should be awarded in his client's favour at the higher end of the scale. However, it is Mr Hussain who has enjoyed the great degree of success and so I need consider this request no further. Mr Wasu succeeded in the opposition and Mr Hussain succeeded in the invalidation. The costs of these actions will cancel each other out. However, Mr Hussain has also succeeded in relation to both revocation cases. As a result, I consider it appropriate to make an award of costs in relation to the revocations only. I bear in mind that there was significant overlap in terms of evidence filed in relation to both cases.

92. This seems to me to be the correct approach on the basis of the findings that the Hearing Officer made. However, as a result of the appeals the position is not that Mr Hussain has only succeeded on one of the revocations and failed on the other. Adopting the reasoning of the Hearing Officer it seems to me that both parties have had an equal measure of success and that therefore there should be no order as to costs with respect to the proceedings at first instance.

93. I now turn to the question of the costs of the appeals. On appeal Mr Wasu has been successful in the overall result and Mr Hussain has not. Mr Wasu is therefore entitled to a contribution towards his costs of the appeals including the costs relating to the preparation of his Respondent's Notice. In exercising my discretion on costs, I have in mind that whilst not successful in the overall result Mr Hussain did not fail on all

issues raised before me; and that likewise Mr Wasu did not succeed on all issues. I will therefore order Mr Hussain to pay to Mr Wasu a contribution of £2,000 towards his costs of the appeals such costs to be paid within 28 days of this decision.

Emma Himsworth KC  
Appointed Person

24 October 2022