o/981/22

TRADE MARKS ACT 1994

IN THE MATTER OF

APPLICATION No 3393771 in the name of LR TRADER LTD

OPPOSITION THERETO No 417932 by TWISTED AUTOMOTIVE LTD

AND IN THE MATTER OF

AN APPEAL TO THE APPOINTED PERSON BY LR TRADER LTD

DECISION

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1. The Appellant, LR Trader Limited, appeals the decision of the Hearing Officer Mr. Salthouse in this matter dated 23 April 2021.

2. I shall refer throughout this decision to LR Trader Limited as the Appellant and Twisted Automotive Ltd as the Respondent.

Preliminary Matters

3. The appeal was due to be heard before me on 14 June 2022. In the event there was no hearing. In advance of the date set for the Appeal, the Opponent indicated writing that it did not intend to attend this hearing. On appeal, the Appellant acted through its director Frances Morrow. On the morning of the 14 June 2023, I received two emails sent by Frances Morrow. These indicated that she could not, for work related reasons, attend the appeal if it were heard in the morning and requested that the hearing either a) be moved to the afternoon or b) determined on the papers. In consequence:

    a. I issued two short decisions on the morning of the 14 June 2022, together with further directions set out in an email to the parties;

    b. the Appellant was offered, as requested, an afternoon hearing;

    c. no response was received from the Appellant until 16 June 2022 (which the Appellant later explained was due to difficulties with accessing Frances Morrow's email). The hearing therefore did not proceed during the afternoon of the 14 June, and

d. on 16th June the Appellant indicated that it would like the appeal to proceed on the papers.

Background

4. The Appellant applied on 21 April 2019 to register the word mark L R Trader in respect of the following services in class 35: "Advertising automobiles for sale by means of the internet" (the "**MARK**").

5. This application was opposed by the Respondent under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994, relying upon an earlier filed trade mark application for the word mark "LR" (the "Earlier Mark"). It was also opposed under section 5(4)(a), relying upon an alleged goodwill and reputation in the signs LR and LR Motors.

6. The Hearing Officer, Mr. Salthouse, found that the opposition succeeded under all three bases. However, at the date of his decision, the Earlier Mark had not been granted. The Hearing Officer therefore proceeded, in my view correctly, on the basis that any decision he reached on sections 5(2)(b) and 5(3) would be provisional on the Earlier Mark proceeding to grant. In the event the earlier mark was withdrawn on 7 April 2022. It follows that the Hearing Officer's decision is operative only in relation to the section 5(4)(a) ground. This is therefore the only ground I shall consider on this appeal.

The Hearing Officer's Decision on Section 5(4)a

7. Section 5(4)(a) provides that a trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented, inter alia, by the law of passing off. The elements necessary to reach a finding of passing off are (a) the existence of a goodwill or reputation in the earlier sign (b) misrepresentation leading to deception or a likelihood of deception; and (c) damage resulting from the misrepresentation (see *Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL).

8. Before the Hearing Officer, the Respondent contended that as a result of the use made of the signs LR and LR MOTORS since 2015 it had acquired a substantial goodwill and reputation under its signs in the UK in relation to the supply and sale of second hand vehicles, spare parts and accessories for vehicles, custom work on vehicles, servicing, bodywork, and finance to the general public in the purchase of second hand vehicles, advertising and marketing on-line and otherwise and in connection with the Respondent's website; such that the average consumer will assume that the services of the Appellant are those of the Respondent or linked to them and therefore misrepresentation will occur.

9. The Respondent filed evidence relating to its use of the LR and LR Motors signs. That evidence was accepted by the Hearing Officer.

10. The Appellant filed evidence which, inter alia, was said to show that the letters "LR" had become "LR" are generic in the industry as standing for Land Rover. That evidence was addressed by the Hearing Officer at paragraph 26 of his judgment as follows:

> The applicant has sought to show that the letters LR are generic in the industry as standing for Land Rover. However, much of the applicant's evidence is undated or after the relevant date, what is acceptable is unconvincing. For the most part the examples provided show that having used the name Land Rover in full the writer / magazine / advertiser then shortens this to LR obviously in order to save space (particularly in an advertisement). Similarly, it is hardly surprising that Land Rover prefixes its parts with the letters LR rather than attempting to use its full name. In any case this is internal Land Rover use not use in the marketplace. Having said this the opponent has relied upon the fact that in a previous case the Hearing Officer found that the opponent in the instant case had reputation in the mark LR. However, in the instant case it has not filed any evidence of turnover or market share. All I have is the advertising spend and the number of visits made to its website, as well as the number of cars offered for sale at its premises. I accept that the advertising figures and visits to its website are both considerable. However, the activity all relates to the actual retail of vehicles not the provision of advertising services. I therefore find that although the opponent's mark is inherently distinctive to an average degree it cannot benefit from enhanced distinctiveness.

11. Overall, the Hearing Officer found that the Respondent possessed the requisite goodwill and reputation in the signs LR and LR motors (and in so doing rejected the assertion that the signs were no more than generic).

12. The Hearing Officer then turned to misrepresentation. He set out what he regarded as the appropriate legal principles that should guide his approach to misrepresentation. These legal principles are not challenged on appeal. Such debate on appeal as there is relates to the Hearing Officer's findings of fact.

13. Finally, the Hearing Officer turned to the question of damage. Again, such debate as there is relates to the Hearing Officer's findings of fact.

The Arguments on Appeal

14. The Appellant's Grounds of Appeal all relate to the Hearing Officer's consideration of the evidence before him. No point of law is raised.

15. The Appellant did not file a skeleton of argument on appeal. However, it did file an additional witness statement by its director Frances Morrow on 8 June 2022. I have treated the arguments in that witness statement as being the Applicant's skeleton of argument appeal. As I as I explained in my first decision of 14 June 2022, I have not

admitted any part of the content of Frances Morrow's statement as evidence on this appeal:

> *"More generally, this appeal proceeds on the based of the evidence before Mr Salthouse, his decision, and the grounds raised on appeal. There is no application before me to a) vary those grounds and/or b) to admit new evidence. I should however note that insofar as it contains argument (and not new evidence) I will treat the most recent statement by Frances Morrow as the skeleton argument of the appellant's case on appeal."*

For the remainder of this decision, I will refer to the arguments set out in Frances Morrow's statement as the Appellant's "Skeleton". Likewise, where below I refer to Frances Morrow's witness statement, I am referring to the witness statement dated 3 November 2020 (which was before the Hearing Officer).

Standard of Appeal

16. The principles which I must apply on this appeal are well established and are as summarized by Joanna Smith J in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch):

> "(i) the appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd (*O/017/17) at [52(i)]);
>
> (ii) the appeal court will allow an appeal where the decision of the lower court was "wrong" (see CPR 52.11). Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS* O/039/21 at [14]);
>
> (iii) the decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 at [81]);
>
> (iv) the approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mar*k [2003] RPC per at [26]). There is a "spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision"

(*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum;

(v) in the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country v Okotoks Ltd* [2014] FSR 11 at [50]-[51]);

(vi) 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. The 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 (*Actavis Group* at [80]);

(vii) another variable to be taken into account will be "the standing and experience of the fact-finding judge or tribunal" (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts (*Shanks v Unilever Plc* [2014] RPC 29 at [28] citing the warning given by Baroness Hale in AH *(Sudan) v Secretary of State for the Home Department* [2007] UKHL 49);

(viii) the appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; "The duty to give reasons must not be turned into an intolerable burden" (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with

every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English v Emery Demibold & Struck* [2002] 1 WLR 2409 at [17], Fage at [115]). The issues the resolution of which were vital to the judge's conclusions should be identified and the manner in which she resolved them explained (*English* at [19]);

(ix) in evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*TT Education* at [52(vi)]).

Grounds of Appeal

17. The Grounds of Appeal assert that the Hearing Officer:

    a. failed to take into account relevant information supplied by the Opponent in relation to the Opponent listing vehicles for sale on a third party website www.lro.com;

    b. wrongly declared some of the Applicant's evidence as undated;

    c. made assumptions in relation to the opponent that lack basis;

    d. failed to take into account how part numbers are used and who uses them;

    e. wrongly determined that consumers would only take a slightly above average level of attention when selecting service in the market under class 35

    f. erred in his findings in relation to distinctiveness and similarity, and

    g. wrong determined than more than mere confusion would take place.

Grounds (a), (b) and (d)

18. The Appellant's skeleton does not explain why consideration of the errors alleged in grounds (a), (b) and (d) necessarily leads to the conclusion that the Hearing Officer's decision on s.5(4)(a) was wrong. It is however clear that underlying the appeal is the more general contention that the Hearing Officer erred in concluding that "LR" was not generic. It seems to me that it is primarily to that point that these three grounds go. I accept that if I were to find the Hearing Officer should have found LR to be generic then it would raise material doubt as to the correctness of this findings in relation to passing off in general.

LRO.com

19. There is, in my view, no substance in the suggestion that the Hearing Officer failed to take into account "relevant" material relating to the LRO.com website. It should be noted that neither the Grounds of Appeal nor the skeleton identify what the "relevant" material is. However, I do note that paragraph 17 of the witness statement of Frances Morrow sets out what the Appellant says the websites show. I have assumed that this material is the "relevant" material referred to in the grounds.

20. It is clear in my view that the Hearing Officer did consider what was shown by the LRO.com website (see paragraph 8 of his decision). The content of the website therefore did play a part in his overall assessment of the evidence (as recorded at paragraph 26). If, as appears apparent from the decision, the Hearing Officer gave little weight to the content of the LRO.com website, then that was a decision which I find he was properly entitled to reach. In my view the content of the LRO.com website adds little, if anything, to the overall picture given by the remainder of the evidence. I therefore reject this ground of appeal.

2009 LRW Show Advert

21. At paragraph 13 of its skeleton the Appellant states as follows:

> It should be noted that although Mr Salthouse claims page 81 of my evidence is undated dated, the date 2009 is shown. This advert relates to the 2009 LRW Show (Land Rover World magazine show). This advert had been specifically discussed during the original hearing and the date pointed out.

22. The Hearing Officer was correct, in my view, to find that the advert was untitled and was not marked with a formal date. However, the advert contains the wording, namely "lrw-show-2009", that clearly appears to identify both a) its purpose (i.e. as an advert for the lrw show and b) its approximate date – i.e. 2009. In my view a fair reading of this document is that it was, as the Appellant submits, a document produced in 2009. To this extent I find that the Hearing Officer's assessment of this document was incorrect. However, this error is not in and of itself an adequate basis to overturn the Hearing Officer's overall finding on the nature of the letters "LR". Given the totality of the evidence before the Hearing Officer, such material as is shown in the advert does not, in my view, make a material difference.

Part Numbers

23. The Hearing Officer found that the evidence showed, albeit much of it was undated, that Land Rover use the letter LR as a pre-fix to their parts numbers. He also found (see paragraph 26 of the decision, as reproduced above) that this use was a) as an

abbreviation made for convenience and b) internal use by Land Rover and not use in the marketplace.

24. In paragraph 6 of its Skeleton, the Appellant submits as follows:

> [The Hearing Officer] failed to take full account of how part numbers are used and who uses them. Many Land Rover owners, enthusiasts and independent Land Rover specialist garages purchase parts to put on to vehicles. Mr Salthouse appears to believe that it is only Land Rover main dealerships who purchase parts by part number. Part numbers are vitally important for safety reasons, e.g. the fitting of brake components. Purchasing by part number ensures the correct component for the specific vehicle can be obtained.

25. In my view the evidence clearly demonstrates that the Hearing Officer was incorrect insofar as he concluded that LR pre-fixed part numbers were only used internally. However, be that as it may it also demonstrates little more than that there had been external use as a pre-fix to a part number e.g. "Part No LR 369". In my view something considerably more would be required to show that such pre-fix use had materially contributed to the letters "LR" becoming generic. I find there to be no adequate support for such a proposition in the evidence. I therefore reject this ground of appeal.

Grounds (c)

26. The Grounds of Appeal and Skeleton do not explain what assumptions the Hearing Officer made in relation to the Opponent or why they were without basis. I therefore reject this ground of appeal

Grounds (e)-(f)

27. The Appellant has failed to identify any point of principle in relation to Grounds (e)-(f). I have in any event considered the Hearing Officer's findings in relation to each of these grounds, and in my view, these findings disclose no error on the part of the Hearing Officer that would entitle me to revisit them. I therefore reject these grounds of appeal.

Conclusion

28. I dismiss this appeal. The Respondent did not take an active part in the Appeal and therefore I will make no order in relation to the costs of the appeal itself.

29. Paragraph 51 of the Order of the Hearing Officer was stayed pending determination of the Appeal and therefore will now come into effect.

GEOFFREY PRITCHARD

THE APPOINTED PERSON

4 November 2022